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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2007 WAIRC 01151

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2007 WAIRC 01151
CORAM	:	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		SENIOR COMMISSIONER J F GREGOR
		COMMISSIONER S M MAYMAN
HEARD	:	FRIDAY, 24 MARCH 2006, TUESDAY, 2 MAY 2006, MONDAY, 24 JULY 2006, THURSDAY, 24 AUGUST 2006
DELIVERED	:	FRIDAY, 5 OCTOBER 2007
FILE NO.	:	FBA 7 OF 2006
BETWEEN	:	INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE
		Appellant
		AND
		CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND SKILLED RAIL SERVICES PTY LTD
		Respondents

FILE NO.	:	FBA 8 OF 2006
BETWEEN	:	SKILLED RAIL SERVICES PTY LTD
		Appellant
		AND
		CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS AND INTEGRATED GROUP LTD T/AS INTEGRATED WORKFORCE
		Respondents

ON APPEAL FROM:

Jurisdiction:	Western Australian Industrial Relations Commission
Coram:	Commissioner S Wood
Citation:	(2006) 86 WAIG 448
File No:	A 3 of 2005

CatchWords:

Industrial Law (WA) - Application to adjourn hearing of appeals - Decision in another appeal likely to determine some grounds in present appeals - Appeals adjourned - Reasons given extempore.

Legislation:

Nil

Result:

Hearing of appeals adjourned

Representation (FBA 7 of 2006):

Counsel:

Appellant:	Mr N D Ellery (of Counsel), by leave
Respondent:	Mr D H Schapper (of Counsel), by leave
	Mr J B Blackburn (of Counsel), by leave

Representation (FBA 8 of 2006):

Counsel:

Appellant:	Mr J B Blackburn (of Counsel), by leave
Respondent:	Mr D H Schapper (of Counsel), by leave
	Mr N D Ellery (of Counsel), by leave

Extempore Reasons for Decision (Revised from the Transcript)

RITTER AP:

1 We have considered the adjournment application and we are of the view that the most appropriate course is to adjourn the hearing today. It is regrettable that this comes about again but I think it is the preferable course primarily for the reasons articulated by Mr Schapper. Essentially they are that the reasons for decision in FBA 11 of 2006 are likely to determine, if not the result in these matters, some of the grounds. The parties can then determine the course with which they think is in their client's best interests in the light of that decision and those reasons for decision.

2 There is a likely of potential saving of costs in not having the two days presently listed for hearing. There is however also costs thrown away for the parties in preparing for these days of hearing so I do not think at the end of the day the costs issue determines the matter one way or the other.

3 We are concerned about the issue of the six month time clock which the Work Choices Act and regulations puts in place for the determination of the appeals. Insofar as that effects the appellants, it means that a decision needs to be handed down by 27 September 2006. We think that that is very likely even if we take the course suggested by Mr Schapper. As conceded by him if we take the course that his clients presently wish us to take then there is the real possibility that that time clock could be running against them rather than against the appellants, if the appeal succeeds. I also take into account, as well, as mentioned to the parties earlier that the intention is that the decision and the reasons for decision in FBA 11 of 2006 be handed down sooner rather than later, without indicating more precisely than that when it will occur.

4 So essentially for those reasons I am of the view that the hearing of the appeals ought to be adjourned. We will correspond with the parties as soon as FBA 11 of 2006 is handed down.

GREGOR SC:

5 I agree with his Honour and have nothing further to add.

MAYMAN C:

6 I agree with his Honour and have nothing further to add.

2007 WAIRC 00266

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERREDIN CUSTOMER SERVICE PTY LTD AS TRUSTEE FOR HATCH FAMILY TRUST T/A DONOVAN FORD/MERREDIN NISSAN AND DONOVAN TYRES
	APPELLANT
	-and-
	ROSLYN GREEN
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 MARCH 2007
FILE NO/S	FBA 39 OF 2006
CITATION NO.	2007 WAIRC 00266

Decision	Direction issued re Practice Note 1 of 2007
Appearances	
Appellant	Mr R Gifford, as agent
Respondent	In person

Direction

THE FULL BENCH having received a request from the respondent that because she will not be represented in the proceedings, a direction be issued that she need not comply with Practice Note 1 of 2007, which is not objected to by the appellant, it is ordered that:-

1. The respondent is not required to comply with Practice Note 1 of 2007.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2007 WAIRC 01002

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01002
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		COMMISSIONER P E SCOTT
		COMMISSIONER S WOOD
HEARD	**:**	WEDNESDAY, 16 MAY 2007
DELIVERED	**:**	THURSDAY, 16 AUGUST 2007
FILE NO.	**:**	FBA 39 OF 2006
BETWEEN	**:**	MERREDIN CUSTOMER SERVICE PTY LTD AS TRUSTEE FOR HATCH FAMILY TRUST T/A DONOVAN FORD/MERREDIN NISSAN AND DONOVAN TYRES
		Appellant
		AND
		ROSLYN GREEN
		Respondent

ON APPEAL FROM:

Jurisdiction	:	Western Australian Industrial Relations Commission
Coram	:	Commissioner J H Smith
Citation	:	(2006) 86 WAIG 3253
File No	:	U 172 OF 2005

CatchWords:

Industrial Law (WA) - Appeal against decision of the Commission – Alleged harsh, oppressive or unfair dismissal – Declaration by Commission that respondent was unfairly dismissed and order for compensation made – Appellant seeks variation of the amount of compensation ordered – Evidence of witnesses on issue of casual employment – Issues relating to assessing witness credibility/reliability –Issues regarding mitigation and compensation – Failure to mitigate and nominal damages – Relevant authorities examined – Employer's onus regarding mitigation – Assessing compensation – Additional submissions required

Legislation:

Industrial Relations Act 1979 (WA) (as amended), s12, s23A(6), (7), (8), s26(1)(b), (1)(d), (3), s49, s49(4), (5)(b), (6), (6a)

Result:

Additional submissions required.

Representation:

Appellant	:	Mr R Gifford, as agent
Respondent	:	In person

Case(s) referred to in reasons:

Bagnall v National Tobacco Corporation of Australia Ltd (1934) 34 SR (NSW) 421

Beckham v Drake (1849) 2 HLC 579

BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australia Branch (2006) 86 WAIG 642

BNP Paribas v Pacific Carriers Ltd [2005] NSWCA 72

Bogunovich v Bayside Western Australia (1998) 79 WAIG 8

Brace v Calder and Others [1895] 2 QB 253

Castle Constructions Pty Ltd v Fekala Pty Ltd (2006) 65 NSWLR 648

Conway-Cook v Town of Kwinana (2001) 108 IR 421

Coulton v Holcombe (1986) 162 CLR 1

Cubillo v Commonwealth (No 2) (2000) 103 FCR 1

Curtis v Ausdrill Limited (2006) 86 WAIG 3133

Dellys v Elderslie Finance Corporation Ltd (2002) 82 WAIG 1193

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

Fox v St Barbara Mines Ltd [1998] FCA 621 (BC9802286).

G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd [2005] VSC 336

Glavonjic v Foster [1979] VR 536

Glentham Pty Ltd v Luxer Holdings Pty Ltd and Another [2006] WASC 132

Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711 (FC)

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

Growers Market Butchers v Stephen Blackman (1999) 79 WAIG 1313

Iyer v Minister for Immigration and Multicultural Affairs [2000] FCA 1788

JLW (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237

Jones v Dunkel (1959) 101 CLR 298

Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellschaft mbH (Court of Appeal) [1993] 2 Lloyds Reports 1

Karabotsos v Plastex Industries Pty Ltd [1981] VR 675

Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313

Leigh v Quito Pty Ltd t/as Benara Nurseries [2000] WADC 38

Monroe Schneider Associates (Inc) and Another v No 1 Raberem Pty Ltd (1991) 33 FCR 1

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd (2003) 196 ALR 257

Schanka v Employment National (Administration) Pty Ltd (2000) 97 FCR 186

Sealanes (1985) Pty Ltd v Foley and Buktenica (2006) 86 WAIG 1239; (2006) 86 WAIG 1254

Serco (Australia) Pty Limited v Moreno (1996) 76 WAIG 937

Sherson and Associates Pty Ltd v Bailey (2000) NSWCA 275

Skinner v Broadbent [2006] WASCA 2

Standard Chartered Bank v Pakistan National Shipping Corporation and Others [2001] 1 All ER (Comm) 822

The St Cecilia's College School Board v Grigson (2006) 86 WAIG 3146; (2006) 86 WAIG 3159; (2006) 86 WAIG 3163

The St Cecilia's College School Board v Grigson [2007] WASCA 72

Timpar Nominees Pty Ltd v Archer [2001] WASCA 430

Case(s) also cited:

Anderson v Rogers Seller & Myhill Pty Ltd (2007) 87 WAIG 289

AWU v Barminco Pty Ltd (2000) 81 WAIG 916

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

House v King (1936) 55 CLR 499

Norbis v Norbis (1986) 161 CLR 513

Sprigg v Paul's Licensed Festival Supermarket (1998) 88 IR 21

Reasons for Decision

RITTER AP:

Summary of Outcome

1 As the respondent was unrepresented it is appropriate to set out the outcome of the appeal based on my reasons. In my opinion the appellant has failed to establish all grounds of appeal, except ground 2(ii). This ground has been established to the extent that the Commissioner ought to have found the respondent did not take reasonable steps to mitigate, or lessen, the amount of her loss after her unfair dismissal. The probable effect of this is that the amount of the compensation ordered to be paid by the Commissioner must be reduced. The amount of the reduction however is not yet clear. On this issue, in my opinion the Full Bench requires additional written submissions. I suggest in my reasons that the respondent ascertain if the Employment Law Centre of Western Australia is prepared to assist her in providing these submissions. Scott C agrees with my reasons and although he has written separate reasons Wood C agrees with the outcome.

Procedural Background

2 The appellant operates a business in Merredin. The respondent was employed by the appellant as a motor vehicle cleaner from 10 October 2005 to 27 October 2005 when her employment was terminated by Mr Sydney Hatch (known as Mr Rick Hatch). Mr Hatch was the appellant's Dealer Principal. The employment involved providing a complimentary clean for cars being serviced and washing vehicles in the car yard.

3 On 3 November 2005 the respondent filed an application with the Commission seeking a remedy for her alleged harsh, oppressive or unfair dismissal. The appellant opposed the application. The application did not settle and proceeded to a hearing on 9 August 2006. The Commissioner (as the Senior Commissioner then was) published reasons for decision on 18 October 2006 and made a declaration and order on 23 October 2006.

4 Relevantly, it was declared that the respondent had been unfairly dismissed. An order was made that the appellant pay the respondent within 14 days of the date of the order the sum of $8,840 as compensation less any taxation that may be payable to the Commissioner of Taxation.

5 On 13 November 2006 the appellant filed a notice of appeal against the decision of the Commission pursuant to s49 of the *Industrial Relations Act 1979* (WA) (*the Act*). Attached to the notice of appeal was a document setting two grounds of appeal. As was made clear by the appellant's agent during the hearing of the appeal, the appellant did not seek to set aside the declaration that the respondent was unfairly dismissed. The appellant sought, on the basis of the grounds of appeal, a variation of the amount of compensation which had been ordered to be paid.

6 Upon the application of the appellant and without opposition by the respondent, on 13 December 2006 I made an order that the operation of the decision appealed against be stayed until the determination of the appeal or further order.

Ground 1

7 Ground 1 of the appeal is as follows:-

> "*1. The Learned Commissioner erred in finding, in relation to the applicant at first instance, that there was a 'reasonable mutual expectation of continuity of employment', and that therefore the applicant did not have a casual contractual relationship, in the*

> *context of a trial period of employment, with the respondent at first instance, by:*
>
> *(i) electing to prefer the evidence of the applicant over that of the Dealer Principal, for the respondent, in light of uncertain evidence on the applicant's behalf on the matter in question, compared with the clear and unequivocal evidence by the Dealer Principal on the same matter.*
>
> *(ii) failing to assess the form of the contractual relationship, in the context of the manner in which the applicable award defines casual employment, and the fact that the applicant's engagement conformed with that definition. (The applicable award is the Motor Vehicle (Service Station, Sales Establishments, Rust Prevention, & Paint Protection) Industrial Award).*"

8 The gravamen of ground 1 is that the Commissioner was in error in reaching the conclusion that the respondent was not a casual employee as had been asserted by the appellant at the hearing. The Commissioner considered and determined the issue of whether the respondent was a casual employee at paragraphs [36]-[41] of her reasons. At paragraph [38] the Commissioner quoted with approval the observations made by Sharkey P in *Serco (Australia) Pty Limited v Moreno* (1996) 76 WAIG 937 at 939 that:-

> "*… the concept of casual employment within the common law of employment, untrammelled by award prescription, is generally taken to connote an employee who works under a series of separate and distinct contracts of employment entered into for a fixed period to meet the exigencies of particular work requirements of an employer, rather than under a single and ongoing contract of indefinite duration.*"

9 At paragraph [41] the Commissioner said that although the respondent's hours of work varied between 16 to 20 hours each week "*the evidence establishes that there was a reasonable mutual expectation of continuity of employment.*" The Commissioner said the respondent "*was not engaged for a series of separate and distinct contracts of employment. Consequently, the nature of the contractual relationship was not casual*".

Ground 1(i)

10 Ground 1(i) contends the Commissioner erred in preferring the evidence of the respondent over that of Mr Hatch because of what was said to be uncertain evidence by the respondent on the casual employee issue as opposed to the clear evidence of Mr Hatch. (They were the only two witnesses at the hearing).

11 In her reasons for decision the Commissioner set out the relevant background and then in some detail the evidence given by both the respondent and Mr Hatch. The Commissioner considered the issue of credibility at paragraphs [33] to [35] of her reasons and concluded that "*where their evidence departs*" she preferred the evidence given by the respondent to that of Mr Hatch. In arriving at this conclusion, the Commissioner said she had "*heard the evidence given by [the respondent] and Mr Hatch and observed them closely*". The Commissioner described the respondent as being a "*reliable and truthful witness*", who gave evidence "*consistently and in a forthright manner*". By contrast the Commissioner said she "*did not find material parts of Mr Hatch's evidence to be reliable*".

12 Mr Hatch's evidence was described as vague about an assertion he had made that the respondent had taken on average an hour to clean a vehicle, which was an important issue at the hearing. The Commissioner said Mr Hatch had not given any evidence about when these observations were made, whether he had the opportunity to observe the respondent for long periods of time whilst she worked or how he drew the conclusion. The Commissioner also said the respondent gave a credible explanation about why Mr Hatch may have formed this impression. The respondent said she would often start to wash a vehicle but not complete it as she would wash and clean other vehicles that had been given to her as a priority before completing the first vehicle.

13 The Commissioner said the respondent also gave "*uncontradicted testimony*" that her immediate supervisor, Mr Tompkin would sometimes require the use of the wash pad which caused her cleaning duties to be interrupted. The Commissioner then said "*Mr Hatch's concession that the [respondent] completed cleaning all of the service vehicles plus others supports the [respondent's] version of events.*" The Commissioner also said there was no evidence adduced that vehicles were not returned to the service department on time or that Mr Tompkin had to undertake additional work to ensure all vehicles were cleaned on time. The Commissioner referred to the respondent taking issue with the fact that Mr Tompkin was not called as a witness. The Commissioner referred to the principle based on *Jones v Dunkel* (1959) 101 CLR 298. The Commission said that given there was no reasonable explanation for Mr Tompkin not giving evidence she drew the inference that his evidence would not have assisted the appellant's case.

14 The appellant faces the considerable hurdle that after having seen and heard Mr Hatch and the respondent give evidence, the Commissioner decided the respondent was a reliable and truthful witness and preferred her evidence to that of Mr Hatch. These findings make relevant the principles considered by Steytler P in *Skinner v Broadbent* [2006] WASCA 2 at paragraphs [32] to [37] which I summarised in *Grierson v International Exporters Pty Ltd* (2006) 86 WAIG 2935 (Scott C and Smith C agreeing) as follows:-

> "*50 The process involved for an intermediate appellate court in an appeal of this type was discussed by Steytler P in Skinner v Broadbent [2006] WASCA 2 at [32]-[37]. By reference to the relevant authorities, the*

President made a number of points which may be summarised as follows:-

(a) An appellate court has a disadvantage in assessing the credibility of witnesses to that of a trial court. As stated by Lord Sumner in SS Hontestroom v SS Sagaporack [1927] AC 37 at 47, unless it is shown that a trial court has misused its advantage the appeal court should not reverse conclusions reached, based on their own assessment of the evidence and the probabilities of the case.

(b) Kirby J criticised this approach in State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq) (1999) 73 ALJR 306 at 327 [88].

(c) Despite this, caution must be exercised in overturning findings of fact based on the credibility of witnesses. In resolving a conflict of evidence the "subtle influence of demeanour" cannot be overlooked. (Citing McHugh J in Jones v Hyde (1989) 63 ALJR 349 at 351 and Abalos v Australian Postal Commission (1990) 171 CLR 167 at 179).

(d) Steytler P quoted the reasons of Brennan, Gaudron and McHugh JJ in Devries v Australian National Railways Commission (1993) 177 CLR 472 at 479 where their Honours said a finding of fact based on credibility is not to be set aside because an appellate court thinks the probabilities are against the finding. If the finding is to any substantial degree dependent upon the credibility of a witness, the finding must stand unless the trial judge has failed to use or palpably misused his advantage or acted on evidence inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable.

(e) Even allowing for the criticism by Kirby J of the words "misused his advantage", this is a strong reminder of the difficulties facing a person seeking to overturn a finding of this kind. As a matter of logic, experience and legal authority, the appellate court must respect the advantage of the primary decision maker. (Quoting Suvaal v Cessnock City Council (2003) 77 ALJR 1449 at 1462 [73] per McHugh and Kirby JJ).

(f) As stated by Gleeson CJ, Gummow and Kirby JJ in Fox v Percy (2003) 214 CLR 118, an appeal court must perform their statutory functions even when a trial judge has reached a conclusion by favouring the witnesses of one party over another. This may lead to the overturning of a finding where incontrovertible facts or uncontested testimony demonstrate the trial judge's conclusions are erroneous or the conclusion reached was glaringly improbable or contrary to compelling inferences.

(g) As stated by their Honours in Fox v Percy, recent research has cast doubt upon the ability of judges to tell truth from falsehood from the appearance of witnesses.

(h) When deciding between competing versions of facts it is necessary for a trial judge to explain why one version has been preferred to another.

(i) It is a trial judge's duty to consider all of the evidence in a case and where important or critical evidence is not referred to an appellate court may infer that it has been overlooked or not considered.

51 Although Steytler P dissented in Skinner v Broadbent, the reasons of the other members of the court (McLure and Pullin JJA) did not differ from the President's analysis of these issues. (See also Lackovic v Insurance Commission (WA) (2006) 31 WAR 460 per Buss JA at [65]-[67]; Steytler P and Pullin JA agreeing). …"

15 The Commissioner complied with the duty summarised in point (h) above in that she explained why she preferred the evidence of the respondent to that of Mr Hatch. The caution which must be exercised in overturning findings of fact based in part upon the credibility of witnesses must in my opinion be steadily borne in mind. It can occur where, for example as explained above,

incontrovertible facts or uncontested testimony demonstrate that conclusions reached were wrong or were "*glaringly improbable or contrary to compelling inferences*". In my opinion however there is no basis in this appeal for setting aside the factual finding under attack.

16 The appellant argued the respondent's evidence at T20-24 and especially at T23 and 24 "*exhibited a level of confusion*" over her understanding of an engagement on a part-time basis as against the earlier clearer evidence which she gave at T5. It was submitted in contrast Mr Hatch had given clear evidence at T46, 47, 49 and 54 that the respondent's engagement had been on a casual basis and she was made aware of that.

17 I do not accept the criticism of the respondent's evidence. At T20 it was put to the respondent by the appellant's agent that when engaged by Mr Hatch he made no reference to part-time employment. The respondent said "*that's incorrect, because when I was speaking to him he said that I'd be a part-time vehicle cleaner, and in fact - - because I had set hours a - - a set amount of hours each week*". She then said her employment "*was basically permanent part-time vehicle cleaner*". The respondent then said "*it was a constant - - it wasn't like he'd ring me and say 'Oh well, is it okay to work this hour or this hour?' It was 'Each week you will work this amount of hours'*". The respondent then said the job was "*a certain amount of hours a week. I made it into the 3 days a week.*" (T20). The respondent then reiterated that Mr Hatch had not told her the appointment was as a casual employee. The respondent was then asked whether she knew what "*casual*" meant and she replied that she had looked up on the internet the difference between casual and part-time.

18 The confusion by the respondent occurred after it was put to her by the appellant's agent that "*a casual is a person who receives a loading on their rate – usually 20 per cent - and that loading compensates for any of the leave benefits, like annual leave, sick leave, public holiday benefits*". The respondent then queried "*for all casual [sic]*". (T21). In my opinion the answer by the respondent was an understandable response to what was, with respect, a not wholly accurate assertion about what constitutes casual employment.

19 It is correct that some confusion followed in the answers given by the respondent but this was in my opinion as a result of the questions which were being asked of her. The intent of the appellant's agent was to try and establish that the hourly rate of pay which had been set for the respondent took into account a casual loading because the award rate for the job was $12.75 per hour and the respondent was being paid $17 per hour. The respondent was, as the Commissioner observed in the hearing at T24, confused about the respective entitlements of a part-time as opposed to a casual employee. Whilst this may be so however, there were no inconsistencies by the respondent about the basis upon which she had been engaged by Mr Hatch and had worked for the appellant. The Commissioner was in my opinion entitled to accept this evidence and in doing so has not made any errors of the type referred to above which would permit appellate interference with the finding.

20 In my opinion ground 1(i) cannot be established.

Ground 1(ii)

21 Ground 1(ii) asserts a failure by the Commissioner to assess the contractual relationship in the context of the applicable award definition of casual employment. The ground asserted the applicable award was the *Motor Vehicle (Service Station, Sales Establishments, Rust Prevention, and Paint Protection) Industry Award* (*the award*).

22 This ground faces the immediate problem that the appellant did not argue the case before the Commissioner on this basis or even name *the award* at the hearing, let alone tender it or place it before the Commissioner in some acceptably reliable form. This is problematic because of the contents of s49(4) of *the Act* and the principles established by *Coulton v Holcombe* (1986) 162 CLR 1 at 7, comprehensively summarised by the Full Federal Court in *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at paragraphs [16]-[19].

23 Even without this difficulty however there is no substance in the ground. The appellant referred to clause 6(3) of *the award* which had the following definitions:-

> "*Casual:* *means an employee who is engaged and advised as such at the time of employment. Casual employment shall include circumstances where the expected duration of employment is for a short term or is irregular.*
>
> *Part-time:* *means an employee who is engaged to work a specified number of ordinary hours less than an average of thirty eight on a regular basis and who shall accrue leave and other award benefits in the same proportion as the average weekly number of hours worked bears to thirty eight.*"

24 The award definition requires that a casual is an employee "*who is engaged and advised as such at the time of employment*". The Commissioner accepted the evidence of the respondent was that she was not so engaged or advised. As I have said above this finding was not tainted with appealable error. Accordingly, ground 1(ii) cannot be sustained.

25 For these reasons ground 1 cannot be upheld.

Ground 2

26 In ground 2 the appellant more directly attacks the amount of compensation ordered to be paid. The ground is:-

> "*2. In having made a finding that the applicant was unfairly dismissed, the learned Commissioner erred by proceeding to determine an amount of compensation due by:*
>
> *(i) failing to give any weight to the casual nature of the applicant's employment, pursuant to the award definition,*

with the consequent failure to take that form of employment into account in the setting of the compensation.

(ii) concluding that the applicant had acted reasonably in the mitigation of her loss, by discounting her obligation to do so because of a finding that the applicant's self esteem and confidence had been affected by the actions of the company and ignoring the fact that she had no recent employment history, and had just re-entered the employment environment.

(iii) concluding that had she not been dismissed, her employment with the company would have continued for a further six months, when even accepting the applicant's evidence, there was no positive indication given to her by the Dealer Principal, either at the conclusion of the two week trial or at the time the job description form was provided to her, that her performance met the company's requirements.

(iv) concluding, by implication, that the applicant would have remained available to carry out her role, when the evidence was unclear as to whether she would have been available to work at all, due to her husband's decision to transfer his employment, with the family needing to move to Boyanup, and the need for her to make necessary arrangements for the family to make that shift."

The Commissioner's Reasons on Compensation

27 The Commissioner dealt with compensation in paragraphs [46]-[52] of her reasons. The Commissioner commenced by saying she was satisfied reinstatement was not "*practical*" as the respondent no longer resided in Merredin. The Commissioner then set out the amounts which the respondent had been paid which averaged $340 gross per week. The Commissioner quoted with approval the observations by the Full Bench about mitigation of loss in *The St Cecilia's College School Board v Grigson* (2006) 86 WAIG 3159 at paragraphs [9]–[10].

28 In paragraph [49] of her reasons, the Commissioner referred to the argument of the appellant that there had been a failure to mitigate loss. The Commissioner said that there needed to be an assessment of whether the respondent had "*acted reasonably in the mitigation of loss, but this does not mean that the test is objective. It is not an assessment from the viewpoint of a reasonable and prudent person. What is reasonable for a person to do in mitigation of his or her loss is not a question of law but is one of fact in the circumstances of each particular case (see Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104 at 115-117 and the cases cited therein)*". The Commissioner made a finding the respondent had acted reasonably in her mitigation of loss and the appellant had failed to "*meet its onus of proof*".

29 The Commissioner's reasons for reaching this conclusion were set out in paragraphs [50]-[51] of her reasons as follows:-

"*50 I am satisfied that but for the dismissal the Applicant would have continued to work for the Respondent for a period of at least six months. Further, I am satisfied that in the circumstances the Applicant acted reasonably in the mitigation of her loss. She sought work as a teacher's aide but was unsuccessful. Although the Applicant did not apply for any other positions her reasons for not doing so are reasonable as the Applicant's esteem and confidence to seek other work has been affected by the actions of the Respondent.*

51 For these reasons I find that the Applicant has acted reasonably in her mitigation of loss and the Respondent has failed to meet its onus of proof."

Grounds 2(i), 2(iii) and 2(iv)

30 Ground 2(i) cannot be sustained because of the reasons set out above when considering ground 1(ii).

31 Ground 2(iii) can also be dealt with shortly. In the appellant's written submissions it was asserted that "*even accepting [the respondent's] evidence that the Dealer Principal did not convey to her his concern over the time she was taking to wash and clean vehicles which had been serviced, it did not mean that this would forever have remained the case*". In his oral submissions the agent for the appellant amplified this point by saying the findings of the Commissioner were consistent with there being a miscommunication or misunderstanding of what Mr Hatch was endeavouring to explain to the respondent about how long she was taking to wash cars. It was submitted that this miscommunication problem would be likely to be overcome if the respondent had remained in the employment of the appellant, but that it was possible the respondent would not even then be able to wash cars in a timely manner and therefore there may be a termination of employment on that basis prior to the six months referred to by the Commissioner.

32 There are at least two problems with this submission. The first is that the Commissioner's findings were not that there was a miscommunication problem but that there had been no problem with the timeliness of the respondent's car washing. The Commissioner accepted the respondent's evidence about this and as referred to earlier said her evidence was supported by Mr Hatch's admission that the respondent washed within time at least all of the vehicles allocated to her.

33 Secondly, the contention made by the appellant is speculative. The following observations made by Kenner C in *Fisher & Paykel Australia Pty Ltd v Skinner* (2006) 87 WAIG 1 at [79], agreed with on this point by Ritter AP and Wood C are apposite: "*For there to be consideration of the on going employment of the respondent in this matter, beyond the actual dismissal, there would need to be evidence capable of characterisation as more than mere speculation and that there was a real prospect of the employment being terminated fairly at some point thereafter in any event*". In my opinion, there was no such evidence at the hearing and for this reason also ground 2(iii) cannot be sustained.

34 In my opinion appeal ground 2(iv) also cannot be sustained because as will be set out below the evidence of the respondent was that she commenced her move to Boyanup in June 2006. This was more than six months after the termination of the respondent's employment by the appellant and therefore did not have an impact upon the finding by the Commissioner that if the termination had not occurred there would have been at least six months employment of the respondent by the appellant.

Ground 2(ii)

(a) Introduction

35 The determination of ground 2(ii) requires much greater consideration. The first thing to consider is the evidence about what the respondent did after the termination of her employment.

(b) The Evidence About Mitigation

36 The respondent was not represented at first instance and accordingly was, to the extent it was procedurally fair to both parties to do so, assisted by the Commissioner in presenting her evidence. The evidence of the respondent about what she did after the termination of her employment was not entirely clear; perhaps because as stated by the Commissioner in her reasons, the respondent became upset during the course of giving evidence. Nevertheless, the relevant evidence of the respondent is as follows:-

(a) Examination-in-chief: Prior to and whilst employed by the appellant the respondent was doing a teacher's aide course certificate III and had completed all but four units of the course. (T18).

(b) After the termination of employment the respondent stopped doing the course, which she had done partly to enhance her confidence and to enable her to assist her children with their schooling. (T18).

(c) The respondent could return to the course later but had also been moving house. (T18).

(d) The respondent had sought employment as a teacher's aide and applied for two positions but did not get an interview. (T18).

(e) The respondent did not seek any other employment. (T18).

(f) The respondent moved house about a month ago. (The hearing being on 9 August 2006). (T18).

(g) The appellant was now "*looking into*" getting work. There were a "*huge amount of jobs*" where she was now living in Boyanup. (T18/19).

(h) The respondent was "*actually afraid to go and work because I'm just - - well, I'm going to get this over and done with, even if - - either way, whatever way it goes, just to move on*". (T19).

(i) Cross-examination: The respondent said she had been unsuccessful in her applications to become a teacher's aide because of her grammar. Nurses with better resumes had applied for the jobs. (Feedback had been provided by a principal). (T40-42).

(j) The respondent had not been looking for other employment because she had been moving with her husband and "*travelling constantly*" to Merredin to "*re-do the house*". The respondent said by the end of the week the house would be available to put on the market. The respondent said she could not have got a job unless they were going to be flexible with her going "*whenever to get this house done*". (T40).

(k) The respondent also referred to her children who were then living with their grandparents. (T40/41).

(l) The move to Boyanup commenced in about June 2006.

(m) The respondent said there was also "*no way I was going to get a job in this town*", meaning Merredin, because Mr Hatch was "*quite high in the community*". The respondent said there was no way she was going to get a job "*in this town if I can't clean a car in half an hour*". This was clearly a reference to the assertion which Mr Hatch had made about her. (T41).

(n) Obtaining a job as a teacher's aide was difficult because she had not finished her course, lacked experience working in schools and could not afford to buy a professional resume. The respondent said it was a gradual transition to try and get "*your foot in there, in the Education Department*". (T41).

(o) There were "*no prospects*" in Merredin. (T41).

(p) The respondent's husband got a "*transfer to Picton*" and then there was "*government departments, transfers take ages, removalists, getting the house ready, all that sort of stuff, there was no way I could get a job, or even go for a job*". (T41).

(q) "*I need to be living down there [Boyanup] permanently, go for a job, and get it*". "*Though I need this out of the way as well*". (T41/42).

(r) The respondent referred to the 10 months it had taken for her application to be heard and said, "*I have not only got all that stuff happening, I've got other things happening as well, and I've got totally low self esteem, and everything like that. I will get through this, and I will get a job*". (T42).

(s) The house in Merredin would no longer be an issue by the end of the week. (T42).

(c) Appellant's Closing Submissions at the Hearing

37 In his closing submissions the appellant's agent submitted there was "*no scope*" for the Commission to make a compensation order for loss of income. (T93). He referred to the lack of attempt to obtain employment, apart from the teacher's aide positions. After the appellant's agent had finished his submissions the Commissioner asked, with reference to the submission about "*mitigation*" of loss, whether an award could be made for injury because of the "*evidence about the distress that she suffered as a result of loss of confidence in terms of - - from the – - the termination*". (T93). The appellant's agent essentially submitted that although there was evidence that the respondent was upset when she found out she had been misled about the reasons for dismissal, this was within "*normal bounds*" and did not constitute a compensable injury. (T94). The reference to being "*misled*" was to the evidence of the respondent that she was told by Mr Hatch that he did not have the money to keep her on, but found out a few days later someone had been employed to replace her.

(d) The Commissioner's Errors on Mitigation

38 As set out earlier the Commissioner's reasons for finding the respondent had acted reasonably in mitigating her loss were because, firstly, she had sought employment as a teacher's aide and, secondly, in not applying for other positions her actions were reasonable because her self esteem and confidence to seek other work was affected by the actions of the appellant.

39 From the review of the respondent's evidence set out above, I do not think it was open for the Commissioner to find that this was the reason for her not applying for other positions. There was a combination of factors. The respondent in her evidence did not directly attribute not looking for employment because of a lack of self esteem and confidence caused by the actions of the appellant. Indeed, this explanation was at least to some extent undermined by the respondent applying for two jobs as a teacher's aide and being admirably assertive enough to seek and obtain feedback from a principal as to why she had not been successful in obtaining an interview.

40 In my opinion having regard to all of the evidence of the respondent, it was not open to the Commissioner to find the respondent acted reasonably in the mitigation of her loss. The Commissioner therefore erred. The respondent could have reasonably chosen to make a greater effort to find alternative employment but did not do so. The respondent's reasons for not seeking employment, apart from the two teacher's aide positions, for the whole period of 10 months prior to the hearing were not reasonable. It is also questionable whether seeking the teacher's aide positions was a reasonable attempt to minimise loss given the respondent's lack of relevant qualifications or experience. This made it most unlikely she would obtain the employment sought. But even putting that issue to one side the respondent's reasons for not seeking other employment in the 10 months before the hearing included moving house, lack of a professionally produced resume, awaiting the outcome of the hearing and an assumption that she would not be employed in Merredin because of Mr Hatch's status. In my opinion this was a combination of lifestyle choices and with respect to the latter, an unsound or at least untested reason. This combination of facts had the effect in my opinion that, at least, not all of the respondent's post termination loss has been caused by the appellant.

41 With respect I also think the Commissioner erred in stating in paragraph [49] that reasonableness in this context is not objective or "*an assessment from the view point of a reasonable and prudent person*". In my opinion there is an objective element within the concept of reasonableness in the present context. This opinion is supported by *Leigh v Quito Pty Ltd t/as Benara Nurseries* [2000] WADC 38 at [61] and [62], *Karabotsos v Plastex Industries Pty Ltd* [1981] VR 675, *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1 at [1522] and *Sherson and Associates Pty Ltd v Bailey* (2000) NSWCA 275 per Heydon JA at [77], quoted with approval by Mason P (Beazley JA agreeing) in *Castle Constructions Pty Ltd v Fekala Pty Ltd* (2006) 65 NSWLR 648 at [57]. *In Karabotsos* Kaye J (with whom McGarvie J agreed) at pages 680 and 683 accepted the correctness of the observation of Gobbo J in *Glavonjic v Foster* [1979] VR 536 at 540 that the appropriate test was whether a reasonable man in the circumstances as they existed for the claimant, would have taken the same course. This was in the context of a personal injury claim. Heydon JA in *Sherson* referred to the taking of such steps "*as a reasonably prudent man in his [the claimant's] position would have taken to avoid further loss to himself*". There is an objective component in both of these formulations, which in my opinion expresses the correct position for the purposes of assessing mitigation under *the Act*.

(e) Ground 2(ii) Established

42 In my opinion therefore ground 2(ii) at least to the words "*actions of the company*" has been established. I also take the words after this to be an additional or separate aspect of the particular to the ground so that the ground is established without having to satisfy the Full Bench of the failure by the Commissioner to take into account the respondent's lack of recent employment history.

43 Accordingly the appellant has succeeded in establishing that the Commissioner erred in her assessment of compensation because she found, with respect, wrongly that there had been a reasonable attempt to mitigate. The next question is what flows from this.

(f) The Appellant's Contentions

44 As set out earlier the appellant submitted at the hearing that there was no scope for a compensation order for loss of income because, in effect, of the failure to reasonably mitigate. On appeal the appellant submitted the Full Bench should substitute its decision about the appropriate amount of compensation which should be "*nothing greater than a nominal figure*".

45 The appellant's submission about the Full Bench now substituting its own decision and assessment of compensation is in accordance with the application of s49(5)(b), (6) and (6a) of *the Act*. The appellant's agent did not however elaborate on what he meant by a "*nominal figure*". There are issues about what the expression means, and how you decide an appropriate nominal figure.

(g) Assessment of Compensation

46 The basis upon which the Commission may order the payment of compensation when there has been an unfair dismissal is set out in s23A(6)-(8) of *the Act* as follows:-

> "*(6) If, and only if, the Commission considers reinstatement or re-employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.*
>
> *(7) In deciding an amount of compensation for the purposes of making an order under subsection (6), the Commission is to have regard to —*
>
> *(a) the efforts (if any) of the employer and employee to mitigate the loss suffered by the employee as a result of the dismissal;*
>
> *(b) any redress the employee has obtained under another enactment where the evidence necessary to establish the claim for that redress is also the evidence necessary to establish the claim before the Commission; and*
>
> *(c) any other matter that the Commission considers relevant.*
>
> *(8) The amount ordered to be paid under subsection (6) is not to exceed 6 months' remuneration of the employee.*"

(h) Compensation and Mitigation

47 The role of mitigation upon an assessment of loss for the purposes of making an order of compensation under these subsections was considered in the joint reasons of Ritter AP and Gregor SC in *Curtis v Ausdrill Limited* (2006) 86 WAIG 3133 at paragraphs [32]-[38]. That decision and the reasons of the majority were part of a series of Full Bench decisions in the last 18 months which have considered the issue of mitigation in unfair dismissal cases. The other cases include *Sealanes (1985) Pty Ltd v Foley and Buktenica* (2006) 86 WAIG 1239; (2006) 86 WAIG 1254, *BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australia Branch* (2006) 86 WAIG 642, *The St Cecilia's College School Board v Grigson* (2006) 86 WAIG 3146; (2006) 86 WAIG 3159; (2006) 86 WAIG 3163.

48 The reasons of the majority in *Curtis*, which have not been questioned in any subsequent Full Bench or Industrial Appeal Court decisions, brought together some of the strands of reasoning in the earlier decisions. The points made by the majority may be summarised as follows:-

(a) Section 23A(6) of *the Act* provides for the payment of an amount of compensation for loss and injury caused by the dismissal.

(b) In the context of an unfair dismissal application mitigation means the taking of reasonable steps to minimise the financial impact upon an employee of their unfair dismissal.

(c) Mitigation was considered relevant to the assessment of compensation by the Commission before the introduction of s23A of *the Act*, and has continued relevance both because of the need to assess loss and its specific mention in s23A(7).

(d) As there is a connection between the concepts of causation of loss and mitigation, s23A(7) insofar as it refers to the employee, may have been legislatively unnecessary. This connection was recognised and developed in *Sealanes* at [101]-[105].

(e) The reasons in *Sealanes* were quoted with approval by the majority in *Curtis*. (In those reasons there were quotations from a number of cases of high authority. Some of them will be referred to below).

(f) If it can be established that there has been a failure by an applicant to reasonably mitigate loss, the total amount of income they have not received from the lack of continued employment with their former employer may not be the total of the loss "*caused by*" the unfair dismissal for the purposes of s23A(6) of *the Act*.

(g) It is for an employer respondent to establish on balance a failure to take reasonable steps to mitigate.

(h) Whether reasonable steps to mitigate have been taken is a question of fact, dependent upon an evaluation of the facts and circumstances of the case.

49 The causation point made in (d) of the previous paragraph is with respect clearly expressed by Bingham LJ (Dillon LJ and Stocker LJ agreeing) in *Kaines (UK) Ltd v Osterreichische Warrenhandelsgesellschaft mbH* (Court of Appeal) [1993] 2 Lloyd's Law Reports 1 at page 10. There, in the context of what was a sale of goods case, the Lord Justice said:-

> "*If the buyer fails to take reasonable steps to mitigate his loss consequent on the seller's breach, he is debarred from claiming any part of the damage which is due to his neglect to take such steps. The seller's breach is not causative of that additional loss and therefore not recoverable.*"

50 A number of authorities, some of which were quoted in *Sealanes*, were cited in support of this proposition.

51 There are presently two relevant aspects to the mitigation issue. The first is whether reasonable steps have been taken to mitigate loss. The second is only relevant if a former employer proves a failure to reasonably mitigate loss. This is the extent

to which the failure to mitigate has lead to an exacerbation of the loss of the employee after their dismissal so that the whole of that loss cannot be said to be caused by the dismissal.

52 For the appellant's submission about "*nominal compensation*" to be accepted there must be a conclusion that if the respondent had reasonably mitigated, her loss would have been "*nominal*".

(i) Failure to Mitigate and Nominal Damages

53 In my opinion therefore, just because there was a reasonable failure to mitigate does not always mean there should be an award of "*nominal*" compensation as submitted by the appellant.

54 The issue was directly addressed by the majority in *Curtis at* [40] as follows:-

> *"40 We have earlier quoted paragraph [31] of the reasons of decision of the Commissioner. The Commissioner there referred to the "requirement" and "duty" to mitigate. Whilst there may be some technical misdescription involved in the use of these terms, based on the authorities referred to earlier, nothing necessarily turns on this. In the same paragraph the Commissioner said that an employee who is wrongfully dismissed and unreasonably acts by failing to mitigate his loss would only be entitled to nominal damages. Two cases are cited in support of this proposition which will be referred to in a moment. In our opinion the point made by the Commissioner should be qualified to the extent that nominal damages (or compensation under the Act) will only be the result where the consequence of the unreasonable failure to mitigate is that no loss has been caused by the dismissal. The outcome of nominal damages (or compensation) is not some form of punishment imposed upon an employee who unreasonably fails to mitigate. Even such an employee will be entitled to the remaining loss caused by the dismissal. This is illustrated by the supplementary reasons of the Full Bench in Sealanes. (See (2006) 86 WAIG 1255-1258). In Sealanes, there had been a finding at first instance, not appealed against, that an employee had failed to take reasonable steps to mitigate his loss. The Full Bench found that if he had chosen to seek employment the employee would have been successful in doing so between two and five weeks after the termination of his employment. Loss of remuneration for this period therefore marked the maximum amount of lost remuneration which could be characterised as being because of the dismissal. (This was on the basis that the employee could have found equally remunerative employment). The failure to mitigate did not of itself mean there would be no order made for lost remuneration."*

55 After a review of *Brace v Calder and Others* [1895] 2 QB 253 and *Beckham v Drake* (1849) 2 HLC 579, the majority in *Curtis* said at [43]:-

> *"43 Accordingly, the relevant observations made by members in court in Brace v Calder and Beckham v Drake support the view that an employee who is unlawfully or unfairly dismissed and unreasonably acts in failing to mitigate their loss, would be entitled to nominal compensation if the consequence of their failure to mitigate is that there has been no loss caused by the dismissal."*

56 Given the appellant's submission about a "*nominal figure*", I have reviewed the correctness of these statements of principle. Having done so I am satisfied on the basis of the authorities that what was stated in *Curtis* should be subject to one alteration but is otherwise correct. I think the alteration is the reference to an award of "*nominal*" compensation. This is because nominal damages (as opposed to compensation) arises where there has been an infraction of a legal right but no damages proved. (*G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd* [2005] VSC 336 at [65]; *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 241, 243, 249, 251).

57 In *Timpar Nominees Pty Ltd v Archer* [2001] WASCA 430, Kennedy J, with whom Wheeler JJ generally agreed said:-

> *"[108] In The Mediana [1900] AC 113 at 116, Lord Halsbury LC considered the meaning and incidents of nominal damages. He said:*
>
> *"'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict of judgment because your legal right has been infringed."*
>
> *[109] A second advantage has been considered to be the main purpose of an award of nominal damages, namely, as Maule J described it*

in Beaumont v Greathead (1846) 2 CB 494; 135 ER 1039 at 499, "a mere peg on which to hang costs".

[110] The respondents have not served any notice of contention in relation to this ground.

[111] In the case of nominal damages, a token sum is awarded. The learned editor of McGregor on Damages noted that, in the United Kingdom, 5 pounds has become the norm for nominal damages - see Brandeis Goldschmidt & Co v Western Transport Ltd [1981] QB 864 at 874 and see also Michael Kellaway International Pty Ltd v Shark Bay Airport Pty Ltd, unreported; FCt SCt of WA; Library No 970604; 13 November 1997, in which nominal damages were fixed at $10. An award of $1,000 is clearly not an award of nominal damages, as that expression is understood. As to the award of nominal damages for interference with servitudes, see J G Fleming, The Law of Torts 9th ed (1998) at 494. I would allow this ground of appeal and reduce the award to $10."

58 As set out earlier compensation under s23A(6) of *the Act* may only be awarded for "*loss or injury*". Therefore if no loss or injury is proved, nominal compensation cannot be awarded; no compensation can. The same result was arrived at in *JLW* for a claim based on s82 of the *Trade Practices Act 1974* (Cth) where "*loss or damage is the gist of the statutory cause of action* …". (*JLW* page 249 and see also page 251).

(j) Content of an Employer's Onus Regarding Mitigation

59 As set out earlier by reference to *Curtis*, the onus of proof is on the former employer to prove a reasonable failure to mitigate. Despite some earlier equivocation, this now seems beyond doubt.

60 There are a number of authorities, including High Court authorities, which support this conclusion. They are helpfully collected in footnote 288 on page 1015 of Cheshire and Fifoot's, Law of Contract, Eighth Australian Edition, Butterworths 2002 and footnote 7 in paragraph [41-340] of Carter on Contract, 2007, Butterworths loose leaf edition. To those lists I would add the reasons of Le Miere J in *Glentham Pty Ltd v Luxer Holdings Pty Ltd and Another* [2006] WASC 132 at [54].

61 At common law, in both contract and tort, to have an impact on the amount of damages to be awarded, the onus to be discharged is not merely that there has been a reasonable failure to mitigate. It extends to proof of the amount in dollar terms that the failure has lead to an exacerbation of loss. The cases which support this include *Standard Chartered Bank v Pakistan National Shipping Corporation and Others* [2001] 1 All ER (Comm) 822 at [41]; *Bagnall v National Tobacco Corporation of Australia Ltd* (1934) 34 SR (NSW) 421 at 429/430; *BNP Paribas v Pacific Carriers Ltd* [2005] NSWCA 72 at [64]; *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at [187]-[188], *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257 at [83] and *Monroe Schneider Associates (Inc) and Another v No 1 Raberem Pty Ltd* (1991) 33 FCR 1 at 17. Some of these cases were referred to in *Sealanes* and *Curtis*.

62 Succinct passages explaining the point are as follows. In *BNP Paribas* Handley JA at [64] said:-

"***[64]*** *… the mitigation principle only applies once the plaintiff has proved his damages on a prima facie basis. If a failure on his part to mitigate his damage is relied on to reduce that prima facie measure the defendant has the onus of establishing that failure and the quantum of any deduction.*"

63 For the benefit of the respondent "*prima facie*" is a latin phrase which means at first sight or on the face of it.

64 In *Karacominakis* Giles JA with whom Handley JA and Stein JA agreed said at [187]:-

"***[187]*** *A plaintiff who acts unreasonably in failing to minimise his loss from the defendant's breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which he has not. (TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130).*"

65 In *Monroe Schneider Associates (Inc)* Burchett J with whom O'Loughlin J agreed said at page 17:-

"*There is no doubt that the onus in respect of mitigation of loss is on a defendant, and it would be extraordinary if the rule were the other way in respect of an elaboration of it. That the defendant must bear the onus on mitigation has been asserted repeatedly: see Halsbury's Laws of England, (4th ed), Vol 12, para 1196; Vischer Simonius & Co v Holt [1979] 2 NSWLR 322 at 361; World Beauty [1970] P 144 at 154, 158; Volpato v Zachory [1971] SASR 166 at 168–9; Wollington v State Electricity Commission (Vic) (No 2) [1980] VR 91 at 93; Karas v Rowlett [1944] SCR 1 at 9, per Duff CJ*

> *and Rand J; Roper v Johnson (1873) LR 8 CP 167 at 178, 181–182, 184. In the last case, Grove J (at 184) said:*
>
> > *The plaintiffs having made out a prima facie case of damages, actual and prospective, to a given amount, the defendant should have given evidence to shew how and to what extent that claim ought to be mitigated.*
>
> *Similarly, Halsbury's says: "The burden of proving that the plaintiff's loss has been diminished or avoided lies on the defendant."*
>
> *On the basis that the onus rests on the appellants, their first difficulty is to establish by what amount the figure representing the prima facie estimate of the respondents' damages should be reduced.*"

66 Finally in *Placer (Granny Smith) Pty Ltd* Callinan J said at paragraph [83]:-

> "*Another way of viewing the respondent's submissions in the Full Court and in this court is as a plea in the nature of a plea in mitigation of damages. The onus in this regard lies upon the party seeking the reduction.*[31] *Even though this is a case in contract, an analogy may be drawn between it and Watts v Rake*[32] *in which it was held that it was for the tortfeasor to identify and effectively isolate in the case of pre-existing and subsequently occurring damage, damage for which it was not responsible.*"

67 In the above quotation, after the reference to *Watts v Rake* there was a footnote which read: "*(1960) 108 CLR 158 especially at 160, 163–4. See also Purkess v Crittenden (1965) 114 CLR 164*."

68 If there is a failure to prove the requirement referred to there will have been a failure to discharge the onus. There will then be no reduction in the amount of compensation to be awarded on the basis of a failure to mitigate. This is demonstrated by the reasons of French J in *Fox v St Barbara Mines Ltd* [1998] FCA 621 (BC9802286). His Honour said:-

> *"The company's submission was that a reasonable person mitigating his loss would have looked to work opportunities for which he was qualified outside the mining sphere. When Counsel was asked how the Court would quantify the difference between what was awarded and what the company said should have been awarded if alternative opportunities were properly taken into account, the submission was put that absent evidence on award rates and the like this was a matter which should be assessed as a contingency.*
>
> *In my opinion this is the kind of matter which ought to have been the subject of evidence to provide some basis for assessment of a contingency based reduction in the amount of compensation awarded. No such basis having been established, I do not propose to interfere with the Judicial Registrar's award in this regard.*"

69 The principle I have referred to also follows from a consideration of the general concept of mitigation. As stated by Le Miere in *Glentham* at [37]:-

> "***[37]*** *An injured party cannot recover losses that could have been avoided. The plaintiff must take all reasonable steps to mitigate the loss flowing from the breach of contract and may not recover damages for any part of the loss that is due to failure to take such steps (see Hasell v Bagot, Shakes & Lewis Ltd (1911) 13 CLR 374 at 388). The issue in this case is whether the plaintiff took reasonable steps to relet the premises.*"

70 To determine this requires an assessment of what part of the loss, in monetary terms, is due to the failure. That cannot be done without evidence or information about the extent of that loss.

71 Another illustration of the point is provided by the reasons of Steytler J in *Conway-Cook v Town of Kwinana* (2001) 108 IR 421 at [36] in the context of a damages claim for a wrongly terminated contract of employment. His Honour said that: "*damages were required to be reduced by so much as he was able to earn as a consequence of his attempts to mitigate his loss*". In my opinion the same applies with respect to assessing compensation under *the Act*.

72 Accordingly, if the respondent had obtained alternative employment and earned income, her entitlement to compensation would be reduced by this amount. The other side of the coin is that if an unfairly dismissed employee fails to reasonably mitigate their loss, then the amount of their compensation should be reduced by the amount which it is assessed they could have earned if they had done so. That is because this affects the amount of the loss which has been caused by the dismissal. This method of analysis was applied by the Full Bench in *Curtis*, *Sealanes* and *St Cecilia's*, upheld on appeal in *The St Cecilia's College School Board v Grigson* [2007] WASCA 72, although there was no ground of appeal on this point.

73 It is acknowledged that the observations made in the cases referred to in paragraphs [61]-[71], with the exception of *Fox*, were about damages in breach of contract or wrongful dismissal cases. In my opinion however the same principles generally apply in assessing "*loss … caused by the dismissal*" and mitigation in s23A of *the Act*. As stated in *Curtis* mitigation is required to be taken into account as being a component of the assessment of "*loss*" or from the terms of s23A(7)(a) of *the Act*. In determining loss caused by a dismissal and the effect of mitigation on loss, in my opinion the common law understanding of

what causation, loss and mitigation are and the impact of mitigation upon assessing loss should be generally applied. This opinion is supported by the rule of statutory construction that where a word used in a statute has an accepted legal meaning that is the meaning which should be given to it unless the statutory context requires otherwise. (See *Schanka v Employment National (Administration) Pty Ltd* (2000) 97 FCR 186, Full Federal Court at [12]-[14] and D C Pearce and R S Geddes, Statutory Interpretation in Australia, Butterworths, 6th Edition, 2006 at [4-13] ff).

74 In my opinion there is no context in *the Act* which changes the common law understanding of the concepts of loss, causation and mitigation.

75 There is in my opinion however something in the context and content of *the Act* which affects the way in which findings of exacerbation of loss can be made, and to that extent, the discharge of the former employer's onus of proof. This is why I said "*generally*" two paragraphs earlier. The procedures of the Commission which affect the way in which facts may be found moulds, at least to some extent, the way in which an exacerbation of loss can be proved.

76 Although it is a court (s12 of *the Act*) the Commission is not bound by the rules of evidence (see s26(1)(b) of *the Act*). The Commission may under the same section also "*inform itself on any matter in such a way as it thinks just*" and take into account to the extent relevant the considerations listed in s26(1)(d). This includes the state of the national economy and Western Australian economy.

77 The Commission's capacity to so inform itself is however controlled by the need to act in a procedurally fair way. This requirement stems from both the common law and s26(3) of *the Act* which provides:-

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

78 The width of the potential fact finding processes available to the Commission means that although there must be information upon which the Commission can properly and reliably rely to assess exacerbation of loss, the strict requirement of the common law, for the wrongdoer to prove the loss based on admissible evidence, is not present.

79 In summary therefore to satisfy the onus referred to in the cases the Commission must have before it evidence or information (see s26(1)(b) of *the Act*) which establishes both a failure to reasonably mitigate and the extent to which the failure has exacerbated or failed to minimise the former employee's loss. Relevant evidence/information can be adduced or pointed to in a variety of ways, as cases such as *Sealanes*, *Curtis* and *St Cecilia's* demonstrate. In many cases the extent of the failure to minimise loss could be established by proving the probable availability of employment in a similar position to that formerly enjoyed and the probable remuneration of the position. But this is not the only method. In some cases it may be open to the Commission to infer that if reasonable steps had been taken to mitigate, the employee would have been likely to have found employment with the same pay.

(k) Applicability of Principles in Assessing Compensation in the Appeal

80 There is a difficulty in determining the orders which should be made in this appeal. This is because apart from the reference to nominal compensation the appellant did not make any submission to the Full Bench about the extent to which the respondent's reasonable failure to mitigate had exacerbated her loss. Accordingly in my view the Full Bench is not yet in a position to assess the extent which the loss of the respondent could have been lessened if she had made reasonable attempts to mitigate. The Commissioner found that but for the unfair dismissal the employment of the respondent with the appellant would have lasted at least a further six months. This finding of fact is not challenged on appeal and must in my opinion be taken into account in assessing compensation. In my opinion however it cannot be said that the loss of wages by the respondent over the whole of that period was caused by the unfair dismissal. At least some of it was caused by her failure to mitigate. The difficulty is in deciding that amount.

81 In deciding compensation the Commission is also required by s23A(7)(a) of *the Act* to take into account the efforts of the former employer to mitigate loss. Here the appellant paid the respondent two week's wages instead of providing notice. This amount must be taken into account in assessing loss. (See *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193).

82 Additionally it is my preliminary view that in assessing the respondent's compensation the Full Bench may take into account the unskilled nature of her employment with the appellant, the level of wages she earned and hours worked in that employment, the buoyancy of the Western Australian economy and statistics about the rate of unemployment. Using this evidence and information the Full Bench could make a reasoned determination, on balance, of the extent of the loss caused by the dismissal.

(l) Additional Submissions

83 This method of now assessing the respondent's loss was not discussed with the parties at the hearing of the appeal. Therefore in accordance with s26(3) of *the Act* and the duty of the Full Bench to be procedurally fair, in my opinion the appropriate course is for the Full Bench to publish its reasons and seek additional submissions from the parties about the amount of the loss which should be found by the Full Bench and orders which should be made, in light of my reasons.

84 As to this, the respondent is at a disadvantage because of her lack of representation. Accordingly, I would suggest the respondent ascertain if the Employment Law Centre of Western Australia would be prepared to assist her to provide submissions.

Minute of Proposed Order

85 My present inclination is that at this stage the only order which the Full Bench ought to make is that the parties file additional written submissions within 14 days. In my opinion a minute of proposed order ought to be published, with the parties having three days within which to advise whether they would like to speak to the minute or make written submissions on the content of the proposed order about additional written submissions.

SCOTT C:

86 I have had the benefit of reading the Reasons for Decision of the Honourable Acting President. I agree with those Reasons and also that the matter of mitigation relating to appeal ground 2(ii) ought to be the subject of further submissions from the parties.

WOOD C:

87 I have had the benefit of reading the Hon Acting President's reasons and would agree with them, except as they relate to Ground 2(ii). In respect of the other grounds of appeal, I have nothing further to add.

88 Ground 2(ii) contends that the learned Commissioner erred in determining compensation by, "*concluding that the applicant had acted reasonably in the mitigation of her loss, by discounting her obligation to do so because of a finding that the applicant's self-esteem and confidence had been affected by the actions of the company and ignoring the fact that she had no recent employment history, and had just re-entered the employment environment*".

89 The relevant findings of the learned Commissioner are at Paragraphs 50 and 51 of the decision. They are:-

> "*50. I am satisfied that but for the dismissal the Applicant would have continued to work for the Respondent for a period of at least six months. Further, I am satisfied that in the circumstances the Applicant acted reasonably in the mitigation of her loss. She sought work as a teacher's aide but was unsuccessful. Although the Applicant did not apply for any other positions her reasons for not doing so are reasonable as the Applicant's esteem and confidence to seek other work has been affected by the actions of the Respondent.*
>
> *51 For these reasons I find that the Applicant has acted reasonably in her mitigation of loss and the Respondent has failed to meet its onus of proof.*"

90 The finding as to loss was challenged by Ground 2(iii) and for the reasons expressed by the Hon Acting President I do not consider that ground of appeal can succeed. With respect, however, I consider that the learned Commissioner erred in finding that the actions of Mrs Green in mitigation were reasonable and that the appellant had not discharged their onus as to mitigation. In my view, the appeal succeeds on Ground 2(ii) alone, and I will deal later with the order that should issue.

91 The evidence about mitigation has been covered by the Hon Acting President and does not need to be repeated here.

92 Mrs Green simply did not look for work other than two jobs as a teacher's aide (T18), for which she was not yet qualified. The learned Commissioner's question was, "*All right. And did you seek other jobs at all?*" Mrs Green answered, "*No, I haven't*". I consider that the evidence of the respondent, when taken as a whole, shows that the respondent was concerned, for a large part of the relevant time, with relocating and with ensuring her house in Merredin was improved. This was the respondent's immediate reason as to why she had not looked for other employment (T40), and this rationale was covered in some detail by the respondent. The respondent chose not to look for other jobs as she was otherwise occupied. Her reference to "*no prospects*" in Merredin, on a fair reading of the transcript, can also be seen to be within the context of preparing to move towns. The two teaching aide positions for which she applied were jobs where she lacked the qualification, having ceased her studies once dismissed.

93 Similarly, I do not think it was open for the Commissioner to find that a lack of confidence was the reason for her not applying for other positions. I agree with the Hon Acting President that the respondent herself did not attribute a lack of self esteem and confidence, due to the appellant, as the rationale for not seeking alternative employment. She did refer to Mr Hatch's status in the town and his negative comment about the time it took her to clean a car. She connected this to the difficulty in finding work. Whilst this reason was not tested by the appellant, I do not consider it to be a sound or reasonable excuse for not seeking other work. Mrs Green also said that she had "*totally low self esteem*" in the context of the time it took to hear the application. As expressed by the Hon Acting President this rationale lacks substance when viewed against her commendable actions in seeking the teaching aide positions and in pursuing feedback on those applications.

94 In summary, the evidence of the respondent alone, when taken as a whole, in my respectful view leads to the conclusion that Mrs Green's actions in mitigation were not reasonable. She provided no valid reason for her lack of action. Mrs Green's focus was more on improving her house in Merredin and on moving to Boyanup. She stated also that any work which she could have obtained (if she had looked) would have had to accommodate her labours in preparing to move location (T40).

95 I agree and adopt the reasoning of the Hon Acting President that there is an objective element within the concept of reasonableness in this matter. In my view, the appropriate test is as expressed by Gobbo J in *Glavonjic v. Foster*, [1979] V.R. 536.

96 Given the circumstances of this matter, and the manner in which it was argued, I have found it necessary to consider in some detail the question of "*onus*" as it applies to mitigation. The claimant has a "*duty*" to mitigate. This "*duty*" was referred to in the majority decision in *Curtis*, as a "*technical misdescription*" (*Curtis v Ausdrill Limited* (2006) 86 WAIG 3133 at paragraph [40]). The claimant is free to act how they choose, but the claimant's actions post-termination may then impact upon the compensation payable, if those actions are found not to be reasonable. In its simplest expression the duty to mitigate, at least

in this jurisdiction, is typically the task of taking reasonable steps to find suitable alternative employment. For example, Macken, O'Grady, Sappideen and Warburton's Law of Employment 5th Edition at page 312 state:-

> "*The duty to mitigate loss applies equally to an employer as it does to an employee. An employee who has been wrongfully dismissed is under a duty to mitigate her or his loss. In practical terms this requires the employee to diligently seek suitable alternative employment.*"

97 The onus of proof of failure to mitigate loss is of course upon the defendant, the appellant in this appeal (see *Growers Market Butchers v Stephen Blackman* (1999) 79 WAIG 1313 at 1316 and the cases cited therein). The lack of diligence by the respondent in seeking suitable alternative employment is apparent from the evidence as a whole and was addressed in brief questioning and submission by the appellant. The appellant would therefore have apparently discharged their onus. The difficulty I have is whether this proof of this lack of diligence is sufficient to the discharge of onus, given the appellant led no evidence as to the availability of alternative employment. There is also the question of the consequent effect of the failure to mitigate on the quantification of compensation.

98 The practical importance of deciding whether "*onus*" has been discharged is displayed in McGregor, Harvey. McGregor on Damages, 2003, 17th edition at Chapter 7, "Mitigation of Damage". The author states, "*If he (the defendant) fails to show that the claimant ought reasonably to have taken certain mitigating steps (my emphasis), then the normal measure will apply*". The author goes on to say:-

> "*That onus can sometimes have great practical importance is usefully illustrated by Saunders v Williams [2003] B.L.R., 155 CA. The defendant had damaged a party wall and the claimant had failed to have it repaired for three years, partly because of shortage of money. The Court of Appeal decided to reassess the damages rather than order a new trial but, because of a lack of findings by the trial judge, did not have the material to decide whether or not the claimant had acted reasonably in not repairing. In these circumstances the court held, Chadwick L.J. citing the rule on onus from this text, that, because the defendant hadn't proved the claimant had acted unreasonably, she was entitled to full damages.*" (P.223)

Hence if it is found that the appellant did not discharge the "*onus*", then Mrs Green would seemingly be entitled to full compensation, i.e. six months' pay.

99 The process is to first make a finding as to loss, followed by findings as to mitigation, and once the impact of this is assessed then a determination of compensation (capped when required). Loss and compensation being separate considerations; compensation being affected by findings as to mitigation. This point was expressed by the then Hon President in *Bogunovich v Bayside Western Australia* (1998) 79 WAIG 8 as follows:-

> "*In addition, I express some of those principles hereunder and explain some of them.*
>
> *1. (a) The Commission is required to make a finding as to the loss and/or injury which the employee suffered by reason of the dismissal.*
>
> *(b) The employee is required to establish his/her loss, on the balance of probabilities, and also his/her injury. Obviously, if no loss or injury is established, then there is nothing to compensate.*
>
> *2. The Commission is then required to compensate the appellant to the fullest extent in respect of such loss or injury, up to the statutory limit specified by s.23A(4) of the Industrial Relations Act 1979 (as amended) (hereinafter called "the Act"). (See the abovementioned authorities.) Compensation is not compensation, as defined, if it does not, as much as possible, put the person who suffered the injury, loss or damage back in the position in which, but for the injury loss or damage, the person would have been.*
>
> *3. There must be a causal link between the loss and/or injury claimed and the termination of employment.*
>
> *4. There is a duty upon the employee to mitigate her/his loss or injury but the onus of proof of failure to mitigate rests on the respondent to a claim of harsh, oppressive or unfair dismissal (see Metal Fabrications (Vic) Pty Ltd v Kelcey [1986] VR 507 (FC) and Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711 (FC)).*
>
> *This duty to mitigate does not impose on an applicant an obligation which a reasonable and prudent person would not undertake.*
>
> *5. (a) (i) First of all, the Commission makes a finding as to the loss and/or injury. That is, as the Full Bench has*

> *explained, an exercise involving a finding of fact and/or law, and is a different exercise from assessing compensation.*
>
> *(ii) Findings as to future loss, for example, will sometimes involve a finding, on the balance of probabilities, as to how long the claimant might have remained in his/her current employment had he/she not been unfairly dismissed, but that is not an exercise at all involving assessment of compensation; nor is it a vehicle for using conduct to reduce or increase an award of compensation.*
>
> *(b) The Commission must then assess the proper amount of compensation for loss and/or injury in the light of all the relevant circumstances but disregarding the cap, prescribed by s.23A(4) of the Act.*"

I do not need to quote the passage in full here, but the cap is finally applied when necessary.

100 The judgement as to mitigation is dependant on whether the actions of the claimant post-termination, when viewed in the context of the circumstances as a whole, are found to be reasonable. The literature concentrates on the test of reasonableness (see *Macken* pp 312-3; *McGregor* Chapter 7; and Freedland's, The Contract of Employment (1976) pp 250-263), and the authorities cited therein). For example, whether it is reasonable to delay looking for employment (*BHP Billiton Iron Ore Pty Ltd v Transport Workers' Union of Australia Industrial Union of Workers, Western Australian Branch* (2006) 86 WAIG 642), to reject a job of lower status and salary, or to refuse to move location.

101 It is plain that the respondent did little to look for work. Her actions in mitigation then ought not be seen as reasonable. In my respectful view, having reached that conclusion, the onus is discharged. The reasonableness of the conduct overall remains the touchstone. The failure of the respondent to mitigate must then impact on the compensation awarded. Perhaps the most clear expression of the view which I have reached is cited in *Goldburg* at page 716 as follows:-

> "*In Harding v Harding (1928) 29 SR (NSW) 96, the first of the cases cited by Greig and Davis at p.1392 of their work, Campbell J observed (at 106):*
>
> > *"I recognise that generally the onus is on the defendant to show that the dismissed servant might have obtained equivalent or at least suitable employment within the period of notice, but where the dismissed servant himself proves that he sat by for the full period of the omitted notice, and occupied himself unremuneratively on some concern of his own, without making any inquiry or effort about other employment, and the evidence supplies no reason for thinking that such employment could not be obtained, or that it would be even difficult to obtain, and the jury, after proper direction, then gives full wages for the full period of the required notice, I think the verdict would be open to the inference that the jury must either have misapprehended their duty or have acted on a wrong principle.*"

102 How then is proper compensation to be determined in the absence of direct evidence as to the availability of work and quantum (i.e. the rates of pay which could have been obtained)? In *Brace v Calder* [1895] 2 QB 253 and *Beckham v Drake* (1849) 2 HLC 579, where there was a failure to mitigate, only nominal compensation was awarded.

103 In *Freedland*, the author discussed mitigation of loss as follows:-

> "*The basic head of damages recoverable for wrongful dismissal is that of the loss of the amount the employee would have earned if the contract had been performed.*"(p.250)

The author then goes on to state:-

> "*It has long been recognized that the right to damages for wrongful dismissal is qualified by the rules as to mitigation of loss. This appears in the best-known early statement of the principle governing the measure of damages for wrongful dismissal, where Erle J. said, in Beckham v. Drake,*
>
> > *'The measure of damages for the breach of contract now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved and that . . . it is the duty of the servant to use diligence to find another employment.'*
>
> *There are two rules of mitigation which are relevant in an action for damages for wrongful dismissal. These have been distinguished and characterized as:*

> *(a) the rule as to avoidable loss – no recovery for loss which the plaintiff ought to have avoided; and*
>
> *(b) the rule as to avoided loss – no recovery for loss which the plaintiff has avoided, unless the matter is collateral.*
>
> …
>
> *Where the issue is the possibility that the dismissed employee might have reduced his loss by obtaining employment with another employer, then the question is what standard of occupational mobility and geographical mobility is required of the employee. The decided cases do not afford detailed guidance upon this point. They show that the employee is required to minimize his loss by a reasonable course of conduct (though the onus is upon the defaulting defendant to show that it could be, or could have been, done, and is not being, or has not been, done). This clearly means that the employee is not bound to accept any other possible employment regardless of change in location, occupation, or remuneration.*" (p.261-263)

104 In *McGregor*, these rules are perhaps stated more simply as follows:-

> (1) "*the claimant cannot recover for avoidable loss. ….*
>
> (2) *the claimant can recover for loss incurred in reasonable attempts to avoid loss. …*
>
> (3) *the claimant cannot recover for avoided loss*". (p.217)

105 Hence it would seem that once onus in relation to mitigation is discharged, the loss is reduced according to the claimant's failure, or if a claimant has earned income in mitigation, or if the defendant has paid monies to the claimant on termination (see Anderson J in *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193).

106 Whilst there is no direct evidence as to the availability of work in Merredin post dismissal, which might otherwise serve as a guide, it should be noted that the respondent was employed in an unskilled occupation. Hence any search for employment was not restricted by qualifications. It is also relevant that judicial notice may be taken of the generally healthy economic conditions in Western Australia, but in particular the historically low rate of unemployment.

107 These are not matters which were presented at hearing by either party and hence, prior to concluding any order of compensation, I agree with the reasoning of the Hon Acting President that it would be procedurally fair to publish these reasons and allow the parties to provide additional submissions as to the order which should issue.

2007 WAIRC 01023

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERREDIN CUSTOMER SERVICE PTY LTD AS TRUSTEE FOR HATCH FAMILY TRUST T/A DONOVAN FORD/MERREDIN NISSAN AND DONOVAN TYRES
	APPELLANT
	-and-
	ROSLYN GREEN
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	THURSDAY, 23 AUGUST 2007
FILE NO	FBA 39 OF 2006
CITATION NO.	2007 WAIRC 01023

Decision	Additional submissions required
Appearances	
Appellant	Mr R Gifford, as agent
Respondent	In person

Order

This matter having come on for hearing before the Full Bench on 16 May 2007, and having heard Mr R Gifford, as agent, on behalf of the appellant, and the respondent in person, and reasons for decision having been delivered on 16 August 2007, it is this day, 23 August 2007 ordered that:

1. The parties shall file and serve additional written submissions within 21 days about the orders which should be made as a consequence of the reasons for decision of the Full Bench.

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

2007 WAIRC 01150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01150
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		COMMISSIONER P E SCOTT
		COMMISSIONER S WOOD
HEARD	**:**	WEDNESDAY, 16 MAY 2007; ADDITIONAL WRITTEN SUBMISSIONS RECEIVED ON 11 SEPTEMBER 2007 AND 13 SEPTEMBER 2007
DELIVERED	**:**	THURSDAY, 4 OCTOBER 2007
FILE NO.	**:**	FBA 39 OF 2006
BETWEEN	**:**	MERREDIN CUSTOMER SERVICE PTY LTD AS TRUSTEE FOR HATCH FAMILY TRUST T/A DONOVAN FORD/MERREDIN NISSAN AND DONOVAN TYRES
		Appellant
		AND
		ROSLYN GREEN
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner J H Smith
Citation	**:**	(2006) 86 WAIG 3253
File No	**:**	U 172 OF 2005

CatchWords:

Industrial Law (WA) - Appeal against amount of compensation ordered to be paid by appellant for unfair dismissal - Principles regarding mitigation and compensation - Parties ordered by Full Bench to file additional written submissions about amount of loss to be found - Additional submissions of respondent not taken into account - Information/Evidence not before Commission at first instance - Allowance made for period of adjustment - Economic factors considered - Inference of ready employment - Four weeks compensation for loss

Legislation:

Industrial Relations Act 1979 (WA), s49(4)(a)

Result:

Appeal allowed, order 2 of the Commission on 23 October 2006 set aside, substituted compensation order

Representation:

Appellant:	Mr R Gifford, as agent
Respondent:	In person

Case(s) referred to in reasons:

Underdown v Dowford Investments Pty Ltd (2005) 85 WAIG 1437

Trades and Labour Council of WA v Minister for Consumer and Employment Protection and Others (2006) 86 WAIG 1633

Case(s) also cited:

Goldburg v Shell Oil Co of Australia Ltd (1990) 95 ALR 711

Supplementary Reasons for Decision

RITTER AP:

The Purpose of the Additional Submissions

1 The Full Bench published its primary reasons on 16 August 2007. In my reasons (with which Scott C agreed), in conclusion, at paragraphs [80]-[84] I said:-

> "***(k) Applicability of Principles in Assessing Compensation in the Appeal***
>
> *80 There is a difficulty in determining the orders which should be made in this appeal. This is because apart from the reference to nominal compensation the appellant did not make any submission to the Full Bench about the extent to which the respondent's reasonable failure to mitigate had exacerbated her loss. Accordingly in my view the Full Bench is not yet in a position to assess the extent which the loss of the respondent could have been lessened if she had made reasonable attempts to mitigate. The Commissioner found that but for the unfair dismissal the employment of the respondent with the appellant would have lasted at least a further six months. This finding of fact is not challenged on appeal and must in my opinion be taken into account in assessing compensation. In my opinion however it cannot be said that the loss of wages by the respondent over the whole of that period was caused by the unfair dismissal. At least some of it was caused by her failure to mitigate. The difficulty is in deciding that amount.*
>
> *81 In deciding compensation the Commission is also required by s23A(7)(a) of the Act to take into account the efforts of the former employer to mitigate loss. Here the appellant paid the respondent two week's wages instead of providing notice. This amount must be taken into account in assessing loss. (See Dellys v Elderslie Finance Corporation Ltd (2002) 82 WAIG 1193).*
>
> *82 Additionally it is my preliminary view that in assessing the respondent's compensation the Full Bench may take into account the unskilled nature of her employment with the appellant, the level of wages she earned and hours worked in that employment, the buoyancy of the Western Australian economy and statistics about the rate of unemployment. Using this evidence and information the Full Bench could make a reasoned determination, on balance, of the extent of the loss caused by the dismissal.*
>
> ***(l) Additional Submissions***
>
> *83 This method of now assessing the respondent's loss was not discussed with the parties at the hearing of the appeal. Therefore in accordance with s26(3) of the Act and the duty of the Full Bench to be procedurally fair, in my opinion the appropriate course is for the Full Bench to publish its reasons and seek additional submissions from the parties about the amount of the loss which should be found by the Full Bench and orders which should be made, in light of my reasons.*
>
> *84 As to this, the respondent is at a disadvantage because of her lack of representation. Accordingly, I would suggest the respondent ascertain if the Employment Law Centre of Western Australia would be prepared to assist her to provide submissions.*"

The Order and Compliance

2 On 23 August 2007 the Full Bench issued an order in the following terms:-

> "*1. The parties shall file and serve additional written submissions within 21 days about the orders which should be made as a consequence of the reasons for decision of the Full Bench.*"

3 After delivery of the reasons the respondent advised my associate by telephone that, as suggested in my reasons, she had made contact with the Employment Law Centre. She advised my associate however that although it had given her some advice, the Centre was not able to represent her in making submissions.

4 The respondent filed her written submissions on 11 September 2007. The appellant did so on 13 September 2007.

The Respondent's Submissions

5 The respondent's submissions did not address the point identified in paragraph [83] of my reasons (agreed to by Scott C) and paragraph [107] of the reasons of Wood C. That is they did not address the amount of loss which should be found by the Full Bench in light of the reasons for decision.

6 Instead, the respondent made submissions directed at the issue of whether she had taken reasonable steps to mitigate her loss. Her submissions:-

(a) Provided further information about the move from Merredin to Boyanup. A copy of a letter sent to the respondent's husband advising of his transfer was provided. The letter showed that this was eight months after the unfair dismissal.

(b) The respondent's husband's work roster was also included for the months during which the respondent worked with the appellant and after that. The roster demonstrated the dates and times when the respondent's husband was away from home. The respondent said this supported a submission that she was running their household "*as almost a single parent*".

(c) Said the type of work which the respondent could most readily have applied for would be night shift or weekend work which would either interfere with her caring for her children or require a full-time nanny to be employed.

(d) Said, with respect to the teacher's aides positions applied for, that there were others employed as teacher's aides at the time who had completed less of the relevant course than she had.

(e) Indicated the only positions which would be reasonably practicably available for the respondent were those where the work hours coincided with school hours.

(f) Said her concern about not being able to find work after being dismissed by Mr Hatch was genuine because of the "*small town syndrome*" of people generally offering employment to those who they knew as part of sporting clubs, churches, social groups and the like.

7 The respondent concluded that she had done "*everything I could to mitigate my loss*".

Can the Respondent's Submissions be Taken into Account?

8 Regrettably for the respondent, I think that I am unable to take into account the additional information provided about whether her attempts to mitigate were reasonable. Section 49(4)(a) of the *Industrial Relations Act 1979* (WA) (*the Act*) provides that an appeal "*shall be heard and determined on the evidence and matters raised in the proceedings before the Commission …*". The information provided in the respondent's additional written submissions was not "*evidence*" raised in the proceedings before the Commissioner at first instance. According to the ordinary meaning of the words contained in s49(4)(a), the Full Bench cannot determine the appeal on the basis of this evidence/information.

9 It has been previously held by the Full Bench that in some exceptional circumstances, despite the terms of s49(4)(a), the Full Bench may receive new or fresh evidence. In *Underdown v Dowford Investments Pty Ltd* (2005) 85 WAIG 1437 Sharkey P and Kenner C with whom Scott C agreed said at paragraphs [4]-[9] the following:-

> "***FRESH OR NEW EVIDENCE***
>
> *4 The appellant, on the hearing of the appeal, applied to adduce fresh evidence. The fresh evidence consisted of a letter of resignation from her employment dated 14 August 2004 and addressed to Mr Graham Laitt, Managing Director of Dowford Investments Pty Ltd, the above-named respondent. There was also an affidavit sworn by Ms Underdown on 4 November 2004. In the affidavit, the substance of evidentiary matters deposed to related to the relationship between Dowford Investments Pty Ltd and Milne Feeds Pty Ltd, now known as Milne AgriGroup Pty Ltd (see paragraphs 2, 3, 4, 5, 6 and 7 of the affidavit).*
>
> *5 In the affidavit, Ms Underdown also seeks to challenge some findings of the Commissioner and to complain about the decision approximately one month after it had issued (see paragraphs 8, 11, 12 and 13 of the affidavit).*
>
> *6 There are also matters deposed to which are irrelevant to any ground of appeal (see paragraphs 9, 12 and 13 of the affidavit).*
>
> *7 This appeal was heard and determined on 2 February 2005. The application at first instance was filed on 23 March 2004. The application was heard and determined on 26, 27 and 28 July 2004 and the decision and reasons are dated 19 October 2004 and 12 October 2004 respectively.*
>
> *8 The evidence is fresh evidence and can only be admitted if certain conditions are complied with (see FCU v George Moss Limited 70 WAIG 3040 (FB) and see Hanssen Pty Ltd v CFMEU (2004) 84 WAIG*

> *694 (FB)). The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not "available to the appellant at the time of the trial" and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached.*
>
> *9 We would add that, in FCU v George Moss Limited (FB) (op cit), we put the effect of this last condition too low by saying that the evidence sought to be admitted is required to be such that it would have had an important influence on the result of the hearing at first instance, and we wish to retract what we said in that case and substitute what we have said about the almost certain opposite result being likely to be achieved.*"

10 Although these paragraphs may blur any difference between "*new*" and "*fresh*" evidence that is immaterial in this appeal. Also paragraph [8] refers to the "*opposite result*" being reached to that at first instance. This aspect of the reasoning in *Underdown* does not apply because the respondent seeks to provide additional evidence/information before the Full Bench to maintain the finding made by the Commissioner at first instance that reasonable steps were taken to mitigate. This difference is not however material in the present case.

11 The evidence/information which the respondent has now tried to put before the Full Bench does not meet the tests outlined in *Underdown*. The evidence/information was certainly available to the respondent at the time of the hearing before the Commissioner. Additionally, as set out in my primary reasons, both the Commissioner and the appellant's agent asked the respondent questions about her attempts to find employment after her dismissal. It was then open to the respondent to make the points she now wishes to. She did not take this opportunity to do so. Even though the respondent was unrepresented at first instance, she is bound by the way she ran her case and the failure to provide this evidence/information at that time.

12 Accordingly, I do not intend to take into account the respondent's additional submissions.

The Appellant's Submissions

13 The appellant's written submissions argued that although it did not lead any direct evidence about the prospects of other relevant employment opportunities in Merredin, it was open to the Commission to rely on other information.

14 In the submissions there was reference to the following:-

(a) Information which could be obtained from the yellow pages about other motor vehicle dealerships in Merredin.

(b) The state of the Western Australian economy including unemployment statistics available from the Western Australian Treasury website.

(c) The reasons for decision of the Commission in Court Session in the "*General Order to Vary all Award Rates and Allowances*"; *Trades and Labor Council of Western Australia v Minister for Consumer and Employment Protection and Others* (2006) 86 WAIG 1633 (the 2006 General Order).

15 With respect to (a) and (b) I am not persuaded that the Full Bench should have regard to this information, given the constraints referred to above about receiving new evidence/information. I do think however that the Full Bench may have regard to the findings made by the Commission in Court Session in the 2006 General Order. The analysis by the Commission in Court Session of economic conditions was relevant to the period now under consideration. I also think that the Full Bench can take into account facts which are "*at large*" or which one might take judicial notice of such as the buoyant state of the economy of Western Australia including the low unemployment rate.

16 In the 2006 General Order the Commission in Court Session made findings about the state of the Western Australian economy including the gross domestic state product and the unemployment rate. At paragraph [111] the Commission in Court Session said the unemployment rate was 3.5% in May 2006.

17 The appellant submitted the Full Bench ought to conclude that it had discharged its onus to both prove a failure to reasonably mitigate and the amount of the respondent's prima facie loss had not therefore been caused by the appellant. It was submitted that the only steps taken to reasonably mitigate loss were the attempts to secure the teacher's aide positions.

18 It was submitted that the loss caused by the appellant amounted to only two weeks pay. The appellant also referred to the amount paid by it to the respondent in lieu of notice; and pointed out that contrary to what I said in paragraph [81] of my primary reasons, the evidence was that the respondent was paid a week's pay in lieu of notice and not two. I thank the appellant's agent for pointing this out.

19 The bottom line submission of the appellant therefore was that an amount equivalent to two weeks average earnings was the appropriate amount of compensation.

The Amount of Compensation for Loss

20 I largely accept the process of analysis submitted by the appellant. As suggested in my primary reasons, I think the Full Bench, in assessing the respondent's loss, may take into account the nature of employment the respondent had with the appellant, the rate of her pay and the economic factors I have referred to. As set out in my primary reasons it is also

appropriate to take into account the pay in lieu of notice given by the appellant to the respondent. In my opinion, on balance, the respondent could readily have obtained employment with at least a similar rate of pay and hours of work if she had taken reasonable steps to mitigate her loss.

21 The issue of when it is reasonable for a person to commence looking for work after their employment has ended is a question of fact, dependent on the circumstances. As discussed in my primary reasons it is a question of what a reasonable person would have done in the circumstances of the wronged employee. On the particular facts of this case I think that allowance should be made for a period of adjustment for the respondent in coming to terms with a dismissal which was found to be unfair, making an assessment of her position and then trying to obtain alternative employment. This is because of the following:-

(a) In giving her evidence it is clear, from the transcript, that the respondent had been upset by what had happened.

(b) The experience that she described in the workplace involving unfair treatment by another employee.

(c) The way she found out about the real reason for her dismissal. The respondent was initially told by Mr Hatch that he could not afford to keep her on. In her evidence the respondent said that she was "*really upset though I could understand his position…*". (T8).

(d) The respondent took a sensible first step towards getting another job by asking for a reference. She did this by sending an email to the appellant.

(e) A couple of days after her dismissal the respondent was told by someone she knew that worked near the appellant's workplace that it looked like there was another car cleaner being employed there.

(f) Shortly afterwards the respondent went to the appellant's workplace to find out about the reference and collect her pay. She spoke to Mr Hatch and was told they had a new car cleaner and that the reason she had been dismissed was that she "*didn't do a good job"*. In response the respondent said that she was "*really really hurt"* and "*shocked"* and walked out. (T11).

22 In my opinion on the facts of this case a period of two weeks should be allowed for the adjustment referred to. I emphasize however that this does not mean that this is an appropriate allowance to be made in every case. Also it is not a back door way of obtaining compensation for injury for what might be described as the ordinary disappointments of losing a job. It is simply recognition that the allowance may be justified on the facts where the circumstances are such that a reasonable person in the position of the wronged employee would take a period to adjust to their position before seeking other work.

23 I am satisfied, as conceded by the appellant, that the attempts to obtain the teacher's aide positions were reasonable attempts to mitigate loss. There was no precise evidence about when or how long this process took. I am prepared to make an allowance of three weeks for this however, on the basis of what the respondent said about writing letters of application, receiving responses and her following up why she had not received an interview.

24 In my opinion after this period of five weeks (two for adjustment and three for the teacher's aide applications) the respondent did not reasonably mitigate her loss. Additionally, based on the factors referred to above, if she had done so she would probably have been able to earn an amount which was at least the same as that which she was being paid by the appellant. Accordingly, taking into account the one week's pay in lieu of notice, in my opinion the appropriate level of compensation which ought to be ordered by the Full Bench is the equivalent of four weeks pay.

25 In paragraph [47] of her reasons the Commissioner made a finding that the respondent was paid on average $340.00 gross per week. The appellant has not sought to challenge that figure. Accordingly in my opinion it is appropriate for the Full Bench to make an order that the appellant pay the respondent within seven days of the date of the order the sum of $1360.00 less any taxation that may be payable to the Commissioner of Taxation.

Orders

26 In my opinion therefore the Full Bench should publish a minute of proposed orders that:-

1. The appeal is allowed.

2. Order 2 made by the Commission on 23 October 2006 is set aside.

3. The appellant pay to the respondent within seven days of the date of this order compensation of $1360.00 less any taxation that may be payable to the Commissioner of Taxation.

SCOTT C:

27 I have had the benefit of reading the supplementary reasons for decision of the Honourable Acting President. I respectfully agree with those reasons. The circumstances of each case are unique. As his Honour makes clear, the components for compensation applicable to the respondent in this matter, particularly a period of adjustment of two weeks, relate directly to the facts of this case. There are many cases of unfair dismissal where the circumstances are such that the employee is able to commence looking for and secures alternative employment without delay. This will depend on a number of factors including but not limited to:

1 The circumstances of the dismissal;

2 The type of work the employee is capable of performing and seeks;

3 The employee's personal circumstances which may limit his or her availability to move locations or to work different hours arrangements; and

4 The labour market, both generally and for the particular employee's skills, qualifications and experience.

28 Therefore it should not be seen that any period of adjustment will automatically arise. On the contrary for most employees the period of notice will constitute that period of adjustment.

WOOD C:

29 I have had the benefit of reading the Supplementary Reasons for Decision of His Honour the Acting President. I agree with those reasons and have nothing to add.

2007 WAIRC 01158

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MERREDIN CUSTOMER SERVICE PTY LTD AS TRUSTEE FOR HATCH FAMILY TRUST T/A DONOVAN FORD/MERREDIN NISSAN AND DONOVAN TYRES
	APPELLANT
	-and-
	ROSLYN GREEN
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 10 OCTOBER 2007
FILE NO	FBA 39 OF 2006
CITATION NO.	2007 WAIRC 01158

Decision	Appeal allowed, order 2 of the Commission on 23 October 2006 set aside, substituted compensation order
Appearances	
Appellant	Mr R Gifford, as agent
Respondent	In person

Order

This matter having come on for hearing before the Full Bench on 16 May 2007, and having heard Mr R Gifford, as agent, on behalf of the appellant, and the respondent in person, and reasons for decision having been delivered on 16 August 2007, and supplementary reasons for decision having been delivered on 4 October 2007, it is this day, 10 October 2007 ordered that:-

1. The appeal is allowed.
2. Order 2 made by the Commission on 23 October 2006 is set aside.
3. The appellant pay to the respondent within seven days of the date of this order compensation of $1360.00 less any taxation that may be payable to the Commissioner of Taxation.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2007 WAIRC 01121

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01121
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		SENIOR COMMISSIONER J H SMITH
		COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 17 SEPTEMBER 2007
DELIVERED	**:**	TUESDAY, 25 SEPTEMBER 2007
FILE NO.	**:**	FBA 12 OF 2007
BETWEEN	**:**	MRTA OF WA INC
		Appellant
		AND
		PANAGOUTA TSAKISIRIS
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner S M Mayman
Citation	**:**	(2007) 87 WAIG 2516
File No	**:**	U 543 of 2006

CatchWords:

Industrial Law (WA) - Appeal against decision of Commission - "*Application*" of appellant to adjourn jurisdictional hearing at first instance declined - Whether matter is in the public interest that an appeal should lie to the Full Bench - Requirements of s49(2a) of the *Industrial Relations Act 1979* (WA) examined - Leave to appeal granted - Grounds of appeal unnecessarily prolix - Issues relating to s78B notices under the *Judiciary Act 1903* (Cth) - Duty of the Commission when s78B(1) is engaged - Upon which party does the obligation to issue s78B notices lie - Whether a hearing date should be vacated pending the determination of an appeal in another case - Consideration of fairness and justice to the parties in delaying a hearing - Efforts to communicate with respondent who did not appear - Appeal allowed - Appellant directed by Full Bench to issue notices pursuant to s78B

Legislation:

Industrial Relations Act 1979 (WA), s12, s22B, s23(1), s23A, s26, s29, s35, s49(2a), s49(5), s49(6), s49(6a)

Judiciary Act 1903 (Cth), s78B(1), s78B(2)(b), s78B(5)

Result:

Appeal allowed, decision of the Commission varied

Representation:

Counsel:

Appellant	:	Mr D Howlett (of Counsel), by leave
Respondent	:	No appearance

Solicitors:

Appellant	:	Bowen Buchbinder Vilensky Lawyers
Respondent	:	No appearance

Case(s) referred to in reasons:

Aboriginal Legal Service of WA Inc v Lawrence (2007) 87 WAIG 856

Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd and Others (1999) 95 FCR 292; (1999) 167 ALR 303

BGC Contracting Pty Ltd v The Construction Forestry Mining and Energy Union of Workers [2004] FCA 417

Black v Lipovac (1998) 217 ALR 386

City of Sydney Council v Satara [2007] NSWCA 148

Commissioner of Police v Civil Service Association of Western Australia Inc [2002] WASCA 19

Culverhouse v John Septimus Roe Anglican Community School (1995) 75 WAIG 1960

Geelong Football Club Ltd v Clifford [2002] VSCA 212

Griffiths v Kerkemeyer (1977) 139 CLR 161

Holland v R [2005] WASCA 140

House v The King (1936) 55 CLR 499

Integrated Group Ltd t/a Integrated Workforce v Construction, Forestry, Mining and Energy Union of Workers and Skilled Rail Services Pty Ltd (2006) 86 WAIG 2706

Meggitt Overseas Ltd & Others v Grdovic (1998) 43 NSWLR 527

MRTA of WA Inc v Tsakisiris (2007) WAIRC 01048

Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2005) 86 WAIG 247

Myers v Myers [1969] WAR 19

Okmasich v Evans (1980) 25 SASR 481

Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146

Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd (1935) 54 CLR 230

Re S and the Adoption Act 2000 [2005] NSWSC 1346

State Bank of NSW v Commonwealth Savings Bank of Australia (1986) 4 NSWLR 549; (1986) 66 ALR 129

Case(s) also cited:

Burswood Resort (Management) v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch (2000) 81 WAIG 9

Bysterveld v Shire of Cue (2007) 87 WAIG 2462

Coal and Allied v AIRC 203 CLR 194;

Cousins v YMCA of Perth [2001] WASCA 374; 82 WAIG 5 (IAC 6 2000)

Crown Scientific Pty Ltd v Clarke (2007) 87 WAIG 598

G & M Partacini t/as Bayswater Powder Coaters v SDAE (2005) 85 WAIG 51

John Holland Group Pty Ltd v The Construction, Forestry, Mining and Energy Union of Workers (2005) 85 WAIG 3918

Norbis v Norbis (1986) 161 CLR 513

R v Whiteway; Ex Parte Stephenson [1961] VR 168

Re: Mona Olive Kelly and Others together comprising a Repatriation Board (1981) 52 FLR 302 W.A.G. No. 9 of 1981

Rendezvous Observation City Hotel v Ian Mumme 86 WAIG 415

Seale and Anor and Repatriation Commission [2004] AATA 700 (30 June 2004)

Skilled Rail Services Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers FBA 11 2006 (Ref 2006 WAIRC 05199) delivered 3 August 2006

Sydney City Council v Ke-Su Investments Pty Ltd [1985] 1 NSWLR 246

The Registrar v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2007) 87 WAIG 126

Thornton v Repatriation Commission (1981) 52 FLR 285

Wayne Shortland v Lombardi Nominees Pty Ltd T/A Howard Porter FBA 28 2006 (2007 WAIRC 00547) delivered 25 June 2007

Yates Settlement Trusts [1954] 1 All ER 619

Reasons for Decision

RITTER AP:

The Application and Appeal

1 The appellant seeks to appeal against a "*finding*" constituted by an order made by the Commission on 26 July 2007. The hearing as to whether "*an appeal should lie*" under s49(2a) of the *Industrial Relations Act 1979* (WA) (*the Act*), together with the appeal if this conclusion was in favour of the appellant were heard together on the afternoon of 17 September 2007. (I will for convenience simply refer to an "*appeal*" and the applicant/appellant as "*the appellant*").

2 After the appeal was filed, the appellant also filed an application for the stay of the operation of the decision of the Commission which is the subject of the appeal. The stay application was heard on 29 August 2007. On 31 August 2007 I published reasons for decision and made an order granting a stay (*MRTA of WA Inc v Tsakisiris* (2007) WAIRC 01048 ("*the stay reasons*")).

The Respondent

3 Unusually, the hearing took place without an appearance by or on behalf of the respondent. The respondent also did not appear at the hearing of the stay application. The communications and attempted communications with the respondent by my associate about the stay application are detailed in the stay reasons at paragraphs [42]-[54] and [66]-[69].

4 Despite the best endeavours of the Commission and as I understand it the appellant, there has been no communication with the respondent since that identified in the stay reasons.

5 The attempts by my associate to make contact with the respondent and ensure that she was aware of the hearing of the appeal include:-

(a) Sending to the respondent by email a copy of the stay order and a request that the respondent advise of any unavailable dates for the hearing of the appeal. The respondent had earlier advised that email was her preferred method of communication.

(b) When there was no response to the letter referred to in (a) above, my associate as directed by me listed the appeal for hearing. My associate sent by registered mail a letter explaining when the hearing was going to take place, a copy of the notice of hearing and the practice direction about an outline of submissions and list of authorities. The letter also invited the respondent to advise if she sought a direction from the Full Bench that as an unrepresented party she be excused from having to comply with the practice direction.

(c) Copies of these documents were also sent to the respondent by email.

(d) My associate has not as yet received any confirmation from Australia Post that the registered mail was collected by the respondent. As explained to her, the system is that if somebody is not at the address on the mail to collect and sign for it, a collection notice is left there and the mail taken to the closest post office for collection. On 17 September 2007 my associate spoke to Australia Post and was advised that further information about what had happened to the delivery of the mail would be available on 19 September 2007. As it turned out this information was not available until 20 September 2007. My associate was advised the mail was not received on delivery. A card was left advising of the mail to be collected but so far it has not been.

(e) On 17 September 2007 my associate tried to speak to the respondent by telephone to see whether she intended to appear at the hearing. My associate telephoned the home, work and mobile telephone numbers of the respondent. There was no answer at the home telephone. At the work telephone number my associate was told the respondent was not at work. There was no answer on the mobile telephone and my associate left a voice mail message which has not been replied to.

6 At the commencement of the hearing Mr Howlett, appearing for the appellant, informed the Full Bench that his instructing solicitors had attempted to serve the respondent with their outline of submissions and list of authorities by registered post, but they also had no information that the mail had been collected. Mr Howlett submitted it was appropriate to proceed with the hearing. The Full Bench agreed with this and advised Mr Howlett that he should proceed with his submissions.

7 I concurred with this because in the particular circumstances of this case it would not be procedurally unfair for the hearing to take place in the absence of the respondent. This is because:-

(a) Both the Commission and the appellant have taken reasonable measures to ensure the respondent was aware of the hearing and what was to be determined at the hearing.

(b) Given the background as set out in the stay reasons it appears there may well be, for whatever reason, a decision made by the respondent not to involve herself in the appeal.

(c) As set out in the stay reasons, in my opinion it is in everyone's interests that this appeal be expeditiously decided one way or the other.

(d) My view was that the decision on the appeal would need to be reserved. After this occurred my associate would be directed to again try and communicate with the respondent about the hearing. This would constitute yet another effort to advise the respondent of what was happening and give her the opportunity, if she chose to do so, to involve herself in the proceedings.

8 My associate has acted in accordance with (d) above but there has been no response.

The Background

9 In the stay reasons I set out the relevant background in some detail. During the hearing of the appeal it was not submitted that there was any error in this description. Accordingly I adopt and incorporate into these reasons, paragraphs [3]-[39] of the stay reasons. These paragraphs discussed the application at first instance, the notice of answer, relevant correspondence, the course of the hearing on 11 July 2007, the order and the reasons for decision.

The Order

10 Bearing in mind the present appellant is the respondent at first instance, the order of the Commission on 26 July 2007 was that it:-

> "*ORDERS that the respondent's application to adjourn the listing of jurisdictional proceedings is dismissed.*"

11 As set out in paragraph [87] of the stay reasons there was a conundrum in the order as there had been no application to adjourn the listing of jurisdictional proceedings before the Commission. This was because the jurisdictional proceedings had not at that time been listed for hearing. It had previously been listed for hearing on two occasions and then administratively adjourned. Prior to it being listed for hearing again the appellant requested by letter that this not yet occur. The Commission then decided that matter should be determined upon the making of oral submissions. This was what the hearing on 11 July 2007 was about. It was as I set out in the stay reasons an "*application, submission, or request that the jurisdictional issue*" at that stage not be listed for hearing.

12 The mismatch between the order and the application before the Commission was discussed with Mr Howlett at the hearing of the appeal. Mr Howlett was given the opportunity to take instructions upon whether he wished to amend the grounds of appeal to include a ground based upon this. After doing so Mr Howlett informed the Full Bench that the appellant did not seek leave to amend its grounds of appeal.

Section 49(2a) of *the Act*

13 Due to the terms of s49(2a) of *the Act*, the first hurdle which the appellant has to overcome is that the Full Bench decides "*the matter is of such importance that, in the public interest, an appeal should lie*".

14 In *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 I discussed the requirements of s49(2a) of *the Act* at paragraphs [12]-[14] of my reasons, which were agreed with by Gregor SC and Smith C. I there stated:-

> *"12 The appellant accepted that the order made by the Commission was a "finding" as defined in s7 of the Act. This was because the order did not finally dispose of the matter before the Commission at first instance. Accordingly, the appellant also accepted that s49(2a) of the Act applied to the appeal. This subsection provides that an appeal does not lie from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie. The subsection focuses the attention of the Full Bench upon "the matter". It seems that a determination is to be made as to whether the matter, as opposed to individual appeal grounds, is of such importance that, in the public interest, an appeal should lie. Accordingly, it seems that the Full Bench may not form the opinion that an appeal should lie on only some of the grounds.*
>
> *13 In RRIA v AMWSU and Others (1989) 69 WAIG 1873, the Full Bench at 1879 said that the words "public interest" in s49(2a) of the Act should not be narrowed to mean "special or extraordinary circumstances". As stated by the Full Bench, an application may involve circumstances which are neither special nor extraordinary but which are, because of their very generality, of great importance in the public interest. The Full Bench, on the same page, went on to say that important questions with likely repercussions in other industries and substantial matters of law affecting jurisdiction can give rise to matters of sufficient importance in the public interest to justify an appeal. The RRIA decision was cited with approval and applied in the recent Full Bench decision of CSA v Shean (2005) 85 WAIG 2993 at 2995-2997.*
>
> *14 The forming of the opinion referred to in s49(2a) of the Act involves a value judgment and is clearly a matter which the Full Bench needs to assess on a case by case basis, having regard to the issues which the proposed appeal will give rise to.*"

15 The emphasis in s49(2a) is upon the "*matter*" and the "*public interest*". It is not upon what might be important to the parties. Some broader public interest is the primary consideration.

16 In the schedule attached to the notice of appeal, the appellant set out in 18 numbered paragraphs what it asserted was the public interest for present purposes. The appellant did not elaborate upon this in its written outline or oral submissions but was content to adopt what was in the schedule. With respect, I do not think that the contents of the schedule in any clear or succinct way point to aspects of the subject matter of the appeal as being in the public interest.

17 As set out in the stay reasons, the respondent had filed an unfair dismissal claim with the Commission. The appellant asserted the Commission had no jurisdiction because it was a "*constitutional corporation*". The appellant submitted and the Commission accepted that it was necessary to first hold a hearing into whether the Commission had jurisdiction. On two occasions this issue was listed for hearing but administratively adjourned. The appellant then asked that the re-listing of the issue not take place until the outcome of the Industrial Appeal Court (IAC) decision in IAC 4/2007. This was an appeal against *Aboriginal Legal Service of WA Inc v Lawrence* (2007) 87 WAIG 856, a decision of the Full Bench about the basis for determining whether or not a corporation is a trading corporation.

18 For the reasons set out in the stay reasons, the Commission did not accept that the jurisdictional hearing should be delayed as submitted by the appellant. The appeal against that decision is the "*matter*" for the purposes of s49(2a) of *the Act*. The schedule to the notice of appeal appears at times to confuse that with the issue of whether the decision of the IAC in *Aboriginal Legal Service* will be of public interest. As to the latter there is little doubt but this is not the same "*matter*" as the "*matter*" now before the Full Bench.

19 There are in my opinion however two aspects of the matter before the Full Bench which are of sufficient importance in the public interest so that the appeal should lie. The first of these is the requirements of s78B(1) of the *Judiciary Act 1903* (Cth) which is raised in the grounds of appeal. The second is the approach which the Commission ought to take when there is an application to adjourn a hearing pending an appeal to the IAC (or the Full Bench) which is likely to involve issues of law relevant to the determination of the application.

20 Accordingly in my opinion the present appeal should lie.

The Grounds of Appeal

21 The grounds of appeal were set out under two headings being "*The Judiciary Act 1903 (Cth) ("Judiciary Act")*" and "*The Exercise of Discretion*". As I indicated in the stay reasons, in my opinion the grounds of appeal were unnecessarily prolix. The stay reasons contained a hint that the appellant ought to redraft the grounds and seek leave to substitute the grounds of appeal at the hearing. The appellant did not however act upon the hint. When discussed with Mr Howlett at the hearing, he accepted that there were some overlap in the grounds of appeal but asserted that under the heading "*The Exercise of Discretion*" there had been an attempt to set out the alleged errors in the categories identified in *House v The King* (1936) 55 CLR 499 at 504/5. Mr Howlett, whilst accepting that not each of the grounds had the same strength, declined to formally abandon any of them. Accordingly the Full Bench is obliged, either individually or collectively, to determine each of the grounds. To this end I set out in full below the grounds of appeal:-

> "***The Judiciary Act 1903 (Cth) ("Judiciary Act")***
>
> *1. The Commission erred in misunderstanding the Respondent's argument in relation to the obligations pursuant to section 78B of the Judiciary Act.*
>
> *2. The Commission erred in law in not complying with the mandatory requirement of s78B(1) of the Judiciary Act*
>
> *3. Further or alternatively, the Commission acted arbitrarily and/or capriciously in not dealing with s78B(1) of the Judiciary Act in a manner consistent with that taken by the Commission as constituted by different Commissioners and the President in other Applications.*
>
> ***The Exercise of Discretion***
>
> *The Commission erred in exercising its discretion for the reasons that follow:*
>
> *1. It acted upon a wrong principle in:*
>
> *a Incorrectly applying the principle in Myers v. Myers (1969) WAR 19 by refusing an adjournment (which should have been granted) in circumstances where there would be serious injustice to the Appellant when, by comparison, there was no serious injustice to the Respondent because:*
>
> *i. The Respondent was able to approach witnesses to give evidence on the substantive matter (contrary to the finding of the Commission and even though that was not the Respondent's submission) which meant that there was no issue of injustice affecting the Respondent to weigh against the issues of injustice affecting the Appellant;*
>
> *ii. The injustice that the Commission found (paragraph 18 of the reasons for decision) was different to the perceived injustice as stated by the Respondent (see paragraph 11 of the reasons for decision even though that was not the Respondent's submission); and*
>
> *iii. There was no reason articulated by the Commission as to why the Appellant's submission (contained at paragraph 6 of the reasons for decision) did not completely alleviate the Respondent's perceived injustice (as stated at paragraph 11 of the reasons for decision even though that was not the Respondent's submission).*
>
> *b. Failing to have proper regard to the serious injustice to the Appellant (Respondent in U543 of 2006) in the event that an adjournment was not granted.*
>
> *c. Identifying as a "principle" the requirement to deal with matters promptly and take evidence as close as possible to the events to which the application relates without referring to any authority.*
>
> *d. In the event that there is such a principal or requirement of law (as referred to at sub-paragraph c. above) the hearing in relation to jurisdiction would not satisfy that principal or requirement of law.*
>
> *e. Failing to apply the principle that there is a need to prevent there being any more uncertainty than is necessary in industrial matters.*

f. Giving undue weight to the requirements of section 26 and insufficient weight to the principles in Myers v. Myers (1969) WAR 19.

g. Failing to apply the relevant principles in relation to a stay application that were relevant to an application for an adjournment.

2. It allowed extraneous or irrelevant matters to guide or affect it in:

a. Giving or giving too much weight to the Respondent's (Applicant in U543 of 2006) only objection to the adjournment.

b. Failing to have proper regard to the serious injustice to the Appellant (Respondent in U543 of 2006) in the event that an adjournment was not granted.

c. Giving weight or too much weight and consideration to its incapacity to draw any comparison between the nature of the work carried out by the Appellant in ALS and the nature of the work carried out by the Appellant in this appeal.

d. Giving undue weight to the requirements of section 26 and insufficient weight to the principles in Myers v. Myers (1969) WAR 19.

e. Giving undue weight to the fact that two hearing dates had been vacated.

f Misunderstanding and/or misapplying the decision of Beech C in Culverhouse v John Septimus Roe Anglican Community School 75 WAIG 1960.

g. Misunderstanding and/or misapplying the obiter of Justice Scott in Commissioner of Police v Civil Service Association of Western Australia Inc.

3. It mistook the facts in:

a. Perceiving that the Appellant submitted that the Commission should issue the notices pursuant to the Judiciary Act.

b. It's finding as to the injustice to the Respondent (Applicant in U543 of 2006) which was contrary to the Respondent's submission (see paragraph 11 of the reasons for decision even though that was not the Respondent's submission).

4. It did not take into account material considerations in:

a. Failing to treat as relevant to the Appellant's submissions as to the application of s78B(1) of the Judiciary Act.

b. Failing to recognise that there was nothing to balance, in relation to injustice to the Respondent, against the injustice to the Appellant.

c. Failing to have regard or sufficient regard to the fact that the outcome of the appeal in IAC 4 of 2007 would assist the Commission in determining the question of jurisdiction. In ALS, the Full Bench held that:

> *"20. A decision of the Full Bench on this appeal will be of assistance to other Commissioners who are required to determine whether a corporation is a trading corporation.*
>
> *21. It is accordingly unnecessary to consider the second basis on which leave was sought."*

The same applies, with equal force, in relation to the decision by the Industrial Appeal Court in IAC 4 of 2007.

d. Failing to have regard or sufficient regard to the fact that the purpose of the Full Bench decision in ALS, as quoted in the paragraph above, could not be achieved while the appeal in IAC 4 of 2007 was pending.

e. Failing to have regard or sufficient regard to the fact that the outcome of the appeal in IAC 4 of 2007 would assist both the Appellant and the Respondent in preparing and presenting their cases on the question of jurisdiction.

f. Failing to properly recognise and record the Respondents submissions in relation to the adjournment.

g. Failing to have proper regard to the fact that the Respondent (Applicant in U543 of 2006) was able to approach witnesses and to gather evidence and that in that regard the Respondent's only recorded objection to the adjournment was misconceived (even though that was not the Respondent's submission).

h. Failing to have proper regard to the serious injustice to the Appellant (Respondent in U543 of 2006) in the event that an adjournment was not granted.

i. Failing to have sufficient regard to the fact that issues of law unconnected to the facts relating to the work carried out by the Appellant in this appeal or the facts relating to the work carried out by the Appellant in ALS were likely to be determined by the Industrial Appeal Court in ALS.

j. Failing to have regard or proper regard to the Appellant's submission that any questions of law determined by the Industrial Appeal Court in IAC 4 of 2007 would have a bearing on the conduct of the case (submissions and evidence) in the jurisdiction hearing in U543 of 2006.

k. Failing to have sufficient regard to the public interest considerations in relation to sub-paragraph j. above.

l. Not giving sufficient weight or consideration to the submissions in relation to the decision in Peter Black v Tomislav Lipovac BHNF Maria Lipovac & Ors [1998] 699 FCA (4 June 1998) Full Court of the Federal Court compared to the obiter of Justice Scott referred to in paragraph 2g. above.

m. Failing to require evidence or explanation from the Respondent as to why she could not approach witnesses to give evidence on the substantive matter (even though that was not the Respondent's submission).

n. Failing to have regard to the Respondent's submission that she was advised not to approach potential witnesses.

o. Failing to allow the Appellant to make submissions in relation to the finding of injustice contained at paragraph 18 of the reasons for decision when such finding was contrary to the submission made by the Respondent (thereby denying the Appellant natural justice).

p. Failing to properly have regard to the considerations of fairness and justice to the parties as required by Myers v Myers [1969] WAR 19 when the injustice to the Respondent, as found by the Commission, was not the injustice stated by the Respondent and when there was, in truth, no injustice to the Respondent.

q. Failing to properly have regard to the fact that because the Respondent's challenge is a challenge to jurisdiction the evidence in relation to the merits of the case would not be heard in the preliminary hearing.

r. Failing to properly have regard to the fact that whether or not there is an adjournment will not assist in the Commission's concern as to the evidence in relation to the merits.

s. Failing to properly have regard to the fact that some of the principles in relation to a stay application had equal application to an adjournment."

22 In his oral and written submissions however Mr Howlett primarily focussed upon the *Judiciary Act* grounds, and grounds 4(j), (k), (n) and (p).

The Judiciary Act Grounds

23 The constitutional issue was raised by the appellant on 21 December 2006 when in its notice of answer it asserted the Commission did not have jurisdiction because it was a constitutional corporation and the respondent's *"employment was governed by the Workplace Relations Act 1996 ("WRA") (see the definition of "employer" in sections 4 and 6 of the WRA)*".

24 The notice did not contain any particulars supporting the assertion the appellant was a constitutional corporation. With the notice of answer the appellant's solicitors filed a letter to the Commission dated 21 December 2006. The letter said that no

further action could be taken until the jurisdictional question was determined and also asserted without particulars that the respondent needed to comply with the "*Judiciary Act 1903*" before the matter could proceed any further.

25 No notices pursuant to s78B(1) of the *Judiciary Act* were issued by either party before the hearing on 11 July 2007. It has not been suggested that notices were not required. In my opinion they were (see *Aboriginal Legal Service* at paragraph [10]; *Re S and the Adoption Act 2000* [2005] NSWSC 1346 at paragraphs [30]-[35]).

26 At the hearing on 11 July 2007 the non issuing of the s78B notices was relied on by Mr Howlett as being a reason why the jurisdictional issue should not as yet be listed for hearing. Mr Howlett said:-

> "*A further reason why this matter should not be listed for jurisdictional argument and why the adjournment should be granted is that no notices have been issued pursuant to the Judiciary Act, and that is a matter that the respondent has raised formally on at least two occasions in letters dated 21 December last year and 11 January this year.*"
>
> (T6)

27 Mr Howlett then referred the Commission to the reasons of the Full Bench in *Aboriginal Legal Service* at paragraph [10] about the issuing of s78B notices in that appeal.

28 In her reasons, the Commissioner set out this submission at paragraph [7]. The Commissioner dealt with the issue at paragraph [20] as follows:-

> "*20 The Commission finds the respondent's submissions regarding the provisions of s 78B of the Judiciary Act to notify the Commonwealth and State Attorneys-General of proceedings are not a relevant consideration in these proceedings. Such notification under the provisions of the statute is acknowledged. The particular provision of the Judiciary Act referred to, requires the respondent in this matter to undertake the notification process not the Commission.*"

29 In my opinion this paragraph of the Commissioner's reasons, with respect, demonstrates error. Firstly the lack of s78B notices was a relevant consideration in determining whether to continue to adjourn the jurisdictional hearing. Secondly the Commissioner referred to the "*notification process*" in s78B of the *Judiciary Act* but ignored what that section says about the duty of the Commission, as a court. (See s12 of *the Act*). In my opinion grounds 1 and 2 of the *Judiciary Act* grounds are established. Ground 3 is not. I do not think there is support for the contention that the Commissioner acted "*arbitrarily*" or "*capriciously*". There were no particulars supporting these claims, which should not properly have been made.

30 Section 78B of the *Judiciary Act* is in the following terms:-

> "*(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.*
>
> *(2) For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:*
>
> *(a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;*
>
> *(b) may direct a party to give notice in accordance with that subsection; and*
>
> *(c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.*
>
> *(3) For the purposes of subsection (1), a notice in respect of a cause:*
>
> *(a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and*
>
> *(b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.*

> *(4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.*
>
> *(5) Nothing in subsection (1) prevents a court from proceeding without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.*"

31 Section 78B(1) of the *Judiciary Act* clearly states "*it is the duty of the court not to proceed in the cause unless and until the court is satisfied*" that the notices have been given. The duty of the Commission not to proceed until it was satisfied as required by the subsection was overlooked by the Commissioner in her reasons.

32 During the hearing of the appeal an issue emerged as to whether s78B(1) was engaged or could be complied with prior to a hearing date having been set. In my opinion a hearing date is not so required. This stems from the language used, being "*not to proceed in the cause*". The subsection requires the giving of a notice and a reasonable time for the Attorneys-General to consider the question of intervention or removal. If a hearing date has been set then it is easy to determine whether or not a reasonable time exists between the issuing of the notice and the hearing date. If no hearing date has been set however then it will be possible to structure the hearing date to take into account the required reasonable time. There is no requirement in s78B(1) for the notices to say when the hearing is. And the notices can and in my experience have been drafted to accommodate a hearing date not yet being set.

33 This approach is consistent with the purpose of notices under s78B(1) of the *Judiciary Act.* In *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549; (1986) 66 ALR 129, Kirby P at page 558 (NSWLR) said of s78B:-

> "*… The object of the new procedure is clear. It is to ensure that, in our Federal polity, the Federal, State and Territory law officers should always be afforded the opportunity to consider whether the possible effect of a matter before the courts on their interests and on the development of constitutional law is such that they should avail themselves of the opportunity to intervene. If the matter is not already before the High Court, they should have the opportunity to consider whether to seek removal of the cause. The history of the legislation suggests that the change that was introduced in 1976 simply altered the exclusive jurisdiction of the High Court to a contingent exclusive jurisdiction, upon the option of the Attorneys-General and decision of that Court. But that option could not properly be exercised without reasonable notice of the considerations to govern the exercise.*"

34 Kirby P also said at pages 558 and 559 (NSWLR) that:-

> "*… s 78B is expressed in terms that are unusually emphatic … and … strictly limited exceptions … In such circumstances, the duty should not be narrowly confined.*"

35 The reasons of Kirby P in *State Bank of NSW* were cited with approval by French J in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd and Others* (1999) 95 FCR 292; (1999) 167 ALR 303. At paragraph [12] French J referred to the court's duty not to proceed, apart from the exceptions specified in s78B(2) and (5), being "*unqualified by any residual discretion to proceed*". In the same paragraph his Honour reiterated the observations of Kirby P that the strictly limited exceptions to the duty imposed on the court stressed the importance attached by Parliament to the proper fulfilment of the duty of notification.

36 At paragraphs [25]-[27] French J concluded:-

> "***[25]*** *In the ordinary course, if one or other of the parties had raised the constitutional point in its pleadings, the question of the issue of a s 78B notice would have arisen well prior to the trial date. Although in this case there were case management conferences prior to trial, the issue was not raised. The Court's awareness of the point as arising in this case was only enlivened upon a review of the pleadings in the weekend prior to the trial and recent unrelated consideration of the issue by the trial judge*
>
> ***[26]*** *It is probably not possible to construct a fail safe mechanism to avoid recurrence of the inconvenient course thrust upon the Court and the parties in this case. It may be, however, that in future the possibility of s 78B applying to a case should routinely be checked by solicitors and counsel for the parties and, in a case where there is any doubt, should be raised in a directions hearing or case management conference.*
>
> ***[27]*** *The provisions of s 78B themselves may merit further review to broaden the discretion of the Court to proceed with a cause to which it applies provided that reasonable notice is given to Attorneys-General so that they may intervene at some time before the conclusion*

> *of the proceedings which could be adjourned part heard for that purpose or, in a suitable case, to allow submissions by any intervening Attorney-General after the evidence and before judgment. That, however, is a matter for the legislature.*"

37 This makes it clear that the opinion of his Honour was that there was no requirement for a hearing date to be set before the duty set out in s78B(1) was engaged.

38 An illustration of this appears to be *Holland v R* [2005] WASCA 140. An appeal against conviction involved a constitutional issue. Malcolm CJ noted in paragraph [4] of his reasons that a s78B notice was filed on 17 December 2003 and served on all Attorneys-General. The report indicates however that the appeal was not heard until 14 February 2005. Common knowledge of how the Supreme Court appeal lists then operated strongly suggests that at the date of the filing and serving of the s78B notices, no hearing date had been set.

39 It is also clear that the Justices of the High Court believe there is no requirement for a hearing date before notices should be issued. The *High Court Rules 2004*, rule 5.02 sets out when s78B(1) notices should be issued. This contemplates, for example, notices being given as early as 7 days after the filing of any originating process. (Rule 5.02(b)). In an explanatory statement accompanying this new rule issued with the authority of the justices, it said the rule was to "*overcome procedural difficulties which have occurred during proceedings raising constitutional issues. The court has had occasion to adjourn proceedings because a notice under s78B of the Judiciary Act 1903 had not been given to the appropriate Attorney-General, or because a notice had not been given within a reasonable time.*"

40 The Commissioner said the notification obligation lay upon the present appellant. In their letter to the Commission in December 2006, the appellant contended otherwise. In some Australian jurisdictions there are provisions in the rules which set out that the party who raises the issue has the obligation to issue the notices. (See for example *High Court Rules* 5.01.1, *Federal Court Rules* Order 51, *Supreme Court Rules* NSW Order 12, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Order 19; cf *Federal Magistrates Court Rules 2001* 10.06). The Commission does not have any such prescription. However, common sense dictates that in this case the appellant ought to have issued the s78B notices. They could have done it as early as in late December 2006 or January 2007. At that stage the appellant had raised the constitutional issue. As the appellant put to the Commission the issue needed to be first determined. The respondent knew what that constitutional question was. As it was represented by at least solicitors at that stage the appellant would have been able to comply with the procedural requirements of s78B.

41 In *Okmasich v Evans* (1980) 25 SASR 481 there was an appeal against convictions for unlawfully taking abalone pursuant to the *Fisheries Act 1971-1977* (SA). White J referred to the issue of whether there was "*some possible collision*" between the provisions of the *Fisheries Act 1952* (Cth) and the South Australian *Fisheries Act* (page 486). White J said that if the appellant had wished to raise that point he should have done so in the hearing before the Magistrate and obtained an adjournment in order to give the requisite written notice of his intention to do so to the Attorneys-General pursuant to s78B of the *Judiciary Act*. His Honour said that at no stage did the appellant raise the point and said if there was in existence some Commonwealth provision regulating fishing for abalone which came into collision with the State legislation the provision had not come to his attention nor did it come to the notice of the Magistrate.

42 This decision reinforces the point that the appellant could and should have issued the s78B notices. That it did not do so appears to be based upon a misconception of the party on whom the duty lay, as referred to in the letter dated 21 December 2006. Also at that stage given the duty which lay upon the Commission, it could have made a direction to the appellant under s78B(2) of the *Judiciary Act*.

43 In the stay reasons at paragraph [79] I said the following:-

> "… *It is not the function of the Commission to issue the notices. As the respondent is in person and does not appear to have any legal training, it would be appropriate for the applicant who raised the jurisdictional issue and is represented by solicitors and counsel, to issue the notices under s78B of the Judiciary Act. This having been now pointed out, any failure to do so by the applicant might attract the criticism that the applicant is simply desirous of delaying the hearing of the jurisdictional application.*"

44 The appellant did not however issue the s78B notices prior to the hearing of the appeal. Mr Howlett explained that even if the notices were now filed and served, this would not cure the error made by the Commissioner at first instance. Whilst this might be so, the fact remains that the notices are required to be issued before the jurisdictional issue can be determined. Accordingly there is no logical reason why the appellant at least now cannot issue the s78B notices forthwith. I uphold the grounds of appeal 1 and 2 but will later consider the relief which the appellant is entitled to.

The Exercise of the Discretion Grounds

45 As quoted above, under the heading "*The Exercise of Discretion*", the schedule to the notice of appeal has four grounds, with sub-grounds setting out why it is asserted the exercise of the discretion miscarried. As stated earlier, these grounds were framed with an eye focussed upon the well-known passage of the reasons of three members of the High Court in *House v The King*. In this passage it was said:-

> "*But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. 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.*"

46 This well known passage is authoritative in appeals to the Full Bench against discretionary decisions of Commissioners.

47 As stated, Mr Howlett focussed upon grounds 4(j), (k), (n) and (p).

Focus on the Commissioner's Reasons

48 Before turning to these grounds I wish to focus a little more closely upon the reasons given by the Commissioner for not accepting that the hearing of the jurisdictional issue should be further delayed.

49 At paragraphs [12]ff the Commissioner made its assessment of the application. The Commissioner said she had taken into account a number of factors in assessing whether there would be a serious injustice to the appellant. This statement was linked to the submissions of the appellant and what the Commissioner had said in paragraph [3] of her reasons as follows:-

> "*An application to adjourn the listing of jurisdictional proceedings is similar to those principles applied to an application for adjournment in that it is within the discretion of the Commission. Where the refusal of an adjournment would result in a serious injustice to one party an adjournment should be granted unless in turn this would mean serious injustice to the other party, principles reflected in Myers v Myers [1969] WAR 19.*"

50 This persuades me that the Commissioner had, with respect, the correct approach in mind in deciding the application, even though it was not strictly an application to adjourn. Indeed, the appellant does not contest this. It argues instead that the Commissioner erred in assessing the extent of the prejudice to be suffered by the appellant and the respondent.

51 The factors considered by the Commissioner as set out in paragraphs [12]ff of her reasons were:-

(a) The complexity and costs issue raised by the appellant having to participate in the hearing prior to the IAC decision in *Aboriginal Legal Service*. The Commissioner said whether "*it be the current decision of the Full Bench or the IAC determination following the hearing of IAC 4/2007 the Commission considers on balance that all relevant decisions would require consideration*". ([13]).

(b) Two hearing dates for the jurisdictional hearing had already been vacated. ([14]).

(c) The Commissioner was unable to draw any comparison between the nature of the work carried on by the appellant and the *Aboriginal Legal Service* given "*limited submissions and no evidence before me on which to make such a comparison*". ([15]).

(d) The appellant's submission about a public interest case for adjourning the listing of the jurisdictional issue was not made out because of the lack of submissions or evidence upon which to make a comparison between the appellant and the *Aboriginal Legal Service*. ([16].

(e) Matters coming before the Commission are best dealt with promptly and evidence is best taken from witnesses as close as possible to the events to which the application relates, citing Scott J in *The Commissioner of Police v Civil Service Association of Western Australia Inc* [2002] WASCA 19. ([17]).

(f) If the listing of the jurisdictional proceeding is adjourned there will be injustice to the respondent in that she will be "*unavailable [sic-unable] to call evidence on the substantive matter for a lengthy period of time from the date of dismissal*". (The dismissal was on 30 October 2006). ([18]).

(g) Claims of unfair dismissal must be dealt with expeditiously, citing *Culverhouse v John Septimus Roe Anglican Community School* (1995) 75 WAIG 1960. ([18]).

(h) The appellant cited cases about stay applications but there is a significant difference between an application for a stay and an application for adjournment. ([19]).

(i) The s78B of the *Judiciary Act* argument was irrelevant. ([20]).

52 The Commissioner therefore concluded that "*to adjourn the listing of the jurisdictional proceedings would mean a serious injustice*" to the respondent. ([21]). It appears also from the structure and text of the Commissioner's reasons that she did not find there was a serious injustice to the appellant by the failure to further delay the hearing of the jurisdictional issue. In my opinion, for the reasons later set out, I do not think there was demonstrated to be any serious injustice to the appellant by the Commissioner not acceding to the application.

Ground 4(j)

53 Ground 4 is drafted as a ground of not taking into account material considerations. Ground 4(j) is failing to have regard or proper regard to the appellant's submission that any questions of law determined by the IAC in *Aboriginal Legal Service* "*would have a bearing on the conduct of the case (submissions and evidence)*" in the jurisdictional hearing.

54 In support of this ground the appellant took the Full Bench to the grounds of appeal in *Aboriginal Legal Service* which were also placed before the Commissioner at first instance. It was pointed out that the grounds of appeal brought into question the "*qualitative assessment*" of the trading activity of the *Aboriginal Legal Service* which the Full Bench thought was determinative of whether it was a trading corporation. The grounds also raise the question of whether the use of monies earned by trading activity was relevant to whether a corporation was a trading corporation.

55 Although the Commissioner did not perhaps deal with this issue very clearly at paragraph [15] of her reasons, she said that the principal submission that the Full Bench decision in *Aboriginal Legal Service* was the subject of an IAC appeal, listed for hearing, was "*accepted*". The Commissioner then went on to say that she was unable to draw any comparison between the nature of work carried on by the appellant and the *Aboriginal Legal Service.*

56 The Commissioner also set out the appellant's argument with clarity in paragraph [4] of her reasons in which it was recorded that the appellant "*submitted that a critical aspect of the Commission's consideration as to whether [sic] adjourn the listing of the jurisdictional proceedings was the uncertain state of the law in this area until the outcome of the IAC's considerations*" in *Aboriginal Legal Service* was known. The appellant submitted the IAC decision "*would settle the matter.*" In my opinion what the Commissioner was in effect saying was that in the absence of any evidence or submissions comparing the appellant with the *Aboriginal Legal Service* it was difficult to assess the extent to which the IAC decision would have an impact upon the present application.

57 Mr Howlett drew our attention to the Full Bench decision of *Integrated Group Ltd t/a Integrated Workforce v Construction, Forestry, Mining and Energy Union of Workers and Skilled Rail Services Pty Ltd* (2006) 86 WAIG 2706. In paragraph [6] of these reasons the Full Bench said:-

> "*The appeals were then listed for hearing on 24 July 2006. Prior to that date counsel for the CFMEU advised that they wished the hearing to be adjourned. Due to the unavailability of members of the Full Bench, an application to adjourn could not be heard until the date of the hearing. Accordingly, on the morning of the hearing, counsel for the CFMEU sought an adjournment. This was because the Full Bench had on 29 June 2006 reserved its decision in another appeal which involved a number of similar issues to those raised in the present appeals. This appeal was Skilled Rail Services Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers [2006] WAIRC 05199; (2006) 86 WAIG 2509 (Skilled No 1). Counsel for the CFMEU argued that once Skilled No 1 was decided, that decision would determine or at least substantially decrease the issues in dispute in the present appeals. Accordingly, it was argued that overall there would be a saving of time and money for the parties if the adjournment was granted. The application to adjourn was opposed by both Integrated and Skilled. We were of the view however that it was appropriate to grant an adjournment.*"

58 Mr Howlett pointed out that no reasons for decision about the adjournment application were otherwise published in that case. This is so, although upon checking I confirmed that extempore reasons for decision were given on 24 July 2007 at (T29). It is appropriate that these reasons be reproduced in published form and I will arrange for this to occur. In any event however the reasons for the adjournment application being granted can be gleaned from paragraph [6] quoted above. This is that the Full Bench accepted the other decision "*would determine or at least substantially decrease the issues in dispute in the present appeals*".

59 Mr Howlett submitted that on the basis of a parity of approach the application at first instance should have been granted. I do not accept this submission. This links with what the Commissioner at first instance said about the lack of evidence or submissions upon the nature and activities of the appellant. In the absence of such information, it is not possible to say that the decision by the IAC in *Aboriginal Legal Service* will "*determine or at least substantially decrease the issues in dispute*" in the jurisdictional application.

60 When asked how the decision of the IAC in *Aboriginal Legal Service* could affect the evidence which the appellant would adduce at the jurisdictional hearing, Mr Howlett struggled to find an answer. At one point he suggested that if the "*qualitative approach*" was not accepted by the IAC it might not be necessary to lead evidence about all of the things which the appellant did with the money it received/earned. I do not accept this is a likely outcome of the IAC decision in *Aboriginal Legal Service*.

61 The IAC is bound by what the High Court has said about determining the status of a trading corporation. The Full Bench reasons in *Aboriginal Legal Service* at paragraphs [196]-[218] summarised relevant decisions of the High Court. In paragraph [232] of its reasons the Full Bench, based on the High Court decisions, summarised that whether a corporation was a trading corporation was a question of fact to be determined upon the evidence before the Commission. The primary focus was on what the corporation did; that is what its activities are. A corporation is a trading corporation if it substantially engages in trading activity. It is difficult to see that the IAC could as a matter of law and precedent say anything different to this. As a result I cannot see that the outcome of the appeal in *Aboriginal Legal Service* will have an impact upon the evidence which the appellant will need to lead at the hearing of the jurisdictional issue.

62 I accept that when the IAC hands down its decision in *Aboriginal Legal Service* (assuming the case is not settled beforehand) the exposition of the law is likely to assist the appellant in the submissions it wishes to make to the Commission. This does not of itself however dictate that the Commissioner erred in failing to delay the hearing until after the IAC decision.

63 The issue of vacating a trial date pending the determination of an appeal in another case was recently considered by the New South Wales Court of Appeal in *City of Sydney Council v Satara* [2007] NSWCA 148. When asked by me, Mr Howlett did not submit there were any errors of law in the reasons of McColl JA (with whom Beazley JA and Tobias JA agreed). It is accepted that the decision is not on all fours with the present case. The court was there dealing with an appeal against an adjournment granted on the basis of an application for special leave to appeal to the High Court in another case which, if special leave was granted, could have an impact upon the relevant law. The general observations of McColl JA are however of assistance. I extract the following five important observations by McColl JA in *City of Sydney Council*:-

(a) An appeal court will only interfere with a decision to grant or refuse an adjournment in exceptional cases and then only where the discretion has been exercised on a wrong principle or resulted in serious injustice; citing *Meggitt Overseas Ltd & Others v Grdovic* (1998) 43 NSWLR 527 at 528. ([18]).

(b) The court should deal with the law as it is, rather than speculate about changes in the law; citing Starke J in *Ramsay v Aberfoyle Manufacturing Co (Australia) Pty Ltd* (1935) 54 CLR 230 at 253 and other authorities. ([19], [20]).

(c) It is not "*ordinarily sufficient to show that an appeal yet to be heard in another case may reach a legal conclusion which could support the claim made by the party seeking the adjournment*"; quoting with approval the reasons of Ormiston JA (with whom Callaway JA agreed) in *Geelong Football Club Ltd v Clifford* [2002] VSCA 212 at paragraph [6]. ([30]).

(d) There were no black and white rules preventing adjournments in appropriate circumstances and in a civil case involving some technical rule of law or the disputed meaning of a particular section, "*where the hearing and the resolution of the case will directly depend on the outcome of an appeal in a test case*" it would be preferable to await the expected outcome; quoting Ormiston JA again at paragraph [6]. ([30]).

(e) Possible changes in the law are too speculative and it is ordinarily rare that one can foresee that a decision on appeal will necessarily apply although in some circumstances it might be open to a trial judge to adjourn the hearing of a case pending the outcome of an appeal yet to be heard in another case (quoting Ormiston JA in *Geelong Football Club* at paragraph [7] and citing *Meggitt*. ([30], [32]).

64 Having regard to these principles I am not satisfied that ground 4(j) has been established. In particular given the lack of evidence or information about the activities of the appellant, the Commissioner did not err in failing to delay the hearing of the jurisdictional issue until the IAC decision. It is not in any way apparent how or even if the IAC decision will impact upon the result in the present application.

65 Mr Howlett also cited *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at page 154 (per Dawson, Gaudron and McHugh JJ) and pages 164-166 (per Kirby J). At page 154 in the joint reasons it was said that "*the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim*".

66 Whilst those observations cannot be doubted the requirements of justice are multifaceted and vary with the circumstances of the individual case.

67 The general jurisdiction of the Commission under s23(1) of *the Act* is to "*enquire into and deal with any industrial matter*". An alleged unfair dismissal as an industrial matter may be referred to the Commission under s29 of *the Act.* Section 23A of *the Act* gives the Commission power to make certain remedial orders if it finds the dismissal of an employee was harsh, oppressive or unfair. The remedies provided, in general terms, are those of reinstatement or compensation. Where reinstatement is sought, there is obviously a need, subject to the requirements of procedural fairness, for the application to be determined as expeditiously as reasonably possible. Even where reinstatement is not sought, as here, the nature of the jurisdiction and powers of the Commission is such that the dispute ought be arbitrated with reasonable expedition. This requirement is legislated for in s22B of *the Act* which says that:-

> "***22B. Commission to act with due speed***
>
> *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.*"

68 As I said in the stay reasons, notions of justice and fairness are inherent within the expression "*proper consideration*" in s22B of *the Act*. Nevertheless in being concerned about more delay, the Commissioner was clearly not in error.

Ground 4(k)

69 Ground 4(k) refers to the public interest considerations in relation to ground 4(j). As articulated, this was the public interest consideration in the parties saving time and expense and the time of the Commission being saved if the jurisdictional issue was decided after the IAC decision.

70 In paragraph [16] of her reasons the Commissioner did not accept the "*public interest case for adjourning*". It is argued that this observation ignores the fact that the *Aboriginal Legal Service* decision of the IAC would have relevance irrespective of whether there was a close comparison between the appellant and the *Aboriginal Legal Service*. I have already addressed this issue. In my opinion any failing of the Commissioner, as submitted, was not such that it vitiated the exercise of her discretion. This is because the potential impact of the *Aboriginal Legal Service* decision was not shown to be crucial to the outcome of the application.

Grounds 4(n) and 4(p)

71 Ground 4(n) was that the Commissioner did not take into account material considerations in failing to have regard to the respondent's submission that she was advised not to approach potential witnesses. This is linked to ground 4(p) which was also heavily relied upon. Ground 4(p) was that the Commissioner did not properly have regard to the considerations of fairness and justice to the parties as required by *Myers v Myers* [1969] WAR 19, when the injustice to the respondent, as found by the Commissioner, was not the injustice stated by the respondent and there was in fact no injustice to the respondent.

72 The respondent, who appeared in person before the Commissioner, made short submissions opposing the continuing delay of the hearing of the jurisdictional issue. Her submissions occupied a half page of transcript (T13). Relevantly, the respondent submitted:-

(a) She was concerned about a further adjournment.

(b) If the Commission did not have jurisdiction she had obtained legal advice that there would be other options "*but that also did depend on how much time that this matter takes here*".

(c) In answer to a leading question from the Commissioner about how further delays were prejudicing her, the respondent said: "*The longer it takes, the harder it is for me … this happened last year and I put in the application last year. The further the delays go, the harder it will be for me if it does progress to the stage that I need to bring in witnesses. Obviously, since I've left the employer, the MRTA, I don't have connections*".

(d) She had not approached witnesses as she was advised she should not until the matter progresses and so it would be harder to get statements and other material required for the case.

(e) Also she was "*just worried about the delay and how it'll affect me to prepare for it and that I won't know where I stand*".

73 In paragraph [11] of her reasons the Commissioner said of the present respondent:-

> "*The applicant opposed the application to adjourn the listing of the jurisdictional proceedings submitting if the matter was to be delayed further it would be more difficult to approach witnesses to give evidence on the substantive matter.*"

74 In my opinion this was not an inaccurate summary of submission (c) of the respondent, in the list above.

75 In paragraph [18] the Commissioner set out that she considered the injustice to the respondent to be an inability "*to call evidence on the substantive matter for a lengthy period of time from the date of dismissal*". In paragraph [21] the Commissioner referred to the "*serious injustice*" to the respondent.

76 The appellant asserts the respondent did not complain about the injustice referred to by the Commissioner in paragraph [18]. I am not at all sure that this is correct, given at least (a), (c) and (e) above. In any event, however, it is obvious that ordinarily a lengthy delay between dismissal and hearing will cause injustice to the parties. Mr Howlett submitted the injustice would be the same for both parties. I am not sure that this is so either in the present case or generally, where an applicant has the onus of proving that their dismissal was unfair and that they should obtain one of the remedies set out in s23A of *the Act*. Mr Howlett also submitted the respondent could in effect secure her position by now contacting witnesses and obtaining witness statements. She might be able to do this, but merely locating witnesses and obtaining witness statements would not necessarily or entirely avoid the potential injustice of a further delayed hearing. Witnesses' memories fade and they can become ill, indisposed, or difficult or impossible to locate. Simply having a witness statement or even an affidavit does not, at least in all cases, fill the real potential for an evidential gap caused by one of these events. Additionally delay in potentially obtaining a remedy was prejudice in itself.

77 It is correct that the Commissioner did not refer to the statement by the respondent that she was advised not to approach potential witnesses. In my opinion however this was not something so material that it vitiated the exercise of the Commissioner's discretion. I do not accept there was no injustice to the respondent by the continued delay of the hearing of the jurisdictional issue, as asserted in ground 4(p).

The Other Grounds of Appeal

78 As set out earlier, the appellant did not abandon any of the other grounds or sub-grounds of appeal under the heading "*The Exercise of Discretion*". I have already referred to the repetitive nature of many of these sub-grounds. Generally, I think what I have said above is sufficient to collectively dispose of each of them. Many of the sub-grounds are predicated upon an asserted "*serious injustice to the appellant*" if the jurisdictional hearing was not delayed. I do not accept that there was or is a serious injustice to the appellant. As stated the appellant's evidence will not in all likelihood be affected by the IAC decision. In my opinion the outcome of the IAC decision is not closely linked with the outcome of the present case, at least on the basis of the information before the Commission and the Full Bench. Applying the principles extracted from *City of Sydney Council* it would probably not have been a sound exercise of discretion to defer the hearing, in the face of the opposition by the respondent.

79 It is necessary to make a few specific observations on some of the other grounds of appeal. Ground 2(f) complains that the Commissioner misunderstood or misapplied the decision of Beech C in *Culverhouse*. In that decision Beech C emphasised the juridical and forensic need for unfair dismissal applications to generally be heard promptly. Beech C did not as the Commissioner said at paragraph [18] decide that unfair dismissal claims "*must be dealt with expeditiously*". This did however form the basis of the decision the Commissioner made. The Commissioner referred to the 9 month delay since the dismissal, characterised this as a "*lengthy period*" and said it was a "*relevant consideration*". None of this was erroneous.

80 Grounds 2(g) and 4(l) complain about the Commissioner's reliance upon the observations of Scott J in *Commissioner of Police* and say insufficient weight was placed on the submissions about *Black v Lipovac* (reported in (1998) 217 ALR 386). *Black* was an appeal in part against an assessment of damages in a case of medical negligence. One aspect of the appeal, the question of interest on the past component of the award of damages under the principle in *Griffiths v Kerkemeyer* (1977) 139 CLR 161, was adjourned pending the decision of another Full Court, of five members, which would determine a conflict of authority on the issue. This situation is an example of principle (d) from *City of Sydney Council*, listed above. It is far removed from that which was before the Commissioner. The comments by Scott J were in the context of an appeal about the jurisdiction of the Public Service Arbitrator. The appeal reached the IAC without any evidence being taken at all and therefore no occasion for the applicant to obtain a remedy. The comments of Scott J were, with respect, entirely understandable. The quotation from his Honour's reasons was "*in regard for*" the "*principle*" which the Commissioner mentioned in paragraph [17] of her reasons and is summarised in paragraph [50](e) above. There was no error in this reasoning of the Commissioner.

81 There is a complaint in ground 1(c) that there was no authority cited to support the principle that matters should be dealt with promptly and evidence taken as close as possible to the events to which the application relates. In my opinion this is a fairly obvious and common sense point and the failure to cite any authority did not mean that the Commissioner fell into error.

82 There is also a complaint in ground 1(f) about the giving of undue weight to the requirements of s26 of *the Act*. I do not accept this. The Commissioner did not mention s26 in her reasons.

83 Ground 2(e) asserts the Commissioner gave undue weight to the fact that two hearing dates had been vacated. I do not accept this as the ongoing length of the delay from the date of dismissal was important to the determination of the issue by the Commission.

84 Ground 4(o) complains the Commissioner did not allow the appellant to make submissions about the finding of injustice contained at paragraph [18] of the reasons for decision, when the finding was contrary to the submission made by the respondent and therefore the appellant was denied natural justice. I do not accept this. The appellant's counsel was able to and did deal with the issue of whether there was an injustice caused by the respondent not calling evidence on the substantive matter for a lengthy period of time. Indeed it made the submission which it has continued to rely on, being that this injustice could be obviated by the taking of witness statements and the like.

85 Overall in my opinion it has not been established that, save for the s78B notice issue, the Commissioner's discretion miscarried.

86 I do not think any of the grounds of appeal under the heading "*The Exercise of the Discretion*" have been established.

Relief

87 It remains to be considered what the outcome of the appeal ought to be.

88 I am satisfied that the discretion of the Commissioner miscarried because of her errors in relation to s78B of the *Judiciary Act*.

89 The powers of the Full Bench on appeal are set out in s49(5) of *the Act*. The Full Bench may subject to s49(6) uphold an appeal and vary a decision in such a manner as the Full Bench considers appropriate. Additionally s49(6a) provides that the Full Bench should not remit a case to the Commission unless it considers it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

90 In my opinion this is a case where the Full Bench should vary the decision made by the Commissioner. Once the s78B notices have been issued and a reasonable time allowed for responses thereto, there is no reason why the hearing of the jurisdictional matter cannot proceed.

91 Both the Commissioner and the Full Bench under s78B(2)(b) of the *Judiciary Act*, may direct the appellant to give notices in accordance with s78B(1) of the *Judiciary Act* (see *BGC Contracting Pty Ltd v The Construction Forestry Mining and Energy Union of Workers* [2004] FCA 417 at [8]). The notices could be issued within a short period of time, say seven days.

92 The Full Bench now directing the appellant to issue notices under s78B(1) was not discussed with counsel for the appellant. It is however an outcome which will in my opinion best resolve the appeal. If they wish to do so, the appellant may speak to this issue following the publication of a minute in accordance with s35 of *the Act.*

Minute of Proposed Orders

93 In my opinion, a minute of proposed orders should issue that:-

1. The appellant is granted leave to appeal.
2. The appeal is upheld.
3. The decision of the Commission made on 26 July 2007 is varied by the order being substituted with an order in terms of 4 below.
4. The appellant is directed, pursuant to s78B(2)(b) of the *Judiciary Act 1903* (Cth), to give notices within 7 days in accordance with s78B(1) of the *Judiciary Act.*

94 The effect of these orders is that s78B notices will be issued The Commissioner at first instance will again be seized of the application and be able to list the jurisdictional issue for hearing as soon as reasonable to do so, in terms of s78B(1) of the *Judiciary Act.*

SMITH SC:

95 I have read the reasons of decision of His Honour, the Acting President and I agree with those reasons and have nothing to add.

HARRISON C:

96 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 01141

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01141
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		SENIOR COMMISSIONER J H SMITH
		COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 17 SEPTEMBER 2007
DELIVERED	**:**	WEDNESDAY, 3 OCTOBER 2007
FILE NO.	**:**	FBA 12 OF 2007
BETWEEN	**:**	MRTA OF WA INC
		Appellant
		AND
		PANAGOUTA TSAKISIRIS
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner S M Mayman
Citation	**:**	(2007) 87 WAIG 2516
File No	**:**	U 543 of 2006

CatchWords:

Industrial Law (WA) – Appellant wishing to speak to the minute regarding timeframe for issuing s78B notices – Extension of time not granted – Order issued in same terms as minute

Legislation:

Industrial Relations Act 1979 (WA), s90

Judiciary Act 1903 (Cth), s78B(1), (2)

Result:

Appeal allowed, decision of the Commission varied

Representation:

Counsel:

Appellant	: Mr D Howlett (of Counsel), by leave
Respondent	: No appearance

Solicitors:

Appellant	: Bowen Buchbinder Vilensky Lawyers
Respondent	: No appearance

Case(s) referred to in reasons:

Nil

Case(s) also cited:

Nil

Supplementary Reasons for Decision

RITTER AP:

1 The primary reasons for decision were published on 25 September 2007. At the same time the Full Bench published a minute of proposed orders. A letter from my associate informed the parties of the time within which they should let her know if they wished to speak to the minute.

2 There was no response from the respondent. The appellant's solicitor responded by letter dated 28 September 2007 and sent by facsimile on that day. The material parts of the letter are as follows:-

> "*The purpose of this letter is to speak to the Minute.*
>
> *Based on the reasons for decision, our client is currently considering whether to appeal any decision in the form of the proposed order as presently drafted in FBA 12 of 2007.*
>
> *There is a 21 day period in which to appeal the decision (once it issues) and our client could apply for a stay in the event that it decided to appeal.*
>
> *Whilst orders 1 to 3 in the Minute reflect the reasons of the Full Bench in this matter, we submit that the timeframe in order 4 should be extended until after the time within which to appeal the above decision expires (for example the notice could be issued within 7 days after the 21 day appeal period).*
>
> *Any appeal and application for a stay may be rendered nugatory if the proposed order remains as drafted. It will be difficult for us to consider the issues, take instructions and prepare and file an appeal and an application for a stay before the time expires to issue the notices if the proposed order remains as is.*
>
> *We assume that the reference in the reasons for decision to 7 days is a reference to the High Court Rules (paragraphs 39 and 90 of the reasons for decision). However, those rules do not apply in this matter and in any event that is the earliest time specified in the High Court Rules. There is no reason why any notices should be issued within 7 days in this case. There are valid reasons to extend the time because of the right of appeal and because an order in the terms proposed was not canvassed with the Appellant during the hearing of the appeal.*"

3 I do not accept that the appellant's submissions are good reasons to extend the period for compliance with order 4 to within seven days after the 21 day appeal period. These are my reasons for reaching this conclusion.

4 Firstly, the period within which a s78B(1) notice may be directed to be given under s78B(2) of the *Judiciary Act 1903* (Cth) is discretionary. The appropriate period of time is dependent on the circumstances of the particular case. In this case there has already been substantial delay in the setting down of the jurisdictional issue for hearing. Delay was something that also concerned Mayman C at first instance. As I said in my primary reasons I do not think that she erred in the way it was taken into account.

5 Secondly the appellant is represented by solicitors and counsel. They have identified from an early stage in the proceedings that s78B notices are required. The drafting of the s78B notices is not difficult. The constitutional issue is easy to define and there is a precedent in a form in a schedule to the *High Court Rules 2004* which sets out the way to structure the notice. The issuing of the notice will not be burdensome for the appellant.

6 Thirdly, even if there is an appeal to the Industrial Appeal Court (IAC) I find it difficult to see that it could lead to an order that constitutional notices are not required to be given. As stated the appellant has at all times asserted there is a constitutional issue to be determined and the notices must be given. This will not change even if there is a successful appeal against the orders of the Full Bench. The notice must be issued sooner or later and it should now be issued expeditiously in my opinion. The appellant may wish to argue before the IAC that they should not be the party directed to give the notices. If so however the appellant's solicitors do not make this point in their submissions and it is difficult to see that it is an arguable proposition. The contents of s78B(2) do not restrict a court as to which of the parties it may issue the direction to. As set out in the primary reasons I think there are good reasons why the appellant should give the notices.

7 Fourthly the position of the appellant is ill-defined. They have not informed us that they will appeal just that they might do. There has been no submission about the possible grounds for appeal or the way in which such grounds will fit within the narrow appellate jurisdiction of the IAC as set out in s90 of the *Industrial Relations Act 1979* (WA).

8 Fifthly it appears that the appellant is in effect seeking from the Full Bench a short term defacto stay of the direction to give the notices. I say this because if the period for compliance is extended to 28 days, then that will be a period of 21 days in excess of that which the Full Bench thought was the appropriate time. I do not, at least in this case, believe the Full Bench should set the time for compliance for this purpose.

9 Sixthly but related to the fifth point, if the appellant wishes to and does appeal to the IAC, then it is the appropriate court to consider if there is a sound reason to stay the order of the Full Bench; I do not believe it is for the Full Bench to second guess the view of the IAC on the issue. An appeal against the order will not be rendered nugatory if the appellant acts with haste in seeking and obtaining a stay.

10 Seventhly it is accepted that the *High Court Rules* do not apply. In my onion however for the reasons set out above a period of seven days is just in all the circumstances.

11 Eighthly I do not accept that the period of time not being canvassed at the hearing of the appeal is a good reason to extend the time as submitted. That was a good reason for giving the parties the opportunity to make submissions on the point, as the appellant now has, but not for making the time limit longer than seven days.

12 Accordingly I am not persuaded that the time for giving the s78B(1) notices should be any longer than the seven days contained in the minute. An order will now issue in the terms of the minute.

SMITH SC:

13 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.

HARRISON C:

14 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 01140

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRTA OF WA INC
	APPELLANT
	-and-
	PANAGOUTA TSAKISIRIS
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 3 OCTOBER 2007
FILE NO	FBA 12 OF 2007
CITATION NO.	2007 WAIRC 01140

Decision	Appeal upheld, decision of the Commission varied
Appearances	
Appellant	Mr D Howlett (of Counsel), by leave
Respondent	No appearance

Order

This matter having come on for hearing before the Full Bench on 17 September 2007, and having heard Mr D Howlett (of Counsel), by leave, on behalf of the appellant, and there being no appearance by or on behalf of the respondent, and reasons for decision having been delivered on 25 September 2007, and supplementary reasons for decision having been delivered on 3 October 2007, it is this day, 3 October 2007, ordered that:-

1. The appellant is granted leave to appeal.
2. The appeal is upheld.
3. The decision of the Commission made on 26 July 2007 is varied by the order being substituted with an order in terms of 4 below.
4. The appellant is directed, pursuant to s78B(2)(b) of the *Judiciary Act 1903* (Cth), to give notices within 7 days in accordance with s78B(1) of the *Judiciary Act*.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for registration—

2007 WAIRC 01144

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRINCIPALS' FEDERATION
	APPLICANT
	-and-
	STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA (INC)
	OBJECTOR
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 3 OCTOBER 2007
FILE NO	FBM 3 OF 2007
CITATION NO.	2007 WAIRC 01144

Decision	Orders and directions
Appearances	
Applicant	Mr A J Power (of Counsel), by leave and with him Mr S Kemp (of Counsel), by leave
Objector	Mr T Borgeest (of Counsel), by leave

Order

This matter having come on for a directions hearing before the Full Bench on 3 October 2007 and having heard Mr A J Power (of Counsel), and with him Mr S Kemp (of Counsel), on behalf of the applicant and Mr T Borgeest (of Counsel), on behalf of the objector it is this day, 3 October 2007, ordered that:

1. The order issued by the Full Bench on 9 July 2007 is revoked.
2. The applicant file and serve:-
   (a) its witness statements; and
   (b) any documents upon which it wishes to rely

   on or before 31 October 2007.
3. The objector file and serve:-
   (a) its witness statements; and
   (b) any documents upon which it wishes to rely

   on or before 20 December 2007.
4. The applicant file and serve any further witness statements and any documents upon which it wishes to rely by way of reply on or before 18 January 2008.
5. The directions hearing be adjourned to a date to be fixed.
6. The parties have liberty to apply.

By the Full Bench

[L.S.]

(Sgd.) M T RITTER,
Acting President.

FULL BENCH—Procedural Directions and Orders—

2007 WAIRC 00996

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 13 AUGUST 2007
FILE NO/S	FBA 27 OF 2006
CITATION NO.	2007 WAIRC 00996

Decision	Direction issued re Practice Note 1 of 2007
Appearances	
Appellant	In person
Respondent	Mr D Newman

Direction

THE FULL BENCH having received a request from the appellant that because he will not be represented in the proceedings, a direction be issued that he need not comply with Practice Note 1 of 2007, which is not objected to by the respondent, it is ordered that:-

1. The appellant is not required to comply with Practice Note 1 of 2007.

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

2007 WAIRC 01000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 16 AUGUST 2007
FILE NO/S	FBA 27 OF 2006
CITATION NO.	2007 WAIRC 01000

Decision	Orders and directions
Appearances	
Appellant	Mr S Thomas
Respondent	Mr D Newman

Order

This matter having come on for hearing before the Full Bench on 15 August 2007 to hear the respondent's application to strike out the appeal, and having heard Mr S Thomas on behalf of the appellant, and Mr D Newman on behalf of the respondent, it is this day, 16 August 2007, ordered that

1. The appellant within 14 days of the date of this order file and serve the appeal books.
2. The appellant within 14 days of the date of this order file and serve any application to the Full Bench to receive any documents or other evidence which was not before the Commission at first instance together with copies of the documents.
3. The respondent's application to strike out the appeal be adjourned to a date to be fixed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2007 WAIRC 01088

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 12 SEPTEMBER 2007
FILE NO	FBA 27 OF 2006
CITATION NO.	2007 WAIRC 01088

Decision	Respondent's application to strike out dismissed
Appearances	
Appellant	Mr K Trainer, as agent
Respondent	Ms R Hartley (of Counsel), by leave

Order

This matter having come on for a directions hearing before the Full Bench on 12 September 2007, and having heard Mr K Trainer, as agent on behalf of the appellant, and Ms R Hartley (of Counsel), by leave on behalf of the respondent, it is this day, 12 September 2007, ordered that:-

1. The respondent's application to strike out appeal FBA 27 of 2006 is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2007 WAIRC 01111

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	APPELLANT
	-and-
	THE ORIGINAL CROISSANT GOURMET PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 20 SEPTEMBER 2007
FILE NO	FBA 9 OF 2007
CITATION NO.	2007 WAIRC 01111

Decision	Orders and Directions
Appearances	
Appellant	Ms A Crichton-Browne (of Counsel)
Respondent	Mr T Carmady (of Counsel)

Order

This matter having come on for hearing before the Full Bench on 19 September 2007 and having heard Ms A Crichton-Browne (of Counsel) on behalf of the appellant and Mr T Carmady (of Counsel) on behalf of the respondent, it is this day, 20 September 2007, ordered that :-

1. The appellant have leave to amend the grounds of appeal to the form contained in the minute of consent order filed on 17 September 2007.

2. The appellant shall within 7 days file and serve on the respondent additional written submissions about:-

   (a) the practical implications of the appeal being determined;

   (b) the transcript references which the appellant asserts supports ground 1 of the appeal;

   (c) any assistance which the appellant submits the Full Bench may obtain from the Hooker Report; and

   (d) any other matters arising out of the hearing of the appeal which the appellant wishes to make submissions upon.

3. The respondent be at liberty within 14 days of the receipt of the appellant's additional written submissions to provide written submissions to the Full Bench on any of the matters contained within the appellant's additional written submissions.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2007 WAIRC 01101

EDUCATION DEPARTMENT MINISTERIAL OFFICERS SALARIES ALLOWANCES AND CONDITIONS AWARD 1983 NO 5 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED **APPLICANT**
	-v-
	DEPARTMENT OF EDUCATION AND TRAINING **RESPONDENT**
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 SEPTEMBER 2007
FILE NO	P 4 OF 2007
CITATION NO.	2007 WAIRC 01101

Result	Award varied
Representation	
Applicant	Mr S Farrell and Mr E Schnell
Respondent	Mr A Harper

Order

HAVING heard Mr S Farrell and Mr E Schnell on behalf of the applicant and Mr A Harper on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No 5 of 1983 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,
Commissioner,
[L.S.] Public Service Arbitrator.

SCHEDULE

1. Clause 37. – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing Employer's caravan or trailer.

In case where officers are required to tow employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 40. – Relieving Allowance: Delete subclause (4) of this clause and insert in lieu thereof the following:

(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 $163.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $163.00 in any one period of three (3) years.

3. Clause 41. – Removal Allowance:

A. Delete subclause (1)(c) and (d) of this clause and insert in lieu thereof the following:

(c) An allowance of $534.00 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 Employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least $3,199.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependents for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

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

(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 $992.00 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.

4. Schedule G – Overtime: Delete Part II – MEALS of this schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from first pay period commencing on and from 14 September 2007)

Breakfast	$9.00 per meal
Lunch	$11.05 per meal
Evening Meal	$13.25 per meal
Supper	$9.00 per meal

2007 WAIRC 01102

ELECTORATE OFFICERS AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE HONOURABLE PRESIDENT OF THE LEGISLATIVE COUNCIL, THE HONOURABLE SPEAKER OF THE LEGISTLATIVE ASSEMBLY

RESPONDENT

CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER S J KENNER
DATE	FRIDAY, 14 SEPTEMBER 2007
FILE NO	P 5 OF 2007
CITATION NO.	2007 WAIRC 01102

Result	Award varied
Representation	
Applicant	Mr S Farrell and Mr E Schnell
Respondent	Mr A Harper

Order

HAVING heard Mr S Farrell and Mr E Schnell on behalf of the applicant and Mr A Harper on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Electorate Officers Award 1986 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,
Commissioner,
[L.S.] Public Service Arbitrator.

SCHEDULE

1. Clause 36. – Motor Vehicle Allowances: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing Electorate Office caravan or trailer.

In case where employees are required to tow Electorate Office caravans on official business, the additional rate shall be 7.0 cents per kilometre. When Electorate Office trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 38. – Removal Allowance:

A. Delete subclause (1)(c) and (d) of this clause and insert in lieu thereof the following:

(c) An allowance of $534.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,199.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $169.00.

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

(6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $992.00 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.

AWARDS/AGREEMENTS—Variation of—

2007 WAIRC 01126

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVIS
	APPLICANT
	-v-
	METROPOLITAN SECURITY SERVICES, CHUBB ELECTRONIC SECURITY, WORMALD SECURITY CONTROLS
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 26 SEPTEMBER 2007
FILE NO/S	APPL 87 OF 2007
CITATION NO.	2007 WAIRC 01126

Result	Award varied
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	No appearance

Order

HAVING heard Mr L Edmonds of counsel 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 Electrical Trades (Security Alarms Industry) 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 the date of this order.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SCHEDULE

1. Clause 11. – Overtime: Delete subclause (3)(f) of this clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) 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 $10.30 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 $7.00 for each meal so required.

2. Clause 15. – Special Rates and Provisions:

A. Delete subclauses (1) to (4) of this clause and insert in lieu thereof the following:

(1) **Height Money:** An employee shall be paid an allowance of **$2.35** for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) **Dirt Money**: An employee shall be paid an allowance of **48 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Confined Space**: An employee shall be paid an allowance of **60 cents** per hour when, because of the dimensions of the compartment or space in which he/she is working, he/she is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) **Hot Work:** An employee shall be paid an allowance of **48 cents** per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

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

(6) **Percussion Tools:**

An employee shall be paid an allowance of **30 cents** per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

C. Delete subclauses (13) and (14) of this clause and insert in lieu thereof the following:

(13) An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **$9.70** per week in addition to his ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of **$19.80** per week.

3. Clause 16. – Car Allowance: Delete subclause (3) of this clause and insert in lieu thereof the following:

(3) A year for the purpose of this clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
	Over 2600cc	Over 1600cc - 2600cc	1600cc & Under
Rate per Kilometre (cents)			
Metropolitan Area	74.3	66.3	57.7
South West Land Division	76.0	68.0	59.1
North of 23.5 ^{o} South Latitude	83.3	75.0	65.3
Rest of the State	78.2	70.3	61.0
Motor Cycle (In All Areas)	25.4 Cents per Kilometre		

4. Clause 18. – Distant Work: Delete subclauses (4) and (5) of this clause and insert in lieu thereof the following:

(4) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of **$**31.10 for any weekend that he/she returns to his/her home from the job but only if -

(a) The employee advises the employer or the employer's agent of their intention no later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee 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.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of **$**13.85 per day provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

5. Clause 28. – Wages: Delete subclauses (3) to (5) of this clause and insert in lieu thereof the following:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of his/her work as a tradesperson the employer shall pay a tool allowance of **$13.70** per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson.

(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 all necessary power tools, special purpose tools and precision measuring instruments.

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

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) $44.20 per week if he/she is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $40.00 per week if he/she is engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $23.00 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) **Leading Hand:** In addition to the appropriate total wage prescribed in subclause (1) of this Clause, a leading hand shall be paid –

(a)	If placed in charge of not less than three and not more than ten other employees	**$25.10**
(b)	If placed in charge of more than ten and not more than twenty other employees	**$38.30**
(c)	If placed in charge of more than twenty other employees	**$49.30**

2007 WAIRC 01125

ELECTRONICS INDUSTRY AWARD NO A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS' UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVIS
	APPLICANT
	-v-
	ALLCOM PTY LTD, ACTION ELECTRONICS PTY LTD, ALDETEC PTY LTD
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 26 SEPTEMBER 2007
FILE NO/S	APPL 88 OF 2007
CITATION NO.	2007 WAIRC 01125

Result	Award varied
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	No appearance

Order

HAVING heard Mr L Edmonds of counsel 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 Electronics Industry Award No A 22 of 1985 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,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 9. – Overtime: Delete subclause (3)(f) of this clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) 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 $10.30 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 each such meal by the employer or be paid $6.95 for each meal so required.

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

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE

ON EMPLOYER'S BUSINESS

MOTOR CAR

AREA AND DETAILS	**ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)**		
Rate per kilometre (cents)	**Over 2600cc**	**1600cc -2600cc**	**1600cc & Under**
Metropolitan Area	75.1	67.1	58.3
South West Land Division	76.7	68.6	59.9
North of 23.5o South Latitude	84.3	75.8	66.1
Rest of the State	79.1	71.0	61.6
MOTOR CYCLE (IN ALL AREAS)	25.6 cents per kilometre		

3. Clause 15. – Distant Work: Delete subclauses (4) and (5) of this clause and insert in lieu thereof the following:

(4) An employee, to whom the provisions of subclause (1) of this Clause apply, shall be paid an allowance of $31.70 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employer's agent of the employee's intention no later than Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee 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.

(5) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $13.85 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 20. – Special Provisions:

A. Delete subclauses (1) to (4) of this clause and insert in lieu thereof the following:

(1) **Dirt Money**: An employee shall be paid an allowance of **48 cents** per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space**: An employee shall be paid an allowance of **59 cents** per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work**: An employee shall be paid an allowance of **48 cents** per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money**: An employee shall be paid an allowance of **$2.30** for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

B. Delete subclauses (6) to (8) of this clause and insert in lieu thereof the following:

(6) **Diesel Engine Ships**: The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of **80 cents** per hour whilst so engaged.

(7) **Percussion Tools**: An employee shall be paid an allowance of **30 cents** per hour when working pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works**: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of **$12.10** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

C. Delete subclause (14) of this clause and insert in lieu thereof the following:

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid **$9.40** per week in addition to their ordinary rate.

5. Clause 33. – Wages:

A. Delete subclause (2) of this clause and insert in lieu thereof the following:

(2) Leading Hands:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$24.80
(b)	If placed in charge of more than ten but not more than twenty other employees	$37.60
(c)	If placed in charge of more than twenty other employees	$48.70

B. Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -

(i) **$**13.70 per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of **$**13.70 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer 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 technicians, servicepeople, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II – CONSTRUCTION

6. Clause 5. – Special Rates and Provisions: Delete subclause (2) of this clause and insert in lieu thereof the following:

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of $288.90.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

7. Clause 6. – Allowance for Travelling and Employment in Construction Work: Delete subclause (1)(a), (b) and (c) of this clause and insert in lieu thereof the following:

(a) On places within a radius of 50 kilometres from the General Post Office, Perth - $15.15 per day.

(b) For each additional kilometre to a radius of 60 kilometres from the General Post Office, Perth – 77 cents per kilometre.

(c) Subject to the provisions of paragraph (d), work performed at places beyond a 60 kilometre radius from the General Post Office, Perth shall be deemed to be distant work unless the employer and the employees, with the consent of the union, agree in any particular case that the travelling allowance for such work shall be paid under this clause, in which case an additional allowance of 77 cents per kilometre shall be paid for each kilometre in excess of the 60 kilometre radius.

8. Clause 7. – Distant Work: Delete subclauses (6) and (7) of this clause and insert in lieu thereof the following:

(6) An employee, to whom the provisions of subclause (1) of this clause apply, shall be paid an allowance of $30.90 for any weekend that the employee returns home from the job, but only if -

(a) The employee advises the employer or the employee's agent of the employee's intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) The employee 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 the employee shall be provided with suitable transport to and from the job or be paid an allowance of $13.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

9. Clause 10. – Wages: Delete subclauses (5), (6) and (7) of this clause and insert in lieu thereof the following:

(5) Construction Allowances:

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(i) **$43.70** per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) **$39.50** per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) **$23.10** per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) Leading Hand:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$24.80
(b)	If placed in charge of more than ten but not more than twenty other employees	$37.60
(c)	If placed in charge of more than twenty other employees	$48.70

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -

(i) $13.70 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $13.70 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer 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 Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2007 WAIRC 01109

ENGINEERING TRADES (GOVERNMENT) AWARD 1967 AWARD NOS 29, 30, 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH, THE MINISTER FOR WORKS, THE MINISTER FOR EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 19 SEPTEMBER 2007
FILE NO/S	APPL 56 OF 2007
CITATION NO.	2007 WAIRC 01109

Result	Award Varied
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr Z Gillam

Order

HAVING heard Mr L Edmonds of counsel on behalf of the applicant and Mr Z Gillam on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT the Engineering Trades (Government) Award 1967 Award Nos 29, 30, 31 of 1961 and 3 of 1962 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 14. – Overtime:

A. Delete paragraph (e) of subclause (3) of this clause and insert the following in lieu thereof:

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid **$10.00** for a meal 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 **$7.00** for each meal so required

B. Delete paragraph (h) of subclause (3) of this clause and insert the following in lieu thereof:

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid **$4.70** for breakfast.

2. Clause 17. – Special Rates and Provisions:

A. Delete subclauses (1) - (5) of this clause and insert the following in lieu thereof:

(1) **Height Money:** An employee shall be paid an allowance of **$2.25** for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) **Dirt Money**: Dirt Money of **47 cents** per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in s ite (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged

by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of **52 cents** per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) Confined Space:

58 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid **29 cents** per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of **47 cents** per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

B. Delete subclauses (8) - (16) of this clause and insert the following in lieu thereof:

(8) Any employee working in water over his/her boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of **$1.35** per day.

(9) Employees using Anderson-Kerrick steam cleaning un its or unit of a similar type on cranes or other machinery shall be paid an allowance of **47 cents**.

(10) Well Work: Any 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 **$2.80** for such examination and **$1.00** per hour extra thereafter for fixing, renewing or repairing such work.

(11) **Ship Repair Work**: Any employee engaged in repair work on board ships shall be paid an additional **$5.00** per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of **$1.94** per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of **17 cents** per hour, with a minimum payment of **$1.20** per day.

(14) **Abattoirs -**

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of **$15.90** per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to **$14.60** with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of **49 cents** per hour, with a minimum payment for four hours.

(16) **Morgues -**

An employee required to work in a morgue shall be paid **49 cents** per hour or part thereof, in addition to the rates prescribed in this clause.

C. Delete subclause (19) of this clause and insert the following in lieu thereof:

(19) An employee required to repair or maintain incinerates shall be paid **$2.95** per unit.

D. Delete subclauses (21) - (24) of this clause and insert the following in lieu thereof:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of **34 cents** for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(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 an 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 compos ition 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 paragraph (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 grav ity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics 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 **$19.30** per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of **62 cents** per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance**: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of **$4.39** per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

E. Delete subclauses (26) - (29) of this clause and insert the following in lieu thereof:

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid **$9.40** per week in addition to their ordinary rate.

(27) 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 allowances of **$1.94** per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of **$16.80** per week.

(29) Hospital Environment Allowance:

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) **$13.50** per week for work performed in a hosp ital environment; and

(ii) **$4.60** per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

(b) **$9.80** per week for work performed in a hosp ital environment at -

Kalgoorlie Hospital

Osborne Park Hospital

Albany Hospital

Bunbury Hospital

Geraldton Hospital

Mt. Henry Hospital

Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) **$6.50** per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	PortHedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital
Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

3. Clause 21. – District Allowances: Delete subclause (6) of the 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	**COLUMN II**	**COLUMN III**	**COLUMN IV**
DISTRICT	**STANDARD RATE**	**EXCEPTIONS TO STANDARD RATE**	**RATE**
	$ Per Week	**Town Or Place**	**$ Per Week**
6	73.80	Nil	Nil
5	60.40	Fitzroy Crossing	81.40
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	75.90
		Marble Bar	
		Wittenoom	
		Karratha	71.40
		Port Hedland	66.20
4	30.60	Warburton Mission	82.00
		Carnarvon	28.60
3	19.30	Meekatharra	30.60
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	13.70	Kalgoorlie	4.60
		Boulder	
		Ravensthorpe	18.10
		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.

4. First Schedule – Wages:

A. Delete subclause (5) of this schedule and insert the following in lieu thereof:

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of **$15.20**.

(b) This allowance shall be paid in two instalments, as follows:

(i) **$7.60** of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining **$7.60** - totalling **$15.20** - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance w ith any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

B. Delete subclause (8) of this schedule and insert the following in lieu thereof:

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than ten other employees	24.40
If placed in charge of more than ten and not more than twenty other employees	37.20
If placed in charge of more than twenty other employees	47.80

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

(c) 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 to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	59.70
Harvey, Dwellingup, Mundaring, Yanchep	29.80
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	15.00
Jarrahdale	15.00

C. Delete subclauses (10) - (12) of this schedule and insert the following in lieu thereof:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) **$42.80** per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) **$38.60** per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) **$22.80** per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

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

(i) **$13.50** per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in of this Schedule,

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

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

(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 the employer, if lost through the negligence of such employee.

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional **$2.24** per hour whilst so engaged.

5. Fifth Schedule – Building Management Authority Wages and Conditions:

A. Delete paragraphs (c), (d) and (e) of subclause (5) of this schedule and insert the following in lieu thereof:

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of **$25.50** per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of **$34.30** per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule - Wages of this Award.

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

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid **$3.65** per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2007 WAIRC 01124

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.

APPLICANT

-v-

OTIS ELEVATOR CO PTY LTD, SCHINDLER LIFTS AUSTRALIA PTY LTD, KONE ELEVATORS PTY LIMITED

RESPONDENTS

CORAM COMMISSIONER S J KENNER

DATE WEDNESDAY, 26 SEPTEMBER 2007

FILE NO/S APPL 89 OF 2007

CITATION NO. 2007 WAIRC 01124

Result	Award varied
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	No appearance

Order

HAVING heard Mr L Edmonds of counsel 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 Lift Industry (Electrical and Metal Trades) Award 1973 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 12. – Overtime: Delete subclause (3)(f) of this clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) 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 $10.30 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 each such meal by the employer or be paid $7.00 for each meal so required.

2. Clause 16. – Special Rates and Provisions: Delete subclauses (5) and (6) of this clause and insert in lieu thereof the following:

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $19.60 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $9.70 per week in addition to his/her ordinary rate.

3. Clause 28. – Lift Industry Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $92.10 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

4. First Schedule – Wages:

A. Delete subclause (3) of this schedule and insert in lieu thereof the following:

(3) 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 three and not more than ten other employees	$24.80
(b)	If placed in charge of more than ten and not more than twenty other employees	37.80
(c)	If placed in charge of more than twenty other employees	48.80

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

(6) (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 his/her work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $13.70 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $13.70 being the percentage which appears against his/her years of apprenticeship in Clause 3 of this schedule, 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 of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

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

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

2007 WAIRC 01123

RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIV.
	APPLICANT
	-v-
	INDOOR AMUSEMENT GAMES CO., CANBERRA TELEVISION SERVICES, HILLS INDUSTRIES LTD
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 26 SEPTEMBER 2007
FILE NO/S	APPL 90 OF 2007
CITATION NO.	2007 WAIRC 01123

Result	Award varied
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	No appearance

Order

HAVING heard Mr L Edmonds of counsel 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 Radio and Television Employees' Award 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 9. – Overtime: Delete subclause (3)(f) of this clause and insert in lieu thereof the following:

(f) Subject to the provisions of paragraph (g) 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 $10.30 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 $6.90 for each meal so required

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

(3) A year for the purpose of this Clause shall commence on 1 July and end on 30 June next following.

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE
ON EMPLOYER'S BUSINESS
MOTOR CAR

AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
	Over 2600cc	Over 1600cc -2600cc	1600cc & Under
Rate per Kilometre (Cents)			
Metropolitan Area	74.1	66.2	57.6
South West Land Division	75.7	67.8	58.9
North of 23.5 ' South Latitude	83.2	74.7	65.2
Rest of the State	78.2	70.1	61.1
Motor Cycle (In All Areas)		25.4 cents per kilometre	

3. Clause 14. – Distant Work: Delete subclause (4) of this clause and insert in lieu thereof the following:

(4) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job the employee shall be provided with suitable transport to and from that job or be paid an allowance of $13.85 per day provided that where the time actually spent in travelling either to or from the job exceeds twenty minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

4. Clause 29. – Wages:

A. Delete subclause (2) of this clause and insert in lieu thereof the following:

(2) Leading Hands:

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and more than ten other employees	24.80
(b)	If placed in charge of more than ten and not more than twenty other employees	37.80
(c)	If placed in charge of more than twenty other employees	48.70

B. Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of his/her work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

(i) $13.60 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $13.60 being the percentage which appears against his/her year of apprenticeship in subclause (3) of this Clause,

for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler 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 negligence.

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2007 WAIRC 01099

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE ROMAN CATHOLIC BISHOP OF PERTH, THE ROMAN CATHOLIC BISHOP OF BUNBURY, THE ROMAN CATHOLIC BISHOP OF BROOME
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 14 SEPTEMBER 2007
FILE NO/S	APPL 86 OF 2007
CITATION NO.	2007 WAIRC 01099

Result	Discontinued by leave
Representation	
Applicant	Ms L Kirkwood of counsel
Respondent	Ms K Wroughton of counsel

Order

HAVING heard Ms L Kirkwood 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 orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

NOTICES—Award/Agreement matters—

2007 WAIRC 01165

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 60 of 2007

APPLICATION FOR A NEW AGREEMENT ENTITLED

"ADVOCARE ENTERPRISE AGREEMENT 2007"

NOTICE is given that an application was made to the Commission, on the 10 October 2007, by the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch, under the Industrial Relations Act 1979, for the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation or scope are published hereunder.

1.2 Parties Bound

This is an agreement between Advocare Incorporated and the Australian Municipal, Administrative, Clerical and Services Union of Employees, West Australian Clerical and Administrative Branch (ASU) and extends to and binds all employees who are eligible to members of the respondent union.

This agreement shall apply to approximately 15 employees.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) J.A SPURLING,
Registrar.

11 October 2007

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2007 WAIRC 01067

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK COSTA
	APPLICANT
	-v-
	THE CHIEF EXECUTIVE OFFICER OF THE CITY OF BAYSWATER
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	MONDAY, 25 JUNE 2007
DELIVERED	FRIDAY, 7 SEPTEMBER 2007
FILE NO.	U 258 OF 2006
CITATION NO.	2007 WAIRC 01067

CatchWords	Application to correct or amend an order granting leave to discontinue - agreement made to compromise claim - respondent claims agreement lapsed when order made to discontinue - power to amend order to reflect the terms of the compromise agreement considered -*Industrial Relations Act 1979* (WA) s 26, s 27(1)(l), s 27(1)(m) s 35(1), s 35(3) and s 35(4)
Result	Amendment made
Representation	
Applicant	Mr K Trainer (as agent on behalf of the Applicant)
Respondent	Mr S White (as agent on behalf of the City of Bayswater)

Reasons for Decision

1 Mark Costa ("the Applicant") made an application on 27 March 2006 under s 29(1)(b)(i) of the *Industrial Relations Act* 1979 ("the Act") claiming he was unfairly dismissed by the Chief Executive Officer of the City of Bayswater ("the Respondent") on 8 March 2006. The Respondent filed a notice of answer and counter-proposal on 27 April 2006 stating that it refuted the Applicant's claim that the termination of his employment was harsh, oppressive or unfair.

2 A conference was convened by Senior Commissioner Gregor on 14 June 2006. At the conference the Applicant was represented by Mr Ken Trainer and the Respondent was represented by Mr Simon White. It is an agreed fact that at the conference the parties reached an agreement to settle the matter and record the terms of agreement in a deed of settlement. A draft deed of settlement and release was prepared by the Respondent and forwarded to the Applicant's representative Mr Trainer (*Exhibit 1*). On 26 June 2006, the Associate to Senior Commissioner Gregor, Maryna Hewitt, sent an email to Mr Trainer asking him to advise if this matter could be discontinued. Mr Trainer replied on the same date stating as follows:

> "Thanks for the note. I have the draft deed from Mr White and will arrange for it to be executed this week. It will be discontinued when the settlement amount has cleared. That should be within fourteen days."

(*Exhibit 3*)

3 On 12 July 2006, Mr Trainer sent an amended copy of the deed of settlement and release to Mr White for his review. On the same day, Mr White informed Mr Trainer by email that the Respondent was in agreement with the changes requested and that provided the document was satisfactory to the Applicant could he please arrange for two copies to be signed. (*Exhibit 2*).

4 Mr Trainer informed the Commission at the hearing on 25 June 2007 that the deed (*Exhibit 2*) was forwarded to the Applicant to sign immediately following 12 July 2006.

5 Mr Trainer on behalf of the Applicant contends that the Applicant agreed to the terms of the deed on 12 July 2006 when he (Mr Trainer) had a telephone conversation about the terms of the deed with the Applicant on that date.

6 On 22 August 2006, a second email was sent to Mr Trainer from the Associate to Senior Commissioner Gregor with a copy to Rian Myers, who at that time was the Chamber Liaison Officer to Senior Commissioner Gregor. The Commission file records that Ms Hewitt stated in the email:

> "please find attached Minutes of Proposed Order to discontinue the above matter and advise me by cob 31/8/06 should you wish to speak to the Minutes.
>
> If no advice is received by that date the Minutes will issue as is."

7 The minutes of proposed order attached to the email stated:

> "WHEREAS on 27th March 2006 Mark Costa applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979;* and
>
> WHEREAS on 14th June 2006 the Senior Commissioner conducted conciliation proceedings between the parties and the matter was settled pending finalisation of a Deed of Settlement; and
>
> WHEREAS on 31st August 2006 the Applicant's Agent advised that the matter was finalised and the Commission decided to discontinue the proceedings.
>
> 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"

8 The Commission file records that on 6 September 2006, Senior Commissioner Gregor made the following order ("the Order"):

> "WHEREAS on 27th March 2006 Mark Costa (the Applicant) applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979;* and
>
> WHEREAS on 14th June 2006 the Senior Commissioner conducted conciliation proceedings between the parties and the matter was settled pending finalisation of a Deed of Settlement; and
>
> WHEREAS on 22nd August 2006 the Commission requested that the Applicant advise the Commission by 31st August 2006 the status of the matter failure of which may result in the matter being discontinued; and
>
> WHEREAS on by 31st August 2006 there being no advice from the Applicant the Commission decided to discontinue the proceedings.
>
> 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"

(*2006 WAIRC 05394*)

By its terms the Order appears to be made pursuant to s27(1)(a)(iv) of the Act which empowers the Commission in relation to any matter before it, to refrain from hearing or determining the matter if it is satisfied for any other reason other than the reasons set out in sub paragraphs (i) to (iii) of s27(1)(a), that the hearing of the matter thereof should be discontinued.

9 The Applicant did not return a signed copy of the deed to Mr Trainer until sometime in late November 2006 to Mr Trainer's office. However Mr Trainer did not locate the signed copy of the deed until some time in January 2007 after the Applicant telephoned Mr Trainer and Mr Trainer conducted an extensive search of his office.

10 After Mr Trainer located the executed deed in January 2007, Mr Trainer sent the executed deed to the Respondent's representative, Mr White. On 14 February 2007, Mr White responded on behalf of the Respondent as follows:

> "We acknowledge receiving the attached two copies of the Deed of Settlement for application U258 of 2006.
>
> Please find attached a copy of the Notice of Discontinuance issued by the Western Australian Industrial Relations Commission on 6 September 2006 together with the original Deeds for your records.
>
> The matter was discontinued due to Mr Costa's failure to conclude the settlement agreement entered into and communicate the status of the matter to the Commission. As a result, the City of Bayswater consider the settlement agreement lapsed on 6 September 2006."

(*Exhibit 4*)

11 On 20 February 2007, Mr Trainer wrote to the Chief Commissioner of the Commission seeking that the Commission intervene as the Respondent had refused to comply with the terms of the settlement. In a letter dated 27 February 2007, Mr White informed the Commission that the Respondent opposed the Commission making any order to reactivate the application on the basis that the matter was closed by way of an order to discontinue the application on 6 September 2006. Following a conference before Senior Commissioner Smith, the Applicant requested that the Commission list the matter for hearing as to whether it had power to amend the order made by Senior Commissioner Gregor on 6 September 2006.

12 On 15 May 2007, the Applicant served on the Respondent a notice to admit in which one of the facts it sought was to have admitted was that as of 12 July 2006, all the terms of the agreement between the parties were agreed and contained in the deed forwarded on that date. In the Respondent's response to the notice to admit, the Respondent stated it did not admit that fact. However, on 25 June 2006 when the Commission sat to hear whether it could amend an order made by Senior Commissioner Gregor on 6 September 2006 to discontinue the application, Mr White on behalf of the Respondent stated:

> "The respondent agrees that the terms of the deed were agreed to between the parties on the 12th of July and the applicant was provided with an unsigned deed for him to confirm his acceptance of the terms and conclude the agreement. The agreement though had not been signed by the respondent on that date and has … has never been … been signed by the respondent. From that date onwards though, Senior Commissioner, the applicant disappeared. He failed to sign the deed, he didn't communicate his acceptance or otherwise of the agreement, he didn't make any contact with the Commission or the applicant – sorry, with the … the respondent's representative, even when this office, the Local Government Association did … did seek to have the matter concluded."

(*Transcript page 15*)

13 The Applicant seeks that the Commission vary or rectify the order made by Senior Commissioner Gregor:

(a) by making a finding that the basis of the facts acted on by Senior Commissioner Gregor to make the order were not correct;

(b) by considering the facts and deciding whether the agreement reached between the parties fits within the parameters of orders the Commission could make if it were to arbitrate; and

(c) to vary or rectify the order by making an order that the Respondent pay the amount of compensation that was agreed between the parties in the deed of settlement.

Applicant's submissions

14 The Applicant says that at the conference before Senior Commissioner Gregor on 14 June 2006, the parties reached an agreement to compromise his claim subject to the parties agreeing the terms of the deed of settlement. The Applicant also says that the email dated 12 July 2006 shows that an agreement was reached in respect of the terms of the deed (*Exhibit 2*).

15 Mr Trainer stated from the bar table, (without objection) that he did not see the email (with the attached minutes of proposed order) sent on 22 August 2006 from Ms Hewitt, until after the order was made by Senior Commissioner Gregor. He said that he did not dispute that it was transmitted to his email address but he said that because of his father's ill health he did not see the email until sometime shortly after 9 September 2006.

16 At the time the minutes of proposed order were sent to Mr Trainer and the Order was made, the deed of settlement was in the Applicant's possession to sign.

17 It is pointed out on behalf of the Applicant that the Exhibit 2 contains no timeframe for execution or the return of the document. From 12 July 2006 until 6 September 2006 there was no communication between the parties to the effect that in the event that the Applicant did not execute the document within a particular timeframe that the agreement between the parties would lapse. Further, the Applicant says that had such demand been made, the demand would have been to seek to amend the deed of settlement to impose a timeframe which had not previously been agreed.

18 It is contended on behalf of the Applicant that he had no reason to believe that the Respondent would renege on the deal that it had entered into and that it was an error by Mr Trainer to presume that the Respondent would stand by its agreement notwithstanding the errors on the face of the Order. The error the Applicant points to is in paragraph 3 of the Order which states "… WHEREAS on 22nd August 2006 the Commission requested that the Applicant advise the Commission by 31st August 2006 the status of this matter failure of which may result in the matter being discontinued; …" It is pointed out there is nothing in the email from Associate to Senior Commissioner Gregor to that effect nor is there anything in the minutes of the proposed order which states that to be the case.

19 The Applicant says that it is open to the Commission to amend and vary the Order pursuant to s 27(1)(m) of the Act.

The Respondent's Submissions

20 The Respondent concedes that the terms of the agreement to compromise the Applicant's claim were agreed on 12 July 2006. However, the Respondent says that the Applicant was provided with an unsigned copy of the deed for him to confirm his acceptance of the terms and conclude the agreement. The agreement has not been signed by the Respondent.

21 The Respondent contends that it is not obligated to honour an agreement indefinitely in a situation where the other party goes missing or refuses to communicate his or her intention. In particular, it says the Applicant failed to sign the deed or did not communicate his acceptance or otherwise of the agreement and did not make any contact with the Respondent's representative even when the Respondent's representative sought to have the matter concluded. When asked to explain what steps were taken by the Respondent to have the matter brought to a conclusion, the Respondent's representative, Mr White said that he telephoned the Applicant's representative, Mr Trainer on a number of occasions in late July 2006 and August 2006, to ask for progress. He said that the explanation given by Mr Trainer for the delay in signing the deed was that the Applicant was having a child. However, the Respondent concedes there was no time given by the Respondent for the Applicant to sign the deed.

22 In relation to the email sent on 22 August 2006 by Ms Hewitt, Mr White informed the Commission at the hearing of this application that the Respondent did not have a record of the email. He said, however, that they were aware of the email which meant that they either received a copy of it or they were verbally informed that it was provided. He then said that he would have received notice of the email some time around 22 August 2006. However it is conceded that the Commission's record of the email does not indicate that it was sent to Mr White or to any other representative of the Respondent. When Mr White was asked whether he received a copy of the minutes of proposed order, he said: "not until they were confirmed". When it was put to Mr White that s 35 of the Act, requires an order to be drawn up in the form of minutes and handed down to the parties, Mr White said that his recollection was that they were aware of it (the minutes), so that when the Order was handed down there was no surprise. When questioned further, Mr White conceded on behalf of the Respondent that he could not say whether he received a copy of the minutes of proposed order or whether he was simply advised about it.

23 The Respondent argues that the settlement agreement lapsed on 6 September 2006, as the Applicant had walked away from the deal. The Respondent argues that it did not renege the agreement but the agreement was not confirmed by the Applicant and the consideration for the payment to the Applicant failed, that is the filing of a notice of discontinuance by the Applicant was no longer in place. It argues that the agreement was frustrated and lapsed. The Respondent points out that it was not until seven months after the conciliation conference before Senior Commissioner Gregor that Exhibit 2 was sent to the Respondent. The Respondent says that it should not have to honour the terms of settlement. In addition, the Respondent says that the agreement was not validly made because the Applicant did not acknowledge or confirm acceptance of the terms of settlement. Consequently the Respondent says that the Commission should not vary the Order to reflect the terms of the agreement, as there is a dispute as to the validity of the terms of the agreement. In support of submissions the Respondent referred to the decision of the Commission in *Thompson v Bituminous Products Pty Ltd and Anor* (2002) 82 WAIG 1309.

24 The Respondent also says that no injustice arises so as to require rectification of the Order as contemplated in the decision of the Supreme Court in *Monaco and Anor v Arnedo Pty Ltd and Anor* (1994) 13 WAR 522 ("*Arnedo Pty Ltd*"). In the alternative, the Respondent says that if the Commission does have the power to vary or rectify the Order that it should not exercise its discretion to do so. In support of this submission the Respondent referred to the decision of this Commission in *Downs-Stoney v Derbarl Yerrigan Health Service* (2004) 84 WAIG 2612 ("*Downs-Stoney").*

25 At the conclusion of oral submissions the parties were invited to provide supplementary submissions about the effect of the decision of the Industrial Appeal Court in *Registrar v Metals and Engineering Workers' Union of Western Australia and Others* (1994) 74 WAIG 1487 ("*Tom Price*") and the decision of the Full Bench in *Shortland v Lombardi Nominees Pty Ltd t/a Howard Porter* (2007) 87 WAIG 1158; [2007] WAIRC 00547 ("*Shortland*").

Supplementary Submissions by the Parties

26 The Applicant says that *Tom Price* and *McCorry v Como Investments Pty Ltd* (1989) 69 WAIG 1000 ("*Como Investments*") are authorities for the proposition that a decision of the Commission is delivered when it is deposited in the Registry. The Applicant also says that a prerequisite prior to delivery is the Commission is to draw up the proposed decision in minutes and hand the minutes to the parties pursuant to s 35(1) of the Act. The Applicant says that this is a mandatory requirement that must be complied with before delivery can be effective.

27 In relation to the facts of this matter, the Applicant says that it is clear from the email sent from the Commission on 22 August 2006 that the minutes of the proposed order were not sent to both parties. The Applicant argues that an order cannot be delivered in these circumstances and it is open to the Commission pursuant to s 27(1)(m), to remedy the omission by preparing new minutes for circulation to the parties. The Applicant also argues that the new minutes must include a correction of the "WHEREAS" statements because the facts disclose that the Commission did not seek the advice of the Applicant as to the status of the matter. If that correction is made, the basis upon which the Commission relied to make the decision to discontinue the matter falls away. Further, the Applicant argues that the Commission in preparing minutes to hand to the parties is to exercise its own discretion as to the terms of an order based on the material before it and that any order must be determined having regard to s 26 of the Act. The Applicant contends that the weight of the evidence strongly supports the Commission issuing an order in the terms of the agreement reached between the parties and contained in the second version of the deed of settlement tendered into evidence and accepted as reflecting the terms agreed between the parties on 12 July 2006 (*Exhibit 2*).

28 The Respondent makes no submission about the *Tom Price* case other than to say that the Respondent does not dispute that through its agent, Senior Commissioner Gregor communicated an opportunity for it to speak to matters contained in the minutes of the decision in accordance with s 35(3) of the Act. It says that both parties were provided with an opportunity to speak to the minutes as required by s 35(3) of the Act and that the Respondent's position is that the Order has been made in accordance with the Act and stands as per s 35(4) of the Act.

29 In relation to the *Shortland* decision the Respondent submits that that decision does not diminish its argument that the Applicant's action in failing to sign the deed and/or communicate its acceptance or otherwise of the agreement constituted a repudiation of the agreement.

Conclusion

30 It is apparent from the email dated 22 August 2006, the face of the minutes and the Order that the reasons given in the Order for making an order to discontinue the substantive application, do not reflect the facts known to the Commission at the time of issuing the minutes and the Order.

31 The reasons set out in the minutes do not reflect the facts known to the Commission at the time of issuing the minutes as the Applicant's agent had not at the time of issuing the minutes advised that the matter was finalised. In addition, the email stated that if no advice was received by close of business 31 August 2006 that the Applicant wished to speak to the minutes, the minutes would issue as is. The minutes did not issue as is, as the third paragraph of the minutes was changed from: "WHEREAS on 31st August 2006 the Applicant's Agent advised that the matter was finalised and the Commission decided to discontinue the proceedings", to a statement in the Order in the third and fourth paragraphs of the Order:

> "WHEREAS on 22nd August 2006 the Commission requested that the Applicant advise the Commission by 31st August 2006 the status of the matter failure of which may result in the matter being discontinued; and
>
> WHEREAS on by 31st August 2006 there being no advice from the Applicant the Commission decided to discontinue the proceedings."

32 Further, the Order does not reflect the facts known to the Commission at the time of issuing the Order as the email to the Applicant's agent requested that the Applicant advise by close of business on 31 August 2006 whether he wished to speak to the minutes. Although, the email stated that if no advice was received by that date the minutes would issue, in the terms of the minutes, the Order does not reflect that.

33 The next issue is whether the agreement between the parties was not concluded, lapsed or extinguished. Clauses 4 and 5.1 of the deed executed by the Applicant relevantly provides:

> "4 OBLIGATIONS OF THE LOCAL GOVERNMENT
>
> Subject to the execution of this Deed, the Local Government agrees to
>
> (a) provide a written records of service and to pay the Former Employee $7,962.00 (gross), $5,462.00, net of taxation ('the Settlement Sum').

(b) release and discharge Costa from all claims, or potential claims against Costa in respect of or arising directly or indirectly out of the Employment and/or the termination of the Employment, excluding when required by law."

5 EMPLOYEE OBLIGATIONS

5.1 Discontinuance and Release of the Local Government

In consideration of the terms of this Deed, and the performance by the Local Government of it's obligations pursuant to clause 3 of this Deed, the Former Employee:

(a) agrees to file a notice of discontinuance of the Matter with the WAIRC within 3 business days of receipt of the Settlement Sum, and to provide a copy of that notice to the representatives representing the Local Government in this matter.

(b) releases and discharges the Local Government from all claims, or potential claims against the Local Government in respect of or arising directly or indirectly out of the Employment and/or termination of the Employment."

(*Exhibit 2*)

34 It is common ground that the terms of the deed (*Exhibit 2*) were agreed to by the parties on 12 July 2007. Whilst pursuant to Clause 4 of the deed the settlement sum was not payable until the execution of the deed by the parties, I do not accept that the agreement between the parties was not concluded by the Applicant. On 12 July 2006, the Respondent's agent, Mr White asked Mr Trainer if the deed (*Exhibit 2*) was satisfactory to the Applicant could he (Mr Trainer) arrange for the Applicant to sign two copies. No condition subsequent was expressly agreed or can be implied that if the Applicant failed to sign the deed within a particular period of time, performance of the terms of the agreement would not be required. No basis has been put forward on which a finding of such a term could be implied. Further I do not accept that the Applicant was required to discontinue the proceedings prior to receipt of the settlement sum. To the contrary Clause 5.1 of the deed (*Exhibit 2)* provides that a notice of discontinuance was not required to be filed by the Applicant until 3 days after payment of the settlement sum.

35 The Applicant executed the deed sometime in November 2006 but the Respondent has not done so. Until the Respondent does so prima facie the settlement sum is not payable. Whether it is open to the Applicant to sue for specific performance or damages at common law is not a matter the Commission can make any findings about as specific performance is not a remedy available in these proceedings or is a matter the Commission generally has power to deal with.

36 I do not accept that the agreement to compromise the Applicant's claim was extinguished by the Order. As soon as you have ended a dispute in respect of an unfair dismissal by a compromise, you have disposed of the dispute (*Knowles v Roberts* (1888) 38 Ch D 263 at 272). As Beech C pointed out in *MacLeod v Paulownia Trees Pty Ltd* (1997) 78 WAIG 1057 at 1057, once an agreement to compromise is reached, the claim of unfair dismissal is no longer before the Commission but the agreement of the parties in settlement of it. Consequently if it can be said the parties concluded the terms of the agreement on 12 July 2007 the Applicant's claim that he was unfairly dismissed would have been extinguished. However the application prima facie remained on foot until the Order was made to discontinue. I use the words prima facie as an issue arises in these proceedings whether the Order can be corrected or varied or whether the Order was enforceable as an Order under the Act. After an Order is perfected an agreement to compromise remains on foot and unless impeached is enforceable as a contract between the parties.

37 The Respondent says the agreement is impeached as the agreement was not concluded as the Applicant did not acknowledge or confirm acceptance of the terms of settlement. That argument fails as the Applicant signed the deed *(Exhibit 2*) sometime in November 2006 and the executed deed was provided to the Respondent through its agent Mr White sometime in January or February 2007. As time for communication of acceptance by executing and the delivery of deed to the Respondent was not limited, acceptance was complete at the time Mr White received the copies of the deed executed by the Applicant, as at no time did the Respondent seek to withdraw the offer prior to that time. In any event it is conceded by the Respondent that the agreement to compromise was complete on 12 July 2006. Consequently it could be said that communication by the Applicant that the terms of the deed were acceptable was unnecessary. It is however not necessary to decide this point.

38 In light of these findings does the Commission have the power to correct or amend the Order and if so should the Commission exercise its discretion to do so? In *Adriansz v Epath WA Pty Ltd* (2003) 83 WAIG 917 ("*Epath WA"*) Sharkey P and Coleman CC in a joint judgement considered the Commission's power to correct an error in an order made by the Full Bench that was deposited in the office of the Registry after the requirements of s 35(1) of the Act had been complied with and observed at [1] to [8]:

> "1 This was a matter where minutes of proposed order were issued by the Full Bench on 21 February 2003, and a time notified to the parties within which they were required to advise the Full Bench if either wished to speak to the minutes of the proposed order.
>
> 2 After the time of expiry of such a period, and after the order was perfected by depositing in the office of the Registrar, namely 24 February 2003, the solicitors for the respondent wrote to the Commission requesting that the figure of compensation to be awarded as contained in the order of the Full Bench be amended because it was an incorrect figure and did not reflect the reasons for decision of the Full Bench. At no time was that contention said to be wrong. There was such an error. However, the matter was not raised on a speaking to the minutes as it should have been and normally would have been raised. No explanation was made concerning this omission.

> 3 The matter was one which in other jurisdictions could be corrected pursuant to the slip rule.
>
> 4 Correction powers in this Commission exist by virtue of s.27(1)(m) of *the Industrial Relations Act* 1979 (as amended) and this confers, inter alia, a power akin to the slip rule also (see *Aussie Online Ltd v Lane* (2001) 81 WAIG 2511 (FB)).
>
> 5 In our opinion, notwithstanding that s.27 powers are exercisable "in relation to any matter before it", there was power in the Commission to correct under s.27(1)(m), such an obvious error. The contention was that the Commission would be acting functus officio and have no power to so act.
>
> 6 The general rule is that once an order has been sealed or a judgement entered up it may only be varied by an appeal. However, after a decision in whatever form is perfected by depositing it in the office of the Registrar the Commission may amend it to correct an error or amend it to make good an omission due to the inadvertence of court officers or the Commission or due to the inadvertence of the parties' representatives. Accidental slips or omissions are not confined to subsidiary or inconsequential matters but may relate to any matter in issue in the proceedings or to something incidental to such a matter (see *Milson v Carter* [1893] AC 638 at 640 and *Shaddock and Associates Pty Ltd v City of Parramatta (No 2)* (1982) 151 CLR 590 at 594, and also Seaman "*Civil Procedure "*, Volume 1, 5710).
>
> 7 The Commission is not functus officio for the purposes of correcting an error of that type. Such a case was this. That is because the Commission is not functus officio until it has issued, in its opinion, a decision without an error and the matter is still before it for the purpose of correcting that error and for no other purpose. Put another way, the matter, for the purposes of s.27(1)(m), was still before the Commission until it corrected the "slip rule error" in its order.
>
> 8 Of course, the Commission will not retain jurisdiction once the order has been perfected for any other purpose."

Similar observations were made by Malcolm CJ and Kennedy J in *Arnedo Pty Ltd.*

39 In this matter it is questionable whether the Order took effect. Section 35 of the Act provides:

> "(1) Subject to this section, the decision of the Commission, except a direction, order or declaration under section 32 or an order for dismissal shall, before it is delivered, be drawn up in the form of minutes which shall be handed down to the parties concerned and, unless in any particular case the Commission otherwise determines, its reasons for decision shall be published at the same time.
>
> (2) At the discretion of the commissioner giving the decision the minutes and reasons for decision may be handed down by the Registrar.
>
> (3) The parties concerned shall, at a time fixed by the Commission, be entitled to speak to matters contained in the minutes of the decision and the Commission may, after hearing the parties, vary the terms of those minutes before they are delivered as the decision of the Commission.
>
> (4) The Commission, with the consent of the parties, may waive the requirements of this section in any case in which it is of the opinion that the procedures therein prescribed are inappropriate or unnecessary."

Unless the Order could be said to have been made pursuant to s 32 of the Act (which would have the effect that the requirements of s 35 of the Act do not apply), even if I accept the Respondent's vague assertion that they were aware of the minutes prior to the order being made I do not accept that "awareness" satisfied the mandatory requirement in s 35(1) that the minutes be handed down. The words "handed down" contemplates delivery to the parties of the document containing the minutes (*Como Investments* per Brinsden J at 1003 and *Tom Price* per Kennedy J at 1488). That did not occur in this case as the minutes were not delivered to the Respondent. Until a decision is perfected in the manner required by ss34, 35 and 36 of the Act it is not an order and is thus unenforceable (*Tom Price* per Kennedy J at 1489). However a single member of the Commission is not empowered to quash an order of the Commission. Such a remedy is only available on appeal to the Full Bench (see ss 34(4) and 49(5)(b) of the Act). Further a single Commissioner has no power to revoke an order of the Commission that has been perfected (*Aussie Online Limited v Lane* (2001) 81 WAIG 2511. Consequently I must treat the Order as on foot.

40 The decision of the Full Bench in *Epath WA* makes it clear that the Commission does have power to correct an order. However should the Commission do so in this matter? In this matter the error or inadvertence which lead to making the Order was on the part of Mr Trainer who did not view the email containing the minutes until after the Order was made. In addition the Commission erred in making the Order in that the reasons set out in the Order do not reflect the minutes, nor do the reasons in the Order reflect the facts known to the Commission at the time the minutes issued.

41 In *Deputy Commissioner of Taxation for the Commonwealth of Australia v Healy & Anor* [2003] WASC 38 Hasluck J had before him an application to set aside a judgment made by consent. The application was made pursuant to the slip rule. The parties had reached an agreement to settle part of the action whereby it was agreed that one claim was to be disposed of by the entry of a consent judgment in favour of the plaintiff in the sum of $151,113.00 with the defendants to pay interest of that amount plus costs. It was agreed that the defendants would have liberty to contest the balance of the claim being advanced by the plaintiff. A memorandum of consent signed by the parties was not sufficiently precise. The plaintiff obtained judgement

that "…the Defendants pay to the Plaintiff $151,113.00 together with interest thereon in the sum of $4,496.12 and $500.20 costs." The plaintiffs later applied to set aside the judgment. After reviewing a number of authorities including *Shaddock and Associates Proprietary Limited and Another v The Council of the City of Parramatta* (1982) 151 CLR 590 and *Arnedo Pty Ltd*, Hasluck J observed at [26]:

> "The decided cases suggest that the crucial considerations are whether the matter now sought to be corrected would have been attended to at once if the matter had been raised for consideration before judgment was entered and whether the matter to be resolved would require the exercise of an independent discretion or could be regarded as a matter upon which a real difference of opinion might exist. Further, it seems that the slip rule allows for the correction of any infelicity or ambiguity in the expression of the judgment which would result in the order of the Court having an untoward effect."

His Honour had regard to the compromise agreement and concluded that there was no basis for an exercise of an independent discretion as to what was the amount to be allowed to the plaintiff and that if the matter had been brought to the attention of the Court the correction in question would have been made in order to give precise expression to the underlying compromise agreement negotiated by the parties. Further he did not consider that there was any reason why it would be expedient or inequitable to make the order sought.

42 Similarly in this matter there can be no basis for an exercise of independent discretion as to what the amount should be paid to the Applicant by the Respondent as the terms of the compromise agreement are not in dispute. It is clear that the Commission would not have made an order dismissing the Applicant's claim if it were aware that the email and minutes had not been read by the Applicant's agent prior to making the Order and that the Respondent would refuse to perform the terms of the compromise agreement and treat the agreement as having lapsed on the day the Order was made. If the Commission had been aware of those facts it would not have made the Order to discontinue. In particular it would not have made an order that would have resulted in the Applicant being denied the benefit of the compromise. In my opinion it would be inequitable not to amend the Order that the Respondent pay the Applicant the amount the Respondent agreed to pay him to compromise his claim that he was unfairly dismissed.

43 The question that now arises is whether the Commission has the power to amend the Order to provide the specific remedy sought by the Applicant. The power of the Commission to make an order to enforce the terms of a compromise agreement was considered by the Commission in *Downs- Stoney* at [42] to [53] where I observed:

> "42 In *Thompson v Bituminous Products Pty Ltd* (op cit) the issue before the Commission in that case is whether parties reached an agreement to compromise a claim under s 29B(1) of the Act. In that case there was a dispute as to whether an offer was made to compromise all claims including for a claim of under payment of award entitlements claimed on behalf of the Applicant by the Construction, Forestry, Mining and Energy Union in the Industrial Magistrates' Court. I observed in paragraph [12].
>
> > "Although I have concluded that the Commission does have the power to hear and make a declaration as to whether the parties have, by agreement, compromised an application and to make orders to enforce a compromise agreement, it is my view that the Commission should not exercise its power to hear and determine whether this application has in fact been compromised by an agreement between the parties. The reason I have reached this view is that it is clear that the remedy the Applicant seeks is in the nature of a summary judgement or relief. In an application for enforcement of a compromised agreement in the Supreme Court in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd* unreported; SCt of WA; del. 21 February 1995 Heenan J at page 7 observed:
> >
> > 'Bearing in mind that the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried (see *Fancourt and Another v Mercantile Credits Ltd* (1983) 48 ALR 1 at 10) I am satisfied that this is a case in which the power should be exercised. On the material before me it is clear not only that the Court has the power in these proceedings to enforce an agreement compromising the action but also that the agreement in question is binding upon the first defendant.'
>
> Further in *Chesterton International (WA) Pty Ltd v Interchange Holdings Pty Ltd (op cit)* Heenan J, at page 5, observed that if there was a substantial dispute as to the terms of the agreement in question the summary procedure would be inappropriate. Murray J in *Dalmation Nominees Pty Ltd v Marinovich (op cit)* made similar observations at page 14 of his reasons for decision. In my view the order sought by the Applicant is an order enforcing the agreement. In *Roberts v Gippsland Agricultural Earthmoving Contracting Co Pty Ltd* [1956] VLR 555 at 561 Smith J observed:
>
> > 'And it is to be observed, at the outset, that what we are concerned with here is not the class of case in which, following upon the making of an agreement for the compromising of an action, an order has been pronounced with the real or apparent consent of both parties, and one of them then says that the order should not be drawn up or should be set aside. What we are concerned with is the class of case in which, following upon the making of such an agreement, and at a stage when no order has been pronounced, one of the parties comes to Court, with the other opposing, and asks the Court to make an order to which, by the agreement, the other party undertook to give his consent, or an order directing the other party to pay money or do some other act which, by the agreement, he undertook to do. In other words it is the class of case in which a party to an action comes to the Court seeking what is, in effect, an order enforcing the agreement specifically.'

Smith J dealt with a number of rules of practice in relation to enforcement of compromise action and summary procedure at page 562-563. At 563 he observed that it would not be appropriate to make orders in terms of an agreement if there was a:

> '(d) …substantial question to be determined as to what were the terms of the agreement, or as to whether it was valid or specifically enforceable, as for example where a substantial case was put forward of material mistake or of other circumstances such as would afford a defence to a suit for specific performance, a party would ordinarily be left to proceed by separate bill so that the matters raised might be fully investigated: see *Askew v Millington (supra); Richardson v Eyton (supra); Edwards on Compromises*, p. 186; *Fry on Specific Performance* (6th ed.), p.720.' "

43 In *Thompson v Bituminous Products Pty Ltd* (op cit) it was conceded by the parties that the Commission does have power in an appropriate case to make orders in terms of a compromise agreement. In this matter the Respondent makes no such concession and says that the compromise agreement constitutes a separate contract which cannot be dealt with by the Commission under s 29(1)(b) of the Act.

44 The Commission is not a superior court of record, it has no inherent jurisdiction, and its jurisdiction is limited to that explicitly provided by the Act *(Robe River Iron Associates v Federated Engine Drivers and Firemen's Union of Workers' of Western Australia* (1987) 67 WAIG 315; *Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers', Western Australian Branch* (1992) 72 WAIG 1499). The Commission's powers are circumscribed by statute. In respect of an application under s 29, powers to make orders are confined to the express provisions of the Act (see *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26). The Commission does have implied powers that arise by necessary implication out of the effect of exercise of a jurisdiction which is expressly conferred (*Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J). Pursuant to s 12(1) of the Act the Commission is a Court of record. It exercises judicial power when hearing and determining claims by an employee under s 29(1)(b). As its jurisdiction is limited it is an inferior court of record. Dawson J, in *Grassby v The Queen* (1989) 168 CLR 1 at 16, delivered the leading judgment of the court in which he discussed the limits of the implied jurisdiction of an inferior court. Dawson J, first referred to Menzies J observations in *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7, that implied jurisdiction requires no authorising provision, and Dawson J then went on to say at 16 to 17:

> "Inherent jurisdiction is an elusive concept and the proposition that it arises from the nature of a court has been described as metaphysical. See *Yale Law Journal* , vol. 57 (1947) 83, at p. 85, cited by Jacob, 'The Inherent Jurisdiction of the Court', *Current Legal Problems* , vol. 23 (1970) 23, at p. 27. But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J. points out, fundamental.
>
> …

It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'."

45 In this matter the Commission has before it an application under s 29(1)(b)(i) and (ii). Despite the fact the Applicant was reinstated to her position as Director, Client Services on 23 September 2003, the application was not discontinued. The Commission cannot in this case make orders expressly under s 23A in relation to the application under s 29(1)(b)(i) because as the Respondent points out the Commission may only make an order under the section if the Commission determines that the dismissal of an employee was harsh, oppressive or unfair. Section 23A has no application to a contractual benefit claim under s 29(1)(b)(ii). This matter has been the subject of conciliation and arbitration under ss 23(1) and 32 of the Act. The Commission has no express power under ss 23(1), 23A or 32 to make an order in terms of a compromise agreement. Although there is no express power vested in the Commission to make an order in terms of a compromise agreement I am of the view that the Commission has inherent power to do so in relation to this matter. The reasons why I have reached this conclusion are as follows.

46 This application was referred for conciliation and for arbitration under ss 23(1) and 32 of the Act. Section 23(1) provides:

"(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter."

47 Section 32(1), (2) and (7) provides:

> "(1) Where an industrial matter has been referred to the Commission the Commission shall, unless it is satisfied that the resolution of the matter would not be assisted by so doing, endeavour to resolve the matter by conciliation.
>
> (2) In endeavouring to resolve an industrial matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter.
>
> (7) Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation."

48 Section 32A of the Act provides that conciliation and arbitration functions may be exercised at anytime and are not limited by any other provision of the Act.

49 Pursuant to s 7(1a) of the Act the Commission still has before it an industrial matter. Section 7(1a) provides:

> "(1a) A matter relating to —
>
> (a) the dismissal of an employee by an employer; or
>
> (b) the refusal or failure of an employer to allow an employee a benefit under his contract of service,
>
> is and remains an industrial matter for the purposes of this Act even though their relationship as employee and employer has ended."

50 As Beech C, observed in *MacLeod v Paulownia Trees (op sit)*, s 6(b) and (c) of the Act are consistent with making order in terms of a compromise agreement. Section 6(b) and (c) provide it is a principal object of the Act:

> "(b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes;
>
> (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality;"

51 For a power to be implied, it must be necessary for the effective exercise of the jurisdiction. What is "necessary" requires identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies provided for in the Act (see *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435 at 452; [51] per Gaudron, Gummow and Callinan JJ).

52 I am of the view that the Commission has power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with everything that is necessary for the effective exercise of the power.

53 In the context of claims made under s 29(1)(b) it is reasonably necessary or legally ancillary to the proper object of accomplishing settlement of industrial disputes that parties be held to their bargains and the means for holding them to their bargains be carried out with the maximum of legal form and technically. The implied power does not extend to making orders that are not within the scope of the original application or to make orders in terms of a compromise that could not have been made following an arbitration of the merits of the application in the absence of any compromise agreement. For example the Commission could not make an order requiring the Respondent to pay the Applicant's legal costs as to do so is contrary to s 27(1)(c) of the Act."

44 In this matter I am satisfied that the terms of the agreement are unimpeached as the Respondent has not raised any substantial question that has merit as to whether the agreement is valid. I am also satisfied that the amendment to the Order sought by the Applicant is within the scope of orders the Commission can make in respect of a claim brought under s 29(1)(b)(i) of the Act.

45 For these reasons the Order will be amended as follows:

> WHEREAS on 27th March 2006 Mark Costa (the Applicant) applied to the Commission for an order pursuant to the *Industrial Relations Act* 1979 ("the Act");
>
> WHEREAS on 14th June 2006 Senior Commissioner Gregor conducted conciliation proceedings between the parties and the matter was settled pending finalisation of a deed of settlement;
>
> WHEREAS on 22nd August 2006 the Commission requested that the Applicant advise the Commission by 31st August 2006 the status of the matter;
>
> WHEREAS on by 31st August 2006 there being no advice from the Applicant, the Commission decided to discontinue the proceedings;
>
> WHEREAS on 6th September 2006 the Commission ordered that Application U258 of 2006 be discontinued;
>
> WHEREAS an error occurred in the Order dated 6th September 2006 issued in Application U258 of 2006;
>
> WHEREAS the Commission has been informed that the Applicant's agent did not view the Commission's correspondence sent on 22nd August 2006 until after 6th September 2006;

WHEREAS the Applicant and the Respondent reached an agreement to compromise the Applicant's claim the terms of which were set out in a deed of settlement sent to the Applicant to execute prior to the 6th of September 2006, but not executed by the Applicant until sometime in November 2006;

WHEREAS two copies of the deed of settlement which were executed by the Applicant were sent to the Respondent for execution sometime in January or February 2007;

WHEREAS on the 14th February 2007 the Respondent's agent informed the Applicant's agent that it was the Respondent's opinion that the settlement agreement had lapsed as the matter had been discontinued due to the Applicant's failure to conclude the settlement agreement entered into; and to communicate the status of the matter;

WHEREAS it was not a term of the agreement to compromise that the Applicant execute the deed of settlement within a specified period of time;

WHEREAS the Commission would not have made the order to discontinue Application U258 of 2006 if it were aware that the Applicant's agent had not viewed the Commission's correspondence sent on the 22nd August 2006 and that the Respondent would refuse to perform the terms of the compromise agreement and treat the agreement as having lapsed; and

WHEREAS the Commission, in order to correct this error, pursuant to the powers conferred on it by the Act, hereby orders;

THAT the words: "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" in the order made on 6th September 2006 in Application U258 of 2006 be deleted and to now read: "THAT the Respondent is to pay the Applicant $5,462.00 (net) of taxation by close of business 21 September 2007".

46 A minute of proposed orders will now issue in the terms set out above.

2007 WAIRC 01103

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK COSTA
	APPLICANT
	-v-
	THE CHIEF EXECUTIVE OFFICER OF THE CITY BAYSWATER
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 13 SEPTEMBER 2007
FILE NO/S	U 258 OF 2006
CITATION NO.	2007 WAIRC 01103

Result Amendment made

Order

WHEREAS on 27th March 2006 Mark Costa (the Applicant) applied to the Commission for an order pursuant to the *Industrial Relations Act* 1979 ("the Act");

WHEREAS on 14th June 2006 Senior Commissioner Gregor conducted conciliation proceedings between the parties and the matter was settled pending finalisation of a deed of settlement;

WHEREAS on 22nd August 2006 the Commission requested that the Applicant advise the Commission by 31st August 2006 the status of the matter;

WHEREAS on by 31st August 2006 there being no advice from the Applicant, the Commission decided to discontinue the proceedings;

WHEREAS on 6th September 2006 the Commission ordered that Application U258 of 2006 be discontinued;

WHEREAS an error occurred in the Order dated 6th September 2006 issued in Application U258 of 2006;

WHEREAS the Commission has been informed that the Applicant's agent did not view the Commission's correspondence sent on 22nd August 2006 until after 6th September 2006;

WHEREAS the Applicant and the Respondent reached an agreement to compromise the Applicant's claim the terms of which were set out in a deed of settlement sent to the Applicant to execute prior to the 6th of September 2006, but not executed by the Applicant until sometime in November 2006;

WHEREAS two copies of the deed of settlement executed by the Applicant were sent to the Respondent for execution sometime in January or February 2007;

WHEREAS on the 14th February 2007 the Respondent's agent informed the Applicant's agent that it was the Respondent's opinion that the settlement agreement had lapsed as the matter had been discontinued due to the Applicant's failure to conclude the settlement agreement entered into; and to communicate the status of the matter;

WHEREAS it was not a term of the agreement to compromise that the Applicant execute the deed of settlement within a specified period of time;

WHEREAS the Commission would not have made the order to discontinue Application U258 of 2006 if it were aware that the Applicant's agent had not viewed the Commission's correspondence sent on the 22nd August 2006 and that the Respondent would refuse to perform the terms of the compromise agreement and treat the agreement as having lapsed; and

WHEREAS the Commission, in order to correct this error, pursuant to the powers conferred on it by the Act, hereby orders;

THAT the words: "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" in the order made on 6th September 2006 in Application U258 of 2006 be deleted and to now read: "THAT the Respondent is to pay the Applicant $5,462.00 (net) of taxation by close of business 21 September 2007".

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

2007 WAIRC 01145

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIE JENNIFER GHERGHETTA
	APPLICANT
	-v-
	TIMBERLANE HOLDINGS PTY LTD T/A ROY WESTON WARWICK
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 3 OCTOBER 2007
FILE NO/S	B 147 OF 2007
CITATION NO.	2007 WAIRC 01145
Result	Discontinued

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on 25 September 2007 the applicant advised the Commission in writing that an agreement had been reached between the parties and that she wished to discontinue her application; and

WHEREAS on 25 September 2007 the respondent consented to the matter being discontinued;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
[L.S.] Commissioner.

2007 WAIRC 01115

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON HALL
	APPLICANT
	-v-
	CHALLENGER FORD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 24 SEPTEMBER 2007
FILE NO	U 106 OF 2007
CITATION NO.	2007 WAIRC 01115

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr J H Brits (of Counsel)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 21 June 2007, the Commission wrote to the Applicant requesting that he provide reasons in writing within 28 days why the Commission may have jurisdiction to hear and determine his claim and informing him that if he did not contact Senior Commissioner Smith's chambers within 28 days, Senior Commissioner Smith may make an order to dismiss his claim;

AND WHEREAS on 9 August 2007, the Applicant had not submitted his reasons nor had he contacted Senior Commissioner Smith's chambers in respect of this matter;

AND WHEREAS on 9 August 2007, the Commission wrote to the Applicant requesting that if he did not provide reasons in writing nor contact Senior Commissioner Smith's chambers within 28 days, Senior Commissioner would dismiss his application;

AND WHEREAS on 24 September 2007, the Applicant had not responded to the letter dated 9 August 2007 nor had he contacted Senior Commissioner Smith's chambers in respect of this matter;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act*, hereby orders:

THAT the application be and is hereby dismissed.

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

2007 WAIRC 01134

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMILY JEANETTE JESSUP
	APPLICANT
	-v-
	PERTH AUTO ALLIANCE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 OCTOBER 2007
FILE NO/S	U 165 OF 2006
CITATION NO.	2007 WAIRC 01134

Result	Application discontinued
Representation	
Applicant	Mr T. Solomon (as agent)
Respondent	Mr E Rea and later Mr D Johnston (as agent)

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 28 April 2006 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference matters remained unresolved between the parties;

AND WHEREAS the matter was listed for hearing on 26 June 2006;

AND WHEREAS the Commission adjourned the hearing into a conference and an agreement was reached between the parties at that conference;

AND WHEREAS on 31 August 2007 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2007 WAIRC 01133

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TAHJANA NORRISH
	APPLICANT
	-v-
	SUMMIT STORAGE PRODUCTS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 2 OCTOBER 2007
FILE NO	U 121 OF 2007
CITATION NO.	2007 WAIRC 01133

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS on 4 September 2007 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2007 WAIRC 01131

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JESSICA TURNBULL
	APPLICANT
	-v-
	HEALTHLEA TRUST
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 28 SEPTEMBER 2007
FILE NO/S	U & B 150 OF 2007
CITATION NO.	2007 WAIRC 01131

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr S Cheeson

Order

HAVING heard Ms J Turnbull on her own behalf and Mr S Chesson on behalf of the respondent, the Commission pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby orders –

THAT the applications be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2007 WAIRC 01135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN TURNER
	APPLICANT
	-v-
	PATHWEST FORMERLY PATHCENTRE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
HEARD	THURSDAY, 20 SEPTEMBER 2007
DELIVERED	TUESDAY, 2 OCTOBER 2007
FILE NO.	U 110 OF 2007
CITATION NO.	2007 WAIRC 01135

CatchWords	Industrial law (WA) - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Application referred outside of 28 day time limit - Dismissal before legislation introduced to allow Commission to extend time - Whether the Commission's power to extend time retrospective - Presumption against retrospective application - No power to extend time - Application for extension of time dismissed - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), (2) and (3) - *Labour Relations Reform Act 2002* (WA) s 139 (2)
Result	Application for extension of time dismissed
Representation	
Applicant	Mr K Turner (in person)
Respondent	Mr C Gleeson

Reasons for Decision

1 The applicant, Kevin Turner, claims that on 1 January 2000 he was harshly, oppressively, or unfairly dismissed from his employment by the respondent. The applicant sought to refer the claim to the Commission by way of a notice of application lodged with the Registrar on 18 June 2007. The applicant also seeks that the application be received outside the 28 day time limit set for the referral of such applications. The reasons given by Mr Turner in his application for the claim not being lodged within 28 days of the termination of his employment and why it would be unfair not to accept his claim include that he has:

1) Bi-polar disorder and the dismissal caused demonstrated semi-permanent psychiatric trauma and he is only able to make the claim after several years of treatment;

2) Only recently received the outcome of an investigation by the Medical Board of Western Australia that provided him with the documents that he needed to prove that his dismissal was both unfair and unlawful; and

3) Only recently received information through the *Freedom of Information Act 1992* to support his claim.

2 The first issue to be considered in this matter is whether the Commission has jurisdiction to receive Mr Turner's claim given that the dismissal occurred in January 2000. The starting point for that consideration is the statutory scheme. Section 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the IR Act") provides for an employee to refer a claim to the Commission that he has been harshly, oppressively or unfairly dismissed from his employment.

3 Until 1 August 2002, s 29(2) provided that:

> "A referral by an employee under s (1)(b)(i) cannot be made more than 28 days after the day on which the employee's employment terminated."

This meant that there was no jurisdiction in the Commission to extend time in which to make such an application (*Richardson v Cecil Bros* (1994) 74 WAIG 1017).

4 On 1 August 2002, s 139(2) of the *Labour Relations Reform Act 2002* ("the Reform Act") repealed s 29(2) of the IR Act and inserted a new s 29(2) together with s 29(3) which now reads:

> "(2) Subject to subsection (3), a referral under subsection (1)(b)(i) is to be made not later than 28 days after the day on which the employee's employment is terminated.
>
> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

5 The question then is whether Mr Turner is able to seek that the Commission extend time for him to file the application on the basis of s 29(3).

6 The Full Bench of the Commission in *Carnarvon Medical Service Aboriginal Corporation v Nicholas Jonathon Styles* (2003) 83 WAIG 2751 dealt with the question of the application of the legislation and whether it had retrospective effect. In particular, his Honour the President referred to the general rule in respect of retrospectivity set out in *Maxwell v Murphy* (1957) 96 CLR 261 being that:

> "… a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

7 His Honour also noted that in *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 131 ALR 465 the majority of the High Court said that:

> "The relevant question for the purpose of determining whether it is to be presumed that a statutory provision was not intended to have retrospective operation in the sense of applying to past events is not, however, whether it can be broadly characterised as a procedural provision. It is whether the provision's operation is merely procedural in the sense that it would not if given unconfined operation, affect pre-existing substantive rights or liabilities. It is only if a statutory provision is merely procedural in that narrow sense that the ordinary presumption against retrospective operation is inapplicable." (*Deane, Dawson, Toohey and Gaudron JJ* at 479).

8 Therefore, there is a common law presumption that a statutory provision is not intended to have retrospective effect in the sense that it applies to past events. It is only where the statutory provision is merely procedural that that presumption is negated.

9 In this case, as noted in *Carnarvon Medical Service Aboriginal Corporation v Nicholas Jonathon Styles* (op cit), s 29 as amended by the Reform Act does in fact affect pre-existing substantive rights or liabilities that is, in this particular case, the right of the employer not to have a claim made against it after the period of 28 days.

10 In these circumstances, s 29(3) is not procedural and therefore the presumption that the legislation does not have the effect of applying to past events arises. Accordingly, any dismissal which occurred prior to 1 August 2002 is not one to which 29(3) applies, save for a situation where the 28 days time limit commenced prior to 1 August 2002, but expired after that date. As the termination of Mr Turner's employment occurred in December 2000, there is no jurisdiction in the Commission to receive his claim of unfair dismissal beyond the 28 days allowed.

11 Accordingly, the application will be dismissed.

2007 WAIRC 01136

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN TURNER
	APPLICANT
	-v-
	PATHWEST FORMERLY PATHCENTRE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 2 OCTOBER 2007
FILE NO/S	U 110 OF 2007
CITATION NO.	2007 WAIRC 01136

Result	Application for extension of time dismissed

Order

HAVING heard the applicant on his own behalf and Mr C Gleeson on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application for extension of time be and is hereby dismissed.

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

2007 WAIRC 01148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOE VISSER
	APPLICANT
	-v-
	ERAL PTY LTD AS TRUSTEE FOR THE PRESTIGE PRODUCTS UNIT TRUST TRADING AS COMPLEAT ANGLER & CAMPING WORLD ROCKINGHAM
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 22 AUGUST 2007, FRIDAY, 7 SEPTEMBER 2007
DELIVERED	THURSDAY, 4 OCTOBER 2007
FILE NO.	U 118 OF 2007
CITATION NO.	2007 WAIRC 01148

CatchWords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Whether Commission has jurisdiction – Principles applied – Commission satisfied respondent is a constitutional corporation – Claim beyond Commission's jurisdiction – Application dismissed – *Industrial Relations Act* 1979 (WA) s 29(1)(b)(i), *Commonwealth Constitution* s 51(xx)
Result	Order Issued
Representation	
Applicant	In person
Respondent	Ms A Gee

Reasons for Decision

1. This is a claim brought pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that he was harshly, oppressively and unfairly dismissed by the respondent on or about 21 June 2007.

2. The respondent objects to and opposes the applicant's claim and says that the applicant was dismissed as a consequence of failing on a number of occasions, to attend for duty as rostered.

Preliminary Issue of Jurisdiction

3. The notice of application cites "Compleat Angler & Camping World Rockingham" as the respondent. It was submitted by the respondent and it is self evident, that the respondent as named is merely a trading name and as such has no identifiable legal personality and could not have been the applicant's employer. The respondent submitted that the applicant's employer was in fact "Eral Pty Ltd as trustee for the Prestige Products Unit Trust trading as Compleat Angler & Camping World Rockingham"

("Eral"). The Commission afforded the parties the opportunity of being heard on this issue and both parties, as a part of putting their cases, gave evidence about these matters.

4. The applicant testified that when he commenced employment, there was no document setting out the terms and conditions of his employment, other than a document described as "pay and job description" a copy of which was tendered as exhibit A1. This document does not refer to any corporate entity as the employer. A Tax File Declaration form was tendered in evidence as exhibit A2, which discloses that the applicant's payer referred to an Australian Business Number "60 015 952 132" and a business or trading name as "Compleat Angler & Camping World Rockingham". The applicant further testified that he received his wages generally in cash and a copy of a bundle of time sheets tendered in evidence by the applicant as exhibit A7, apparently taken as an extract from the respondent's wages book, only refers to the respondent by its trading name.

5. However, also tendered in evidence as exhibit A4, was a letter of 9 July 2007 to the applicant, enclosing his final termination payment. A photocopy of a cheque in the sum of $395.20 is included on the copy of this letter, which describes the payer as "ERAL PTY LTD ACN 009465543 ITF PRESTIGE PRODUCTS UNIT TRUST T/AS ROCKINGHAM FISHING & CAMPING WORLD".

6. Ms Gee, who appeared for the respondent, also gave evidence. She testified that at all material times the employer of the applicant was Eral Pty Ltd as the corporate trustee of the Prestige Products Unit Trust. Ms Gee tendered a number of documents in support of this contention. A "Business Names Extract – Western Australia", as exhibit R2 discloses that the respondent's business name is that as set out in the notice of application. It further identifies the corporation currently carrying on the business as Eral with a corporate registration number 009 465 543. The business address of Eral as set out in the Business Names Extract is "c/- Harden East and Conti L1 20 Kings Park Road West Perth WA 6005". Also tendered in evidence as exhibit R3 was a letter dated 5 September 2007 from Harden East and Conti Chartered Accountants by a Mr Simon Read, to the effect that Eral owns and operates the respondent business. Furthermore, tendered as exhibits R4 and R5 were firstly, a copy of the certificate of incorporation of Eral establishing its incorporation as a proprietary limited company limited by shares on 5 July 1990.

7. Exhibit R5 is a copy of a deed of trust dated 8 August 1990, establishing a trust known as the Prestige Products Unit Trust with Eral Pty Ltd appointed as the trustee. The trust instrument confers a variety of powers on Eral Pty Ltd as trustee, including the powers at cl 33(j) to carry on either alone or in partnership under any name the trustee thinks fit, a trade or business and under cl 33(k), to employ any person in connection with any such trade or business carried on by the trustee and any incidental powers necessary to effect those purposes.

Proper Identity of Employer

8. It is trite to observe, as I have noted above, that a business or trading name is not a separate legal entity and cannot be an employer. Similarly, a trust upon its creation is not accorded any separate legal personality. It has been said that the nature of a trust is:

> *"a collection of duties, disabilities, rights and powers in relation to some specific property imposed upon or accorded to an existing legal person, the trustee. A trustee, as such, is not a distinct legal person, in a representative capacity, separate from himself, in his personal capacity. ….a trust not being an entity separate from the trustee or beneficiaries cannot be a party to legal proceedings. A person who is the trustee is the appropriate party. In general, apart from statute, in proceedings relating to trust activity the trustee is not sued and does not sue in any special capacity": Principles of the Law of Trusts* Ford and Lee LBC 1983 at 39. (See also as to corporate trustees *Ford's Principles of Corporations Law* 13th Ed 2007 at 1.360-1.370; 4.225)

9. In this case, I am satisfied and I find on the evidence, that the business of the respondent as cited by the applicant in the notice of application, was conducted by a common form of trading trust through the corporate trustee Eral Pty Ltd. I am satisfied on the evidence and I find that at all material times Eral has conducted and conducts the business of the named respondent and as a part of its responsibility for conducting the business, employed and employs all relevant staff including the applicant. This is despite the fact that the existence of the corporate trustee and the trading trust was not apparent to the applicant at the time that he accepted his offer of employment. However, this does not alter the conclusion that must be reached, that at all material times it was Eral that was his employer.

10. Moreover, a trust, such as the unit trading trust conducting the business of the respondent, does not have liabilities or assets as those assets and liabilities vest in and are imposed on the trustee, in this case Eral Pty Ltd. It is to Eral Pty Ltd, as the corporate trustee, and as his former employer, to which the applicant must turn to seek a remedy in the present case.

11. Given that the applicant has genuinely laboured under a misapprehension as to the proper identity of his employer, and I am satisfied that at all material times the applicant intended to commence these proceedings against his employer, it is an appropriate case for the exercise of the Commission's powers of amendment under s 27(1)(l) and (m) of the Act, to substitute the proper identity of the applicant's employer for the trading or business name as presently cited: *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375. The Commission will order accordingly.

Trading or Financial Corporation

12. The Commission foreshadowed with the parties the issue as to whether, if a corporation was found to be the applicant's properly identified employer, it is a trading corporation and thus beyond the Commission's jurisdiction: *Sewell v Glenn Brown – CTI Logistics* (2006) 86 WAIG 3278 per Kenner C at pars 15-19.

13. Whether a corporation is a trading corporation is essentially a matter of fact. In *Lawrence v The Aboriginal Legal Service* (2006) (unreported 2006 WAIRC 05849) I considered the relevant principles in relation to this issue and said at pars 20-21:

> "*Whether a corporation is a trading corporation for these purposes is a question of fact and agree. There are a number of guiding principles which have fallen from several judgments of the High Court to which reference should be made in order to determine whether in any particular case, a corporation can be so characterised. If trading activities form a significant or substantial part of a corporation's activities, and trading is not precluded by the*

organic rules of the corporation, then the conclusion that the corporation is a trading corporation is one that is open: R v ex parte The Western Australian National Football League (1979) 143 CR 190 per Barwick CJ at 208; per Mason J at 233. It has been said that "it is the acts of buying and selling that are at the very heart of trade: as Lush J said in Higgins v Beauchamp [1914] 3 KB 1192 at 1195, "a trading business is one which depends on the buying and selling of goods". The word "trade" was said by the Lordships in Commissioners of Taxation v Kirk [1900] AC 588 at 592, to mean primarily "traffic by way of sale or exchange or commercial dealing". The Shorter Oxford English Dictionary gives, as meaning of "trading", "carrying on of trade; buying and selling; commerce, trade, traffic": E v Australian Red Cross (1991) 99 ALR 601 per Wilcox J at 632.

The attainment of profit is not necessary to the conclusion that a corporation is a trading or financial corporation, and the motive or object of a corporation does not necessarily condition the conclusion as to whether it is a trading corporation: R v Trade Practices Tribunal; ex parte St George County Council (1974) 130 CLR 533 per Stephen J at 569-570. Furthermore, trading activities do not cease to be trading because they are entered into in the course of carrying out some other primary undertaking, which is not characterised as trade, as long as the carrying on of that undertaking requires or involves the engaging in trading activities: State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282 per Mason Murphy and Deane JJ at 303-304. In the case of a corporation which has yet to commence any activity, then the "purpose test" taken from the constitution of a corporation can be used: Fencott v Muller (1983) 152 CLR 570 at 602. (See also the discussion of these principles generally in Quickenden v O'Connor (2001) 184 ALR 260)."

14. I adopt and apply what I said on that occasion for present purposes. These matters were further considered and amplified on appeal to the Full Bench of the Commission in *Aboriginal Legal Service of Western Australia Incorporated v Mark James Lawrence* (2007) 87 WAIG 856, which appeal was dismissed. (Also see the helpful summary of these principles in *Hardeman v Children's Medical Research Institute* [2007] NSWIRComm at pars 17-18).

15. In order for the Commission to determine whether or not the respondent is a trading or financial corporation for the purposes of s 51(xx) of the Commonwealth Constitution, the respondent was granted leave to file and serve an affidavit by its accountant in relation to the respondent's trading activities. By an affidavit filed on 17 September 2007, Mr Gregory John Cochrane the principal of Harden East and Conti Pty Ltd, Chartered Accountants, enclosed a true copy of the special purpose financial statements for Eral ending as at 30 June 2006. Given that the content of Mr Cochrane's affidavit refers to the profits and financial position of the respondent, the material contained in the affidavit is only to be disclosed to the Commission pursuant to s 33(3) of the Act. Having considered the content of Mr Cochrane's affidavit I am well satisfied that in conducting the business of the respondent, Eral engages in trading activities in terms of the buying and selling of goods and services and other activities, associated with the conduct of a commercial enterprise. Eral expends and receives substantial sums of money in the conduct of the business and the business returns a profit, which is available for distribution to unit holders. There was no evidence before me to suggest that Eral engages in any other activities. Even if it does its activities in the conduct of the respondent business is plainly significant or substantial. I am therefore well satisfied on the evidence and I find that on the authorities the respondent is a trading corporation.

Conclusion

16. In light of the Commission's conclusions as to this preliminary issue, it is inevitable therefore that on the authority of *Sewell*, having found the respondent to be a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution, that the present claim is beyond the jurisdiction of the Commission and it must be dismissed. It is therefore unnecessary for the Commission to further consider the other evidence and issues raised in these proceedings.

2007 WAIRC 01147

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOE VISSER
	APPLICANT
	-v-
	COMPLEAT ANGLER & CAMPING WORLD ROCKINGHAM
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 4 OCTOBER 2007
FILE NO/S	U 118 OF 2007
CITATION NO.	2007 WAIRC 01147

Result	Order Issued
Representation	
Applicant	In person
Respondent	Ms A Gee

Order

HAVING heard Mr J Visser on his own behalf and Ms A Gee 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 name of the respondent be amended by deleting the name "Compleat Angler & Camping World Rockingham" and inserting in lieu thereof the name "Eral Pty Ltd ATF the Prestige Products Unit Trust trading as Compleat Angler & Camping World Rockingham"
2. THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

2007 WAIRC 01025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN MARTIN WALL
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
	-and-
	TREVOR JAMES WARD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
	-and-
	JOHN MARTIN WALL
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
	-and-
	TREVOR JAMES WARD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	FRIDAY, 8 JUNE 2007
DELIVERED	FRIDAY, 24 AUGUST 2007
FILE NOS.	B 44 OF 2007, B 45 OF 2007, P 1 OF 2007, P 2 OF 2007
CITATION NO.	2007 WAIRC 01025

CatchWords	Contractual benefits claim – Entitlements under statutory contract of employment – Whether provisions of an award or industrial agreement override provisions of a statutory contract of employment preserved by the *Workplace Agreements Act 1993 – Industrial Relations Act 1979* (WA) s 29(1)(b)(ii), s 7, s 34, s 41, s 46, s 80E, s 80G, s 80G and s 114; *Workplace Agreements Act 1993* (WA) s 4H, s 4I, s 4J and s 19; *Interpretation Act 1984* (WA) s 18, s 29 and s 37; *Labour Relations Reform Act 2002* (WA) Part 3 s 99; *Public Sector Management Act 1994* (WA) s 64(1)(a).
Result	Applications made out
Representation	
Applicants	Mr R L Hooker (of counsel appeared for the Applicants)
Respondent	Mr D J Matthews (of counsel appeared for the Respondent)

Reasons for Decision

1 John Martin Wall and Trevor James Ward made applications under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* ("the IR Act"). Both Applicants claim that they have not been allowed a benefit, not being a benefit under an award or order to which they are entitled under their contract of employment for the reasons set out in the statements of claim. The statements of claim filed in contractual benefits applications B 44 of 2007 and B 45 of 2007, are the same in relation to both Applicants. The Applicants also each made an application to the Public Service Arbitrator for an order and related ancillary relief under s 80F of the IR Act. In P 1 of 2007 and P 2 of 2007 the Applicants rely upon the same matters set out in the statements of claim filed in respect of the contractual benefits applications.

Background

2 Mr Wall is a permanent employee employed under s 64(1)(a) of the *Public Sector Management Act 1994* ("the PSM Act"). His substantive classification is Level 2. Mr Ward is also a permanent employee employed under s 64(1)(a) of the PSM Act and his substantive classification is Level 3.

3 As at 31 December 2002, the Applicants' terms and conditions of employment were regulated by a workplace agreement which provided that they would "work an average of 40 hours per week" for which they were paid an annual salary expressed as a lump sum as base salary (*Exhibits 1 and 2*).

4 On coming into operation of s 4H of the *Workplace Agreements Act 1993* ("the WA Act") (which was enacted by the *Labour Relations Reform Act 2002* ("the LRR Act")), the Applicants' terms and conditions of employment became subject to statutory contracts of employment. Until 10 March 2006, the salary increases provided for by the *Public Service Award 1992* ("the Award") and the *Public Service General Agreement 2006* ("the General Agreement") were applied to the Applicants' 40 hour working week. After the Respondent received some advice about the interpretation about s 4H of the WA Act, the Applicants were not paid salary increases under the Award or the General Agreement because the Respondent took the view that they were only to be paid the ordinary rate of pay under the Award and General Agreement for 37.5 hours per week and not for 40 hours per week.

5 The Respondent says the Applicants' salaries have not decreased but concedes they have not been paid the ordinary rate of pay under the Award or General Agreement for 40 hours per week. The Applicants, however, at all material times have continued to work 40 hours a week. The Respondent says they have allowed the Applicants to do this. The Applicants say they have a contractual right to work 40 hours per week and to be paid the hourly rate for each of the 40 hours a week that they work at the normal rate of pay under the Award and the General Agreement. In the alternative, the Applicants claim that they are entitled to be paid for two and a half hours per week at the rate for overtime specified in the Award.

6 The quantum of the Applicants' claims are not in dispute. Mr Wall claims he is entitled to be paid $3,699.30 (owed until 31/5/07) and $2,983.50 (ongoing per annum) if he is entitled to be paid for 40 hours a week at normal rates of pay and $5,548.95 (until 31/5/07) and $4,652.70 (ongoing per annum) if he is entitled to be paid at time and a half. Mr Ward claims he is entitled to be paid $4,164.00 (owed until 31/5/07) and $3,357.00 (ongoing per annum) if he is entitled to be paid at normal rates of pay for 40 hours a week for the additional two and a half hours of work each week and $6,246.00 (owed until 31/5/07) and $5,239.65 (ongoing per annum) if he is entitled to be paid at time and a half.

7 Each of the Applicants' statements of claim is substantially the same and in each matter states as follows:

> "3. The Applicants:
>
> …
>
> (g) at all material times have been contracted to work, and have actually worked, an average of 40 hours per week and hence an average of 80 hours per fortnight
>
> 4. The *Labour Relations Reform Act 2002* (the LRR Act), among other effects, amended the *Workplace Agreements Act 1993* (the WA Act) so as to cease the legal operation of workplace agreements and to provide for certain transitional arrangements.
>
> 5. Specifically, s.4H of the WA Act, as inserted by the LRR Act, provided for employment conditions if a workplace agreement were terminated. The … material effects of s.4H included:
>
> (a) An employee who became subject to a contract of employment under s.4H was to, and is to, have the full extent of his or her terms and conditions of employment determined by a proper construction of the totality of the text of the former workplace agreement, any letter of appointment or similar documentation and/or any applicable award, industrial agreement or employer-employee agreement.
>
> (b) Where such an employee is bound by any award, then by virtue of s.4H(8), there is to be an assessment of entitlements on a yearly basis to determine *which* of the contract of employment or the relevant award is the operative *source* of remuneration. Where, as is relevant to this application, the greater numerical source is a contract of employment, one then moves to calculate the full extent of the 'employee's entitlement *arising under*' that contract of employment. Nothing in s.4H(8) or otherwise requires that calculation of entitlements to be restricted to merely 'paying out' one's annual entitlement pursuant to such a contract.
>
> (c) That exercise – of determining the full entitlement which 'arises under' a contract of employment – is unaffected by s.4H(7), which is confined in its operation to determining a *rate* of pay for the purposes of the award. Where, by force of s.4H(8), it is the contract of employment which is the source of determining the extent of an employee's entitlements, sub-section (7) has no relevant operation.

6. The intent of the Government of Western Australia (for whom, and on whose behalf, the Respondent employs the Applicants) as expressed in a Policy Statement (paragraphs 13-16) and a circular entitled 'Workplace Agreements – Transitional Provisions' (Circular) (paragraphs 5-8 and 12-14) published by the Department of Consumer and Employment Protection (DOCEP) in November 2002, was:

   (a) to preserve the terms and conditions of those employees, such as the Applicants, moving from workplace agreements to so-called Statutory Contracts of Employment (SCOEs), such that none of those employees would be any worse off by reason of that change in the means of employment regulation;

   (b) for hours of work not to change as a result of the ceasing of workplace agreements; and

   (c) for employees henceforth employed under SCOEs and an award (and/or an industrial agreement) to have their salaries calculated by reference to an award or EBA rate as applied to hours worked under the contract, rather than merely through an annualised assessment.

7. That intent has subsisted at all material times, it having been reaffirmed that that Policy Statement and Circular are to continue to have application for employees still covered by SCOEs in lieu of repealed workplace agreements in the Implementation Guidelines and Explanatory Notes to the Public Service General Agreement 2006 published by DOCEP on 10 November 2006.

8. Clause 64 of the Explanatory Memorandum accompanying the *Labour Relations Reform Bill 2002* provided:

   It is expected that employees will continue to work the same hours of work after the expiry of their agreement and will receive the higher of either their wages under:

   (a) the contract of employment; or

   (b) as required under the relevant award.

9. The Applicants rely on sections 18, 19, and 37(1)(c) and (d) of the *Interpretation Act 1984*, s 4I of the WA Act and s.99 of the LRR Act

10. Schedules A and B (pertaining to the First Applicant and the Second Applicant respectively) summarise, in tabular form, the arrears due and owing to the Applicants on a proper interpretation of the totality of the instruments and materials governing their contracts of employment.

11. Despite demand (including Schedule C, an email from the First Applicant to the Premier of 25 December 2006), the Respondent has refused or declined to pay the Applicants at an hourly rate equivalent to employees at equivalent levels who work a 75 hours fortnight and whose salaries are governed by the Public Service General Agreement 2006.

12. The Applicants invoke the jurisdiction of this Commission on the basis that they claim pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* that they have not been allowed by the Respondent certain benefits, not being benefits which, properly understood as to their derivation, arise under an award or order, to which they are entitled under the contracts of employment. (This claim is related to other claims brought to the Public Service Arbitrator, the subject of a separate form of commencement, filed with this application.)"

8 In response to each of the applications the Respondent's solicitor filed a notice of answer and counter-proposal which contains the same particulars in respect of each matter. The Respondent's notice of answer and counter-proposal states as follows:

"2. The Applicants' case is that section 4H *Workplace Agreements Act* 1993 (WPA Act) has the following effect:

   (a) their ordinary hours of work is an average of 40 hours per week;

   (b) they are entitled to be paid the ordinary rate of pay under the *Public Service General Agreement* 2006 for those hours worked.

3. The Respondent's case is that section 4H WPA Act has the following effect:

   (a) the ordinary hours of work for the Applicants are, pursuant to the *Public Service Award* 1992 (PS Award) and the *Public Service General Agreement 2006* (PSGA), an average of 37½ hours per week;

   (b) that any purported contractual provision to different effect, and in particular the clause in the workplace agreement signed by the Applicants that the Applicants were to work an average of 40 hours per week as ordinary hours, cannot form part of their contract of employment;

   (c) the Applicants can only be paid the ordinary rate of pay under the PS Award and the PSGA for an average of 37½ hours per week with overtime payments being available for hours worked in excess of this if the preconditions for payment of overtime are otherwise met.

4. The Respondent admits paragraphs 1 and 2 of the Statements of Claim.

5. The Respondent admits paragraphs 3(a) to (f) of the Statements of Claim.

6. The Respondent denies paragraph 3(g) of the Statements of Claim and says that any purported contractual provision to the effect that the Applicants work an average of 40 hours per week as ordinary hours is invalid and unenforceable.

7. The Respondent admits paragraph 4 of the Statements of Claim.

8. The Respondent denies paragraph 5 of the Statements of Claim and says that the material effect of section 4H WPA Act is that the terms of a workplace agreement, upon the expiry of the workplace agreement, continue, subject to the parties being bound by any award that extends to them, with the one qualification being that a person's annual salary may not decrease as a result of the workplace agreement expiring and the award applying.

9. The Respondent does not admit paragraphs 6 and 7 of the Statements of the Claim and says the following:

   (a) the documents referred to in paragraphs 6 and 7 of the Statements of Claim are merely an interpretation by one body, the Department of Consumer and Employment Protection, of the meaning and effect of Part 3 of the *Labour Relations Reform Act* 2002 and do not carry any particular weight in relation to the Commissioner's task of interpreting the legislation;

   (b) the documents are, in any event, more supportive of the Respondent's interpretation of section 4H WPA Act than that of the Applicants;

   (c) if the Commission finds it necessary to refer to extrinsic material for the purpose of interpreting the legislation, the most useful source is the second reading speech and in particular pages 7512-7513 and 8770-8776 of Hansard;

   (d) in relation to the matter of intent, Parliament's clear intent was to move employees from individual contracts of employment to collective agreements and awards.

10. The Respondent admits paragraph 8 of the Statements of Claim.

11. In relation to paragraph 10 of the Statements of Claim the Respondent does not admit that there are amounts due and owing to the Applicants on a proper interpretation of the totality of the instruments and materials governing their contracts of employment.

12. In relation to paragraph 11 of the Statements of Claim the Respondent denies that the Applicants are entitled to be paid the hourly rates provided for by the PSGA, given that the employees remain on contracts of employment under section 4H(2) WPA Act, but admits that dispute resolution preconditions have been met.

13. In relation to the Applicants' claim the Respondent sets out its position as follows:

   (a) Parliament's intention in enacting Part 3 *Labour Relations Reform Act* 2002 was to move employees from individual contracts of employment to collective agreements and awards;

   (b) by sections 4H(6) Parliament provided that when an employee's workplace agreement expired that the employer and employee would be bound by any award that extends to them;

   (c) 'award' was defined by the WPA Act to include agreements registered under section 41 *Industrial Relations Act* 1979;

   (d) by section 4H(8) Parliament qualified the application of awards to employees to this extent; no employee would end up receiving less remuneration on an annual basis due to the expiry of a workplace agreement and the application of an award. That is, if the annual remuneration of an employee under the workplace agreement was higher than under an award, the remuneration would be preserved;

   (e) by sections 4H(7) and 4H(8) Parliament was careful to ensure that in comparing remuneration the workplace agreement and the award were considered 'on their own terms' (to quote from page 8773 Hansard) and there would not be 'mixing and matching' of workplace agreement provisions and award provisions;

   (f) by section 4H(7) Parliament was careful to ensure that employees did not 'mix and match' pay rates under a workplace agreement to award conditions so as to produce an unintended result (see 8773 Hansard);

   (g) similarly by section 4H(8) Parliament was careful to ensure that employees would not be able to apply award pay rates to workplace agreements so as to produce an unintended result (see page 8773 Hansard);

   (h) clause 20(1) PS Award provides that 'the prescribed hours of duty to be observed by officers shall be 7 hours 30 minutes per day ……';

   (i) clause 11(3)(d) of the PS Award provides that:

   'The hourly rate referred to in paragraph (c) of this subclause shall only be applied to an average of no more than 37.5 hours per week worked as ordinary hours under:

   (i) this award; or

   (ii) a contract of employment subject to the provisions section 4H of the *Workplace Agreements Act* 1993 as preserved by section 100 of the *Labour Relations Reform Act* 2002.'

   (j) clause 13.2 PSGA provides that 'the prescribed hours of duty shall be 150 hours per 4 week settlement period;'

   (k) the effect of the above provisions is that under the PS Award and PSGA an employee may only work, as ordinary hours, 37½ hours per week or an average of 37½ hours per week and be paid at the ordinary rate for that number of hours;

(l) in so far as section 4H(6) provides that the parties in this matter are bound by the award and the award provides for 37½ ordinary hours per week or an average of 37½ ordinary hours per week, and for payment at the ordinary rate for that number of hours, any purported contractual term providing for something different is expressly and impliedly prohibited by statute and for that reason invalid and unenforceable;

(m) in this case the purported term of the contract of employment providing that the employee will work an average of 40 hours per week at the ordinary rate of pay is expressly or impliedly prohibited by statute and therefore invalid and unenforceable;

(n) the Respondent has complied with section 4H(8) in that it has ensured that the Applicants did not have their annual remuneration reduced upon the expiry of the workplace agreement;

(o) the Respondent disputes that it has to apply the pay rates provided for under the award for ordinary hours to the prohibited ordinary hours provisions of the workplace agreement. The effect of this would be that the statutory contract of employment would always be more attractive financially (as pay increases under the PS Award and PSA would apply to 40 hours a week rather than 37½ hours) and, contrary to the intention of the legislative changes, there would be no incentive to move from an individual contract to a collective one. The provisions of section 4H were always intended to be transitional.

14. Section 114 *Industrial Relations Act* has application in this matter.

15. If the Applicants consider that because they have worked an average of 40 hours per week in the past they are entitled to overtime payments that is a matter which will be considered by the Respondent."

9 Prior to the hearing of this matter the parties agreed to the matter being heard and determined by regard to a statement of agreed facts. The Applicants also tendered a number of documents in support of their interpretation of s 4H of the WA Act. No party gave oral evidence.

10 The statement of agreed facts states as follows:

"1. The First Applicant is, and has been at all material times, employed by the Respondent as a Level 2 Administration Officer.

2. The Second Applicant is, and has been at all material times, employed by the Respondent as a Level 3 Project Officer.

3. The Applicants are public service officers employed pursuant to s.11 of the *Agriculture Act* 1988 and under and subject to Part 3 of the *Public Sector Management Act* 1994.

4. The Applicants are government officers for the purposes of Part IIA, Division 2 of the *Industrial Relations Act* 1979.

5. The Applicants were until 31 December 2002, employed under workplace agreements pursuant to the *Workplace Agreements Act* 1993 (WA Act).

6. The Applicants are employed under the *Public Service Award* 1992.

7. The Applicants are employed under the *Public Service General Agreement* 2006.

8. The Applicants are employed under the *Department of Agriculture Agency Specific Agreement* 2007.

9. The workplace agreements which previously provided for the terms and conditions of the Applicants' employment became, by virtue of s.4H(2) of the WA Act, contracts of employment.

10. The contracts of employment referred to in paragraph 9 above include, for each Applicant, an Hours of Work Agreement the text of which has provided at all material times, that 'the employee will work an average of 40 hours per week'.

11. At all material times each Applicant has, in fact, worked 40 hours per week.

12. In November 2002 the Government of Western Australia issued:

(a) a Circular entitled 'Workplace Agreements – Transitional Provisions'; and

(b) an Information Package for Employees Affected by (changes to the relevant legislation)

the text of which is appended to this Statement of Agreed Facts (Annexures 1 and 2 respectively).

13. In November 2006 the Government of Western Australia issued Implementation Guidelines and Explanatory Notes to the Public Service General Agreement 2006, the text of which is appended to this Statement of Agreed Facts (Annexure 3).

14. This Commission is empowered to resolve the present dispute, difficulty or question arising in the course of the employment of the Applicants under each of:

(a) clause 64 of the *Public Service Award* 1992;

(b) clause 35 of the *Public Service General Agreement* 2006; and

(c) clause 8 of the *Department of Agriculture Agency Specific Agreement* 2005,

and the preconditions for this Commission to exercise its arbitral function pursuant to those respective clauses have, in each case, been satisfied.

15. The Public Service Arbitrator is empowered to inquire into and deal with the industrial matters relating to the Applicants which arise from these applications.

16. Annexure 4 (concerning the claim of the First Applicant) and Annexure 5 (concerning the claim of the Second Applicant), accurately reflect the quantum of the Applicants' claims and thus the amounts due and owing to them if, on a proper construction of their contracts of employment, totality of instruments governing that employment, and relevant legislation, their present claims are properly grounded in law."

Section 4H of the *Workplace Agreements Act 1993*

11 Section 4H of the WA Act provides:

"(1) This section applies where —

(a) a workplace agreement or an arrangement under repealed section 19(4)(b) ceases to have effect as provided by section 4C, 4D, 4E or 4F; or

(b) an employee ceases to be a party to a collective workplace agreement as provided by section 4G.

(2) The employment of an employee becomes subject to a contract of employment under this section.

(3) If —

(a) the workplace agreement that ceased to have effect was an individual workplace agreement; or

(b) the arrangement under repealed section 19(4)(b) that ceased to have effect followed on the expiry of an individual workplace agreement,

the contract of employment is one containing —

(c) the same provisions as those of the workplace agreement or arrangement that has ceased to have effect, other than the provisions implied by section 18; and

(d) if the employee had an existing contract of employment relating to the workplace agreement or arrangement, the provisions of that contract.

(4) If —

(a) the workplace agreement that ceased to have effect was a collective workplace agreement; or

(b) the arrangement under repealed section 19(4)(b) that ceased to have effect followed on the expiry of a collective workplace agreement,

the contract of employment is an individual contract —

(c) applying to the employee such of the provisions of the collective workplace agreement or arrangement that has ceased to have effect, other than the provisions implied by section 18, as were applicable to the employee; and

(d) containing, in addition, the provisions of the existing contract of employment that the employee had relating to the workplace agreement or arrangement.

(5) A contract of employment referred to in subsection (3) or (4) has effect, and may be varied or terminated, as if it were a contract entered into between the employer and the employee.

(6) Despite subsection (2) the employer and the employee are bound by —

(a) any award that extends to them; or

(b) any employer-employee agreement under Part VID of the *Industrial Relations Act 1979* to which they are parties.

(7) Where subsection (6)(a) applies, the award ordinary rate of pay (howsoever described in the award) shall, for the purposes of the award only, be the rate of pay as prescribed in the award and not that prescribed in the contract of employment.

(8) Where subsection (6)(a) applies, nothing in this section or in any other enactment or law requires an employer to pay an employee more than the greater of —

(a) the employee's entitlement arising under the contract of employment; or

(b) the employee's entitlement arising under the relevant award,

whichever is the greater when assessed on a yearly basis.

(9) This section does not apply to —

(a) a workplace agreement that was registered under repealed section 40I; or

(b) an arrangement under repealed section 19(4)(b) that followed on the expiry of such a workplace agreement.

Note: For the position when an agreement or arrangement referred to in subsection (9) ceases to have effect, see section 152 of the *Workplace Relations Act 1996* of the Commonwealth."

The Applicants' Submissions

12 The Applicants contend that the preferable construction of the legislation taking into account applicable aids to statutory interpretation under the *Interpretation Act 1984* ("the I Act") and the common law, supports their entitlement to be paid at the correct rate for all 40 hours worked each week and not merely 37.5 hours per week. Alternatively, the Applicants say, to the extent, that if there is any plausibility in the Respondent's competing construction of relevant provisions (which the Applicants deny) the position is made clear by s 37(1)(c) of the I Act reinforced by s 4I of the WA Act and s 99 of the LRR Act. The Applicants say that they had and continue to have an accrued right to be paid for 40 hours each week as their right has not been displaced by any manifestation of statutory intention to the contrary. The Applicants say that if there is any real point of difficulty, it is whether the excess of 2.5 hours upon 37.5 hours a week should be paid at time for time (as per the *Department of Agriculture and Food Western Australia Agency Specific Agreement 2007* ("the Agency Specific Agreement")) or time and a half as per the Award.

(a) Construction of Section 4H of the *Workplace Agreements Act 1993*

13 The Applicants contend that by the express terms of s 4H(2) and (3) of the WA Act the Applicants' employment upon the cessation of the operation of their workplace agreements became subject to a contract of employment under and by virtue of s 4H itself. This is referred to as a statutory contract of employment. Because the former workplace agreements were individual workplace agreements, the contracts of employment that have subsisted ever since are ones containing the same provisions as those of the workplace agreements at their cessation. It is acknowledged that despite s 4H(2) of the WA Act the parties are bound by any award that extends to them (which relevantly includes industrial agreements registered under s 41 of the IR Act).

14 The Applicants say that a person who is a statutory contract of employment employee is to have the full extent of his or her terms and conditions of employment determined by a proper construction of the totality of the text of the former workplace agreement, any letter of employment or similar contractual documentation and any applicable award, industrial agreement or employer-employee agreement. The mere fact that s 4H(6) of the WA Act operates to bind a statutory contract of employment to any award that extends to him or her does not alter the distinct effect of s 4H(3)(c) and (5) of the WA Act. It is said that if it had been intended that the text of any award (in the broad sense) was somehow to override and render inoperative cognate provisions in the contract of employment rather than for the two to co-exist in a compatible manner the statutory text would have said so. Instead, however, s 4H of the WA Act deals with the specific issue of the rate of pay, such that the rate prescribed in the award, not that prescribed in the statutory contract of employment, is to apply for the purposes of the award. Further, far from enacting that the entitlements, or some entitlements "arising under" the relevant award override or cancel out, related entitlements "arising under" the statutory contract of employment, the employee has an entitlement to receive the greater of those amounts when assessed on a yearly basis (s 4H(8) of the WA Act). Consequently, the Applicants say that the Commission must make an overriding assessment of the totality of the Applicants' terms and conditions which are found, not only in the statutory contracts of employment but also in the Award and the other industrial agreements.

15 The Applicants say the limitation of s 4H(8) of the WA Act is important. Its effect is to require an assessment of entitlements on a yearly basis to determine whether the statutory contract of employment or the relevant award is the operative source of remuneration. The Applicants contend that where, as here, the greater numerical source is the statutory contract of employment, one then moves to calculate the full extent of the "employee's entitlement arising under" that contract of employment. They say there is nothing in s 4H(8) of the WA Act or otherwise, which requires that calculation to be confined to an annual entitlement which is a function of something less than the hours of work contracted to be performed and actually performed by the employee concerned.

16 The Applicants say that the crucial exercise of determining the full entitlement "which arises under" the contract of employment is unaffected by s 4H(7) of the WA Act. That task is confined to determining a rate of pay for the purposes of the award. Where by operation of s 4H(8) of the WA Act it is the statutory contract of employment which is the source of determining the extent of an employee's entitlements, s 4H(7) of the WA Act has nothing to say. It is acknowledged that the "mixing and matching" of which the Respondent speaks of in paragraphs 13(e)-(g) of the notice of answer and counter-proposal are concerned with the consistency of identifying the rate of remuneration. Yet the Respondent seeks to extend that notion beyond simply the rate of pay to other entitlements that may arise under the contract of employment. There is no warrant in the text of s 4H(8) of the WA Act to do so, to the contrary the provision requires an assessment of what truly does "arise under" the contract to be undertaken and then compared with what truly "arises under" the relevant award.

17 The Applicants say that nothing in the Parliamentary debate reflected in *Hansard* relied upon by the Respondent manifests an intention to extend the restrictions on calculation of remuneration to be gleaned from s 4H of the WA Act to the degree asserted by the Respondent. The Applicants say that the more illustrative extrinsic materials are the policy statements and implementation guidelines which are annexed to the statement of agreed facts. The Applicants point out that those policy statements and implementation guidelines are continued to be relied upon on behalf of the Government of Western Australian.

18 The Applicants say that if the Commission concludes that there is an ambiguity in s 4H of the WA Act which arises because s 4H does not deal in explicit detail with the present circumstances, in resolving such an ambiguity it is appropriate to have regard to construction that would promote the purpose or object underlying the amendments (see s 18 of the I Act) and any material not forming part of the written law which is capable of assisting in ascertaining that meaning so as to resolve the ambiguity (s 19(1)(b)(i) of the I Act).

19 Section 18 of the I Act provides:

> "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.

20 Section 19 of the I Act provides:

> "(1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
>
> (b) to determine the meaning of the provision when —
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.
>
> (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes —
>
> (a) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer;
>
> (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the time when the provision was enacted;
>
> (c) any relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the time when the provision was enacted;
>
> (d) any treaty or other international agreement that is referred to in the written law;
>
> (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted;
>
> (f) the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House;
>
> (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the written law to be a relevant document for the purposes of this section; and
>
> (h) any relevant material in any official record of proceedings in either House of Parliament.
>
> (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —
>
> (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and
>
> (b) the need to avoid prolonging legal or other proceedings without compensating advantage."

21 The Applicants say that there is some overlap between those two indicators of statutory meaning and it is not necessary, in the Applicants' submissions, to identify a "bright line" between "purpose" on the one hand and "extrinsic material" on the other hand. It is said that both may fall within the overall concept of context, which the High Court has repeatedly affirmed is of primary significance in the task of statutory construction (indeed in the first instance, and not necessarily when ambiguity has been identified) (*CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381).

(b) Policy Statements

22 The Applicants rely upon two policy statements issued by the Government of Western Australia in support of their interpretation of s 4H of the WA Act. On 22 November 2002, the Acting Executive Director of Labour Relations of the Department of Consumer and Employment Protection ("DOCEP") issued a *Circular to Departments and Authorities No. 16 of 2002* ("Circular 16 of 2002"). Circular 16 of 2002 recounts that Part 3 of the LRR Act came into effect on 15 September 2002 and will progressively bring about the cessation of all workplace agreements by 14 September 2003. Circular 16 of 2002 attaches a policy statement to provide for workplace agreement transitional provisions specific to the public sector.

23 Under the heading "Monetary Entitlements under Statutory Contracts" in the Transitional Guidelines issued in November 2002, it is stated:

> "13. Employers are required to calculate and compare employees' annual monetary entitlements under both statutory contracts of employment and the relevant awards/EBAs.
>
> 14. Employers are to pay the greater of the annual monetary entitlements under either statutory contracts or awards/EBAs.
>
> 15. Employers should undertake comparisons at the commencement of statutory contracts and each 12 months thereafter, or when changes to awards/EBAs may affect the outcome of the comparison.

16. Calculations under awards/EBAs are to be based upon the award or EBA pay rate, and applicable allowances and penalties in awards/EBAs, applied to the hours of work under statutory contracts."

24 In the document headed Transitional Provisions for Individual Workplace Agreements which also form part of Circular 16 of 2002 under the heading "What happens to employment conditions?" it is stated:

"8. Upon the ceasing of workplace agreements non-monetary conditions of employment that are better than awards and, if applicable, relevant enterprise bargaining agreements (EBAs) will be retained in statutory contracts of employment. Conditions of employment that are provided for in awards/EBAs, but not in statutory contracts of employment, will be gained.

9. Hours of work will not change as a result of the ceasing of workplace agreements. If the hours of work in statutory contracts of employment are greater than the ordinary hours provided for in awards/EBAs, the additional time worked will be treated as overtime in accordance with the provisions of awards/EBAs. This does not necessarily mean the additional time worked will be paid as overtime. Some awards require minimum additional time to be worked before overtime is paid."

25 In the document headed Transitional Provisions for Individual Workplace Agreement under the heading "What happens to pay?", in paragraph 12, 13 and 14 it is stated:

"12. Total annual monetary entitlements will not decrease as a result of the ceasing of workplace agreements and the application of statutory contracts of employment.

13. Employers are required to carry out a comparison of monetary entitlements over a 12 month period under awards/EBAs, and statutory contracts of employment, based on the hours specified in the statutory contracts, as follows:

(a) Annual monetary entitlements A: calculated using the award/EBA hourly rate of pay, plus any allowances and penalty rates to which employees would be eligible if covered by the award/EBA; and

(b) Annual monetary entitlement B: calculated using the hourly rate of pay under the statutory contract of employment, plus any allowances and penalty rates which were provided for in ceased workplace agreements.

14. Employees will receive the higher total annual monetary entitlement. …"

26 Further, under the heading "How can statutory contracts of employment be replaced after workplace agreements ceased?", paragraph 16 and 17 it is stated:

"16. Employers in the public sector may only offer to replace statutory contracts to give effect to the terms and conditions of awards/EBAs applying to employees.

17. Statutory contracts of employment can only be replaced by agreement between the parties. The parties cannot unilaterally replace statutory contracts of employment."

27 A further circular to the departments and authorities was issued by the Executive Director of DOCEP on 10 November 2006 titled *Circular to Departments and Authorities No. 17 of 2006* ("Circular 17 of 2006"). In the Implementation Guidelines at paragraph 18 of Circular 17 of 2006 it is stated under the heading "Statutory Contracts of Employment":

"For employees still covered by statutory contracts of employment, in lieu of repealed workplace agreements, refer to Circular to Departments and Authorities No. 16 of 2002 – *Workplace Agreements – Transitional Provisions*, including the associated Policy Statement, which continues to have application."

28 The Applicants say that:

(a) The position is made very clear in these documents that public sector statutory contracts of employment are not to be varied, although such contracts may be replaced in their entirety.

(b) The relevant wave of reform, overall, reflects the State Government's commitment to the discontinuance of workplace agreements in the public sector. This overriding commitment says nothing concerning an intention to disadvantage the personal circumstances of individual employees.

(c) Consistently with s 4H(8) of the WA Act, employers are required to calculate and compare employees' annual monetary entitlements under both statutory contracts of employment and the relevant awards and industrial agreements. But, critically, calculations under awards and industrial agreements are to be based upon the award or industrial agreement pay rate, and applicable allowances and penalties in awards and industrial agreements applied to the hours of work under statutory contracts.

(d) To identical effect is the manifest intent that employers are required to carry out a comparison of monetary entitlements (which employees are to receive the higher of) based on the hours specified in the statutory contracts.

29 The Applicants say that it is untenable for the Respondent to argue away these expressions of the position of the Applicants' employer as being "merely an interpretation by one body, DOCEP and thereby being of no particular weight in the process of statutory construction. That "one body" is no less than the department of the executive government charged with the conceptualisation implementation of policy concerning labour relations of the public sector of Western Australia.

30 The Applicants also say that the extracts of *Hansard* relied upon by the Respondent in their answer do not specifically address the specific circumstances of this particular matter and therefore have no cogency in resolving any statutory ambiguity. They say the debate does talk about "mixing and matching" of rates of pay but not hours of work.

31 The Applicants also rely upon clause 64 of the Explanatory Memorandum to the Labour Relations Reform Bill 2002.

(c) Misconception of Invalidity

32 The Applicants acknowledge there are circumstances where a contract may be in whole or in part rendered void or inoperative by, for example:

(a) illegality, in the sense of the substance of the contract being an agreement to do something that is forbidden by law;

(b) being, somewhat less tangibly, contrary to public policy; or

(c) involving something that is forbidden by statute.

33 The Applicants contend that plainly the circumstances in paragraphs (a) or (b) above are inapplicable. The only conceivable basis for it to be argued is that there might be inoperability in the relevant statutory contracts of employment by force of some statutory provision. The Applicants say that s 114 of the IR Act expressly relied upon by the Respondent is the only remotely plausible basis for such a contention, however, that provision provides no support for the Respondent's case.

34 Section 114 of the IR Act provides:

"(1) Subject to this Act, a person shall not be freed or discharged from any liability or penalty or from the obligation of any award, industrial agreement or order of the Commission by reason of any contract made or entered into by him or on his behalf, and every contract, in so far as it purports to annul or vary such award, industrial agreement or order of the Commission, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from any provisions hereby annulled.

(2) Each employee shall be entitled to be paid by his employer in accordance with any award, industrial agreement or order of the Commission binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and the employee may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount shall be commenced within 6 years from the time when the cause of action arose, and the employee is not entitled to recovery of wages under this subsection and otherwise, in respect of the same period."

35 The Industrial Appeal Court in *Commissioner, Public Service Commission v Civil Service Association of WA* (1998) 78 WAIG 3629 at 3634 acknowledged, unanimously, that s 114 of the IR Act does not forbid arrangements under which employment benefits are in a form other than money. Rather it forbids the contracting out of awards, industrial agreements and orders. The Applicants also say that there has been no "contracting out" in the circumstances of the present case. The contract, in the form of a workplace agreement, pre-existed the award provisions on which the Respondent relies. To hold that the subsequent amendment of a pre-existing award, applicable to individual employees not as direct parties to the Award but by virtue of common rule, can deprive an individual employee of the benefit of the bargain he or she has struck would be to invert the language and tense of s 114 of the IR Act. In addition the Applicants say that a reading of the full text of s 114 of the IR Act against the context of the IR Act generally taking into account its purpose and objects, reveals that the provision against "contracting out" of awards is designed to ensure that employees do not lose a benefit, entrenched in an award for their own benefit, through a subsequent contract. Hence, as the Full Bench recently noted in *The St Cecilia's College School Board v Grigson* (2006) 86 WAIG 3146 at [74]-[76] there is nothing to prevent a contract which contains conditions superior to those in an award from having effect.

(d) Accrued Rights of Employees Maintained

36 It is argued on behalf of the Applicants that the Applicants have an accrued right prior to the repeal effected by the LRR Act, to be paid for the 40 hours per week they contracted to perform, at the applicable award rate. They say their position is placed beyond doubt by the operation of s 37 of the I Act.

37 Section 37(1)(c) of the I Act provides:

"Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears —

(c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;"

38 There being no intention to the contrary to affect that right to their detriment, the repeal is not to be construed as having the consequence of not being entitled to payment for more than 37.5 hours of work a week as "normal" time. It is argued that the Applicants claim an express entitlement under the text of the contracts of employment continued in force by the legislation. They have taken abundant steps to exert that right, by virtue their pressing of claims so as to invoke the dispute resolution procedures (a fact admitted by the Respondent) and the institution of these proceedings. The Applicants are claiming something that is not contingent or inchoate. It said that there are strong indicators that it was the intention of the legislature to maintain the relevant accrued right. Section 4I of the WA Act and s 99 of the LRR Act sit compatibly with s 37(1)(c) of the I Act and reinforce the need for a clear and specific legislative treatment on this precise aspect of the Applicants' employment. Moreover, the effect of the statements of policy of the Executive Government of Western Australia reinforce the nature of and limitations upon Parliament's intention in this regard.

39 Section 4I of the WA Act provides:

"The termination of a workplace agreement or an arrangement under repealed section 19(4)(b) by operation of this Division does not affect —

(a) any —

(i) right or entitlement that accrued; or

(ii) obligation or liability that was incurred,

under the agreement or arrangement before the termination; or

(b) any proceedings or remedy in respect of anything referred to in paragraph (a)."

40 Section 4J of the WA Act provides:

"This Part has effect despite any provision of this Act or a workplace agreement or any other agreement or arrangement."

41 Section 99 of the LRR Act provides:

"The provisions of this Division do not affect the application of sections 37 and 39 of the *Interpretation Act 1984*, so far as they are consistent with those provisions, in relation to the expiry of the Act."

(e) Remedies sought by the Applicant

42 The Applicants each seek that the Commission make a declaration in respect of the proper interpretation of the Applicants' contracts of employment and orders requiring the Respondent to pay past and future entitlements.

43 The Applicants also seek a declaration that they have a contractual entitlement to commute two and a half hours of work of their 40 hour week pursuant to clause 10.10 – Commuted Overtime Allowance of the Agency Specific Agreement. Clause 10.10 – Commuted Overtime Allowance provides:

"This sub-clause is an enabling provision within clause 10, which will allow for two and one half (2.5) hours of accrued ordinary hours per week to be converted into a monetary equivalent.

Governance and application of this sub-clause is subject to the following provisions;

a) Application for effect of this sub-clause has to be duly authorized by the Director-General or delegated officer, and, with the consent of the employee, as per Schedule 1.

b) Where Schedule 1 has been duly approved, the Employer will renumerate the Employee an allowance of 8%, in addition to the appropriate salary contained in the General Agreement.

c) The application period for Commuted Overtime will be for a minimum of 12 months, unless the employee's assigned duties and / or position is subject to project funding, in which case the period will be for the term of the funding.

d) The salary schedule of the General Agreement shall be made available to an employee with an additional and corresponding column of the commuted overtime allowance.

e) Either party may withdraw from the provisions of this sub-clause by giving a notice period of no less than thirteen weeks.

f) Application of this allowance will automatically cease when the employee is promoted, transferred or re-assigned duties to a new project or funding source. In such circumstances continuation of Commuted Overtime may only occur as prescribed in (a) of this sub-clause.

g) Any variations and/or disputes in relation to this sub-clause or Schedule 1, shall be determined in accordance with the Clause 8- Dispute Settlement Procedure."

44 It is argued on behalf of the Applicants that the 40 hours can be characterised not as "ordinary" hours of work but as extraordinary or additional hours pursuant to the statutory contract. The Applicants say that to construe the extra two and a half hours a week in this way overcomes the Respondent's argument that it is a core condition of the General Agreement that ordinary hours of work are no more than 37.5 hours per week.

45 A calculation of the quantum of the Applicants' claims was provided to the Commission. Exhibit 5 provides as follows:

"CALCULATION OF PAYMENT AT NORMAL RATES

EMPLOYEE#	SURNAME	FIRST NAME	AWARD	HOURLY RATE @ 10/3/06	HOURLY RATE @ 10/3/06	10/3/2006 to 8/3/2007	9/3/2007 to 31/5/2007	Total owed to 31/5/07	ongoing PA
004250	Wall	John	SCEPS	22.95	23.86	2983.50	715.80	3699.30	2983.50
004526	Ward	Trevor	SCEPS	25.83	26.87	3357.90	806.10	4164.00	3357.90

CALCULATION OF PAYMENT AT OVERTIME RATES

EMPLOYEE#	SURNAME	FIRST NAME	AWARD	HOURLY RATE @ 10/3/06	HOURLY RATE @ 10/3/06	10/3/2006 to 8/3/2007	9/3/2007 to 31/5/2007	Total owed to 31/5/07	ongoing PA
004250	Wall	John	SCEPS	22.95	23.86	4475.25	1073.70	5548.95	4652.70
004526	Ward	Trevor	SCEPS	25.83	26.87	5036.85	1209.15	6246.00	5239.65"

(*Exhibit 5*)

46 It is conceded on behalf of the Applicants that there may be some difficulty with the remedy sought in respect of payment at time and a half as overtime, if the Commission in making an order calculates the payments to be made at overtime rates if it can be said that the order enforces the provisions of an award.

The Respondent's Submissions

47 The Respondent points out that s 4H(3) of the WA Act provides for the terms of a statutory contract of employment. In general terms s 4H(3) of the WA Act preserves the terms of workplace agreements. However, s 4H(6) of the WA Act provides that despite s 4H(2), the employer and employee are bound by any award that extends to them. The Respondent makes a submission that in binding the employer and employee to an award, the employer and employee are tied to the award and are in "bonds" in relation to the award and they are under an obligation to observe the provisions of the award including any industrial agreement that applies.

48 The Respondent contends that in this matter clauses 20(1), (2) and (3) of the Award apply to the Applicants' contracts of employment pursuant to s 4H(6)(a) of the WA Act. Clause 20(1) of the Award provides:

> "Prescribed hours of duty to be observed by officers shall be seven hours thirty minutes per day to be worked between 7.00 am and 6.00 pm Monday to Friday as determined by the employer with a lunch interval of forty-five minutes to be taken between 12.00 noon and 2.00 pm. Subject to the lunch interval prescribed hours are to be worked as one continuous period.
>
> Employers wishing to vary the prescribed hours of duty to be observed shall be required to give one month's notice in writing to the department, branch, section or officers to be affected by the change."

49 Clauses 20(2) and 20(3) of the Award provided for "Other Working Arrangements" and "Flexitime Arrangements" respectively but do not vary the provision that the prescribed hours of duty shall be 7 hours 30 minutes per day. The Respondent also says that importantly, clause 11(3)(c) of the Award provides that the "hourly rate shall be computed as one seventy fifth of the fortnight's salary" and clause 11(3)(d) of the Award provides:

> "The hourly rate referred to in paragraph (c) of this subclause shall only be applied to an average of no more than 37.5 hours per week worked as ordinary hours under
>
> (i) this award; or
>
> (ii) a contract of employment subject to the provisions s 4H of the *Workplace Agreements Act 1993* as preserved by s 100 of the *Labour Relations Reform Act 2002*."

50 The Respondent also points out clause 13.2 of the General Agreement provides:

> "The prescribed hours of duty shall be 150 hours per four (4) week settlement period, to be worked between 7.00 am and 6.00 pm Monday to Friday as determined by the employer, with a lunch interval of not less than 30 minutes."

51 The Respondent says that like the Award, the General Agreement provides for flexibility but specifically maintains that an average of no more than 37.5 hours per week is to be worked as ordinary hours.

52 The Respondent concedes that after 2005 the Applicants have not been paid for 40 hours work a week. It is said on the Respondent's behalf that any work by the Applicants in excess of 37.5 hours per week are potentially overtime if the Applicants are able to satisfy the requirements of clause 22 of the Award. However, whether they are able to do so or not, is not a matter that is open for the Commission in these proceedings to consider.

53 The Respondent says that the Agency Specific Agreement is irrelevant for present purposes. It can provide no foundation for an argument that an average of 40 hours per week (as ordinary hours) shall be worked by the Applicants as such a requirement would be inconsistent with a "core" condition of the General Agreement. This is because clauses 9.1 and 9.2 of the General Agreement provide that where the General Agreement identifies conditions as "core" that such agreements will prevail over an agency specific agreement. Clause 8.1 of the General Agreement is a core condition. It provides that pursuant to clause 13 an average of no more than 37.5 hours a week is to be worked as ordinary hours.

54 The Respondent says that the effect of s 4H(6) of the WA Act, when read with clause 20 of the Award and clause 13 of the General Agreement, is that the Applicants may only work an average of 37.5 hours per week as ordinary hours. Insofar as a term of their workplace agreements provide that the Applicants shall work an average of 40 hours per week as ordinary hours, that term does not form part of their statutory contracts of employment.

55 The Respondent says that the Commission should not enforce the workplace agreements insofar as they provide for ordinary rates of pay to be paid for an average of 40 hours per week. In support of this proposition, the Respondent points to the following authorities which deal with contractual provisions being found void for public policy or an aspect of it being illegal on the basis that it is expressly or impliedly prohibited by statute (*Initial Services Ltd v Putterill* [1968] 1 QB 396 at 410; *Burswood Resort (Management) Ltd v ALHMWU* (2003) 83 WAIG 1371 at [98] per McLure J; *Minister for Education v CSA* (1997) 77 WAIG 2185 at 2187; and *A v Hayden* (1984) 156 CLR 532 at 571).

56 The Respondent contends that the Applicants' interpretation of the effect of s 4H(8) of the WA Act is flawed. The Respondent says that s 4H(8) of the WA Act simply ensures that an employee's annual salary does not decrease as a result of the transition from a workplace agreement to a statutory contract of employment. Section 4H(8) of the WA Act does not have the effect, nor could it possibly have been intended to have the effect, that the ordinary rate of pay under an award or industrial agreement is to be applied to a number of hours that may not be paid at the ordinary rate under the award or industrial agreement.

57 The Respondent says that to resort to extrinsic material is not necessary but if that occurs those materials support the Respondent's interpretation. In particular, it is contended that regard should be had to the second reading speech in *Hansard* in vol 373, 2001-2002, at pages 7511 to 7513. In particular, regard should be had to what was said at 7512 to 7513 where the Minister for Consumer and Employment Protection made it clear that the legislation was designed to move employees from individual agreements to collective agreements. The Respondent also says that the exchanges between the Minister for Consumer and Employment Protection and the shadow Minister in *Hansard* vol 374, 2001-2002, at pages 8768-8776 are

enlightening. The Respondent says that the exchange makes it clear that s 4H(8) of the WA Act preserves employees' salaries under the workplace agreement, but the provision does not preserve other terms of the workplace agreement. In addition, it is submitted that Parliament's concern is to protect the employer in the circumstances where arguments of "mixing and matching" lead to an unfair result for an employer. It is contended that Parliament was concerned about persons who have won pay increases under a workplace agreement by trading off entitlements and the right to penalties and then coming back under an award and saying, "I'm entitled to that amount of money, plus half where a penalty rate, for instance applies." (*Transcript page 20*) In *Hansard* volume 374, 2001-2002 at 8733, the Minister says the effect of s 4H(8) is that, "an employer cannot be required to pay an employee more than he was entitled to, either under the contract of employment or the award on its own terms."

58 In relation to the policy documents referred to by the Applicants, the Respondent says that they are of limited utility in relation to the task before the Commission as they are merely a public servant's interpretation of the legislation and ultimately it is the Commission's job to interpret the legislation. The Respondent also says that in any event, there is nothing in the policy documents referred to which runs contrary to the argument put by the Respondent. The Respondent points out that in Circular 16 of 2002 in the document, Workplace Agreements – Transitional Provisions, under the heading "Policy Objective" the policy of the legislation is stated as, "The expedient transition of public sector employees from individual to collective employment arrangements." The Respondent says that if the Applicants are correct with the result that they are to be paid the Award or the General Agreement pay rates for an average of 40 hours, rather than 37.5 hours per week, there will be no incentive to ever move from the individual to the collective workplace arrangement. The Respondent says at paragraph 6 of Circular 16 of 2002, Workplace Agreements – Transitional Provisions, under the heading "Statement", "Employees in receipt of pay higher than that provided by awards/EBAs, will have their pay maintained where they move from statutory contracts on or after 1 January 2003 or transfer at level" is consistent with s 4H(8) of the WA Act. The Respondent also says that paragraphs 13, 14 and 25 of Attachment A to Circular 16 of 2002 make it clear that employees cannot be paid less as a result of the enactment of s 4H of the WA Act. In particular, paragraph 25 clearly contemplates that pay under the statutory contract of employment will at some stage be overtaken by that available under the relevant award or industrial agreement. The Respondent says that if the Applicants' argument is correct this will never occur.

59 The Respondent says that effect of s 4H(6)(a) of the WA Act clearly is that the Award and the General Agreement apply to the Applicants with a result they may not be paid at the ordinary rate of pay for more than 37.5 hours per week. The Respondent says the Commission should not enforce the workplace agreement insofar as it provides for ordinary rates of pay to be paid for an average of 40 hours per week. The Respondent says that although workplace agreements, awards and industrial agreements can co-exist in a compatible manner up to a point, they can only do so where there is no clash between the workplace agreement and the award or industrial agreement. In particular, the Respondent says that s 4H(6) of the WA Act provides that the award binds the parties and that means that they are under an obligation to follow it and it is not open to look to the workplace agreement on its own terms when it is inconsistent with the provision of an award or industrial agreement.

60 In relation to the Applicants' argument that they have an accrued right to be paid for 40 hours work at the award rate for ordinary time, the Respondent says there is nothing in the workplace agreements which provides that the Applicants are to be paid at the Award rate.

Conclusion

(a) Is s 4H of the Workplace Agreements Act ambiguous?

61 The tension between the effect of the terms of the statutory contract of employment and an award, including an industrial agreement created by s 4H(2), (6), (7) and (8) of the WA Act is unusual. I say that firstly because s 4H contemplates to some degree the melding of two or more bundles of statutory rights and obligations where at least one of which (the statutory contract of employment) was originally made (prior to the enactment of s 4H) as a document that was intended to cover matters without regard to any other competing terms and conditions in an award or industrial agreement. Secondly, the interrelationships created between a statutory contract of employment, the award and industrial agreements in s 4H(2), (6), (7) and (8) appear not to be clear on a plain reading of these subsections. If the Respondent's argument is correct then these provisions should be interpreted to render any provision in a statutory contract of employment inoperative where there is a conflict with the award or an industrial instrument. However, the provisions of s 4H do not expressly raise that consequence. The most critical words in the relevant provisions of s 4H are the opening words of subsection (6) which provide, "Despite subsection (2) the employer and the employee are bound by – (a) any award that extends to them". The question that arises is whether by the use of the word "despite", s 4H(6) means that the provisions of the award prevails or overrides the provisions of the statutory contract of employment, or (subject to s 4H(7) in respect of rate of pay) whether the provisions of the documents must be read together. The *Macquarie Dictionary* defines "despite" to mean, among other meanings, "in spite of; notwithstanding" and it defines "notwithstanding" as "without being withstood or prevented by; in spite of the fact that; although". Regard to these definitions does not indicate with any clarity whether the award is to prevail. However, the use of the word "despite" in s 4H(6) could be said to indicate that some conflict may arise between the statutory contract of employment and the award as the word "despite" does not convincingly raise an intention to override. It conveys uncertainty, is vague and thus raises an ambiguity in the meaning of and the effect of s 4H, in particular subsection (6).

(b) Extrinsic Materials

62 I agree with the Respondent's submission that the Commission should not have regard to the Implementation Guidelines in Circular to Departments and Authorities No 16 of 2002 formulated by officers of the DOCEP as that document simply is an interpretation of the legislation by one body. In addition and of greater importance, Circular 16 of 2002 is a policy and was not published until after the LRR Act was passed by Parliament. Section 4H was enacted by Part 3 of the LLR Act. Part 3 came into effect on 15 September 2002 and Circular 16 of 2002 was published on 22 November 2002.

63 At the time Parliament debated the provisions of the Labour Relations Reform Bill 2002, members of Parliament had before them the explanatory memorandum to the Bill. Paragraphs 61 to 65 of the explanatory memorandum dealt with the consequential amendments effected by s 4H of the WA Act. Paragraph 61 to 65 stated:

> "61. Upon the expiry of a workplace agreement, or its prior cancellation by the parties, new arrangements will come into effect for both the employer and the employee which will act as a safety net for those employers and employees who have not already entered into alternative employment arrangements.
>
> 62. The provisions will ensure that no employee, other than by agreement, will be worse off following the expiry of their workplace agreement. Every employee's contract of employment, which was either part of their workplace agreement or operated alongside it will remain in existence and operation. Employers will not be permitted to reduce an employee's wages below that being paid under the workplace agreement.
>
> 63. Where a relevant award exists, an employee's employment will also be subject to that award. An employer will be required to comply with all of the terms and conditions contained in the provisions of the relevant award, including penalty rates, allowances and rates of pay. Employers will only apply the ordinary wage as expressed in the award to the provisions of the award.
>
> 64. It is expected that employees will continue to work the same hours of work after the expiry of their agreement and will receive the higher of either their wages under:
>
> a) the contract of employment; or
>
> b) as required under the relevant award.
>
> 65. However, an employee will not be entitled to recover payment under their contract of employment and the penalties and allowances payable under the award. Employers in these circumstances are to be protected from the principle of "set-off" as it is currently applied by the Industrial Magistrate's Court (see Poletti v Ecob 91 ALR 381)."

64 When making the second reading speech the Minister for Consumer and Employment Protection in the Assembly on 19 February 2002 at page 7513 of *Hansard* stated, "Every employee will retain a contract of employment comprising their workplace agreement and common law contract of employment. An employee's employment will also be subject to the relevant award when one exists. An employer will be required to comply with all the terms and conditions contained in the provisions of the relevant award, including penalty rates, allowances and rates of pay."

65 After the second reading speech was made, the Bill was debated in the Assembly on 21 March 2002. At page 8772 of *Hansard* the Shadow Minister raised a number of questions about proposed s 4H. At page 8772 of *Hansard* the Shadow Minister said:

> "Two serious issues arise from the interpretation of proposed section 4H. Firstly, there is the loss of conditions. Although pay or salary is protected, conditions are not. I will go through that shortly. Secondly, as raised by the member for Darling Range, when a workplace agreement expires and the company is faced with a choice between an industrial agreement, EEA or award, the company may realise that it cannot afford those agreements. This particularly applies to those workplace agreements I identified earlier, which were for full-time work and open-ended hours. That will cause a serious problem if an employer wishes to dismiss those employees.
>
> I will take the minister, in a logical way, through the first problem – the loss of conditions. The Bill guarantees that wages provided by workplace agreements will not fall. The transitional arrangement fails to secure the employee conditions when they conflict with an award provision. The Bill provides that an employee's current workplace agreement and employment contract will form a new contract of employment but, at the same time, the award applies. The problem is that many terms of the new contract of employment will be inconsistent with the award. What is the provision for people on workplace agreements who have a condition of employment that is inconsistent with the award?"

66 The Minister replied and said at page 8773 of *Hansard* that if an employer neglects to put in place an alternative industrial agreement or an employee/employer agreement before the workplace agreement expires, the:

> "… proposed section 4H(6) provides for the award to extend to those employees. That is a matter that will have to be worked out, and I am not in a position to tie down exactly how it will work out. The award will be the standard, but a contract of employment also exists from the workplace agreement. Proposed section 4H(7) and 4H(8) attempt to make sure that a couple of matters are very clearly laid out. …
>
> First of all, in the calculation of the award entitlement, the problem was raised that, particularly in the mining industry, the whole system may originally have started with the award, but has now moved to annualised salaries because of fly in, fly out arrangements. Holiday pay then becomes an issue. An annualised salary is seen to be the standard, but it has bundled up a range of efficiencies, including rostering arrangements, penalty rates and site allowances. These are all now included in the hourly rate or the annual salary. The concern was that that might be equated to the ordinary hours for the award, so the employer would be stuck with the same base payment, as well as all the extra costs because of rostering constraints or requirement for loadings. That was never the intention. The calculation of an employee's award entitlement must be done solely on the contents of the award, and it is to be carried out independently of the contract of employment. All awards contain an ordinary or base rate of pay, which is used for paying employees for their ordinary working hours. This rate of pay must be used for calculating all entitlements under the award, including overtime, penalty rates, loading, and any allowances or other entitlements tied to the rate of pay rather than a flat dollar amount. The worker will be paid whichever is the better rate between the contract of employment as it stood under the workplace agreement, and the award. I am trying to make it clear that when calculating the two to see which is the best, conditions

cannot be dragged out of the existing agreement, be said to be part of the award and thus push the payment even higher.

Proposed section 4H(8) continues from there, and deals with the exclusion of set-off principles. Workplace agreements frequently provide for higher ordinary rates of pay, having abolished entitlements to overtime, penalty rates and sometimes allowances.

…

Industrial magistrate's courts, as part of a principle called set-off, have frequently held that, when a contract provides a higher base rate of pay, as a trade-off for other entitlements, the employee is nonetheless entitled to use that higher rate of pay for the purpose of calculating unpaid award entitlements. The legislation will prevent this. An employer cannot be required to pay an employee more than he is entitled to, either under the contract of employment or the award on its own terms."

67 The Shadow Minister then asked, "Does that relate to annual leave as well, when it has been incorporated in the annual salary? Does that mean the employee cannot then get that annual leave and the increased benefit, through salary?" The Minister replied, "On expiry of the workplace agreement, the person will be entitled to whatever is the greater; that is, the remuneration and conditions laid down in the workplace agreement or the award. We will not be able to transpose conditions established under a workplace agreement to the award calculations. If in establishing the rate of pay for the workplace agreement, matters going to annual leave or long service leave were included in the total payment, we would not be able to benchmark them across to the award calculation." The Shadow Minister then asked, "What does that mean?" and the Minister said, "The calculation will stand on the basis of the award as it is." The Shadow Minister asked, "Will they still get whatever is the greater salary, which will be incorporated into the trade-off of annual leave, in addition to the annual leave?" and the Minister said, "Yes." The Shadow Minister then put to the Minister, "That would be double dipping." and the Minister said, "No."

68 There was then some further debate about double dipping and at page 8774 of *Hansard*, the Minister admitted that there would be potential for double dipping to occur if they have traded off the four weeks' annual leave as they would be entitled to the annual leave in addition to the package they had agreed to. There was then some further debate about annual leave. Then the Shadow Minister put to the Minister that there would be double dipping on a range of standard award conditions and the Minister said, "There will be potential for double dipping to occur." There was then some discussion about fly in, fly out arrangements and working arrangements of two weeks on and one week off and whether those arrangements would result in statutory contracts of employment being inconsistent with the award and amount to contracting out. The Minister admitted in that case double dipping and a range of other problems would flow from that.

69 A further discussion about a high cost structure for employers ensued and then the Minister said at page 8775 of *Hansard*, "The practicalities are that most employees have traded off those conditions against the higher remuneration they received under a workplace agreement. If the conditions of the award are applied to them, that would most probably be advantageous to them although not in every case. The problem is for the employer who, in order to get the productivity for shift arrangements, has a higher cost structure."

70 The Minister then made a further comment about fly in, fly out arrangements and then said, "The advice I have, which I think helps clarify an important point that the member has raised, is that people must comply with the contract of employment. If the contract of employment is for 12-hour shifts and fly in, fly out arrangements, employers cannot say that employees must comply with an award condition of a 40-hour week, for example." The Shadow Minister challenged that by saying, "I am sorry, but that is wrong. If there is any inconsistency between the award and the contract of employment, the award applies. In the two examples I have given there are quite clearly inconsistencies so the award will apply." The Minister then replied, "The member is correct, as was I. It looks as though we are in conflict, but the fact is that the contract must be complied with. The member is saying that the award would lead to a breach of that." At page 8776 of *Hansard* the Shadow Minister said in response, "That would happen when the contract is inconsistent with the award." The Minister replied, "Yes. If there are clear, positive benefits to employees in retaining the conditions of working under the contract, they would continue to do so." The Shadow Minister then said, "In which proposed section does that apply in the event of an inconsistency?" The Minister said, "It applies in the practicalities of how the system will work." The Shadow Minister then said, "Tell me where in this legislation that applies, because I say it does not apply." The Minister then said, "I agree. I am saying that in the practicalities of how it will work, according to the member some people will have missed the boat and not done what would be expected of them in order to manage the difficulties. Therefore, they would be in a position of some jeopardy, which is taken account of in the legislation. The member is asking how they would handle it. When a contract is still in effect, it would be overridden by conditions in the award. Therefore, people would have to sort that out. They would look to how employer-employee relationships are normally conducted. If it is to the benefit of both parties, they will get on with business. That is how it always works."

71 The Shadow Minister then said:

"Under proposed subsection (5) the statutory contract of employment 'may be varied or terminated, as if it were a contract entered into between the employer and the employee'. Proposed subsection (6) then comes into play. Notwithstanding the creation of such a contract of employment, the employer and the employee are bound by any award that applies. The transitional arrangements built by statute will be what neither the employer nor the employee really wanted when they entered into a workplace agreement. The provisions create a new contract of employment with elements drawn from the workplace agreement and any previous contract of employment and makes them subject to the award that applies.

While that is recognised as causing a bit of a problem, an example has been brought to my attention that many workplace agreements provide for flat hourly rates, regardless of when work is performed. I earlier identified the workplace agreements that were 'loose' regarding hours worked. In other words, they did not provide for overtime or weekend penalty rates and only provided an hourly rate that was usually higher than the ordinary hourly rate in the award to

compensate for the absence of penalties. The problem arises when the hourly rate in a new contract is subject to the award. The new hourly rate of pay is the basis for the calculation of weekend and penalty rates. In other words, it would be a penalty in the rate of pay for the employee. The outcome is something that neither would have intended. In order to lessen the effect of that the draftsman has tried to resolve the dilemma with the provisions of proposed subsections (7) and (8). In combination, the provisions provide, for the purposes of the award, that the award ordinary rate of pay applies and not the rate in the new contract of employment. Rates of pay are protected. It provides that nothing requires the employer to pay more than that arising from the new contract of employment or from the award, whichever is the greater. Employee rates of pay are protected. The flat hourly rate derived from the former workplace agreement cannot be used for the purposes of calculation. As the minister explained, the award is used for the calculation of penalties. If the agreed hours in the new contract of employment were primarily worked at times when penalty rates applied, the requirement to pay rates as provided by the award would lead to significant additional wage payments. Proposed subsections (4), (7) and (8) have avoided a massive blow-out in wage costs in some cases but they have not cured the problem when unreasonable or irregular hours are worked."

72 Having read the debate about the proposed effect of s 4H, I am not satisfied that the debate provides any assistance to the task before the Commission as no clear statement of legislative intent in respect of this matter emerges. When the foregoing debate in *Hansard* is analysed a number of issues arise. The first is that it was contemplated that when s 4H was enacted that Parliament intended that there would be some conflict between the provisions of the statutory contract of employment and the award in some cases. Whilst Parliament was aware that could occur it made the amendments to the WA Act with the intention that parties to a statutory contract of employment would address this conflict by entering into another industrial arrangement. Why that has not occurred in these matters is not known. Plainly the operation of statutory contracts pursuant to s 4H of the WA Act was intended to be transitory.

73 The second aspect that emerges from the debate in *Hansard* is that no clarity emerges about what effect of a term of the statutory contract of employment would be when there is a conflict with a provision in the award. The Minister in particular made conflicting statements about this issue. For example, at page 7513 of *Hansard* the Minister stated that an employer will have to comply with all the terms and conditions in the award, including penalty rates, allowances and rates of pay. Then at page 8775 of *Hansard* he said that if the contract of employment provides for 12 hour shifts and fly in, fly out arrangements, employers cannot say that employees must comply with an award condition of a 40 hour week. He also said at the same page that where the contract is inconsistent with the award, the conditions of the contract would be applied if there are clear, positive benefits to employees. It is notable that except for the observation made by the Minister at page 7513 of *Hansard* set out above in this paragraph, the Shadow Minister disagreed with all of these propositions.

74 Thirdly, the debate does not directly deal with the issue before the Commission in this matter.

75 Fourthly, regard should be had to the fact that the explanatory memorandum before Parliament when the Bill was debated stated that it was expected that the hours of work of employees would not change.

(c) Purpose of the Workplace Agreements Amendments Repeal and Transition Provisions

76 The requirement that a Court must look to the purpose or object of the Act is the modern approach to statutory interpretation. Kirby J in *X and Others v Australian Prudential Regulation Authority and Another* (2007) 232 ALR 421 recently observed at [116]:

> "The time has long passed when this court will construe particular words out of context and give meaning to them divorced from the relevant parts of the legal document in which the words appear. That was the former way in which statutes were construed in Australia and elsewhere. It caused many statutory provisions to miss their target by an excessively narrow and literal interpretation of statutory language, read in isolation. This is not the way meaning is attributed to words in ordinary life. Such meaning is ordinarily derived from the text, viewed in its context. It is therefore crucial to have regard to other provisions of the legal text, as such provisions cast light on ambiguous words or phrases in a particular provision."

77 To ascertain the mischief the Act was designed to remedy, the Court may consider extrinsic materials (*Newcastle City Council v GIO General Limited* (1997) 191 CLR 85 at 99, see also *Bropho v State of Western Australia* (1990) 171 CLR 1 at 20). The mischief proposed by the amendments to the WA Act by the Labour Relations Reform Bill was disclosed in the Second Reading Speech given by the Minister on the introduction of the Labour Relations Reform Bill. At page 7512 of *Hansard* on 19 February 2002 the Minister stated in relation to the amendments to the WA Act:

> "In the time workplace agreements have operated, they have significantly and fundamentally damaged the working condition of thousands of Western Australian workers. Individual employees, without the ability to bargain collectively, have seen their wages and conditions driven down below the acceptable community standards in the award system to an artificial low, which was created by the Court Government. These agreements caused enormous difficulties in industries in which the employees were already among the lowest paid, including the security and cleaning industries.
>
> There is a paucity of precise data on the outcomes of the workplace agreements system. However, from the two surveys published by the Commissioner of Workplace Agreements during the term of the previous Government, even from the limited material made available in them, an aggregate picture of wage and conditions erosion clearly emerges.
>
> The Court Government promoted its workplace agreement system as providing flexibility and choice, but effectively it denied many employees any choice. This Government is committed to providing employees with a genuine choice in the type of employment arrangements under which they work. This Government was elected on the principle of implementing a fair, efficient and productive industrial relations policy. It was also elected on a policy that promotes

> fairness for all employees, not only those with skills that are in short supply. Part of this policy of fairness and justice includes the abolition of the Workplace Agreements Act. Part 3 of this Bill achieves that pre-election commitment. Workplace agreements that were registered prior to 22 March 2001 will remain in operation for up to 12 months after the commencement of this part. This period will give ample opportunity for employers to review their current employment arrangements and put in place new agreements. Workplace agreements that took effect after 21 March 2001 will remain in operation for only six months after the commencement of this part.
>
> In one of its more Machiavellian provisions, section 19(4) of the Workplace Agreements Act allowed a workplace agreement to continue in effect beyond its nominal expiry date. Agreements that are continuing in operation by effect of this section will remain in operation for only six months after the commencement of this part. Although the workplace agreements remain, the agreements will need to comply with the enhanced provisions contained in the Minimum Conditions of Employment Act. Any agreement that has been lodged for registration with the office of the Commissioner of Workplace Agreements but not formally registered, will not come into effect. On expiry of a workplace agreement, or its prior cancellation by the parties, new arrangements will come into effect for both the employer and the employee. The provisions will ensure that no employee, other than by agreement, will be worse off following the expiry of his or her workplace agreement. Every employee will retain a contract of employment comprising their workplace agreement and common law contract of employment. An employee's employment will also be subject to the relevant award when one exists. An employer will be required to comply with all the terms and conditions contained in the provisions of the relevant award, including penalty rates, allowances and rates of pay."

78 The mischief that emerges from the amendments to the WA Act in 2002 is that they were designed to produce interim arrangements and to encourage employers and employees to choose to enter into different industrial arrangements. The amendments were also put forward on the basis that no employee would be disadvantaged following the expiry of their workplace agreement.

79 In my opinion the interpretation put forward by the Respondent does not promote the purpose of the amendments made to the WA Act in 2002 by the LRR Act. When regard is had to the purpose and the express words of ss 4H, 4I and 4J of the WA Act, I am of the opinion, (except that in relation to rates of pay) the rights and obligations in a workplace agreement are not rendered inoperative by the provisions of the award. The operation of s 4H(6)(a) and (7) has the effect that except where s 4H(8) applies, the rate of pay for each condition of employment created by the workplace agreement is the rate of pay prescribed in the award.

80 When this construction is applied to the facts of this matter the following consequences flow. Firstly, pursuant to the terms of statutory contracts of employment the Applicants are required to work an average of 40 hours of work a week. Pursuant to the statutory contract of employment all of these hours are ordinary hours of work. Expressly pursuant to s 4H(7) they are required to be paid the award rate of pay when this term of the statutory contract of employment (which requires the Applicants to work an average of 40 hours a week) is read with s 4H(7). Consequently the rate of pay for each of those hours is the rate of pay prescribed under the Award for ordinary hours of work as it is a term of the statutory contract of employment that ordinary hours of work are an average of 40 hours a week. None of these hours of work are overtime. Consequently, no entitlement to claim overtime under the Award arises.

81 It is irrelevant that it is a core condition of the General Agreement than an average of no more than 37.5 hours of work is to be worked as ordinary hours, as the only provisions of the Award, the General Agreement and the Agency Specific Agreement that renders inoperative any provisions in the statutory contracts of employment are provisions that are rates of pay.

82 The operation of s 114 of the IR Act does not apply. Section 114 of the IR Act applies to parties entering into a contract of common law. Statutory contracts of employment are not common law contracts. They are contracts which were entered into and given effect only by statutory force firstly as registered workplace agreements and then by s 4H.

83 If I am wrong in concluding that s 114 does not apply to statutory contracts of employment preserved by s 4H, in my opinion it is strongly arguable that the effect of ss 4H, 4I and 4J is that these sections impliedly repeal s 114 insofar as s 114 applies to the terms of a contract of employment preserved by s 4H.

84 In *Goodwin v Phillips* (1908) 7 CLR 1 at 7 Griffith CJ set out the application of this test is:

> "… where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

85 However, the two enactments must be so inconsistent or repugnant that they cannot stand together (per Barton J in *Goodwin v Phillips*). In *Ferdinands v Commissioner for Public Employment* (2006) 224 ALR 238 Gummow and Hayne JJ at [47] to [49] observed:

> "47 No conclusion can be reached about whether a later statutory provision contradicts an earlier without first construing both provisions. If, upon their true construction, there is an '[e]xplicit or implicit contradiction' between the two, the later Act impliedly repeals the earlier. One example that may be given of an explicit contradiction is provided by the legislation considered in *Michell v Brown* where the later Act gave the same definition of an offence as had been stated in the earlier Act, but specified a different punishment, and varied the procedure to be followed for its prosecution. It was not possible to comply with both Acts simultaneously.

48 In *Rose v Hvric*, a distinction was drawn between explicit or implicit contradiction on the one hand and 'merely 'inferential contradiction', as Lord Hatherley called it in *Attorney-General v Great Eastern Railway Co*' on the other. Thus, it was said that to show that provisions of the later Act would ground a conclusion that the train of thought of those who drafted that later Act, if logically pursued, would have led the drafters to enact an exception to the operation of the former Act, would not suffice to demonstrate implicit contradiction. It would show only an inferential contradiction. It would not show implicit contradiction because, as Gaudron J said in *Saraswati*, the general presumption is that there is no contradiction between two Acts of the one legislature.

49 Reference to 'implicit contradiction' may suggest that it is both permissible and useful to resort to 'covering the field' tests developed in the application of s 109 of the Constitution in deciding whether a later Act impliedly repeals an earlier. It is, however, necessary to recognise that s 109 concerns the paramountcy of a law of the Commonwealth over a law of a state. The question in the present case is not whether one law enacted by one legislature prevails over a law enacted by another legislature; it is whether the presumption that two laws made by the one legislature are intended to work together is displaced. It is unnecessary to decide in this case whether, or how much, …"

86 In the present case there are difficulties with s 114 of the IR Act and s 4H of the WA Act standing together as s 114 prohibits what s 4H permits. The two provisions cannot stand together as s 4H provides for some contractual provisions (in this matter a 40 hour week) to operate when s 114 could be said to prohibit such an arrangement as the 40 hour week can be said to "purport to annul or vary an award or industrial agreement" within the meaning of s 114 as a 40 hour week is contrary to requirements of clauses 11(3)(d), 20(1), (2) and (3) of the Award and clauses 8.1, 9.1, 9.2 and 13 of the General Agreement to work a 37 and a half hour week.

87 If the Respondent's construction of s 4H is correct then s 4H(7) would have no work to do as it would follow from s 4H(6) that the rates of pay in the award would render inoperative the rates of pay in the statutory contract of employment by operation of s 4H(6)(a) and s 114 of the IR Act. In addition, s 4H(8) would only apply to an employee's entitlements under the statutory contract of employment which were not inconsistent with any provision of an award. If for example an employee was entitled to eight weeks' paid annual leave under the statutory contract of employment and the award provided for four weeks' paid annual leave, if the Respondent's argument is correct the employee would only be entitled to four weeks' paid annual leave as s 4H(8) would not apply. However, if the construction set out above in paragraph [79] is applied, the employee would retain a right to be paid eight weeks' annual leave but the rate of pay for that annual leave would be determined by the award rate of pay pursuant to s 4H(7). Further, s 4H does not characterise a statutory contract of employment as having the same effect as common law contracts of employment but simply describes them as an "individual contract" (s 4H(4)).

88 In relation to the Applicant's argument that they have an accrued right to be paid for the 40 hours a week they contracted to perform at the applicable award rate, whilst it is not necessary to make a finding about this argument because of my findings in respect of the proper construction of s 4H, it is my view that with respect the argument is misconceived. At the highest, pursuant to s 4I of the WA Act and s 99 of the LLR Act the only right or entitlement that accrues is a right to be paid for 40 hours a week at the rate specified in the workplace agreement for hours of work that were worked prior to the LLR Act coming into force. If an employee had not been paid for those hours of work after the LLR Act came into force they would have an accrued right to be paid. For s 37 of the I Act and s 99 of the LLR Act and s 4I of the WA Act to apply, the right must have become complete prior to the coming into operation of the LLR Act.

(d) Remedy

89 The Commission during the hearing invited the parties to provide submissions as to whether the Public Service Arbitrator's power to "enquire into and deal with" an industrial matter under s 80E includes a general power to award compensation to remedy industrial fairness. The Respondent filed submissions on 15 June 2007 and the Applicants filed their submissions on 19 June 2007 in respect of this issue. Because of my findings in respect of the construction of s 4H of the WA Act it is not necessary to recite the arguments put about the width of the plenary power in respect of any inquiry into industrial fairness or whether s 80E of the IR Act empowers such an inquiry by the Commission. However, implicitly raised in the submissions by both parties is the issue whether beyond making a declaration the Commission can make an award of money to compensate the Applicants for the failure of the Respondent to pay the Applicants less than their statutory contract of employment entitlement under s 80E(5) of the IR Act.

90 Section 80E(1), (2) and (5) of the IR Act provides:

"(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

(2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —

(a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and

(b) a claim in respect of a decision of an employer to downgrade any office that is vacant.

…

(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the

jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

91 It is contended on behalf of the Applicants in their written submissions filed on 19 July 2007 that:

"(a) The capacity of the Arbitrator to 'enquire into and deal with' an industrial matter is, on the very language of the conferral of power, a broad and plenary one. In particular, a 'dealing with' any inequity or unfairness found to have occurred self-evidently sits compatibly with a remedy through the order for payment of a compensatory sum.

(b) The specific ways in which a 'dealing' with a matter so 'enquired into' may arise are expressly contemplated by s.80E(5). Here, the acts of the Respondent to pay the Applicants less than their contractual entitlement (including, potentially, the underpayment of any overtime duly earned) may be 'modified' or 'varied' as a means of redress.

(c) The express restrictions on the plenary power are inapplicable. Division [sic] of Part II is concerned with the presently irrelevant jurisdiction of the Commission to make General Orders. No referral has been sought, or is being contemplated to the Commission in court session or the Full Bench pursuant to s.80E(6). There is no limitation by reason of any procedure referred to in s.97(1)(a) of the *Public Sector Management Act 1994*, contrary to s.80E(7). Critically though, were there to be any more express restrictions of a substantive kind, the legislature surely would have expressed itself with clarity.

(d) The application of the provisions of Part II, Divisions 2 to 2G do not restrict the plenitude of that power either. Notably, s.80G(1) is concerned with the application of those provisions, concern the *exercised by* an Arbitrator of *his (or her) jurisdiction* under the Act. The qualifications are thus concerned with the *manner* or *mode* of how jurisdiction is exercised, as opposed to the nature and content of that jurisdiction itself."

92 In support of the Applicants' submissions they say the decision of Wheeler and Le Miere JJ in *Director-General Department of Justice v Civil Service Association of Western Australia Inc* (2005) 149 IR 160 at [23] to [33] supports the width of the power conferred by s 80E of the IR Act.

93 The Respondent points out in his submissions filed on 15 June 2007 that in a claim for denied contractual benefits it is clear that the power to "deal with" the breach of contract includes a power to award damages for the breach (*Matthews v Cool or Cosy Pty Ltd & Anor* (2004) 84 WAIG 2152).

94 I note that s 80E(1) of the IR Act provides that a Public Service Arbitrator has exclusive jurisdiction to enquire into a deal with any industrial matter relating to a Government Officer and s 80G(1) provides that "Subject to this Division, the provisions of Part II Divisions 2 to 2G … shall apply with such modifications … as may be necessary or appropriate, to the exercise by an Arbitrator" of his or her jurisdiction under the IR Act.

95 The Applicants have put the issues for determination by the Commission in the form of two types of applications. One is the applications brought by each Applicant under s 80E(2)(a) pursuant to s 80F(2) and the other is the applications brought by each Applicant under s 29(1)(b)(ii). Whether the Commission has the power to determine the s 29(1)(b)(ii) claims is not clear and has not been the subject of argument by counsel. Consequently, I will make no findings about this issue.

96 I note, however, that whilst it is open under ss 29(1)(b)(ii) and 34(1) of the IR Act to make a declaration that the Applicants are each owed contractual benefits, it is not possible to do so under s 80E(5). Section 29(1)(b)(ii) is an exercise of judicial power by the Commission as it determines existing rights and liabilities. (See Kennedy J at [2] in *Ahern v The Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (Western Australian Branch) Inc* (2000) 80 WAIG 1729). It is observed, however, that the power to make a declaration as to a right under s 29(1)(b)(ii) is confined to the contractual benefit which is an "industrial matter" within the meaning of s 7 of the IR Act.

97 Section 80E of the IR Act is a source of arbitral power. Pursuant to s 80E(5) a Public Service Arbitrator may only review, nullify, modify or vary a decision by an employer. In *Director-General Department of Justice v Civil Service Association of Western Australia Inc*, Wheeler and Le Miere JJ at [21] held that jurisdiction of the arbitrator under s 80E did not contain a power to make declarations. At [33] their Honours found that the power to "review" in s 80E(5) is not an independent power to review the decision of the employer but only a power to review (and, if necessary, to differ from) the decision where it is necessary to do so as part of the process of dealing with an industrial matter.

98 In light of these observations I wish to consider whether to make the following orders in respect of applications made under s 80E (P1 of 2007 and P2 of 2007). Firstly, I wish to consider whether I should make an order that the Respondent is to revoke his decision in 2006 not to pay the Applicants for 40 hours a week at the ordinary rate of pay specified in the Award and the General Agreement that the Respondent is to pay:

(a) Mr Wall - $3,699.30 being the amount owed to him as at 31 May 2007 and to pay him for 40 hours a week for each 40 hour week worked since 31 May 2007 at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) until Mr Wall and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(6) of the Act.

(b) Mr Ward - $4,164.00 being the amount owed to him as at 31 May 2007 and to pay him for 40 hours a week for each 40 hour week worked since 31 May 2007 at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) until Mr Wall and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(6) of the Act.

99 In relation to the contractual benefits claims, I wish to consider whether to make the following orders. In relation to Mr Wall, I propose making a declaration that the Respondent owes Mr Wall contractual benefits and order the Respondent to pay Mr Wall $3,699.30 being the amount owed to him as at 31 May 2007 and to pay him for 40 hours a week for each 40 hour week worked since 31 May 2007 at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) until Mr Wall and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(6) of the Act .

100 In relation to Mr Ward, I propose to make similar orders except in relation to the amount outstanding as at 31 May 2007.

101 As to the declaration sought by the Applicants in respect of the effect of clause 10.10 of the Agency Specific Agreement it is my opinion that I have no power to do so. The Commission may only make a declaration as to the meaning of a provision of an industrial agreement if it has before it an application under s 46 of the IR Act. Section 46(1)(a) expressly empowers an employer, a organisation under the IR Act or an association bound by an award to make an application to declare the true interpretation of the award. Where the parties seek a "bald interpretation" of the IR Act contains the exclusive jurisdiction of the Commission (see *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Roman Catholic Bishop of Bunbury Chancery Office and Others* (2007) 87 WAIG 1148 at [42]). Secondly, even if I was not prohibited by the operation of s 46 of the IR Act for the reasons outlined above declarations cannot be made under s 80E. In addition, there is no evidence before me of any act, matter or thing done by the Respondent within the meaning of s 80E(5) in relations to clause 10.10 that is able to be reviewed, nullified, modified or varied by the Commission in my capacity as Public Service Arbitrator. Thirdly, in any event, even if I was empowered to make a declaration, I am not satisfied that the declaration sought could be made under s 29(1)(b)(ii) of the IR Act as there is no evidence or material before me that either Applicant has made an application under clause 10.10 to commute 2.5%. In any event, clause 10.10 does not create an unfettered right to convert two and a half hours of work into a monetary entitlement as all applications to do so must be duly authorised by the Respondent or delegated officer as per Schedule 1. In addition, clause 10.10 only applies to overtime and not ordinary hours of work.

102 For the reasons set out above I will hear further from the parties prior to making any orders.

2007 WAIRC 01106

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN MARTIN WALL
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
	-and-
	TREVOR JAMES WARD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
	-and-
	JOHN MARTIN WALL
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
	-and-
	TREVOR JAMES WARD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 19 SEPTEMBER 2007
HEARD	THURSDAY, 6 SEPTEMBER 2007
FILE NO.	B 44 OF 2007, B 45 OF 2007, P 1 OF 2007, P 2 OF 2007
CITATION NO.	2007 WAIRC 01106

Catchwords	Entitlements under statutory contract of employment – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii), s 7, s 34, s 41, s 46, s 80E and s 80I; *Workplace Agreements Act 1993* (WA) s 4H.
Result	Orders made
Representation	
Applicant	Mr R L Hooker (of counsel for the Applicants)
Respondent	Mr D J Matthews (of counsel for the Respondent)

Supplementary Reasons for Decision

1 Following the delivery of reasons of decision in this matter on 24 August 2007 [2007] WAIRC 01025 ("the reasons") the Commission heard submissions from the parties whether the Commission has the power to issue the orders contemplated in paragraphs [98] to [100] of the reasons.

2 In paragraphs [98] to [100]of the reasons I stated:

> "In light of these observations I wish to consider whether to make the following orders in respect of applications made under s 80E (P1 of 2007 and P2 of 2007). Firstly, I wish to consider whether I should make an order that the Respondent is to revoke his decision in 2006 not to pay the Applicants for 40 hours a week at the ordinary rate of pay specified in the Award and the General Agreement that the Respondent is to pay:
>
> (a) Mr Wall - $3,699.30 being the amount owed to him as at 31 May 2007 and to pay him for 40 hours a week for each 40 hour week worked since 31 May 2007 at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) until Mr Wall and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(6) (sic) of the Act.
>
> (b) Mr Ward - $4,164.00 being the amount owed to him as at 31 May 2007 and to pay him for 40 hours a week for each 40 hour week worked since 31 May 2007 at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) until Mr Wall and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(6) (sic) of the Act.
>
> In relation to the contractual benefits claims, I wish to consider whether to make the following orders. In relation to Mr Wall, I propose making a declaration that the Respondent owes Mr Wall contractual benefits and order the Respondent to pay Mr Wall $3,699.30 being the amount owed to him as at 31 May 2007 and to pay him for 40 hours a week for each 40 hour week worked since 31 May 2007 at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) until Mr Wall and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(6) (sic) of the Act.
>
> In relation to Mr Ward, I propose to make similar orders except in relation to the amount outstanding as at 31 May 2007."

3 Counsel for the Respondent, Mr Matthews submits that the orders contemplated in paragraph [98] could not be made as the Commission is not empowered under s 80E(1)(e) of the *Industrial Relations Act 1979* ("the IR Act") to make an order to provide for an award of compensation, damages or back pay. Section s 80E(1)(2) and (5) of the IR Act provide:

> "(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.
>
> (2) Without limiting the generality of subsection (1) the jurisdiction conferred by that subsection includes jurisdiction to deal with —
>
> (a) a claim in respect of the salary, range of salary or title allocated to the office occupied by a government officer and, where a range of salary was allocated to the office occupied by him, in respect of the particular salary within that range of salary allocated to him; and
>
> (b) a claim in respect of a decision of an employer to downgrade any office that is vacant.
>
> …
>
> (5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division."

4 In support of its submission the Respondent relies upon the decision of the Industrial Appeal Court in *State Government Insurance Commission v Johnson* (1977) 77 WAIG 2169 in which the Court held the power of the Public Service Board to "adjust" matters under s 80I(1) of the IR Act could not be construed in such a manner to grant the Board the power to award compensation. Section 80I(1) of the IR Act provides:

> "(1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —

(a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;

(b) an appeal by a government officer, who is the holder of an office included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*, under section 78 of the *Public Sector Management Act 1994* against a decision referred to in subsection (1)(b) of that section;

(c) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary not lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed;

(d) an appeal by a government officer, other than a person referred to in paragraph (b), under section 78 of the *Public Sector Management Act 1994* against a decision referred to in subsection (1)(b) of that section;

(e) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed,

and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e)."

5 In *State Government Insurance Commission v Johnson*, the Respondent, a government officer was dismissed for misconduct. He sought a declaration that his dismissal was an unfair and (an order for) compensation. Anderson J with whom Franklyn and Scott JJ agreed observed at 2170 to 2171:

> "The word "adjust" has various applications in common parlance and in any given case it obtains its precise meaning or sense from the context in which it is used. In this legislation, the context is provided by each of the paragraphs (a) to (e) of s80I(1) and in the case under consideration the context is provided by para (e). The only "matter" which is referred to in that paragraph is "a decision, determination or recommendation ... that the Government officer be dismissed". It is that, and only that, which may be "adjusted" in the exercise of this particular aspect of the Board's jurisdiction. The power to "adjust" a decision or determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is, by altering the period of notice. He made only a claim for monetary compensation on the ground that the decision of dismissal itself was unfair. Hence, the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus to adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss."

6 The Respondent contends that as for the word "adjust" in relation to the Public Service Appeal Board, the Public Service Arbitrator's powers cannot be construed in such a manner so as to grant the Arbitrator jurisdiction to award compensation. The Respondent points out the Industrial Appeal Court in *State Government Insurance Commission v Johnson* found that in awarding compensation the Public Service Appeal Board was not "adjusting" the decision of the employer. It is said similarly here to award compensation is not a "review, nullification, modification or variation" of any act, matter or thing done by the employer to the Applicants. Whilst the Respondent says that the Public Service Arbitrator has jurisdiction in this matter to modify or vary the decision not to pay the Applicants for 40 hours per week at the ordinary rate under the *Public Service Award 1992* ("the Award") or the *Public Service General Agreement 2006* ("the General Agreement") at the time the order is made by the Commission, it may not take the further step of awarding compensation for the failure to do so in the past. It is also said that to make an order as contemplated in paragraph [98] of the reasons would not be a modification or variation of the act, matter or thing done to the Applicants.

7 I do not accept that the provisions of s 80E(1)(5) of the IR Act should be construed as narrowly as the Respondent contends. Firstly, the ratio of *State Government Insurance Commission v Johnson* must be considered by regard to the facts before the Industrial Appeal Court. In *State Government Insurance Commission v Johnson* what was sought by the employee did not constitute an adjustment of the decision of the employer to dismiss. The employee did not seek to challenge the fact that his employment was terminated, but sought a declaration that the termination was unfair and an award of compensation which did not constitute an adjustment of the determination of the employer's decision to dismiss. His Honour, Justice Anderson left open the question whether there would be a power to adjust a period of notice. Secondly, the power to review, modify or vary a decision of any employer under s 80E(5) of the IR Act is wider than the power to adjust under s 80I. As Justice Anderson stated a power to adjust can only be a power to reform the decision in some way. In *Director General Department of Justice v The Civil Service Association of Western Australia Incorporated* (2005) 149 IR 160 at [33] Wheeler and Le Miere JJ in a joint judgement observed that the word "review" in s 80E(5) of the IR Act although plainly is not intended to confer some independent power to review any decision of an employer, is a power to review and if necessary, to differ from the decision where it is necessary to do so as part of the process of dealing with an industrial matter. To differ is to change. Under

s 80E(1)(5) of the IR Act the Commission also has power to modify a decision of an employer. The word modify also connotes the ability to change a decision of the employer and the power to nullify is to make a decision ineffective or inoperative. Thirdly, the whole of s 80E of the IR Act must be read as a whole. When regard is to s 80E(1) of the IR Act it can be seen that the Public Service Arbitrator has general power to enquire and deal with any industrial matter relating to a government officer. Under s 80E(2)(a) in relation to claims referred by a government officer the jurisdiction of the Arbitrator also includes a jurisdiction to deal with a claim in respect of salary allocated to an office occupied by a government officer. The Public Service Arbitrator has wider powers to hear and determine matters under s 80E than the Public Service Board does under s 80I. In my opinion if the Commission is to make an order to vary the decision made by the Respondent in 2006 by making an order which has the effect of requiring that the Applicants be paid for 40 hours per week at the ordinary rate of pay specified in the Award or the General Agreement since the decision took effect, the order would be within the power to review, nullify, modify or vary the decision of the Respondent as contemplated by s 80E(5) of the IR Act. The effect of such an order would be to vary the decision of the Respondent, that is to differ from or change the decision of the Respondent.

8 Having reviewed paragraph [98] of the reasons I am of the opinion that the orders contemplated in that paragraph should be better expressed so as to properly reflect the provisions of s 80E(5). Further I am of the opinion that the way in which I contemplated making an order in paragraph [98] could be prima facie interpreted as an award of compensation. However I am of the opinion that I am empowered to make an order which will have the effect of requiring the Respondent to make the payments sought by the Applicants. Accordingly I intend to make orders that the decision of Respondent made in 2006 not to pay the Applicants for 40 hours a week at the ordinary rate of pay specified in the Award or the General Agreement be varied in that the Respondent is to pay the Applicants for 40 hours a week at the ordinary rate of pay specified in the Award or the General Agreement (whichever is the greater) from the time the decision made by the Respondent took effect in 2002 until the Applicants and the Respondent vary or terminate the statutory contracts of employment in the manner provided for in s 4H(5) of the *Workplace Agreements Act 1993*. As the Commission has two applications before it I will make separate orders in relation to Mr Wall and Mr Ward. The Respondent will be given 21 days to effect the variation of his decision.

9 In relation to the contractual benefits claims the Respondent contends that to make the order contemplated in paragraph [99] of the reasons would be to make an order to enforce the provisions of the Award. The Respondent says that s 83(3) of the IR Act provides that an application for an enforcement of an instrument which includes an award or industrial agreement shall not be made otherwise than to the Industrial Magistrate. I do not accept that such an argument could be made out in this matter as the findings made in the reasons make it clear that the Applicants' entitlement to the amount claimed arise pursuant to the Applicants' statutory contracts of employment and not by operation of the Award or General Agreement.

10 For these reasons set out above I will issue minutes of proposed orders in P1 and P2 of 2007 as set out in paragraph [8] of these reasons and in relation to B44 and B45 of 2007 I will issue minutes of proposed orders in the terms set out in paragraph [99] of the reasons.

2007 WAIRC 01116

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN MARTIN WALL
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 24 SEPTEMBER 2007
FILE NO	B 44 OF 2007
CITATION NO.	2007 WAIRC 01116

Result	Declaration and Order made
Representation	
Applicant	Mr R L Hooker (of counsel for the Applicant)
Respondent	Mr D J Matthews (of counsel for the Respondent)

Order

HAVING HEARD Mr R L Hooker (of counsel for the Applicant) and Mr D J Matthews (of counsel for the Respondent), the Commission, pursuant to the powers conferred on it under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* hereby:

(1) DECLARES that the Respondent owes the Applicant contractual benefits;

(2) ORDERS that the Respondent pay the Applicant $3,699.30 within 21 days of the date of this order;

(3) ORDERS that the Respondent pay the Applicant 40 hours a week at the ordinary rate of pay specified in the *Public Service Award 1992* or the *Public Service General Agreement 2006* (whichever is the greater) until the Applicant and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(5) of the *Workplace Agreements Act 1993*.

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

2007 WAIRC 01117

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES TREVOR JAMES WARD

APPLICANT

-v-

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH
DATE MONDAY, 24 SEPTEMBER 2007
FILE NO B 45 OF 2007
CITATION NO. 2007 WAIRC 01117

Result Declaration and Order made
Representation
Applicant Mr R L Hooker (of counsel for the Applicant)
Respondent Mr D J Matthews (of counsel for the Respondent)

Order

HAVING HEARD Mr R L Hooker (of counsel for the Applicant) and Mr D J Matthews (of counsel for the Respondent), the Commission, pursuant to the powers conferred on it under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* hereby:

(1) DECLARES that the Respondent owes the Applicant contractual benefits;

(2) ORDERS that the Respondent pay the Applicant $4,164.00 within 21 days of the date of this order;

(3) ORDERS that the Respondent pay the Applicant 40 hours a week at the ordinary rate of pay specified in the *Public Service Award 1992* or the *Public Service General Agreement 2006* (whichever is the greater) until the Applicant and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(5) of the *Workplace Agreements Act 1993*.

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

2007 WAIRC 01118

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHN MARTIN WALL

APPLICANT

-v-

CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH
DATE MONDAY, 24 SEPTEMBER 2007
FILE NO P 1 OF 2007
CITATION NO. 2007 WAIRC 01118

Result	Order made
Representation	
Applicant	Mr R L Hooker (of counsel for the Applicant)
Respondent	Mr D J Matthews (of counsel for the Respondent)

Order

HAVING HEARD Mr R L Hooker (of counsel for the Applicant) and Mr D J Matthews (of counsel for the Respondent), the Commission, pursuant to the powers conferred on it under s 80E of the *Industrial Relations Act 1979* hereby orders that:

(1) The decision of the Respondent in 2006 not to pay the Applicant for 40 hours a week at the ordinary rate of pay specified in the *Public Service Award 1992* ("the Award") or the *Public Service General Agreement 2006* ("the General Agreement") is varied in that the Respondent is to pay the Applicant for 40 hours a week at the ordinary hourly rate of pay specified in the Award or the General Agreement (whichever is the greater) from the date of the effect of decision in 2006 until the Applicant and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(5) of the *Workplace Agreements Act 1993*.

(2) The variation of the decision is to be effected by the Respondent within 21 days of the date of the Order.

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

2007 WAIRC 01119

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR JAMES WARD
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 24 SEPTEMBER 2007
FILE NO	P 2 OF 2007
CITATION NO.	2007 WAIRC 01119

Result	Order made
Representation	
Applicant	Mr R L Hooker (of counsel for the Applicant)
Respondent	Mr D J Matthews (of counsel for the Respondent)

Order

HAVING HEARD Mr R L Hooker (of counsel for the Applicant) and Mr D J Matthews (of counsel for the Respondent), the Commission, pursuant to the powers conferred on it under s 80E of the *Industrial Relations Act 1979* hereby orders that:

(1) The decision of the Respondent in 2006 not to pay the Applicant for 40 hours a week at the ordinary rate of pay specified in the *Public Service Award 1992* ("the Award") or the *Public Service General Agreement 2006* ("the General Agreement") is varied in that the Respondent is to pay the Applicant for 40 hours a week at the ordinary hourly rate of pay specified in the Award or the General Agreement (whichever is the greater) from the date of the effect of decision in 2006 until the Applicant and the Respondent vary or terminate the statutory contract of employment in the manner provided for in s 4H(5) of the *Workplace Agreements Act 1993*.

(2) The variation of the decision is to be effected by the Respondent within 21 days of the date of the Order.

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

2007 WAIRC 01154

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KALMA JOY WYATT
	APPLICANT
	-v-
	REALTOWN PTY LTD T/AS MEDINA TAVERN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	MONDAY, 10 SEPTEMBER 2007
DELIVERED	MONDAY, 10 SEPTEMBER 2007
FILE NO.	U 140 OF 2007
CITATION NO.	2007 WAIRC 01154

CatchWords	*Industrial law* - Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Commission satisfied applying principles that discretion should not be exercised – Commission satisfied that respondent is a trading corporation – Claim beyond Commission's jurisdiction - Acceptance of referral out of time not granted – Industrial Relations Act 1979 *(WA) s 29(1)(b)(i), s 29(2), s 29(3)*
Result	Application dismissed
Representation	
Applicant	In Person
Respondent	Mr D Johnston as agent

Reasons for Decision

(ex tempore)

1. This application is brought by Kalma Joy Wyatt ("the applicant") against Realtown Pty Ltd, trading as the Medina Tavern ("the respondent"). The application alleges that on or about 5 July 2007 the applicant's employment as assistant manager, as she describes it in her application, was brought to an end in circumstances which were harsh, oppressive and unfair. It is also said by the applicant that she does not request reinstatement, but rather seeks compensation for loss caused by the unfair dismissal by the respondent.

2. The respondent by its notice of answer and counterproposal raises a number of issues in relation to this application. Firstly, it denies that the dismissal of the applicant, as alleged, occurred at all; rather it has asserted that the applicant left her employment of her own volition. Secondly, in any event, it is said by the respondent that it is a trading corporation for the purposes of the Workplace Relations Act 1996 (Cth) and therefore by reason of s 16(1) of that legislation and on the authority of *Sewell v Glenn Brown CTI Logistics* (2006) 86 WAIG 3278 the applicant's claim is in any event beyond the Commission's jurisdiction.

3. This proceeding deals with whether or not the applicant's claim should be received by the Commission outside of time pursuant to s 29(3) of the Act, it being clearly the case that the application was filed more than 28 days after the applicant's employment was terminated by the respondent. Indeed, on the papers before the Commission, the application is some 13 days out of time. It is also the case that by s 29(3) of the Act the Commission has the power to extend time within which such a claim can be brought before it on the basis that not to do so would be unfair. The onus is on the applicant to establish in the circumstances if it would be unfair if her claim was not able to proceed. The relevant principles in relation to matters of this kind were dealt with by the Industrial Appeal Court in *Malik v Department of Education* (2004) 84 WAIG 683, a case which is well known in this jurisdiction. It is plainly the case, in my view, on the authority of *Malik*, that where the Commission either lacks jurisdiction or an application is completely devoid of merit, then it could not ever be said that it would be unfair to not extend time pursuant to s 29(3) of the Act as in either case the application would have, in any event, no prospect of success.

4. In relation to the constitutional corporation point, the applicant appears to have accepted from the bar table that Realtown Pty Ltd, the corporate entity which appears to conduct the business of the Medina Tavern, was the trading business conducting the affairs of the tavern. However, evidence was adduced by the respondent through Mr Stronach who, as the Commission understands it, is the sole director of Realtown Pty Ltd. His evidence was to the effect that Realtown Pty Ltd conducts the affairs of the Medina Tavern business and Mr Stronach assisted the Commission by indicating how it was that that corporate entity came into existence and is a separate entity to a trust also maintained by Mr Stronach. He testified that Realtown Pty Ltd, in conducting the business, is responsible for all revenue and expenses of the tavern, pays the staff their wages and in all respects conducts the business of the tavern. That evidence was not challenged in any way by the applicant in cross examination and as I have already observed, at least in part, seems to have been accepted by the submissions from the applicant from the bar table.

5. In light of that evidence, which is uncontroverted, I am satisfied on the authorities and I find that the respondent, Realtown Pty Ltd, it being conceded as being the applicant's employer, was not only a corporation for the purposes of these proceedings, but was a trading corporation, or is a trading corporation rather, in that it conduct a business as a going concern. That being so, in light of my conclusions in the matter of *Sewell* which has been referred to by the agent for the respondent, it is the case that this Commission has no jurisdiction to deal with the applicant's claim because it is a claim against a constitutional corporation for the purposes of the Workplace Relations Act 1996 (Cth) and therefore by reason of s 16(1) of that Act, this Commission's jurisdiction is ousted insofar as unfair dismissal claims are concerned.
6. In light of that conclusion, then as I have already indicated, it could not be unfair for the Commission to not grant an extension of time in circumstances where the application could not proceed before the Commission because it has no jurisdiction to deal with the application in any event.
7. The only order open to the Commission in these proceedings is that the application be dismissed for want of jurisdiction. An order dismissing the application will issue.

2007 WAIRC 01092

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KALMA JOY WYATT
	APPLICANT
	-v-
	REALTOWN PTY LTD T/AS MEDINA TAVERN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 13 SEPTEMBER 2007
FILE NO/S	U 140 OF 2007
CITATION NO.	2007 WAIRC 01092

Result	Application dismissed
Representation	
Applicant	In Person
Respondent	Mr D Johnston as agent

Order

HAVING heard Ms K Wyatt on her own behalf and Mr D Johnston as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S J KENNER,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Gregory David Gibbens	Timberlane Holdings Pty Ltd t/as Roy Weston Warwick	B 74/2007	Commissioner J L Harrison	Concluded
Mark Dodd	The Salvation Army WA Property Trust	U 107/2007	Senior Commissioner J H Smith	Withdrawn

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Construction, Forestry, Mining and Energy Union of Workers	South Metropolitan Area Health Service, Royal Perth Hospital	Wood C	C 7/2007	6/03/2007 27/03/2007	Dispute regarding reclassification of union member	Concluded

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers' Union (Western Australian Public Sector) General Agreement 2007 AG 45/2007	2/10/2007	Department of Agriculture and Food	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Commissioner S M Mayman	Agreement registered
Department of Corrective Services Prison Officers' Enterprise Agreement 2007 AG 58/2007	14/09/2007	Department of Corrective Services on behalf of the Minister for Corrective Services	Western Australian Prison Officers' Union of Workers	Commissioner S J Kenner	Agreement registered
Department of Environment and Conservation Agency Specific Agreement 2007 PSAAG 15/2007	28/09/2007	The Department of Environment and Conservation and The Civil Service Association of Western Australia Incorporated	N/A	Senior Commissioner J H Smith	New agreement registered
Main Roads AWU Enterprise Bargaining Agreement 2007 AG 43/2007	19/09/2007	Commissioner of Main Roads, Main Roads Western Australia	The Australian Workers' Union West Australian Branch	Commissioner P E Scott	Order Issued
Western Australian Greyhound Racing Association (Outside Workers) General Agreement 2007 AG 57/2007	4/10/2007	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Western Australian Greyhound Racing Association	Senior Commissioner J H Smith	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2007 WAIRC 01128

APPLICATION FOR INTERLOCUTORY ORDERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN MANN
	APPELLANT
	-v-
	EMPLOYING AUTHORITY, GOVERNMENT EMPLOYEES SUPERANNUATION BOARD AND ANOTHER
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR D VOLARIC - BOARD MEMBER
DATE	WEDNESDAY, 26 SEPTEMBER 2007
FILE NO	PSAB 5 OF 2007
CITATION NO.	2007 WAIRC 01128

Result	Application for Interlocutory Orders Dismissed

Order

HAVING heard from Mr G McCorry on behalf of the appellant and Mr R Andretich (of counsel) on behalf of the Employing Authority, Government Employees Superannuation Board, and by consent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application for interlocutory orders be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.