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INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

2008 WAIRC 00022

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 8 OF 2007 GIVEN ON 12 NOVEMBER 2007

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	CHRISTINE ANNE MILES & RICHARD GLINTON MILES T/AS MILESAWAY TOURS
	APPELLANT
	-v-
	WARREN GRAHAM MILWARD
	RESPONDENT
CORAM	**STEYTLER J**
	PULLIN J
	LeMIERE J
DATE	WEDNESDAY, 9 JANUARY 2008
FILE NO/S	IAC 7 OF 2007
CITATION NO.	2008 WAIRC 00022

Result	Motion for stay granted in IAC 8 of 2007. Appeals IAC 7 – 10 of 2007 consolidated
Representation	
Appellant	Mr G McCorry
Respondent	Mr A Shuy (of Counsel)

Order

1. That the motion dated 29 November 2007 in IAC 8 of 2007 for a stay of the lower court's decision be granted, on the condition that the judgement sum be paid, within 21 days of 19 December 2007, into a trust account operated by the Department of Consumer and Employment Protection.
2. The appeals IAC 7 – 10 of 2007 be consolidated.

[L.S.]

(Sgd.) J A SPURLING,
Clerk of Court.

2008 WAIRC 00025

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 5 OF 2007 GIVEN ON 12 NOVEMBER 2007

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	CHRISTINE ANNE MILES & RICHARD GLINTON MILES T/AS MILESAWAY TOURS
	APPELLANT
	-v-
	WARREN GRAHAM MILWARD
	RESPONDENT
CORAM	**STEYTLER J**
	PULLIN J
	LeMIERE J
DATE	THURSDAY, 10 JANUARY 2008
FILE NO/S	IAC 10 OF 2007
CITATION NO.	2008 WAIRC 00025

Result	Motion for stay granted in IAC 8 of 2007. Appeals IAC 7 – 10 of 2007 consolidated
Representation	
Appellant	**Mr G McCorry**
Respondent	**Mr A Shuy (of Counsel)**

Order

1. That the motion dated 29 November 2007 in IAC 8 of 2007 for a stay of the lower court's decision be granted, on the condition that the judgement sum be paid, within 21 days of 19 December 2007, into a trust account operated by the Department of Consumer and Employment Protection.
2. The appeals IAC 7 – 10 of 2007 be consolidated.

[L.S.]

(Sgd.) J A SPURLING,
Clerk of Court.

[2007] WASCA 278

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	KERSHAW -v- SUNVALLEY AUSTRALIA PTY LTD [2007] WASCA 278
CORAM	**:**	WHEELER J (Deputy Presiding Judge)
		PULLIN J
		LE MIERE J
HEARD	**:**	2 NOVEMBER 2007
DELIVERED	**:**	19 DECEMBER 2007
FILE NO/S	**:**	IAC 5 of 2007
		IAC 6 of 2007
BETWEEN	**:**	GLENN (properly DAVID GLENN) KERSHAW
		Applicant
		AND
		SUNVALLEY AUSTRALIA PTY LTD
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	RITTER AP
		SMITH SC
		SCOTT C
File No	**:**	FBA 35 of 2006, FBA 36 of 2006

Catchwords:

Appeal - Industrial law - *Minimum Conditions of Employment Act 1993* (WA) - Jurisdiction of Industrial Magistrate's Court to enforce minimum conditions - Whether Full Bench misconstrued Act in relation to annual leave entitlements

Legislation:

Industrial Relations Act 1979 (WA), s 83, s 83A, s 90

Minimum Conditions of Employment Act 1993 (WA), s 3, s 5, s 7, s 23

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Applicant	:	Mr G McCorry
Respondent	:	Mr M D Cuerden

Solicitors:

Applicant	:	Labourline
Respondent	:	Michael Paterson & Associates

Case(s) referred to in judgment(s):

Devaynes v Noble (1816) 1 Mer 572

1 **WHEELER J (Deputy Presiding Judge)**: I agree with Le Miere J.

2 **PULLIN J**: I agree with Le Miere J.

3 **LE MIERE J**: The appellant appeals from the decision of the Full Bench of the Western Australian Industrial Relations Commission whereby the Full Bench dismissed the appellant's appeal from a decision of an Industrial Magistrate's Court given on 18 October 2006. The Industrial Magistrate's Court had dismissed the appellant's claims in relation to annual leave entitlements.

4 At the hearing of appeal IAC 5 of 2007, the appellant advised the court that the appeal was not pressed, and the appeal was dismissed by consent. These reasons are therefore concerned only with appeal IAC 6 of 2007.

Background

5 From 1 July 2000 to 30 June 2003 the appellant was employed as the operations manager of Rock N Tails Pty Ltd (RNTPL). RNTPL conducted the business of constructing tailings dams and other associated earthworks. Martin Bruce Jones and Gary John Trevor (the liquidators) were appointed as liquidators of the company on 17 July 2003. RNTPL agreed to sell its assets and business to the respondent by a deed dated 14 October 2003 (the deed). The parties to the deed are RNTPL, the respondent and the liquidators. On 1 July 2003 the appellant commenced employment with the respondent as its operations manager.

6 Trevor Kershaw, the appellant's brother, and his wife Julie Kershaw were the directors of RNTPL and of the respondent. The appellant and his brother had a falling out. The respondent terminated the appellant's employment on 31 January 2005.

7 The appellant commenced proceedings against the respondent in the Industrial Magistrate's Court. The appellant made claims in relation to long service leave and annual leave entitlements. The Industrial Magistrate's Court ordered the respondent to pay to the appellant an amount in relation to long service leave but dismissed his claim in relation to entitlements to annual leave under the *Minimum Conditions of Employment Act 1993* (MCE Act).

8 In summary, the appellant's claim under the MCE Act was for payments in lieu of annual leave which he contended he was entitled to during his employment with RNTPL. The appellant contended that by reason of the deed the respondent became responsible for the obligations of RNTPL for the appellant's annual leave entitlements. The appellant claimed that by 30 June 2003 the appellant had accrued an annual leave entitlement of 38 weeks' leave under the MCE Act and the respondent became responsible for those entitlements. The appellant claimed that he still had this

entitlement when his employment with the respondent was terminated on 31 January 2005. Accordingly, the appellant contended, due to the provisions of s 24 of the MCE Act, the appellant had an entitlement to be paid by the respondent for 38 weeks' annual leave.

Findings of Industrial Magistrate's Court

9 The Industrial Magistrate found that the appellant accrued an entitlement to annual leave during the period between July 2000 and July 2003 when he was employed by RNTPL. The Magistrate said that it appears that the appellant did not take annual leave during that period and therefore that he may be able to recover payment in that regard.

10 The respondent asserted that, given that the basis of the appellant's claim was against the respondent for annual leave entitlements allegedly accrued whilst he was an employee of RNTPL, the Industrial Magistrate's Court does not have jurisdiction to determine that claim. The Industrial Magistrate upheld the respondent's submission and determined that the court lacks jurisdiction to determine the issue of annual leave entitlements accrued by the appellant with respect to its employment by RNTPL.

11 The Industrial Magistrate concluded that insofar as the appellant's claim for annual leave relates to the respondent for the period July 2003 until termination, it had not been established that there had been a failure on the part of the respondent to pay the appellant's entitlements in that regard. The Industrial Magistrate dismissed the appellant's claims in relation to annual leave entitlements.

Appeal to the Full Bench

12 The appellant appealed to the Full Bench on two grounds. The first was that the Industrial Magistrate erred in fact and in law in finding that the Industrial Magistrate's Court does not have jurisdiction to determine the appellant's claim against the respondent for annual leave entitlements accrued while he was in the employment of RNTPL. The Full Bench found that the Industrial Magistrate's Court did not have jurisdiction to determine this aspect of the appellant's claim against the respondent and dismissed that ground of the appeal.

13 The second ground of appeal was that the Industrial Magistrate erred in law in finding that the respondent did not owe the appellant annual leave entitlements in respect of his period of service between 1 July 2003 and 31 January 2005 in that the six weeks annual leave taken by the appellant in December 2004 and January 2005 was, by operation of the rule in ***Devaynes v Noble*** (1816) 1 Mer 572, annual leave accrued in the service of RNTPL for which the respondent had assumed liability under the deed.

14 The Acting President, with whom the other members of the Full Bench agreed, made four findings relevant to that issue. First, the appellant took unpaid leave from January 2002 to October 2002 and therefore during that period did not accrue an entitlement to annual leave. Secondly, the appellant took other leave from time to time between 1 July 2000 and 30 June 2003. Thirdly, there was evidence that in June or July 2003 the appellant admitted that he was owed no outstanding annual leave as at 30 June 2003. Fourthly, there was a lack of clarity in the evidence about the appellant's asserted entitlement to annual leave as at July 2003. The Acting President found that given the state of the evidence the appellant had not established on the balance of probabilities an outstanding entitlement to at least 12 weeks of annual leave for the period of his employment with RNTPL from July 2000 to June 2003. The Full Bench dismissed that ground of appeal.

The appeal to this court

15 The appellant now appeals to this court on two grounds. I will consider each ground separately.

Ground 1

16 The notice of appeal states that the first matter appealed against is:

> The decision of the Full Bench that the Appellant could not take proceedings against the Respondent in the Industrial Magistrate's Court in respect of annual leave entitlements solely conferred by the [MCE Act] and accrued while in the employ of [RNTPL] and for which the respondent had accepted liability.

on the ground that:

> The Full Bench erred in its construction of section 7 of the [MCE Act] in that on a proper construction of s 7, proceedings in respect of an entitlement to a minimum condition of employment conferred by the Act may be conducted only in the Industrial Magistrate's Court and not elsewhere.

17 The MCE Act provides for minimum conditions of employment. Section 3(1) provides that 'minimum condition of employment' means amongst other things, a condition for leave prescribed by the MCE Act. Section 23(1) provides that an employee (other than a casual employee) is entitled, in relation to each year of service, to a period of paid annual leave equal to the number of hours the employee is required ordinarily to work in a four week period during the year, up to 152 hours. Section 5(1) provides that the minimum conditions of employment are taken to be implied in a contract of employment. Section 7 provides that a minimum condition of employment may be enforced where the condition is implied in a contract of employment, under s 83 of the *Industrial Relation Act 1979* (WA) (IR Act) as if it were a provision of an award, industrial agreement or order other than an order made under s 32 or s 66 of that act.

18 Section 83 of the IR Act is in the following terms:

> **83. Enforcement of certain instruments**
>
> (1) Subject to this Act, where a person contravenes or fails to comply with a provision of an instrument to which this section applies any of the following may apply in the

prescribed manner to an industrial magistrate's court for the enforcement of the provision -

…

(e) any person on his or her own behalf who is a party to the instrument or to whom it applies;

…

(2) In this section -

'**instrument to which this section applies**' means -

(a) an award;

(b) an industrial agreement;

(c) an employer-employee agreement; and

(d) an order made by the Commission, other than an order made under section 23A, 32, 44(6) or 66.

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

(4) On the hearing of an application under subsection (1) the industrial magistrate's court may, by order -

(a) if the contravention or failure to comply is proved -

(i) issue a caution; or

(ii) impose such penalty as the industrial magistrate's court thinks just but not exceeding $2 000 in the case of an employer, organisation or association and $500 in any other case;

or

(b) dismiss the application.

(5) If a contravention or failure to comply with a provision of an instrument to which this section applies is proved against a person as mentioned in subsection (4) the industrial magistrate's court may, in addition to imposing a penalty under that subsection, make an order against the person for the purpose of preventing any further contravention or failure to comply with the provision.

…

19 Section 83A of the IR Act provides that where in any proceedings brought under s 83(1) an employee has not been paid the amount he was entitled to then he may recover the underpayment. Section 83A is in these terms:

83A. Underpayment of employee

(1) Where in any proceedings brought under section 83(1) against an employer it appears to the industrial magistrate's court that an employee of that employer has not been paid by that employer the amount which the employee was entitled to be paid under an instrument to which that section applies the industrial magistrate's court shall, subject to subsection (2), order that employer to pay to that employee the amount by which the employee has been underpaid.

…

20 The appellant submits that properly construed, s 5(1)(c) and s 7(c) of the MCE Act and s 83 and s 83A of the IR Act require any claim reliant solely on terms implied by the MCE Act, to be conducted by way of enforcement proceedings under s 83 of the IR Act and before and only before an Industrial Magistrate's Court. The appellant submits that the policy of the MCE Act and the proper construction of s 7(c) of that Act and s 83(3) of the IR Act leads to the conclusion that where that has been a failure to observe a minimum condition of employment implied into a contract of employment, the failure will be enforceable only by way of proceedings under s 83 of the IR Act. The appellant puts the same point another way by saying that properly construed, s 7 of the MCE Act and s 83 of the IR Act provide that the Industrial Magistrate's Court is the only court in which the claim against an employer - or a third party provider - for a minimum condition of employment, can be pursued.

21 Clause 5 of the deed provides that from 1 July 2003 the respondent 'is solely responsible for any Transferring Employee, any Employee Entitlements and the wages of any Transferring Employee'. 'Employee Entitlements' is defined to include all entitlements of employees, including the appellant, including statutory annual leave entitlements owing at 30 June 2003. The appellant says that the respondent assumed responsibility for the appellant's annual leave entitlements arising from the MCE Act.

22 The effect of s 5 of the MCE Act is that the minimum conditions of employment, including entitlement to paid annual leave prescribed by s 23, is implied in a contract of employment. The effect of s 7 is that that minimum condition may be enforced under s 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than a order made under s 32 or s 66 of that Act.

23 Section 83 of the IR Act provides that specified people may apply for the enforcement of a provision 'where a person contravenes or fails to comply with a provision of an instrument to which this section applies'. A condition for paid annual leave prescribed by s 23 of the MCE Act and implied in a contract of employment is, by reason of s 7 of the MCE Act, deemed to be a provision of an instrument to which s 83 of the IR Act applies. Any person who is a party to the instrument or to whom it applies may apply for the enforcement of the provision of the instrument - see s 83(1)(e).

24 Only a party to the instrument may contravene or fail to comply with a provision of that instrument. The appellant's entitlement to annual leave is implied by s 5 of the MCE Act in his contract of employment with RNTPL. Section 7 of the MCE Act, in effect, deems that implied term of the contract of employment with RNTPL to be a provision of an instrument to which s 83 of the IR Act applies. The appellant may apply to the Industrial Magistrate's Court for the enforcement of that provision against RNTPL. The appellant cannot apply to the Industrial Magistrate's Court for the enforcement of that provision against the respondent because the respondent has not contravened or failed to comply with a provision of an instrument to which s 83 applies, or a provision which is deemed by s 7 of the MCE Act to be a provision of an instrument to which s 83 of the IR Act applies.

25 In his appeal to the Full Bench the appellant argued that the appellant's contract of employment with RNTPL has been assigned to the respondent. However, the appellant did not press that argument on this appeal and it is unnecessary to refer to it further.

26 Section 83A of the IR Act provides, in effect, that where an employee has not been paid by the employer the amount which the employee was entitled to be paid under an instrument to which s 83(1) applies, the Industrial Magistrate's Court shall order that employer to pay to that employee the amount by which the employee has been underpaid. The underpayment must be of an amount the employee was entitled to be paid under an instrument to which s 83(1) applies.

27 In this case, the underpayment must be of an amount which the employee was entitled to be paid under an instrument which is deemed by s 7 of the MCE Act to be an instrument to which s 83(1) applies, that is the contract of employment between RNTPL and the appellant. Section 83A provides that the Industrial Magistrate's Court shall order 'that' employer to pay the amount of the underpayment. 'That' employer is a reference to the employer against whom proceedings have been brought under s 83(1) and who or which has not paid the employee the amount which the employee was entitled to be paid under the instrument to which s 83(1) applies. The employer against whom proceedings under s 83(1) are brought must be the employer that has contravened or failed to comply with a provision of an instrument to which s 83(1) applies. The respondent is not an employer that has contravened or failed to comply with a provision of an instrument to which s 83(1) applies, or which is deemed by s 7 of the MCE Act to apply.

28 The obligation of the respondent to pay to the appellant annual leave entitlements owing at 30 June 2003 arises, if at all, from the provisions of the deed. The deed is not an instrument to which s 83(1) applies and the provisions of the deed are not provisions of an instrument to which s 83(1) of the IR Act applies or which are deemed by s 7 of the MCE Act to be provisions to which s 83(1) of the IR Act applies.

29 The appellant made other arguments before the Full Bench, including an argument based upon s 8 of the MCE Act but those arguments were not pursued before this court and it is unnecessary to consider them.

30 The Full Bench was correct to hold that the Industrial Magistrate's Court did not have jurisdiction to determine that part of the appellant's claim which related to annual leave entitlements accrued whilst working for RNTPL. Ground 1 fails.

Ground 2

31 The appellant appeals against the finding of the Full Bench that ground 2 of his grounds of appeal to the Full Bench was dependent upon the contention that the appellant had accrued not less than 12 weeks annual leave in the period July 2000 to June 2003 whilst an employee of RNTPL and that this had not been established. The appellant appeals against that finding on the ground that:

> The Full Bench erred in failing to construe or to properly construe sections 23 and 25 of the [MCE Act] in that on a proper construction of those sections, any absences from work by the appellant in the period July 2000 to June 2003 do not constitute 'unpaid leave' and the six weeks annual leave taken by the Appellant in December 2004 and January 2005 could not have been annual leave accrued after July 2003, the right to take annual leave being a right to take only the leave accrued more than 12 months prior to going on the leave.

32 The appellant submitted that he had accrued six weeks' annual leave from the period July 2003 to termination in January 2005. He took six weeks' annual leave immediately prior to termination. However, the appellant submitted that the six weeks' annual leave that he took was part of the annual leave that he had accrued whilst employed by RNTPL and which the respondent has assumed responsibility for in the deed. Accordingly, on termination the six weeks' leave accrued by the appellant since July 2003 remained owing and was not paid. The appellant submitted therefore that the Industrial Magistrate had erred in finding that there was no failure by the respondent to pay the appellant's annual leave entitlements.

33 The Acting President, with whom the other members of the Full Bench agreed, found that the appellant was off work from about January 2002 to October 2002 because of illness and that was a period of unpaid leave. Section 23(3) of the MCE Act provides that a year of service does not include any period of unpaid leave. Therefore, during the period from January 2002 to October 2002 the appellant did not accrue an entitlement to annual leave. The Full Bench also found that the appellant took other leave from time to time between 1 July 2000 and 30 June 2003. The Acting President

referred to the evidence of Julie Kershaw that in June or July 2003 the appellant admitted that he was owed no outstanding annual leave as at 30 June 2003. The Acting President found that there was 'a lack of clarity in the evidence about the asserted entitlement of [the appellant] to annual leave as at July 2003'. The Acting President found that the appellant had failed to establish that he had accrued not less than 12 weeks' annual leave from the period July 2000 to June 2003 whilst an employee of RNTPL and therefore that ground of appeal to the Full Bench failed.

34 An appeal lies to this court only on the grounds set out in s 90(1) of the IR Act. The appellant submits that the appeal on this ground lies pursuant to s 90(1)(b) that is that the decision of the Full Bench is:

> [E]rroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against.

The appellant says that the Full Bench erred in its interpretation or construction of s 23(3) of the MCE Act which provides that in s 23(1), 'year' does not include any period of unpaid leave. The appellant argues that the Acting President misconstrued 'unpaid leave'.

35 The Acting President did not discuss the meaning of 'unpaid leave'.

36 The appellant submits that properly construed, the reference to unpaid leave in s 23(3) of the MCE Act is a reference to an absence from work without payment of wages, taken by permission of and at the discretion of the employer. The appellant argues that there was no evidence before the Industrial Magistrate's Court or the Full Bench that the appellant took unpaid leave. The appellant did not work between January and October 2002 because of complications from an illness but received payment of $4,000 per month from the respondent during this time. The appellant argues that it was not leave and it was not unpaid.

37 It is implicit in the reasons of the Acting President that the appellant's absence from work between January and October 2002 was with the permission of the respondent. It plainly was. The respondent made payments during that period to the appellant's wife. The leave was unpaid. The respondent made no payments to the appellant during that period but paid $4,000 per month to the appellant's wife to assist the family to survive.

38 The Full Bench made its own findings of fact that the appellant took unpaid leave from January 2002 to October 2002. The Full Bench made its own findings of fact that the appellant took other leave from time to time between 1 July 2000 and 30 June 2003 and that the appellant had failed to establish an outstanding entitlement to at least 12 weeks annual leave for the period of his employment with RNTPL from July 2000 to June 2003. The findings of the Full Bench, the subject of this ground of appeal are findings of fact. The appellant has not demonstrated that the Full Bench misconstrued the meaning of 'unpaid leave' in s 23 of the MCE Act. This ground of appeal fails.

Conclusion

39 For the reasons stated this appeal must be dismissed.

2008 WAIRC 00018

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 36 OF 2006 GIVEN ON 13 JUNE 2007

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	GLENN KERSHAW
	APPELLANT
	-v-
	SUNVALLEY AUSTRALIA PTY LTD
	RESPONDENT
CORAM	**WHEELER J**
	PULLIN J
	LE MIERE J
DATE	FRIDAY, 21 DECEMBER 2007
FILE NO/S	IAC 5 OF 2007
CITATION NO.	2008 WAIRC 00018

Result	Appeal dismissed
Representation	
Applicant	Mr G McCorry
Respondent	Mr R Galpin, of Counsel

Order

Having heard Mr G McCorry on behalf of the Appellant and Mr R Galpin (of Counsel) on behalf of the Respondent THE COURT HEREBY ORDERS THAT:-

The Appeal is dismissed.

There be no order as to costs.

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

2008 WAIRC 00019

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 35 OF 2006 GIVEN ON 13 JUNE 2007

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	GLENN (PROPERLY DAVID GLENN) KERSHAW
	APPELLANT
	-v-
	SUNVALLEY AUSTRALIA PTY LTD
	RESPONDENT
CORAM	**WHEELER J**
	PULLIN J
	LE MIERE J
DATE	WEDNESDAY, 12 DECEMBER 2007
FILE NO/S	IAC 6 OF 2007
CITATION NO.	2008 WAIRC 00019

Result	Appeal dismissed
Representation	
Applicant	Mr G McCorry
Respondent	Mr M D Cuerden, of Counsel

Order

Having heard Mr G Mc Corry on behalf of the Appellant and Mr M D Cuerden (of Counsel) on behalf of the Respondent THE COURT HEREBY ORDERS THAT:

The appeal be dismissed.

The Appellant is to pay the Respondent's costs of IAC 5 of 2007, to the extent only that additional costs were incurred that would not have been incurred in relation to IAC 6 of 2007.

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

2008 WAIRC 00023

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 7 OF 2007 GIVEN ON 12 NOVEMBER 2007

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	MELROSE FARM PTY LTD T/AS MILESAWAY TOURS
	APPELLANT
	-v-
	WARREN GRAHAM MILWARD
	RESPONDENT
CORAM	**STEYTLER J**
	PULLIN J
	Le MIERE J
DATE	THURSDAY, 10 JANUARY 2008
FILE NO/S	IAC 8 OF 2007
CITATION NO.	2008 WAIRC 00023

Result	Motion for stay granted. Appeals IAC 7-10/2007 consolidated.
Representation	
Appellant	MR G McCorry
Respondent	Mr A Shuy (of Counsel)

Order

1. That the motion dated 29 November 2007 in IAC 8 of 2007 for a stay of the lower court's decision be granted, on the condition that the judgement sum be paid, within 21 days of 19 December 2007, into a trust account operated by the Department of Consumer and Employment Protection.

2. The appeals IAC 7 – 10 of 2007 be consolidated

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

2008 WAIRC 00024

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO. FBA 6 OF 2007 GIVEN ON 12 NOVEMBER 2007

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	MELROSE FARM PTY LTD T/AS MILESAWAY TOURS
	APPELLANT
	-v-
	WARREN GRAHAM MILWARD
	RESPONDENT
CORAM	**STEYTLER J**
	PULLIN J
	LeMIERE J
DATE	THURSDAY, 10 JANUARY 2008
FILE NO/S	IAC 9 OF 2007
CITATION NO.	2008 WAIRC 00024

Result	Motion for stay granted in IAC 8 of 2007. Appeals IAC 7 – 10 of 2007 consolidated
Representation	
Appellant	**Mr G McCorry**
Respondent	**Mr A Shuy (of Counsel)**

Order

1. That the motion dated 29 November 2007 in IAC 8 of 2007 for a stay of the lower court's decision be granted, on the condition that the judgement sum be paid, within 21 days of 19 December 2007, into a trust account operated by the Department of Consumer and Employment Protection.

2. The appeals IAC 7 – 10 of 2007 be consolidated.

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

FULL BENCH—Appeals against decision of Commission—

2007 WAIRC 01286

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01286
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		COMMISSIONER J L HARRISON
		COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 10 OCTOBER 2007
DELIVERED	**:**	FRIDAY, 7 DECEMBER 2007
FILE NO.	**:**	FBA 11 OF 2007
BETWEEN	**:**	JULIE-ANNE FRIESSBOURG
		Appellant
		AND
		WILLIAM THOMAS JOHN VALLI
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Western Australian Industrial Relations Commission
Coram	**:**	Commissioner S Wood
Citation	**:**	2007 WAIRC 00612
File No	**:**	U 38 OF 2007

CatchWords:

Industrial Law (WA) - Appeal against decision of the Commission to extend time to receive application out of time under s29(1) and 29(3) of the *Industrial Relations Act 1979* (WA) - Termination of Employment - Harsh, oppressive, unfair dismissal - Decision of Commission was a '*finding*' under s49(2a) of *the Act* - Public interest requirement in s49(2a) not satisfied - Merits of appeal - Discretionary decision - Whether necessary for respondent to have provided acceptable explanation for the delay - Application of *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 - Whether Commissioner found acceptable explanation or properly considered the evidence - Lack of findings in reasons - Whether the Commission erred in its consideration of the merits of the substantive claim - Whether the Commission properly considered the evidence before it - Role of Full Bench – Appeal dismissed

Legislation:

Industrial Relations Act 1979 (WA) – s29(1), s29(1)(b)(i), s29(2), s29(3), s49(2a), s49(3)

Industrial Relations Commission Regulations 1985 – reg 102(4)

Result:

Appeal dismissed

Representation:

Counsel:

Appellant	:	Ms M Saraceni (of Counsel)
Respondent	:	Mr D Schapper (of Counsel)

Solicitors:

Appellant	:	Deacons Lawyers
Respondent	:	Parry Street Chambers

Case(s) referred to in reasons:

Azzalini v Perth Inflight Catering (2002) 82 WAIG 2992

Brodie-Hanns v MTV Publishing Limited (1995) 67 IR 298

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194

Coulton v Holcombe (1986) 162 CLR 1

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

Gronow v Gronow (1979) 144 CLR 513

House v The King (1936) 55 CLR 499

Jackamarra v Krakouer (1998) 195 CLR 516

John Holland Group Pty Ltd v CFMEU (2005) 85 WAIG 3918

Malik v Paul Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683

Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273

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

Norbis v Norbis (1986) 161 CLR 513

Australia and Others (1989) 69 WAIG 1873

Skinner v Broadbent [2006] WASCA 2

Case(s) also cited:

Aboriginal Legal Service of Western Australia Incorporated v Lawrence (2007) 87 WAIG 856

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

Appeal by Telstra-Network Technology Group (1997) 42 AILR 3-590

Civil Service Association of Western Australia v Shean (2005) 85 WAIG 2993

Coyne v Ansett Transport Industries (Industrial Relations Court of Australia, unreported 24 September 1996, Decision No 449 of 1996

Devries and Another v Australian National Railways Commission and Another (1992) 177 CLR 472

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

Fox v Percy (2003) 214 CLR 118; 197 ALR 201

Gallo v Dawson (1990) 64 ALJR 458

Jackson v Newland (2006) 86 WAIG 933

Matthews v Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Limited (2003) 84 WAIG 199

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Robowash Pty Ltd v Hart (1998) 78 WAIG 2323

Ryan v Hazelby and Lester trading as Carnarvon Waste Disposals (1993) 73 WAIG 1742

Sealanes (1985) Pty Ltd v The Shop, Distributive and Allied Employees' Association of Western Australia, the Food Preservers Union of Western Australia, Union of Workers, The Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch (2005) 86 WAIG 5

Tip Top Bakeries v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1994) 74 WAIG 1189

Valli v Royal International (WA) (1997) 77 WAIG 3497

Worksafe Western Australia Commissioner v Anthony and Sons Pty Ltd t/a Oceanic Cruises (2006) 86 WAIG 2950

Reasons for Decision

RITTER AP:

The Application to the Commission

1 Section 29(1) of the *Industrial Relations Act 1979* (WA) (*the Act*) provides that an industrial matter constituted by a claim that an employee has been harshly, oppressively or unfairly dismissed from his employment may be referred to the Commission by that employee.

2 Section 29(2) and (3) of *the Act* are:-

> *"(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.*"

3 On 2 March 2007 the respondent filed a notice of application under s29(1)(b)(i) of *the Act* in accordance with Form 2 to the *Industrial Relations Commission Regulations 2005* (the Regulations). The application asserted the respondent was employed by the appellant from April 1996 until 29 January 2007. The application also said Mr Schapper was the respondent's "*authorised representative*". A box was also ticked to indicate the respondent became aware of his right to make the application via his "*Legal or industrial advisor*".

4 The application was filed more than 28 days after the date when the employment was said to be terminated. The respondent therefore included in his application a statement of the "*reason/s for not lodging this claim within 28 days of my date of termination of employment and why I consider it would be unfair not to accept the claim*".

5 The respondent wrote on the form:-

> "*informed Solicitor Derek Schapper 1/2 wks [weeks] after discharge. Derek was/is representing me & he lost a week or two. He informed me yesterday 2/3/07 to come in personally to 16FI [sic – agreed by parties to mean 16th floor; where the Commission registry is located] which I have done.*"

The Answer

6 The appellant, then acting in person, filed a notice of answer and counter proposal on 22 March 2007. The answer did not directly address the s29(3) issue but concluded that if the Commission "*accepts the out of time claim, I will attend the conciliation conference to address this nonsense personally*".

The Hearing

7 The application proceeded to a hearing on 8 May 2007 and 19 June 2007 so that the Commission could decide whether it would accept the out of time referral. At the hearing on 8 May 2007 the respondent was represented by Mr Schapper and the appellant appeared for herself. At the adjourned hearing on 19 June 2007 Mr Schapper continued to appear for the respondent and the appellant was then represented by a solicitor Mr Cook.

The First Day of the Hearing

8 Mr Schapper made a brief opening on 8 May 2007. In this he submitted that "*the merits of the claim*" was "*of primary importance*" in determining the application. He submitted that the Commission needed to determine prima facie whether the respondent was terminated and whether that termination was unfair for the purposes of determining whether to accept the application out of time. It was submitted that subsidiary questions were the length of the delay, the explanation for the delay and the prejudice to the appellant if any. Mr Schapper pointed out that the length of the delay was minimal in that the application should have been filed before 26 February 2007 and it was actually filed on 2 March 2007. It was submitted it would be difficult to imagine any prejudice to the (now) appellant in the claim being accepted out of time.

9 Mr Schapper then called the respondent to give evidence. The respondent gave evidence about the facts and circumstances of his termination of employment. Although it is unnecessary to set out the detail, relevant background from the evidence is that the appellant operates a fundraising business in which it seeks support on behalf of institutions like the Rotary Club of West Perth, Lions Clubs and Police and Citizens Youth Clubs. The business operated from an office in West Perth. The respondent said he worked full-time, five days per week, as a fundraiser for the business. The respondent was paid a 20% commission. The respondent said that at the time of his termination he was awaiting the payment of a "*pledge*" by a company for about $3000, which was paid after termination. He said he received a commission of about $500 or $600 from that payout about 3 or 4 weeks after he left the appellant's business.

10 In answer to a question in chief about why the filing of the claim did not occur until 2 March 2007, the respondent said:-

> "*Well, essentially I was waiting for the bulk of the money to come in. I wasn't quite sure of the legality. You know, after 12 years of being engrossed and passionate about a charity business and involved from top to toe, I was, you know, not in a state of shock after being dismissed, but sort of in addition to that I had my head down and trying to promote my real estate and forget the charity work, because I didn't, you know, I was emotionally involved with my charity work like most people are and, after 12 years, you have reason to be taken aback if you're [sic] desk is cleared and you're told to go.*" (T8/9).

11 Shortly after this the appellant cross-examined the respondent. The cross-examination traversed many matters relating to the alleged termination of employment but not the reasons for delay in filing the application. The topic also not covered in re-examination.

12 The appellant then gave evidence and was cross-examined. Again the detail need not be canvassed. Reference was made though to a statement by Mr David Powlay which the appellant asserted supported her case. He was the floor manager of the appellant's business and had been a long time friend of the respondent. There was an objection to the statement of Mr Powlay being received into evidence when Mr Powlay was not present to give evidence. Accordingly and upon application by the appellant, the hearing was adjourned.

13 Prior to adjourning the Commissioner made some observations. (T42/44). He said he found at that point the delay was minimal and from the answers of the appellant under cross-examination there was no prejudice to the appellant by the delay. The Commissioner said the appellant was not notified of the challenge to the dismissal, if there was a dismissal, until the application was received. The Commissioner said about the reasons for the delay:-

> "*… I'm a bit left in the dark about what the reason is, except that seemingly [the respondent] was looking to chase up some commissions. But anyway, on those criteria, the matters weigh in the applicant' [sic] favour.*"

14 The Commissioner then said he was not in a position to make even a prima facie judgment about merits at that time. The Commissioner referred to an assertion made by the appellant in her evidence that the respondent was not an employee. The Commissioner pointed out that there had been no notice of that claim and if it was going to be asserted it should be put on the record by a detailed letter to the Commission. The Commissioner said that on the face of the appellant's answer there was no challenge to the respondent's status as an employee.

The Second Day of the Hearing

15 As I have said the hearing recommenced on 19 June 2007. The respondent was given leave to re-open his case and called a second witness Ms Geraldine Rust, a former employee of the appellant. The appellant then called Mr Powlay to give evidence. The appellant's final two witnesses were Ms Mary Allcott, an employee of the appellant and Mr Gregory Dyson, an assistant manager employed by the appellant. Once again the detail of the evidence does not need to be set out. The appellant did not adduce evidence or make submissions to support any claim that the respondent was not an employee.

16 The appellant's counsel made the following submissions in closing:-

(a) The application was filed only a few days out of time and so it was accepted there was not much prejudice to the appellant. (T75).

(b) Reference was made to the evidence of the respondent quoted above about the reasons for the delay. It was submitted the Commission could infer from the contents of the application and the respondent's evidence that he was aware of the time limit and had sufficient time to make the claim within time. (T75).

(c) The Commission needed to form a preliminary view about whether there had been a dismissal. It was submitted the evidence taken at its highest and most favourable to the respondent did not establish a dismissal. (T76).

17 The submissions of the respondent's counsel in summary were:-

(a) Mainly about the evidence on the alleged dismissal.

(b) Even on the appellant's version of events, there was a dismissal. This was because the respondent was paid on a commission only basis and on the appellant's evidence the respondent was told not to come into his office for a month.

(c) This was a termination of employment. (T76/77).

(d) Counsel also referred to the comments made by the Commissioner at the end of the first day of the hearing, set out earlier. He submitted the comments were correct. (T78).

18 A brief point in reply was made by the appellant's counsel and the Commissioner then reserved his decision.

The Order and Reasons

19 On 17 July 2007 an order was made that "*it would be unfair not to accept [the respondent's] application pursuant to s 29(1)(b)(i)*". On the same date the Commissioner published his reasons for decision.

20 In paragraph [2] of the reasons the Commissioner said:-

> "*The Industrial Appeal Court (IAC) set out the criteria for deciding such an application in Prem Singh Malik v Paul Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683. The delay in making the application is short and Mr Valli did not advise the respondent of any challenge prior to making the application. There is no prejudice to the respondent in now having the matter heard. The delay in making the application arose, on Mr Valli's evidence, because he waited for the bulk of his outstanding commissions to be paid, he was not sure about the legality of the situation, he was in a state of shock and he had his head down promoting his real estate work. These criteria weigh in favour of the applicant.*"

21 The Commissioner then summarised the evidence of each of the witnesses about what happened on and around 29 January 2007, which was the critical date.

22 At paragraph [13] of his reasons the Commissioner said there were considerable differences in the accounts of the witnesses but "*the key issue is whether [the respondent] was in fact dismissed*". The Commissioner said he needed to assess the evidence of the appellant, the respondent and Mr Powlay. The Commissioner said that having "*seen [the respondent] give evidence I would treat the whole of [the respondent's] evidence with some caution*". ([14]).

23 At paragraph [16] however the Commissioner accepted the respondent's evidence that he was required to take leave from his employment. He found it was an enforced absence and one which was not open to the respondent to refuse. Earlier, in paragraph [15], the Commissioner said that on the appellant's evidence the respondent was at the very least suspended.

24 In paragraph [18] of his reasons the Commissioner said:-

> "*In Macken, O'Grady, Sappideen and Warburton, "Law of Employment" (fifth edition) they discuss "suspension" and make the point at p. 158 that, "an employer has no common law right to suspend an employee without pay". This issue was also canvassed by Gray J in Gregory v Philip Morris Ltd (1987) 19 IR 258 @ 279. He stated, "The respondent could not suspend the applicant without pay, pending clarification of his membership status; suspension without pay is not open to an employer in the absence of a term of the contract of employment or of an award permitting such suspension. See Re Application by Building Workers' Industrial Union of Australia (1979) 41 FLR 192 @ 194. To suspend the applicant on pay would have been to treat him more favourably than other employees of the respondent…." The Full Court overturned this decision on appeal (Gregory v Philip Morris Ltd (1988) 80 ALR 455 @ 473) because they considered that the company should have explored the alternatives with Mr Gregory, including possibly obtaining his consent to suspension without pay. However, they reiterated that unilateral action by an employer to suspend an employee without pay where there has been no consent by the employee is unlawful.*"

25 In paragraph [19] the Commissioner said: "*The question then as to whether [the respondent] was dismissed is answered. [The respondent's] suspension constituted a dismissal in the circumstances*". In paragraph [20] the Commissioner said there "*was no evidence that [the respondent] had been warned that his performance would need to improve or he would be suspended or dismissed. I am not deciding the merits of the application at this point, except to say that the application at this time is at least arguable*". This seems to be a reference to the unfairness of the dismissal.

26 The Commissioner concluded in paragraph [21] as follows:-

> "*Having then considered all the relevant criteria I would find that it would be unfair not to accept this application, it being out of time, and I will order accordingly.*"

The Notice of Appeal and Amendment

27 On 21 August 2007 the appellant filed a notice of appeal against the order made by the Commission.

28 In the notice of appeal the appellant's name was styled "*Julie-Anne Friessbourg*". Counsel for the appellant brought to our attention that the application cited the (then) respondent as "*Julie Anne Friesbourg*" (with one "s"). Additionally, she was named in the order on 17 July 2007 as "*Julie Anne Friesbourg J.A.F. Promotions*". Counsel explained the appellant's name and the business in which the respondent asserted he was employed, were correctly styled in the notice of appeal. In the circumstances I do not think the anomaly in the application or order is of consequence. Neither counsel submitted it was.

29 The Full Bench also referred counsel to the mention of s29(1)(b)(i) in the order of the Commission. There was some discussion about whether this was the appropriate section. In my opinion the issue is not material to the determination of the appeal.

30 Attached to the notice of appeal was a schedule containing the grounds of appeal. The decision appealed against was a "*finding*" as defined in s7 of *the Act*. Accordingly, s49(2a) of *the Act* applied, which is as follows:-

> "*(2a) An appeal does not lie under this section 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.*"

31 The notice of appeal did not comply with r 102(4) of the Regulations, which requires a statement of "*reasons why it is considered that the matter is of such importance that in the public interest an appeal should lie.*" Indeed the notice of appeal did not refer to the requirement for leave.

32 A document described as the appellant's amended notice of appeal was filed on 4 October 2007. The purpose of the filing of this document was to seek to add ground of appeal 1(7) about the requirement for leave under s49(2a) of *the Act*. Proposed ground 1(7) did not set out why the public interest requirement was satisfied, it simply asserted that it was. This still did not comply with r 102(4). Despite this, the Full Bench advised at the hearing of the appeal that an order allowing the amendment would be made in due course.

The Grounds of Appeal

33 The grounds of appeal as amended are:-

> "***GROUNDS OF APPEAL***
>
> *1. The Commissioner erred in fact and law in extending the time in which the Respondent had to lodge his harsh, oppressive or unfair dismissal application.*

PARTICULARS

(1) The Commissioner erred in finding that there was an acceptable explanation for the Respondent's delay in filing the application. The Respondent's evidence that he:

(a) was waiting for "the bulk of his outstanding commissions to be paid";

(b) was "not sure about the legality of the situation"; and

(c) "was in a state of shock and he had his head down promoting his real estate work."

does not, on balance, provide a satisfactory explanation for failing to lodge his application within the prescribed timeframe.

(2) The Commissioner failed to take adequate account of the fact that on the Respondent's Form 2, Notice of Application dated 2 March 2007, that the Respondent sought legal advice on 1 February 2007, 2 days after the alleged termination.

(3) The Commissioner erred in failing to give due consideration to the fact that the Respondent did not take any step to notice the Appellant that he was contesting the alleged termination, apart from filing the application itself.

(4) The Commissioner failed to give adequate consideration to the lack of merits in the Respondent's substantive claim, in that:

(a) the Respondent was engaged as an independent contractor and not as an employee; and

(b) in the alternative, if the Respondent is found to be an employee, that there was no termination of employment at the initiative of the employer, or at all.

(5) The Commissioner failed to give adequate consideration to the fairness as between the Respondent and other persons in a like position are relevant to the exercise of the Court's discretion, in that the Commissioner extended the time in which the Respondent had to lodge his unfair dismissal application when the Respondent had sought legal advice within the 28 day time limit.

(6) The Commissioner erred in exercising his discretion in preferring the Respondent's evidence over that of the Appellant's, notwithstanding the Commissioner's [sic] concluded that the Respondent's evidence should be treated "with some caution".

(7) It is in the public interest as outlined in section 49(2a) of the Industrial Relations Act (WA) for the appeal to be heard." (footnotes omitted)

Leave to Appeal

34 The appellant accepted the correctness of the observations I made about the public interest requirement in s49(2a) of *the Act* in *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 at [13]-[14] as follows:-

> "*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.*"

35 In her written outline of submissions the appellant's counsel submitted the public interest requirement was satisfied because the proposed appeal demonstrated that in making a discretionary decision the Commissioner erred. In her oral submissions counsel also said the proposed appeal raised matters of public interest being the jurisdiction of the Commission when the respondent was a commission only paid agent, the role of the Full Bench in determining appeals on the basis of alleged errors in credibility findings and how fairness in s29(3) of *the Act* was measured.

36 The respondent's counsel correctly submitted that none of these matters were previously particularised. Nevertheless counsel did not seek an adjournment or time to make written submissions in answer to them. The respondent opposed leave to appeal being granted because none of the errors identified in the grounds of appeal or the arguments made by counsel at the hearing satisfied the public interest test.

37 I accept this submission. Although the proposed appeal involves questions of importance for the appellant they do not satisfy the public interest criteria as identified in *Murdoch University*. In my opinion the principles to be applied by the Commission in determining the question contained in s29(3) of *the Act* are well established. The present appeal does not cavil with these principles but really argues about the application of the principles and the findings of fact made by the Commissioner. The question of the Commission's jurisdiction with respect to commission only paid employees does not properly arise as it was not argued at first instance (*Coulton v Holcombe* (1986) 162 CLR 1; s49(4) of *the Act)*. The way in which to decide appeals against credibility findings is also settled. (See *Grierson v International Exporters Pty Ltd* (2006) 86 WAIG 2935 at paragraph [50] ff). This is not therefore a "*matter*" which in my opinion attracts the exercise of the discretion in s49(2a) of *the Act*. Accordingly the appeal should be dismissed.

38 I also make the following respectful comments about s49(2a) of *the Act* in the context of s49 as a whole. Section 49(2a) is not clearly worded. It does not with clarity say that "*leave to appeal*" is required although this is the effect of its contents. There is also some tension between s49(2a) and s49(3) of *the Act* for appeals "*instituted*" against findings. I discussed this tension in the context of s s49(11), where an application for a stay may be made after an appeal is "*instituted*", in *John Holland Group Pty Ltd v CFMEU* (2005) 85 WAIG 3918 at paragraphs [20]-[30]. I concluded that an appeal against a finding was "*instituted*" when filed even though at that point the Full Bench had not made a decision about whether the appeal should lie. Regulation 102(4) in the use of the word "*appeal*" operates on a consistent basis with my reasons in *John Holland*. With respect though, in my opinion these aspects of s49 would benefit from legislative attention.

39 As the appeal was fully argued and in case there is an appeal against the dismissal on the basis of s49(2a), it is appropriate to go on and consider the other grounds of appeal. In doing so I will ignore the fact that in my opinion the appeal should be dismissed for the reasons already expressed.

The Grounds of Appeal Generally

40 The appellant accepted the decision of the Commissioner involved the exercise of a discretion. Accordingly an appeal could only succeed if the discretion had miscarried because of an error of the type identified in *House v The King* (1936) 55 CLR 499 at 504/5, *Norbis v Norbis* (1986) 161 CLR 513 at 518/9 and *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [21] and [72].

41 The appellant submitted that in reaching the conclusion that an extension of time ought to be granted the Commissioner incorrectly applied, and/or gave insufficient weight to evidence relevant to the application of, the criteria set out in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 and *Brodie-Hanns v MTV Publishing Limited* (1995) 67 IR 298. The appellant relied upon the summary of these cases and the applicable criteria set out by Kenner C in *Azzalini v Perth Inflight Catering* (2002) 82 WAIG 2992.

42 In *Malik* the Industrial Appeal Court decided an appeal where the sole ground was that the Full Bench erred in its construction of s29(3) of *the Act* by holding an applicant had a positive obligation to establish merit in the proposed claim. At paragraphs [25]-[27], Steytler J said:-

> "*25 In my respectful opinion, that reading of s 29(3) adds an impermissible gloss to the simple meaning of its words. The Commission is empowered to accept a late referral if it would be "unfair" not to do so and, while an assessment of the merits "in a fairly rough and ready way" (see* ***Jackamarra v Krakouer*** *(1998) 195 CLR 516 at [9]) will often be an important consideration, there is nothing in the words of s 29(3) which imports any obligation, on the part of an applicant, to establish any degree of merit (and it should not be overlooked, in this regard, that the Commission is given broad powers to dismiss a matter summarily under s 27(1)(a) of the Act). It is, of course, difficult to imagine that it would ever be unfair to an applicant to deny him or her the right to lodge a referral out of time where it was positively shown that the applicant had no prospect of success. However, that is a very different proposition from one to the effect that an applicant has, in every case, an obligation to show that he or she has some prospect of success.*

> *26 Like E M Heenan J, I consider that the principles enunciated by Marshall J in **Brodie-Hanns v MTV Publishing Ltd** (1995) 67 IR 298 are apposite. As E M Heenan J has said, Marshall J there identified the following six "principles" (at 299 - 300):*
>
> > *"1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.*
> >
> > *2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.*
> >
> > *3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.*
> >
> > *4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.*
> >
> > *5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.*
> >
> > *6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."*
>
> *27 Those "principles" or considerations are not exhaustive and, putting to one side the uncontestable proposition that there must be something positively to satisfy the Court that it would be unfair not to accept the referral out of time, none of them is necessarily decisive and each case will turn upon its own individual facts and circumstances.*"

43 Steytler J dissented on the outcome but not on a basis which affects the authority of what his Honour said in these paragraphs.

44 Pullin J at paragraph [44] of his reasons said:-

> "*44 The result is that the correct approach to applications under s 29(3) of the Act is to consider the sole criterion of whether it would be unfair not to grant the extension. Factors which are relevant will vary from case to case. The length of the delay and the reasons for the delay will usually be relevant factors. The merits of the substantive application will usually be a relevant factor, but it is not a sine qua non.*"

45 E M Heenan J in his reasons at paragraph [67] emphasised that great care should be taken in using any test which did not employ the precise statutory language contained in s29(3) of *the Act*. At paragraph [74] his Honour quoted the above passage of the reasons of Marshall J in *Brodie-Hanns*.

46 In my opinion *Malik* sets out the approach which the Commission ought to follow in deciding s29(3) applications.

Grounds 1(1) and (2)

47 These grounds are both directed to the Commissioner's findings about whether there was an acceptable explanation for the delay.

48 The appellant submitted the respondent's evidence about the delay in filing was:-

(a) He was waiting for "*the bulk of his outstanding commissions to be paid*".

(b) He was "*not sure about the legality*" of the situation.

(c) He was "*not [sic] in a state of shock after being dismissed*".

(d) He had his head down promoting his (new) real estate work.

49 The appellant pointed to paragraph [2] of the reasons for decision and in particular the final sentence. It was submitted the Commissioner erred if he decided the respondent had given an acceptable explanation for the delay which therefore supported a favourable exercise of the discretion. A difficulty with this paragraph of the Commissioner's reasons is that there was no analysis of the evidence of the respondent about the delay. The Commissioner said he was following *Malik* but did not say if or if so why he found the respondent's explanations acceptable. The final sentence contains a hint perhaps that he did but does not with respect contain any analysis or clear conclusion.

50 The appellant submitted the time limit imposed by *the Act* is to be complied with. This point is accepted and is made in the authorities referred to earlier. It was also submitted that the "*time limit of 28 days must be complied with unless there is an acceptable explanation for the delay*". If this submission includes the assertion that absent an acceptable explanation for delay the discretion to accept the application cannot be exercised then I do not accept this. To construct and apply such a rule would be a gloss on what the legislation says and is contrary to the approach mandated by the IAC decision in *Malik.* Whilst ordinarily the explanation for the delay may be a factor of some relevance, it cannot be said that in every case where there is not an acceptable explanation for the delay the Commission ought to inevitably find there will be no unfairness in not accepting the application out of time. Whether there is a good explanation for the delay is a factor which can be weighed up along with others in deciding the question posed by s29(3) of *the Act*.

51 The appellant also relied on the terms of the application as filed. This recorded the respondent became aware of his right to make an application through a "*Legal or industrial advisor*". This was linked to the reasons in the application for not lodging the claim within 28 days, quoted above. It was submitted the Full Bench could infer that if the respondent consulted Mr Schapper one to two weeks after his "*discharge*" and the respondent said he became aware of his right to make the application from a "*Legal or industrial advisor*", the "*advisor*" was Mr Schapper and a legal practitioner of his experience would have told the respondent the time limit. I think there is some merit in this submission. There can at times be a fine line between speculation and inference but I think the facts relied on do support the inference that the appellant contends. Additionally the respondent did not assert lack of knowledge of the time limit in either his evidence or application. He merely tried to explain the lateness. Therefore I think the inference should be drawn that he knew of the time limit. The "*fact*" referred to in ground 1(2), the timing of seeking of the advice from Mr Schapper, was not mentioned by the Commissioner. In the circumstances I think it can be concluded that this fact was overlooked or not considered. (*Skinner v Broadbent* [2006] WASCA 2 at [37]). Ground 1(2) is therefore established.

52 The acceptableness of the explanation for the delay was a matter to be assessed by the Commissioner. In my opinion however there is merit in the submission that the explanations given by the respondent in his evidence were not cogent. If I was considering the application, I might well have formed the view that the explanations were not acceptable. I have earlier quoted the relevant passage of the respondent's evidence. I find it hard to see that the respondent waiting for the appellant to receive the pledge from the business or him being paid the consequent commission were valid reasons for not filing the application within time. It is unclear what the respondent meant when he said he was not "*quite sure of the legality*". This may relate to his entitlement to the commission from the pledge but it is neither a clear nor acceptable explanation. Next the transcript quotes the respondent as saying he was "*not in a state of shock after being dismissed*". From the context it appears likely the respondent intended to say that he *was* in a state of shock. This assertion is understandable on the facts as found by the Commission. It would not on its own in my opinion explain why the respondent did not file the application within the period of 28 days. The respondent was clearly able to take advice from Mr Schapper within that time. There was no independent or medical evidence about "*shock*". Although this was not necessary to support a colloquial claim of "*shock*" it suggests the "*shock*" was not that severe. The respondent also said he had his "*head down*" trying to promote his real estate business. Again this may be so but it does not necessarily provide a good explanation for not taking the relatively short amount of time necessary to file the application. The lack of detail also tends to undermine the explanation.

53 Accordingly, in my opinion the Commissioner may have erred if he made a finding that there was an acceptable explanation for the delay in filing the application. It is unclear however if this is what the Commissioner found. This is because he did not, with respect, deal separately or clearly with the issue of the explanation. The Commissioner's statement that the "*criteria weigh in favour of the*" respondent did not explain how or why he arrived at this conclusion. The Commissioner should in my respectful opinion have taken this step. (See *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273).

54 In my opinion the absence of an acceptable explanation for the delay was a factor which weighed against the exercise of the discretion in the respondent's favour. As the Commissioner did not find or at least clearly express his conclusion, in my opinion it is difficult to ascertain if ground 1(1) is established. I am prepared to assume however that it is.

55 If grounds 1(1) and (2) are upheld it does not mean the appeal will necessarily succeed. The appeal does not succeed just because the Commissioner made an error in the assessment of relevant criteria in deciding the question posed by s29(3) of *the Act.* In the circumstances of this appeal it is only if the Full Bench concludes the error led to a wrong exercise of the discretion that the appeal will be allowed. Put slightly differently, if despite any errors made by the Commissioner, the Full Bench is nevertheless of the view that the discretion ought to have been exercised in favour of the respondent, the appeal will be dismissed.

56 This issue will be considered after an examination of the other grounds.

Ground 1(3)

57 I have already referred to the contents of paragraph [2] of the Commissioner's reasons. There is specific reference in the paragraph to the respondent not advising the appellant of any challenge to the termination prior to the making of the application.

58 The reference to a failure to give "*due consideration*" in the ground is an attack upon the weight which the Commissioner placed upon this factor. Stephen J in *Gronow v Gronow* (1979) 144 CLR 513 at 520 said that "*an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involve conflicting assessments of matters of weight.*" In my opinion, this applies to the current appeal ground.

59 I do not accept the Commissioner erred as asserted. In this instance, the failure to advise the appellant that the termination was liable to be challenged was of no real consequence. There was no prejudice to the appellant which was said to flow from this. Accordingly, it was not a factor of much weight.

Ground 1(4)

60 This ground also suffers the difficulty of an assertion that there was a failure to give "*adequate consideration*". It again brings into focus the warning of Stephen J quoted above. Ground 1(4)(a) can be quickly disposed of. The issue that the respondent was engaged as an independent contractor was not pressed before the Commissioner. I have earlier referred to the Commissioner's observations at the end of the first day of the hearing. The issue was not taken up again prior to or at the adjourned hearing on 19 June 2007. Accordingly, the Commissioner cannot be criticised for failing to give any "*adequate consideration*" to the issue.

61 Ground (1)(4)(b) occupied much of the oral submissions of the appellant. Although the drafting of this sub-ground is a little awkward, the assertion appears to be that the Commissioner did not give adequate consideration, if the respondent was an employee, to there being no termination of employment. The issue of whether the respondent was an employee can be put to one side, because as just stated this was not placed in issue before the Commissioner. The intent of the ground and submissions of the appellant was to establish the Commissioner ought to have found there was no termination of employment.

62 It is relevant to consider the nature of the hearing before the Commissioner. It was effectively an application to extend time. It was not a hearing about whether there had been a dismissal/termination for the purpose of determining jurisdiction. If the extension of time was granted, and the application did not settle, it would proceed to arbitration. At the arbitration, to succeed the respondent would need to prove that he was dismissed and unfairly so. It is apparent the appellant contests whether there was a dismissal. This was not however an issue which the Commissioner was required to determine as part of the s29(3) hearing. To proceed on this basis would at least partly conflict with the approach mandated by *Malik*. The IAC emphasised that the merit of the claim may be relevant. Steytler J referred to a merits assessment in a "*fairly rough and ready sort of way*" (quoting *Jackamarra*). His Honour also said if it "*was positively shown that the applicant had no prospect of success*" it would be difficult to imagine unfairness. This was the framework within which the Commissioner was required to operate. As submitted at least at times by counsel before him, the Commissioner did not need to decide the merits in other than an arguable or "*prima facie*" way.

63 Despite this it seems that the Commissioner went further than he was required to and positively decided there was a dismissal. In paragraph [16] the Commissioner did not simply find the respondent's position or evidence to be arguable, he accepted it, despite the earlier expressed reservations about the respondent's evidence. In paragraph [15] the Commissioner decided the respondent had been suspended and in paragraph [18] the Commissioner cited *Macken* in support of the proposition that a suspension constituted termination. In paragraph [19] the Commissioner found that there was a "*dismissal in the circumstances*".

64 Although the Commissioner did not decide whether the termination of employment was harsh, oppressive or unfair, the reasons show he made a finding on an important fact which was to be disputed at the final hearing of the application. He did not simply decide whether this part of the application was arguable in a "*rough and ready*" sort of way.

65 The appellant does not complain about this as such; instead as I have mentioned she sought to persuade the Full Bench that the Commissioner ought to have made a finding that there was no termination. The appellant's counsel then took the Full Bench to a number of passages of the evidence. (T75-76). I have considered these. It is not necessary to detail this evidence. I am not satisfied the evidence was such that the only conclusion the Commissioner could properly reach was there was no termination. As is apparent from the transcript of the evidence and the Commissioner's reasons, there was conflict between the evidence of different witnesses. The Commissioner assessed the evidence of the respondent with care and made a finding that his evidence on a key fact was accepted. Given the difficulties of an appeal court assessing the correctness of a finding based in part upon credibility and the limited enquiry about the merits which the Commissioner was required to make, I am not satisfied the asserted error occurred. (On credibility findings and appeals see *Skinner* at paragraphs [32]-[37] and *Grierson* at [50] ff).

66 In addition, if there was a "*suspension*" as the Commissioner found, it was at least arguable there was a dismissal.

Ground 1(5)

67 This ground can be quickly disposed of. I am not satisfied there is any basis upon which the Full Bench could decide the Commissioner erred as asserted. In her outline of submissions, the appellant referred to the decision being likely to encourage other applicants to delay filing proceedings. I do not accept this is established.

Ground 1(6)

68 Again this ground can be quickly disposed of. The Commissioner clearly expressed that he treated the evidence of the respondent with care. Nevertheless, he accepted the respondent's evidence as set out in paragraph [16] of his reasons. The Commissioner was not prevented from making this finding by his earlier expression of caution in looking at the respondent's evidence. The finding was not inconsistent with what the Commissioner earlier expressed.

Conclusion on Appeal

69 As I have set out, grounds 1(1) and (2) are the only grounds which are or I have been prepared to assume are established. The appeal will be allowed if the errors made by the Commissioner led to a wrong exercise of the discretion.

70 The question for the Commissioner was whether it would be "*unfair not to*" accept the referral by the respondent. The Commissioner took into account relevant factors as identified in *Malik*. I have found or assumed that it is established the Commissioner failed to take into account that the explanations given for the delay in filing the application were not cogent and that the contents of the application form supported such a conclusion. Additionally, it must be accepted that time limits are ordinarily meant to be observed and the mere failure of any prejudice to an employer, as here, will not necessarily lead to the exercise of the discretion in favour of an employee. In the present case however the findings by the Commissioner established the claim has merit. The delay in the filing of the application was not in any way substantial; it was only three or four days out of time. As stated by Steytler J in *Malik*, there must be something positively to satisfy the Commission that it would be unfair not to accept the referral out of time. In the present case, the merit of the claim as found by the Commission, the short period that had expired since the end of the 28 day time limit and the lack of prejudice to the respondent were factors which pointed positively to the exercise of the discretion in the respondent's favour.

71 Accordingly, even if grounds 1(1) and 1(2) are upheld, I am not satisfied the Commissioner erred in concluding it would be unfair not to accept the application.

Conclusion and Orders

72 As I have said, in my opinion the appeal should be dismissed because this is not an appropriate "*matter*" favouring the exercise of the discretion under s49(2a) of *the Act*. Even if the appellant passed the s49(2a) hurdle however the appeal should be dismissed on the merits for the reasons I have expressed.

73 In my opinion, the appropriate orders are:-

1. The appellant has leave to amend the notice of appeal to the form of the document filed on 4 October 2007.
2. The appeal is dismissed.

74 A minute of proposed order should in my opinion be published in these terms.

HARRISON C:

75 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.

MAYMAN C:

76 I have had the advantage of reading the draft reasons for decision of His Honour, the Acting President. I agree with those reasons and have nothing further to add.

2007 WAIRC 01314

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE-ANNE FRIESSBOURG
	APPELLANT
	-and-
	WILLIAM THOMAS JOHN VALLI
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 18 DECEMBER 2007
FILE NO	FBA 11 OF 2007
CITATION NO.	2007 WAIRC 01314

Decision	Appeal dismissed
Appearances	
Appellant	Ms M Saraceni (of Counsel)
Respondent	Mr D Schapper (of Counsel)

Order

This matter having come on for hearing before the Full Bench on 10 October 2007 and having heard Ms M Saraceni (of Counsel) on behalf of the appellant, and Mr D Schapper (of Counsel) on behalf of the respondent, and reasons for decision having been delivered on 7 December 2007, it is this day, 18 December 2007, ordered that:-

1. The appellant has leave to amend the notice of appeal to the form of the document filed on 4 October 2007.
2. The appeal 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.]

2007 WAIRC 01273

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01273
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 19 SEPTEMBER 2007
		FINAL WRITTEN SUBMISSIONS FILED WEDNESDAY, 26 SEPTEMBER 2007
DELIVERED	**:**	FRIDAY, 30 NOVEMBER 2007
FILE NO.	**:**	FBA 9 OF 2007
BETWEEN	**:**	THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER
		Appellant
		AND
		THE ORIGINAL CROISSANT GOURMET PTY LTD
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Occupational Safety and Health Tribunal
Coram	**:**	Commissioner S M Mayman
Citation	**:**	2007 WAIRC 01039
File No	**:**	OSHT 1 OF 2007

CatchWords:

Occupational Safety and Health Act 1984 - Appeal against decision of Occupational Safety and Health Tribunal - Appeal under s49(2a) *Industrial Relations Act* - Appeal in the public interest - Error of law - Tribunal purported to cancel the appellant's improvement notices - Irrelevant consideration relied on by Tribunal - No evidence to support orders of Tribunal - Criteria for issuing of improvement notices - Criteria for issuing of prohibition notices - marking of plant under *OSH Regulation* 2.9 - Tribunal's powers under s51A(5) - Further review by Tribunal - Tribunal purported to make all orders under the jurisdiction and powers in s51A(5)(c) *Occupational Health and Safety Act 1984* - 'Make such other decision with respect to the notice as seems fit' - Relevant context and nature of the review and further review of Tribunal not taken into consideration - Orders of Tribunal not 'with respect to' the improvement notices - Failure to comply with s26(3) *Industrial Relations Act* or otherwise to provide the parties with an opportunity to be heard - Procedural fairness -Opportunity to be heard – Hearing rule – Practical injustice suffered by Appellant - Appeal upheld

Legislation:

Occupational Safety and Health Act 1984 (WA)

s3A(1)(b)(ii), s5, s48, s48(1), s48(2), s49, s49(1), s51, s51(6), s51A, s51A(1), s51A(3), s51A(5), s51G, s51I(1), s54, s61.

Occupational Safety and Health Regulations 1996 (WA)

2.15, 2.16, 2.9, 4.14(1), 4.43(1).

Industrial Relations Act 1979 (WA)

s7, s26(3), s49, s49(1), s49(2), s49(2a), s83, s83(4), s49(5), s113

Interpretation Act 1984 (WA)

s5, s18, s46(1), s46(1a).

Industrial Relations Commission Regulations 2005

96(1)

Occupational Safety and Health Legislation Amendment and Repeal Bill 2004

Result:

Appeal upheld

Representation:

Counsel:

Appellant	:	Ms A Crichton-Browne (of Counsel)
Respondent	:	Mr T Carmady (of Counsel)

Solicitors:

Appellant	:	The WorkSafe Western Australia Commissioner
Respondent	:	Williams & Hughes, Barristers & Solicitors

Case(s) referred to in reasons:

Attorney General (Qld) v Australian Industrial Relations Commission (2002) 213 CLR 485

Bennett v Higgins (2005) 146 IR 205; (2005) 85 WAIG 3653

BHP Billiton Iron Ore Pty Ltd (BHPB) v Construction, Forestry, Mining and Energy Union of Workers (2006) 151 IR 361; (2006) 86 WAIG 1193; [2006] WASCA 549

Building Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616

Butler v Johnston, Guild and Somes (1984) 55 ALR 268

Civil Service Association of Western Australia Incorporated v The Commissioner of Police, Western Australian Police (2006) 86 WAIG 639

Commissioner of Taxation (Cth) v Scully (2000) 201 CLR 148

Cooper Brookes (Wollongong) Pty Ltd v FCT (1981) 147 CLR 297

FCT v Holmes (1995) 58 FCR 151; 138 ALR 59

Fox v Percy (2003) 214 CLR 118

Jeilles v Secretary, Department of Employment and Workplace Relations [2007] FCA 1590

Jennings Constructions v Workers Rehabilitation and Compensation Corporation (1998) 71 SASR 465

Kioa v West (1985) 159 CLR 550

McDowell v Baker (1979) 144 CLR 413

Monaco v Arnedo Pty Ltd (unreported); Full Court, S Ct of WA; Library No 940481; 6 September 1994

Mount Lawley Pty Ltd v Western Australian Planning Commission (2004) 29 WAR 273.

Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2005) 86 WAIG 247
O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356

Nordland Papier AG v Anti-Dumping Authority (1999) 93 FCR 454; 161 ALR 120

Pantorno v The Queen (1989) 166 CLR 466

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

R v L (1994) 122 ALR 464

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1

Re Minister for Resources; Ex parte Cazaly Iron Ore Pty Ltd [2007] WASCA 175 Salomon v Salomon & Co Ltd [1897] AC 22

Seltsam Pty Ltd v Ghaleb (2005) 3 DDCR 1; [2005] NSWCA 208

Solomons v District Court of New South Wales and Others (2002) 211 CLR 119

Technical Products Pty Ltd v State Government Insurance Office (1989) 167 CLR 45; 85 ALR 173

Thiess Pty Ltd v The AFMEPKU (2006) 86 WAIG 2495

Tuite v Administrative Appeals Tribunal (1993) 40 FCR 483

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2005) 225 CLR 88

Veloudos and Others v Young (1981) 56 FLR 182

Wilson v Anderson (2002) 213 CLR 401

Workers' Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642; 81 ALR 260 at 267

Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare (1994) 74 WAIG 2

Case(s) also cited:

Australasian Society of Engineers, Moulders and Foundry Workers, Industrial Union of Workers, Western Australian Branch and Electrical Trades Union of Workers of Australia (Western Australian Branch) and Amalgamated Metal Workers and Shipwrights Union of Western Australia v State Energy Commission of Western Australia (1990) 71 WAIG 315.

Civil Service Association of Western Australia Incorporated v Public Service Commissioner of Western Australia (1937) 17 WAIG 22.

Grade Pty Ltd (Formerly World Enzymes Pty Ltd) v Graham McCorry, Department of Productivity and Labour Relations (1993) 73 WAIG 2016.

Kioa and Others v Minister for Immigration and Ethnic Affairs and Another (1985) 62 ALR 321.

Smith v Allan, Secretary, Treasury of New South Wales 31 NSWLR 52.

The Construction, Forestry, Mining and Energy Union of Workers v BHP Billiton Iron Ore Pty Ltd and Integrated Group Ltd t/a Integrated Workforce (2005) 85 WAIG 1954.

Western Australian Government, Tramways, Motor Omnibuses and River Ferries' Employees' Union of Workers, Perth v Commissioner of Railways (1947) 27 WAIG 517.

Western Mining Corporation Limited v Amalgamated Metal Workers and Shiprights Union of Western Australia, Australian Electrical, Electronic, Foundry and Engineering Union, WA Branch, and The Constructions, Mining and Energy Workers' Union of Australia, Western Australian Branch (1991) 71 WAIG 2009.

Reasons for Decision

RITTER AP:

The Appeal/Application

1 This is an appeal, or an application for leave to appeal if leave is required, and then an appeal if leave is granted. For ease of reference I will refer to the applicant/appellant as "*the appellant*". The application/appeal is against a decision of the Commission sitting as the Occupational Safety and Health Tribunal (the Tribunal). The decision was constituted by an order made on 15 June 2007. Reasons for decision were published on 28 August 2007. In making the decision the Tribunal was purporting to exercise the jurisdiction contained in ss51A and 51G of the *Occupational Safety and Health Act 1984* (WA) (*the OSH Act*).

The Right of Appeal

2 Section 51I(1) of *the OSH Act* provides that listed provisions of the *Industrial Relations Act 1979* (WA) (*the Act*) "*apply to the exercise of the jurisdiction*" of the Tribunal conferred by s51G, with such modifications as are prescribed under s113 of *the Act* and as may be necessary or appropriate.

3 Section 49 of *the Act* is one of the sections listed in s51I(1) of *the OSH Act*. It is about appeals to the Full Bench from decisions of the Commission. Section 49(2) provides for a right of appeal against a "*decision*" of the Commission. Section 49(2a) 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. Pursuant to s51I of *the OSH Act*, these subsections apply to the decisions and findings of the Tribunal. A decision is defined in s7 of *the Act* to include an "*award, order, declaration or finding*". A finding is defined in s7 of *the Act* to mean a "*decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate*".

Outline of Events and Relevant Sections of *the OSH Act*

4 To understand and analyse the grounds of appeal it is necessary to set out the events and course of proceedings before the Tribunal in some detail.

(a) The Respondent

5 As stated by the Tribunal in its reasons in paragraph [7], the respondent, "*is engaged in the baking industry producing a range of products which are distributed across Australia. The employer's operations are continuous, 24 hours per day, 7 days per week. Some 50 employees are engaged at the site in Hamwell Way, Bassendean. New pressure vessels were recently installed by the employer in the plantroom driving the cool rooms associated with the production process.*"

(b) The Inspection

6 The first relevant event was on 17 May 2007. Senior Inspector John Lawrence Ebert of WorkSafe went to the Bassendean workplace of the respondent and did three things:-

(i) Issued Improvement Notice 302645 about 2 pressure vessels, pursuant to s48 of *the OSH Act*. (The first improvement notice).

(ii) Issued Improvement Notice 302646 about 2 pressure vessels, pursuant to s48 of *the OSH Act*. (The second improvement notice).

(iii) Marked 2 pressure vessels.

(c) Improvement Notices

7 Section 48 of *the OSH Act* is:-

"***48. Inspectors may issue improvement notices***

(1) Where an inspector is of the opinion that any person —

(a) is contravening any provision of this Act; or

(b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated,

the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.

(2) An improvement notice shall —

(a) state that the inspector is of the opinion that the person —

(i) is contravening a provision of this Act; or

(ii) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated;

(b) state reasonable grounds for forming that opinion;

(c) specify the provision of this Act in respect of which that opinion is held;

(d) specify the time before which the person is required, to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention; and

(e) contain a brief summary of how the right to have the notice reviewed, given by sections 51 and 51A, may be exercised.

(3) A person, other than the employer, issued with an improvement notice shall forthwith give the notice, or a copy of it, to the employer, and where —

(a) under subsection (1), an improvement notice is issued to an employer; or

(b) under this subsection an improvement notice, or a copy thereof, is given to an employer,

the employer shall cause the notice, or a copy of it, to be displayed in a prominent place at or near any workplace affected by the notice.

(3a) A person shall not remove an improvement notice displayed under subsection (3) before the requirements of that improvement notice have been satisfied.

(3b) Subsection (3a) does not apply in respect of an improvement notice that is suspended under section 51 or 51A or that has ceased to have effect.

(3c) If an improvement notice is issued —

(a) to a self-employed person in respect of a contravention of section 21; or

(b) to a body corporate to which section 21B applies in respect of a contravention of that section,

the person or body shall comply with subsection (3) and (3d) as if the person or body were an employer.

(3d) If an improvement notice is modified by the Commissioner under section 51(5)(b), the employer shall cause a copy of the Commissioner's decision to be displayed with the improvement notice, or a copy of it, as required by subsection (3).

(4) Subject to sections 51 and 51A, if a person —

(a) is issued with an improvement notice; and

(b) does not comply with the notice within the time specified in it,

the person commits an offence.

> *(5) A person issued with an improvement notice commits an offence if the Commissioner is not notified forthwith upon the requirements of the improvement notice being satisfied.*
>
> *(6) If a person contravenes subsection (3), (3a), (3c) or (3d), the person commits an offence.*"

8 Section 5 of the *Interpretation Act 1984* (WA), defines "*Act*", "*regulation*" and "*written law*", in such a way that *the OSH Act* is an "*Act*", and the *Occupational Safety and Health Regulations 1996* (WA) (*the OSH Regulations*) is a "*regulation*" which is a subset of "*subsidiary legislation*". "*Subsidiary legislation*" and "*Acts*" are part of what is defined as a "*written law*".

9 Relevantly, s46(1) and (1a) of the *Interpretation Act* then provides:-

> "*(1) A reference in a written law to a written law shall be construed so as to include a reference to any subsidiary legislation made under that written law.*
>
> *(1a) An example of the operation of subsection (1) is that a reference in an Act to "this Act" includes a reference to any subsidiary legislation made under the Act.*

10 Accordingly the reference in s48(1) of the *OSH Act* to "*contravening*" or having "*contravened*" any provision of "*this Act*", includes *the OSH Regulations.*

(d) Marking of Plant

11 *OSH Regulation* 2.9 is:-

> "***2.9. Marking of plant***
>
> *If an inspector issues an improvement notice or a prohibition notice that relates to any plant at a workplace then the inspector may mark the plant, or any part of it, to indicate that it is not to be used and a person must not —*
>
> *(a) use, or cause to be used, any plant, or any part of it, that is marked to indicate that it is not to be used; or*
>
> *(b) without the authority of an inspector to do so, remove, obliterate, or otherwise interfere with the mark.*
>
> *Penalty for a person who commits the offence as an employee: the regulation 1.15 penalty.*
>
> *Penalty in any other case: the regulation 1.16 penalty.*"

(e) Contents of the Two Improvement Notices

12 The first improvement notice (302645) said it was in "*relation to: Pressure vessels - Chinese built ammonia plant*" at the Bassendean workplace. Senior Inspector Ebert wrote that he formed the opinion the respondent was contravening *OSH Regulation* 4.43(1). The notice said the grounds for this opinion were: "*I have formed the opinion that the above place is a workplace and that the above units are not set up as required by AS 3873 in that the safety valves are separated from the vessels by stop valves and that the safety valves are not vented to outside of the building. This may lead to a very hazardous situation for employees with an accidental release of ammonia gas.*"

13 The first improvement notice directed the respondent to take the following remedial work by no later than 7 June 2007 at 4:30pm:-

> "*(i) Vent the safety valves of the above vessels to the outside of the building and to an area where no one can be adversely affected by the release of ammonia gas.*
>
> *(ii) Ensure that there are no stop valves that can isolate the safety valves from the above vessels.*"

14 The second improvement notice (302646) was also in "*relation to: Chinese built ammonia pressure vessels*". The second improvement notice said Senior Inspector Ebert formed the opinion the respondent was contravening *OSH Regulation* 4.14(1). The grounds for the opinion were said to be: "*I have formed the opinion that the above place is a workplace and that you have the above plant in use in contravention of the above regulation in that the plant is not registered as required by the Commissioner or any other regulatory authority.*"

15 The second improvement notice required the respondent to remedy this by no later than 25 May 2007 at 4:30pm. The respondent was directed to have the plant "*appropriately assessed and registered as required before further use*".

(f) Senior Inspector Ebert's Marking of the Plant

16 As mentioned Senior Inspector Ebert also marked the two pressure vessels. This involved placing a sticker on the plant in the following form:-

"***PLANT NOT TO BE USED***

I have issued Improvement/Prohibition Notice No: _____ that relates to this item of plant.

This item of plant/part (specifiy) _____ ***MUST NOT BE USED*** *without the authority of an inspector.*

Inspector _____ Number _____ Date _____

It is an offence to remove, obliterate or otherwise interfere with this tag without the authority of an inspector (regulation 2.9 of the Occupational Safety and Health Regulations 1996)."

(g) Review by the Appellant

17 Pursuant to s51 of *the OSH Act* the respondent by letter dated 21 May 2007 sought a review by the appellant of the first and second improvement notices. Section 51 of *the OSH Act* is:-

"***51. Review of notices***

(1) An improvement notice or prohibition notice may, in accordance with this section, be referred for review to the Commissioner by —

(a) the person issued with the notice; or

(b) the employer (if any) of the person issued with the notice.

(2) A reference under subsection (1) may be made in the prescribed form —

(a) in the case of an improvement notice, within the time specified in the notice as the time before which the notice is required to be complied with;

(b) in the case of a prohibition notice, within 7 days of the issue of the notice or such further time as may be allowed by the Commissioner.

[(3) and (4) repealed]

(5) On the reference under this section of an improvement notice or a prohibition notice for review, the Commissioner shall inquire into the circumstances relating to the notice and may —

(a) affirm the notice;

(b) affirm the notice with such modifications as seem appropriate; or

(c) cancel the notice,

and, subject to section 51A, the notice shall have effect or, as the case may be, cease to have effect, accordingly.

(6) The Commissioner shall give to the person that referred the matter for review, and to any other person that was entitled under subsection (1) to refer the notice for review, a notice in writing of the decision on the reference and of the reasons for that decision.

(6a) In dealing with a reference for the review of a prohibition notice the Commissioner may refer to an expert chosen by the Commissioner such matters as appear appropriate and may accept the advice of that expert.

(7) Pending the decision on a reference under this section for the review of a notice, the operation of the notice shall —

(a) in the case of an improvement notice, be suspended; and

(b) in the case of a prohibition notice, continue, subject to any decision to the contrary made by the Commissioner."

18 The respondent's general manager was advised in writing of the outcome of the s51 review by letter from the appellant, dated 25 May 2007. Relevantly, the letter said:-

"…

Improvement notice no. 302645

Having considered your submission and the circumstances in which the above notice was issued, I have decided to affirm the content of the notice and agree to modify the date for compliance for the above notice to 5.00pm on 10 August 2007.

I would like to note the seriousness of issues relating to the notice. I am informed the safety valves of the pressure vessels have not been set up according to Australian Standard AS 3873. They are required to be set up according to this standard by law. This standard establishes safety standards and, because the pressure vessels do not comply, it cannot be guaranteed that they are safe. The risks from failure of the pressure vessels are extreme because ammonia is a highly hazardous substance.

Improvement notice no. 302646

Having considered your submission and the circumstances in which the above notice was issued, I have decided to affirm the content of the notice. I agree to modify the date for compliance for the above notice to 5.00pm on 10 August 2007.

Pressure vessels cannot be used

Please note that the pressures vessels cannot be used because they have been marked as 'do not use', under regulation 2.9. They can be used once Inspector Ebert has been informed of compliance with the notices and verified this.

Display of notices

For the information of your employees, you are directed to display a copy of this letter and the notice it modifies in a prominent place at any workplace affected by the notice." (emphasis is in original)

(h) The Referral to the Tribunal for Further Review

19 On 30 May 2007 the respondent filed a notice of referral to the Tribunal, purportedly under s51A of *the OSH Act* and regulation 96(1) of the *Industrial Relations Commission Regulations 2005*. Section 51A of the *OSH Act is:-*

"***51A. Further review of notices***

(1) A person issued with notice of a decision under section 51(6) may, if not satisfied with the Commissioner's decision, refer the matter in accordance with subsection (2) to the Tribunal for further review.

(2) A reference under subsection (1) may be made in the prescribed form within 7 days of the issue of the notice under section 51(6).

(3) A review of a decision made under section 51 shall be in the nature of a rehearing.

(4) The Tribunal shall act as quickly as is practicable in determining a matter referred under this section.

(5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may —

(a) affirm the decision of the Commissioner;

(b) affirm the decision of the Commissioner with such modifications as seem appropriate; or

(c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,

and the notice shall have effect or, as the case may be, cease to have effect accordingly.

[(6) repealed]

(7) Pending the decision on a reference under this section, irrespective of the decision of the Commissioner under

> *section 51, the operation of the notice in respect of which the reference is made shall —*
>
> *(a) in the case of an improvement notice, be suspended; and*
>
> *(b) in the case of a prohibition notice, continue, subject to any decision to the contrary made by the Tribunal.*"

20 The notice of referral said the respondent had referred to the Tribunal the "*review of improvement notice 302645 + 302646*". The grounds of the referral were written as:-

> "*We are happy to comply with the requests of notices 302645 + 302646 we are requesting that whilst we try to meet these requirements that we are able to operate*".

(i) The Tribunal's Jurisdiction

21 The jurisdiction of the Tribunal is provided or confirmed by s51G of *the OSH Act*. This section is:-

> ***"51G. Industrial Relations Commission sitting as the Occupational Safety and Health Tribunal***
>
> *(1) By this subsection the Commission has jurisdiction to hear and determine matters that may be referred for determination under sections 28(2), 30(6), 30A(4), 31(11), 34(1), 35(3), 35C, 39G(1), (2) and (3) and 51A(1).*
>
> *(2) When sitting in exercise of the jurisdiction conferred by subsection (1) the Commission is to be known as the Occupational Safety and Health Tribunal (the **"Tribunal"**).*
>
> *(3) A determination of the Tribunal on a matter mentioned in subsection (1) has effect according to its substance and an order containing the determination is an instrument to which section 83 of the Industrial Relations Act 1979 applies.*"

The Course and Outcome of the Tribunal Hearing

(a) 12 June 2007 – Adjournment and Inspection

22 The referral came before the Tribunal for hearing on 12 June 2007. At the commencement of the hearing it became apparent that the plant the subject of the two improvement notices, and which had been marked, was still being used. This was prima facie contrary to the marking of the plant. Counsel for the appellant said the continued use of the plant was not previously known by the appellant. The respondent's counsel sought an adjournment to more fully prepare for the hearing. To determine that application the Tribunal heard evidence from Senior Inspector Ebert about the dangerousness of the plant. There was then an adjournment for lunch. After that the Tribunal granted an adjournment of only 24 hours because of the risk caused by the continued operation of the pressure vessels on the site.

23 That afternoon the Tribunal inspected the premises and plant of the respondent.

(b) 13 June 2007 – Commencement of Hearing, Amendment of Referral and Meeting with the Tribunal

24 At the suggestion of the Tribunal the referral was amended at the hearing which commenced in the afternoon of the next day. This was because, as the Tribunal later described in its reasons, the respondent "*sought to refer the improvement notices at first instance and not the notice of the [appellant] issued on 25 May 2007*". The amendment was "*to reflect that the issue before the Tribunal was the [appellant's] notice in respect of*" the two improvement notices. (Reasons paragraph [21]).

25 Counsel for the respondent also informed the Tribunal that some progress had been made overnight about the first improvement notice. Counsel provided a copy of a letter dated 7 June 2007 by Belcold Pty Ltd, a refrigeration consultancy company, which set out a timetable of remedial work. (T27). The letter said the first improvement notice could be satisfied by the work which was described in the letter and this would be completed by lunch time on Monday 18 June 2007. Counsel also advised he was aware that Senior Inspector Ebert was in a position to inspect, on Monday afternoon, to ensure compliance with the first improvement notice. There was then discussion about whether the review of the first improvement notice would be adjourned until after, say, 19 June 2007 to enable Senior Inspector Ebert to perform the inspection. (T27).

26 Counsel then referred to the second improvement notice and said it was not in issue that the plant had not been registered. Counsel said what was in issue was whether the plant was safe or unsafe and there would be some expert evidence about that. (T32). Counsel said the respondent sought the revocation of the decision of the Commissioner under s51A(5)(c) of *the OSH Act* and the making of another decision about the notices and the marking of the plant. (T32). Counsel then advised that the parties were in dispute about whether the Tribunal had jurisdiction or power to review the marking of the plant or whether this was only held by the Health and Safety Magistrate. (See *OSH Regulations* 2.15 and 2.16). Counsel submitted the decision of the Tribunal could be to re-issue the improvement notices with an extension of the times for the improvement and the lifting of the marking. (T33).

27 Counsel for the appellant said she wanted the matter to move forward to a decision about the first or second notice. The Commissioner then suggested a meeting in her chambers. The transcript does not reveal the purpose or outcome of that meeting.

(c) 13 June 2007 – Opening by Respondent's Counsel

28 The next thing transcribed was the recommencement of the hearing. Counsel for the respondent opened by providing photographs and a site map of the work premises. (T36-T37). Reference was again made to the remedial work to be done and that the premises would shut down on Saturday for this purpose. Counsel said this was the evidence of the respondent about the first improvement notice. It was submitted "*the remedial work is happening in a timely fashion and that steps have been taken to ensure that the health and safety of staff is preserved until the work is finished.*" (T38).

29 There was then some discussion between counsel and the Tribunal about the safety of the premises and the process of registration of the plant. Counsel submitted the respondent was hoping to have the marking of the plant lifted so that during the registration process they could keep using the plant. (T44). It was submitted and asserted the appellant did not disagree with this and that the marking could be removed if other things were done, prior to registration. Counsel submitted the second improvement notice could stay in place about the registration, but the marking of the plant could be lifted in the meantime. (T45). Counsel made submissions about the cost of the potential closure of the respondent's work premises.

(d) 13 and 14 June 2007 – Witnesses for the Respondent

30 The respondent's counsel then called Mr Kenneth John Beer to give evidence. Mr Beer has a Bachelor of Engineering and graduated from the University of Western Australia in 1970. He specialises in mechanical engineering. He gave evidence about design registration and the pressure vessels. It is not necessary to discuss his evidence in any detail. At the end of Mr Beer's evidence the Tribunal adjourned until the following day.

31 At the commencement of the hearing on 14 June 2007, the respondent called Mr Allen Keith Bernhardi to give evidence. He said he had a long involvement in the baking industry and was presently seconded to work for "*Yarrows*", the parent company of the respondent. Mr Bernhardi gave evidence about the remedial work which was to be done to comply with the first improvement notice. Again it is not necessary to detail his evidence. Counsel for the respondent informed the Tribunal they did not have any more witnesses. (T79).

(e) 14 June 2007 – Opening by the Appellant's Counsel and the Appellant's Witness

32 Counsel for the appellant then opened her case. (T79 ff). This commenced with submissions about the relevant *OSH Regulations*. There were also submissions about the interaction between the two improvement notices and the *OSH Regulations*. A submission was made that the respondent was "*a long way away from getting the plant registered*". (T81). Submissions were then made about the first improvement notice and the relevant Australian Standard. Counsel summarised that the second improvement notice was about the registration of the pieces of plant and the first improvement notice was about how the plant was set up or installed. This had led, after inspection by Senior Inspector Ebert, to a belief that the two regulations were contravened which are specified in the two improvement notices. Senior Inspector Ebert also decided to exercise his power under *OSH Regulation* 2.9, to mark the plant and prohibit it from being used. (T82). The Tribunal asked counsel why Senior Inspector Ebert did not issue a prohibition notice. The Tribunal also questioned whether it was the intention of the appellant that the machinery would stop, given the compliance dates in the improvement notices were some way into the future. (T82).

33 Counsel answered that although it was a question which could be asked of the Senior Inspector, he may have been of the view that the risk of harm was not serious and imminent so that a prohibition notice could not have been issued. The Senior Inspector could however write improvement notices and exercise his discretion under *OSH Regulation* 2.9, as he did, to mark the plant, with the effect that the plant could not then be used. Counsel reiterated the appellant was not aware the plant was still being used until the first day of the hearing. Counsel said the compliance dates were prefaced upon the plant not being used. (T84).

34 Counsel for the appellant concluded her opening by saying the appellant wanted the notices to be affirmed. She said the second improvement notice was based upon the plant not being registered and there seemed to be no dispute about that, so the notice was valid. With respect to the first notice, counsel submitted the plant had not been installed with correct safety valves and exits for gas and so the notice was also valid. It was also submitted the compliance dates of 18 June 2007 for the first improvement notice and 10 August 2007 for the second improvement notice, should remain. During the opening it was also agreed that the submissions about whether the Tribunal had jurisdiction to review the marking of the plant would be made in closing.

35 Senior Inspector Ebert then gave his evidence. Again it is unnecessary to review the detail.

(f) 14 June 2007 – Closing Submissions of the Appellant's Counsel

36 Following Senior Inspector Ebert's evidence the Tribunal called upon counsel for the appellant to make her closing submissions. (T105). Submissions were made about the relevant sections of *the OSH Act* and *the OSH Regulations* and the evidence about both improvement notices. Counsel then made submissions about whether the Tribunal had jurisdiction to review the decision of Senior Inspector Ebert to mark the plant under *OSH Regulation* 2.9. The submission was that only the Health and Safety Magistrate had this jurisdiction.

(g) 14 June 2007 – Closing Submissions of the Respondent's Counsel and Re-listing

37 Counsel for the respondent then started his closing submissions. (T120). The Tribunal informed him it would like to have the matter finished that day so she could re-list it for 10:30am the next day for the handing down of the decision. In his submissions counsel for the respondent emphasised the removal of the marking of the plant under *OSH Regulation* 2.9. (T122). It was submitted this could be done by a revocation of the first improvement notice and then a reinstatement of it with the obligation imposed by the marking excised; or an affirmation of the decision with a modification, being the excision of the marking of the plant.

38 With respect to the first improvement notice it was submitted the plant be allowed to operate until the remedial work was completed on Monday 18 June 2007. (T122). With respect to the second improvement notice, it was accepted by counsel that the plant had not been registered but he said the process of registration was now underway. This would take about six weeks to be completed. (T122). Submissions were then made about whether the Tribunal had jurisdiction to review the marking of the plant. (T125 ff). At the conclusion of these submissions there was discussion about the form of orders sought by each party. (T131). The Tribunal advised it intended to hand down a minute of proposed order the next day and then list a speaking to the minute. (T132).

(h) 14 June 2007 – Reply by the Appellant's Counsel and Re-Listing

39 Counsel for the appellant then made some submissions in reply. At the conclusion the Tribunal again said the matter was listed for tomorrow at 10:30am when a minute would be handed down. (T139).

(i) 15 June 2007 – Minute of Proposed Orders and the Speaking to the Minute

40 At the commencement of the hearing on the next day the Tribunal said it had considered the submissions and reached a decision. (T141). No reasons were then delivered. It appears from the transcript that the parties had been handed a minute of proposed order by the Tribunal. This was then read by the Tribunal. Afterwards the Tribunal said "*that concludes the minute … and my determination of this matter*". (T142). The Tribunal said it needed to know from the parties how long they required to consider speaking to the minute as the Tribunal wanted to issue the order later that morning. The proceedings were adjourned *pro tem* to enable counsel to consider the minute and take instructions.

41 When the Tribunal reconvened, submissions were made by both counsel about the form of some of the orders to be made. After this the Tribunal stood the matter down for a short period of time whilst changes were made to the minute. Upon resumption both counsel concurred with the redrafted form of the minute. (T147/8). The Tribunal then said the order would issue within the next hour and copies would be made available.

(j) The Tribunal's Publication of Reasons

42 The Tribunal said the reasons would issue as soon as reasonably practicable. (T148). At that stage the Tribunal had not given any reasons even in oral summary form, for the publishing of the minute of proposed order or the making of the order. In my respectful opinion it would have been far better if the Tribunal had done so. I accept the Tribunal was understandably concerned about the safety of the workplace and wanted to make orders expeditiously. Despite this however I cannot see any reason why at least short oral reasons could not have been given and expanded on later. The provision of reasons is a normal component of the process of judicial determination or arbitration. The purpose and benefits of reasons being formed and published are set out in *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at paragraphs [26]-[28].

The Order of the Tribunal

43 The order made on 15 June 2007 and appealed against (if leave is required and granted) is:-

> "*WHEREAS the Occupational Safety and Health Tribunal has heard this application and has determined that it will issue its decision and publish its reasons for that decision later;*
>
> *WHEREAS having heard Mr T Carmady (of counsel) on behalf of The Original Croissant Gourmet Pty Ltd and Ms A Crichton-Browne (of counsel) on behalf of the Worksafe Western Australia Commissioner, the Occupational Safety and Health Tribunal, pursuant to the powers conferred under the Occupational Safety and Health Act 1984 ("the Act") hereby:*
>
> *1. REVOKES that part of the Worksafe Western Australia Commissioner's notice referring to Improvement Notice 302645 as affirmed on 25 May 2007 with an extended compliance date and, in accordance with s 51A(5)(c) of the Act, cancels Improvement Notice Number 302645. The revocation of the Worksafe Western Australia Commissioner's notice and the cancellation of the Improvement Notice Number 302645 will take effect on and from the issuance of this Order.*
>
> *2. MAKES the following Orders with respect to the venting of safety valves and the location of stop valves relating to all pressure vessels in the plant room of The Original Croissant Gourmet Pty Ltd:*

(a) *THAT the safety valves of the pressure vessels be immediately vented to the outside of the building to an area where no one can be adversely affected by the release of ammonia;*

(b) *ENSURE that there are no stop valves that can isolate the safety valves from the pressure vessels;*

(c) *THAT the scope of works referred to in Order 2. be commenced within 24 hours following the issuance of this Order and completed by close of business Monday, 18 June 2007;*

(d) *THAT The Original Croissant Gourmet Pty Ltd be prohibited from operating the pressure vessels in the plant room until the scope of works referred to in Order 2(a) and 2(b) has been completed; and*

(e) *THAT the Worksafe Western Australia Commissioner or a delegated representative knowledgeable in the area of plant inspects the modifications referred to in Order 2. and reports back to the Occupational Safety and Health Tribunal by close of business Tuesday, 19 June 2007.*

3. *REVOKES that part of the Worksafe Western Australia Commissioner's notice referring to Improvement Notice 302646 as affirmed on 25 May 2007 with an extended compliance date and, in accordance with s 51A(5)(c) of the Act, cancels Improvement Notice Number 302646. The revocation of the Worksafe Western Australia Commissioner's notice and the cancellation of the Improvement Notice Number 302646 will take effect on and from the issuance of this Order.*

4. *MAKES the following Orders with respect to the registration of all pressure vessels in the plant room of The Original Croissant Gourmet Pty Ltd:*

(a) *THAT all pressure vessels contained in the plant room be appropriately assessed and registered in accordance with the terms of the Occupational Safety and Health Regulations, 1996;*

(b) *THAT The Original Croissant Gourmet Pty Ltd be prohibited from operating the pressure vessels in the plant room on or before Friday, 10 August 2007 except for:*

(i) *any operation that might be required for the registration process pursuant to the Occupational Safety and Health Regulations, 1996 to be concluded; or*

(ii) *any reduced pressure in the plant room vessels considered by a Worksafe Inspector, knowledgeable in the area of plant, to be sufficient to allow for the safe operation of the plant.*

(c) *THAT the Worksafe Western Australia Commissioner or a delegated representative knowledgeable in the area of plant inspects the modifications referred to in Order 4. and reports back to the Occupational Safety and Health Tribunal by close of business Friday, 10 August 2007.*

5. *REQUIRES that all access of person(s) through, in and around the area containing the pressure vessels be prohibited, within reason, until all acts required by Order 2 and 4 herein have been completed.*

6. *REQUIRES that a copy of this Order be provided to every person, including employees, employers, subcontractors and*

any other person(s) in or around the workplace by The Original Croissant Gourmet Pty Ltd until such time as the terms of this Order have been met.

7. LIBERTY to apply is reserved to either party to vary the times in Orders 2(c), 2(d), 4(b), 4(c), 5. and 6. or to refer any matter relating to the implementation of Order 4 (b)(ii) to the Occupational Safety and Health Tribunal."

The Reasons of the Tribunal

(a) Introduction

44 The Tribunal commenced its reasons for decision with an introduction and setting out of relevant background. The reasons then mentioned the amendment of the application.

(b) Evidence and Submissions

45 The Tribunal summarised the respondent's "*Evidence and Submissions*" and discussed the evidence of Mr Beer and Mr Bernhardi. The Tribunal then summarised the respondent's legal submissions about whether there could be a review of the marking of the plant. The Tribunal discussed the appellant's evidence and submissions. Included within this was a discussion of the evidence of Senior Inspector Ebert and a summary of the legal submissions of the appellant.

(c) Credibility

46 The Tribunal then commenced a section of its reasons headed "*Conclusion and Findings*". A first sub-heading was "*Credibility*". The Tribunal found all the evidence of the witnesses to be credible, except for some speculative evidence on one point which is immaterial to the appeal. The Tribunal also said "*to the extent of any inconsistency between the three witnesses the Tribunal accepts the evidence of Inspector Ebert and Mr Beer over Mr Bernhardi*". ([56]).

(d) Jurisdiction to Review Marking of Plant

47 The Tribunal decided the jurisdictional issue about whether the Tribunal could review the marking of the plant. It decided it did not have this jurisdiction. (See paragraphs [57] and [58] of the reasons and *OSH Regulations* 2.15 and 2.16).

(e) *"Legal Considerations"*

48 The Tribunal next commenced a section of reasons headed "*Legal Considerations*". The Tribunal said that its role was "*administrative in nature*". ([59]). The Tribunal quoted ss51A, 48 and 49 of *the OSH Act*. Section 49 of *the OSH Act*, which has not been quoted earlier, is:-

> "***49. Inspectors may issue prohibition notices***
>
> *(1) Where an inspector is of the opinion that an activity is occurring or may occur at a workplace which activity involves or will involve a risk of imminent and serious injury to, or imminent and serious harm to the health of, any person, the inspector may issue to a person that is or will be carrying on the activity, or a person that has or may be reasonably presumed to have control over the activity, a prohibition notice prohibiting the carrying on of the activity until an inspector is satisfied that the matters which give or will give rise to the risk are remedied.*
>
> *(2) An inspector who issues a prohibition notice, other than in respect of an activity as defined in subsection (7), shall remain at the workplace until the employer has been advised of the notice and, where the notice is in respect of an activity that is occurring, the prohibited activity has ceased.*
>
> *(3) A prohibition notice shall —*
>
> *(a) state that the inspector is of the opinion that in the workplace there is occurring or may occur an activity which involves or will involve a risk of imminent and serious injury to, or imminent and serious harm to the health of, a person;*
>
> *(b) state reasonable grounds for forming that opinion;*
>
> *(c) specify the activity which in the inspector's opinion involves or will involve the risk and the matters which give or will give rise to the risk;*
>
> *(d) where in the inspector's opinion the activity involves a contravention or likely contravention of any provision of this Act, specify that provision and state the reasons for that opinion; and*

(e) contain a brief summary of how the right to have the notice reviewed, given by sections 51 and 51A, may be exercised.

(4) A person, other than the employer, to whom a prohibition notice is issued shall forthwith give the notice, or a copy of it, to the employer, and where —

(a) under subsection (1), a prohibition notice is issued to an employer; or

(b) under this subsection a prohibition notice, or a copy thereof, is given to an employer,

the employer shall cause the notice, or a copy of it, to be displayed in a prominent place at or near any workplace affected by the notice.

(4a) A person shall not remove a prohibition notice displayed under subsection (4) before the requirements of that prohibition notice, taking into account any modifications made under section 51(5), have been satisfied or the prohibition notice has ceased to have effect.

(4b) If a prohibition notice is issued —

(a) to a self-employed person in respect of a contravention of section 21; or

(b) to a body corporate to which section 21B applies in respect of a contravention of that section,

the person or body shall comply with subsection (4) and (4c) as if the person or body were an employer.

(4c) If a prohibition notice is modified by the Commissioner under section 51(5)(b), the employer shall cause a copy of the Commissioner's decision to be displayed with the prohibition notice, or a copy of it, as required by subsection (4).

(5) Subject to sections 51 and 51A, if a person issued with a prohibition notice does not comply with the notice, the person commits an offence.

(6) If a person contravenes subsection (4), (4a), (4b) or (4c), the person commits an offence.

(7) The application of this section extends to residential premises that are being or may be occupied by an employee as mentioned in section 23G(2), and for that purpose —

(a) in this section —

*(i) **"workplace"** includes such premises; and*

(ii) references to imminent and serious injury to, or imminent and serious harm to the health of, a person are to be read as applying only to an employee;

and

*(b) in this section and section 50 **"activity"** includes the occupation of such premises."*

49 In paragraph [61] the Tribunal said that, "*relevant to the Tribunal's considerations in these matters as referred are the provisions for an inspector to issue a prohibition notice …*". This is a reference to s49 of *the OSH Act.*

50 The Tribunal then considered the nature of its task by citing the Industrial Appeal Court (IAC) decision of *Wormald Security Australia Pty Ltd v Peter Rohan, Department of Occupational Health, Safety and Welfare* (1994) 74 WAIG 2. The Tribunal said that at the time of *Wormald Security*, reviews were conducted by the Commission. The Tribunal said *the OSH Act* had been amended but the legislation about the operation of the Tribunal today "*has some similarities*". The Tribunal quoted from the reasons of Franklyn J at page 4 of *Wormald Security* where his Honour said there was, "*no question of the onus being on the person seeking the review to establish that the notice should not have issued, either in the form in which it did or at all, although he would of course be entitled to adduce evidence to that effect. The inquiry being "into the circumstances relating to the notice" it necessarily, in my view, requires that the Commissioner inquire into and ascertain for himself the validity of the Inspector's opinion and the relevant circumstances giving rise thereto as set out in the notice.*" The Tribunal said it considered these observations to be relevant.

51 The Tribunal said at paragraph [63] that after conducting an inquiry (under s51A(5) of *the OSH Act*) it had three options. These were to affirm, modify or revoke the decision of the appellant. The Tribunal said the third option under s51A(5)(c) of *the OSH Act* was the broadest. The Tribunal said that under the former *OSH Act* the Commission's powers were narrower than those it presently possessed.

52 The Tribunal said s51A(5)(c) provided for the revocation of the appellant's decision and the making of such other decisions with respect to the notices as the Tribunal "*seems fit*". The Tribunal then quoted definitions of each of the words "*as*", "*seem*" and "*fit*" from the *Macquarie Dictionary Online, Fourth Edition 2005* (28 August 2007). The Tribunal also quoted from paragraph [12.7] of *Statutory Interpretation in Australia, 6th edition*, D C Pearce and R S Geddes, 2006 where the authors discussed the meaning of the expression "*in respect of*". ([63]-[64]). (The part of the paragraph quoted by the Tribunal is quoted later in these reasons).

53 The Tribunal then said its decision "*would need to be well adapted or suited to the findings of the inquiry having regards to the objects of the [OSH Act] in particular the first four objects as prescribed in s 5 of the [OSH Act]*". ([64]).

54 The Tribunal referred to the reasons of Nicholson J in *Wormald Security* about the meaning of the word "*risk*", and the reasons of Nicholson J and Franklyn J about the expression "*imminent and serious*". ([65]-[66]). This expression is still used in s49(1) of *the OSH Act*.

55 The Tribunal then said in paragraph [67] of its reasons:-

> "*67 Critical to the issuance of a prohibition notice is whether the inspector is of the opinion that an activity involves or will involve a risk of imminent and serious injury or harm. Having regard for the statute the Tribunal considers the issuance of an improvement notice even when combined with an administrative decision pursuant to reg 2.9 to 'mark' the pressure vessels requiring the employer to cease operating the plant is a less serious consequence than the issuance of a prohibition notice. More stringent provisions apply when the decision has been made to issue a prohibition notice. Provisions within s 49(2) require an inspector to "remain at the workplace" until such time as the activity the subject of the prohibition notice has ceased. The operation of a prohibition notice under review by the WorkSafe Commissioner or a further review by the Tribunal continues s 51(7)(b) and s 51A(7)(b), subject to any decision to the contrary made by either the WorkSafe Commissioner or the Tribunal. The matters the subject of a prohibition notice are prohibited "until an inspector is satisfied that the matters which give or will give rise to the risk are remedied". By comparison no such provisions are reflected in the statute when an inspector issues an improvement notice.*"

(f) Findings

56 The next section of the Tribunal's reasons was headed "*Findings*". The main findings made by the Tribunal were:-

(i) It was not in dispute that when the two improvement notices were issued the safety valves were separated from the pressure vessels by stop valves and not vented to the outside of the building. Also the pressure valves which had been installed in November 2006 and operative from half way through January 2007 were not registered. ([68]).

(ii) It was conceded by the respondent that at no stage since 17 May 2007 had the pressure vessels ceased to operate, with the exception of short term shut down periods, despite the marking of the plant pursuant to *OSH Regulation* 2.9. ([70]).

(iii) Each of the two improvement notices "*met the terms required of such issuance with one exception*". ([70]). In effect the Tribunal said this was that the respondent's premises on 17 May 2007 had a significant risk that ammonia, a toxic gas, could be released into the workplace. Accordingly the Tribunal found "*the appropriate action on the day in question to ensure a shut down of the pressure vessels and associated plant would have been to issue prohibition notices*". ([70]).

(iv) After quoting some of Senior Inspector Ebert's evidence the Tribunal found that issuing improvement notices and marking the plant was inappropriate. ([72]). The Tribunal found the circumstances were more serious than situations in which inspectors would normally issue prohibition notices. ([72]).

(v) The Tribunal said from the evidence of Senior Inspector Ebert he appeared to be guided by WorkSafe's policy. The Tribunal then said, "*… there was no information available on which such an opinion could have been reached other than the opinion envisaged by s49(1), that being operation of the pressure vessels 'would involve' a risk of imminent and serious injury to or harm to any person*". ([75]).

(vi) In making this finding the Tribunal followed the meaning of the expression "*imminent and serious*" as discussed by the IAC in *Wormald Security*. ([76]).

(vii) In paragraph [77] the Tribunal said it found "*in such circumstances unregistered equipment was normally from another state and there were visual indications that the plant was more than 90% satisfactory. The Tribunal finds that on the basis of the lack of detail available to Inspector Ebert at the employer's premises that the unregistered pressure vessels in the plantroom, the risk of inhalation of ammonia gas accidentally released from the pressure vessels into the plant room together with the potential for an explosion to occur was severe, more so at the employer's premises than circumstances where WorkSafe inspectors had issued prohibition notices in the past. Inspector Ebert had a reasonable basis on which to issue prohibition notices.*"

(viii) The respondent did not challenge statements contained in the improvement notices, the issuing of the notices and the provisions of *the OSH Act* and *OSH Regulations* which Senior Inspector Ebert relied upon to support his opinions. The placement of the mark on the plant was the issue of most concern to the respondent. ([79]).

(g) Conclusions

57 The next section of the Tribunal's reasons was headed "*Conclusions*". The major conclusions reached were:-

(i) The Tribunal had conducted an inquiry as required and was satisfied that on 17 May 2007 Senior Inspector Ebert thought the ongoing operation of the pressure vessels in the plant room at the employer's premises involved a serious risk of injury or harm to the health of persons in and around the plant. ([80]).

(ii) There was clear evidence to support a "*serious*" risk. "*The one contentious issue for the Tribunal to consider was whether at the time the risk referred to involved or would involve 'imminent' injury or harm to any person as required by s49(1) of the Act*". ([80]).

(iii) Having regard to the opinions of Senior Inspector Ebert as set out in the two improvement notices, the Tribunal found the situation at the respondent's premises posed risks which were "*imminent and serious*" under s49(1) of *the OSH Act*. ([81]-[83]).

(iv) Despite the marking of the plant, the respondent did not "*cease operations*". ([84]). At the time of the s51 review the risk at the respondent's premises was unchanged. The risk remained "*serious and imminent*" and the decision of the appellant on 25 May 2007 to affirm each improvement notice ought be revoked. ([84]).

(v) The Tribunal, having revoked the decision of the appellant, was required under s51A(1)(c) to "*make such other decision with respect to the notice as seems fit*". The Tribunal concluded "*it seems fit*" to prohibit the operation of the machinery effective on and from the issuing of any orders by the Tribunal. The failure of the respondent to shut down the plant, despite the marking, was taken into account by the Tribunal in determining the appropriate action to take. This was said to be not a relevant factor in the Tribunal's decision to revoke the appellant's decision. It was however relevant when considering what appropriate action ought now occur. ([85]).

(vi) After reviewing some of the evidence of Senior Inspector Ebert, the proposed remedial works and the remaining registration process, the Tribunal concluded that "*if there is a safe operating level able to be achieved by [the respondent], then the pressure vessels ought to be allowed to operate within the terms of the order*". ([87]). The Tribunal thought the respondent ought to consult with a delegated representative of the appellant to oversee the progress of the registration of the plant. The Tribunal said it was "*unable to conclude at this point whether a safe alternative option for operation of the pressure vessels is available*". (87]).

(vii) In the absence of information indicating the plant could operate safely, "*it seems fit*" to issue orders prohibiting the operation of the pressure vessels in the plant room until the registration process had been concluded. As part of this, access of all persons through, in and around the area containing the pressure vessels should be prohibited, within reason, until such time as the registration process and the alterations to the safety valves and venting was complete. ([88]).

(viii) It is appropriate to set out in full the final substantive paragraph of the Tribunal's reasons:-

> "*90 Having revoked the WorkSafe Commissioner's decision of 25 May 2007 and having concluded that the risk associated with the operation at the pressure vessels in the plant room at the employer's premises was on 17 May 2007, the day the improvement notices were issued was "imminent and serious" the Tribunal concludes that Improvement Notice Number 302645 and Improvement Notice Number 302646 ought be cancelled with effect on and from the issuance of any orders. The Tribunal concludes, having regard for the definition of "practicability" under the Act, together with the presence of risk considered to be "imminent and serious" that the pressure vessels in the plantroom at the employer's premises ought cease operating on and from the issuance of any orders. The Tribunal concludes "it seems fit" as those words are envisaged by s 51A(5)(c) of the Act to issue orders requiring:*

- *The immediate venting of safety valves to the outside of the building to an area where no one can be adversely affected by the release of ammonia;*
- *the relocation of stop valves to ensure that safety valves associated with the pressure vessels are not isolated;*
- *commencement of works associated with these two matters within 24 hours following the issuance of any orders resulting from this determination and completed by close of business, Monday, 18 June 2007;*
- *The employer implement the assessment process and have registered all pressure vessels from the plantroom in accordance with the Regulations; and*
- *That the WorkSafe Commissioner or a delegated representative knowledgeable in the area of plant inspect the modifications once the registration process has been complete and report back to the Tribunal.*
- *That all access of person(s) through, in and around the area containing the pressure vessels be prohibited, within reason, until the proposed works envisaged for the weekend commencing 16 June 2007 until the conclusion of the registration process have been completed.*
- *That a copy of any Orders issuing be provided to all persons in and around the site including employees, employers, subcontractors and any other person(s) by The Original Croissant Gourmet Pty Ltd until such time as the terms of any Order issuing have been met.*"

The Grounds of Appeal

58 The notice of appeal was filed on 4 July 2007. As stated the Tribunal published its reasons on 28 August 2007. The appellant then filed an application on 4 September 2007 for an order to amend the grounds of appeal to the terms set out in a minute attached to the application. The application to amend was consented to by the respondent at the hearing and an order granting the application was made. (Technically, this order should have been made subject to the Full Bench granting leave to appeal, if required, but nothing turns on this.)

59 As amended, the grounds of appeal are:-

"*Grounds of Appeal*

1. The Occupational Safety and Health Tribunal (the Tribunal) erred in law in failing to comply with section 26(3) of the Industrial Relations Act 1979 (the IR Act) or to otherwise provide the parties with an opportunity to be heard as to whether:

1.1 it had jurisdiction to make the orders in paragraphs 2, 4, 5 and 6 of the final orders it made on 15 June 2007; and

1.2 upon the review of an improvement notice it was open to the Tribunal to consider whether it would have been appropriate for the inspector to have issued a prohibition notice.

2. The Tribunal erred in law in deciding that it had jurisdiction to make the orders in paragraphs 2, 4, 5 and 6 of the final orders it made on 15 June 2007.

Particulars

2.1 Upon the referral to it of a matter pursuant to section 51A(1) of the Occupational Safety and Health Act 1984 (the Act) the jurisdiction of the Tribunal was limited to making orders which effected the terms of Improvement Notice 302645 and Improvement Notice 302646 (the Notices) and/or whether the Notices had effect or ceased to have effect. The orders in paragraphs 2, 4, 5 and 6 do not relate to the Notices at all.

2.2 If the jurisdiction of the Tribunal is not limited in the manner set out in paragraph 2.1 of these Grounds of Appeal, in any

event the Tribunal did not have jurisdiction to make the orders in paragraphs 2, 4, 5 and 6 of the final orders it made on 15 June 2007.

3. The Tribunal erred in law in deciding, in paragraphs 1 and 3 of the final orders made on 15 June 2007, firstly to revoke the decisions of the WorkSafe Western Australia Commissioner to affirm the Notices, and secondly to cancel the Notices.

Particulars

3.1 Upon the review of the Notices it was not open to the Tribunal to consider whether it would have been appropriate for the inspector to have issued prohibition notices.

3.2 The Tribunal failed to properly exercise the discretion which section 51A(5) of the Act reposed in it, because upon the facts the results embodies in paragraphs 1 and 3 of the orders made on 15 June 2007 are plainly unreasonable and unjust.

Particulars of the Facts

3.2.1 There was no evidence that an error had been made in the issuing of the Notices, or that there was insufficient evidence to support the issuing of the Notices.

3.2.1.1 The decision of the inspector not to issue prohibition notices under section 49 of the Act does not have any impact upon the validity and appropriateness of the Notices.

3.2.1.2 All of the evidence supported the issuing of the Notices, and neither of the parties sought to present evidence to the contrary or make submissions to the contrary."

The Respondent's Position

60 Prior to the hearing of the appeal, the respondent through its solicitors respectfully advised that although they would be bound by any order made by the Full Bench, it was not intending to actively participate in the hearing of the appeal. Counsel for the respondent appeared at the hearing to seek leave to withdraw. Counsel submitted the equipment which was the subject of the orders of the Tribunal was in the process of being replaced. The Full Bench was told the work the subject of order 2 had been completed. We were also told the plant had been approved by Worksafe to operate within parameters. Counsel also said the registration process had not been completed but the respondent had obtained a source of alternative equipment and was in the process of installing it. This equipment already had design registration in Western Australia, so that once the equipment was satisfactorily installed the last step in the registration process would follow almost as a matter of course. Counsel submitted that in a practical sense the events on the ground had overtaken the orders that had been made. It was accordingly submitted any decision by the Full Bench would not have any practical consequences. Counsel did not however submit the Full Bench should dismiss the appeal on this basis.

Practical Consequences of the Appeal being Determined

61 Nevertheless the respondent's counsel's submissions raised the issue of whether there was any point in proceeding to hear and determine the application/appeal. The appellant's counsel made a number of submissions in support of the proposition that there were practical consequences if the appeal was determined and therefore the hearing ought to proceed. I then advised the appellant's counsel on behalf of the Full Bench that although there were some concerns about this issue, the Full Bench had not reached a position where we considered there was no point in proceeding with the appeal. We therefore excused the respondent's counsel from attending, if that was what he chose to do, and heard the application/appeal. I also said the Full Bench would grant leave to the appellant, after the hearing, to file additional submissions about the practical consequences of the appeal being determined. This was later formalised in an order which gave the appellant liberty to address this and other issues, in additional written submissions to be filed within 7 days of the hearing. By the time the order was made, the respondent's counsel had withdrawn. Accordingly an order was also made that the appellant should serve the respondent with the additional written submissions and the respondent had the right within 14 days thereafter to file written submissions in response.

62 The appellant's additional written submissions were duly filed and the respondent advised the Full Bench it did not intend to file submissions. The additional written submissions of the appellant, amongst other things, dealt with the issue of the practical consequences of the appeal being determined.

63 In my opinion the Full Bench ought not dismiss the application/appeal on the basis that it is devoid of practical consequences. I will explain this opinion after my reasons for deciding the substance of the appeal. It is easier to do so at that juncture.

Leave to Appeal

64 The appellant submitted that s49(2a) of *the Act* did not apply to the decision of the Tribunal because the order made was not a "*finding*". It was submitted the order was not made in the course of the proceedings but finally decided, determined or disposed of the matter to which the proceedings related. The difficulty with this contention is that the intent and content of the order was that it did not finally dispose of the proceedings. This is apparent from orders 2(e) and 4(c).

65 The appellant submitted that if the order of the Tribunal did constitute a finding then the matter was of such importance that in the public interest the proposed appeal should lie. In the notice of appeal there were seven particulars supporting this contention. In summary these were:-

(i) The proposed appeal raised important questions of jurisdiction relevant to all references to the Tribunal pursuant to s51A of *the OSH Act*.

(ii) The Full Bench had not previously considered these issues.

(iii) It was in the public interest that the parties be provided with an opportunity to be heard. It was submitted the Tribunal did not provide this.

(iv) The orders of the Tribunal were beyond jurisdiction so that the order could not be enforced. It was within the public interest that orders be enforced.

(v) It was important that there be certainty about the possible outcomes of a reference to the Tribunal pursuant to s51A of *the OSH Act*.

(vi) That part of the order which cancelled the notices would be an encouragement to people to whom notices were issued pursuant to s48 and s49 of *the OSH Act* to apply to seek a review of the notices pursuant to s51A of *the OSH Act* in the hope that even if the circumstances relating to the notice did not reveal error or lack of evidence to support it being issued, the Tribunal will cancel the notices. It was accordingly in the public interest to resolve the capacity of the Tribunal to make the type of orders which it did.

(vii) It was in the public interest to resolve the issue of whether notices issued pursuant to s48 or s49 of *the OSH Act* could be cancelled as it potentially inhibited the ability of notices to achieve compliance with *the OSH Act*.

66 There is overlap in these particulars. In my opinion particulars (i), (ii) and (iii) sufficiently expressed the appellant's position.

67 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.*"

68 The emphasis in s49(2a) is upon the "*matter*" and the "*public interest*". The public interest is the required element not what might be important to the parties.

69 In this matter I am satisfied, on the basis of particulars (i) and (ii) that it is in the public interest that the appeal should lie. As submitted, the proposed appeal raises important questions about the jurisdiction and powers of the Tribunal, which in my opinion ought to be resolved by the Full Bench. I do not think particular (iii) of itself raises a matter of "*public interest*". The asserted denial of being heard may well have been important to the parties at the hearing and form a valid ground of appeal but it is not a matter of public interest. Although having the right to be heard is an important part of procedural fairness, its application in this case does not, in my opinion, satisfy the public interest criteria. For the reasons mentioned however in my opinion the Full Bench ought to make an order that the appeal should lie under s49(2a) of *the Act*.

Analysis of the Tribunal's Order

70 It is helpful to clarify what the order purported to do to decide the grounds of appeal.

71 Orders 1 and 3 firstly purported to revoke part of what was described as the appellant's "*notice*". Order 1 revoked that part of the "*notice*" about the first improvement notice and order 3 that part of the "*notice*" about the second improvement notice. Secondly orders 1 and 3 purported to cancel the first and the second improvement notices. Thirdly orders 1 and 3 set out the time when the orders would take effect, being from the issuing of the order.

72 Orders 2 and 4 were orders requiring actions to be taken about the subject matter of the first and second improvement notices. Order 2 was about the remedial work to be done to the pressure vessels. Order 4 was about the registration and operation of the pressure vessels. Orders 2(e) and 4(c) required the appellant or a knowledgeable delegated representative to inspect the "*modifications*" contained in orders 2 and 4 and report back to the Tribunal by the dates there specified. Order 5 was ancillary to orders 2 and 4 and was about the access of people to the area of the pressure vessels. Order 6 required the publication of the order to the people there named.

73 From the Tribunal's reasons it seems apparent that the Tribunal purported to make all orders under the jurisdiction and powers in s51A(5)(c) of *the OSH Act*. That is the Tribunal revoked the decisions of the appellant and then purported to make a decision with respect to the notices as it saw fit.

Grounds of Appeal – Overview

74 Ground 1 asserts a failure to comply with s26(3) of *the Act* or alternatively, "*otherwise provide the parties with an opportunity to be heard*" about whether the Tribunal had jurisdiction to make the orders it did. Ground 2 asserts the Tribunal did not have jurisdiction to make orders 2, 4, 5 and 6. Ground 3 asserts error of law in the making of orders 1 and 3 because, in effect, in revoking the appellant's decision and cancelling the notices, the Tribunal took into account an irrelevant consideration and there was no evidence to support the orders.

75 Counsel for the appellant argued the appeal grounds in ascending numerical order. In my opinion it makes sense to consider the grounds in the opposite way. This is because if the Tribunal erred in law and had no jurisdiction to make orders 1-6 it does not matter whether an opportunity to be heard was provided or not. The orders will be required to be set aside in any event. The issues relevant to grounds 2 and 3 are interrelated.

Ground 3

(a) Statutory Construction

76 The determination of both grounds 2 and 3 requires an understanding of Part 6 of *the OSH Act*. Part 6 is headed "*Improvement and prohibition notices*". I have earlier quoted relevant ss48, 49, 51 and 51A of *the OSH Act* which are relevant. The statutory construction of *the OSH Act* must take place in accordance with the usual principles. I summarised these in *Thiess Pty Ltd v The AFMEPKU* (2006) 86 WAIG 2495 at paragraphs [54]-[57]. I said there, with the agreement of Smith and Harrison CC:-

> "*54 In Wilson v Anderson (2002) 213 CLR 401, Gleeson CJ said at [8]:-*
>
> > "*In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of parliament. Courts commonly refer to the "intention of the legislature". This has been described as a "very slippery phrase", (Salomon v Salomon & Co Ltd [1897] AC 22 at 38, per Lord Watson) but it reflects the constitutional relationship between the legislature and the judiciary… Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will."*
>
> *55 In Attorney General (Qld) v Australian Industrial Relations Commission (2002) 213 CLR 485 at [113], Kirby J reiterated that it is necessary when engaging in the exercise of statutory construction to focus attention "upon the crucial language of the relevant provisions before other aids to construction are considered".*
>
> *56 In Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ at [69] quoted*

> *from the reasons of Mason and Wilson JJ in Cooper Brookes (Wollongong) Pty Ltd v FCT (1981) 147 CLR 297 at 320, the effect that the meaning of a statutory provision must be determined "by reference to the language of the instrument viewed as a whole".*
>
> *57 Although the focus must be on the meaning of the language used in the statute, s18 of the Interpretation Act, requires that in "the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object". As stated however by the Full Federal Court in R v L (1994) 122 ALR 464 at 468/9, the command contained in provisions like s18 of the Interpretation Act "can have meaning only where two constructions are otherwise open", and the section "is not a warrant for redrafting legislation nearer to an assumed desire of the legislature".*"

(b) Review of Improvement and Prohibition Notices

77 Consistently with its heading, Part 6 of *the OSH Act* allows for the issuing of improvement notices and prohibition notices by an inspector. The issuing of an improvement notice or a prohibition notice may be referred for review to the appellant under s51. A further review, of the decision of the appellant, may be referred to the Tribunal under s51A.

78 In my opinion it is plain that an inspector's power to issue improvement and prohibition notices are complementary. They are not alternative powers or processes. They are both methods aimed at achieving the objectives set out in s5 of *the OSH Act*. A key object of *the Act* may be summarised as being the promotion, protection and enhancement of the safety and health of people at work.

(c) The Tribunal's Error

79 The reason why the Tribunal purported to revoke the decision of the appellant about the first and second improvement notices was because at the time of the appellant's decision the "*risk remained 'serious and imminent'*". ([84]). Earlier, in paragraph [80] the Tribunal said the one contentious issue for it to consider was "*whether at the time the risk referred to involved or would involve 'imminent' injury or harm to any person as required by s49(1) of the Act*". With great respect I do not understand how the Tribunal arrived at the conclusion that this was so. This issue was not put before the Tribunal by the parties by the terms of the reference or submissions at the hearing. It was not submitted by either party that Senior Inspector Ebert and the appellant were in error in the former issuing improvement notices and the latter affirming them with modification, because prohibition notices ought to have been issued instead. Nor was this brought up by the Tribunal at the hearing. Although this overlaps with ground 1, it seems clear the earliest this was raised was perhaps with the delivery of the minute of proposed order and more fully when the reasons for decision were published. In my opinion, for reasons more fully explained below, whether or not a prohibition notice could or should have been issued by Senior Inspector Ebert or whether circumstances existed which could support the issuing of a prohibition notice at the time of the appellant's review and decision, were not considerations relevant to whether the decision of the appellant ought to be revoked. Accordingly appeal ground 3 is established.

80 In addition as pointed out by the appellant, the phraseology used by the Tribunal in its reasons was not in any event at all times consistent with wording of s49(1) of *the OSH Act*. As stated in the appellant's outline of submissions:-

> *"42. In any event, the Tribunal mis-stated and mis-applied the criteria for the issuing of a prohibition notice as: "an imminent and serious risk" (Reasons for Decision para 75); "a serious risk of injury or harm" (para 80); "a serious risk" (para 80); "imminent injury or harm" (para 80); "risks considered by the Tribunal to be imminent and serious" (para 82); "the risk remained serious and imminent" (para 84); "the absence of any information indicating the plant can operate safely" (para 88); "the risk … was imminent and serious" (para 90); and "having regard for the definition of 'practicability' under the Osh Act, together with the presence of risks considered to be imminent and serious" (para 90).*"

(d) Relevant Criteria for Notices

81 I accept the appellant's submission that the only criteria which are necessary for an inspector to issue an improvement notice is one of the two set out in s48(1)(a) and (b) of *the OSH Act*. An inspector may form the opinion that a person has contravened or is contravening *the OSH Act.* At that point the discretion to issue an improvement notice is triggered. The purpose of an improvement notice is to cause the contravention to be remedied. Section 48(2) provides for the contents of an improvement notice. Nowhere in s48 nor s49 is there any text or context which prevents an inspector issuing an improvement notice, or makes it wrong in law or fact to do so, where the circumstances also might exist for the issuing of a prohibition notice.

82 The criteria governing the issuing of a prohibition notice is different from an improvement notice. They may be broken down into the following elements:-

(i) An activity is occurring or may occur at a workplace.

(ii) An inspector is of the opinion that the activity involves or will involve a risk.

(iii) That risk is of imminent and serious injury to, or imminent and serious harm to the health, of any person.

83 As stated by Franklyn J in *Wormald Security* at page 3, "*serious and imminent*" qualify the injury/harm, not the risk. When those circumstances exist an inspector may issue a prohibition notice to the person carrying on the activity or who may be reasonably presumed to have control over the activity (s49(1) of *the OSH Act)*. The purpose and effect of a prohibition notice is that it prohibits "*the carrying on of the activity until an inspector is satisfied that the matters which give or will give rise to the risk are remedied*" (s49(1)).

84 Accordingly, whilst the criteria for the issuing of an improvement notice is a contravention of *the OSH Act*, no such criteria is required to issue a prohibition notice. (See *Wormald Security* page 3). The effect of a prohibition notice is to stop an activity which an inspector believes involves or will involve a risk of the type described in s49(1). The marking of plant under *OSH Regulation* 2.9 can occur when an improvement or prohibition notice is issued. The consequence of a mark being placed is the use of the plant must stop. Therefore any activity involving the use of the plant is stopped.

(e) Review by the Appellant

85 As stated an improvement notice or prohibition notice may be referred for review to the appellant by the people specified in s51(1) of *the OSH Act*. The scope of the review by the appellant is set out in s51(5) of *the Act*. The appellant "*shall inquire into the circumstances relating to the notice*". The reference to "*the notice*" is clearly to the improvement or the prohibition notice which has been issued. After undertaking the inquiry, s51(5) provides the appellant with three alternative powers which may be exercised. They are to affirm the notice, affirm the notice with such modifications as seem appropriate or cancel the notice. Section 51(5) then provides that subject to s51A the improvement or prohibition notice has effect or ceases to have effect accordingly.

86 Each of the appellant's powers under s51(5) are about and directed to "*the notice*". In this case, the subject of the referral to the appellant was the first and second improvement notices. In conducting the review, the appellant had no power to revoke or cancel the improvement notices and in their place issue a prohibition notice, or something similar. Indeed the powers of the appellant under s51(5) are tightly constrained as I have set out.

87 As referred to earlier, when *Wormald Security* was decided the jurisdiction to review which the appellant now possesses under s51 was held by the Commission. Accordingly, the observations by Franklyn J (with whom Ipp J agreed) in *Wormald Security* about the nature of the then review by the Commission are now apposite to that undertaken by the appellant. At page 4 his Honour said (with the "*Commissioner*" meaning the Commission and not the appellant):-

> "*A person to whom a prohibition notice is issued is entitled to refer that notice to the Industrial Relations Commission for review as of right (s51(1)). On such reference the Industrial Relations Commission ('the Commissioner') is required and obliged to "inquire into the circumstances relating to the notice". Having done so he may affirm it as is or with such modification as seems appropriate or cancel it (s51(5)). Those provisions in my opinion make it clear that the review is directed to establishing whether, on the evidence available to the Commissioner, the Inspector was justified in forming the opinion in question.*" (emphasis added)

88 Later on the same page Franklyn J added:-

> "*In other words he must approach the facts and circumstances as found by him on his inquiry as if he were the Inspector determining whether, on those facts and circumstances, he could reasonably form the opinion formed by the Inspector of the particular activity, having regard also to the reasons and matters set out in the notice. If so, he affirms the notice. If not, depending on the opinion formed by him as to such matters, he either affirms it with modifications or cancels it as is appropriate.*"

89 Accordingly when an improvement notice is issued the question for the appellant is whether the inspector was justified in forming the opinion set out in s48(1) of *the OSH Act*. The forming of this opinion does not depend on whether a prohibition notice could also have been issued, or whether it was preferable that a prohibition notice had been issued.

(f) The Further Review by the Tribunal

90 As stated the "*decision*" of the appellant may be referred for further review to the Tribunal under s51A of *the OSH Act*. It is that "*decision*" which is the "*matter*" referred to in s51A(1) and (2) of *the OSH Act*. (The Tribunal's orders 1 and 3 referred to the "*notice*" of the appellant whereas s51A(3) is about a review of the "*decision made under s51*" of *the OSH Act* by the appellant. Nothing turns on this however). The "*notice*" of the appellant referred to in s51A(1) and s51(6) of *the OSH Act* is the notice of the decision rather than the decision itself.

91 The method and purpose of the review described by Franklyn J in *Wormald Security*, and now applicable to the appellant, in part shapes the nature and contents of any further review by the Tribunal.

92 Section 51A(3) provides that the review of the decision under s51 is in the nature of a "*rehearing*". The word "*rehearing*" is one that has shades of meaning (*Building Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 620-

621, cited with approval in *Fox v Percy* (2003) 214 CLR 118 per Gleeson CJ, Gummow and Kirby JJ at [207]). Mason J in *Sperway* at page 621 said that although there was no "*absolute rule*", where "*a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo …*". At page 622 his Honour said the issue was one of discerning the legislative intent. Here, that is gleaned from the structure of the review process and s51A of *the OSH Act*.

93 Section 51A(5) provides that the Tribunal shall "*inquire into the circumstances relating to the notice*". This is the same expression as used in s51(5). In my opinion the "*notice*" referred to is the improvement or prohibition notice, as the case may be, as opposed to the notice of decision of the appellant provided for in s51(6) of *the OSH Act*. An inquiry into the circumstances relating to the improvement/prohibition notice is thus required. This seems to contemplate the prospect of hearing evidence on the topic, as occurred in this instance. Having inquired into the circumstances, the Tribunal is in a position to review and assess the appellant's decision. The Tribunal has 3 powers which it may exercise under s51A(5) of *the OSH Act*. The first two follow the same form as the powers of the appellant in s51(5)(a) and (b). Section 51A(5)(c) of *the OSH Act* is however cast in different terms to the power of the appellant under s51(5)(c). The latter simply permits the cancellation of the notice whilst the former permits the revocation of the decision of the appellant and the making of "*such other decision with respect to the notice as seems fit*". The reference to "*the notice*" here is to the improvement and prohibition notice and not the notice of the appellant's decision. To some extent the difference in the power is to accommodate the fact that the Tribunal exercises a higher level of review than the appellant. Accordingly there are two levels of decision which have already occurred, the inspector issuing the notice and the appellant's review. *The OSH Act* allows for the Tribunal in certain circumstances to make orders which impact on both of the prior levels of decision.

94 *The OSH Act* does not contain express criteria to guide the Tribunal in the exercise of its powers contained in s51A(5). In other words it does not set out the particular facts and circumstances which may or may not lead to an affirmation or revocation of the decision of the appellant. It must be remembered however that the role of the Tribunal is to "*further review*" the "*matter*", which is the appellant's decision. (See also s51A(3)). The method for and purpose of the making of the appellant's decision has been set out earlier by reference to *Wormald Security*. As stated it is no part of the review of an improvement notice to consider whether a prohibition notice could or should have been issued in addition to or instead of that notice. In my opinion it is also therefore no part of the "*further review*" by the Tribunal. The Tribunal in effect, is to inquire into the circumstances relating to the notice to see if the appellant's decision about the justifiability of the inspector forming the opinion he did, is in turn justified. This construction is enhanced by each of the powers in s51A(3) being directed to "*the decision of [the appellant]*". It would be a strange outcome in my opinion if the powers of the Tribunal, after a review of the appellant's decision, were substantially different to and broader than those of the appellant.

95 If there be any ambiguity in the Tribunal's powers under s51A(5) of *the OSH Act*, reference to the Second Reading Speech of the Minister, in support of the *Occupational Safety and Health Legislation Amendment and Repeal Bill 2004*, which, when passed and commenced, inserted s51A, supports the above construction. (See s18 of the *Interpretation Act*). The Minister said on 8 April 2004, (Parliamentary Debates), page 2019:-

> "*Safety and health tribunal: The Act currently provides for a number of matters to be referred to a safety and health magistrate for resolution. The Bill reflects the general principle that prosecutions should continue to be dealt with by the courts, while providing that more administrative matters, such as the entitlement of an employee to wages and conditions under the stop-work provisions, and appeals of the commissioner's decisions in relation to reviews of notices, for example, should be dealt with by a specialist safety and health tribunal.*"

96 The notion of an "*appeal*" against the appellant's decision is not consistent with the Tribunal having much broader powers than the appellant – including to traverse at large the issue of health and safety that gave rise to an improvement notice, revoking the appellant's decision, cancelling the notice and the substitution of orders it thinks fit about the health or safety of the workplace in question.

(g) Conclusion on Ground 3

97 Ground 3 has been established because the Tribunal relied on an irrelevant consideration in deciding to revoke the improvement notices in orders 1 and 3. There was no basis on the evidence consistent with the review which the Tribunal was required to undertake which reasonably permitted the revocation of the appellant's decision. In any event the marking of the plant ought to have had the effect of prohibiting the operation of the machinery which the Tribunal was concerned about.

Ground 2

(a) Necessity to Decide the Ground

98 It is strictly unnecessary to decide ground 2. This is because the Tribunal only has the power to make an "*other decision*" under s51A(5)(c) of *the OSH Act*, where the appellant's decision has been revoked. I have decided the Tribunal erred in law in deciding to revoke the two improvement notices. Therefore the power to make an "*other decision*" did not arise. Nevertheless I will decide it as the ground involves important issues and was fully argued by the appellant's counsel.

(b) *"As Seems Fit"*

99 The appellant submitted that given the scope of the Tribunal's inquiry was limited to "*the circumstances relating to the notice*" it was "*logical*" that the decisions it could make were also limited to decisions about the notice. It was also submitted the

Tribunal construed the words "*as it seems fit*" in s51A(5)(c) of *the OSH Act* in isolation from the words "*with respect to the notice*".

100 In my opinion, from a fair reading of the reasons for decision of the Tribunal as a whole, it acted on the basis it was permitted to consider at large the facts and circumstances that give rise to the issuing of the improvement notices, and if it thought workplace safety could have been enhanced by taking some different course to that of the inspector and the appellant, it could revoke the appellant's decision; and then make any order it saw fit consistently with the objects set out in s5 of *the Act*. As set out earlier, in my opinion, the jurisdiction and powers of the Tribunal were not so broad.

101 In my opinion the Tribunal's application of the expression "*as seems fit*" in paragraphs [64] and [85] of its reasons, did not adequately take into account "*with respect to the notice*", the preceding words in s51A(5)(c). Although the expression was quoted in paragraph [63] it was not referred to in paragraph [64] where the Tribunal set out the nature of the decision it thought it was able to make. Additionally, in paragraph [85] although again quoting that part of s51A(5)(c) which contains "*with respect to the notice*", the Tribunal concluded "'*it seems fit' [sic] as those words are intended in s 51A(5)(c) to prohibit the operation of the machinery effective on and from the issuance of any orders*". In my opinion this was not a decision "*with respect to the notice*". As I have said the "*notice*" in this instance was the two improvement notices. The Tribunal may make a decision with respect to or about "*the notice*", not the facts and circumstances which existed at the workplace in question and gave rise to the issuing of the notice.

(c) *"With Respect to the Notice"*

102 The appellant was critical of the reliance by the Tribunal of only part of paragraph [12.7] of Pearce and Geddes to support its understanding of this expression. The heading to paragraphs [12.5]-[12.14] of Pearce and Geddes, *Statutory Interpretation in Australia, 6th edition*, is "*Drafting Expressions*". Paragraph [12.7] is about "'*In respect of', and similar phrases*". The passage quoted by the Tribunal was:-

> "*… the expression is 'of broad import': per Toohey and Gaudron JJ in O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356 at 374; 92 ALR 213 at 226. In the same case, McHugh J said (at 376; 228) the phrase 'requires no more than a relationship, whether direct or indirect, between two subject matters'. The words are 'among the broadest which could be used to denote a relationship between one subject matter and another': per Lehane J in Nordland Papier AG v Anti-Dumping Authority (1999) 93 FCR 454 at 461; 161 ALR 120 at 126. However, the relationship must be between distinct subjects or subject matters.*"

103 The appellant points out that the Tribunal did not refer to those parts of the paragraph which emphasise the relevance of context. For example in paragraph [12.7] Pearce and Geddes also say:-

> "*However, Deane, Dawson and Toohey JJ in Workers' Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642 at 653; 81 ALR 260 at 267 described this as 'going somewhat too far'. They continued: 'The phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends'. The same parties were before the court again in Technical Products Pty Ltd v State Government Insurance Office (1989) 167 CLR 45; 85 ALR 173. This time Brennan, Deane and Gaudron JJ (at 47; 175) described the words as having 'a chameleon-like quality in that they commonly reflect the context in which they appear'.*"

104 The authors also refer to *FCT v Holmes* (1995) 58 FCR 151 at 155; 138 ALR 59 at 62 as another example of the meaning of the expression being dictated by its context. Reference is also made to "*the useful summary of the cases in Jennings Constructions v Workers Rehabilitation and Compensation Corporation (1998) 71 SASR 465 at 480-2*". There, Olsson J at page 481 said, "*the exact width of the expression will very much depend on the precise context in which it appears and a consideration of the purpose or object underlying the relevant legislation (Butler v Johnston, Guild and Somes (1984) 55 ALR 268).*" This observation was agreed with by Doyle CJ at page 469 whose reasons were in turn agreed with by Prior J and Nyland J.

105 The reasons of the joint judgment in *Technical Products Pty Ltd v State Government Insurance Office (1989) 167 CLR 45 at 47; 85 ALR 173*, quoted by Pearce and Geddes were cited with approval by McHugh J as part of the majority in *Solomons v District Court of New South Wales and Others* (2002) 211 CLR 119 at [45].

106 Finally, as summarised by Le Miere J, with whom Wheeler and Pullin JJ agreed, at paragraph [31] in *Bennett v Higgins* (2005) 146 IR 205; (2005) 85 WAIG 3653:-

> "***[31]*** *The phrase "in respect of" has a very wide connotation and has been said to have the widest possible meaning of any expression intended to convey some connection or relation between two subject-matters to which the words refer: McDowell v Baker (1979) 144 CLR 413 and 419 per Gibbs J, but reflects the context in which it appears: Technical Products Pty Ltd v State Government Insurance Office (Qld) (1989) 167 CLR 45 at 47 and 51; Commissioner of Taxation (Cth) v Scully (2000) 201 CLR 148 at 171.*"

(d) The Tribunal's Error

107 I accept the submission that the opinion of the Tribunal, about the breadth of its power to make an order, "*with respect to the notice as seems fit*" did not take sufficient account of the context within which the expression appeared. The relevant context was the structure of *the OSH Act* and the nature of the review by the appellant and the further review by the Tribunal. The expression "*with respect to*" did not fix upon the facts and circumstances which gave rise to the notice but "*the notice*" itself. I accept the submission of the appellant that orders 2 and 4 and the ancillary orders 5 and 6 were not "*with respect to*" the first and second improvement notices and were therefore beyond the jurisdiction and power of the Tribunal to make.

108 As to what might be "*such other decision with respect to the notice as seems fit*", the appellant pointed out that if the Tribunal exercises the powers set out in s51A(5)(a) or (b), the consequence for the notice are apparent. It is either affirmed, affirmed with any modifications made by the appellant or affirmed with different modifications made by the Tribunal. Where the decision is to revoke the appellant's decision to affirm the notice however the consequence for the notice is not clear. The power of the Tribunal to "*make such other decision with respect to the notice as seems fit*" allows the Tribunal to make a decision about the status of the notice as a consequence of the revocation of the appellant's decision. The Tribunal may for example decide the notice will cease to have effect.

109 I also accept the appellant's submission that if s51A(5)(c) of *the OSH Act* enabled the Tribunal to issue orders such as those in paragraphs 2(d), 4(b) and 5, the Tribunal could prohibit an activity without satisfying itself of any of the matters set out in s49 of *the OSH Act*. I accept that, in the context of a staged process of review, the granting of such a power would be expected to be explicit. This is not present and the text and context suggests the more limited power referred to earlier.

110 Another relevant factor is that the penalty for non-compliance with an order of the Tribunal is a maximum of $2000 (s83(4) of *the Act*). In contrast the penalty for non-compliance with a prohibition notice by a body corporate with no prior record for the same offence is $50,000 (s54 and s3A(1)(b)(ii) of *the OSH Act*). This suggests the legislature did not intend s51A(5)(c) of *the OSH Act* to give the Tribunal the power to make orders similar to the issuing of a prohibition notice. As colourfully set out in the appellant's Further Written Submissions, the way in which the Tribunal construed its jurisdiction and powers involved a "*transmogrification*" of its role "*from that of a reviewer of a decision [by the appellant] under section 51 of the Osh Act, to a that of a law enforcer with a role similar to WorkSafe Inspectors, but without any of the limitations which the Osh Act imposes upon the powers of WorkSafe Inspectors*". ([42]). I do not accept the legislators intended the Tribunal to be an entity of this type.

111 For these reasons appeal ground 2 is also established.

Ground 1

(a) Necessity to Decide the Ground

112 Again it is not strictly necessary to decide this ground, but in deference to the argument of the appellant's counsel and because the ground involves issues of general importance I will do so.

(b) Section 26(3) of *the Act*

113 The ground is drafted on the premise that the Tribunal had a duty under s26(3) of *the Act* or "*otherwise*" to allow the parties to make submissions about the issues described in the ground. Section 26(3) of *the Act* is listed in s51I(1) of *the OSH Act* as applying to and in relation to the exercise of jurisdiction by the Tribunal. Section 26(3) 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.*"

114 In my opinion this aspect of the ground is not established. This is because the Tribunal did not take into account "*any matter or information that was not raised before it on the hearing of the matter*". In making the orders the Tribunal only relied upon evidence and information of which the parties were aware.

(c) Applicability of Procedural Fairness

115 As discussed with counsel during the hearing of the appeal, the use of the word "*otherwise*" in ground 1 is broad enough to encompass a denial of "*common law*" procedural fairness by the Tribunal. As stated by Buss JA with the agreement of Wheeler and Pullin JJA in *Re Minister for Resources; Ex parte Cazaly Iron Ore Pty Ltd* [2007] WASCA 175 at paragraph [267]:-

> "***[267]*** *Absent a clear legislative intention to the contrary, a statutory power must be exercised with procedural fairness to parties whose interests might be adversely affected by its exercise. See Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1 at 27–28 [81]–[83].*"

116 The contents of s26(3) of *the Act* does not cover the field of requirements of procedural fairness by the Commission or Tribunal or provide any "*clear legislative intention*". Nor does *the OSH Act* in giving the Tribunal jurisdiction to conduct a "*further review*" by way of an "*inquiry*" and "*rehearing*".

117 Although the observations of Buss JA were made in the context of an administrative decision, procedural fairness must ordinarily be provided to parties to court and arbitral hearings – because almost axiomatically their interests are potentially affected. Accordingly the exercise by the Tribunal of its jurisdiction and powers had to be in a procedurally fair way.

118 One of the fundamental requirements of procedural fairness is a right to be heard. In *Jeilles v Secretary, Department of Employment and Workplace Relations* [2007] FCA 1590, Logan J said at paragraph [23]:-

> "***[23]*** *A convenient summary of the content of procedural fairness or natural justice, as sometimes it's called, as known to our law, is to be found in a leading Australian text on administrative law, namely: Aronson, Dyer and Groves, "Judicial Review of Administrative Action", Third Edition, at p 370. There, the learned authors state:*
>
> > *There are two traditional rules of natural justice. The hearing rule requires a decision maker to hear a person before making a decision affecting the interests of that person.*"

119 The hearing rule clearly applied to the hearing and determination by the Tribunal of the referral.

(d) Contents of the Hearing Rule

120 The contents of procedural fairness do not have a fixed content. They have been described as having a "*chameleon like*", "*flexible quality*" depending upon, amongst other things, the relevant legislative scheme, the nature of the judicial hearing, inquiry or administrative decision and the circumstances of the individual case. (See Brennan J in *Kioa v West* (1985) 159 CLR 550 at pages 612-613).

121 As a result and as stated in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2005) 225 CLR 88, in the joint judgment of the 5 sitting members of the court, at paragraphs [14]-[16]:-

> "***[14]*** *… Rather, as procedural fairness is directed to the obligation to give the appellant a fair hearing, it is necessary to begin by looking at what procedural fairness required the Tribunal to do in the course of conducting its review.*
>
> …
>
> ***[16]*** *… Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.*" (The reference to the "*Tribunal*" was to the Refugee Review Tribunal).

122 This aspect of the reasons of the High Court was applied by the Court of Appeal in *Cazaly Iron Ore* at [280]. Importantly, as stated by Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37]:-

> "*Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice*".

123 The Full Court in *VEAL* cited this paragraph in support of the proposition that "*the application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances of that case*". ([25]).

124 A relevant illustration of this is the decision of the IAC in *BHP Billiton Iron Ore Pty Ltd (BHPB) v Construction, Forestry, Mining and Energy Union of Workers* (2006) 151 IR 361; (2006) 86 WAIG 1193; [2006] WASCA 549. This was an appeal against a decision of the Full Bench of the Commission. One issue which the IAC had to consider was whether the President had denied BHPB procedural fairness in the way he decided the appeal. The President, in his reasons, departed from the basis on which the parties conducted the application at first instance, which was also the basis on which the Tribunal decided the application and BHPB conducted the Full Bench appeal. The President did this without any warning being given to the parties. Le Miere J (with whom Wheeler and Pullin JJ agreed) at paragraph [39] said:-

> "***[39]*** *… By not alerting the parties to the possibility that he might depart from the basis upon which the parties had conducted the case, the President failed to afford them a reasonable opportunity to put what ever case they might have wished to put in the circumstances. BHPB was denied the right to be heard in relation to that matter.*"

125 In coming to this conclusion Le Miere J cited authorities which are also relevant to the present appeal. They included *Pantorno v The Queen* (1989) 166 CLR 466 and cases which have followed it including *Monaco v Arnedo Pty Ltd* (unreported); Full Court, S Ct of WA; Library No 940481; 6 September 1994, *Tuite v Administrative Appeals Tribunal* (1993)

40 FCR 483 and *Seltsam Pty Ltd v Ghaleb* (2005) 3 DDCR 1; [2005] NSWCA 208. In *Seltsam*, Ipp J, with whom Mason P agreed, reviewed a number of cases including *Monaco* and said at paragraph [78]:-

> "***[78]*** *These cases illustrate the general principle that although the basis on which the parties conduct a trial does not bind the judge, if the judge contemplates determining the case on a different basis he or she must inform the parties of this prospect so that they have an opportunity to address any new or changed issues that may arise.*"

(e) Application of the Hearing Rule

126 In my opinion, this aspect of the "*hearing rule*" applied to and was breached by the Tribunal as:-

(i) In the reference before the Tribunal the respondent said it was "*happy to comply*" with the two notices of improvement but wanted to be "*able to operate*" whilst "*trying to meet these requirements*".

(ii) For this to happen the marking of the plant needed to be removed. This is what the respondent sought. (See for example the respondent's counsel's opening at T27, 32 and 33, summarised earlier; and counsel's closing at T122 and 125 ff, also summarised earlier). This issue in turn lead to the question of whether the Tribunal had jurisdiction to review the marking.

(iii) The respondent also argued the appellant's decision could be revoked or modified to "*excise*" the marking.

(iv) There was some discussion and evidence about the possible issuing of a prohibition notice by the Senior Inspector. The Tribunal did not however inform either counsel that:-

(aa) A relevant consideration in deciding the further review was whether the inspector ought to have issued a prohibition notice, or the circumstances to issue a prohibition notice existed at the time of the appellant's decision.

(bb) This was a possible basis for the appellant's decision to be revoked.

(cc) The Tribunal was contemplating making orders of the nature of what became 2, 4, 5 and 6.

(dd) The Tribunal therefore believed it had the jurisdiction and power to make these types of orders.

(v) These issues were not within the reasonable contemplation of the parties as being relevant to the outcome of the further review. They were beyond the boundaries of both the reference and way the parties conducted the case.

(vi) Counsel for the appellant and respondent therefore had no opportunity to lead evidence or make submissions about them.

(vii) There was accordingly a breach of procedural fairness.

(f) Conclusion – The Tribunal's Error

127 In this combination of circumstances in my respectful opinion the hearing of the further review was not conducted in a procedurally fair way. The appellant suffered "*practical injustice*" as it did not get the opportunity to call evidence or make submissions about the method and basis upon which the Tribunal decided the further review. If the Tribunal had provided this opportunity, it may be that the appellant and/or the respondent would have been able to persuade it that it did not have the jurisdiction or power to make the orders which it was contemplating.

128 For these reasons in my opinion ground 1 has also been established.

Determination of the Appeal

129 I earlier referred to the issue of whether there was any practical consequence of the appeal being determined. It is not the role of the Full Bench to provide advisory opinions on academic points which do not affect the rights and interests of the parties. (See *Civil Service Association of Western Australia Incorporated v The Commissioner of Police, Western Australian Police* (2006) 86 WAIG 639 at [11]). The Full Bench will therefore not decide an appeal where the issues or questions raised are "*useless*", "*merely hypothetical*" or "*dead*". (*Veloudos and Others v Young* (1981) 56 FLR 182 at 190).

130 In the Further Written Submissions the appellant's counsel set out what she considered to be "*the practical implications of the appeal*". In summary these were that if the orders of the Tribunal were set aside this would:-

(i) Enliven the two improvement notices which would require compliance, enable enforcement and expose the respondent to risk of penalty if it did not comply with the notices.

(ii) Enliven the mark placed by Senior Inspector Ebert on the pressure vessels pursuant to *OSH Regulation* 2.9 with consequences of prohibition, enforcement and exposure to penalty.

(iii) Remove the entitlement granted by the Tribunal to the respondent by order 4(b) to operate the pressure vessels after 10 August 2007 regardless of whether they were registered or safe to operate.

(iv) Remove the possibility that the appellant would not be able to prosecute the respondent for failure to register the pressure vessels because by order 4(a) the Tribunal imposed its own requirement enforceable pursuant to s83 of *the Act* and the principle of double jeopardy and issue estoppel may prevent the respondent being prosecuted twice for the same act or omission.

131 In her oral submissions at the hearing of the appeal the appellant's counsel also said that if a workplace inspector attended the respondent's workplace in the future and saw the plant was still being used whilst not registered, an improvement notice as a tool of enforcement may not be available to the inspector, because the Tribunal had decided it was not appropriate and instead made its own orders.

132 The lapse of time has to some extent overtaken the relevance of the improvement notices. The appellant's decision was that both the first and second improvement notices were modified by making 10 August 2007 the date for compliance. These decisions were purportedly revoked by the Tribunal on 15 June 2007. The remedial work required by the Tribunal's order 2 was to be completed by close of business, 18 June 2007 and be reported back to the Tribunal by 19 June 2007. Order 4 required prohibition from operation of the pressure vessels by close of business on 10 August 2007 except for the purposes described in that order. The application/appeal was not heard until after all of these dates.

133 As set out earlier however the entitlement to mark plant under *OSH Regulation* 2.9 is dependent upon an improvement notice or prohibition notice being issued. The Tribunal purported to cancel the two improvement notices on 15 June 2007. Although it is not a matter which needs to be finally determined in this appeal, it is at least arguable that the cancellation of the notices led to the mark either no longer applying, being invalid, or incapable of enforcement. It appears that the respondent was quite possibly still using the plant on 15 June 2007 and perhaps thereafter. If this did occur any breach of *OSH Regulation* 2.9 is possibly not enforceable because of the revocation of the improvement notices by the Tribunal on the morning of 15 June 2007. By the same token however order 4(a) of the Tribunal could not be enforced because it was beyond jurisdiction.

134 Additionally I think there is merit in submission (iii) above. Submission (iv) I consider to be unlikely as a matter of law or fact. I also think there is some merit in the submission that if the plant was still being used or was used again and the orders of the Tribunal were not set aside, it would be unclear whether an inspector could properly issue an improvement notice given the decision and orders made by the Tribunal and its reasons for decision.

135 Overall I am not convinced that this is a case where the issues are "*academic*" or "*dead*" so as to cause the appeal to be dismissed. In addition and with respect, the Tribunal misconceived the nature and function of the further review and the scope of its powers. For that reason the Tribunal made orders which exceeded its jurisdiction. In this combination of circumstances it is appropriate to set aside the orders made.

The Review of the *Occupational Safety and Health Act 1984* – The Hooker Report

136 During the hearing of the appeal reference was made to the most recent review under s61 of *the OSH Act* carried out by independent barrister Mr Richard Hooker of Wickham Chambers. (Final Report: Review of the *Occupational Safety and Health Act 1984*, 6 December 2006 (*the Hooker Report*)). The issue of whether the Full Bench should take into account any relevant aspect of *the Hooker Report* was raised during the hearing of the appeal. In the appellant's Further Written Submissions it was submitted it would be an error of law for the Full Bench to consider *the Hooker Report* in determining the appeal. This was because it was not the type of extrinsic material which either the common law or the *Interpretation Act* permitted to be considered by a judicial body when construing the meaning of legislation.

137 In my opinion it is not necessary to determine this submission as the appeal can be decided without reference to *the Hooker Report*. Accordingly I have not considered the report in preparing these reasons for decision.

Minute of Proposed Orders

138 In my opinion, pursuant to s49(5) of *the Act*, the following orders should be made and a minute published in these terms:-

1. The appeal is upheld
2. The decision of the Occupational Safety and Health Tribunal is quashed.

139 The effect of these orders will be that the decision of the appellant about the two improvement notices will again be operative. Although the appellant sought a substitution of the Tribunal's orders with orders that the decisions of the appellant about the two improvement notices be affirmed, my present view is that this is unnecessary. If the appellant continues to contend otherwise, submissions can be made by way of a speaking to the minute at the appropriate time.

BEECH CC:

140 I have had the advantage of reading in advance a draft of the Reasons for Decision of His Honour. I agree that that the appeal should be upheld and with the order proposed. I have nothing to add.

SCOTT C:

141 I have had the benefit of reading the draft Reasons for Decision of His Honour the Acting President. I agree with those reasons and the orders proposed and have nothing to add.

2007 WAIRC 01306

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01306
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 19 SEPTEMBER 2007
REASONS DELIVERED	**:**	FRIDAY, 30 NOVEMBER 2007
SUPPLEMENTARY REASONS	**:**	FRIDAY, 14 DECEMBER 2007
FILE NO.	**:**	FBA 9 OF 2007
BETWEEN	**:**	THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER Appellant AND THE ORIGINAL CROISSANT GOURMET PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	Occupational Safety and Health Tribunal
Coram	**:**	Commissioner S M Mayman
Citation	**:**	2007 WAIRC 01039
File No	**:**	OSHT 1 of 2007

CatchWords:

Industrial Law (WA) - Appellant speaking to the minute - Respondent no objection to revised minute - Full Bench to make the orders in revised minute - Orders made to reflect the exercise of powers of the Full Bench under s49(5) of the *Industrial Relations Act 1979* (WA)

Legislation:

Industrial Relations Act 1979 (WA)

s49(5)

Result:

Orders made in terms of the revised minute

Representation:

Counsel:

Appellant	:	Ms A Crichton-Browne (of Counsel)
Respondent	:	Mr T Carmady (of Counsel)

Solicitors:

Appellant	:	The WorkSafe Western Australia Commissioner
Respondent	:	Williams & Hughes, Barristers & Solicitors

Case(s) referred to in reasons:

Case(s) also cited:

Supplementary Reasons for Decision

THE FULL BENCH:

1 The Full Bench published its reasons for decision on 30 November 2007 together with a minute of proposed order. The final 2 paragraphs of the reasons of the Acting President, agreed with by the other members of the Full Bench, were:-

> "*138 In my opinion, pursuant to s49(5) of the Act, the following orders should be made and a minute published in these terms:-*
>
> *1. The appeal is upheld*
>
> *2. The decision of the Occupational Safety and Health Tribunal is quashed.*
>
> *139 The effect of these orders will be that the decision of the appellant about the two improvement notices will again be operative. Although the appellant sought a substitution of the Tribunal's orders with orders that the decisions of the appellant about the two improvement notices be affirmed, my present view is that this is unnecessary. If the appellant continues to contend otherwise, submissions can be made by way of a speaking to the minute at the appropriate time.*"

2 The minute which was published was in accordance with paragraph [138].

3 The associate to the Acting President received a facsimile from the appellant's solicitor dated 4 December 2007 which submitted that different orders should be made. The material parts of the letter were:-

> "*Both counsel for the Respondent and I are of the view that it is necessary for the Full Bench to make the orders set out in paragraph 53 of the Appellant's Written Submissions dated 13 September 2007. To assist I enclose a copy of those orders in the form of a Minute. The parties are of this view because:*
>
> *1. in the absence of an order pursuant to section 51A(5) of the Occupational Safety and Health Act 1984 (Osh Act) the status of the decision of the WorkSafe Western Australia Commissioner and the Improvement Notices is uncertain; and*
>
> *2. it is uncertain whether section 51A(7)(a) of the Osh Act operates to suspend the Improvement Notices the subject of the appeal until a decision is made pursuant to section 51A of the Osh Act.*
>
> *If the Full Bench remains minded not to make orders of the nature proposed by the parties, the parties seek an opportunity to speak to the Minute provided to the parties with your letter dated 30 November 2007.*"

4 The attached minute was in the terms quoted in the letter referred to in paragraph [6] below.

5 The appellant's solicitor's advice that the respondent consented to the making of the orders in terms of the minute was confirmed by letter from the respondent's solicitor dated 6 December 2007.

6 On 10 December 2007 the associate to the Acting President wrote to the parties' solicitors. The material parts of that letter were:-

> "*The Full Bench has considered your letters dated 4 December and 6 December 2007 respectively. I have been asked to send this reply.*
>
> *The letters were received in response to the minute of proposed order published by the Full Bench with its reasons for decision on 30 November 2007.*
>
> *The effect of your letters is that both parties consent to orders being made in terms of paragraph [53] of the appellant's written submissions dated 13 September 2007. These orders have been reduced to a minute which seeks orders that:-*
>
> *1. The appeal is upheld.*
>
> *2. The orders of the Occupational Safety and Health Tribunal in Osh 1 of 2007 issued on the 15th day of June 2007 be and are hereby varied as follows:*
>
> *1.1. By deleting all of the orders.*
>
> *1.2 By substituting therefore the following orders –*
>
> *1.1.1 The decision of the WorkSafe Western Australia Commissioner in regard to Improvement Notice 302645 be affirmed.*
>
> *1.1.2 The decision of the WorkSafe Western Australia Commissioner in regard to Improvement Notice 302646 be affirmed.*
>
> *The letter from Ms Crichton-Browne also sets out two reasons why the parties are of the view that the orders should be in this form.*

Having considered the correspondence and draft minute, the Full Bench is presently of the view that orders should be made in terms of the attached revised minute of proposed order.

Could you please let me know by 4.00pm on Wednesday, 12 December 2007 whether you wish to speak to the attached minute. If neither party wishes to speak to the minute, then the order will be made and published by the Full Bench together with brief supplementary reasons for decision."

7 The attached revised minute was in these terms:-

"*1. The appeal is upheld*

2. The decision of the Occupational Safety and Health Tribunal (the Tribunal) is varied by the setting aside of the orders made by the Tribunal and the substitution of orders 3 and 4 below.

3. The decision of the appellant about Improvement Notice 302645 is affirmed.

4. The decision of the appellant about Improvement Notice 302646 is affirmed."

8 The respondent's solicitor advised by the time specified in the letter that they had no objection to orders being made in the terms of the revised minute. The appellant's solicitor did not respond to the letter. This may be taken, because of the terms of the letter, as also signifying a lack of objection.

9 The Full Bench will make orders in terms of the published revised minute for these reasons. Firstly the parties have requested orders of this ilk. Whilst this is an insufficient reason on its own it is a relevant factor. Secondly the orders are consistent with the reasons for decision of the Full Bench. Thirdly the orders merely amplify what the members of the Full Bench thought were the consequences of the making of orders in terms of the original minute. Fourthly the Full Bench is of the view that the wording of the orders as contained in the revised minute reflects the exercise of the powers of the Full Bench under s49(5) of the *Industrial Relations Act 1979* (WA).

10 The making of the orders in the terms of the revised minute may well satisfy the purposes set out in the letter from the appellant's solicitor. It is unnecessary however for the Full Bench to decide if they will.

11 Accordingly orders will now be made in terms of the revised minute.

2007 WAIRC 01308

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	FRIDAY, 14 DECEMBER 2007
FILE NO/S	FBA 9 OF 2007
CITATION NO.	2007 WAIRC 01308

Decision	Appeal upheld; decision of Occupational Safety and Health Tribunal varied
Appearances	
Appellant	Ms A Crichton-Browne (of Counsel), by leave
Respondent	Mr T Carmady (of Counsel), by leave

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), by leave, on behalf of the appellant and Mr T Carmady (of Counsel), by leave, on behalf of the respondent, it is this day, 14 December 2007, ordered that :-

1. The appeal is upheld
2. The decision of the Occupational Safety and Health Tribunal (the Tribunal) is varied by the setting aside of the orders made by the Tribunal and the substitution of orders 3 and 4 below.
3. The decision of the appellant about Improvement Notice 302645 is affirmed.
4. The decision of the appellant about Improvement Notice 302646 is affirmed.

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

FULL BENCH—Unions—Declarations made under Section 71—

2007 WAIRC 01208

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2007 WAIRC 01208
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		COMMISSIONER P E SCOTT
		COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 17 SEPTEMBER 2007
DELIVERED	**:**	FRIDAY, 2 NOVEMBER 2007
FILE NO.	**:**	FBM 6 OF 2007
		THE WESTERN AUSTRALIAN POLICE UNION OF WORKERS
		Applicant

CatchWords:

Industrial Law (WA) – Application pursuant to s71 for approval of financial agreement between State organisation and counterpart Federal body– Requirements of s71 – Agreement to safeguard assets of State organisation –Purpose of orders under s71 - Whether notice required to be given to members - Order that the agreement is approved under s71(1) of the Act.

Legislation:

Industrial Relations Act 1979 (WA) (as amended) – s55, s62, s71

Result:

Application Approved

Representation:

Applicant: Mr R Horton (as agent)

Case(s) referred to in reasons:

Western Australian Police Union of Workers (2006) 86 WAIG 402

Case(s) also cited:

Reasons for Decision

RITTER AP:

The Application

1 This application, filed on 16 August 2007, is made to the Full Bench pursuant to s71(7) of the *Industrial Relations Act 1979* (*the Act*). It sought the registration of an agreement between the applicant and the "*Police Federation of Australia*" (PFA). The agreement was attached as schedule A to the application. Attached as schedule B was a statement of the grounds for the application. Also filed at the same time was a supporting statutory declaration of Mr Kenneth John See, the General Secretary of the applicant.

The Legislation

2 Section 71 of *the Act* is headed "*Provisions relating to State branches of Federal organisations*". Section 71(1) contains the following definitions:-

> "***"Branch"*** *means the Western Australian Branch of an organisation of employees registered under the Commonwealth Act;*
>
> ***"counterpart Federal body"****, in relation to a State organisation, means a Branch the rules of which —*
>
> *(a) relating to the qualifications of persons for membership; and*
>
> *(b) prescribing the offices which shall exist within the Branch,*
>
> *are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and*
>
> ***"State organisation"*** *means an organisation that is registered under Division 4 of Part II.*"

3 Section 71(5) provides for the Registrar to issue to a State organisation a certificate which makes the declarations referred to in s71(5)(c) and (d). Section 71(5) of *the Act* in full provides:-

> *(5) Where, after the coming into operation of this section —*
>
> *(a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body; and*
>
> *(b) the committee of management of the State organisation decides and, in the prescribed manner notifies the Registrar accordingly, that from a date specified in the notification all offices in the State organisation will be filled in accordance with the rule referred to in paragraph (a),*
>
> *the Registrar shall issue the State organisation with a certificate which declares —*
>
> *(c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation; and*
>
> *(d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation,*
>
> *and the certificate has effect according to its tenor.*"

4 Section 71(6)-(8) provide:-

> "*(6) A State organisation to which a certificate issued under this section applies may, notwithstanding any provision in its rules to the contrary, make an agreement with the organisation of which the State organisation's counterpart Federal body is the Branch, relating to the management and control of the funds or property, or both, of the State organisation.*
>
> *(7) Where a memorandum of an agreement referred to in subsection (6) is —*

> *(a) sealed with the respective seals of the State organisation and the other organisation concerned;*
>
> *(b) signed on behalf of the State organisation and the other organisation by the persons authorised under their respective rules to execute such an instrument; and*
>
> *(c) lodged with the Registrar,*
>
> *the Full Bench may, if it is satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising, approve the agreement.*
>
> *(8) Where the Full Bench approves an agreement under subsection (7) the Registrar shall —*
>
> *(a) register the memorandum as an alteration to the rules of the State organisation;*
>
> *(b) amend, where necessary, the certificate issued to the State organisation under subsection (5) by declaring that the State organisation is, from the date of registration of the memorandum, exempted from compliance with such provisions of this Act and to such an extent as the Full Bench may, having regard to the terms of the memorandum, direct; and*
>
> *(c) notify the State organisation in writing of the matters referred to in paragraphs (a) and (b).*"

West Australian Police Union of Workers **(2006) 86 WAIG 402**

5 In this matter the Full Bench made declarations about the applicant and its counterpart federal body, the "*Police Federation of Australia Western Australian Police Branch*" that:-

> "*(1) The rules of the applicant and its Counterpart Federal Body relating to the qualifications of persons for membership are deemed to be the same, in accordance with s71(2) of the Industrial Relations Act 1979 (as amended) (the Act).*
>
> *(2) The rules of the Counterpart Federal Body prescribing the offices which exist in the Branch are hereby deemed to be the same as the rules of the applicant, prescribing the offices which exist in the applicant, in accordance with s71(4) of the Act*."

6 Following the decision of the Full Bench a s71(5) certificate was issued by the Registrar. The certificate was issued on 1 February 2006.

7 At the time of seeking the certificate in FBM 4 of 2005 the applicant had intended to have an agreement with the PFA made under s71(6) and to seek the approval of the Full Bench under s71(7). However, no final form of the agreement had been settled at the date of the hearing on 17 January 2006. Accordingly, the applicant did not then proceed with this.

Submissions

8 Prior to the hearing Mr Horton, an industrial officer appearing as agent for the applicant, provided a helpful set of written submissions. The Full Bench was informed by Mr Horton that he had been unable to find any previous application to the Full Bench under s71(7). This accords with the records of the Commission. Mr Horton supplemented his written submissions with oral submissions.

The Agreement

9 The agreement is constituted by a deed made on 20 March 2007. It is a simple two page document made between the applicant and the PFA.

10 The recitals and agreement contained in the deed are as follows:-

> "*RECITALS:*
>
> *A. The Union is an organization registered under the Industrial Relations Act 1979 (Western Australia).*
>
> *B. The Federation is an organization of employees registered under the Workplace Relations Act 1996 and includes a Branch known as the Police Federation of Australia (Western Australia Police Branch) ("the Branch").*

C. The Branch is the Union's Counterpart Federal Body for the purposes of Section 71 of the Industrial Relations Act 1979 (Western Australia).

D. The Union and the Federation are desirous of entering into an agreement relating to the management and control of the funds and property of the Union.

IT IS AGREED:

1. INTERPRETATION AND DEFINITIONS

1.1 In this Agreement, unless inconsistent with the context or subject matter the following terms shall have the following meanings:

***"Agreement"** means the Agreement hereby constituted and includes the recitals and all documents annexed hereto or incorporated by reference herein, and shall be referred to as the Management and Control Agreement;*

***"Commencement Date"** means February 1 2006;*

***"Funds"** includes membership contributions and any income derived by the Union;*

***"Party"** means a party to this Agreement;*

***"Property"** means property, both real and personal, owned by, or in the possession of, the Union.*

2. MANAGEMENT AND CONTROL OF THE FUNDS AND PROPERTY OF THE WESTERN AUSTRALIAN POLICE UNION OF WORKERS

2.1 The funds and property of the Western Australian Police Union of Workers shall be and shall remain the property and funds of the Western Australian Police Union of Workers

2.2 The management and control of the funds and property of the Western Australian Police Union of Workers is the sole responsibility of the Western Australian Police Union of Workers

2.3 The Federation has no legal or equitable rights to manage and control the funds and property of the Western Australian Police Union of Workers

3. MISCELLANEOUS

3.1 Costs

The costs of and incidental to the instructions for and the preparation, execution and stamping of this Agreement shall be borne and paid by the Union.

3.2 Amendment

This Agreement may be amended or varied only by agreement in writing signed by the Parties hereto.

3.3 Applicable Law

For all purposes this Agreement shall be governed by and construed in accordance with the law of Western Australia."

11 The deed then asserts that it is executed as a deed and there is stamped on the deed the common seal of both the applicant and the PFA. The seal of the applicant is said to be affixed by the authority of the Board of Directors in the presence of the General President and the General Secretary. The same assertion is made about the common seal of the PFA and their President and Chief Executive Officer. All of these office bearers are shown as having signed the deed.

The Statutory Declaration of Mr See

12 The statutory declaration of Mr See made on 16 August 2007 declares:-

"*1. That the Common Seals affixed to the Deed of Agreement at Schedule A to the Form 1 – Notice of Application herewith are the Common Seals of the Western Australian Police Union of Workers and the Police Federation of Australia respectively;*

2. That the signatory to the Deed of Agreement on behalf of the Western Australian Police Union of Workers is the Chief Executive Officer as

provided for in Rule 30 – Seal of the Constitution Rules of the Union and further that the Chief Executive Officer is the General President of the Union as provide for in Rule 10 – Duties of the Chief Executive Officer; and

3. That the signatory to the Deed of Agreement on behalf of the Police Federation of Australia is the President as provided for in Rule 26 – Seal of the Registered Rules of the Police Federation of Australia."

13 The assertions contained in paragraphs [2] and [3] of Mr See's statutory declaration are consistent with the rules of the applicant and the PFA respectively. The relevant excerpts from these rules were annexed to Mr See's affidavit. There is no reason not to accept what Mr See has declared.

The Statutory Criteria

14 The requirements contained in s71(6) have been met in that:-

(a) The applicant is a "*State organisation*".

(b) A certificate has been issued to the applicant under s71.

(c) The applicant has made an agreement with the PFA as the organisation of which the applicant's "*counterpart Federal body*" is the "*Branch*".

(d) The agreement relates to the management and control of the funds of the applicant "*State organisation*".

15 Section 71(7) provides for 3 pre-conditions before the Full Bench may approve the agreement. Each of these have been met. The requirements of s71(7)(a) and (b) are satisfactorily proved by the statutory declaration of Mr See and the excerpts from the rules. The memorandum of agreement has also been lodged with the Registrar so as to comply with s71(7)(c).

Consideration

16 The power of the Full Bench contained in s71(7) is discretionary. To trigger the discretion the Full Bench needs to be "*satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising*".

17 When I first considered this application I had concerns that the members of the applicant and the PFA had not been advised about the making of the application so as to enable them to object to it if they sought fit. I note however that, unlike other sections of *the Act*, for example those providing for the alteration of an organisation's rules under ss62 and 55 of *the Act*, there is no statutory requirement to provide notice to members of the relevant organisations. This is not to say that on an appropriate occasion it might not be something the Full Bench would require to be done before it reached the level of satisfaction required by s71(7).

18 In this application however I am satisfied that the failure to provide notices does not prevent the Full Bench from exercising its discretion. This is because:-

(a) The agreement is straightforward.

(b) The agreement protects the assets of the applicant.

(c) The agreement maintains the status quo.

19 For these reasons, I regard the agreement as sufficiently benign so as not to require notice of a possible objection to be given to the members of either the applicant or the PFA. Indeed, the purpose of the agreement is to protect the applicant's members by ensuring the preservation of its assets.

20 As stated the agreement maintains the status quo as contained in rule 22 of the rules of the applicant. This is as follows:-

"*<u>22 – MONIES</u>*

(1) All monies and other valuables subscribed by and obtained on behalf of the members of the Union shall be the property of the Union as a whole and not the individual members; provided that for legal purposes connected with the Union, all monies, valuables, assets and property of the Union shall be deemed to be that of the Chief Executive Officer.

(2) The Board shall have the control of all property of the Union." (The "*Union*" is the applicant).

21 Mr Horton frankly submitted that in seeking to become part of the PFA and forming a WA branch of the PFA, the applicant wanted to ensure that their assets were not "*raided*" so they "*decided that it was appropriate from the very beginning to … [proceed] … on the side of caution and use this section of the Act … to protect the assets of the*" applicant. Mr Horton submitted this was one of the purposes of s71(6) into *the Act*. I accept this.

22 Mr Horton also provided to the Full Bench an email from Mr Mark Burgess, Chief Executive Officer of the PFA, sent on 11 September 2007 at 10:27am which referred to the written outline of submissions which Mr Horton had filed with the Full

Bench. The email from Mr Burgess said that he had read the submissions and advised it was "*not the intention of the PFA to intervene or object in this matter*".

23 As stated, based upon the information before the Full Bench, I am satisfied that the pre-conditions contained in s71(7) of *the Act* have been met. Accordingly, in my opinion the Full Bench may exercise the discretion contained in s71(7) to approve the agreement. In my opinion there are sound reasons for the making of the agreement. As submitted by Mr Horton, "*clause 2 of the Agreement is explicit in ensuring the funds of the [applicant] remain under the full control of the [applicant] and accordingly will not hinder the [applicant] from meeting any and all of its financial obligations*." In my opinion the Full Bench should exercise its discretion to approve the agreement. As a consequence, the Registrar will be required to act in accordance with s71(8) of *the Act*.

24 In my opinion a Minute of Proposed Order should issue that:-

> "*The agreement constituted by a deed between the applicant and the Police Federation of Australia made on 20 March 2007 is approved under s71(7) of the Industrial Relations Act 1979 (WA).*"

SCOTT C:

25 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:

26 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 01214

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN POLICE UNION OF WORKERS **APPLICANT**
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
DATE	TUESDAY, 6 NOVEMBER 2007
FILE NO	FBM 6 OF 2007
CITATION NO.	2007 WAIRC 01214

Decision	Application approved
Appearances	
Applicant	Mr R Horton (as agent)

Order

This matter having come on for hearing before the Full Bench on 17 September 2007 and having heard Mr R Horton (as agent) on behalf of the applicant and reasons for decision having been delivered on 2 November 2007 it is this day, 6 November 2007, ordered that:-

1. The agreement constituted by a deed between the applicant and the Police Federation of Australia made on 20 March 2007 is approved under s71(7) of the *Industrial Relations Act 1979* (WA).

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Procedural Directions and Orders—

2007 WAIRC 01216

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GOOD SHEPHERD CATHOLIC SCHOOL
	APPELLANT
	-and-
	INDEPENDENT EDUCATION UNION OF WA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 6 NOVEMBER 2007
FILE NO/S	FBA 10 OF 2007
CITATION NO.	2007 WAIRC 01216

Decision Appeal dismissed

Order

1. The appeal is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2007 WAIRC 01331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2007 WAIRC 01331
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DELIVERED	**:**	MONDAY, 24 DECEMBER 2007
FILE NO.	**:**	PRES 5 OF 2006
BETWEEN	**:**	STEPHEN DARROW STACEY
		Applicant
		AND
		CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
		Respondent

CatchWords:

Industrial Law (WA) - Application pursuant to s66 of the *Industrial Relations Act 1979* (WA) - Orders issued - Application to amend - Order corrected

Legislation:

Industrial Relations Act 1979 (WA), s66

Public Sector Management Act 1994 (WA)

Result:

Order varied

Representation:

Applicant	:Williams & Hughes, Barristers & Solicitors
Respondent	:Mr W Claydon, as agent

Case(s) referred to in reasons:

Stephen Darrow Stacey v Civil Service Association of Western Australia (Incorporated) (2007) 87 WAIG 1229

Case(s) also cited:

Ihaan Adrianz v Epath WA Pty Ltd [2003] WAIRC 08025

Supplementary Reasons for Decision

RITTER AP:

1 The substantive application was made under s66 of the *Industrial Relations Act 1979* (WA). I published reasons for decision and a minute of proposed orders on 28 June 2007. Later that day the parties were heard at what was in effect a speaking to the minute. They were represented by counsel, neither of whom objected to the form of the minute. Accordingly on the same day I made orders in accordance with the minute.

2 The second order which I made was:-

> *"2. Within 30 days of 28 June 2007 the executive and council of the respondent initiate the process set out in the registered rules of the respondent to alter rule 6(a)(i) to delete the reference to the "Public Service Act 1978-1980" and replace it with the "Public Sector Management Act 1994 (WA)"."*

3 In this order there was a misdescription of the relevant rule. As referred to in paragraph [417] of my reasons the rule in the order ought to have been 6(a)(l).

4 The issue laid dormant until the respondent filed an application on 21 November 2007. Relevantly paragraphs [2]-[6] of the application were:-

> *"2. Order 2 [as referred to above] is not in accord with the decision of the Acting President in Stacey and the Civil Service Association PRES 5 of 2006, paragraph 417 which states:*
>
> *"[417] The position relating to rule 6(a)(1) is more complicated in that it is contained within one of the membership rules of the CSA. The alteration of membership rules can only take place after authorisation by the Full Bench and registration by the Registrar, under s62(2) of the Act. Accordingly I think the President's jurisdiction only extends to a direction or order that the CSA council and executive, in accordance with the rules of the CSA, take steps to alter the membership rule."*
>
> *3. Accordingly the Respondent applies to the Acting President pursuant to s.27(I)(m) Industrial Relations Act 1979 to correct or amend the original order 2 to come into line with paragraph 417 of the decision as follows:*
>
> *"2. Within 30 days of 28 June 2007 the executive and council of the respondent initiate the process set out in the registered rules of the respondent to alter rule 6(a)(1) to delete the reference to the "Public Service Act 1978-1980" and replace it with the "Public Sector Management Act 1994 (WA)"."*
>
> *4. Pursuant to s.27(1)(m) the President has power to amend or correct an error whether in substance or in form.*
>
> *5. The original order 2 is an error because it does not correctly and accurately reflect the reasons for the decision, and accordingly in terms of the reasoning in Ihaan Adrianz v Epath WA Pty Ltd [2003 WAIRC 08025], and authorities cited therein, the Acting President has power to recall, and amend or correct the order.*

6. Given the circumstances outlined above the Respondent is not seeking to be heard formally unless this application is opposed."

5 The respondent later advised in writing that the application had been served on the applicant and his solicitors. A declaration of service was filed which supported this assertion. The applicant's solicitors later advised in writing that they had no instructions to object to the application.

6 In my opinion, I have jurisdiction to make the variation to the order sought for the reasons set out in the application quoted above. It also is common sense that the order ought to be varied to correct what was just a slip.

7 Accordingly a minute of proposed order was published and sent to the respondent and the applicant, his solicitor and former counsel, requesting that by a specified time the parties advise if they wanted to speak to the minute. The respondent advised in writing that it did not wish to speak to the minute. There was no response by or on behalf of the applicant. This is not surprising given the earlier communicated position I have referred to and the uncontroversial nature of the order. The order set out below varies from the minute in that it includes the date of the order I made. As this does not in any way alter the substance of the order however there is no purpose served in providing the parties with an amended minute.

8 Accordingly I will now make an order that:-

1. Order 2 of the orders made on 28 June 2007 is amended so that it reads:-

2. Within 30 days of 28 June 2007 the executive and council of the respondent initiate the process set out in the registered rules of the respondent to alter rule 6(a)(1) to delete the reference to the "*Public Service Act 1978-1980*" and replace it with the "*Public Sector Management Act 1994 (WA)*".

2007 WAIRC 01332

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN DARROW STACEY
	APPLICANT
	-and-
	CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	MONDAY, 24 DECEMBER 2007
FILE NO/S	PRES 5 OF 2006
CITATION NO.	2007 WAIRC 01332

Decision Order varied

Order

Upon the filing of an application by the respondent on 21 November 2007 to amend the order dated 28 June 2007, it is ordered that:-

1. Order 2 of the orders made on 28 June 2007 is amended so that it reads:-

2. Within 30 days of 28 June 2007 the executive and council of the respondent initiate the process set out in the registered rules of the respondent to alter rule 6(a)(1) to delete the reference to the "*Public Service Act 1978-1980*" and replace it with the "*Public Sector Management Act 1994 (WA)*".

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

2007 WAIRC 01211

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRZYSZTOF GAGATEK
	APPLICANT
	-and-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	FRIDAY, 2 NOVEMBER 2007
FILE NO	PRES 3 OF 2007
CITATION NO.	2007 WAIRC 01211

Decision	Orders and directions
Appearances	
Applicant	Ms K Wroughton (of Counsel)
Respondent	Mr J Nicholas (of Counsel)

Order

This matter having come on for hearing before me on 1 November 2007, and having heard Ms K Wroughton (of Counsel) on behalf of the applicant, and Mr J Nicholas (of Counsel) on behalf of the respondent, it is this day, 1 November 2007, ordered that:-

1. The Applicant file and serve upon the Respondent further and better particulars by 4.00pm 7 November 2007 particularising:

   (a) what it alleges are the material times the Applicant was:

   (i) entitled to be;

   (ii) eligible to be; and

   (iii) in fact;

   a member of the Respondent as alleged in paragraph 5 of its Statement of Claim;

   (b) when the Respondent ceased paying the fees to the Respondent referred to in paragraph 5 of its Statement of Claim;

   (c) which of the Respondent's rules it alleges the Respondent has breached;

   (d) the nature of each alleged breach of that rule, including the conduct which the Applicant alleges amounts to such breach;

   (e) what "case" it alleges in paragraph 19 of its Statement of Claim that the Respondent decided not to take up;

   (f) how each of the actions identified in paragraph 20 of its Statement of Claim relates to a particular alleged breach of the Respondents rules;

   (g) which of the Rules of the Respondent it claims the Respondent breached in relation to the claims made in paragraph 21 of its Statement of Claim and how such breach arose;

   (h) what it alleges the "successful outcome(s)" were in each of the matters referred to in paragraph 22 of its Statement of Claim;

   (i) the dates, amounts and matters upon which it is alleged the applicant incurred fees and expenses referred to in paragraph 23 of its Statement of claim and how those fees and expenses related to any alleged breach of the Respondents rules;

(j) any alleged refusal to provide advice and representation referred to in paragraph 24 of its Statement of Claim and what rule the Respondent is alleged to have thereby breached;

(k) what "Policies" it alleges in its Statement of Claim under the heading "Relief Sought" the Respondent has breached and how; and

(l) how each of the matters in paragraph 2 and paragraphs 6 through 19 (inclusive) are relevant to any alleged breaches of the Respondents rules.

2. The Respondent file and serve its answer to the Applicant's further and better particulars by 4.00pm 16 November 2007.

3. The application be listed for a directions hearing on 26 November 2007 at 10:00am.

4. The parties have liberty to apply on 48 hours notice.

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

2007 WAIRC 01256

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRZYSZTOF GAGATEK
	APPLICANT
	-and-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	MONDAY, 26 NOVEMBER 2007
FILE NO/S	PRES 3 OF 2007
CITATION NO.	2007 WAIRC 01256

Decision	Orders and directions
Appearances	
Applicant	Ms K Wroughton (of Counsel), by leave
Respondent	Mr J Nicholas (of Counsel), by leave

Order

This matter having come on for hearing before me on 26 November 2007, and having heard Ms K Wroughton (of Counsel), by leave, on behalf of the applicant, and Mr J Nicholas (of Counsel), by leave, on behalf of the respondent, it is this day, 26 November 2007, ordered that:-

1. The applicant file and serve its answer to the respondent's interlocutory application by 4.00pm on 3 December 2007.

2. The respondent file and serve an outline of submissions and the affidavits of any witnesses in support of the interlocutory application by 4.00pm on 12 December 2007.

3. The applicant file and serve an outline of submissions and the affidavits of any witnesses in opposition to the respondent's interlocutory application by 4.00pm on 14 December 2007.

4. The hearing of the respondent's interlocutory application be listed for hearing at 10.00am on 19 and 20 December 2007.

5. The parties have liberty to apply on 48 hours notice.

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

2007 WAIRC 01315

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRZYSZTOF GAGATEK
	APPLICANT
	-and-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	TUESDAY, 18 DECEMBER 2007
FILE NO/S	PRES 3 OF 2007
CITATION NO.	2007 WAIRC 01315

Decision	The application is discontinued by consent.
Appearances	
Applicant	Ms K Wroughton (of Counsel), by leave
Respondent	Mr J Nicholas (of Counsel), by leave

Order

Upon the filing of a notice of withdrawal and discontinuance on 6 December 2007 and by consent it is ordered that:-

1. The application is discontinued.

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

AGREEMENTS—Industrial—Retirement from—

2007 WAIRC 01309

PUBLIC TRANSPORT AUTHORITY RAILCAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) ENTERPRISE AGREEMENT 2006

AG 31 of 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 128 of 2007

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch will cease to be a party to the Public Transport Authority Railcar Drivers (Transperth Train Operations) Enterprise Agreement 2006 on and from 2 January 2008.

DATED at Perth this 12 day of December 2007.

(Sgd.) J SPURLING,
[L.S.] Registrar.

NOTICES—Award/Agreement matters—

2008 WAIRC 00020

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 69 of 2007

APPLICATION FOR A NEW AGREEMENT ENTITLED

"REGISTERED NURSES, MIDWIVES AND ENROLLED MENTAL HEALTH NURSES – AUSTRALIAN NURSING FEDERATION – WA HEALTH INDUSTRIAL AGREEMENT 2007"

NOTICE is given that an application was made to the Commission, on 21 December 2007, by The Minister for Health in his incorporated capacity under s. 7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel Health Services Board, the WA Country Health Service and the Western Australian Drug and Alcohol Authority, under the Industrial Relations Act 1979, for the registration of the above named Agreement.

As far as relevant, those parts of the proposed Agreement that relate to area of operation or scope are published hereunder: -

4. – AREA, INCIDENCE AND PARTIES BOUND

(1) This Agreement applies throughout the State of Western Australia to employees employed by the Employers in the classifications prescribed in Clause 14 – Salaries and Classifications of this Agreeement.

(2) The parties to this Agreement are the Australian Nursing Federation, Industrial Union of Workers Perth and the Employers cited in subclause (3) of this clause.

(3) The Employers bound by this Agreement are:

(a) The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as:

(i) the Hospitals formerly comprised in the Metropolitan Health Service Board,

(ii) the Peel Health Services Board,

(iii) the WA Country Health Service.

(b) The Western Australian Alcohol and Drug Authority.

(4) The Director General of Health is the delegate of the Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA). In this capacity the Director General acts as the "Employer" for the purposes of this Agreement.

(5) This Agreement does not apply to persons employed as a Rehabilitation Assistant or Registered Enrolled Nurse (other than Enrolled Mental Health Nurse).

(6) This Agreement does not apply to persons employed pursuant to the Enrolled Nurses and Nursing Assistants (Government) Award No. 7 of 1978.

(7) This Agreement applies to approximately 12,500 employees.

14. – SALARIES AND CLASSIFICATIONS

(1) Registered Nurse

Level 1.1;

Level 1.2;

Level 1.3;

Level 1.4;

Level 1.5;

Level 1.6;

Level 1.7;

Level 1.8;

Level 1.9;

Level 2.1;

Level 2.2;

Level 2.3;

Level 2.4.

Senior Registered Nurse
SRN Level 1;
SRN Level 2;
SRN Level 3;
SRN Level 4;
SRN Level 5;
SRN Level 6;
SRN Level 7;
SRN Level 8;
SRN Level 9;
SRN Level 10.
Enrolled Mental Health Nurse
EMHN Pay point 1;
EMHN Pay point 2;
EMHN Pay point 3;
EMHN Pay point 4;
EMHN Pay point 5;
EMHN Pay point 6.
Mother Craft Nurse
Year 1;
Year 2;
Year 3;
Year 4;
Year 5.

A copy of the proposed Agreement may be inspected at my office at 111 St Georges Terrace, Perth.

(Sgd.) J SPURLING,
Registrar.

[L.S.]

8 January 2008

2008 WAIRC 00008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 70 of 2007

APPLICATION FOR A NEW AGREEMENT ENTITLED
"SHIRE OF PINGELLY (OUTSIDE WORKERS) CERTIFIED ENTERPRISE BARGAINING AGREEMENT 2007"

NOTICE is given that an application has been made to the Commission by the "Western Australian Municipal, Road Boards, Parks and Racecourses Employees' Union of Workers, Perth" under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

2) PARTIES TO AGREEMENT

2.1 This agreement is between the Western Australian Municipal Road Boards, Parks and Racecourses Employees Union (hereinafter referred to as "the Union") and those employees eligible to be members of the Union.

and

2.2 The Shire of Pingelly (hereinafter referred to as "the Employer".

3) APPLICATION

3.1 This agreement shall apply to the Shire of Pingelly and shall be binding on its employees, whether they are members of the Union or not, and on the Union, its officers and members; and on any new employee regardless of contract employed during the life of the agreement whether or not they be members of the Union.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) J SPURLING,
[L.S.] Registrar.

2 January 2008

INDUSTRIAL MAGISTRATE—Claims before—

2007 WAIRC 01324

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	STEPHEN MANN
	CLAIMANT
	-v-
	EMPLOYING AUTHORITY, GOVERNMENT EMPLOYEES SUPERANNUATION BOARD
	RESPONDENT
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 29 NOVEMBER 2007, THURSDAY, 20 DECEMBER 2007
DELIVERED	THURSDAY, 20 DECEMBER 2007
CLAIM NO.	M 66 OF 2007
CITATION NO.	2007 WAIRC 01324

CatchWords	**Failure to pay prescribed salary for a pay period; Right to suspend without pa; Improper exercise of discretion to suspend; When power to suspend can be exercised; Procedural fairness.**
Legislation	***Public Sector Management Act 1994***
	Industrial Relations Act 1979
	Property Law Act 1969
Cases Cited	**Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435**
	The Queen v The Australian Broadcasting Tribunal and Others, Ex parte 2HD Pty Ltd (1979) 144 CLR 45
	Re Piper, Ex parte Nilong (1996) SC Library 960021
	Re Railway Appeal Board; Ex parte Western Australian Government Railways Commission [1999] 21 WAR 1
	Csomore and Another v Public Service Board of NSW [1986] 10 NSWLR 587
Cases referred to in decision	***Director General, Department of Justice v The Civil Service Association of Western Australia [2003] 83***
Result	**The claim fails.**
Representation	
Claimant	**Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeared for the Claimant.**
Respondent	**Mr R Andretich (of Counsel) instructed by the *State Solicitor for Western Australia* appeared for the Respondent.**

REASONS FOR DECISION

Agreed Facts

1 1. The Claimant is a public service officer.

2 2. The Respondent is an employing authority for the Crown in the right of the State of Western Australia and is the employer of the Claimant for the purposes of the *Public Sector Management Act 1994* (the PSMA) and the *Industrial Relations Act 1979* (the IR Act).

3 3. The Claimant and the Respondent are both subject to the disciplinary provisions of Part 5 of the PSMA.

4 4. The Claimant and the Respondent are both bound by the Public Service Award 1992 (the Award) and the Public Service General Agreement 2006 (the Agreement).

5 5. The Claimant is substantively classified at Level 6.4 under the Award and the Agreement.

6 6. The prescribed fortnightly salary for a public service officer classified at Level 6.4 under the Award and the Agreement at the material time was $2,995.70 gross. Payment to the Claimant is made fortnightly, in accordance with clause 11(3) of the Award.

7 7. Pursuant to (section) 81(1) of the PSMA, on 8 February, 2007, the Respondent notified the Claimant that –

a) he was suspected of having committed a breach of discipline contrary to section 80 of the PSMA;

b) he was relieved of the requirement to attend work until the matter was concluded;

c) he would receive his normal remuneration during this period; and

d) he was required to provide an explanation in relation to the suspected breach of discipline.

8 8. As the Claimant's explanation was not accepted an investigation was undertaken into the suspected breach of discipline pursuant to section 81(2) of the PSMA. On 3 April, 2007, following that investigation, the Respondent charged the Claimant with having committed the breach of discipline pursuant to section 83(1)(b) of the PSMA.

9 9. On 1 June, 2007, the Respondent appointed Mr Keith Dodd, pursuant to section 86(4)(a) of the PSMA, to undertake a disciplinary inquiry into the Claimant's alleged breach of discipline.

10 10. On 6 August, 2007, the Claimant lodged an appeal to the Public Service Appeal Board (PSAB) against the decision to charge him and against the decision of the Respondent to appoint Mr Keith Dodd to undertake the disciplinary inquiry.

11 11. On 5 September, 2007, the Respondent notified the Claimant by letter that it proposed suspending the Claimant without pay, pursuant to section 82 of the PSMA, effective for the paydate of 20 September, 2007.

12 12. On 18 September, 2007 the Respondent notified the Claimant by letter that he was being suspended without pay pursuant to section 82 of the PSMA, effective for the paydate of 20 September, 2007, as foreshadowed in the letter of 5 September, 2007.

13 13. On 20 September, 2007, the Respondent did not pay the Claimant the salary for the fortnight ending 20 September, 2007.

14 14. The Respondent has not paid the Claimant any salary from the beginning of the pay period ending on 20 September, 2007.

15 15. The Claimant has not been required to render service since 8 February, 2007 and will not be required to pending the outcome of the disciplinary proceedings commenced on that date.

Claim and Response

16 The Claimant alleges that contrary to clause 11(3)(a) of the Award and without lawful authority, the Respondent failed to pay the Claimant his prescribed salary for the pay period ending on 20 September 2007.

17 The Respondent contends that the Claimant's suspension without pay effective from the pay date of 20 September 2007 was lawful and in accordance with the provisions of section 82(1) of the PSMA.

Issues

18 The two issues requiring determination are:

1. Whether the Respondent's suspension of the Claimant's employment without pay was lawful; and
2. If so, whether it was entitled to stop paying the Claimant commencing the pay period ending 20 September 2007.

Did the Respondent Lawfully Suspend the Claimant's Employment Without Pay?

19 The determination of this issue necessarily involves a consideration of the following sub-issues;

1. Was the Respondent entitled to suspend the Claimant when it did? ; and
2. Did the Respondent properly exercise its discretionary right to suspend the Claimant without pay?

Was the Respondent Entitled to Suspend the Claimant When it Did?

20 Section 82 of the PSMA empowers the employing authority to suspend an employee without pay. It provides:

> ***82. Suspension without pay***
>
> *(1) If an investigation is initiated under section 81, the employing authority may at any time before proceedings against the respondent are terminated within the meaning of subsection (2) suspend the respondent, if still its employee, without pay.*
>
> *(2) When proceedings against a respondent for a suspected breach of discipline are terminated by –*
>
> *(a) the taking of action under section 83 or 84 that is not cancelled under section 85, or the taking of action under section 86(3), 88(1) or 89; or*
>
> *(b) a finding that no breach of discipline was committed by the respondent, the employing authority shall terminate any suspension of the respondent without pay under subsection (1) and, if no breach of discipline has been found to have been committed by the respondent, restore to the respondent the pay of which the respondent has been deprived during the period of that suspension.*
>
> *(3) An employing authority may, in relation to an employee who has been suspended without pay under subsection (1), on its own initiative or on the application of that employee restore pay to that employee for such period as the employing authority thinks fit.*

21 The Claimant submits that, given the penal nature of the relevant provisions, section 82 of the PSMA ought to be construed strictly. He says that the necessary conditions for suspending an employee without pay are:

> a) An investigation must first have been commenced under section 81 of the PSMA; and
>
> b) The suspension must occur before the proceedings (i.e. the investigation commenced under section 81) have been terminated within the meaning of section 82(2) of the PSMA.

22 The Claimant submits that the investigation instigated by the Respondent on 8 February 2007 was terminated within the meaning of section 82(2) of the PSMA when the Respondent, on 3 April 2007, decided to charge him with a serious breach of discipline. The Respondent's opportunity to suspend him without pay ceased on 3 April 2007 when he was charged. It follows that the Respondent's suspension of him without pay on 20 September 2007 was unauthorised and unlawful. He contends that the Respondent's failure to pay him his salary for the pay period ending 20 September 2007 constitutes a breach of the Award.

23 The Claimant's assertion that action to suspend under section 82(2) may only be taken prior to an officer being charged or the taking of action under section 83 or section 84 of the PSMA is, in my view, incorrect. I accept the Respondent's submission that disciplinary proceedings are only terminated by the taking of action under sections 83 or 84 where that action is not cancelled by an objection under section 85 of the PSMA, and where a finding of a minor breach of discipline is made and the prescribed outcomes result or, alternatively, where no breach of discipline is found to have been committed. Where however, a serious breach of discipline appears to have been committed, section 83(1)(b) requires the employee to be charged. The charging of the employee does not terminate the proceedings. If the employee admits the charge, one of the penalties mentioned in section 86(3) may be imposed which will result in the disciplinary proceedings being terminated. If the charge is not admitted a disciplinary inquiry is required to be held by section 86(4). Where a directed person conducting an inquiry submits a finding that the charge has been made out, he or she is required by section 86(8) to recommend to the employing authority that it act as if the respondent had admitted the charge or, where no breach of discipline was committed, notify the employee that no further action will be taken. In either case the disciplinary proceedings are terminated.

24 Disciplinary proceedings can only be terminated under section 86 following an investigation, where a charge is admitted, or an inquiry into the charge is held which either substantiates the charge or results in a finding that no breach of discipline was committed.

25 The Claimant's contention that the meaning of "*proceedings*" in section 82(2) of the PSMA relates only to the investigation commenced under section 81 is, in my view, far too narrow. Its proper construction dictates that it relates to the entire disciplinary process and not just its investigative stage as the Claimant suggests. Section 82 is enacted to provide the employing authority with the power to suspend once there has been a decision made that there will be an investigation. The power to suspend commences immediately the disciplinary process starts and continues throughout the process until the proceedings are concluded. If it had been the intention of Parliament to restrict the power to suspend without pay to only the investigative stage it would have said so. Indeed the use of the plural *"proceedings"* reflects that it relates to the various stages of the process and not just the initiating stage.

26 In this instance the disciplinary proceedings relating to the Claimant continue and the steps thus far taken under sections 83 and 86 have not had the effect of terminating proceedings. Given that the proceedings had not terminated when the Respondent suspended the Claimant without pay, its act in so doing was lawful.

Did the Respondent Properly Exercise its Discretionary Right to Suspend the Claimant Without Pay?

27 The Claimant asserts that the discretion of the employer to suspend without pay must be exercised for a proper purpose. It must not be exercised unreasonably or in bad faith.

28 The Claimant says that the terms of a letter from the Respondent to the Claimant dated 5 September 2007 demonstrate bad faith and an improper purpose. In its letter to the Claimant the Respondent said inter alia:

> *In my letter of 8 February 2007 I relieved you of the obligation to attend work until this matter is concluded.*
>
> *While I appreciate your need to get advice, this matter has taken a significant period of time to resolve. I note your recent appeal to the Public Service Appeal Board (PSAB) and the substance of your claim. On 16 August 2007 GESB nominated its representative on the PSAB. Subsequent contact with the Western Australian Industrial Relations Commission has informed me that your nominated representative is not able to attend to this matter until the week commencing 10 September 2007.*
>
> *This delay is not acceptable and GESB has sought further advice from the State Solicitor's Office regarding the specific grounds of your appeal and what GESB perceives as continuing attempts to frustrate and extend the disciplinary process.*
>
> *Following that advice, and in accordance with section 82 of the Public Sector Management Act 1994, I wish to inform you that I propose suspending you without pay effective for the paydate of 20 September 2007. Should you wish to make a written representation on this proposed course of action this should be made by 14 September 2007.*

29 The Claimant submits that the stated reasons for suspension without pay are:

a) A delay of five days in the representative being available to attend the PSAB was unacceptable; and

b) The Respondent's perception that the union representative on the PSAB was a nominee of the Claimant rather than a nominee of the Civil Service Association and the Claimant was in some way responsible for the delay; and

c) The Respondent's perception that the Claimant's appeal to the PSAB was a continuing attempt to frustrate and extend the disciplinary process.

30 The Claimant contends that the decision to suspend him arose because of errors of fact made concerning the nomination of a representative on the PSAB and also because he had exercised his right to appeal. He says he was punished for exercising his legal right to appeal. In the circumstances the Respondent's decision to suspend him without pay was not made for a proper purpose, was in bad faith and was unreasonable.

31 Damien Stewart, who prepared the letter dated 5 September 2007 on behalf of the Respondent, testified that the decision to suspend without pay was made as a consequence of a conclusion reached that there had been a substantial delay in the entirety of the proceedings against the backdrop that the appeal to the PSAB was without merit. I accept Mr Stewart's evidence. Indeed his evidence in that regard was not inconsistent with what was said in the letter dated 5 September 2007.

32 The evidence supports the Respondent's contention that its reason for suspending the Claimant without pay was entirely legitimate and the decision to suspend him without pay was not made in bad faith. There was no improper purpose behind the decision. The Respondent afforded procedural fairness to the Claimant in the form of an opportunity to make representations as to why the discretion should not be exercised.

33 I reject the Claimant's contention that the Respondent's exercise of its discretion miscarried and that therefore its decision was void and of no effect. I find that the Respondent did what it was entitled to do. It had an unfettered discretion to suspend the Claimant without pay. Such unfettered discretion was qualified by the protection afforded to the Claimant by section 82(2) which entitles him to have his pay restored in the event that a finding is made that he did not commit a breach of discipline.

Was the Respondent Entitled to Stop Paying the Claimant Commencing the Pay Period Ending 20 September 2007

34 The Claimant contends that his salary is an annual amount payable periodically and pursuant to section 131 of the ***Property Law Act 1969*** accrues from day to day. When the Respondent purported to suspend him on 18 September 2007 his salary for the period up to the date of notification had already accrued and was vested in him. He was therefore entitled to be paid on 20 September 2007. He submits that his suspension without pay could lawfully only have occurred after 20 September 2007. Consequently the Respondent has breached the Award and Agreement by failing to pay him on 20 September 2007.

35 Is the Claimant correct in his assertion that his salary entitlement had been accruing leading up to his suspension without pay? I think not. The legal entitlement to wages or salary is dependent upon rendering service in the absence of agreement, award or statutory provision to the contrary. In ***Director General, Department of Justice v The Civil Service***

Association of Western Australia [2003] 83 WAIG 908 the Full Bench of the Western Australian Industrial Relations Commission confirmed that the "*no work no pay*" principle was the law in Western Australia even where the failure to render service by an employee was caused by the unlawful act of an employer (see paragraphs 48 to 53). Given that the Claimant was not rendering services at the material time, he was not entitled to wages. He was not accruing wages. Indeed there is nothing in the PSMA which implies an obligation on the part of an employing authority to pay a person when service is not rendered, nor is such a provision contained in the Award or the Agreement.

36 The payments made by the Respondent to the Claimant after he was relieved of his obligation to attend work were not made in consequence of the Respondent's legal obligation to pay wages but rather gratuitously as a result of a unilateral decision made by the Respondent to continue paying him. That decision was revocable at any time. Therefore the decision to stop paying the Claimant and to suspend him without pay could occur at any time and with immediate effect.

37 Given that the Claimant did not have a legal entitlement to be paid for the pay period ending 20 September 2007, there could not have been, nor was there, a breach of the Award and/or the Agreement.

Result

38 The claim fails.

G Cicchini

Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2007 WAIRC 01330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SCOTT ANDERSON
	APPLICANT
	-v-
	JOHN & BARBARA ALTMANN - MARGARET RIVER HOLIDAY COTTAGES
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 24 DECEMBER 2007
FILE NO	U 162 OF 2007
CITATION NO.	2007 WAIRC 01330

Result Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 14 November 2007 at the conclusion of which the matter was unresolved; and

WHEREAS the applicant advised the Commission on 12 December 2007 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, 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.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

2007 WAIRC 01323

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CAROLINE ANN EDWARDS
	APPLICANT
	-v-
	PAM MC KENNA, CEO
	(PALMERSTON ASSOCIATION INC)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 DECEMBER 2007
FILE NO/S	U 165 OF 2007
CITATION NO.	2007 WAIRC 01323

Result Discontinued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the Commission set down a conference on 30 November 2007 for the purpose of conciliating between the parties; and

WHEREAS on 27 November 2007 the applicant advised the Commission that the matter had settled and the conference was vacated; and

WHEREAS on 18 December 2007 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 18 December 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 01300

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD JOHN FEATHER HURST
	APPLICANT
	-v-
	JOHN MATSON, AARON LEE PEST CONTROL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 12 DECEMBER 2007
FILE NO	B 111 OF 2007
CITATION NO.	2007 WAIRC 01300

Result	Application discontinued
Representation	
Applicant	Mr B Taylor of Counsel
Respondent	Mr T Solomon as agent

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 3 August 2007 at the conclusion of which the matter was adjourned; and

WHEREAS the applicant advised the Commission on 4 December 2007 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, 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.

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

2007 WAIRC 00453

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE TRANTHAM
	APPLICANT
	-v-
	KIM MEZGER/ACA NOMINEES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 16 MAY 2007
FILE NO/S	U 24 OF 2007
CITATION NO.	2007 WAIRC 00453

Result Order issued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"); and

WHEREAS on 20 April 2007 this application was set down for hearing and determination on 6 June 2007 to deal with the issue of the Commission's jurisdiction to hear this application; and

WHEREAS by letter dated 1 May 2007 received in the Commission on 3 May 2007 the respondent's representative requested that the Commission change the date of the hearing; and

WHEREAS on 3 May 2007 the Commission advised the respondent that it was required to formally apply for an adjournment of the hearing; and

FURTHER that the respondent's application to adjourn the hearing would be dealt with by way of written submissions and the parties were advised to file and serve submissions in relation to this issue by no later than 10 May 2007; and

WHEREAS the respondent is seeking an adjournment of the hearing as it claims that in the week prior to the hearing the respondent's owner and its practice manager will be busy preparing to leave on a business trip overseas between 8 and 26 June 2007 that was organised in February 2007; and

FURTHER the respondent argues that it cannot prepare for the hearing as the respondent's solicitor is currently overseas and will not return until after the hearing date; and

WHEREAS the applicant opposes the hearing being adjourned as the respondent has not provided any evidence that it would suffer prejudice if the Commission refused to grant the adjournment and the applicant argues that she will suffer prejudice by having her application delayed; and

WHEREAS after hearing from the parties and in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19) and when taking into account equity and fairness the Commission is of the view that an adjournment should be granted; and

WHEREAS the Commission accepts that the respondent will suffer some prejudice if the hearing takes place on 6 June 2007 due to work commitments resulting from a proposed business trip and the inability of the respondent's representative to prepare for the hearing and the Commission is also of the view that apart from a delay in the timing of the proceedings the applicant has not highlighted any significant disadvantage she will suffer if the adjournment is granted;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s27(1), hereby orders:

THAT the hearing of application U 24 of 2007 scheduled for 6 June 2007 is adjourned to a date to be fixed.

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

2007 WAIRC 01056

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE TRANTHAM
	APPLICANT
	-v-
	KIM MEZGER/ACA NOMINEES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	WEDNESDAY, 29 AUGUST 2007
DELIVERED	WEDNESDAY, 5 SEPTEMBER 2007
FILE NO.	U 24 OF 2007
CITATION NO.	2007 WAIRC 01056

Catchwords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Whether Commission has Jurisdiction - Principles applied - Applicant not employed by a constitutional corporation - Claim within Commission's jursidiction - *Industrial Relations Act 1979* (WA) s 27(1), s 29(1)(b)(i); *Workplace Relations Act 1996* (Cth) s 4, s 6 and s 16(1)
Result	Declaration and Order issued
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Mr K Mezger

Reasons for Decision

1 On 6 February 2007 the applicant lodged an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was unfairly dismissed by Kim Mezger/ACA Nominees ("the respondent") in January 2007. The respondent denies the applicant's claim that she was unfairly dismissed and maintains that as it is a constitutional corporation for the purposes of the *Workplace Relations Act 1996* ("the WRA") this application is outside the jurisdiction of this Commission.

Proper name of the respondent

2 In the Notice of Application the applicant named the respondent as Kim Mezger/ACA Nominees and during the hearing which was set down to deal with the preliminary issue of the Commission's jurisdiction to deal with this application the applicant sought leave to amend the name of the respondent to Kim Mezger.

3 Mr Kim Mezger gave evidence on behalf of the respondent and I accept that he was an honest and credible witness. Mr Mezger confirmed that the applicant's employer from July 2003 until her termination in January 2007 was Kim Mezger and he also verified that a number of exhibits tendered into the evidence by the applicant confirm that the applicant was employed by Kim Mezger (see the applicant's Tax file number declaration form completed by her on 10 September 2004, a PAYG Payment Summary for the year ending 30 June 2004, a payslip dated 29 January 2007 and a copy of a cheque paid to the applicant dated 29 January 2007 drawn on the account of KA Mezger Practice Account - Exhibits A1 to A4).

4 On the basis of Mr Mezger's evidence and the exhibits referred to above I am satisfied and I find that Kim Mezger has been the applicant's employer since July 2003. I am also satisfied that the applicant has mis-described the name of the respondent on her Notice of Application and intended to bring these proceedings against her employer but did not accurately describe the respondent. In my opinion and given the respondent's consent to this course of action it is my view that it is therefore

appropriate for the Commission to exercise its powers pursuant to s27(1)(m) of the Act to correct, amend or waive any error, defect or irregularity whether in substance or in form by amending the name of the respondent in the Notice of Application to reflect the proper identity of the applicant's employer (see *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Bridge Shipping Pty Limited v Grand Shipping SA and Another* (1991) 173 CLR 231). Accordingly I will issue an order that Kim Mezger/ACA Nominees be deleted as the named respondent to this application and be substituted with Kim Mezger.

Constitutional Corporation

5 The respondent maintained in its Notice of Answer lodged in the Commission on 9 March 2007 that the Commission lacks jurisdiction to deal with this application as the applicant was employed by ACA Nominees Pty Ltd which is a constitutional corporation and as s16 of the WRA excludes the application of State or Territory industrial law insofar as they apply to constitutional corporations the respondent argued that the Commission could not deal with this application.

6 Section 16(1) of the WRA relevantly provides:

> "**16 Act excludes some State and Territory laws**
>
> (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law;"

7 Section 4 of the WRA under the definition of "State or Territory Industrial Law" includes a reference to the Act and s6 of the WRA provides that "employer" means a "constitutional corporation, so far as it employs, or usually employs, an individual".

8 I have already stated that I accept Mr Mezger's evidence that since July 2003 the applicant has been employed by him as an individual. Mr Mezger gave evidence that the applicant was initially employed by ACA Nominees Pty Ltd when she commenced employment in February 2001 and on advice from his accountant the applicant ceased to be an employee of ACA Nominees Pty Ltd in July 2003 and became employed by Kim Mezger. In the circumstances I am satisfied and I find that the applicant's employer from 1 July 2003 until she was terminated in January 2007 was Kim Mezger as an individual and not ACA Nominees Pty Ltd which is an incorporated entity.

9 As the Commission's jurisdiction is not ousted by the relevant provisions of the WRA this matter will be listed for hearing and determination to deal with the substantive issues relevant to this application.

2007 WAIRC 01066

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE TRANTHAM
	APPLICANT
	-v-
	KIM MEZGER
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 7 SEPTEMBER 2007
FILE NO/S	U 24 OF 2007
CITATION NO.	2007 WAIRC 01066

Result	Declaration and Order issued

Order

Having heard Mr G McCorry on behalf of the applicant and Mr K Mezger on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS THAT the name of the respondent be deleted and that Kim Mezger be substituted in lieu thereof.
2. DECLARES THAT the applicant was not employed by a constitutional corporation or employer as defined in the *Workplace Relations Act 1996* and the Commission therefore has jurisdiction to deal with this matter.

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

2007 WAIRC 01316

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	YVONNE TRANTHAM
	APPLICANT
	-v-
	KIM MEZGER
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 18 DECEMBER 2007
FILE NO/S	U 24 OF 2007
CITATION NO.	2007 WAIRC 01316

Result	Discontinued
Representation	
Applicant	Mr G McCorry (as agent)
Respondent	Ms D Feeney and Mr K Mezger

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on 3 April 2007 the Commission convened a conference for the purpose of conciliating between the parties however, agreement was not reached; and

WHEREAS the Commission listed the matter for hearing on 6 June 2007 with respect to a preliminary issue raised by the respondent about the Commission's jurisdiction to deal with this matter and this date was later changed to 29 August 2007 as a result of the respondent's request to adjourn the hearing; and

WHEREAS on 7 September 2007 the Commission determined that there was jurisdiction to deal with this matter; and

WHEREAS on 18 September 2007 the Commission was advised that the parties were having discussions with a view to settling the matter; and

WHEREAS the Commission contacted the applicant on a number of occasions about the status of the matter and on 1 November 2007 the applicant's representative advised the Commission that the parties had reached an agreement to settle the matter; and

WHEREAS on 29 November 2007 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 13 December 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 01329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRACEY TURRIFF-SMITH
	APPLICANT
	-v-
	JOHN & BARBARA ALTMANN - MARGARET RIVER HOLIDAY COTTAGES
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 24 DECEMBER 2007
FILE NO	U 161 OF 2007
CITATION NO.	2007 WAIRC 01329

Result	Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS a conciliation conference was convened on 14 November 2007 at the conclusion of which the matter was unresolved; and

WHEREAS the applicant advised the Commission on 12 December 2007 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, 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.

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

2007 WAIRC 01318

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK VAN GELDER
	APPLICANT
	-v-
	APEX FENNER
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 20 DECEMBER 2007
FILE NO	U 175 OF 2007
CITATION NO.	2007 WAIRC 01318

Result	Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 11 December 2007 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

NOW THEREFORE, 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.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Yvonne Trantham	Kim Mezger	U 24/2007	Commissioner J L Harrison	Discontinued

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	I.D. Entity WA	Wood C	C 27/2007	5/11/2007	Dispute re negotiations for a new industrial agreement	Concluded
Western Australian Prison Officers' Union of Workers	The Hon. Minister of Corrective Services	Kenner C	C 30/2007	N/A	Dispute re staffing of Special Services Branch Officers	Withdrawn

PROCEDURAL DIRECTIONS AND ORDERS—

2007 WAIRC 01304

DISPUTE REGARDING INDUSTRIAL ACTION BY UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION

APPLICANT

-v-

CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE FRIDAY, 14 DECEMBER 2007

FILE NO/S PSAC 11 OF 2006

CITATION NO. 2007 WAIRC 01304

Result Order Issued

Representation

Applicant Mr Eddy Rea

Respondent Mr Brendan Cusack

Order

HAVING heard Mr Eddy Rea on behalf of the applicant and Mr Brendan Cusack 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 Strategy For Caseload Management operate from 1 January 2008 in accordance with the attached schedule.
2. THAT the interim order of the Commission deposited in the office of the Registrar on 29 March 2007 be and is hereby revoked from 1 January 2008.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

SCHEDULE

STRATEGY FOR CASELOAD MANAGEMENT

1 (a) This document has been developed after consultation with all Managers and Team Leaders within Country and Metro Services (MS and CS) (formerly CDSS) and with CSA delegates.

(b) This document reflects the agreed outcomes from the Interim Workload Management Strategy. The Interim Strategy was developed to ensure that every case worker has a reasonable caseload and that this is managed in a way that enables the Department to meet its legislative and statutory requirements.

2 (a) The parties recognise that changes in circumstances, including operational and statutory imperatives, may result in the need to review the arrangements. The arrangements in this agreement may be varied with the express consent of the parties.

(b) The Department for Child Protection (the Department) will:

(i) continue to make decisions and provide timely notification to the CSA in accordance with its obligations under clause 58 - Notification of Change of the Public Service Award 1992, and

(ii) undertake timely consultation consistent with the provisions clause 27 - Workload Management, and clause 33 - Joint Consultative Committee of the Public Service General Agreement 2006 or its replacement.

(c) If issues arising cannot be resolved between the parties, and if the existing dispute resolution procedures at the workplace level do not provide an acceptable outcome, the parties acknowledge that the matter may be referred to the WAIRC for assistance.

(d) Either party may initiate discussions for a review.

1. OBJECTIVES

1.1 The Department is committed to the implementation of the Workload Management System.

2. PREMISE OFWORKLOAD MANAGEMENT STRATEGY

2.1 Work is managed in an efficient and effective manner at all levels and that the statutory requirements of the Department are met.

2.2 To ensure that case work unable to be allocated is identified and the responsibility for this is managed at the appropriate level.

2.3 That work is prioritised and managed in accordance with the Guidelines for Workload Prioritisation updated 28 August 2006. (**Attachment A**).

3. DEFINITIONS

3.1 Case

3.1.1 A case is described as an integrated set of activities that collectively seek to address a presented need or issue for an individual or group of people eg for a family or a community of interest.

3.1.2 As a general rule the case will be identified by the client name – in case work this group is most often taken to refer to a family or sibling group, however in community work this may refer to a geographical or demographic 'community of interest'.

3.1.3 A case can be:

- a child in care
- a family in family support
- an assessment and/or investigation of a child or children in a family, or
- a group of tasks associated with a community of interest.

3.2 Case Loads

3.2.1 For the purposes and duration of this workload management strategy there will in general be an upper limit of 15 cases to apply to each case worker. In certain circumstances this upper limit can be increased to 18 cases to apply to each case worker. Such circumstances may include for example, where a case(s) in an allocated caseload is/are absent from the jurisdiction; where senior and experienced caseworkers have little or no priority work to perform in any given period and have capacity. In the case of such an increase to the caseload a Director MS and CS the Executive Director and the Union will be informed. (Strategy **Form 5**).

Pro rata allocation in consideration for part time staff, performing duty and other unplanned priority work allocated from outside those cases allocated, including work allocated by a Nominated Liaison Officer (NLO).

3.2.2 The actual caseload for each caseworker will be monitored through discussions with Directors, Team Leaders and Case Workers through supervision to ensure that every worker has a reasonable and appropriate workload. Consideration will be given to factors such as intensity, complexity, frequency of activity, worker skill level, and geography

Case workers may be required by Team Leaders to undertake some work of a higher priority than planned work arising from their allocated caseload. This work may replace their planned case work and this should be acknowledged and recorded by the Team Leader in supervision.

3.3 Responsibility

3.3.1 The Department for Child Protection Quality and Management in MS, and CS developed an Accord in 2005 which guides our approach to improving quality and standards in MS and CS .

The roles and responsibilities highlighted in the Accord represent the basic themes of our work and help ensure that we focus on the right things when we work with children, their families, carers and communities.

The Accord sets out the roles and responsibilities of Case Workers (Field staff), Team Leaders, District Directors, MS and CS Directors and Executive Directors MS and CS to combine to the best effect.

3.3.2 Consistent with the Accord there are also responsibilities for managing in an efficient and effective manner work load at each of the levels. District planned work arrangements previously documented are to continue.

3.3.2.1 Case Workers - are responsible for planning the work to manage the cases allocated to them. It is the Case Workers responsibility to prioritise the services they provide and if they are unable to complete the priority work it is their responsibility to discuss this with their Team Leader who will decide the priority work to be completed.

3.3.2.2 Team Leaders - are responsible for managing the work within their team. However if priority work cannot be done according to departmental standards it is the Team Leader's responsibility to notify the District Director in writing of any priority work unable to be completed who will take responsibility for the management of that work.

3.3.2.3 District Directors - are responsible for managing the work within their District. The District Director given their overview of all the resources of the District will determine if/how any priority work can be done. If there are no resources available to do this work, it is the responsibility of the Director to notify the appropriate MS and CS Executive Director who will also take responsibility for the management of that work. If there are no workload issues then this will also be reported.

3.3.2.4 MS and CS Directors - The MS and CS Directors given their overview of all the resources of the Division will determine if / how any priority work can be done. The Executive Directors are to review workload issues and queues and with the District Director look for solutions to the issues. If there are no resources available to do this work, it is the responsibility of the Executive Directors to notify the Director General. If there is no workload issue then this will also be reported.

3.3.2.5 Executive Directors MS and CS - The Executive Directors given his/her overview of all the resources of the Directorate will determine if / how any priority work can be done. If there are no resources available to do this work, it is the responsibility of the Executive Directors MS and CS to bring this to the attention of the entire Department's Executive.

3.3.2.6 Nominated Liaison Officer (NLO) - NLOs have decision making responsibility for tasks arising from a case until the reallocation to a case manager or closure. They can allocate tasks to be completed and negotiate the corresponding adjustments to planned work, but cannot delegate the decision making responsibility.

4. PROCESS

4.1 Presently case workers complete and update their individual workload plan (Strategy **Form 1**) on a fortnightly basis. (*NB - Districts have the option to continue to use the original workload management tool if it is working for them).*

This form identifies the cases a worker is responsible for during the next fortnight.

The workload management tool will be completed for each case worker at least three monthly or more frequently upon request by an individual case worker.

4.2 During supervision, the Case worker and the Team Leader will discuss the workers planned priorities for that month arising from their caseload.

4.3 Team Leaders complete their caseload summary report (Strategy **Form 2**) on a fortnightly basis. This form provides a summary of cases allocated for the next fortnight.

Team Leaders also complete (Strategy **Form 3**) which identifies the unallocated cases being held by the Team Leader as NLO.

Cases that are not able to be allocated to caseworkers will be the responsibility of the Team Leader as Nominated Liaison Officer (NLO) for a maximum of 2 weeks. The District Director thereafter becomes the NLO for these cases. When staff are on annual, or extended sick leave, or attending training, the team will manage the cases and these stay allocated to the case worker on CCSS. If however during this period priority work is required, that case will be reallocated formally to another Case Manager or to the Team Leader as NLO.

If allocated to a Case Manager workload adjustments are made to compensate for the extra responsibility.

Any absence of an officer in excess of 4 weeks requires the allocated work to that officer to become unallocated at the conclusion of that four week period and the normal rules apply.

4.4 During supervision, the Team Leader and District Director will discuss the priority work that cannot be allocated that fortnight.

The outcome of the supervision will be documented and agreement will be reached on priority work unable to be allocated to the team and which will become the responsibility of the District Director.

District Directors complete their individual workload summary (Strategy **Form 4 & Form 5**) on a monthly basis i.e. Directors report to Executive Directors on staff carrying more than 15 cases during the month and the number of cases held by Team Leaders and District Directors as NLO. The CSA will receive monthly notification of caseloads that have exceeded 15 that have occurred in the preceding month.

4.5 The District Management Group is to establish/develop a structural response for dealing with work arising from cases held by the Director/Team Leader as the NLO. These processes are to be documented and communicated to District Staff and Executive Directors. Executive Directors will be responsible for monitoring the effectiveness of these strategies to ensure safety concerns for children are prioritised.

Strategies could include the use of existing duty system to receive contacts and carry out minor tasks; or apportioning work to specific positions; or creating "blitz" teams.

Where it is demonstrated that District strategies have not resolved workload issues associated with cases allocated to the Director as NLO for 2 months, Directors will provide advice of these cases to Executive Directors MS and CS for sign off

4.6 Where strategies cannot be put in place at a Directorate level the Executive Director MS and CS will bring this to the attention of the Department's Executive.

5. START UP TRAINING AND INDUCTION

Inexperienced workers must complete Start Up training prior to being allocated cases for management. They can be co-workers and given tasks arising from cases as long as they are closely supervised.

New experienced workers must complete the initial one week induction before being allocated cases for management. This Induction Form must be registered with the Human Resources Department.

These workers should then attend relevant modules of Start Up to ensure they are trained in departmental policy and practice.

6. **IMPLEMENTATION**

The implementation of the work load management strategy will be overseen by a joint Departmental and CPSU/CSA working party as determined between the parties.

Attachment A

GUIDELINES FOR WORKLOAD PRIORITISATION

ARISING FROM CASELOADS

28 August 2006

1. Children's safety as determined by professional assessment and judgement is the overriding principle

1.1 There is reasonable likelihood of significant harm resulting to a child. This requires an immediate response and normally would include an Assessment of Child Concern (ACC) which requires intervention or investigation Under Section 32 of the *Childrens Services Act 2004* (the Act). It is a priority to complete all Action and Outcome reports.

Should intervention action require placing the child in the CEO's care then registration of carers is mandatory. Screening of other service providers in accordance with departmental policy is also mandatory. These are actions that are required to ensure the safety of the child.

1.2 Attending to, or preventing placement breakdown for children in the CEO's care.

- Quarterly Care Reviews and visiting children under the care of the CEO.

1.3 Requirements under the Act:

- Provisional care plan;
- Care Plan;
- Annual review of the care plan;
- Quarterly Care Review
- Carer reviews

and the timely recording of these plans and reviews.

1.4 Maintain Placement for children in the CEO's care

1.5 Concern for the child's wellbeing that results in Child Focused Family Support.

- o A priority is to prevent a child coming into care.

1.6 Ministerial and other Parliamentary briefing – Priority responsibility for Directors.

2. Staff work normal hours as prescribed by their General Agreement.

- o 37.5 hours per week;
- o Flexi time;
- o Overtime; and
- o TOIL - as per Best Practice

3. Directors and Team Leaders ensure work is spread equitably within teams.

4. If work cannot be allocated the reason must be recorded by Team Leaders on the blue form and the Team Leader or Manager becomes NLO. This is reflected on the Client and Community Support System (CCSS)..

5. Formal casework supervision of case workers and Team Leaders is essential to workload management and sound practice.

- o New workers fortnightly up to 6 months
- o Other workers, including Team Leaders, 4 – 6 weeks or as negotiated.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Metropolitan Cemeteries Board Agency Specific Agreement 2007 PSAAG 17/2007	11/01/2008	The Metropolitan Cemeteries Board and The Civil Service Association of Western Australia Incorporated	(Not applicable)	Senior Commissioner J H Smith	Agreement registered

NOTICES—Appointments—

2008 WAIRC 00007

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Senior Commissioner JH Smith to be an additional Public Service Arbitrator for a further period of one year from the 13th day of January, 2008.

Dated the 4th day of January, 2008.

CHIEF COMMISSIONER A.R. BEECH

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2008 WAIRC 00021

NOTICE

METROPOLITAN PRISON COMPLEX CATERING STAFF AWARD

TAKE NOTICE that the Commission acting pursuant to section 47 of the Industrial Relations Act 1979, intends, by order, to cancel the following award, namely the –

Metropolitan Prison Complex Catering Award

On the grounds that there are no longer any persons employed under the provisions of that award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote Admin file 101/2007 on all correspondence.

Dated 8th day of January 2008

(Sgd.) J SPURLING,
[L.S.] Registrar.

PUBLIC SERVICE APPEAL BOARD—

2007 WAIRC 01303

APPEAL AGAINST THE DECISION TO TRANSFER FROM POSITION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARY FORWARD
	APPELLANT
	-v-
	DEPT OF HOUSING AND WORKS
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MS B ABBOTT - BOARD MEMBER
	MR C FLOATE - BOARD MEMBER
DATE	FRIDAY, 14 DECEMBER 2007
FILE NO/S	PSAB 4 OF 2007
CITATION NO.	2007 WAIRC 01303

Result Appeal Dismissed

Order

WHEREAS this is an appeal made pursuant to the Industrial Relations Act 1979; and

WHEREAS on Tuesday, the 11th day of December 2007, the Appellant advised the Public Service Appeal Board that he no longer intended to pursue the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.