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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—General Matters—

2008 WAIRC 00387

SALARY CAP FOR LODGING CLAIMS OF UNFAIR DISMISSAL OR DENIAL OF CONTRACTUAL BENEFITS

Section 29AA(3) and (4) of the *Industrial Relations Act, 1979* provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount. What is meant by an industrial instrument is defined in section 29AA(5) of the *Industrial Relations Act, 1979* and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* (2006) 86 WAIG 2725. The prescribed amount of the salary is determined by Regulations 5 and 6 of the *Industrial Relations (General) Regulations 1997*. The amount is adjusted each July 1.

The figure that will apply 1 July 2008 has been calculated by the Registrar as being $117,500. The amount is a matter for the Commission to determine so that figure must be seen as a guide, until such time as the Commission may determine a different amount.

GENERAL ORDERS—

2008 WAIRC 00405

RESCIND GENERAL ORDER NO. 53 OF 2007 ON LOCATION ALLOWANCES AND ISSUE A NEW GENERAL ORDER PURSUANT TO SECTION 50 OF THE INDUSTRIAL RELATIONS ACT 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER S WOOD
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 JULY 2008
FILE NO/S	APPL 9 OF 2008
CITATION NO.	2008 WAIRC 00405

Result General Order issued

General Order

HAVING heard Mr A Lyon (as agent) for the Honourable Minister for Employment Protection; Mr D Jones on behalf of the Chamber of Commerce and Industry of Western Australia (Inc) and Mr D Robinson by correspondence on behalf of the Trades and Labor Council of Western Australia, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders —

(1) THAT each award, industrial agreement or order cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award, industrial agreement or order the location allowance provisions in Schedule B of this General Order.

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2008.

(3) THAT this General Order replace the General Order in matter No 53 of 2007 which thereby shall be rescinded.

(Sgd.) J H SMITH,
Commissioner

[L.S.] For and On Behalf of the Commission In Court Session.

SCHEDULE A

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Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
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Artworkers Award	20
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Clerks (Commercial Radio and Television Broadcasters) Award of 1970	27
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Clerks' (Credit and Finance Establishments) Award	31
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Title of Award or Order—*continued*	Clause No.
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The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
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Electronics Industry Award No. A 22 of 1985	24
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Foodland Associated Limited (Western Australia) Warehouse Award 1982	39
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Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Nurses' (Day Care Centres) Award 1976	22
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Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
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Beverley Four Square Supermarket and SDA Agreement 2002	32
Bindoon General Store and SDA Agreement 2002	32
Bridgetown Mini Mart and SDA Agreement 2002	32
Broadwater Mini Mart and SDA Agreement 2002	32
Cadoux Traders and SDA Agreement 2002	32
Caversham Store and SDA Agreement 2002	32
Cherries Fine Food Super Mart and SDA Agreement 2002	32
Chicken Treat Dunsborough SDA Agreement 2001	34
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Chicken Treat Narrogin SDA Agreement 2001	34
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Chidlow Growers Mart and SDA Agreement 2002	32
Cranberries and SDA Agreement 2002	32
Crisp's Corner Store & Newsagency and SDA Agreement 2002	32
Essentials Supermarket of South Perth and SDA Agreement 2002	32
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Foodland Bayswater (Beechboro Road) and SDA Agreement 2002	32
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Foodland Boddington and SDA Agreement 2002	32
Foodland Dowerin and SDA Agreement 2002	32
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Title of Industrial Agreements—*continued*	Clause No.
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Foodland Tarcoola and SDA Agreement 2002	32
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Hannan's Foodmart and SDA Agreement 2002	32
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Kimberley Super Value and SDA Agreement 2002	32
Kirkwood Foodland & Delicatessen and SDA Agreement 2002	32
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Laverton Stores and SDA Agreement 2002	32
Leighton Contractors Maintenance Personnel Agreement 2000	Schedule 1, Cl 6
Leighton Contractors Mining and Processing Personnel Enterprise Agreement 1997	Schedule 1, Cl 9
Lionel St Markets and SDA Agreement 2002	32
Little Bucks Supermarket and SDA Agreement 2002	32
Mariella's Continental Deli and SDA Agreement 2002	32
McDonald Wholesalers and SDA Agreement 2002	32
Midland Junction Fresh Markets and SDA Agreement 2002	32
MJ and VD Quinlan and SDA Agreement 2002	32
Muir's Fresh Food Supermarkets and SDA Agreement 2002	32
Murdoch Drive Continental Super Deli and SDA Agreement 2002	32
Noakes Store Denmark and SDA Agreement 2002	32
P.R. & B.M. Harrington and SDA Agreement 2002	32
Pemberton General Store and SDA Agreement 2002	32
Perenjori Supermarket and SDA Agreement 2002	32
Pioneer Store and SDA Agreement 2002	32
Port Hedland Truck Stop and SDA Agreement 2002	32
R & E General and SDA Agreement 2002	32
Retail Food Establishments Employees Agreement 1992	34
Retail Food Services Employees' Agreement 1991	39
River Rooster Broome Agreement No. AG 271 of 1996	34
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Title of Industrial Agreements—*continued*	Clause No.
South Metropolitan Youth Link (Inc.) Agreement 1997	20
South Perth Food Mart and SDA Agreement 2002	32
Supa Valu Capel and SDA Agreement 2002	32
Supa Valu Dongara and SDA Agreement 2002	32
Supa Valu Hamilton Hill and SDA Agreement 2002	32
Supa Valu High Wycombe and SDA Agreement 2002	32
Supa Valu Huntingdale and SDA Agreement 2002	32
Supa Valu Innaloo and SDA Agreement 2002	32
Supa Valu Kelmscott and SDA Agreement 2002	32
Supa Valu Ocean Reef and SDA Agreement 2002	32
Supa Valu Stirling and SDA Agreement 2002	32
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Three Springs General Store and SDA Agreement 2002	32
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Trade Winds Supermarket and SDA Agreement 2002	32
Wundowie One Stop and SDA Agreement 2002	32
Wyndham Supermarket and SDA Agreement 2002	32
York Mini Mart and SDA Agreement 2002	32

SCHEDULE B

(1) Subject to the provisions of this clause, in addition to the rates prescribed in the wages clause of this award, an employee shall be paid the following weekly allowances when employed in the towns prescribed hereunder. Provided that where the wages are prescribed as fortnightly rates of pay, these allowances shall be shown as fortnightly allowances.

TOWN	PER WEEK
Agnew	$18.70
Argyle	$49.50
Balladonia	$19.00
Barrow Island	$32.20
Boulder	$7.90
Broome	$30.00
Bullfinch	$8.80
Carnarvon	$15.30
Cockatoo Island	$32.90
Coolgardie	$7.90
Cue	$19.20
Dampier	$26.00
Denham	$15.30
Derby	$31.20
Esperance	$5.50
Eucla	$20.90
Exmouth	$27.20
Fitzroy Crossing	$37.80
Goldsworthy	$16.40
Halls Creek	$43.40
Kalbarri	$6.60
Kalgoorlie	$7.90

TOWN—*continued*	PER WEEK
Kambalda	$7.90
Karratha	$31.10
Koolan Island	$32.90
Koolyanobbing	$8.80
Kununurra	$49.50
Laverton	$19.10
Learmonth	$27.20
Leinster	$18.70
Leonora	$19.10
Madura	$20.00
Marble Bar	$47.70
Meekatharra	$16.50
Mount Magnet	$20.60
Mundrabilla	$20.50
Newman	$17.90
Norseman	$16.30
Nullagine	$47.60
Onslow	$32.20
Pannawonica	$24.30
Paraburdoo	$24.20
Port Hedland	$25.90
Ravensthorpe	$9.90
Roebourne	$35.80
Sandstone	$18.70
Shark Bay	$15.30
Shay Gap	$16.40
Southern Cross	$8.80
Telfer	$44.00
Teutonic Bore	$18.70
Tom Price	$24.20
Whim Creek	$30.90
Wickham	$29.90
Wiluna	$19.00
Wittenoom	$42.20
Wyndham	$46.50

(2) Except as provided in subclause (3) of this clause, an employee who has:

(a) a dependant shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependant shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.

(3) Where an employee:

(a) is provided with board and lodging by his/her employer, free of charge; or

(b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;

such employee shall be paid $66^{2}/_{3}$ per cent of the allowances prescribed in subclause (1) of this clause.

(4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

(ii) a child where there is no spouse or defacto partner;

who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.

(b) "Partial Dependant" shall mean a "dependant" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

(9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

FULL BENCH—Appeals against decision of Commission—

2008 WAIRC 00365

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2008 WAIRC 00365
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		SENIOR COMMISSIONER J H SMITH
HEARD	**:**	FRIDAY, 30 MAY 2008, TUESDAY, 17 JUNE 2008
DELIVERED	**:**	TUESDAY, 17 JUNE 2008
FILE NO.	**:**	FBA 6 OF 2008
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
		Appellant
		AND
		DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
		Respondent

Summary of Reasons for Decision for the Media/Public

Purpose and Limitations of the Summary

1. In accordance with the practice of the Western Australian Industrial Relations Commission, in certain cases of public interest, the Commission has prepared a Summary to accompany the reasons for decision that are to be delivered and published today.

2. It must be emphasised however that the Summary forms no part of the reasons for decision. The Summary is intended to assist in understanding the principal conclusions reached by the Full Bench but is necessarily incomplete. The only authoritative statement of the reasons of the Full Bench is the published reasons. The summary is not intended to be a substitute for the reasons of the Full Bench or to be used in any later consideration of the reasons.

3. The published Reasons for Decision and this Summary will be available on the Commission's website at http://www.wairc.wa.gov.au.

Facts

4. Since September 2007 the Department of Education and Training (the DET) and the State School Teachers Union of WA (Inc) (the SSTU) have been negotiating for an enterprise bargaining agreement to replace one then due to expire on 1 March 2008.

5. On 10 January 2008 the DET lodged an application with the Commission to initiate a bargaining period for a replacement agreement and the SSTU agreed to participate in this.

6. On 21 February 2008 the SSTU issued a directive to its members to stop work on the morning of 28 February 2008 for the purpose of attending meetings to receive an update on negotiations and to "consider member responses to negotiations".

7. On 25 February 2008 and on the application of the DET the Commission convened a conciliation conference. The Commission ordered that the stop work meeting directed to occur on 28 February 2008 not take place. It also ordered the SSTU, "its officers, employees and members are not to hold any further stop work meetings in relation to the negotiations for a new agreement whilst this order remains in force".

The Appeal

8. An appeal against the order was filed by the SSTU on 17 March 2008.

9. There were three grounds of appeal.

10. The appeal was heard on 30 May 2008 and the Full Bench of the Commission reserved its decision.

The Arguments of the SSTU and the DET

11. The appellant argued, in summary, that the order could not or should not have been made in the terms that it was. It was submitted the Commission could not, based on the information before it, properly form the view that an order so broad, in the classes of people, subject matter and time period it covered, could prevent the deterioration of industrial relations.

12. It was also argued that the Commission did not have the power to make an order against the officers, employees and members of the SSTU as opposed to the union itself.

13. The DET argued that the Commission had a discretion about whether and what order it should make about stop work meetings. It was submitted that the making of the order against the SSTU did not exceed what was appropriate in the circumstances, especially when an application could be made to vary it.

14. On the issue of the order being made against the officers, employees and members of the SSTU the DET argued that if this was an error, the order could simply be amended.

The Decision of the Full Bench

15. The Full Bench today published its reasons for decision and issued a minute of proposed order. The Full Bench decided the appeal should be allowed but only on the basis that the order should not have been made against the officers, employees and members of the SSTU.

16. The members of the Full Bench each published separate reasons for decision.

17. The Full Bench was unanimous in concluding the order was not unacceptably broad in its application to the SSTU. Each member of the Full Bench held the Commission, on the information before it, could properly decide that the order could prevent the deterioration of industrial relations between the SSTU and the DET.

18. Acting President Ritter in deciding the order was not unacceptably broad against the SSTU said in his reasons that it should: "be firmly borne in mind that the making of the order by the Commission involved the exercise of a discretion in which the Commissioner was seized of the industrial matter and was best placed to assess what orders were required to facilitate conciliation. The Commissioner could see and hear what the parties said and how they acted, get an overall sense of the industrial atmosphere and was able to assess what would or would not prevent the deterioration of industrial relations".

19. Chief Commissioner Beech said: "It follows that the order is not impermissibly broad. Rather, it is a matter within the discretion of the Commission whether to order that during negotiations no further stop work meetings be held. It does not order that no industrial action be taken during negotiations. However, stop work meetings evidently have a particular effect because the Commission had reached the conclusion that the stop work meeting to occur on 28 February 2008 should not occur because of its impact on the students and within the context of the concern of the Department that the holding of stop work meetings as such will impact upon the Department's legislative responsibilities. If that is true of one stop work meeting programmed for 28 February 2008, it is not unreasonable to conclude that the same conclusion would apply to any stop work meeting in the future, not just the one proposed".

20. Senior Commissioner Smith in her reasons reached similar conclusions to the Acting President and the Chief Commissioner.

21. The Full Bench upheld the appeal however on the limited basis that the Commission did not have the power to make an order against the officers, employees and members of the SSTU. On this issue the Chief Commissioner and the Senior Commissioner agreed with the reasons of the Acting President. His Honour decided the Commissioner could only make orders against the SSTU which was the party to the conference but not its officers, employees and members who were each different legal entities to the union.

22. Ritter AP also said the order was too broad in its possible application to the classes of people named. His Honour said this was because for example, the "order would apply to a meeting between three teachers at one school who stopped work for half an hour one month after the order was made to discuss the present state of the "negotiations for a new agreement"".

Outcome and Minute of Proposed Order

23. The Full Bench decided the order could be remedied by a variation so that it only applied to the SSTU.

24. A minute of proposed order issued to allow the appeal and vary the order made.

2008 WAIRC 00364

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2008 WAIRC 00364
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		SENIOR COMMISSIONER J H SMITH
HEARD	**:**	FRIDAY, 30 MAY 2008
DELIVERED	**:**	TUESDAY, 17 JUNE 2008
FILE NO.	**:**	FBA 6 OF 2008
BETWEEN	**:**	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
		Appellant
		AND
		DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner J L Harrison**
Citation	**:**	**2008 WAIRC 00121**
File No	**:**	**C 4 of 2008**

CatchWords:

Industrial Law (WA) – appeal and application pursuant to s49(2a) of the *Industrial Relations Act 1979* (WA) for leave to appeal against order of the Commission made at s44 compulsory conference – school teachers – bargaining for a new industrial agreement – order to cease industrial action in the form of stop work meetings - jurisdiction to make orders under s42E and 44(6) – nature and extent of jurisdiction – meaning of "matter in question" - whether order made in the terms used would prevent the deterioration of industrial relations – nature of s44 proceedings - discretionary order - prospect of variation of order - whether reasonable basis for the opinion upon which the order was based – power of Commission to make orders binding officers, members and employees of union – effect of registration under s60(1) – organisation a corporate body - organisation a separate legal entity from its members - Commissioner erred - appeal allowed - order varied

Legislation:

Industrial Relations Act 1979 (WA) – s6(c), s7, s26, s27, s29, s41, s41(1), s42, s42(1), s42B(1), (2), (3), s42D, s42E, s42H, s42L, s44, s44(1), (5a), (6), (6)(ba), (6)(bb), (6a), (7), s49(2a), s60, s60(1), (2), s61

Mines Safety and Inspection Act 1994 (WA) – s74

Result:

Appeal allowed.

Representation:

Counsel:

Appellant	:	Mr T Borgeest (of Counsel), by leave
Respondent	:	Mr R Andretich (of Counsel), by leave

Solicitors:

Appellant	:	Slater and Gordon, Lawyers
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Amalgamated Metal Workers' and Shipwrights Union of Western Australia v Robe River Iron Associates (1989) 69 WAIG 985

Commissioner of Police v Ryan (2007) NSWCA 196

Construction, Forestry, Mining and Energy Union v Clarke (2006) 149 IR 224

Construction, Forestry, Mining and Energy Union v Clarke (2007) 164 IR 299

CSA v Shean (2005) 85 WAIG 2993

Fazio v Interim Advance Corporation Pty Ltd [2007] WASC 108

Gas Lighting Improvement Company Ltd v IRC [1923] AC 723

Hamilton v Whitehead (1988) 166 CLR 121

Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service (2008) WAIRC 00215

Hobart Bridge Company Ltd v FCT (1951) 82 CLR 372

House v The King (1936) 55 CLR 499

Mar Mina (SA) Pty Ltd v City of Marian [2008] SASC 120

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

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611

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

Quan v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 764

R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 990

RRIA v AMWSU and Others (1989) 69 WAIG 1873

Salomon v Salomon & Co Ltd [1897] AC 22

Tesco Supermarkets Ltd v Nattrass (1972) AC 153 at 170, *Hamilton v Whitehead* (1988) 166 CLR 121

The King v Connell and Another; Ex parte The Hetton Bellbird Collieries Ltd and Others (1944) 69 CLR 407

The Registrar of the Western Australian Industrial Relations Commission v The State School Teachers' Union of W.A.(Inc) (2008) 88 WAIG 333

Thiess Pty Ltd and Others v The Automotive, Food, Metals, Engineering, Printing & Kindred Union of Workers - Western Australian Branch and Others (2006) 86 WAIG 2495

Case(s) also cited:

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1998) WAIRC 306 of 1988

Reasons for Decision

RITTER AP:

Introduction

1 This is an application for leave to appeal, and an appeal if leave be granted, under s49 of the *Industrial Relations Act 1979* (WA) (*the Act*). For ease of reference I will simply refer to it as an appeal. The appeal is against an order of the Commission made on 25 February 2008. Related proceedings for the "enforcement" of a contravention of that order have been heard and determined (*The Registrar of the Western Australian Industrial Relations Commission v The State School Teachers' Union of W.A. (Inc)* (2008) 88 WAIG 333 (*Re SSTU*)). At that time the present appeal, filed on 17 March 2008, was pending.

The Application to the Commission

2 The respondent applied to the Commission on 22 February 2008 for a conference pursuant to s44 of *the Act*. The application was addressed to the appellant. The relevant subsections of s44 are set out later. The grounds on which the application was made were set out in a schedule. The terms of the schedule are significant to the grounds of appeal and were as follows:

> "On 21 September 2007, the Respondent served the Applicant with its log of claims for the replacement of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* which is due to expire on 1 March 2008. An initial offer was made by the Applicant on 2 November 2007. The Respondent formally rejected this offer on 7 November 2007.
>
> On 4 December 2007, the Applicant presented its second offer to the Respondent. On 24 December 2007, the Respondent advised that its membership had rejected the Department's offer.
>
> On 10 January 2008, the Applicant lodged an application with the Western Australian Industrial Relations Commission to initiate bargaining for a replacement agreement pursuant to the good faith bargaining provisions in the *Industrial Relations Act 1979*. The Respondent agreed to bargain in good faith in accordance with the Act as indicated via Form GFB2, lodged on 31 January 2008.
>
> The parties recommenced negotiations on 24 January 2008 and have met weekly since then. During this time, the parties have engaged in constructive negotiations. The Applicant claims that negotiations at this stage are not exhausted. Similarly, the Respondent has not at any time indicated that it regards negotiations as being exhausted. Further weekly meetings have been scheduled. At the next meeting, the parties are scheduled to discuss items such as possible changes to the salaries structure, behaviour management and increased flexibility.
>
> At the initial meeting in 2008, the Applicant sought an assurance from the Respondent that there would be no industrial action as negotiations had recommenced but no such assurance was forthcoming. The Respondent's "Directive One" (Attachment 1) has been in place since the beginning of Term One this year.
>
> At a negotiation meeting on 20 February 2008, the Applicant raised the Directive One industrial action with the Respondent and requested that such industrial action cease. No response was provided at this time.
>
> On 21 February 2008, the Respondent issued "Directive Two" (Attachment 2) requiring members to stop work on the morning of 28 February 2008.
>
> Industrial action at this stage of negotiations is not in the public interest. The Applicant has a legislative duty to ensure the safety and welfare of students who are required to attend school. The industrial action proposed by the Respondent will seriously jeopardise the Applicant's capacity to fulfill its legislative obligations.
>
> The Applicant is seeking a recommendation/directive or if necessary an order to immediately cease all industrial action." (Emphasis in original)

The Attachments to the Application

3 Attachment 1 was in fact six documents. They were:

(a) "EBA 2008 Update" dated 31 January 2008. As described in the schedule it contained Directive 1.

(b) "EBA 2008 Update" dated 30 January 2008. This was attached to (a) and headed "Agreement Not Settled: Member Action Phase One Commencing 4 February 2008". It contained "Guidelines" for the implementation of Directive 1 and concluded: "Depending on progress in EBA negotiations members will be advised to undertake further action, as directed".

(c) This was a pro forma "Term 1 2008 Member Action Strategy Form" headed to the "Attention" of the General Secretary of the appellant.

(d) "EBA Update 2008" dated 7 February 2008 setting out "Negotiations Update", "Teacher Shortage Initial Report" and a clarification of the Appellant's position about Directive 1.

(e) "EBA Update 2008" dated 12 February 2008 containing a clarification to Directive 1 entitled "Configuration of the School Day".

(f) "EBA Update 2008" dated 18 February 2008 containing a note about Directive 1 for "Union Reps" to seek to have placed in their school newsletter.

4 Attachment 2 was an "EBA Update 2008" dated 21 February 2008 containing Directive 2 and asking all "Union Reps" to ensure all members received a copy.

The Section 44 Conference

5 The conference took place on 25 February 2008. As is the usual process, there was no sworn testimony or transcript. The order was made on the same day.

The Facts and the Commissioner's Reasons for Decision

6 The Commissioner's reasons were set out in the preamble and recitals to the order. The Commissioner restated what was contained in the application and then referred to information and submissions which had been put before her.

7 In my reasons in *Re SSTU* at [13] – [20] I set out a summary of this part of the Commissioner's reasons. These paragraphs are as below, except for the last sentence of [20]:

> "13 The DET argued that industrial action at this stage of negotiations was unwarranted and not in the public interest as the parties had participated in regular meetings since 24 January 2008 to finalise a new industrial agreement, significant progress had been made between the parties and further meetings were planned to take place.
>
> 14 The DET argued that Directive 1 constituted industrial action. The DET also argued it had a legislative duty to ensure the safety and welfare of students who are required to attend school and the industrial action proposed to take place on 28 February 2008 "*will seriously jeopardise [the DET's] capacity to fulfil this obligation*".
>
> 15 The DET sought an order that Directive 1 and Directive 2 be lifted and the cessation of all current and future industrial action to be undertaken by the respondent and its members in support of a new industrial agreement.
>
> 16 The DET argued "*the foreshadowed "stop work" meeting on 28 February 2008 would present a major safety risk to students and would adversely impact on the learning programmes of the 250,000 students in Western Australian Government Schools as:*
>
> - *[The DET] was unsure exactly how many teachers would attend the stop work meeting and early indications are that no staff may be in attendance at a number of schools and it would therefore be logistically difficult to supervise all students who attended schools on 28 February 2008;*
> - *country schools where teachers are not in attendance will be difficult to staff given geographic constraints;*
> - *buses and cross-walk attendants will not be available to assist students arriving at schools in the middle of the day;*
> - *parents would be seriously inconvenienced by teachers no being available to teach their children.*"
>
> 17 The DET also said it was in a position to give a response to the respondent's revised salary claim the following week. This was to be evaluated in light of the whole package to be negotiated with the respondent. Additionally the DET was committed to having ongoing discussions with the respondent to finalise an industrial agreement, but this was open to being reviewed in light of the industrial action then taking place and that which was scheduled.
>
> 18 The respondent's position was summarised as follows. The respondent argued the "*stop work*" meeting was necessary as:
>
> "• *the respondent's members required first hand knowledge about the status of negotiations with [the DET] for a new industrial agreement given the delays which have already occurred with respect to the negotiations between the parties;*
> - *the respondent's members were not taking industrial action lightly given its obligations to students;*

- *the respondent's members will return to their respective workplaces after the stop work meeting finished at 10.30am.*"

19 The respondent also maintained their members' actions were supported by some parents who would not be sending their children to school. The respondent conceded however that negotiations between the parties for a new industrial agreement had not been exhausted.

20 The Commission said the matter before it was an industrial matter as it "*relates to issues pertaining to the employment relationship between [the DET] and the respondent's members and the rights of an organisation* …". The Commission also said it was of the view that it had jurisdiction to issue the orders sought pursuant to s44 of *the Act.* …"

8 The fourth last and the last two paragraphs of the Commissioner's reasons are worth setting out in full as follows:

> "WHEREAS having heard from the applicant and the respondent and when taking into account equity and fairness and the substantial merits of this case, the objects of the Act and the provisions of s42B(3) and s42E of the Act with respect to the obligation on parties to bargain in good faith and the Commission's powers to order a negotiating party to refrain from doing any particular thing, the Commission has formed the view that the industrial action contemplated under Directive 2 should not occur; and
>
> …
>
> WHEREAS in reaching this conclusion the Commission has taken into account that the interests of those persons directly involved in this dispute, particularly students, will be compromised if the proposed stop work meeting takes place on 28 February 2008;
>
> NOW THEREFORE having heard Mr J Ridley and Ms S O'Neill on behalf of the applicant and Ms A Gisborne and Mr D Kelly on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(i) and (ii) and s44(6)(bb)(i) and s42 of the Act, hereby orders …"

The Order

9 The order made by the Commission was:

> "1. THAT the respondent, its officers, agents, employees and members lift Directive 2 and cease the foreshadowed industrial action, in the form of a stop work meeting to be held on 28 February 2008 in relation to the negotiation of a new agreement.
>
> 2. THAT the respondent, its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and the lifting of Directive 2 and direct its members to comply with this order.
>
> 3. THAT the respondent, its officers, employees and members are not to hold any further stop work meetings in relation to the negotiations for a new agreement whilst this order remains in force.
>
> 4. THAT the parties are to hold further discussions prior to 29 February 2008 with a view to resolving the issues in dispute with respect to a new agreement and a report back conference will be held in the Commission on Friday 29 February 2008 to review the progress of these negotiations.
>
> 5. THAT this order is to remain in force until revoked or varied by the Commission.
>
> 6. THAT both parties have liberty to apply to vary this order."

10 The major focus of the appeal was order 3. This is because the period of practical operation of orders 1, 2 and 4 had expired by the time the appeal was heard. Orders 5 and 6 are also relevant as they feed into the arguments of the parties about whether the Commission was in error in making order 3.

The Grounds of Appeal

11 A schedule to the notice of appeal set out the grounds of appeal and for leave to appeal if leave was required as follows:

> "**Grounds of Appeal**
>
> 1. The learned Commissioner erred by making an order in the terms of paragraph 3 of the decision, without giving any consideration, or proper consideration, as to whether or not an order in these terms would prevent the deterioration of industrial relations in respect of the matter in question.
>
> 2. In ordering that there may be no industrial action in the form of stop work meetings, at any time during the bargaining for a new industrial agreement, the Commission had no regard or insufficient regard to
>
> (a) whether the respondent had been or was, at the time of the making of the order, bargaining in good faith;
>
> (b) the effect of the order upon the bargaining power of the appellant;
>
> (c) whether the making of the order generally, and its paragraph (3) in particular, might cause rather than prevent the deterioration of industrial relations in respect of the matter in question,
>
> and as such the making of the order contained in paragraph 3 of the decision was so unreasonable as to constitute a failure properly to exercise the jurisdiction.
>
> 3. The learned Commissioner erred by purporting to make an order that was expressed to be binding upon the officers, employees and members of the appellant, as distinct from the appellant, where any powers available under section 42E, or paragraphs 44(6)(ba) and (bb), were exercisable against the appellant only.
>
> **Leave to Appeal**
>
> 4. The appellant seeks leave to appeal from the order (which is understood by the appellant to be a finding for the purpose of subsection 49(2a) of the Act) on the ground that the matter is of such importance that, in the public interest, an appeal should lie. The matter is of sufficient importance because it concerns the regulation of bargaining for a very large number of public school teachers and administrators, and it concerns the proper limits of the powers, or the manner of their proper exercise, available to the Commission in making orders under section 44 of the Act and exercising discretion pursuant to ss 42B and 42E."

12 The grounds included complaints about the operation of order 3 to the appellant's officers, employees and members. The respondent did not argue the appellant lacked the standing to make this submission.

Leave to Appeal

13 To some extent the question of whether leave to appeal is required is wrapped up with an understanding of what the "matter" or "matter in question" was for the purposes of s44(6) of *the Act*. This was the subsection relied on by the Commissioner to make the order. The subsection is quoted later. I will also refer to this aspect of the appeal below. In my opinion leave to appeal under s49(2a) of *the Act* is required. This is because the order was a "finding" as defined in s7 of *the Act*.

14 That is the order did not "finally decide, determine or dispose of the matter to which the proceedings relate". There are two reasons for this. The first is that in its terms the order provided for the continuation of the proceedings and the possibility of revocation or variation of the order. The second, as will be later elaborated, is that the "matter to which the proceedings relate" were the negotiations for a new industrial agreement. That "matter" was not finally decided by the order made by the Commission.

15 Section 49(2a) of *the Act* provides that an appeal "does not lie … unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie". In *Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch* (2005) 86 WAIG 247 at [13]-[14] I described the public interest requirement in the following way, with the agreement of Gregor SC and Smith C (as the Senior Commissioner then was):

> "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."

16 In my opinion the present appeal meets the public interest requirement. This is because it raises important questions of the nature and extent of the jurisdiction to make orders against registered organisations under s42E and s44(6) of *the Act*. In addition there is a "public interest" in knowing whether the Commission has the power to make orders under s44(6) which bind the officers, employees and members of an organisation. As I will later elaborate the jurisdiction to make orders under s44 of *the Act* is a significant aspect of the role and the way the Commission functions. Consideration of whether and what orders to make often occurs within a limited timeframe and when industrial action is contemplated, threatened or occurring. Orders then made or not made can, as in this instance, have an important impact on large sectors of the workforce and the public. Also, as in this case, they can lead to an enforcement application. Accordingly there is a public interest in the Full Bench deciding whether the jurisdiction under s44(6) of *the Act* extends as far as the order which was made.

17 Accordingly the appeal ought to "lie" and an appropriate order made.

The Statutory Framework

18 The following sections of *the Act* are relevant to an understanding of the negotiations and bargaining which the parties were engaging in at the time the order was made and the jurisdiction of the Commission to make that order.

(a) Industrial Agreements and Good Faith Bargaining

19 The parties were endeavouring to reach a new industrial agreement for registration pursuant to s41 of *the Act*. Section 42 provides for the initiation of bargaining for an industrial agreement. As set out in my reasons in *Re SSTU* the parties were within a bargaining period at the time the order was made.

20 Section 42B of *the Act* provides for good faith bargaining for an industrial agreement. For present purposes s42B(1)-(3) are relevant as follows:

> "**42B. Good faith bargaining for industrial agreement**
>
> (1) When bargaining for an industrial agreement, a negotiating party shall bargain in good faith.
>
> (2) Without limiting the meaning of the expression, **"bargaining in good faith"** by negotiating parties includes doing the following things —
>
> (a) stating their position on matters at issue, and explaining that position;
>
> (b) meeting at reasonable times, intervals and places for the purpose of conducting face-to-face bargaining;
>
> (c) disclosing relevant and necessary information for bargaining;
>
> (d) acting honestly and openly, which includes not capriciously adding or withdrawing items for bargaining;
>
> (e) recognising bargaining agents;
>
> (f) providing reasonable facilities to representatives of organisations and associations of employees necessary for them to carry out their functions;
>
> (g) bargaining genuinely and dedicating sufficient resources to ensure this occurs;
>
> (h) adhering to agreed outcomes and commitments made by the parties.

(3) The Commission may, having regard to the circumstances in which the industrial action occurs, determine that engaging in industrial action is a breach of the duty to bargain in good faith."

21 From the terms of s42B(3) the engaging in industrial action is not necessarily contrary to the duty to bargain in good faith. "Industrial action" is defined broadly in s7 of *the Act*. It includes any act done by a registered organisation for the purpose of compelling an employer "to accept any terms or conditions of employment or to enforce compliance with any demand relating to employment".

22 Section 42D of *the Act* also makes it clear that the requirement to negotiate in good faith does not require a party to enter into an industrial agreement.

23 Section 42E of *the Act* provides the Commission with powers of conciliation and arbitration to assist bargaining in the following terms:

"**42E. Conciliation and arbitration to assist bargaining**

(1) To assist parties to bargain for an industrial agreement, the Commission may exercise its powers as if it were endeavouring to resolve an industrial matter.

(2) Without limiting subsection (1) the Commission may make orders and give directions for the purpose of —

(a) ensuring that the negotiating parties bargain in good faith; and

(b) otherwise facilitating bargaining in good faith by negotiating parties.

(3) In particular, the Commission may order for the purposes of subsection (2) that a negotiating party do, or refrain from doing, any particular thing."

24 Section 42H of *the Act* gives the Commission the power to declare that a bargaining period has ended. This section is as follows:

"**42H. Commission may declare that bargaining has ended**

(1) If, on the application of a negotiating party, the Commission constituted by a single commissioner determines that —

(a) the applicant has bargained in good faith;

(b) bargaining between the applicant and another negotiating party has failed; and

(c) there is no reasonable prospect of the negotiating parties reaching an agreement,

the Commission may declare that the bargaining has ended between those negotiating parties.

(2) Despite section 49, no appeal lies from a declaration under subsection (1)."

25 Section 42L of *the Act* provides that bargaining which has been initiated under s42(1) ends when an industrial agreement is made or a declaration under s42H of *the Act* is made.

(b) Compulsory Conferences

26 Section 44 of *the Act*, which provides for compulsory conferences, is one of the linchpin provisions of *the Act* and the State industrial relations system. In this appeal the relevant subsections are s44(1), (5a), (6) and (7) which are as follows:

"**44. Compulsory conference**

(1) Subject to this section, the Commission constituted by a commissioner may summon any person to attend, at a time and place specified in the summons, at a conference before the Commission.

…

(5a) In endeavouring to resolve any matter by conciliation the Commission shall do all such things as appear to it to be right and proper to assist the parties to a conference under this section to reach an agreement on terms for the resolution of the matter.

(6) The Commission may, at or in relation to a conference under this section, make such suggestions and give such directions as it considers appropriate and, without limiting the generality of the foregoing may —

(a) direct the parties or any of them to confer with one another or with any other person and without a chairman or with the Registrar or a deputy registrar as chairman;

(b) direct that disclosure of any matter discussed at the conference be limited in such manner as the Commission may specify;

(ba) with respect to industrial matters, give such directions and make such orders as will in the opinion of the Commission —

(i) prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter;

(ii) enable conciliation or arbitration to resolve the matter in question; or

(iii) encourage the parties to exchange or divulge attitudes or information which in the opinion of the Commission would assist in the resolution of the matter in question;

(bb) with respect to industrial matters —

(i) give any direction or make any order or declaration which the Commission is otherwise authorised to give or make under this Act; and

(ii) without limiting paragraph (ba) or subparagraph (i), in the case of a claim of harsh, oppressive or unfair dismissal of an employee, make any interim order the Commission thinks appropriate in the circumstances pending resolution of the claim;

and

(c) exercise such of the powers of the Commission referred to in section 27(1) as the Commission considers appropriate.

…

(7) The Commission may exercise the power conferred on it by subsection (1) —

(a) on the application of —

(i) any organisation, association or employer;

(ii) the Minister on behalf of the State; or

(iii) an employee in respect of a dispute relating to his entitlement to long service leave;

or

(b) on the motion of the Commission itself whenever industrial action has occurred or, in the opinion of the Commission, is likely to occur."

27 Section 44 embodies principal object 6(c) of *the Act* which is as follows:

> "**6. Objects**
>
> The principal objects of this Act are —
>
> …
>
> (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality…"

28 During the hearing of the appeal there was some debate about what the "matter" and/or the "matter in question" was for the purpose of s44(6) of *the Act*, in the application before the Commission.

29 The application was given No C 4 of 2008, which was the same number that had been given to the respondent's application for the initiation of a bargaining period. This of itself though is not particularly relevant. I will otherwise consider this issue later.

Comments on the Schedule to the Application

30 In my opinion, for present purposes, the following points in the schedule are salient:

(a) The appellant served its log of claims on 21 September 2007.

(b) The (present) respondent's application to initiate bargaining was filed on 10 January 2008.

(c) The appellant agreed to bargain in good faith in accordance with documents filed on 31 January 2008.

(d) Negotiations commenced on 24 January 2008 and after that time there had been regular meetings.

(e) At the first meeting in 2008 the respondent sought but had not received an assurance that "there would be no industrial action as negotiations had recommenced…".

(f) Directive 1 had been in place since 4 February 2008.

(g) At a meeting on 20 February 2008 the respondent requested that the Directive 1 industrial action cease but received no assurance it would.

(h) Directive 2 was issued on 21 February 2008. Directive 2 was specifically about a stop work meeting on 28 February 2008.

(i) The assertion by the respondent was that industrial action was not in the public interest "at this stage of negotiations …".

(j) Additional weekly meetings had been scheduled.

(k) The respondent sought a "recommendation/directive or if necessary an order to immediately cease all industrial action".

31 The immediate context of the application was the implementation of Directive 1 and the proposed stop work meeting on 28 February 2008. More broadly however the application should be seen in the overall context of the negotiations for a new agreement including the unsuccessful attempts by the respondent to seek assurances from the appellant to not proceed with industrial action. I also note however that as at the time of the conference there was no directive about any regular, rolling or other stop work meetings.

Additional Facts from the Reasons

32 Due to the nature of a s44 conference additional information can be put forward by the parties and recorded in the order. That occurred on this occasion. In my opinion the following are also material:

(a) The stop work meeting was scheduled for three days after the conference and in the middle of a short timeframe within which the respondent was going to consider putting another offer to the appellant.

(b) The respondent's commitment to having ongoing discussions to finalise an industrial agreement "might be reviewed in light of industrial action currently taking place or proposed to take place". It is relevant that although the Commissioner did not characterise Directive 1 as "industrial action", the respondent did. Accordingly it can be inferred that the position of the respondent just set out applied to both Directives.

(c) The respondent emphasised its legislative duty to ensure the safety and welfare of school students and submitted there would be a "major safety risk" to students and an adverse impact on learning programmes if there was a stop work meeting on 28 February 2008. It can be inferred however that there would be similar concerns about any subsequent stop work meetings.

(d) The appellant's submissions were directed to the necessity for the stop work meeting scheduled for 28 February 2008 taking place. They did not address the possibility of subsequent stop work meetings. (I note however that the appellant's counsel specifically eschewed any assertion that there had been a denial of procedural fairness by the Commissioner making an order prohibiting subsequent stop work meetings).

(e) According to the Commissioner's reasons the appellant did not dispute the respondent's version of the facts as to what had occurred at the meetings between the parties.

The Stated Basis for the Making of the Order

33 The Commissioner said she had the jurisdiction to "issue the orders sought pursuant to s44 of the Act …".

34 From the three paragraphs of the reasons I quoted earlier:

(a) The Commissioner formed the view that the industrial action contemplated under Directive 2 should not occur.

(b) The Commissioner found there would be a compromise of those things listed in the penultimate paragraph if the proposed stop work meeting took place on 28 February 2008.

(c) In the last paragraph the Commissioner specifically referred to orders being made to "prevent the further deterioration of industrial relations". These are an adaptation of the words used in s44(6)(ba)(i), which comprise the jurisdictional foundation for the making of orders under that subparagraph.

Ground 1

35 The first ground of appeal is framed in terms of a failure to give consideration or proper consideration as to whether or not order 3 would prevent the deterioration of industrial relations in respect of the "matter in question".

36 The appellant argued that pursuant to the application to the Commission and the submissions made the "matter in question" was the asserted industrial matter/action constituted by Directives 1 and 2 and not the broader dispute and negotiations between the parties about a new industrial agreement.

37 With respect I do not accept this contention. Whilst the application for the compulsory conference was made about Directives 1 and 2 and in close proximity to the stop work meeting the subject of Directive 2, the broader context was clearly the industrial matter constituted by the negotiations between the parties for a new agreement. In my opinion that was the "matter in question".

38 In considering this submission it is also important to emphasise again the nature of a s44 conference and the role of the Commission in making orders pursuant to s44(6). As I set out earlier a compulsory conference under s44 is one of the linchpin sections of *the Act*. It provides for a party to expeditiously bring an industrial matter to the Commission to enable it to quickly get to grips with the heart of the dispute and assist the parties in conciliation or to undertake arbitration.

39 In conducting conciliation conferences, the flexible procedures and processes of the Commission contained in s26 and s27 of *the Act* have considerable importance and operation (cf *Health Services Union of Western Australia (Union of Workers) v Director General of Health in Right of the Minister for Health as the Metropolitan Health Service, the South West Health Board and the WA Country Health Service* (2008) WAIRC 00215 per Ritter AP at [160]-[175]).

40 Specifically, s26(2) allows the Commission to grant relief or redress without restriction as "to the specific claim made or to the subject matter of the claim". Whilst it is recognised that this subsection cannot add to the jurisdiction of the Commission, it does mean that in the present case the Commission had jurisdiction to make an order impacting upon the conduct of the negotiations of the parties overall, whether or not that was the specific subject matter of the application for a compulsory conference. As set out earlier, this, together with the content of orders 5 and 6 indicates the order was a "finding" as defined in s7 of *the Act* and therefore leave to appeal was required under s49(2a).

41 I would not therefore uphold this ground of appeal based upon any narrow view of what the "matter in question" was.

42 In arguing the ground the appellant's counsel took the Full Bench to each of the bases on which the Commission could have made orders under s42E or s44 of *the Act*.

43 It was argued that the order was not stated to be made on the basis and for the purpose of ensuring or facilitating bargaining in good faith. Accordingly the jurisdiction for the making of an order under s42E(2) of *the Act* had not been enlivened. It was also argued that the facts before the Commissioner and her reasons did not support, under this subsection, an order as broad as the one which was made.

44 The appellant then argued that none of the prerequisites existed under s44(6) of *the Act* to enable orders to be made. This submission faces the obstacle of the breadth and flexibility that s44(6) provides to the Commission. Relevantly:

(a) Section 44(6) allows the Commission to "give such directions as it considers appropriate".

(b) As earlier described s44(6)(ba)(i) allows the Commission to make orders which will "in the opinion of the Commission … prevent the deterioration of industrial relations in respect of the matter in question until conciliation or arbitration has resolved that matter".

(c) Section 44(6)(ba)(ii) allows the Commission to make orders which will "in the opinion of the Commission…enable conciliation or arbitration to resolve the matter in question".

45 The ground of appeal is also met with the specific obstacle that the Commissioner expressed in the final paragraph of her reasons that the orders were made to "prevent the further deterioration of industrial relations".

46 Based upon this and the balance of her reasons I am not persuaded the Commissioner did not give any consideration to whether the orders would prevent the deterioration of industrial relations as asserted in this ground. I would therefore not uphold it on this basis.

47 The part of the ground which is based upon a lack of "proper consideration" of whether an order "in the terms made" would prevent the deterioration of industrial relations requires closer consideration. The appellant argued that neither the facts before the Commissioner nor her reasons could properly found the basis for the making of an order of the breadth that was made.

48 I accept the appellant's submission that, simply because the expressed reason for the making of the order was in the terms of s44(6)(ba)(i), this does not of itself defeat this aspect of the ground of appeal. This is because:

(a) The mere recitation of a statutory condition for the exercise of a power does not immunise the exercise of that power from appellate review.

(b) The reasons for decision about the exercise of the power can be considered to see if they demonstrate a proper foundation for the exercise of the power.

49 In analysing the Commissioner's reasons however the nature of s44 conferences should be taken into account. This was emphasised in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 990 by Nicholson J in the context of the duty to provide reasons for decision. His Honour said a s44 conference procedure is one characterised by great informality and the reasons are formulated in a setting in which there is "no obligation to maintain a record and in which the taking of evidence is either inappropriate or unlikely" (at 999). His Honour also pointed out that reasons were not inadequate merely because every process of reasoning was not set out.

50 Additionally in my opinion the observations in the joint reasons of Brennan CJ and Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 185 CLR 259 at 271-2 are also relevant. Although they were made in the context of judicial review of a decision of an administrative tribunal, the nature of s44 proceedings makes them applicable to an appeal against an order made thereunder. Their Honours said at 272 that "the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed" (footnote omitted).

51 It should also be firmly borne in mind that the making of the order by the Commission involved the exercise of a discretion in which the Commissioner was seized of the industrial matter and was best placed to assess what orders were required to facilitate conciliation. The Commissioner could see and hear what the parties said and how they acted, get an overall sense of the industrial atmosphere and was able to assess what would or would not prevent the deterioration of industrial relations. The Full Bench are simply unable to assess these important considerations in the same ways because of the nature of a s44 conference. The Full Bench should therefore be cautious before upholding an appeal against such an order.

52 It could only do so if there was an error in the exercise of the discretion of the type set out by four members of the High Court in the well known paragraph of *House v The King* (1936) 55 CLR 499 at 504-5. As there stated it is not sufficient to allow an appeal simply because the appellate body thinks it would have made a different order.

53 An error in the exercise of the discretion can occur if the decision-maker acts upon an incorrect principle, allows extraneous or irrelevant matters to guide or affect them, mistakes the facts, or does not take into account some material consideration. Additionally if the order made is "unreasonable" or "plainly unjust" an error may be inferred on the basis of a failure to properly exercise jurisdiction. Given the nature of a s44 conference and the advantages of the Commissioner over the Full Bench I have described I envisage that this situation might be rare.

54 If an error of the types described occurs, a successful appeal is not precluded because orders under s44(6) are couched in terms of giving directions "as it considers appropriate" or "orders as will in the opinion of the Commission" have the stated effects. This is because where the exercise of a power given to a court, tribunal or administrative decision-maker is based upon the formation of an opinion, this does not provide an unfettered discretion which cannot be the subject of appellate scrutiny and correction.

55 This proposition is supported by decisions made in the context of judicial review. In *The King v Connell and Another; Ex parte The Hetton Bellbird Collieries Ltd and Others* (1944) 69 CLR 407, Latham CJ at 430-2 emphasised that where the existence of an opinion was made a condition of the exercise of power, the legislation conferring that power is to be regarded as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. His Honour said this will not occur if there has been an error in the construction of a statute by the decision-maker as to the power the act confers on him, or the taking into account of irrelevant considerations.

56 These observations have been recently applied in for example *Quan v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 764, *Mar Mina (SA) Pty Ltd v City of Marian* [2008] SASC 120 and *Commissioner of Police v Ryan* [2007] NSWCA 196. In *Quan*, Jacobson J said at [37]-[38]:

> "**[37]** In *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133] Gummow J referred to the remarks of Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430. There the Chief Justice said that where the existence of an opinion is made a condition of the exercise of power, legislation confirming the power is treated as referring to an opinion which is such that it can be formed by a reasonable person who correctly understands the meaning of the law under which he or she acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.

> **[38]** The Chief Justice also said at 432 that what the Court does is to inquire whether the opinion required by the legislation has actually been formed. If the opinion was reached by misconstruing the terms of the relevant legislation then it must be held that the opinion required has not been formed."

Analysis of the Order

57 The following is relevant about the order:

(a) It purported to apply to the (present) appellant, its officers, employees and members.

(b) It prohibited "any further stop work meetings" about the subject matter which followed.

(c) The expression "stop work meetings" was not defined in the order. In the context of the application and reasons as a whole however it seems clear that it meant a meeting occurring during a time when the employees of the respondent should be at work. Thus the meeting would involve a stoppage of "work". The respondent's counsel embraced this proposition at the hearing of the appeal.

(d) The stop work meetings prohibited were in "relation to the negotiations for a new agreement whilst this order remains in force". The order therefore applied to "any" stop work meeting within this broadly stated purpose and a then unidentifiable period of time.

(e) The order was to remain in force up until any variation or revocation of the order by the Commission as contemplated in orders 5 and 6.

(f) The order did not prohibit other types of industrial action or the continuation of the conduct the subject of Directive 1.

58 The ground focuses on the "terms of the order" in its breadth of operation. In considering this, (a) above is relevant. The order purported to restrain not only the actions of the appellant but also, for example, all of its members. Whether the Commissioner had the jurisdiction or power to do this constituted ground 3. The terms of ground 1 however are broad enough to allow a review of the merits of this part of the order.

59 The order would apply to a meeting between three teachers at one school who stopped work for half an hour one month after the order was made to discuss the present state of the "negotiations for a new agreement". In my opinion this demonstrates the order was too broad in its possible application to all of the classes of people named.

60 The facts before the Commissioner and her reasons did not reasonably support such an order. The Commissioner could not properly form an opinion that an order of this breadth would or could serve the purpose of preventing the further deterioration of industrial relations between the parties or be appropriate in the context and at the time when it was made.

61 To that extent therefore I think the Commissioner erred.

62 This ground is not however limited in its scope to a consideration of only this part of the order. It also encompassed review of the length of time and the subject matter of the order insofar as it applied to the appellant.

63 As set out earlier in my opinion it is relevant that as at the date of the order there was no directive about subsequent stop work meetings. It is also relevant however that:

(a) The parties were in the middle of a bargaining period.

(b) Meetings had taken place and were scheduled to continue.

(c) The respondent was contemplating putting an offer to the appellant in the following week.

(d) Other industrial action had not been prohibited.

(e) The respondent's commitment to reaching an agreement "might be reviewed".

64 Although the Commission recorded that (d) was made in "in light of industrial action currently taking place and proposed to take place", I think it inappropriate to try and distinguish too finely between the stop work meeting directed for 28 February 2008 and any subsequent one.

65 This construction of the reasons was urged by the appellant's counsel. To accept this however would in my opinion insufficiently take into account the nature of a s44 conference, the need for quickly prepared reasons, the Commissioner's sense of the industrial atmosphere and the caution of the High Court as expressed in *Wu Shan Liang.*

66 The respondent would have the same or similar concerns about its legislative duties, the risks to students at state schools and educational programmes in any subsequent stop work meetings. It was no doubt these factors, amongst perhaps others, that were said to possibly cause the respondent to review its position to negotiate for a new agreement. Accordingly I do not think it can be established that the Commissioner in making order 3 as it applied to the appellant, did not have proper regard to "the deterioration of industrial relations in respect of the matter in question" in accordance with ground 1. If there was a possibility

that the respondent would cease negotiating because of a future stop work meeting, the Commissioner could properly have formed that view.

67 It is also relevant that the order expressly allowed for variation or revocation and that this could occur as early as the report back conference on 29 February 2008. I accept the submission of the appellant's counsel that this would not always save an order made in error, as the existence of an order has the potential to impose a burden or onus on a party wanting to have it varied or revoked. Additionally the order should be supportable on the facts and circumstances then before the Commissioner. In this case however I think that the presence of orders 5 and 6 did support the making of order 3 insofar as it applied to the appellant.

68 As I have said however in my opinion the order was impermissibly broad in its possible application to at least the members of the appellant. To this extent the Commissioner erred. In *House v The King* at 505 it was said that where there is an error in the exercise of a discretion, the appellate court may "exercise its own discretion in substitution …". I have therefore considered whether it is appropriate to do so. To some extent this point is wrapped up with ground 3. As I will state below in my opinion the Commissioner did not have jurisdiction to make the order against the officers, employees and members of the appellant. As I there discuss the order must to that extent at least be varied.

69 Given that error however, and the one identified under this ground, the Full Bench is also justified in reviewing the whole of order 3 in the way mentioned in *House v The King.* The reasons of their Honours at 505 make plain however that there is no requirement for the Full Bench to make any substituted order. It must decide whether it is appropriate to do so having regard to the error made and the facts and circumstances before the primary decision-maker.

70 The Commissioner could have justifiably confined the terms of the order to the report back conference on 29 February 2008 which was the subject of order 4. To limit, in duration, the scope of the order to that or some other definite and nearby date would have been appropriate in the context of Directive 2 and the then state of negotiations. The Commissioner could then have assessed the "state of play" and decided whether or not a continuation of the order was appropriate. This does not mean however that this was the only way the Commissioner should have made an order or that it was necessarily preferable to do so.

71 I am not persuaded that it is necessary to change order 3 from that which was made by the Commissioner as it applied to the appellant.

72 Ground 1 is established to the limited extent I have described, but this does not of itself require any amendment to the orders of the Commission.

Ground 2

73 This ground asserts that for the three reasons which are particularised the order was "so unreasonable as to constitute a failure properly to exercise the jurisdiction".

74 In my opinion there is an insufficient factual basis to establish any of the particulars to the ground.

75 With respect to particular 2(b) it may be readily accepted that the possibility of stop work meetings is part of the negotiating arsenal of the appellant which it might ordinarily wish to consider using. Also as I have said earlier, from the terms of s42B(3) of *the Act*, the engaging in "industrial action" which by its definition would include stop work meetings is not necessarily a breach of the duty to bargain in good faith. *The Act* does not provide for any ban upon an organisation or its members engaging in a stop work meeting apart from when ordered by the Commission.

76 The respondent's counsel submitted that engaging in a stop work meeting by the respondent's employees would involve a breach of their contracts of employment. I am not however in a position to assess this as all of the terms and conditions of employment of the respondent's employees were not put before the Commissioner or the Full Bench.

77 During the hearing of the appeal there was some discussion about the extent to which a "right to strike" has been recognised by the International Labour Organisation (ILO). The ILO is a specialised agency of the United Nations promoting amongst other things internationally recognised labour rights. In a note provided subsequent to the hearing, the appellant's counsel referred to the *ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise* (1948), ratified by Australia on 28 February 1974. It was submitted the guarantee of organisational autonomy in Article 3, read together with the definition of an "organisation" in Article 10, had "conventionally been interpreted so as to protect the right to strike, subject to exceptions and qualifications concerning such matters as essential services and the like".

78 The issue need not be considered further in this appeal. As the respondent's counsel pointed out during the hearing, no issues about ILO conventions were raised by the grounds of appeal.

79 I simply note that the meaning and scope of relevant international instruments are discussed in Gernigon B, Odero A & Guido H, 'ILO Principles Concerning the Right to Strike' (1998) 137 *International Labour Review* 441. The authors also point out that "the education sector" has not been found to be part of the exception which the above submission refers to (at 450).

80 In the Australian context, the relevant ILO conventions have been recently discussed in Fenwick C and Landau I, 'Work Choices in International Perspective' (2006) 19 *Australian Journal of Labour Law* 127 and Orr G and Murugesan S, 'Mandatory Secret Ballots Before Employee Industrial Action' (2007) 20 *Australian Journal of Labour Law* 272. As described by Orr and Murugesan at 280:

> "The principle of freedom of association extends beyond the bare right to associate, to the more instrumental freedoms of action to collectively bargain

> and to strike. That is, the ILO has found the ability to take industrial action to be necessarily implied by the freedoms of association and collective bargaining." (footnote omitted)

81 This could have some relevance to the Commission given that the principal objects of *the Act* in s6 include the promotion of freedom of association, the right to organise and collective bargaining. But no more should be said about the issue in this appeal.

82 Ground 2 is not established.

Ground 3

83 Ground 3 refers to the categories of people who were purportedly covered by order 3. It is submitted that any powers available under s42E of *the Act*, or s44(6)(ba) or (bb), were only exercisable against the appellant.

84 The type of orders expressly contemplated in s42E(2) of *the Act* can only be made against the "negotiating parties". In this instance they were the respondent and the appellant. In addition s44(6a) provides that an order made under s44(6)(ba) or (bb) binds only the "parties" to the relevant conference. Again the "parties" to the conference were the respondent and the appellant. Accordingly no orders could have been made against the officers, employees and members. These individuals are different legal entities to the appellant who was the "party".

85 The appellant is a registered organisation under *the Act*. As such pursuant to s60(1) of *the Act* it is "upon and during registration … a body corporate by the registered name, having perpetual succession and a common seal …". Under s60(2) an "organisation may sue and be sued and may purchase, take on lease, hold, sell, lease, mortgage, exchange, and otherwise own, possess, and deal with any real or personal property".

86 Section 61 of *the Act* provides that upon and after registration "the organisation and its members for the time being shall be subject to the jurisdiction of the Court and the Commission and to this Act …". Section 61 does not however broaden the jurisdiction of the Commission to make orders against the officers, employees and members of an organisation under s42E and s44(6).

87 As stated the incorporation of a registered organisation pursuant to s60(1) of *the Act* has the effect that the organisation exists as a separate legal entity from its officers, members and employees. In accordance with ordinary corporate law an organisation may only act through and by its officers, employees or agents. This does not as a matter of law however subsume the latter legal entity within, or equate it with, the legal entity constituted by the former.

88 As stated in paragraph [4.140] of LexisNexis *Ford's Principles of Corporation Law* (at 9 June 2008):

> "It is a basic doctrine of company law: that a company is a legal entity separate from the legal persons who became associated for its formation or who are now its members. There is a corporate veil obscuring the members most of the time.
>
> To say a company is a separate legal entity implies that rights and duties attaching to the company are not rights and duties of its directors or members…
>
> A representative statement of the separate entity doctrine is provided by Lord Sumner in *Gas Lighting Improvement Company Ltd v IRC* [1923]AC 723 at 740–1 (a passage relied on by Kitto J in *Hobart Bridge Company Ltd v FCT* (1951) 82 CLR 372)…
>
> Although a company or any other corporation aggregate is a legal entity separate from its members, certain acts of members can be attributed to it so as to be considered acts of the separate entity itself. For example, a company can decide to do certain things by its members passing a resolution at a general meeting. In *Salomon v Salomon & Co Ltd* [1897] AC 22 at 57; [1895–9] All ER 33; [1896] WN 160 Lord Davey said that a company is bound by a matter *intra vires* by the unanimous agreement of all its members."

89 In appropriate factual circumstances a particular person can be regarded as the directing mind and will and thus the embodiment of a company but that does not mean they are the same legal entity. The legal distinction between the person and the company remains (See *Tesco Supermarkets Ltd v Nattrass* (1972) AC 153 at 170, *Hamilton v Whitehead* (1988) 166 CLR 121 at 128 and *Fazio v Interim Advance Corporation Pty Ltd* [2007] WASC 108 at [101]).

90 In *Construction, Forestry, Mining and Energy Union v Clarke* (2006) 149 IR 224, Nicholson J at paragraphs [61]-[66] decided an organisation (the Union) registered under the *Workplace Relations Act 1996* (Cth) (*the WRA*) was not a "separate juristic entity" from its members. This was in the context of an allegation that "the Union" had contravened s170MN of *the WRA* by engaging in industrial action contrary to the terms of a certified agreement. "The Union's" members were referred to by Nicholson J as "the Employees". Their employer was referred to as "the Employer". "The Employer" was Barclay Mowlem Construction Ltd. "The Union's" members, (the Employees), were more specifically defined in the certified agreement

between "the Employer", "the Employees" and "the Union" to be the employees of "the Employer" engaged on the Thornlie Rail Extension Structural Work Project in "the classifications detailed in s3".

91 After considering the "constitutional arrangements of the Union" Nicholson J said at [61]:

> "… the Union consists of the Employees. The Union comprises every part of the Union. There is no constitutional concept of the Union on the one hand and the Employees on the other hand. The Employees are as much an integral part of the Union as the officials. The consequence is that if the Employees make a decision to go on strike, the Union is on strike."

92 There was a successful appeal against the decision of Nicholson J in *Construction, Forestry, Mining and Energy Union v Clarke* (2007) 164 IR 299. The aspect of the reasoning of his Honour that I have just referred to was not however discussed.

93 I considered the reasons of Nicholson J in *Clarke* in my reasons (agreed with by Smith C, as the Senior Commissioner then was, and Harrison C) in *Thiess Pty Ltd and Others v The Automotive, Food, Metals, Engineering, Printing & Kindred Union of Workers - Western Australian Branch and Others* (2006) 86 WAIG 2495. The context was whether a registered organisation was a "party" for the purpose of having the authority to refer a dispute about "pay" to the Occupational Safety and Health Tribunal under s74 of the *Mines Safety and Inspection Act 1994* (WA). At [64] and [65] I said:

> "64 In my opinion, neither s60 or s61 of *the Act* nor the constitutional rules of the respondent organisations leads to the conclusion that those organisations are a party to the dispute in terms of s74(2) of *the MSIA*, as held by the Tribunal. In my opinion, and with respect, s60 of *the Act* does not provide an organisation with the authority to act for parties in proceedings before the Tribunal or Commission. In my opinion, s60(1) simply provides for the incorporation of an organisation upon registration in the terms there specified. Section 60(2) of *the Act* provides that such an organisation "*may sue and be sued and may purchase, take on lease, hold, sell, lease, mortgage, exchange, and otherwise own, possess, and deal with any real or personal property*". In my opinion this section confirms, at least for the purposes of the Commission, that registered organisations have a separate legal personality from their members. (cf *CFMEU v Clarke*, referred to above.) Accordingly, registered organisations and their members are not, in effect, one and the same thing, as suggested in at least some of the submissions made by the respondents. As a separate legal entity, an organisation may represent its members but it is not the same legal entity as those members.
>
> 65 Section 61 of *the Act* provides that, upon registration, an organisation and its members are subject to the jurisdiction of the Industrial Appeal Court and the Commission. The section does not provide an organisation with the jurisdiction to bring or refer an application to the Commission or Tribunal. The authority for the taking of such a step must be found in other sections of *the Act* such as s29. In my opinion, the Tribunal was correct to say that the respondent organisations represented their members, but this does not lead to a conclusion that they are thereby a party to the disputes. In my opinion, there is a conceptual difference between being a party to a dispute and being a representative of a party or parties to such a dispute. Further, I do not accept the suggested distinction, relied upon by the AMWU, between a solicitor representing a client and union representing a member. (See [40] above). The union and the member may have coincident interests but this does not mean that the union is not separate from and representing the interests of its members, in disputes as to *MSIA* s74(2) entitlements, as opposed to being a party to the dispute."

94 As indicated above I remain of the opinion that this analysis is correct. Accordingly I accept the submission of the appellant that the Commissioner could not as a matter of law make an order extending to the "officers, employees and members" of the respondent.

95 Ground 3 is therefore established.

96 Order 3 would not have been problematic if the word "by" was inserted prior to the word "its" in the first line and the word "are" in the first line was changed to "is". This would make it plain that although the order was made against the appellant as a registered organisation, as a matter of fact it could breach the order by the actions of its officers, employees and members.

97 The respondent submitted that if only ground 3 was established it would be appropriate to make this variation to the order. I have found ground 1 to be established only to the limited extent described above. The variation submitted by the respondent also overcomes the error there identified. Accordingly in my opinion this is the appropriate course to take.

Conclusion and Minute of Proposed Order

98 In my opinion ground 1 to the limited extent I have described and ground 3 have been established. The appeal should be upheld and the decision of the Commission varied. A minute of proposed orders should issue in these terms:

> 1. The appellant is granted leave to appeal under s49(2a) of the *Industrial Relations Act 1979* (WA).
> 2. The appeal is upheld.
> 3. The order of the Commission made on 25 February 2008 is varied by, in order 3, the insertion of the word "by" before "its" in the first line and the deletion of the word "are" and its replacement with "is" in the first line.

BEECH CC:

99 Ground 1 alleges that the Commission erred by not giving any consideration, or proper consideration, to whether the order would prevent the deterioration of industrial relations in respect of the matter in question.

100 To the extent that the ground of appeal is that the Commission erred in not giving any consideration to whether the order would prevent the deterioration of industrial relations, I do not think the ground can be made out. This is because in the second paragraph of the order (at AB15) the Commissioner stated:

> "The Commission having regard for the interests of the parties directly involved, the public interest and to prevent a further deterioration of industrial relations, …".

101 These words show that one factor to which the Commission had regard when the order was issued was preventing the further deterioration of industrial relations.

102 To the extent that the ground of appeal alleges that no proper consideration was given to whether the order would prevent the deterioration of industrial relations, then it raises for consideration the nature of the proceedings leading to the order which issued. The order which issued arose from a conference held under s 44 of the *Industrial Relations Act, 1979* (the Act). A s 44 conference is a vehicle for the informal exchange of information and suggestions which may culminate in directions, orders or declarations based on a free exchange between the parties (*Robe River Iron Associates v. Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1989) 69 WAIG 990 at 998). At a conference held under s 44 the Commission is not under any obligation at law to maintain a full record of all that occurs; further, the recitals preceding the order are sufficient compliance with the obligation on the Commission to issue reasons for decision (*ibid*).

103 The recitals preceding the order therefore are relevant when dealing with this ground of appeal. In the recitals at AB14, the Commission noted that the Department of Education and Training (the Department) "was committed to having ongoing discussions with the [SSTU] to finalise an industrial agreement but this may be reviewed in the light of industrial action currently taking place and proposed to take place". It does not seem to stretch those words far to hold that the Commission was well aware that the Department's commitment to having ongoing discussions with the SSTU may be reviewed because of the current and proposed industrial action.

104 That is, the current and proposed industrial action occurring may bring to a halt the preparedness of the Department to continue to have ongoing discussions with the SSTU to finalise an industrial agreement. In my view, a breakdown in the preparedness of one party to negotiate with the other is an indication of an imminent deterioration of industrial relations.

105 This provides a foundation for the Commission to take into account the prevention of a further deterioration of industrial relations. It is not apparent from the limited information before the Full Bench, from the schedule to the conference application and from the recitals preceding the order, the extent to which this was considered by the Commission. This is not a criticism: reasons for decision are not inadequate merely because every process of reasoning is not set out (*ibid* at 999).

106 In my view, this ground of appeal effectively argues that the Commission gave too little weight to the issue of whether the order to issue would prevent the deterioration of industrial relations. Questions of weight given to matters at first instance pose particular problems for an appellant (*Amalgamated Metal Workers' and Shipwrights Union of Western Australia v Robe River Iron Associates* (Stott's case) (1989) 69 WAIG 985 at 988). I am not persuaded that the SSTU has shown that the Commission erred as alleged. Indeed I am not sure that it could be shown that the Commission erred as alleged given the nature of s 44 proceedings means that it is unusual for the conference to be transcribed and the limited nature of reasons for decision set out in recitals. Ground 1 is not made out.

107 Ground 2 alleges that the Commissioner had no regard or no sufficient regard to 3 particular matters. The order is said by the SSTU to be impermissibly broad in that it prohibited the taking of industrial action of a kind not apprehended by the conference application for an indefinite period into the future.

108 The SSTU argued that the "matter in question" before the Commission was the disagreement regarding Directives 1 and 2, and in particular, the SSTU intending to engage in conduct pursuant to Directive 2 which involved the holding of a stop work

meeting on a particular day at a particular time. The SSTU asserted that there was no discussion at the conference about an order that would be wider than necessary to embrace Directive 2; if the application to the Commission was about Directives 1 and 2, and the conference was about Directives 1 and 2, then Order 3 was about something quite different.

109 The nature of the s 44 proceedings, and of the order which issued from it, have been referred to by me in relation to Ground 1 above. Whether Order 3 was "impermissibly broad" will depend upon a consideration of the schedule to the conference application to the Commission and to the reasons for decision as revealed by the recitals preceding the order. It is also helpful to bear in mind that a conference held under s 44 of the Act has the capacity to range beyond the matters set out in the schedule to the conference application.

110 Further, the informal nature of the proceedings, the lack of any requirement to keep a record of the proceedings, and the latitude to be given to the requirement to give reasons for decision because of the need for prompt action on the part of the Commission might also mean that not all of the issues raised in the course of a conference will be identified in the recitals preceding the order.

111 The schedule attached to the conference application is in fact quite broad in its terms. It requested a "recommendation/directive or if necessary an order to immediately cease all industrial action". It is not insignificant to the appeal ground to note that the order requested was in relation to "all industrial action" and was not restricted to the stop work meeting foreshadowed in Directive 2.

112 A stop work meeting is one form of industrial action; by referring to "all industrial action" the schedule attached to the conference application broadened the scope of the conference to be held beyond the proposed holding of a stop work meeting on a particular day at a particular time.

113 The schedule attached to the conference application consists of eight paragraphs which deal with:

a. The service by the SSTU of a log of claims in September 2007 and the presentation by the Department of an offer to the SSTU in December 2007.

b. The Department lodging an application with the Commission to initiate bargaining for a replacement agreement in January 2008 and the recommencement of negotiations between the parties in January 2008.

c. That they have met weekly since that time and have further weekly meetings scheduled and that the Department had sought an assurance from the SSTU that there would be no industrial action as negotiations had recommenced but that no such assurance was forthcoming.

d. That at a negotiation meeting the Department requested that the industrial action set out in Directive 1 cease, but received no response and that the SSTU issued Directive 2 (the calling of the stop work meeting at a particular date and time) on 21 February 2008.

e. The statement by the Department that industrial action at the stage of negotiations is not in the public interest and referring to its legislative duty to ensure the safety and welfare of students who are required to attend school.

f. And that the industrial action proposed by the SSTU will seriously jeopardise the Department's capacity to fulfil its legislative obligations.

114 The language used in the schedule is significant: the Department's concern was not regarding the calling of a specific stop work meeting, but rather the fact of the negotiations occurring and continuing yet the SSTU was planning to take industrial action during the course of those negotiations. Thus the recommendation/directive or order sought was not to restrict the specific stop work meeting, it was to immediately "cease all industrial action".

115 The recitals preceding the order commence by recognising this language. They refer to the negotiations occurring between the parties and that the Commission had been advised that the SSTU had issued two directives in February 2008 to its members to undertake industrial action.

116 They refer to the Department's position in relation to the SSTU taking industrial action "at this stage of its negotiations with the [SSTU]" given that the parties had participated in regular meetings since 24 January 2008 to finalise a new industrial agreement.

117 Significantly, the Commission noted that the Department is seeking an order that Directive 1 and Directive 2 be lifted and "that all current and future industrial action to be undertaken by the respondent and its members in support of a new industrial agreement cease". These words especially indicate that the matters that were before the Commission in the conference were broader than merely Directive 1 and Directive 2 to embrace all current and future industrial action to be taken by the SSTU.

118 The recitals preceding the order then detail the Department's position regarding the effect of the stop work meeting to occur on 28 February 2008, the Department's indicating its preparedness to provide the SSTU a response to its revised salary claim and that it was committed to having ongoing negotiations with the SSTU to finalise an industrial agreement, but that it may be reviewed in light of industrial action currently taking place and proposed to take place.

119 They then set out the SSTU's position in relation to the stop work meeting scheduled for 28 February 2008; the Commission noted that the SSTU conceded that negotiations had not been exhausted.

120 The recitals preceding the order then state that the Commission had formed the view that the industrial action contemplated under Directive 2 should not occur, that the terms of Directive 1 did not constitute industrial action, and that the Commission

took into account the interests of the persons directly involved in the dispute, particularly students, in the event that the proposed stop work meeting took place on 28 February 2008. In that context, it ordered that the directive to hold the stop work meeting on 28 February 2008 be lifted and, in Order 3, that the SSTU is not to hold any further stop work meetings in relation to the negotiations for a new agreement.

121 In the context of the schedule and the recitals, it is clear from the words I have referred to that the matter that was before the Commission was industrial action to be taken now and in the future in relation to negotiating for an industrial agreement. The order which issued not only dealt with the intention to hold a stop work meeting on a specific date and time but other stop work meetings which may be held in the future. In my view, that order is within the scope of matters which were before the Commission.

122 It follows that the order is not impermissibly broad. Rather, it is a matter within the discretion of the Commission whether to order that during negotiations no further stop work meetings be held. It does not order that no industrial action be taken during negotiations. However, stop work meetings evidently have a particular effect because the Commission had reached the conclusion that the stop work meeting to occur on 28 February 2008 should not occur because of its impact on the students and within the context of the concern of the Department that the holding of stop work meetings as such will impact upon the Department's legislative responsibilities. If that is true of one stop work meeting programmed for 28 February 2008, it is not unreasonable to conclude that the same conclusion would apply to any stop work meeting in the future, not just the one proposed.

123 Ground 2 also complains that the Commission had no regard, or sufficient regard, to (a) whether the Department has been bargaining in good faith, (b) the effect of the order upon the SSTU's bargaining power and (c) that the order might cause rather than prevent the deterioration of industrial relations. Little was put to the Full Bench during the appeal about these particular grounds. As to (a), it is not clear what was put to the Commission during the conference about the Department and good faith bargaining and it is not clear that a consideration of this matter would have affected the outcome.

124 In relation to (b) there is nothing before the Full Bench to allow it to conclude anything regarding the SSTU's bargaining power given that the order does not order that no industrial action at all be taken during negotiations. I find similarly in relation to (c). It follows that in my view Ground 2 is not made out.

125 I have read in advance the reasons for decision of his Honour the Acting President in Ground 3 and I agree with his conclusion and have nothing to add. I also agree with the conclusion the Acting President has reached regarding granting leave to appeal.

126 It follows that I would uphold the appeal in relation to Ground 3 only and vary the order in the manner suggested by his Honour the Acting President.

SMITH SC:

127 The grounds of appeal are set out in the reasons of decision of the Acting President and I need not repeat them in full. I agree with the reasons given by the Acting President that leave to appeal should be granted.

128 In ground 1 the appellant argues that the Commissioner erred by making the order to prohibit further stop work meetings in relation to the negotiations for a new industrial agreement without giving any consideration to, or proper consideration to, whether the order would prevent the deterioration of industrial relations in respect of the matter in question. In ground 2 the appellant argues that the decision by the Commissioner was so unreasonable as to constitute a failure properly to exercise her discretion by having no regard or insufficient regard to whether the respondent was bargaining in good faith, the effect of the order on the bargaining power of the appellant and whether the order might cause the deterioration of industrial relations.

129 The first issue is what were the relevant industrial matters raised at the s44 conference. In my opinion when all of the material before the Commission in this matter and the reasons of decision are examined it is apparent that one of the industrial matters raised was ongoing and continuing industrial action was threatened at the time the Commission contemplated making the order.

130 In a document titled EBA 2008 Update number 25 dated 30 January 2008, the appellant informed its members in guidelines attached to Directive One dated 31 January 2008 that "agreement not settled, member action phase one, commencing 4 February 2008". The guidelines relate to activities at school at that time which should or should not be undertaken by teachers. Update number 25 also stated at the bottom of the page, "Depending on progress in EBA negotiations members will be advised to undertake further action, as directed".

131 In EBA 2008 Update number 28 dated 18 February 2008, the members of the appellant were informed:

> "That in the event of the failure of government to respond positively to the Union's Log of Claims, the Union Executive will meet on Wednesday the 20th February 2008 to consider escalation of the action."

132 On 20 February 2008 the appellant's executive met and issued Directive 2.

133 In the application before the Commission (filed on 22 February 2008) the respondent stated:

> "On 10 January 2008, the Applicant lodged an application with the Western Australian Industrial Relations Commission to initiate bargaining for a replacement agreement pursuant to the good faith bargaining provisions in the Industrial Relations Act 1979. The Respondent agreed to bargain in good

> faith in accordance with the Act as indicated via Form GFB2, lodged on 31 January 2008.
>
> …
>
> At the initial meeting in 2008, the Applicant sought an assurance from the Respondent that there would be no industrial action as negotiations had recommenced but no such assurance was forthcoming. The Respondent's "Directive One" (Attachment 1) has been in place since the beginning of Term One this year.
>
> At a negotiation meeting on 20 February 2008, the Applicant raised the Directive One industrial action with the Respondent and requested that such industrial action cease. No response was provided at this time."
>
> …
>
> The Applicant is seeking a recommendation/directive or if necessary an order to immediately cease all industrial action."

134 In the Commissioner's reasons set out in the order she recited that:

> "FURTHER the applicant maintained that:
>
> - the applicant was in a position to give the respondent a response to its revised salary claim next week which is to be evaluated in light of the whole package to be negotiated with the respondent;
> - the applicant was committed to having ongoing discussions with the respondent to finalise an industrial agreement but this may be reviewed in light of industrial action currently taking place and proposed to take place; and
>
> WHEREAS the respondent argued that the stop work meeting scheduled for 28 February 2008 was necessary as:
>
> - the respondent's members required first hand knowledge about the status of negotiations with the applicant for a new industrial agreement given the delays which have already occurred with respect to the negotiations between the parties;
> - the respondent's members were not taking industrial action lightly given its obligations to students;
> - the respondent's members will return to their respective workplaces after the stop work meeting finished at 10.30am; and
>
> …
>
> WHEREAS the respondent conceded that negotiations between the parties for a new industrial agreement had not been exhausted;"

135 It is clear from the application, the EBA 2008 updates and the recitals of the Commission that ongoing and continuing industrial action was threatened.

136 The second issue which follows to be determined in this appeal is whether the Commissioner gave consideration to, or proper consideration to, whether the order would prevent the deterioration of industrial relations.

137 There is nothing in the recitals or in any other information before the Commission at first instance where the appellant contradicted, or sought to contradict, the respondent's contention in its application that the appellant would not give an assurance that further industrial action would not occur during negotiations for an EBA. In light of this omission, the fact that the respondent wished to continue negotiations for an EBA but may not do so if industrial action continued, the appellant's concession that negotiations had not been exhausted and the fact that both parties had agreed to negotiate in good faith, the Commission did not err in making the order. Plainly these matters support the finding made by the Commissioner that the order was to prevent the further deterioration of industrial relations pursuant to her discretionary power to do so in s44(6)(ba)(i) of *the Act.* The Commissioner seized of the matter was in the best position to judge what orders should be made to prevent a deterioration of industrial relations in the face of possible continuing industrial action and a possible refusal to negotiate whilst industrial action was contemplated, when the parties agreed negotiations had yet to be exhausted. In addition, she was also in the best position to judge what type of industrial action should be prohibited in light of these facts.

138 In relation to ground 2, no material was put before the Commission at first instance that the respondent was not bargaining in good faith. To the contrary, the Commission was informed meetings were scheduled between the parties and the respondent was going to provide a response to the appellant's claim in the following week. Nor was any material put before the Commission about the effect, if any, of the order on the bargaining power of the appellant, or that the order might cause a deterioration of industrial relations.

139 Leaving aside the issue whether the order could at law extend to members of the appellant, I do not agree that the facts and material before the Commission did not support the order on the basis that it was too broad. What was sought by the respondent was an order to ban industrial action. Industrial action is defined under s7(1) of *the Act* to mean:

> "any act, omission, or circumstance done, effected, or brought about by an organisation or employer or employee or by any other person for the purpose, or in the opinion of the Commission for the purpose, of compelling an employer or an employee or an organisation to accept any terms or conditions of employment or to enforce compliance with any demand relating to employment not including an application made under this Act"

140 Order 3 of the order is not in my view too broad. Order 3 does not impose an all encompassing ban on industrial action into the future, it simply prohibits one type of industrial action for a period limited in time, in particular the order only prohibits stop work meetings held for the specified purpose only "in relation to the negotiations for a new agreement" which on its terms can only operate during the period of time negotiations for a new agreement are on foot as it would be difficult to contemplate a stop work meeting held in relation to negotiations for a new agreement if negotiations have ceased, concluded or if the appellant was no longer seeking to reach agreement with the respondent.

141 For these reasons I am of the opinion that ground 1 and ground 2 of the grounds of appeal have not been made out. As to ground 3, I have read the draft reasons of the Acting President and I agree for the reasons he gives that ground 3 has been made out. Consequently, I would allow the appeal and vary order 3 in the manner proposed by the Acting President.

2008 WAIRC 00377

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPELLANT
	-and-
	DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 20 JUNE 2008
FILE NO/S	FBA 6 OF 2008
CITATION NO.	2008 WAIRC 00377

Decision	Appeal allowed
Appearances	
Appellant	Mr T Borgeest (of Counsel), by leave
Respondent	Mr R Andretich (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 30 May 2008, and having heard Mr T Borgeest (of Counsel), by leave, on behalf of the appellant, and Mr R Andretich (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 17 June 2008, it is this day, 20 June 2008, ordered that:

1. The appellant is granted leave to appeal under s49(2a) of the *Industrial Relations Act 1979* (WA).
2. The appeal is upheld.
3. The order of the Commission made on 25 February 2008 is varied by, in order 3, the insertion of the word "by" before "its" in the first line and the deletion of the word "are" and its replacement with "is" in the first line.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

FULL BENCH—Proceedings for Enforcement of Act—

2008 WAIRC 00371

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-and-

LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

RESPONDENT

CORAM FULL BENCH

THE HONOURABLE M T RITTER, ACTING PRESIDENT

SENIOR COMMISSIONER J H SMITH

COMMISSIONER S WOOD

DATE THURSDAY, 19 JUNE 2008

FILE NO FBM 2 OF 2008

CITATION NO. 2008 WAIRC 00371

Order

It is this day, 19 June 2008, ordered by consent that:

(1) Orders 2 and 3 of the orders made on 9 June 2008 be revoked.

(2) The applicant file and serve witness statements and any documents on which he seeks to rely on or before 4:00pm on 30 June 2008.

(3) The respondent file and serve witness statements and any documents on which it seeks to rely on or before 4:00pm on 7 July 2008.

By the Full Bench

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

2008 WAIRC 00402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-and-

LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH

RESPONDENT

CORAM FULL BENCH

THE HONOURABLE M T RITTER, ACTING PRESIDENT

SENIOR COMMISSIONER J H SMITH

COMMISSIONER S WOOD

DATE TUESDAY, 8 JULY 2008

FILE NO/S FBM 2 OF 2008

CITATION NO. 2008 WAIRC 00402

Order

It is this day, 8 July 2008, ordered that:

(1) Order 3 of the orders made on 19 June 2008 be revoked.

(2) The respondent file and serve witness statements and any documents on which it seeks to rely on or before 4:00pm on 10 July 2008.

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

FULL BENCH—Procedural Directions and Orders—

2008 WAIRC 00385

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LUXE DAY SPA (MS JAQUILINE GILL)

APPELLANT

-and-

MS SARAH DE LONGIS

RESPONDENT

AND

JAQUILINE GILL T/A LUXE DAY SPA

APPELLANT

-and-

SARA DE LONGIS

RESPONDENT

CORAM FULL BENCH

THE HONOURABLE M T RITTER, ACTING PRESIDENT

SENIOR COMMISSIONER J H SMITH

COMMISSIONER P E SCOTT

DATE MONDAY, 30 JUNE 2008

FILE NO/S FBA 3 OF 2008, FBA 5 OF 2008

CITATION NO. 2008 WAIRC 00385

Order

Upon the application of the appellant dated 5 June 2008 and by consent it is ordered that:

1. Appeals FBA 3 of 2008 and FBA 5 of 2008 be consolidated into a single proceeding to be known as consolidated appeal FBA 3 and 5 of 2008.

2. A single set of outline of submissions and list of authorities be filed and served for the consolidated proceeding in accordance with Practice Note 1 of 2008.

By the Full Bench

(Sgd.) M T RITTER,

[L.S.] Acting President.

2008 WAIRC 00397

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	THURSDAY, 3 JULY 2008
FILE NO/S	FBA 27 OF 2006
CITATION NO.	2008 WAIRC 00397

Decision	Appeal adjourned
Appearances	
Appellant	In person
Respondent	Ms R Hartley (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 3 July 2008 and having heard Mr E Michael on his own behalf as appellant, and Ms R Hartley (of Counsel), by leave, on behalf of the respondent, it is this day, 3 July 2008, ordered that:

1. The matter be adjourned to Tuesday, 26 August 2008 at 10.30am.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2008 WAIRC 00370

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAIN AGNEW
	APPLICANT
	-and-
	UNITED FIREFIGHTERS UNION OF AUSTRALIA WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	THURSDAY, 19 JUNE 2008
FILE NO	PRES 1 OF 2008
CITATION NO.	2008 WAIRC 00370

Decision	Order
Appearances	
Applicant	Mr I Agnew, in person
Respondent	Ms L Anderson (industrial officer)

Order

This matter having come on for hearing before me on 18 June 2008, and having heard Mr I Agnew, in person, on his own behalf as the applicant, and Ms L Anderson (industrial officer) for the respondent, it is this day, 19 June 2008, ordered that:

1. The respondent shall file and serve the undertaking proffered to the applicant by 4:00pm on Thursday, 19 June 2008.
2. The respondent shall file and serve the circular it will send to all members of the respondent by 4:00pm on Thursday, 19 June 2008.
3. The application be adjourned to Thursday, 24 July 2008 at 10:00am.
4. The parties have liberty to apply on 48 hours notice.

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

NOTICES—Award/Agreement matters—

2008 WAIRC 00403

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. PSA AG 8 of 2008

APPLICATION FOR A NEW AGREEMENT ENTITLED "DEPARTMENT FOR CHILD PROTECTION COUNTRY RESIDENTIAL SERVICES INTERIM GENERAL AGREEMENT 2008"

NOTICE is given that an application has been made to the Commission by the Director General, Department for Child Protection, under the Industrial Relations Act 1979, for the above Agreement.

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

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by this agreement are the Department for Child Protection and The Civil Service Association of Western Australia Incorporated.

5.2 As at the date of registration, the approximate number of employees bound by this agreement is 77.

6. SCOPE

6.1 This General Agreement shall apply throughout the State of Western Australia to all employees employed by or working in country Residential Units who are members of or eligible to be members of The Civil Service Association of Western Australia Incorporated.

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

J.A SPURLING,
Registrar.

23 June 2008

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2008 WAIRC 00352

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JASON ASHWORTH

APPLICANT

-v-

COATES

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE WEDNESDAY, 11 JUNE 2008
FILE NO B 40 OF 2008
CITATION NO. 2008 WAIRC 00352

Result	Application discontinued
Representation	
Applicant	Mr J Ashworth
Respondent	Mr G Morgan

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 3 June 2008 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.

2008 WAIRC 00395

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREA CROFT
	APPLICANT
	-v-
	FRANK HOLGUIN
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 3 JULY 2008
FILE NO	B 64 OF 2008
CITATION NO.	2008 WAIRC 00395

Result	Application discontinued

Order

WHEREAS this is an application pursuant to section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS the applicant advised the Commission on 24 June 2008 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.

2008 WAIRC 00376

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEAN D'OLIVEIRO
	APPLICANT
	-v-
	MULTICULTURAL SERVICES CENTRE OF WESTERN AUSTRALIA INC.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 20 JUNE 2008
FILE NO/S	U 48 OF 2007
CITATION NO.	2008 WAIRC 00376

Result	Discontinued
Representation	
Applicant	Mr D Heldsinger (of counsel) and Ms S Varughese (of counsel)
Respondent	Ms M Saraceni (of counsel) and later Mr I Curlewis (of counsel)

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 15 May 2007 the Commission convened a directions conference as the respondent in its notice of answer and counter-proposal claimed that the Commission did not have jurisdiction to deal with this matter as the respondent is a constitutional corporation; and

WHEREAS on 17 May 2007 the Commission wrote to the parties providing timelines for filing and serving lists of discoverable documents, submissions, affidavit evidence and exhibits in relation to the issue of jurisdiction and on a number of occasions the timelines were extended at the request of the parties; and

WHEREAS the application was set down for hearing and determination on 17 and 18 October 2007 to deal with the preliminary issue of the Commission's jurisdiction; and

WHEREAS at the end of the hearing on 17 October 2008 the matter was adjourned to be further listed as the applicant was seeking further discovery and the application was set down for further hearing and determination on 22 and 23 January 2008; and

WHEREAS on 14 April 2008 the Commission delivered its decision on the jurisdictional issue and on 17 April 2008 a declaration issued that at the time the applicant ceased employment with the respondent it was not a trading corporation; and

WHEREAS the Commission set down a conference on 23 May 2008 for the purpose of conciliating between the parties; and

WHEREAS on 16 May 2008 the applicant's representative advised the Commission that the parties had reached an agreement to settle the matter and the conference was vacated; and

WHEREAS on 23 May 2008 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 3 June 2008 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.

2008 WAIRC 00383

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA HARRIS
	APPLICANT
	-v-
	TIMBERLANE HOLDINGS PTY LTD T/A ROY WESTON WARWICK
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 JUNE 2008
FILE NO/S	B 190 OF 2007
CITATION NO.	2008 WAIRC 00383

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979; and

WHEREAS on the twenty-fourth day of January 2008 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on the twenty-fifth day of February the Commission convened a further conference for the purpose of conciliating between the parties; and

WHEREAS on the 26th day of June 2008, the applicant advised the Commission that the matter had been resolved in accordance with the agreement reached between the parties and that she therefore wished to discontinue the application; and

WHEREAS on the 27th day of June 2008, the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Commissioner.

2008 WAIRC 00399

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS RICHARD HELM
	APPLICANT
	-v-
	THE OWNERS OF "CITY TOWER" STRATA PLAN 13794
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 7 JULY 2008
FILE NO	B 51 OF 2008
CITATION NO.	2008 WAIRC 00399

Result	Application discontinued
Representation	
Applicant	Mr T Helm
Respondent	Mr K Pages-Oliver

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 11 June 2008 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 30 June 2008 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.

2008 WAIRC 00372

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN LAING
	APPLICANT
	-v-
	CLAUDIA BILLAUE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 19 JUNE 2008
FILE NO/S	U 31 OF 2008
CITATION NO.	2008 WAIRC 00372

Result	Order issued
Representation	
Applicant	Mr J Laing on his own behalf
Respondent	Ms J Barber (of counsel)

Order

WHEREAS on 17 March 2008 John Laing applied to the Commission for an order pursuant to the *Industrial Relations Act, 1979* ("the Act"); and

WHEREAS on 30 May 2008 the Commission conducted a conference between the parties pursuant to section 32 of the Act; and

WHEREAS as the respondent was incorrectly named the parties, by consent, agreed to amend the respondent's name; and

WHEREAS given the Commission's powers under s27(1) of the Act, the Commission formed the view that it was appropriate in the circumstances to amend the respondent's name; and

FURTHER at the end of the conference a settlement was reached between the parties whereby the respondent agreed to pay the applicant $500 nett by cheque, in full and final settlement of the applicant's unfair dismissal claim by no later than 13 June 2008;

NOW THEREFORE having heard Mr J Laing on his own behalf and Ms J Barber of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby orders:

1. THAT the name of the respondent be deleted and that Claudia Billaue be substituted in lieu thereof.
2. THAT the respondent pay the applicant $500 nett by cheque, in full and final settlement of the applicant's unfair dismissal claim by no later than 14 June 2008.

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

2008 WAIRC 00373

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RODERICK ANGUS MACLEOD
	APPLICANT
	-v-
	THE DIRECTOR GENERAL OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 19 JUNE 2008
FILE NO/S	APPL 670 OF 2004
CITATION NO.	2008 WAIRC 00373

Result Discontinued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS the Commission listed the matter for hearing on 7 July 2004, which date was later changed to 16 July 2004, with respect to the claim being referred out of time; and

WHEREAS on 16 July 2004 with the consent of the parties the hearing was adjourned into a conference and at the conclusion of the conference the parties sought time for further discussions; and

WHEREAS the Commission contacted the applicant's representative on a number of occasions about the status of the matter and on 10 January 2005 the Commission was advised that the matter had not settled; and

WHEREAS the matter was re-listed for hearing on 2 March 2005 with respect to the claim being referred out of time and the application to accept the application out of time was granted; and

WHEREAS on 12 May 2005 and 13 July 2005 Deputy Registrar Wickham pursuant to a delegation under regulation 64 of the *Industrial Relations Commission Regulations 2005* conducted conciliation proceedings between the parties, however agreement was not reached; and

WHEREAS on 5 August 2005 the Commission convened a conference to deal with a request by the applicant for interim orders and at the conclusion of that conference the parties were given time for further discussions; and

WHEREAS on 14 September 2005 the applicant's representative advised the Commission that the parties had reached an agreement in principle; and

WHEREAS the Commission contacted the applicant's representative on numerous occasions as to the status of the settlement; and

WHEREAS as there had been no response to e-mail correspondence sent on 9 and 27 February 2006 the Commission wrote to the applicant's representative on 7 April 2006 advising that the matter would be listed for a show cause hearing as to why the matter should not be dismissed if advice about the status of the matter was not received by the close of business on 18 April 2006; and

WHEREAS on 18 April 2006 the applicant's representative contacted the Commission to advise that an issue had arisen with respect to one of terms of settlement and requested further time to deal with this matter and on 7 June 2006 the Commission was advised that the parties remained in dispute about one of the terms of settlement; and

WHEREAS the Commission contacted the applicant's representative on a number of occasions about the status of the matter and was informed that he was awaiting instructions from the applicant; and

WHEREAS the Commission convened a report back conference on 30 April 2007; and

WHEREAS at the conference on 30 April 2007 the Commission was informed that all matters had been resolved in relation to the application except an issue about the payment of wages and the parties were given a further two weeks to finalise this issue; and

WHEREAS following the conference the Commission contacted the applicant's representative on a number of occasions about the status of the matter; and

WHEREAS as no advice about the status of the matter was received, on 15 October 2007 the Commission wrote to the applicant's representative informing him that if advice was not received by the close of business on 29 October 2007 the matter would be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS as the applicant did not contact the Commission by 29 October 2007 the matter was listed for a show cause hearing on 4 December 2007; and

WHEREAS on 3 December 2007 the applicant filed a Notice of Discontinuance in respect of the application and the hearing listed for 4 December 2007 was vacated; and

WHEREAS on 10 June 2008 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.

2008 WAIRC 00394

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ASHLEY MCCORKELL
	APPLICANT
	-v-
	SOUTH PERTH INVESTMENTS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 3 JULY 2008
FILE NO/S	U 186 OF 2007, B 186 OF 2007
CITATION NO.	2008 WAIRC 00394
Result	Dismissed

Order

WHEREAS these are applications pursuant to Section 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*; and

WHEREAS the Commission convened a conference on 14 February 2008 for the purpose of conciliating between the parties; and

WHEREAS the applicant did not attend the conference; and

WHEREAS on 14 February 2008 the Commission wrote to the applicant requesting he contact the Commission by no later than 4.00pm on Thursday 28 February 2008 to provide advice as to why he did not attend the conference; and

FURTHER the applicant was advised that if he did not contact the Commission by this date or provide an adequate reason for his non-attendance at the conference that the matters may be listed for a show cause hearing as to why the matters should not be dismissed; and

WHEREAS as the applicant did not contact the Commission by the due date the matters were listed for a show cause hearing on 3 July 2008 and the applicant was advised that non-attendance by the applicant at these proceedings will result in an order being issued dismissing the applications for want of prosecution; and

WHEREAS on 7 June 2008 the applicant contacted the Commission by way of e-mail to advise his current contact details; and

WHEREAS on 10 June 2008 the Commission wrote to the applicant and informed him that as he was now residing in Perth the arrangements made for him to attend the hearing by way of videoconference facility in Karratha would be cancelled; and

WHEREAS on 11 June 2008 in response to a query from the applicant as to whether he was required to attend the hearing in person the Commission informed the applicant by e-mail of the purpose of the hearing and reiterated that non-attendance by the applicant at these proceedings will result in an order being issued dismissing the applications for want of prosecution; and

WHEREAS the applicant did not attend the hearing;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders:

THAT these applications be, and are hereby dismissed.

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

2008 WAIRC 00368

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVEN JEFFREY MADIGAN
	APPLICANT
	-v-
	KERRY RANDALL KR RANDALL CONSTRUCTIONS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 JUNE 2008
FILE NO/S	U 153 OF 2007
CITATION NO.	2008 WAIRC 00368

Result Dismissed

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS the Commission convened a conference on 25 October 2007 for the purpose of conciliating between the parties however, the applicant did not attend the conference; and

WHEREAS on 26 October 2007 the Commission wrote to the applicant requesting he contact the Commission by no later than 4.00pm on 23 November 2007 to provide advice as to why he did not attend the conference; and

FURTHER the applicant was advised that if he did not contact the Commission by this date or provide an adequate reason for his non-attendance at the conference the matter may be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS as the applicant did not contact the Commission by the due date the matter was listed for a show cause hearing on 18 June 2008 and the applicant was advised that if he did not attend these proceedings an order would issue dismissing the application for want of prosecution; and

WHEREAS the applicant did not attend the hearing;

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 dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2008 WAIRC 00407

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MOTT
	APPLICANT
	-v-
	FLUOR RAIL SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 9 JULY 2008
FILE NO/S	U 62 OF 2008
CITATION NO.	2008 WAIRC 00407

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) filed on 19 May 2008;

AND WHEREAS on 5 July 2008 the applicant advised he no longer wishes to proceed with the application;

NOW THEREFORE, I the undersigned pursuant to the powers conferred on me under section 27(1)(a) of the Act, hereby order -

THAT this application be, and is hereby dismissed for want of prosecution.

(Sgd.) A R BEECH,
[L.S.] Chief Commissioner.

2008 WAIRC 00374

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON ROONEY
	APPLICANT
	-v-
	TIMBER TOTS CHILDCARE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 20 JUNE 2008
FILE NO/S	U 143 OF 2007
CITATION NO.	2008 WAIRC 00374

Result	Discontinued

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 1 November 2007 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS the Commission contacted the applicant on a number of occasions about the status of the matter; and

WHEREAS on 13 December 2007 the applicant was advised that the file would be left open for a further month and at that time she was required to lodge a Notice of Discontinuance; and

WHEREAS as this did not occur, on 22 May 2008 the Commission wrote to the applicant advising that if no written or verbal advice was received from her by close of business on 12 June 2008 the matter would be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS on 6 June 2008 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 8 June 2008 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.

2008 WAIRC 00386

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT TRAVIS
	APPLICANT
	-v-
	RICK SCOTT OF TOP-FLIGHT AVIATION SERVICES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 30 JUNE 2008
FILE NO/S	U 9 OF 2008
CITATION NO.	2008 WAIRC 00386

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*;

AND WHEREAS in its Notice of answer and counter proposal filed on 26 February 2008 the respondent raised a preliminary issue asserting the Commission lacked the jurisdiction to deal with the application as the respondent is a constitutional corporation;

AND WHEREAS on 29 February 2008 the Commission wrote to the applicant requiring submissions in writing within three weeks on his views on the jurisdictional issue;

AND WHEREAS the applicant failed to provide written submissions;

AND WHEREAS the Commission listed the application for hearing on 19 May 2008 for the applicant to show cause why the application should not be dismissed for want of prosecution;

AND WHEREAS on 22 May 2008 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

2008 WAIRC 00382

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GARTH JASON WATERS
	APPLICANT
	-v-
	TAIPAN PUMPS PTY LTD (ACN 097 145 527)
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 27 JUNE 2008
FILE NO/S	U 108 OF 2005
CITATION NO.	2008 WAIRC 00382

Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979; and

WHEREAS on the 27th day of June 2008, the applicant's solicitor advised the Commission that the matter had been settled and that he therefore wished to discontinue the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Commissioner.

2008 WAIRC 00393

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELANIE LEE-ANNE YOUNG
	APPLICANT
	-v-
	RUSSELL POLIWKA
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 3 JULY 2008
FILE NO/S	U 50 OF 2008
CITATION NO.	2008 WAIRC 00393
Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on Tuesday 24th June 2008 the Commission convened a conference for the purpose of conciliating between the parties at the conclusion of which the applicant was to advise the Commission of her intentions within seven days; and

WHEREAS the applicant agreed at that conference that if nothing was heard from her by 4.00pm on Tuesday 1 July 2008 then an order for the application's dismissal could issue; and

WHEREAS by 4.00pm on Tuesday 1 July 2008 the applicant had not contacted the Commission;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Annette Onuoha	SMYL Community Services	U 66/2008	Senior Commissioner J H Smith	Discontinued
Ms Karen Holmes	Liquor, Hospitality and Miscellaneous Union	U 21/2008	Senior Commissioner J H Smith	Withdrawn
Tracy Darby	Dr Troy Stokic	U 13/2008	Senior Commissioner J H Smith	Withdrawn

CONFERENCES—Matters arising out of—

2008 WAIRC 00361

DISPUTE RE PENALTY ENFORCED ON UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES, GOVERNMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 JUNE 2008
FILE NO	PSAC 39 OF 2007
CITATION NO.	2008 WAIRC 00361

Result	Interim Orders issued
Representation	
Applicant	Ms K Worlock and Mr W Claydon
Respondent	Ms K Jack

Order

WHEREAS on 1 November 2007 the Civil Service Association of Western Australia Incorporated ("the applicant") lodged an application in the Commission pursuant to s44 of the *Industrial Relations Act, 1979* ("the Act") in relation to two of its members, Mr Gary Hampson and Mr Michael Rowley ("the officers") who are employed by the Commissioner, Department of Corrective Services, Government of Western Australia ("the respondent"); and

WHEREAS the applicant claimed that the officers were being treated unfairly as they were being prevented from applying to act in higher positions whilst an ongoing disciplinary investigation was taking place into their actions arising out of an incident which occurred on 26 March 2007; and

WHEREAS the respondent maintained that the Public Service Arbitrator ("the Arbitrator") did not have jurisdiction to deal with the issues relevant to this application and after receiving submissions from the parties with respect to this issue on 24 April 2008 the Arbitrator found that there was jurisdiction to deal with the issues relevant to this application; and

WHEREAS at a conciliation conference which took place on 23 May 2008 the Arbitrator was advised by the respondent that the ban on the officers applying for and undertaking higher duties was no longer in place and the officers could now apply for higher duty positions; and

WHEREAS at a further conference held on 3 June 2008 the applicant advised the Arbitrator that as the ban on the officers applying for and undertaking higher duties had not in fact been lifted the applicant was therefore seeking interim orders that the respondent lift the ban on the officers applying for and undertaking higher duties; and

WHEREAS at the end of the conference held on 3 June 2008 the parties were required to file and serve submissions as to whether or not an interim order should issue with respect to lifting the ban on the officers applying for and undertaking higher duties; and

WHEREAS the applicant is seeking the following interim orders with respect to this issue:

1. THAT the respondent lift the Higher Duties Allowance ("HDA") ban currently enforced against Mr Hampson and Mr Rowley immediately;
2. THAT the respondent allows Mr Hampson and Mr Rowley to apply for acting up opportunities in Senior Officer positions at Banksia Hill Detention Centre;
3. THAT the respondent consider Mr Hampson and Mr Rowley for acting Senior Officer positions as they arise;
4. THAT the respondent offer Mr Hampson and Mr Rowley acting up opportunities in the same way they did prior to 10 August 2007; and

WHEREAS the applicant argues the following in support of its application for interim orders:

- the Arbitrator has the power to issue the interim orders being sought under s44(6)(ba) of the Act and the applicant relies on the tests set out in *Thomas Brown v President, State School Teachers Union of WA (Inc) and Others* (1989) 69 WAIG 1390;
- the issue in dispute is an industrial matter as it relates to the ability of the officers to undertake higher duties;
- the issuance of the orders being sought will prevent the deterioration of industrial relations between the parties as the applicant's members at Banksia Hill Detention Centre ("BHDC") are unhappy about the respondent's treatment of the officers and are concerned that they may be subject to similar bans in the future (see s44(6)(ba)(i) of the Act);
- the respondent is acting in bad faith and denying the officers natural justice by imposing a ban on the officers applying for higher duties by pre-judging the officers' actions;
- there is a substantial matter to be tried as to whether the respondent has the power to prevent the officers from accessing HDA while subject to a disciplinary process under the *Young Offenders Regulations 1995* and the applicant argues that the respondent's actions in imposing this ban is not provided for under the provisions of the *Young Offenders Act 1994*, the *Young Offenders Regulations 1995* or the *Public Sector Management Act 1994*;
- there is a prima facie case for relief which is that the officers should be eligible to apply for HDA opportunities as they arise at BHDC;
- the respondent's managerial prerogative with respect to an employee performing higher duties is not relevant in this case as the respondent has no legitimate basis to put this ban in place;
- the detriment to the officers if interim orders do not issue is greater than the detriment to the respondent if interim orders issue as the officers have been subjected to financial detriment and emotional stress since 10 August 2007 because prior to this date the officers had been regularly performing higher duties over a lengthy period and in the 12 months prior to August 2007 both officers performed higher duties for over 90 per cent of their time at work;
- this detriment and stress will continue if interim orders do not issue whereas the detriment to the respondent arising from such orders is insignificant;
- the consequences of the interim orders are not irreversible;
- the application was filed promptly after the ban on the officers applying for higher duties was put in place and the applicant sought orders as soon as the respondent notified the Arbitrator that the respondent was not going to lift the ban; and

WHEREAS the respondent argued the following in support of its claim that interim orders should not issue:

- the respondent does not dispute that the Arbitrator had jurisdiction to issue the interim orders being sought however the respondent submits that in this case the Arbitrator should not exercise that power;
- the respondent has the discretion and management prerogative to determine who should be offered higher duties opportunities and disputes that a ban is in place on the officers undertaking higher duties as they are not prevented from applying for and being considered for any higher duties opportunities which may arise within the respondent's operations excluding the positions they had previously acted in at BHDC;
- there are compelling reasons as to why it would be unconscionable for the respondent to offer certain higher duties opportunities to the officers and there are compelling reasons as to why certain higher duties opportunities should not be offered to the officers given the responsibilities of persons employed in senior positions and given the officers were acting in senior positions at the time the incident took place on 26 March 2007 and given that the officers have admitted a charge of failing to report full details of the incident;
- the nature of the second charge against the officers (that the officers coerced staff members to not fully disclose details of the roof top incident to the superintendent) when considered in concert with the admitted breach of discipline goes directly to the officers' capacity to be placed in positions of influence over lower level staff until the disciplinary matter is resolved;
- the Arbitrator should not make orders that would cause the respondent to breach procedures addressed in statute and which have the effect of interfering with the right of the respondent to manage its business;
- the decision making process when offering acting opportunities is subject to the Temporary Deployment (Acting) Standard ("the Standard") and should the officers apply for acting opportunities and be of the view that the Standard has not been followed in the selection decision, they can seek relief in accordance with the procedures set out in the *Public Sector Management (Breach of Public Sector Standards) Regulations 2005*;
- the decision not to offer the officers acting opportunities reflects the respondent's authority to ensure that the functions expected of the chief executive officer are met;

- the decision to not offer specific acting opportunities to the officers is not unjust or unreasonable in light of the circumstances with respect to the incident on 26 March 2007 and the Arbitrator should not intervene and affect the right of the respondent to manage its own business;
- no order should issue which would pose a direct or indirect statutory conflict or breach for the respondent under section 29 of the *Public Sector Management Act 1994*;
- the respondent disagrees that if the interim order issues this will prevent the deterioration of industrial relations between the parties and the respondent disagrees that there is a substantial matter to be tried and that there is a prima facie case for relief;
- should the Arbitrator determine that the tests applied in *Thomas James Brown v President, State School Teachers Union of WA (Inc) and Others* (op cit) apply in this case, the respondent submits that:
  - the effect of any interim orders issued will not prevent further deterioration in industrial relations in the manner contemplated by s44(6)(ba)(i) of the Act as there is a potential for there to be a negative impact upon the interrelationships amongst staff at the centre should the interim orders be granted;
  - it has not acted in bad faith as alleged by the applicant;
  - the decision not to offer the officers acting opportunities is not a denial of natural justice related to the disciplinary procedures as the disciplinary process is separate to the decision making process related to the offering of acting opportunities;
  - it has not breached any term of an industrial agreement or statute;
  - there would be greater detriment to the respondent if interim orders issue as the orders would impact on the respondent's ability to ensure the public interest is met in the management of its juvenile detention centre and it has the potential to have a future impact on the capacity of the respondent to manage other aspects of its business;
  - the officers have not experienced financial detriment as there should be no expectation of undertaking ongoing higher duties given it is not an automatic employment entitlement and does not form part of the officers' base salary;
  - the respondent denies it has improperly exercised its discretionary decision making powers at to who should be offered an acting opportunity as the *Institution Officers' Allowances and Conditions Award 1997, No 3 of 1997* provides that the employer may direct an officer to undertake higher duties and the Standard reinforces this discretionary power; and

WHEREAS the Arbitrator is of the view that the matter before it is an industrial matter as it relates to the officers' rights as employees; and

WHEREAS the Arbitrator is of the view that it has jurisdiction to issue an interim order that the respondent lift the ban on the officers applying to undertake higher duties pursuant to s 44(6) of the Act in particular s44(6)(ba)(ii) which enables conciliation or arbitration to resolve the matter in question and s 44(6)(bb)(i) which enables the Arbitrator to issue orders which the Arbitrator is otherwise authorised to make under this Act in relation to an industrial matter; and

WHEREAS the Arbitrator is of the view that it is appropriate to take into account relevant objects of the Act, s26 of the Act and the principles set out in *Thomas James Brown v President, State School Teachers Union of WA (Inc) and Others* (op cit) when considering an application for interim relief; and

WHEREAS taking into account the terms of the Act and in particular s 44(6) of the Act whereby the Arbitrator has the power to give such directions and make such orders that the Arbitrator considers appropriate in the circumstances the Arbitrator has formed the view that interim orders should be considered in this instance pending arbitration of the issues in dispute; and

WHEREAS the tests relevant to whether or not an interim order should issue are as follows (see *Thomas James Brown v President, State School Teachers Union of WA (Inc) and Others* [op cit]):

"It seems to me that the principles which apply to the granting of interim injunction proceeding are most applicable here, with such modifications as this jurisdiction requires.

The applicant must therefore establish: –

(a) That as a matter of discretion, it is just and correct for me to make the order in all the circumstances.

(b) That, in fact, there is a substantial matter to be tried.

(c) That the plaintiff has a prima facie case for relief if the evidence on which the order is made is accepted at trial.

In addition, the Commission must consider: –

(a) The damage which may be done to the respondent by granting the order as against the damage to the applicant if it is not granted.

(b) Any irreversible consequences of the granting of the order.

(c) The promptness or otherwise of the application.

(d) Any other relevant consideration."; and

WHEREAS the issuance of interim orders needs to take into account the interests of both parties without reaching any concluded view about the merits of such an application; and

WHEREAS after considering the arguments put by both parties the Arbitrator has formed the view that an interim order that the respondent lift the ban on the officers applying for higher duties so that they can be considered for acting positions in the usual manner should issue based on the following considerations:

- on the information before me it is my view that the applicant has demonstrated that there is a substantial issue to be tried with respect to whether or not the respondent has the power to and/or should in all of the circumstances refuse to allow the officers the opportunity to apply for and therefore be eligible to act in higher positions whilst the investigation into the officers' conduct is ongoing;
- on the information before me I am of the view that given the nature of this dispute there is a prima facie case for relief if the applicant is successful at hearing;
- I find that the balance of convenience in relation to whether or not interim orders should issue lies with the applicant in this instance as the effect of the interim orders not being granted would continue to prevent the officers from applying to undertake higher duties pending the finalisation of the respondent's investigation into the charges against the officers and this disciplinary process has been lengthy and subject to inordinate delays. I also accept that as a result of the lengthy delay in finalising the investigations into the officers' conduct this has caused the officers to experience substantial financial and emotional detriment which will continue if interim orders do not issue;
- I am of the view that issuing an interim order that the respondent lift the ban on the officers applying to undertake higher duties and being considered to undertake these roles pending the hearing and determination of this application is not irreversible;
- the application for interim orders was lodged as soon as it became clear to the applicant that the respondent intended to retain the ban on the officers applying for higher duty positions after the Commission determined that it had jurisdiction to deal with this issue; and

WHEREAS in the circumstances I am of the view that when taking into account all of the circumstances relevant to this issue it is just and equitable that interim orders should issue pending the finalisation of this matter; and

WHEREAS on 12 June 2008 the Arbitrator issued a Minute of Proposed Order with respect to this matter; and

WHEREAS on 17 June 2008 the Arbitrator conducted a Speaking to the Minutes of Proposed Order; and

WHEREAS the respondent sought to include additional wording in relation to its qualified acceptance of the Arbitrator's jurisdiction to deal with this application; and

FURTHER the respondent sought clarification of the intent of interim orders 1, 2 and 3; and

WHEREAS the applicant opposed the additional wording sought by the respondent on the basis that the respondent was bound by its case at first instance and the addition of extra wording did not fit within the principles of a speaking to the minutes; and

FURTHER the applicant argued that the orders contained in the minutes are clear and do not require clarification; and

WHEREAS having considered the submissions of both parties, the parties were advised that it was the Arbitrator's view that the summary of the respondent's submissions in the proposed order accurately reflected the respondent's submissions at first instance and the additional wording proposed by the respondent would therefore not be included in the order; and

FURTHER as it was the Arbitrator's view that the orders are clear and speak for themselves and as the parties have liberty to apply if any issues arise with respect to the orders then the orders would issue as proposed;

NOW THEREFORE having heard Ms K Worlock by way of written submissions and later Mr W Claydon on behalf of the applicant and Ms K Jack by way of written submissions on behalf of the respondent, the Arbitrator, pursuant to the powers conferred on it under the Act hereby orders:

1. THAT the respondent immediately lift the ban on Mr Hampson and Mr Rowley being able to apply for higher duty positions.
2. THAT the respondent allow Mr Hampson and Mr Rowley to apply for acting opportunities in Senior Officer positions at Banksia Hill Detention Centre in the same way Mr Hampson and Mr Rowley applied for these positions prior to 10 August 2007.
3. THAT the respondent consider Mr Hampson and Mr Rowley for acting Senior Officer positions as they arise.
4. THAT this order remain in place until this matter is heard and determined.
5. THAT liberty to apply be granted to the parties in relation to this order.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] Public Service Arbitrator.

2008 WAIRC 00121

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 25 FEBRUARY 2008
FILE NO/S	C 4 OF 2008
CITATION NO.	2008 WAIRC 00121

Result	Order issued
Representation	
Applicant	Mr J Ridley and Ms S O'Neill
Respondent	Ms A Gisborne and Mr D Kelly

Order

WHEREAS this application was lodged pursuant to s44 of the *Industrial Relations Act, 1979* ("the Act") on Friday 22 February 2008 whereby the applicant sought a conference requesting the Commission to issue either a recommendation or order that the respondent and its members immediately cease all industrial action in support of a new industrial agreement; and

WHEREAS on 25 February 2008 the Commission convened a conference; and

WHEREAS at this conference the applicant advised the Commission that since 21 September 2007 the parties have been negotiating a replacement agreement for the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the Agreement") due to expire on 1 March 2008 and the applicant stated that it had made two offers to the respondent and its members which have both been rejected by the respondent; and

WHEREAS the Commission is aware that on 10 January 2008 the applicant lodged an application in the Commission to initiate a bargaining period for a replacement agreement pursuant to the good faith bargaining provisions in the Act and on 31 January 2008 the respondent agreed to bargain for a new agreement in good faith in accordance with the Act; and

WHEREAS the applicant advised the Commission at the conference that the respondent had issued two directives in February 2008 to its members to undertake industrial action; and

WHEREAS Directive 1 obliges the respondent's members to work to rule and not undertake voluntary activities outside of normal working hours unless payment and/or time off in lieu is provided; and

WHEREAS on 21 February 2008 the respondent issued Directive 2 to its members that reads in part as follows:

> "*That the members are directed to stop work on the morning of Thursday 28th February 2008 for the purpose of attending various forums to receive an update on the status of negotiations and to consider further member response to the progress of negotiations.*"; and

WHEREAS the applicant argued that industrial action at this stage of its negotiations with the respondent is unwarranted and not in the public interest as the parties had participated in regular meetings since 24 January 2008 to finalise a new industrial agreement, significant progress had been made between the parties to date and further meetings were planned to take place; and

WHEREAS the applicant argued that Directive 1 constituted industrial action as teachers were in breach of their contractual obligations because teachers were refusing to undertake a range of activities which they would normally undertake and the applicant claims that this action has had an adverse impact on the educational outcomes for students in Western Australian Government schools; and

FURTHER the applicant argues that it has a legislative duty to ensure the safety and welfare of students who are required to attend school and the industrial action proposed to take place on the morning of Thursday 28 February 2008 will seriously jeopardise the applicant's capacity to fulfil this obligation; and

WHEREAS the applicant is seeking an order that Directive 1 and Directive 2 be lifted and that all current and future industrial action to be undertaken by the respondent and its members in support of a new industrial agreement cease; and

WHEREAS the applicant argued that the foreshadowed stop work meeting on 28 February 2008 would present as a major safety risk to students and would adversely impact on the learning programmes of the 250,000 students in Western Australian Government schools as:

- the applicant was unsure exactly how many teachers would attend the stop work meeting and early indications are that no staff may be in attendance at a number of schools and it would therefore be logistically difficult to supervise all students who attended schools on 28 February 2008;
- country schools where teachers are not in attendance will be difficult to staff given geographic constraints;
- buses and cross-walk attendants will not be available to assist students arriving at schools in the middle of the day;
- parents would be seriously inconvenienced by teachers no being available to teach their children; and

FURTHER the applicant maintained that:

- the applicant was in a position to give the respondent a response to its revised salary claim next week which is to be evaluated in light of the whole package to be negotiated with the respondent;
- the applicant was committed to having ongoing discussions with the respondent to finalise an industrial agreement but this may be reviewed in light of industrial action currently taking place and proposed to take place; and

WHEREAS the respondent argued that the stop work meeting scheduled for 28 February 2008 was necessary as:

- the respondent's members required first hand knowledge about the status of negotiations with the applicant for a new industrial agreement given the delays which have already occurred with respect to the negotiations between the parties;
- the respondent's members were not taking industrial action lightly given its obligations to students;
- the respondent's members will return to their respective workplaces after the stop work meeting finished at 10.30am; and

FURTHER the respondent maintained that their member's actions were supported by some parents who would not be sending their children to school; and

WHEREAS the respondent conceded that negotiations between the parties for a new industrial agreement had not been exhausted; and

WHEREAS the Commission is of the view that the matter before it is an industrial matter as it relates to issues pertaining to the employment relationship between the applicant and the respondent's members and the rights of an organisation; and

WHEREAS the Commission is of the view that it has jurisdiction to issue the orders sought pursuant to s44 of the Act which enables the Commission to issue orders with respect to an industrial matter; and

WHEREAS having heard from the applicant and the respondent and when taking into account equity and fairness and the substantial merits of this case, the objects of the Act and the provisions of s42B(3) and s42E of the Act with respect to the obligation on parties to bargain in good faith and the Commission's powers to order a negotiating party to refrain from doing any particular thing, the Commission has formed the view that the industrial action contemplated under Directive 2 should not occur; and

WHEREAS on the information currently before me the Commission is of the view that the terms of Directive 1 does not constitute industrial action and therefore no order shall issue that Directive 1 be lifted and cease to operate; and

WHEREAS in reaching this conclusion the Commission has taken into account that the interests of those persons directly involved in this dispute, particularly students, will be compromised if the proposed stop work meeting takes place on 28 February 2008;

NOW THEREFORE having heard Mr J Ridley and Ms S O'Neill on behalf of the applicant and Ms A Gisborne and Mr D Kelly on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(i) and (ii) and s44(6)(bb)(i) and s42 of the Act, hereby orders:

1. THAT the respondent, its officers, agents, employees and members lift Directive 2 and cease the foreshadowed industrial action, in the form of a stop work meeting to be held on 28 February 2008 in relation to the negotiation of a new agreement.
2. THAT the respondent, its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and the lifting of Directive 2 and direct its members to comply with this order.
3. THAT the respondent, its officers, employees and members are not to hold any further stop work meetings in relation to the negotiations for a new agreement whilst this order remains in force.
4. THAT the parties are to hold further discussions prior to 29 February 2008 with a view to resolving the issues in dispute with respect to a new agreement and a report back conference will be held in the Commission on Friday 29 February 2008 to review the progress of these negotiations.
5. THAT this order is to remain in force until revoked or varied by the Commission.
6. THAT both parties have liberty to apply to vary this order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2008 WAIRC 00369

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 JUNE 2008
FILE NO/S	C 4 OF 2008
CITATION NO.	2008 WAIRC 00369

Result	Order Revoked
Representation	
Applicant	Mr J Serich and Ms P Cameron
Respondent	Mr M Amati

Order

WHEREAS this application was lodged pursuant to s44 of the *Industrial Relations Act, 1979* ("the Act") on 22 February 2008 whereby the applicant sought a conference requesting the Commission to issue either a recommendation or order that the respondent and its members immediately cease all industrial action in support of a new industrial agreement; and

WHEREAS on 25 February 2008 the Commission convened a conference; and

WHEREAS at this conference the applicant advised the Commission that since 21 September 2007 the parties have been negotiating a replacement agreement for the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the Agreement") due to expire on 1 March 2008 and the respondent had issued two directives in February 2008 to its members to undertake industrial action; and

WHEREAS Directive 1 obliges the respondent's members to work to rule and not undertake voluntary activities outside of normal working hours unless payment and/or time off in lieu is provided; and

WHEREAS on 21 February 2008 the respondent issued Directive 2 to its members that reads in part as follows:

> "*That the members are directed to stop work on the morning of Thursday 28th February 2008 for the purpose of attending various forums to receive an update on the status of negotiations and to consider further member response to the progress of negotiations.*"; and

WHEREAS after hearing from the parties the Commission issued the following orders pursuant to s44 of the Act on 25 February 2008 ("the Order"):

1. THAT the respondent, its officers, agents, employees and members lift Directive 2 and cease the foreshadowed industrial action, in the form of a stop work meeting to be held on 28 February 2008 in relation to the negotiation of a new agreement.

2. THAT the respondent, its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and the lifting of Directive 2 and direct its members to comply with this order.

3. THAT the respondent, its officers, employees and members are not to hold any further stop work meetings in relation to the negotiations for a new agreement whilst this order remains in force.

4. THAT the parties are to hold further discussions prior to 29 February 2008 with a view to resolving the issues in dispute with respect to a new agreement and a report back conference will be held in the Commission on Friday 29 February 2008 to review the progress of these negotiations.

5. THAT this order is to remain in force until revoked or varied by the Commission.

6. THAT both parties have liberty to apply to vary this order.; and

WHEREAS on 10 January 2008 the applicant lodged a Notice to Initiate Bargaining with the respondent under s42 of the Act to negotiate an industrial agreement for teachers and administrators employed by the applicant in Western Australia; and

WHEREAS on 31 January 2008 the respondent responded to the Notice to Initiate Bargaining stating that it wished to enter into negotiations to reach agreement on an industrial agreement; and

WHEREAS on 19 March 2008 the respondent lodged an application seeking to vary the Order by deleting order 3 and on 4 April 2008 the applicant lodged a Notice of answer and counter-proposal opposing the application to vary the Order; and

WHEREAS on 8 April 2008 the Commission advised the application to vary the Order would be dealt with by way of written submissions and the parties were provided timeframes for filing and serving submissions; and

WHEREAS notwithstanding that the parties had been negotiating both in the Commission and outside of the Commission with a view to reaching agreement on a proposed agreement and on a number of occasions the parties reported back to the Commission with respect to the progress of these negotiations the parties failed to reach agreement on all issues with respect to finalising an industrial agreement; and

WHEREAS on 9 April 2008 the applicant lodged an application seeking that the Commission issue a declaration pursuant to s42H of the Act that bargaining between the parties has ended and filed detailed submissions in support of its application; and

WHEREAS the respondent opposed a declaration pursuant to s42H of the Act issuing and filed and served submissions in support of its claim that negotiations between the parties had not been exhausted; and

WHEREAS after hearing from the parties as to whether or not bargaining between the parties had ended on 6 June 2008 the Commission issued a declaration pursuant to s42H of the Act that bargaining between the parties had ended; and

WHEREAS on 12 June 2008 the Commission convened a conference to deal with the status of the Order; and

WHEREAS following that conference the parties were asked to provide written submissions with respect to whether or not the Order should be revoked; and

WHEREAS in submissions filed on 13 June 2008 the respondent argued that as the Commission had declared that bargaining between the parties for a new agreement had ended on 6 June 2008 this disposes of any issue with respect to bargaining for a new agreement and there is therefore no live industrial matter before the commission and the Order is unnecessary; and

FURTHER order 5 allows the Commission to rescind the Order; and

WHEREAS in submissions filed on 16 June 2008 the applicant argued that even though it concedes that the parties have been unsuccessful in negotiating the terms of a new agreement the Order should remain in place as the issues in dispute between the parties will now be the subject of future arbitral proceedings; and

FURTHER the Order should remain in place until arbitration has been finalised as the respondent has threatened further industrial action in support of its claims; and

WHEREAS having considered the respective positions of the parties and when taking into account equity, good conscience and the relevant objects of the Act the Commission has formed the view that the Order in its entirety should be revoked based on the following:

- orders 1, 2 and 4 are now redundant;
- order 3 was to remain in place until negotiations for a proposed agreement had reached finality and these negotiation have now ceased as the Commission declared that bargaining between the parties ended on 6 June 2008 on the basis that there was no prospect of the parties reaching a negotiated agreement on all issues in dispute;
- any issues that may arise in the future with respect to industrial action can be dealt with by way of a further application;

NOW having heard Mr J Serich and Ms P Cameron on behalf of the applicant and Mr M Amati on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the order that issued on 25 February 2008 with respect to application C4 of 2008 be and is hereby revoked.

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

2008 WAIRC 00367

DISPUTE REGARDING THREATENED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-v-
	STATE SCHOOL TEACHERS' UNION OF WESTERN AUSTRALIA INC.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 17 JUNE 2008
FILE NO/S	C 17 OF 2008
CITATION NO.	2008 WAIRC 00367

Result	Order issued
Representation	
Applicant	Mr J Ridley and Mr J Serich
Respondent	Mr M Amati

Order

WHEREAS this application was lodged pursuant to s44 of the *Industrial Relations Act, 1979* ("the Act") on 12 June 2008 whereby the applicant sought a conference requesting the Commission to issue an order to prevent threatened and existing industrial action in relation to the finalisation of a replacement agreement for the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* ("the Agreement"); and

WHEREAS on 13 June 2008 the Commission convened a conference; and

WHEREAS at this conference the applicant advised the Commission that the respondent has had a directive in place since the beginning of Term 1 (Directive 1) which reads as follows:

> "*All members are advised that in accordance with the November 2007 State Council decisions, as of Monday 4 February 2008 State School Teacher Union (SSTUWA) members are DIRECTED that the following action be undertaken by members:*
>
> - *Focus all contact time and DOTT only on teaching and learning activities for your students.*
> - *Do not undertake voluntary unpaid activities including meetings and committee work during lunch-time and outside of normal school/college hours. Only participate in paid (contract payment or TOIL) additional activities out-of-school hours.*
> - *Attend only two (2) staff meetings of one hour duration during Term 1 2008.*"; and

FURTHER at the respondent's June 2008 State Council the respondent endorsed industrial action associated with negotiating the replacement agreement and issued and forwarded the following resolutions to its members:

- SC.4.12 That the SSTUWA directs members to prepare student reports but refuse to put the data on SIS or release the information in any other way, until the Twomey report is released;
- SC.4.11 That the SSTUWA June State Council endorse a campaign of rolling half day strike action on a date to be determined by Executive;
- SC.4.3 That State Council requests that teachers should decline student entry to class once EBA maximum class size is reached;
- SC.4.18 That the SSTUWA directs its members not to undertake any planning, preparation or organisation of any out-of-hours voluntary activities for the 2009 school year whilst any arbitration process is active; and

WHEREAS the applicant is seeking the following orders:

1. That the respondent, its officers, agents, employees and members lift Directive 1 and cease the industrial action in relation to the finalisation of the terms and conditions of employment and replacement of the Agreement;
2. That the respondent, its officers, agents, employees and members are prohibited from engaging in the threatened industrial action, including bans, in relation to the finalisation of the terms and conditions of employment and replacement of the Agreement;

3. That the respondent, its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and direct its member to comply with this order;
4. That the respondent, its officers, agents, employees and members are not to engage in any further industrial action in relation to the finalisation of the terms and conditions of employment to replace the Agreement;
5. That the respondent, its officers, agents, employees and members are not to use departmental time and resources for the purposes of the union's campaign;
6. That the respondent, its officers, agents, employees and members are not to distribute information for parents and students on school premises;
7. That this order is to remain in force until revoked or varied by the Commission; and

WHEREAS the applicant argued the following in support of its application that orders should issue:

- Directive 1 was being implemented by a number of teachers and as a result teachers were not undertaking a range of normal duties including attending camps, arranging and attending country week activities and attending meetings over and above the statutory meetings teachers are required to attend;
- actions by teachers associated with Directive 1 was having a detrimental impact on school operations, tensions between staff was evident, some teachers' workloads had increased and students were being disadvantaged;
- teachers were not working in accordance with their contractual obligations to the applicant by following Directive 1;
- teachers who do not input data onto the respondent's SIS reporting system so that written reports can issue to students are refusing to work in accordance with their contractual obligations and were acting contrary to the applicant's Curriculum, Assessment and Reporting K-10: Policy and Guidelines. As a result of this ban the applicant is also unable to meet its obligations under s67 of the *School Education Act 1999*;
- the refusal by teachers to accept students over the notional class size limits will cause disruption and stress to students' learning, this ban is arbitrary and the Agreement contains a grievance process for dealing with excessive class sizes;
- foreshadowed rolling half day strikes will greatly disrupt school learning programmes and therefore disadvantage students and these strikes are unjust, unlawful and unwarranted;
- as these strikes are to take place on a rolling basis this creates uncertainty as to when the strikes will occur thus creating duty of care issues for schools, parents and students;
- the refusal by teachers to undertake planning for 2009 will disadvantage students and cause tension at the school level;
- it is inappropriate and illegal for teachers to use school resources to lobby parents;
- the public interest is served by the issuance of the orders sought by the applicant; and

WHEREAS the respondent confirmed that the resolutions endorsed at its June 2008 State Council meeting and Directive 1 are in operation and even though no determination has been made about the timing of rolling stoppages these stoppages will take place; and

WHEREAS the respondent argued that the orders being sought by the applicant should not issue for the following reasons:

- by following Directive 1 teachers are not undertaking industrial action but working to rule and their actions in this regard constitutes a withdrawal of goodwill by teachers;
- teachers are continuing to fulfil their obligations in accordance with their contracts of employment and have only withdrawn voluntary activities by following Directive 1;
- resourcing and other issues remain outstanding with respect to the SIS reporting system and therefore teachers should not be required to use this system when reporting to parents and the SIS reporting system was not available at all schools;
- notwithstanding these concerns teachers will report directly to parents about student progress;
- the Agreement allows facilities to be used at schools for union activities therefore the use of these resources should not be restricted and the respondent maintains that its current industrial campaign is not a political campaign;
- even though the dates of when rolling stoppages will occur have not yet been finalised schools and parents would be given seven days' notice of any stoppage and the respondent maintains that these stoppages are a legitimate activity to pressure the applicant;
- the refusal to accept additional students over class size limits is in line with a teacher's obligation and rights under the Agreement and does not constitute industrial action;

- a teacher's refusal to undertake planning and preparation activities for 2009 are voluntary activities and therefore do not constitute industrial action;
- it is not in the public interest to issue the orders sought nor is it in the interest of teachers who are directly impacted if the orders sought are granted; and

WHEREAS the Commission is of the view that the matters before it are industrial matters as they relate to issues pertaining to the employment relationship between the applicant and the respondent's members and the rights of an organisation; and

WHEREAS the Commission is of the view that it has jurisdiction to issue the orders sought pursuant to s44 of the Act which enables the Commission to issue orders with respect to an industrial matter; and

WHEREAS having heard from the applicant and the respondent and when taking into account equity and fairness and the substantial merits of this case and relevant objects of the Act the Commission has formed the view that some of the orders being sought by the applicant should issue; and

WHEREAS notwithstanding additional information being put before the Commission I continue to remain of the view that the actions of teachers associated with Directive 1 as well as the ban on teachers undertaking voluntary work with respect to 2009 planning and preparation activities as set out in the respondent's June 2008 State Council resolution SC.4.18 do not constitute action warranting orders issuing that Directive 1 be lifted and cease to operate or that teachers be required to participate in 2009 planning and preparation activities; and

WHEREAS in reaching this view the Commission is aware that any teacher not complying with his or her contract of employment pursuant to the Agreement and other relevant statutes may be directed to do so pursuant to Clause 18.1 of the Agreement; and

WHEREAS the Commission is of the view that no orders should issue with respect to the respondent's members using school resources to undertake union activities however the Commission is of the view that any industrial activities at the workplace by the respondent's members and the use of school facilities should be restricted to activities contemplated under Clause 113 of the Agreement; and

WHEREAS the Commission is of the view that given the combined terms of s67 of the *School Education Act 1999* and the Curriculum, Assessment and Reporting K-10: Policy and Guidelines document teachers have an obligation under their contracts of employment to input data onto the SIS reporting system so that students can be issued with written reports at the end of Semester 1, 2008; and

WHEREAS the Commission is of the view that the rolling stoppages proposed to be undertaken as a result of the respondent's June 2008 State Council resolution SC.4.11 will have a detrimental effect on schools and students and the nature of this industrial action also makes it difficult for schools and parents to make alternative duty of care arrangements for students; and

WHEREAS the Commission has taken into account that the bargaining period with respect to the parties attempting to reach agreement on a replacement agreement has ended on the basis that the Commission was of the view that there was no prospect that the parties would reach a negotiated agreement on a replacement agreement and the applicant has indicated that it will apply to the Commission for the making of an arbitrated enterprise order; and

WHEREAS in reaching the conclusion that some of the orders being sought by the applicant should issue the Commission has taken into account that the interests of those persons directly involved in this dispute, particularly students, and the interest of parents will be compromised if the proposed rolling stoppages occur and Semester 1, 2008 reports do not issue; and

WHEREAS on 16 June 2008 the Commission issued a Minute of Proposed Order with respect to this matter; and

WHEREAS the respondent requested a speaking to the minutes with respect to orders 2 and 3; and

WHEREAS on 17 June 2008 the Commission conducted a speaking to the Minutes of Proposed Order; and

WHEREAS the respondent argued at the speaking to the minutes that order 2 should allow teachers some flexibility if they are unable to input data onto the SIS reporting system as a result of factors beyond their control and the respondent proposed alternative wording for this order; and

WHEREAS the respondent sought clarification about the terms of order 3 as the applicant had not yet lodged an application for an enterprise order; and

WHEREAS the applicant confirmed that employees would not be subject to any sanctions if they were unable to use the SIS reporting system due to factors beyond their control and opposed the alternative wording proposed by the respondent with respect to order 2; and

WHEREAS the Commission is of the view that given the issues raised by the parties the orders should be modified;

NOW THEREFORE having heard Mr J Ridley and Mr J Serich behalf of the applicant and Mr M Amati on behalf of the respondent, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(i) and (ii) and s44(6)(bb)(i), hereby orders:

1. THAT the respondent by its officers, agents and employees and the respondent's members immediately cease the foreshadowed industrial action in the form of rolling half day stoppages as proposed under resolution SC.4.11.
2. THAT the respondent by its officers, agents and employees and the respondent's members immediately lift the ban on inputting data onto the applicant's SIS reporting system or releasing relevant reporting information in any

other way as specified in resolution SC.4.12 so that written reports can issue to parents and students by the end of Semester 1, 2008.

3. THAT the respondent by its officers, agents, employees and the respondent's members are not to engage in any industrial action in relation to the finalisation of the terms and conditions of employment to replace the *School Education Act Employees' (Teachers and Administrators) General Agreement 2006* from the date of this order until the Commission considers and determines whether or not an enterprise order should issue pursuant to s42I of the Act and if an enterprise order is to issue the finalisation of the terms of that enterprise order.

4. THAT the respondent, by its officers, agents and employees are to take reasonable steps to immediately inform its members about the terms of this order and direct its members to comply with this order.

5. THAT this order is to remain in force until revoked or varied by the Commission.

6. THAT both parties have liberty to apply to vary this order.

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

2008 WAIRC 00357

DISPUTE RE THE USE OF FIXED TERM CONTRACT EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) TRADING AS SIR CHARLES GAIRDNER HOSPITAL
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
HEARD	MONDAY, 9 JUNE 2008
DELIVERED	FRIDAY, 13 JUNE 2008
FILE NO.	PSAC 10 OF 2008
CITATION NO.	2008 WAIRC 00357

CatchWords	Public Service Arbitrator – Industrial Law (WA) – Jurisdiction of Public Service Arbitrator – Arbitrator's power to inquire into and deal with any industrial matter – power to make orders absent jurisdiction – power of Agreement to grant jurisdiction to Public Service Arbitrator – selection and appointment of government officer – adverse reports on applicant for employment – referral to Medical Board of Western Australia – Peer review of medical specialists – *Industrial Relations Act 1979* (WA) s 44; s 80(E)(7) and s 83 – *Public Sector Management Act s 97(1)(a) – Department of Health Medical Practitioners (Metropolitan Health Service AMA Industrial Agreement 2007 cl 52(5) – Department of Health Medical Practitioners (Metropolitan Health Service) AMA Industrial Agreement 2004 cl21, 48(5) – Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 – Recruitment, Selection and Appointment Standard*
Result	Application dismissed
Representation	
Applicant	Mr S Ellis of counsel
Respondent	Mr R Bathurst of counsel

Reasons for Decision

Background

1 On 16 May 2008, the applicant filed an application seeking a conference pursuant to s 44 of the *Industrial Relations Act 1979 (the Act)* and *"for orders that the respondent continue the employment of Mr Emil Popovic pending further order of this Commission"*. The schedule to the application is in the following terms:

"1. The applicant and the respondent are parties to the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2004 (PSAAG 2 of 2008) ("Agreement").

2. The respondent has employed Mr Emil Popovic as a sessional neurosurgeon at Sir Charles Gairdner Hospital ("Hospital") since in or about February 2004. Mr Popovic and the respondent have executed a number of employment contracts during the period from on or about 3 April 2006 to date. The contracts have specified fixed periods of employment. The most recent was for the period 6 May 2008 to 19 May 2008 inclusive. The Agreement does not permit the use of fixed term contracts for terms of less than 5 years, except to meet short term exigencies and the operation of the contracts was not continuous.

3. On or about 5 November 2007, the respondent invited Mr Popovic to apply for a further appointment as a neurosurgeon, for a period of 5 years. Mr Popovic applied prior to 8 December 2007. The respondent had this application under consideration from December 2007 until 22 April 2008.

4. On or about 30 April 2008, the respondent, by his solicitor informed Mr Popovic that the Appointments Committee of the Hospital had recommended that Mr Popovic not be offered a further 5 year contract of employment. The respondent invited submissions from Mr Popovic prior to 9 May 2008.

5. Clause 52 sets out the dispute resolution procedure under the Agreement. It provides for the resolution of "any questions, disputes or difficulties" (subclause (1)). It permits a practitioner or a group of practitioners to raise disputes (subclause (2)). It provides for the reference of questions to the Commission (or another independent arbitrator chosen by the parties) (subclause (3)). Clause 52(5) requires that the status quo applying prior to the issue arising shall remain until resolved in accordance with the procedure set out in clause 52(5) of the Agreement. Clause 52(6) requires the respondent to apply the principles of natural justice if the respondent seeks to discipline or terminate a practitioner, such as Mr Popovic.

6. By letter dated 14 May 2008 from Russell Kennedy, Mr Popovic's solicitors, Mr Popovic sought for matters relating to his employment to be dealt with under clause 52(2) of the Agreement. Those matters include but are not limited to:

(a) on or about 3 April 2007, the respondent failed to renew Mr Popovic's appointment for a period of 5 years and instead provided Mr Popovic with contracts with nominal terms of only a month;

(b) sometime prior to 21 December 2005, the respondent reported allegations of misconduct made by a Dr Weidmann to the Medical Board of Western Australia without informing Mr Popovic and without affording Mr Popovic the opportunity to respond to those allegations;

(c) the respondent imposed supervisory requirements on Mr Popovic's practice which were not recommended by the majority of members of a Conduct Review Meeting dated 28 June 2006;

(d) the respondent failed to adhere to the terms of the supervisory requirements imposed on Mr Popovic on 23 August 2006 by:

(i) extending the period of supervision after 31 March 2007 without giving natural justice to Mr Popovic;

(ii) failing to conduct review meetings with Mr Popovic every two months; and

(iii) failing to restore Mr Popovic to the vascular list after restoring Mr Popovic to unrestricted practice; and

(e) the respondent improperly conducted the consideration of the renewal of Mr Popovic's appointment.

7. Further, the respondent acted unfairly to Mr Popovic and in a manner calculated to destroy or seriously damage the relationship of confidence and trust between him and Mr Popovic in that:

(a) on or about 3 April 2007, the respondent failed to renew Mr Popovic's appointment for a period of 5 years and instead provided Mr Popovic with contracts with nominal terms of only a month;

(b) sometime prior to 21 December 2005, the respondent reported allegations of misconduct made by a Dr Weidmann to the Medical Board of Western Australia without informing Mr Popovic and without affording Mr Popovic the opportunity to respond to those allegations;

(c) the respondent imposed supervisory requirements on Mr Popovic's practice which were not recommended by the majority of members of a Conduct Review Meeting dated 28 June 2006;

(d) the respondent failed to adhere to the terms of the supervisory requirements imposed on Mr Popovic on 23 August 2006 by:

(i) extending the period of supervision after 31 March 2007 without giving natural justice to Mr Popovic;

(ii) failing to conduct review meetings with Mr Popovic every two months; and

(iii) failing to restore Mr Popovic to the vascular list after restoring Mr Popovic to unrestricted practice; and

(e) the respondent improperly conducted the consideration of the renewal of Mr Popovic's appointment.

This unfair conduct has caused Mr Popovic substantial hardship and financial loss.

8. By letter dated 14 May 2008 from Russell Kennedy Solicitors, Mr Popovic sought an undertaking from the respondent that the respondent would maintain Mr Popovic's employment pending exhaustion of the dispute resolution procedure, in accordance with clause 52(5) of the Agreement.

9. The respondent failed to provide an undertaking that it would maintain the status quo.

10. The respondent intends to:

(a) terminate the employment of Mr Popovic without applying the principles of natural justice, as detailed in the letters from Russell Kennedy referred to above and as required by clause 52(6) of the Agreement; and

(b) unfairly fail to reappoint Mr Popovic as a neurosurgeon for a period of 5 years.

11. Termination of Mr Popovic's employment would have a serious adverse impact upon his reputation and his ability to obtain employment as a neurosurgeon in Western Australia.

12. The applicant seeks orders maintaining Mr Popovic's employment pending resolution of the issues in accordance with the dispute resolution procedure."

2 The Public Service Arbitrator (the Arbitrator) convened a conference on Friday 16 May 2008, and on Monday 19 May 2008 issued the following orders:

"1. That the respondent shall extend the current contract of employment with Mr Emil Popovic for a period of four weeks for the purpose of enabling further conciliation between the parties and the operation of the Disputes Settlement Procedure set out in the Department of Health Medical Practitioners (Metropolitan Health Service) AMA Industrial Agreement; and

2. That the Arbitrator shall convene a further conference between the parties for the purposes of conciliation, at a date and time to be fixed; and

3. That either party shall have liberty to apply to amend or rescind this Order."

3 On Thursday 5 June 2008, the Arbitrator convened a conference for the purpose of conciliating between the parties. At that conference it became clear that the parties were unlikely to reach agreement resolving the dispute between them. The applicant sought that the dispute between the parties be referred for hearing and determination and that a further order issue for the purpose of the respondent being required to continue to employ Mr Popovic pending the hearing and determination of the dispute.

4 The respondent said that the Arbitrator does not have jurisdiction to deal with the matter and sought an order dismissing the matter in accordance with s 27(1)(a) of *the Act.*

5 A hearing was convened on Monday 9 May 2008 to deal with those matters set out in paras [3] and [4] above.

The Applicant's Claim

6 The applicant characterises the issues it seeks to be heard and have determined in the following way:

"The issues may be broken down as follows:

(a) is the respondent seeking to discipline or terminate Dr Popovic, without affording him natural justice, unfairly and contrary to the requirements of cl 48(5) of the 2004 Agreement and cl 52(5) of the 2007 Agreement?

(b) has the respondent acted unfairly in connection with:

(i) suspending Dr Popovic and referring matters to the Medical Board of Western Australia;

(ii) the investigation of alleged substandard performance associated with Ms GS;

(iii) imposition of supervisory requirements not recommended by the participants in the review process which occurred on 28 June 2006;

(iv) imposition of supervisory requirements that were inconsistent with the approach to similar conduct by other practitioners; and

(v) extending the supervisory requirements imposed on 23 August 2006 beyond the identified term.

(c) were the terms of the contracts offered to Mr Popovic contrary to the requirements of the Agreements and unfair?" (Applicant's Outline of Submissions in relation to Jurisdictional Issues, para 7).

7 The applicant says those matters are within the Arbitrator's jurisdiction. This is said to be on the basis that the Arbitrator has jurisdiction to *"enquire into and deal with any industrial matter relating to a government officer…"* (s 80E(1) of *the Act*). The matters in dispute meet the definition of an industrial matter. The effect of the refusal to offer a new contract is said to be, in reality, a means of disciplining Mr Popovic without applying a fair process, and of bringing his employment to an end. The respondent is said to have unfairly treated Mr Popovic in various ways and this "*unfair conduct impacts upon the disciplinary/termination process adopted by the respondent."* (Applicant's Outline of Submissions in relation to Jurisdictional Issues, para (16)).

8 The applicant says that the issue of the breach of the Agreement relating to offering Mr Popovic contracts of less than five years' duration is not an end in itself but merely a step in the process of dealing with the allegations of the respondent's unfair treatment of Mr Popovic.

9 The applicant says that the issue relating to the respondent's refusal to offer a further five year contract of employment to Mr Popovic is not a matter covered by the *Recruitment, Selection and Appointment Standard* because Mr Popovic had already been appointed to a position at Sir Charles Gairdner Hospital, and the dispute relates to the contractual terms, not the appointment itself.

The Respondent's Response

10 The respondent characterises the issues in the following way:

"The matters sought to be progressed under the dispute settlement procedure fall within five categories:

(a) use of contracts of employment with terms less than five years;

(b) reporting Mr Popovic to the Medical Board in December 2005;

(c) investigation of substandard performance in respect of Mr Popovic's operation on Ms Stokes in April 2006;

(d) compliance with supervisory requirements placed on Mr Popovic in 2006; and

(e) Mr Popovic's application for a further five year contract at Sir Charles Gairdner Hospital ***("Hospital")****."* (Respondent's Outline of Submissions para 4).

11 The respondent says those matters are either not within jurisdiction or ought not be dealt with because:

1. The issue of the use of contracts of less than 5 years' duration is a matter for enforcement of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2007 (the 2007 Agreement), which is a matter for the Industrial Magistrate pursuant to s 83 of *the Act*.
2. The issue of referral to Medical Board occurred in December 2005 and is now finished.
3. The investigation of substandard performance regarding Ms Stokes was reviewed in 2006.
4. Mr Popovic was placed under supervision for a period, that supervision period has been completed.
5. The lack of review meetings during the supervision which came to an end in November 2007 would only result in a bare declaration which is not the purpose of the Commission.
6. The application for a five year contract is not a matter within jurisdiction because it is a "matter in respect of which a procedure referred to in section 97(1)(a) of the *Public Sector Management Act 1994* is, or may be, prescribed under that Act" (s 80E(7) of *the Act*).
7. The Recruitment, Selection and Appointment Standard (the Standard) is such a procedure, and accordingly, the whole matter of the respondent's refusal to offer Mr Popovic a five year contract is outside jurisdiction.

Affidavit of Emil Andrew Popovic

12 The history of this matter is set out in the Affidavit of Emil Andrew Popovic (Exhibit A1).

13 Although the respondent objects to a number of aspects of Mr Popovic's Affidavit, it did not object to it being tendered for the purposes of the hearing and determination of the issues of jurisdiction and whether the matter ought to be dismissed. Mr Popovic was not cross examined as to the veracity of his statement in those circumstances.

14 The relevant points of the Affidavit are:

1. Mr Popovic is a neurosurgeon, who has practised in that field for more than 17 years.
2. On or about 15 January 2001 he commenced work in the neurosurgery department at Royal Perth Hospital and continued there until around 27 June 2004.
3. On or about 29 November 2003, he commenced working at the neurosurgery department of Sir Charles Gairdner Hospital (the Hospital). He does not recall being offered a contract of employment prior to 3 April 2006.
4. He was offered and accepted a contract of employment dated 3 April 2006 on a fixed term basis as a sessional neurosurgeon. The contract provided for a *"period of five years effective from 4 April 2006 to 3 April 2007 inclusive"*. He says he did not note at the time the contradiction between the stated five years and the dates it was to be effective.
5. From about 3 July 2007, the Hospital offered him a series of fixed term contracts for periods of one month each from 4 July 2007 to 5 May 2008.
6. He did not apply for any of these contracts and there was no application or review process involved.
7. He was then offered a fixed term contract for the two weeks from 6 May to 19 May 2008. He says that *"(t)he Hospital offered me this two week contract extension in order to afford me an opportunity to make submissions in respect of my reappointment"*.

8. His employment initially involved 5 sessions per week, however it was mutually agreed between the Hospital and Mr Popovic that this would be halved to 5 sessions per fortnight, effective from 16 October 2006.

9. On 8 August and 6 September 2005, Mr Popovic met with three persons from the Hospital to discuss issues associated with Mr Popovic's work practices.

10. On 7 December 2005, the Hospital informed Mr Popovic that 10 of his cases had been referred to an independent reviewer (Dr Weidmann), and his clinical privileges at the Hospital were suspended pending a review by the Medical Board of Western Australia (the Medical Board).

11. Mr Popovic provided written comments to Dr Weidmann. Dr Weidmann did not meet with Mr Popovic or discuss with him the cases referred for assessment.

12. On 14 February 2006, Mr Graeme Brazenor, a neurosurgeon who Mr Popovic believes provided expert advice to the Medical Board, expressed conclusions as to the 10 cases referred by the Hospital.

13. According to a letter from the Medical Board to the Hospital dated 14 March 2006, on 10 January 2006 the Medical Board had *"initially imposed a S 12BA Interim Constraint on Practice Order on Mr Popovic"*. It commenced an investigation and *"(a)t the end of January 2006, the Order was revoked by the Board and replaced with a Voluntary Undertaking by Mr Popovic, to continue with the restraints on practice and psychological assessments. This Undertaking was given against the background of adverse opinions expressed by Mr Weidmann on some of the cases and remained in place until 10 March 2006 when Mr Popovic elected to discontinue the supervision aspect of the Undertaking.*

    At this time there is no Order imposed upon Mr Popovic by the Medical Board". ("EAP20" attached to Affidavit of Emil Andrew Popovic).

14. Mr Popovic claims that he was unfairly treated by the Hospital in respect of the referral of matters to the Medical Board.

15. On 20 June 2006, Mr Popovic attended a meeting at the Hospital, along with his solicitor, his brother (a neuroanaesthetist), a representative of the applicant, the Hospital's solicitor and a Ms July Haymen of the Hospital. Mr Popovic says that at this meeting it was agreed that the Hospital's concerns regarding the case of Ms GS would be dealt with by a conduct review panel. (Mr Popovic notes that notwithstanding this agreement, he had requested peer review before the neurosurgery department.) It was also agreed that any deficiencies identified by the review panel would *"lead to a positive performance management process being adopted to return (Mr Popovic) to full clinical duties."*

16. On 8 June 2006 Mr Popovic appeared before the conduct review panel.

17. The transcript of the conduct review panel meeting of 17 August 2006 recorded the following recommendations:

    > *"(a) EP (Mr Popovic) requires supervision on his return to Sir Charles Gairdner Hospital.*
    >
    > *(b) Specific recommendation: EP is to establish radiographically the correct level prior to any non-reversible component of spinal surgery."* ("EAP 25" attached to Affidavit of Emil Andrew Popovic).

18. Mr Popovic says the conduct review panel did not make a finding of substandard performance, but that his work on *"this one occasion in relation to Ms GS was less than best practice"*.

19. Mr Popovic says he has spoken to two members of the conduct review panel and their comments to him are inconsistent with those noted in para (17) above. Although Mr Popovic sought their confirmation of those comments, the members of the panel have declined to do so.

20. Mr Popovic says the Hospital's approach to and treatment of him in respect of this matter has been inconsistent with the treatment of other neurosurgeons in similar cases.

21. In respect of the supervision which was to commence on 4 September 2006 and conclude on 31 March 2007, Mr Popovic says this was imposed in a manner contrary to policy. Review meetings were to be conducted every two months, and despite Mr Popovic requesting the convening of a review meeting, none took place.

22. Professor Stokes provided a report by email dated 31 October 2006, in the following terms:

    > *"I write formally to give my report on the work undertaken by Mr Popovic in the last few months. I have already sent to you Amanda his operative lists since the commencement of this review,*
    >
    > ***Firstly** all the operative cases have done very well and there have been no complications of significance.*
    >
    > ***Secondly** his Registrar Dr Michael Kern has expressed his pleasure working with Mr Popovic and has been very pleased by the teaching that he has received.*
    >
    > ***Thirdly** all complex spinal cases Mr Popovic has agreed are being reviewed prior to surgery by one or other of his colleagues who perform similar work in that area.*

> ***Fourthly*** *it is my view that Mr Popovic could return to the on-call Vascular Roster. I have discussed this with Mr Popovic and I have agreed to assist him at appropriate vascular cases.*
>
> *Unfortunately I will not be able to attend the meeting tomorrow but put these views forward and would be happy to answer any questions."* ("EAP 27" attached to Affidavit of Emil Andrew Popovic).

23. Supervision of Mr Popvic continued beyond 31 March 2007. By letter dated 20 September 2007, Professor Stokes provided a report to the Hospital in the following terms:

> *"As requested I am providing a report on my period of supervision of Mr. Emil Popovic. This supervision was pursuant to the Recommendations of the Conduct Review Panel which met on the 28th of June 2006 and the Supervisory Requirements Plan dated the 23rd of August 2006.*
>
> *My supervision consisted of discussion of cases before the procedures with respect to indications and type of procedure and then to be aware of the immediate post operative progress of the patients.*
>
> *All the patients' outcomes have been entirely satisfactory and the operations performed have been appropriate in type. Mr. Popovic has given excellent teaching to the Registrar staff.*
>
> *There have been only 2 incidents during the supervision period which Mr. Popovic has fully discussed with me. These are:-*
>
> 1. *An incident concerning the retention of a cotton ball swab*
> 2. *An issue concerning appropriate informed consent where there was a change of plan regarding what approach to use and this was apparently not communicated to the patient.*
>
> *No adverse outcome occurred in either of these incidents to my knowledge.*
>
> *As it can be appreciated I am not aware of the detail of both these incidents and I have not been involved in their investigation.*
>
> *If the Hospital has had a satisfactory view after investigation of these incidents then in my opinion I would support the return of Mr. Popovic to unsupervised practice at Sir Charles Gairdner Hospital and that he can join the on call roster.*
>
> *I believe he does need to stay within the workload he has been undertaking while under supervision and not to exceed that workload."* ("EAP 30" attached to Affidavit of Emil Andrew Popovic).

24. Mr Popovic challenges the two issues set out at points 1 and 2 of that letter.

He was provided with and took the opportunity to respond to those issues. (See "EAP 32" attached to Affidavit of Emil Andrew Popovic).

25. Mr Popovic satisfactorily completed the period of supervision and returned to unsupervised practice in November 2007. He was advised that his appointment would be *"further(ed)… through the usual Hospital process"*. ("EAP 33" attached to Affidavit of Emil Andrew Popovic).

26. Mr Popovic says that despite being advised that his period of supervision was complete and he could return to unsupervised practice, he has not been returned to the vascular roster.

27. By letter dated 5 November 2007, the Hospital invited Mr Popovic to apply *"for re-appointment for a period of five years"*. ("EAP 34" attached to Affidavit of Emil Andrew Popovic). He submitted an application prior to 3 December 2007.

28. Mr Popovic says that on 1 April 2008, he was advised that the appointments committee was still unable to decide whether to re-appoint him.

29. On 16 April 2008, Mr Popovic was requested to attend a meeting on 23 April 2008, however he was not informed of the purpose of the meeting.

30. On 22 April 2008, Mr Popovic was informed by the applicant that the purpose of the meeting on 23 April 2008 was to discuss the fact that he was not to be re-appointed. The applicant provided Mr Popovic with a copy of a letter from Dr Peter Bentley, A/Executive Director Medical Services of the Hospital dated 22 April 2008 which is in the following terms:

"Thank you for your email dated 21 April 2008 regarding Mr Popovic.

> *After carefully considering the matter over a number of meetings, the Appointments Committee of Sir Charles Gairdner Hospital has made a recommendation that Mr Popovic not be offered a further appointment at the Hospital.*
>
> *I am meeting Mr Popovic tomorrow to discuss this recommendation with him and give him an opportunity to make submissions on the issue, if he wishes to do so.*
>
> *As you know, under clause 21 of the Department of Health Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2007, practitioners do not have an automatic right of reappointment upon expiry of a 5 year contract. Further, there is no prohibition on the Hospital*

offering monthly contracts to a practitioner while the issue of a further appointment is properly considered. I absolutely deny your suggestion that there has been any harassment or intimidation of Mr Popovic.

If Mr Popovic wishes, you are welcome to accompany him to tomorrow's meeting to act as an observer and to provide him with advice." ("EAP 36" attached to Affidavit of Emil Andrew Popovic).

31. Mr Popovic then sought, through his solicitors, and received from the Hospital details of the appointment committee's processes. The Hospital then offered a further 2 week contract to afford Mr Popovic an opportunity to make submissions.

32. Mr Popovic says that the Hospital relied upon adverse views of five neurosurgeons, which he says are factually incorrect, and which also comment on Mr Popovic's mental health. Others whose views Mr Popovic says would be favourable to him were not consulted.

33. At paras 52 – 54 of his affidavit, Mr Popovic says:

"52 By letters dated 8 May 2008 from Russell Kennedy, I raised my concerns that the views relied on by the appointments committee contained matters that are factually incorrect, unsubstantiated and untested in accordance with natural justice. In that letter, it is noted that:

(a) No details of the new allegations referred to by the Committee have been given to me.

(b) Professor Knuckey refers to a series of complications in 2005 despite the fact that the MBWA resolved not to further investigate these matters.

(c) The Committee relies on allegations, including those in relation to an imputed impairment, without any evidence that I am impaired or make mistakes when stressed or tired. I am not aware of any such allegation being made against me in a formal setting, nor put in accordance with the standard Hospital procedures for reporting such impairment or mistakes.

Now produced and shown to me and marked EAP 40 is a copy of those letters.

53 By letter dated 13 May 2008 from Russell Kennedy, I raised my further concerns in respect of the appointments committee process in that:

(a) several aspects of the Hospital's appointments process suggest that the decision to reappoint me had already been pre-judged;

(b) the appointment committee, by having sought advice from practitioners who have had previous involvement in deciding or pursuing matters against me, had adopted the actual views of biased practitioners;

(c) I was denied natural justice given that the Hospital had not put to me any of the new performance concerns it had raised; and

(d) I was denied my legitimate expectation that I would be reappointed consistent with my having completed an extended period of supervision to the Hospital's satisfaction.

That correspondence incorrectly made allegations at sections 3.1 and 3.2 in respect of Professor Knuckey and Professor Stokes, which were withdrawn by my solicitors by letter dated 26 May 2008. To the best of my knowledge and belief, these matters are accurately described in paragraph 70 of this affidavit. Now produced and show (sic) to me and marked EAP 41 is a copy of the letter dated 13 May 2008.

54 By letter dated 13 May 2008, the Hospital refused to provide particulars of the unsubstantiated matters. Now produced and shown to me and marked EAP 42 is a copy of that letter. In addition, the Hospital asserted that it need not afford natural justice to me, despite the circumstances which have transpired in respect of the restrictions. The State Solicitor's Office indicated that the Hospital would accept further submissions by 16 May 2008 on the issue of what reliance can properly be placed upon the five neurosurgeons' views consulted by the appointments committee. The Hospital refused to provide a further short term extension of my position with the Hospital pending such submission and further claim."

34. Mr Popovic alleges bias against Professor Knuckey, and particularly Professor Knuckey's behaviour in 2005, which I take to be in reference to Professor Knuckey's attitude towards Mr Popovic and his involvement in the referral to the Medical Board and the Conduct Review Panel.

35. By letter dated 27 May 2008, the Hospital advised Mr Popovic that his application for a further five year appointment had been unsuccessful. He was provided with information relating to *The Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* and was advised that this allowed him to lodge a written breach claim if he considered that the *Recruitment, Selection and Appointment Standard* had been breached. A copy of the *Recruitment, Selection and Appointment Standard* was provided to him. He was informed that his current contract would come to an end on 16 June 2008. ("EAP 15" Attached to Affidavit of Emil Andrew Popovic).

36. Mr Popovic alleges that the Hospital has discriminated against him because of *"an imputed disability, namely mania"* (para 71, Affidavit of Emil Andrew Popovic).

Consideration and Conclusions

15 The first issue which must be dealt with is whether the Arbitrator has jurisdiction to deal with this matter. The issues which constitute "the matter", as they are characterised by the applicant, are set out in para 6 above.

16 There are a number of ways of approaching this matter, one of which is to examine each of the issues as they arise and decide whether each constitutes a matter which is within jurisdiction. Then the issue would be examined to ascertain whether, as the respondent says, the issue has already been resolved, there is no remedy available save for a bare declaration, or whether, for some other reason that aspect of the matter ought to be dismissed pursuant to s 27(1)(a) of *the Act.*

17 Another approach is to look at "the matter" and ascertain whether the various issues constitute one overarching issue.

18 On 8 May 2008 Mr Popovic, through his solicitors, wrote to the Hospital raising his "concerns that the views relied on by the appointments committee contained matters that are factually incorrect, unsubstantiated and untested in accordance with natural justice". Those issues included:

a) no details of new allegations referred to the Committee had been given to him;

b) reference to the series of complications dealt with by the Medical Board in 2005;

c) allegations of impairment;

d) pre-judgment by the appointments committee;

e) acceptance of and adoption by the appointments committee of the views of practitioners biased against him;

f) that having satisfactorily completed an extended period of supervision, Mr Popovic had a legitimate expectation of being re-appointed; and

g) that the Hospital had refused to supply particulars of unsubstantiated matters.

19 The correspondence between Mr Popovic's solicitors and the Hospital, from 16 April 2008 in particular, relate to the issue of Mr Popovic being re-appointed. The letters from Mr Popovic's solicitors refer in detail to the suspension and referral to the Medical Board, to the allegations and subsequent conduct review panel's considerations, and the supervisory arrangements.

20 I have examined, in particular, Mr Popovic's solicitor's letter of 8 May 2008, the Notice of Application lodged on 16 May 2008, and Mr Popovic's Affidavit, in particular paras 52 – 54 inclusive of the Affidavit, and his references to bias on the part of Professor Knuckey at paras 68 – 70 inclusive of the Affidavit. These items make clear that Mr Popovic has identified and linked a number of issues all of which are raised in the context of and in relation to the one matter – fairness in the process of consideration of Mr Popovic's application for reappointment. Although the issues identified by the applicant in para 6 above are carefully worded to avoid referring the Arbitrator specifically to the question of the fairness of the appointment process, that is the issue and "the matter" about which the applicant and Mr Popovic are concerned.

21 Therefore it is appropriate to consider whether that matter is within jurisdiction.

Jurisdiction

22 The jurisdiction of the Arbitrator is set out in s 80E(1) of *the Act* in the following terms:

> *"(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer…"*

23 An "industrial matter" is defined as:

> *"any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein …"* (s 7 of *the Act).*

24 Subsection (6) is not relevant for the purposes of this issue.

25 In light of the description of the jurisdiction of the Arbitrator, set out above, the issue of an employer's conduct towards an employee, or in this case a government officer, regarding the officer's work performance is within jurisdiction. However, there are limitations upon that jurisdiction.

26 Section 80E(7) of the Act says:

> *"Notwithstanding subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter in respect of which a procedure referred to in s 97(1)(a) of the Public Sector Management Act 1994 is, or may be, prescribed under that Act."*

27 In *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* [2005] WASCA 244, (2006) 86 WAIG 231, Wheeler and Le Miere JJ deal with the issue of the Arbitrator's jurisdiction and the effect of s 80E(7), the *Public Sector Management Act 1994*, s 97(1), the *Public Sector Management (Examination and Review Procedures) Regulations 2001* and the *Recruitment, Selection and Appointment Standard*. Their analysis of the interrelationship of those matters is dealt with in details at [35] to [56] inclusive. Most significantly for this matter, they say:

> *"53 The "matter" in respect of which the procedure may be prescribed pursuant to s 97(1) is the matter of the "breaching of public sector standards". In the present case, there is a standard dealing with "Recruitment, Selection and Appointment", and that is the "matter" in respect of which the procedure is prescribed. That matter having been dealt with by the prescribing of a procedure pursuant to s 97(1)(a), it would follow, in our view, that the jurisdiction of the Arbitrator is therefore excluded in respect of it.*
>
> *54 As we understand it, the Full Bench considered that there were two reasons why s 80E(7) did not operate to exclude the jurisdiction of the Arbitrator in the present case. The first is to be found in [77] of the reasons of the President, with whom Senior Commissioner Gregor agreed. That was that the present case was not a matter "which related in any way to any Public Sector Standards, at least in the manner and in the way in which it came before and was required to be considered by the Arbitrator". That approach reads s 80E(7) as excluding the jurisdiction of the Arbitrator only where a breach of a public sector standard is the allegation made to the Arbitrator. However, the subsection is not framed so narrowly. Rather, it excludes jurisdiction in relation to any "matter" in respect of which a procedure is prescribed. That is, it excludes jurisdiction in relation to the "matter", not in relation to particular allegations. The matter in this case is the breach of a very broad standard relating to the appointment of employees.*
>
> *55 If the Full Bench's reasoning were correct on this point, s 80E(7) on one view would never have any work to do, since the "matter" before the Arbitrator will always be an "industrial matter" as defined by the Act, being, in effect, a matter affecting or pertaining to the work of employees, rather than a matter relating directly to breach of a public sector standard. Since ss 7 - 9 of the PSM Act are so broad in their scope, it would invariably be possible to frame a claim so as to allege breach of those principles, rather than to rely directly on breach of a public sector standard.*
>
> *56 While s 80E(7) is in some respects not happily phrased, and while we acknowledge that as a matter of legal principle, it is undesirable to construe too broadly provisions which limit the right of persons to approach courts and tribunals, it seems to us that, having regard to the statutory context, s 80E(7) must be read as excluding jurisdiction in respect of a matter, wherever there is a matter in respect of which a relevant standard has been prescribed and in respect of which procedures of the type described in s 97(1)(a) have been prescribed. In this case, as we have noted, a standard has been prescribed in relation to selection and appointment, and the result of the prescription of procedures pursuant to s 97 of that standard is that the jurisdiction of the Arbitrator is excluded in relation to the whole of that "matter", regardless of the precise allegations of misconduct or unfair conduct which may be made in respect of it."*

28 In this case, the matter about which the applicant complains is the respondent's approach generally and in particular to Mr Popovic's reappointment. All of the issues in this claim relate either directly or indirectly to the Hospital's decision to not reappoint Mr Popovic, as clearly reflected in Mr Popovic's Affidavit.

29 The purpose of each of the issues in the claim is to challenge the respondent's decision to not reappoint. I conclude that the various issues which Mr Popovic seeks to have the Arbitrator enquire into and deal with are all aspects of his complaint that the respondent has not treated him fairly in its decision to not reappoint him, by taking account of biased and/or factually incorrect information, and by relying on conclusions reached from flawed and unfair processes which dealt with his performance at various points in the past. If not for the respondent going through the process of considering whether or not to reappoint Mr Popovic, the various components of the claim would probably not have been brought to the Arbitrator given they had not been brought at the relevant time.

30 The "matter" in this claim is a matter of appointment. That whole matter is excluded from the Arbitrator's jurisdiction according to the decision in *Director General Department of Justice v Civil Service Association of Western Australia Incorporated* (op cit). Therefore the matter ought to be dismissed.

The Individual Issues

31 If I am wrong and the various aspects of the claim are not so connected to the appointment as to be excluded from the Arbitrator's jurisdiction by virtue of s 80E(7), then it is appropriate to consider the issues raised separately.

32 **Is the respondent seeking to discipline or terminate Mr Popovic's employment, without affording him natural justice, unfairly and contrary to the requirements of cl 48(5) of the Medical Practitioners (Metropolitan Health Services) AMA Industrial Agreement 2004 (the 2004 Agreement) and cl 52(5) of the Department of Health Medical Practitioners (Medical Health Services) AMA Industrial Agreement 2007 (the 2007 Agreement)?** Given the background to this matter generally, the other issues raised in the application and in the Affidavit, that the respondent characterises the issues quite differently, and given the overarching nature of the characterisation by the applicant, it is my view that this first issue, in part, constitutes the conclusion the applicant seeks to be drawn from the resolution of the totality of the issues. Accordingly, it seems that it would be most appropriate to consider this issue after the other issues have been dealt with.

33 Has the respondent acted unfairly in connection with:

(i) suspending Dr Popovic and referring to the Medical Board of Western Australia?

34 There are a number of points to note about this complaint by the applicant on behalf of Mr Popovic. The first is that the applicant would say that this is one aspect of a series of issues which go to demonstrate a course of conduct by the respondent which is unfair towards Mr Popovic, and that it is not to be viewed in isolation.

35 On the other hand, I note that the issue of Mr Popovic's work practices in respect of the cases referred to the Medical Board first arose in August 2005. Mr Popovic provided the Hospital with what he described as *"a detailed response to five cases which had been discussed with (him) at the 8 August 2005 and 6 September 2005 meetings"* (para 16, affidavit of Emil Andrew Popovic).

36 In respect of the ten cases referred to Dr Weidmann, Mr Popovic provided his comments to Dr Weidmann regarding two of those cases. The letter of the Registrar of the Medical Board dated 14 March 2006 indicated that by the end of January 2006, an Interim Constraint on Practice Order had been revoked and replaced with a Voluntary Undertaking by Mr Popovic, and that Mr Popovic had *"elected to discontinue the supervision aspect of the Undertaking"*.

37 Therefore, by 14 March 2006, the matter of Mr Popovic's conduct or practice the subject of the Medical Board referral had been reported, investigated, orders restraining Mr Popovic had been imposed, these orders had been replaced by his voluntary undertaking, and that undertaking in respect of supervision had been discontinued. That was more than two years ago.

38 The role of the Arbitrator in a matter such as this is to provide meaningful and practical solutions to issues in dispute in the industrial relationship *"not to engage in merely academic exercises"*. (see *Civil Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disabilities Services Commission (2005) 85 WAIG 2993 at paras 36-40 (FB)* and *Confederation of Western Australian Industry (Inc) v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous, WA Branch and Others (1990) 70 WAIG 1281 (IAC)).*

39 This matter, as a complaint in its own right is effectively complete. It should not be a matter, absent some other relevant matter, for the Arbitrator to now enquire into and deal with. In any event, the question arises as to what practical remedy the Arbitrator could now apply if an enquiry into this issue were to be found to be justified.

40 Has the respondent acted unfairly in connection with:

(ii) the investigation of alleged substandard performance associated with Ms GS;

(iii) imposition of supervisory requirements not recommended by participants in the review process which occurred on 28 June 2006;

(iv) imposition of supervisory requirements that were inconsistent with the approach to similar conduct by other practitioners; and

(v) extending the supervisory requirements on 23 August 2006 beyond the identified term?

41 I intend to deal with all of these aspects together as they all relate to the internal processes of the Respondent in dealing with Mr Popovic's performance.

42 The issue of Mr Popovic's performance in relation to these matters was the subject of a meeting on 20 June 2006. Mr Popovic attended that meeting along with his brother and a representative of the applicant. Mr Popovic's affidavit records that at this meeting it was *agreed* that the Hospital's concerns regarding a case of Ms GS would be dealt with by a conduct review panel. Mr Popovic says he would have preferred peer review, but in any event, there was agreement to a conduct review panel.

43 On 28 June 2006 Mr Popovic appeared before the conduct review panel. The conduct review panel heard from Mr Popovic and then, on 17 August 2006, issued its recommendation.

44 Mr Popovic complied with the terms of the recommendation and entered a period of supervised practice. He says that comments subsequently made to him by two members of the panel bring the panel's recommendations into question. Those two panel members have not confirmed their comments to him.

45 The period of supervision commenced and proceeded. Although one of the conditions of the supervision was not met by the Hospital in that the formal review meetings were not convened, it seems that on at least two occasions there were reports from Professor Stokes which suggest that informal review occurred.

46 In any event, the supervision was due to conclude in March 2007. It continued well beyond that date. Mr Popovic continued to work under the supervision regime, albeit under protest that the formal review meetings were not occurring as planned. He was returned to unsupervised practice seven months ago in November 2007.

47 The time to complain and seek a remedy for the decision to apply a supervision regime was when that decision was made, around 2 years ago. The time to complain about the continuation of that regime, if it were unfair, was over a year ago, when it was extended.

48 The question arises as to what purpose there could now be in the Arbitrator enquiring into and dealing with Hospital's actions regarding supervision. It could only be for the purpose of a declaration that the process was unfair. Such a bare declaration would be academic is not the appropriate basis for the Arbitrator to enquire into and deal with matters *(Civil*

Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disabilities Services Commission (FB) op.cit).

49 **Were the terms of the contracts offered to Mr Popovic contrary to the requirements of the Agreements and unfair?**

50 This issue relates to the respondent offering contracts which, firstly, were not for five years, or in the case of the one monthly contracts, were said to not be to meet short term exigencies (cl 21(1)(a) and (b) of the 2007 Agreement).

51 The Arbitrator's jurisdiction does not include the enforcement of the Agreement. That is a matter for the Industrial Magistrate pursuant to s 83 of *the Act*. However, it is the role of the Arbitrator to deal with issues of unfairness.

52 The circumstances of the offering of contracts to Mr Popovic are that on 3 April 2006 Mr Popovic was offered and accepted a contract which although stating that it was for a period of five years, also stated that it was effective from 4 April 2006 to 3 April 2007 inclusive, ie one year. ("EAP 2" attached to affidavit of Emil Andrew Popovic).

53 Although Mr Popovic now says that he did not note the contradiction between those terms at the time, and would have rejected it had he known, it is now over two years since he entered into that contract and over one year since it came to an end. Since then he has entered into a series of no less than 7 contracts with the respondent, each for one month, and a further contract for two weeks. ("EAP 3" to "EAP 10" attached to Affidavit of Emil Andrew Popovic).

54 The time to have protested about the contradiction in the contract has passed. The "5 year" contract has been superseded by no less than 8 agreements on Mr Popovic's part to be engaged on a monthly or fortnightly basis.

55 It is notable that Mr Popovic raised the issue of unfairness in the respondent offering such contracts as part of his challenge to the respondent's failure to reappoint him, and it has not previously been the subject of challenge.

56 Having dealt with issues (b) and (c) as identified in the Applicant's Outline of Submissions at para 7, I return to what I described earlier in para 15 of these Reasons as the conclusion which the applicant seeks to be drawn from the resolution of the totality of the issues. That is **whether the respondent is seeking to discipline or terminate Mr Popovic's employment, without affording him natural justice, unfairly and contrary to the requirements of cl 48(5) of the 2004 Agreement and cl 52(5) of the 2007 Agreement.**

57 I do not suggest that this issue is simply the culmination of the other issues, for there are a number of aspects which possibly arise from this final question which are not covered by the other issues. This last issue raises the question of whether the use of the process of offering fixed term contracts has been a device to unfairly avoid a discipline and termination process thus denying Mr Popovic an opportunity to claim that he has been unfairly dismissed.

58 I note two things about the use of fixed term contracts. Firstly the 2007 Agreement (and its predecessor) specifically provide for the appointment of Senior Practitioners by way of fixed term contracts (cl 21(1)(a) and (b)); that *"(t)here shall be no automatic right of reappointment upon expiry of a contract (cl 21(4))";* and *"a practitioner who is unsuccessful in seeking a new contract shall be paid a Contract Completion Payment equal to 10% of their final base salary, for each year of the contract up to a maximum of 5 years (cl 21(5) of the 2007 Agreement)"*.

59 Secondly, the Commission has noted on a number of occasions that the expiration of a fixed term contract does not constitute a dismissal for the purposes of an unfair dismissal claim.

60 I note also that Mr Popovic seems not to have complained about the respondent's use of fixed term contracts when they were offered to him.

61 Therefore, it seems that this issue both as a culmination of the other issues and as an issue relating to the allegation of the unfair use of fixed term contracts said to be for the purpose of avoiding the disciplinary processes is not a matter which ought to be referred for hearing and determination. If it had been a serious issue, then it would have arisen when the so called "5 year contract" was offered. Further the 2007 Agreement contemplates the appointment of Senior Practitioners by the use of fixed term contracts with no automatic right to reappointment. The employer in those circumstances is free to rely on the expiration of the term of the contract without further consideration.

62 If I am wrong and the matter to be referred for hearing and determination is not as I have concluded earlier, and there is no impediment to jurisdiction on the basis of s 80E(7), then a consideration of the individual matters brings me to the conclusion that it is not appropriate for them to be now referred for hearing and determination. It would be contrary to the public interest for the Arbitrator to enquire into and deal with issues and processes which are long ago concluded. The issue of the referral to the Medical Board was concluded over a year ago. The supervision imposed 22 months ago was concluded 7 months ago. Mr Popovic's "5 year contract" ended 14 months ago and he has since been engaged monthly on 7 subsequent contracts, and then for two weeks.

63 The only available remedies for those matters now, if remedy is appropriate, are declarations of unfairness. There is no practical remedy available to the Arbitrator in respect of the issues.

64 Mr Popovic is not without an alternative remedy in respect of the respondent's decision to not reappoint him. The *Public Sector Management (Breaches of Public Sector Standards) Regulations* enables him to bring a complaint about any breaches of *The Recruitment, Selection and Appointment Standard.*

65 Accordingly if the matters sought to be referred for hearing and determination are within jurisdiction, then it is not in the public interest that they be referred for hearing and determination, and it is appropriate that the matter be dismissed.

Interim Orders

66 One final issue remains and that is that the applicant says that even if jurisdiction is excluded due to s 80E(7) of *the Act*, the Arbitrator still has power to order the maintenance of the status quo by reference to clause 52 – Dispute Settling Procedures under the 2007 Agreement.

67 Subclause (3) of that clause provides:

> *"Subject to Clause 4 – No Further Claims, should a question, dispute or difficulty remain in dispute after the above processes have been exhausted the matter may:*
>
> *(a) be referred by either party to the Western Australian Industrial Relations Commission (the persons involved in the question, dispute or difficulty must confer among themselves and make reasonable attempts to resolve questions, disputes or difficulties before taking these matters to the Commission); or*
>
> *(b) if the parties agree, be referred to another independent arbitrator chosen by the parties or as a last resort nominated by the Western Australian Industrial Relations Commission. In such a case:*
>
> *(i) either party may be represented in the arbitration by an agent or legal practitioner and shall bear the costs of that representation;*
>
> *(ii) the Employer shall meet the costs of the arbitration, but if the arbitrator determines that a claim is frivolous or vexatious, the arbitrator may assign the costs of the arbitration (but not the costs of representation) against the claimant or apportion them in any manner between the parties. The parties undertake to accept the arbitrated decision as final and binding."*

68 The first thing I note in this regard is that if the Arbitrator has no jurisdiction to deal with a matter, then the powers under s 44 of *the Act* are not available. Therefore, no orders can be made to maintain the status quo pending hearing and determination of "the matter". Reference to the Arbitrator making orders or giving directions "until conciliation or arbitration has resolved the matters" or "pending resolution of the claim" is in the context of conciliation or arbitration, or resolution of a claim, by the Arbitrator according to jurisdiction conferred by *the Act*. There is no other power to make orders absent jurisdiction. In this case, "the matter" is not within jurisdiction and in that context "the matter" in dispute is to be resolved by an order dismissing it.

69 The second is that the Dispute Settling Procedures clause of the 2007 Agreement cannot grant the Arbitrator jurisdiction or powers it does not have by statute (*Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward and Others* (2008 WAIRC 00079) (FB)).

70 The third is that according to cl 52(3)(b) of the 2007 Agreement an independent arbitrator may be appointed, however, this is subject to the agreement of the parties. It is clear that the respondent does not agree to the matter being determined by the Arbitrator, and there is no suggestion of an independent arbitrator being appointed by agreement. In any event *the Act* does not confer any power on the Arbitrator to issue orders pending the determination of a matter by an independent arbitrator.

71 Therefore interim orders are not available in the absence of jurisdiction.

2008 WAIRC 00356

DISPUTE RE THE USE OF FIXED TERM CONTRACT EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION
	APPELLANT
	-v-
	THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) TRADING AS SIR CHARLES GAIRDNER HOSPITAL
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 13 JUNE 2008
FILE NO	PSAC 10 OF 2008
CITATION NO.	2008 WAIRC 00356

Result	Application Dismissed
Representation	
Applicant	Mr S Ellis of counsel
Respondent	Mr R Bathurst of counsel

Order

HAVING heard Mr S Ellis of counsel on behalf of the applicant and Mr R Bathurst of counsel on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] Public Service Arbitrator.

2008 WAIRC 00375

DISPUTE RE THE USE OF FIXED TERM CONTRACT EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN BRANCH OF THE AUSTRALIAN MEDICAL ASSOCIATION
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH INCORPORATED AS THE BOARD OF THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) TRADING AS SIR CHARLES GAIRDNER HOSPITAL
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	(CORRIGENDUM FRIDAY, 20 JUNE 2008)
FILE NO/S	PSAC 10 OF 2008
CITATION NO.	2008 WAIRC 00375

CORRIGENDUM

In paragraph 14 at point 16 of the reasons for decision of Commissioner Scott dated 13 June 2008 the number 8 is replaced by the number 28 so that the sentence reads: "On 28 June 2006 Mr Popovic appeared before the conduct review panel."

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] Public Service Arbitrator.

Dated: 20 June 2008

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Puntukurnu Aboriginal Medical Service	Wood C	C 3/2008	13/02/2008	Dispute re termination of employment of union member	Concluded

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Lake Joondalup Baptist College Inc Schools' Non - teaching Employee (Enterprise Bargaining) Agreement 2008 AG 8/2008	16/06/2008	The Independent Education Union of Western Australia, Union of Employees, Lake Joondalup Baptist College and Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S Wood	Agreement registered
Lance Holt (Enterprise Bargaining) Agreement 2007 AG 7/2008	16/06/2008	The Independent Education Union of Western Australia, Union of Employees, Lance Holt School and Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S Wood	Agreement registered
St Andrew's Greek Orthodox Grammar (Enterprise Bargaining) Agreement 2008 AG 9/2008	16/06/2008	The Independent Education Union of Western Australia, Union of Employees, St Andrew's Grammar School and Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	(Not applicable)	Commissioner S Wood	Agreement registered
St Hilda's Anglican School for Girls (Inc) (Enterprise Bargaining) Agreement 2008 AG 10/2008	27/06/2008	The Independent Education Union of Western Australia, Union of Employees, St Hilda's Anglican School for Girls Inc., Liquor, Hospitality and Miscellaneous Union, Western Australian Branch.	(Not applicable)	Commissioner P E Scott	Agreement Registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2008 WAIRC 00391

DECLARATION PURSUANT TO S.42H OF THE ACT THAT BARGAINING INITIATED ON 7 DECEMBER 2007 HAS ENDED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING AND OTHERS

APPLICANTS

-v-

STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 3 JULY 2008

FILE NO. APPL 18 OF 2008

CITATION NO. 2008 WAIRC 00391

Result	Declaration Issued
Representation	
Applicant	Mr P Wishart
Respondent	Mr M Amati

Declaration

WHEREAS on 7 December 2007 the State School Teachers' Union of WA (Incorporated) ("the respondent") lodged a Notice to Initiate Bargaining with the Director General, Department of Education and Training and a number of Governing Councils of TAFE ("the applicants") to negotiate on an industrial agreement under s42 of the *Industrial Relations Act, 1979* ("the Act") for TAFE Lecturers employed in all TAFE Colleges in Western Australia; and

WHEREAS on 21 December 2007 the applicants responded to the Notice to Initiate Bargaining stating that they wished to enter into negotiations for an industrial agreement; and

WHEREAS the parties have been negotiating on the terms of an industrial agreement since August 2007; and

FURTHER between 15 November 2007 and 9 June 2008 the parties negotiated both in the Commission and outside of the Commission with a view to reaching agreement on a proposed agreement and on a number of occasions the parties reported back to the Commission with respect to the progress of these negotiations (see C 25 of 2007 and C 38 of 2007); and

WHEREAS on 20 May 2008 the applicants lodged an application requesting that the Commission issue a declaration pursuant to s42H of the Act that bargaining between the parties has ended and the applicants filed detailed submissions in support of this application; and

WHEREAS on 23 May 2008 at a report back conference being held with respect to application C 38 of 2007 the respondent advised the Commission that it opposed the applicants' application for a declaration that bargaining has ended; and

FURTHER at this conference as the parties believed that further negotiations would be useful the parties were given further time to negotiate the terms of an industrial agreement; and

WHEREAS following a further report back conference on 9 June 2008 in respect to application C 38 of 2007 the parties were given further time to consider their respective positions; and

WHEREAS on 19 June 2008 the applicants' representative advised the Commission that no agreement on an industrial agreement had been reached between the negotiating parties; and

FURTHER the applicants advised the Commission that if a declaration issues that bargaining has ended the applicants will apply for an enterprise order pursuant to s42I of the Act; and

WHEREAS the Commission set down a conference in relation to this application on 1 July 2008; and

WHEREAS prior to the conference on 1 July 2008 the respondent filed and served submissions with respect to the application seeking a declaration pursuant to s42H of the Act and the respondent indicated that it supported the issuance of a declaration that bargaining had ended; and

WHEREAS at the conference on 1 July 2008 the Commission heard further from the parties as to whether a declaration pursuant to s42H of the Act should issue; and

WHEREAS s42H of the Act provides as follows:

"**42H. Commission may declare that bargaining has ended**

(1) If, on the application of a negotiating party, the Commission constituted by a single commissioner determines that —

(a) the applicant has bargained in good faith;

(b) bargaining between the applicant and another negotiating party has failed; and

(c) there is no reasonable prospect of the negotiating parties reaching an agreement,

the Commission may declare that the bargaining has ended between those negotiating parties.

(2) Despite section 49, no appeal lies from a declaration under subsection (1)."; and

WHEREAS the applicants argued the following in support of their application that a declaration that bargaining between the parties has ended should issue:

- the applicants have bargained in good faith and have complied with the requirements contained in s42B(2) of the Act;
- despite the parties holding a number of meetings and attending report back and negotiating conferences in the Commission since the commencement of negotiations between the parties in August 2007 a significant disparity remains between the positions of the applicants and the respondent and as a result bargaining has failed;

- the applicants believe that there is no reasonable prospect of the parties reaching an agreement on all of the issues in dispute given the differences between the parties; and

WHEREAS the respondent agreed that a declaration that bargaining between the parties has ended should issue given the substantial differences between the parties on some issues and its view that there was no reasonable prospect of the parties reaching agreement on issues in dispute even though the respondent believes that the applicants have not bargained in good faith; and

WHEREAS the tests to be considered by the Commission in deciding whether a declaration pursuant to s42H of the Act should issue are whether:

- the applicant has bargained in good faith;
- bargaining between the applicant and another negotiating party has failed; and
- there is no reasonable prospect of the negotiating parties reaching an agreement; and

WHEREAS the Commission is aware that the parties have participated in a number of lengthy meetings as well as conciliation and negotiating conferences in the Commission with a view to reaching agreement on the terms of an industrial agreement and the Commission is aware from report back meetings held in the Commission that both parties have exchanged information where relevant and discussed proposals and moved their positions with a view to reaching agreement on a range of matters however the parties remain in dispute on a number of issues; and

WHEREAS on the information before it the Commission is of the view that the applicants have bargained in good faith as they have stated their position on a range of matters, they have met with the respondent on a number of occasions and at reasonable times, they have disclosed relevant and necessary information, they have acted honestly and openly and not capriciously, they have dedicated sufficient resources to the bargaining process and in the Commission's view the applicants have genuinely bargained; and

WHEREAS the Commission has formed the view that given the current impasse between the parties with respect to being unable to reach agreement on a number of significant issues notwithstanding lengthy negotiations to date that bargaining between the applicants and the respondent has failed; and

WHEREAS the Commission is of the view that there is no reasonable prospect of the negotiating parties reaching an agreement on all of the issue in dispute; and

WHEREAS having reached the conclusion that the applicants have bargained in good faith, that bargaining between the applicants and the respondent has failed and there is no reasonable prospect of the negotiating parties reaching an agreement on a range of significant issues and as the respondent concedes that there is no prospect that the parties will reach agreement on all issues in dispute, and when taking into account the requirements under the Act it is the Commission's view that a declaration that bargaining between the parties has ended should issue;

NOW THEREFORE the Commission pursuant to the powers vested in it under s42H and under s27 of the Indust*rial Relations Act, 1979* hereby declares:

THAT the bargaining between the Director General, Department of Education and Training and the other applicants contained in the Schedule to this application and the State School Teachers' Union of WA (Incorporated) initiated by the State School Teachers' Union of WA (Incorporated) on 7 December 2007, has ended.

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

NOTICES—Appointments—

2008 WAIRC 00379

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, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a further period of one year from the 26th day of June, 2008.

Dated the 18th day of June, 2008.

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2008 WAIRC 00400

AGAINST THE DECISION OF THE INTENTION TO DISMISS MADE ON 21 JUNE 2007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER PLATT-HEPWORTH
	APPELLANT
	-v-
	DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR D HOUNSOME - BOARD MEMBER
	MR C FLOATE - BOARD MEMBER
HEARD	TUESDAY, 7 AUGUST 2007, MONDAY, 12 MAY 2008
DELIVERED	TUESDAY, 8 JULY 2008
FILE NO.	PSAB 3 OF 2007
CITATION NO.	2008 WAIRC 00400

CatchWords	Public Service Appeal Board - Agreement to compromise - Appellant sought hearing notwithstanding agreement terms met by respondent - Objects of the *Act* - Need to encourage parties to comply with their agreements - Jurisdiction of Public Service Appeal Board - Appeal dismissed pursuant to s 27(1) - *Industrial Relations Act 1979* (WA) ss 6, 26, 27, 80I
Result	Appeal dismissed
Representation	
Applicant	Mr C Platt-Hepworth on his own behalf
Respondent	Ms R Hartley, of counsel

Reasons for Decision

1 These are the unanimous Reasons of the Public Service Appeal Board ("the Board").

The appellant lodged a Notice of Appeal to the Board on 21 June 2007 in which he appealed against the decision of the respondent said to be "intention of dismissal from Disability Services Commission given on the 21 day of June 2007".

2 On Tuesday 7 August 2007 the Board convened a conference for the purpose of scheduling the hearing of the appeal. As a consequence of that conference the appeal was to be listed for hearing on Tuesday and Wednesday, 23 and 24 October 2007, however there were difficulties associated with contacting Mr Platt-Hepworth as he was out of the state. On 10 October 2007 Mr Platt-Hepworth sent to the Associate to the Board an email in which he advised that, amongst other things:

> *"Although I have considerable data to (sic) at my disposal to provide a more than successful outcome, I seek to resolve matters due to health problems, resulting from my termination order. As long as I have a history of employment in the DSC providing start/finish dates only."*

3 As a consequence of this email and at the direction of the Board the Associate contacted Mr Platt-Hepworth to clarify his intention and advised him to contact the respondent's representative should he have a proposal for settlement to put to the respondent.

4 The matter was then listed for a scheduling conference on 7 February 2008, however this conference did not proceed on the basis that Ms Hartley for the respondent advised the Associate by email dated Friday 1 February 2008 in the following terms, formal parts omitted:

> *"Please be advised that the parties have reached a settlement in the above matter and therefore request that the Scheduling Conference set down for 2pm next Thursday, 7 February 2008 be vacated. The Appellant has advised me that he will be filing a Notice of Discontinuance shortly."*

Accordingly, the conference was vacated and a letter dated 4 February 2008 was sent to Mr Platt-Hepworth by the Acting Associate to the Board in the following terms, formal parts omitted:

"I acknowledge receipt of the email dated 1 February 2008 from Ms Hartley which stated that the parties have reached a settlement and that Mr Platt-Hepworth will file a Notice of Discontinuance. Accordingly, I advise that the conference scheduled for 7 February 2008 is now vacated and the file will be closed upon receipt of the Notice of Discontinuance."

5 Attempts were then made to contact Mr Platt-Hepworth on the telephone numbers he had provided to the Commission on the basis that nothing further was heard from him.

6 On 21 March 2008, Mr Platt-Hepworth sent an email to the Associate in the following terms, formal parts omitted:

"Received your message via message bank. Have discussed my situation with Industrial Relations experts over my sacking for 1. Engaging in emails my (sic) which under DSC policy is not a dismissible offence.

2. Having social contact with fellow employee in own time which is not work related.(sic)(no record of misconduct at workplace).

3. Apparently not signing for registred (sic) mail at home address? (which contained dismissal letter?).

The reference in question does not in any way compensate me for lost super (over $150k).They have not even offered me say 6 weeks pay.

DSC have informed me they will spare no expense(taxpayers money) to save any form of compensation.

Because family illness/distance is making this matter rather traumatic (over 15 months).(sic) I seek your opinion on a solution to an event, (sic) that should have been resolved with management speaking with me immediately after the event. Duty of care. (sic) I seek yor (sic) opinion on this matter."

7 At the direction of the Board the Associate wrote to Mr Platt-Hepworth (with a copy to the respondent) in the following terms, formal parts omitted:

"I am directed to write to you by the Public Service Appeal Board.

Throughout October and November 2007, the Public Service Appeal Board was aware of negotiations between yourself and the Respondent for the settlement of this appeal. Those negotiations were based upon terms which you indicated would be suitable to you and which would result in your not proceeding with this appeal.

As there were delays in the resolution of those terms, a scheduling conference to deal with your appeal was listed for Thursday, 7 February 2008. However this conference was cancelled when advice was received from Ms Hartley, representing the Respondent, in the following terms:

> *Please be advised that the parties have reached a settlement in the above matter and therefore request that the Scheduling Conference set down for 2pm next Thursday, 7 February 2008 be vacated. The Appellant has advised me that he will be filing a Notice of Discontinuance shortly.*

Ms Hartley's email indicated that a copy was forwarded to you. The conference was vacated and correspondence dated 4 February 2008 was sent to you confirming this.

Since that time efforts have been made to contact you on mobile and land line telephone numbers on 15 February, 6 March, and 17 March 2008. Messages were left for you when there was no answer.

I have received your email of 21 March 2008.

The Commission is unable to provide you with advice or an opinion.

Given that the Public Service Appeal Board was advised that agreement had been reached, it is concerned that you may be considering resiling from that agreement.

You are directed by the Public Service Appeal Board to advise of your intentions regarding the application within fourteen days. If you fail to respond within that time, the Public Service Appeal Board will consider whether to dismiss the appeal.

Accordingly, it is essential for you to contact the Commission by no later than ***4.00pm Tuesday 15 April 2008*** *to advise if you wish to proceed with this matter."*

8 On 16 April 2008, Mr Platt-Hepworth responded. He indicated that:

"I would like to settle the matter with the DSC -1 week for every year of service or re-employed under same conditions. If they deem this request unreasonable then I will take the matter to court."

9 Mr Platt-Hepworth's correspondence then addressed difficulties he would experience in attending the hearing of the matter.

10 A copy of Mr Platt-Hepworth's email had been forwarded to Ms Hartley who replied to the effect that the respondent was of the view that the matter had been resolved by a settlement agreement and that "the Respondent objects in the strongest terms to the Appellant now seeking to have this matter listed for hearing."

11 Ms Hartley attached to her correspondence to the Board a copy of her email to the Associate of 1 February 2008 in which she had advised that the parties had reached a settlement and that the applicant had advised that he would be filing a Notice of Discontinuance. She also attached a copy of correspondence to Mr Platt-Hepworth which indicated that a copy of a proposed letter of service had been forwarded to him with an explanation as to why certain information could not be provided within that letter. The letter concludes with "I sincerely hope that this latest version will suffice." Mr Platt-Hepworth then responded by an email dated 1 February 2008 in the following terms:

> *"That draft will be fine.(sic)If you could ask DSC toput (sic) it on a letterhead,(sic)signed and delivered to 2 HEATHCOTE AVE NORTHLAKES 4509 QLD. Please send paperwork that I can sign to close proceedings.Imconfident (sic) you ,Morganand (sic) the PSAB can arrange ASAP.(sic)The next hearing was the 7th Feb.(sic)If you could let them know of arrangement,(sic)that would be greatley (sic) appreciated."*

12 On the basis of this correspondence, the Board convened a conference between the parties on Monday 12 May 2008 for the purpose of scheduling the matter. The appellant appeared by telephone and Ms Hartley appeared in person. During the course of the conference, Mr Platt-Hepworth indicated that subsequent to reaching agreement with the respondent for the resolution of the appeal, he had received legal advice to the effect that there were matters of merit he could raise at the appeal. He said that the seriousness of those matters required investigation and that the decision to reach agreement with the respondent had been rushed. He did not suggest that there had been duress applied to him.

13 In reply the respondent said that a settlement had been clearly reached and that Mr Platt-Hepworth had made no request for extra time to consider the offer before agreeing to it. The respondent also stated that it had engaged in negotiations with him in good faith and had gone to considerable trouble to provide a letter of reference for him in accordance with his requirements. The respondent said that Mr Platt-Hepworth ought to be bound by his agreement and sought that the appeal be dismissed. Mr Platt-Hepworth indicated that there was nothing further he wished to add.

14 The Board then retired to consider how the matter ought to be dealt with. At the direction of the Board, the Associate wrote to Mr Platt-Hepworth on 13 May 2008 in the following terms, formal parts omitted:

> *"I am directed to write to you by the Public Service Appeal Board and refer to the above appeal.*
>
> *A conference was convened at 9.00 am on Monday 12 May 2008 at which you indicated to the Board that subsequent to reaching agreement with the respondent for resolution of your appeal you had received legal advice to the effect that there were matters of merit you could raise at appeal. You mentioned that the seriousness of those matters required investigation, and that your decision to reach agreement with the respondent had been rushed.*
>
> *The respondent said in reply that a settlement had been clearly reached between you, and that you had made no requests for extra time to consider their offer before agreeing to it. The respondent stated that they had engaged in negotiations with you in good faith and had gone to considerable trouble to provide a letter of reference for you in accordance with your requirements. The respondent is of the opinion that you should be bound by your agreement.*
>
> *The Board has now to decide whether to allow your appeal to proceed to a hearing of its merits. There are a number of ways in which that can be resolved:*
>
> 1. *the Board could determine that issue on the basis of what you put to the Board at the conference on Monday 12 May 2008; or*
> 2. *you could put full written submissions to the Board. You would have fourteen days in which to provide submissions, and the respondent would have a similar time in which to respond; or*
> 3. *the Board could convene a formal hearing.*
>
> *You are to indicate to the Board which of these three options you prefer and are required to do so by* ***4.00 pm*** *on* ***Tuesday 20 May 2008*** *or your appeal will be dismissed without further correspondence. Accordingly, it is essential for you to contact the Commission within the specified time to advise how you wish to proceed with this matter."*

15 On 20 May 2008 the Associate received an email from Mr Platt-Hepworth in the following terms:

> *"Dear Jessica,*
>
> *Please go ahead with option 1.*
>
> *Sadly I can only add that the reference I may have bargained away, is not being honoured when prospective employers ring the DSC for confirmation.*
>
> *I leave the matter in your hands,confident (sic) that justice and fairness will prevail."*

16 On the basis of Mr Platt-Hepworth's email communication to the Associate of 20 May 2008 the Board concludes that Mr Platt-Hepworth is agreeable to the Board deciding whether or not the appeal should proceed on the basis of what was put to the Board at the conference on Monday 12 May 2008.

Issues and Conclusions

17 The objects of the *Industrial Relations Act 1979 ("the Act")* as set out in s6 include "to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises" (s6(ag)); "to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes" (s6(b)); "to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality" (s6(c)); and "to provide for the observance and enforcement of agreements and awards made for the prevention or settlement of industrial disputes" (s6(d)).

18 In this case Mr Platt-Hepworth, of his own volition, put a proposal to the respondent as to the terms of the settlement of the appeal. The terms of settlement he proposed was that he should receive a reference or a statement of service and on that basis Mr Platt-Hepworth agreed to discontinue the appeal. The respondent and Mr Platt-Hepworth then engaged in a series of communications aimed at arriving at a satisfactory statement being provided to him. The evidence demonstrates that that statement was agreed between them. All that remained was for him to lodge the appropriate Notice of Discontinuance. Subsequent to reaching agreement, however, Mr Platt-Hepworth received advice to the effect that he had a case on its merits which he then thought he ought to pursue.

19 The issue of what ought to happen in the case where parties reach an agreement to compromise a claim is dealt with in the decision of Smith C in *Diana Elizabeth Downs-Stoney v Derbarl Yerrigan Health Service* (2004 WAIRC 11100; (2004) 84 WAIG 2612). That decision dealt with the question of whether the Commission has power to make an order in appropriate cases in terms of a compromise agreement where one party subsequently does not wish to proceed with the agreement. Smith C said:

> *"For a power to be implied, it must be necessary for the effective exercise of the jurisdiction. What is "necessary" requires identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies provided for in the Act (see Pelechowski v The Registrar, Court of Appeal (1999) 198 CLR 435 at 452; [51] per Gaudron, Gummow and Callinan JJ).*
>
> *I am of the view that the Commission has power to make orders in terms of a compromise agreement providing that the orders it makes could otherwise be made expressly under ss 23(1), 23A and 32 of the Act. The power to do so is implied in the Act when regard is had to objects in s 6(b) and (c) as the grant of power in ss 23(1), 32 and 32A carries with everything that is necessary for the effective exercise of the power.*
>
> *In the context of claims made under s 29(1)(b) it is reasonably necessary or legally ancillary to the proper object of accomplishing settlement of industrial disputes that parties be held to their bargains and the means for holding them to their bargains be carried out with the maximum of legal form and technically. The implied power does not extend to making orders that are not within the scope of the original application or to make orders in terms of a compromise that could not have been made following an arbitration of the merits of the application in the absence of any compromise agreement. For example the Commission could not make an order requiring the Respondent to pay the Applicant's legal costs as to do so is contrary to s 27(1)(c) of the Act."* Paras [51 – 53]

20 It is noted that this is not an application pursuant to s29 of *the Act* but is made to the Board according to the Board's jurisdiction set out in s80H of *the Act*. The power provided to the Board is a power to "adjust" the decision of the employer. In this case the appeal is made pursuant to s80I - Appeals, (1)(c), and the power under that section is to "adjust" all such matters. The Board has the power to dismiss the appeal or to adjust the employer's decision. There is no reason to believe that the terms of settlement, by the provision of a reference, would not be an adjustment of a decision of the employer in accordance with the provisions of s80I of *the Act*.

21 The jurisdiction of the Board also incorporates s26 – "Commission to act according to equity and good conscience" which includes the requirement on the Commission to act according to equity and good conscience. Section 27 – "Powers of Commission" provides that the Commission may at any stage of proceedings dismiss the matter if it is satisfied "that further proceedings are not necessary or desirable in the public interest" (s27(1)(a)(ii)), or "for any other reason" that the matter should be dismissed (s27(1)(a)(iv)).

22 The parties in this case have reached agreement and the agreement has been complied with by the respondent. The appellant has not complied with his part of the agreement being to seek to withdraw the appeal. For the Board to continue to deal with such an appeal would be contrary to equity, good conscience and the substantial merits of the case and would not encourage parties to resolve disputes between them or to recognise the need to comply with their agreements. This would be contrary to the objects of *the Act*. Further, for the Board to hear and determine the appeal on its merits would be unfair to the respondent who has acted in good faith. On the other hand the appellant has acted capriciously and unreasonably by changing his mind after the agreement was reached and met by the respondent.

23 Therefore, there is good reason to dismiss the appeal according to s27(1) of *the Act.*

24 Accordingly an order shall issue that the appeal be dismissed.

2008 WAIRC 00401

AGAINST THE DECISION OF THE INTENTION TO DISMISS MADE ON 21 JUNE 2007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER PLATT-HEPWORTH
	APPELLANT
	-v-
	DISABILITY SERVICES COMMISSION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR D HOUNSOME - BOARD MEMBER
	MR C FLOATE - BOARD MEMBER
HEARD	TUESDAY, 7 AUGUST 2007, MONDAY, 12 MAY 2008
DATE	TUESDAY, 8 JULY 2008
FILE NO	PSAB 3 OF 2007
CITATION NO.	2008 WAIRC 00401

Result	Appeal dismissed
Representation	
Applicant	Mr C Platt-Hepworth on his own behalf
Respondent	Ms R Hartley, of counsel

Order

HAVING heard the appellant on his own behalf and Ms Hartley, of counsel on behalf of the respondent, 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.

RECLASSIFICATION APPEALS—

2008 WAIRC 00398

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON CVETKOSKI
	APPELLANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 4 JULY 2008
FILE NO	PSA 22 OF 2007
CITATION NO.	2008 WAIRC 00398

Result	Reclassification Appeal Dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the Industrial Relations Act 1979; and

WHEREAS on Monday, the 30th day of June 2008, the Appellant advised the Public Service Arbitrator that he no longer intended to pursue the appeal;

NOW THEREFORE, the Public Service Arbitrator, 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.] Public Service Arbitrator.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2008 WAIRC 00221

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	JOEL WILSON AND OTHERS
	APPLICANTS
	-v-
	CBI CONSTRUCTORS PTY LTD
	RESPONDENT
	COREY FLAVELL AND OTHERS
	APPLICANTS
	-v-
	CBI CONSTRUCTORS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 15 APRIL 2008
FILE NO/S	OSHT 4 OF 2007, OSHT 5 OF 2007
CITATION NO.	2008 WAIRC 00221

Result	Direction issued
Representation	
Applicants	Ms K Findlay-Grove (of counsel) on behalf of Joel Wilson and others
	Ms K Bowe (of counsel) on behalf of Corey Flavell and others
Respondent	Mr J Blackburn and Ms L Gibbs (of counsel)

Direction

HAVING heard Ms K Findlay Grove (of counsel) and Ms K Bowe (of counsel) on behalf of the applicants and Mr J Blackburn (of counsel) on behalf of the respondent the Tribunal, pursuant to the powers of the *Occupational Safety and Health Act 1984* hereby directs –

(1) THAT the respondent file and serve its notice of answer and counter proposal by 21 April 2008.

(2) THAT the respondent provide to the applicants copies of documents as requested by the applicants' letter of 15 February 2008 by 28 April 2008.

(3) THAT evidence in chief in this matter be adduced by way of signed witness statement which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements will only be adduced by leave of the Tribunal. Copies of documents referred to in witness statements shall be annexed to the statement.

(4) THAT the applicants file and serve upon the respondent any signed witness statements upon which they intend to rely by 29 May 2008.

(5) THAT the respondent file and serve upon the applicants any signed witness statements upon which it intends to rely by 21 June 2008.

(6) THAT the parties give notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than 5 working days prior to the date of hearing.

(7) THAT the applicants and respondent file an agreed statement of facts (if any) no later than 3 working days prior to the date of hearing.

(8) THAT the applicants and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 working days prior to the date of hearing.

(9) THAT the matter be listed for a hearing initially in Karratha on dates to be fixed.

(10) THAT the parties have liberty to apply on short notice.

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

2008 WAIRC 00343

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES JOEL WILSON AND OTHERS

APPLICANTS

-v-

CBI CONSTRUCTORS PTY LTD

RESPONDENT

COREY FLAVELL AND OTHERS

APPLICANTS

-v-

CBI CONSTRUCTORS PTY LTD

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 6 JUNE 2008
FILE NO/S	OSHT 4 OF 2007, OSHT 5 OF 2007
CITATION NO.	2008 WAIRC 00343

Result	Applications discontinued by leave
Representation	
Applicants	Ms K Findlay-Grove (of counsel) on behalf of Joel Wilson and others
	Ms K Bowe (of counsel) on behalf of Corey Flavell and others
Respondent	Mr J Blackburn and Ms L Gibbs (of counsel)

Order

WHEREAS the applicants sought and were granted leave to discontinue the applications, the Tribunal, pursuant to the powers conferred by the *Industrial Relations Act 1979*, hereby orders –

THAT the applications be and are hereby discontinued by leave.

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