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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2007] WASCA 284

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) -v- LAWRENCE [2007] WASCA 284
CORAM	:	LE MIERE J
HEARD	:	ON THE PAPERS
DELIVERED	:	21 DECEMBER 2007
FILE NO/S	:	IAC 4 of 2007
BETWEEN	:	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) Applicant AND MARK JAMES LAWRENCE Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	RITTER AP BEECH CC SMITH SC
Citation	:	[2007] WAIRC 00435
File No	:	FBA 1 of 2007

Catchwords:

Industrial Appeal court - Programming orders

Legislation:

Industrial Relations Act 1979 (WA), s 87

Result:

Hearing adjourned

Category: B

Representation:

Counsel:

Applicant	:	Ms A Beaumont
Respondent	:	In person

Solicitors:

Applicant	:	Blake Dawson Waldron
Respondent	:	In person

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

Nil

1 **LE MIERE J**: The appellant applies, pursuant to *Industrial Relations Act 1979* (WA) s 87(3) for orders that the respondent file and serve by 13 December 2007 or within seven days of the date of the directions hearing, a notice of contention and an outline of submissions in response to the outline of submissions filed by the appellant on 9 October 2007. I have been authorised by the President of the court to hear the application and have done so by receiving written submissions.

2 The appeal came on for hearing before the court on 15 October 2007. The respondent sought an adjournment of the hearing of the appeal on the grounds that he could not afford legal representation and the legal issues raised by the appeal were complex and required further consideration. The appellant neither consented nor objected to the adjournment. The Minister for Consumer and Employment Protection (the Minister) intervening made no submissions in relation to the adjournment application. In applying for the adjournment the respondent undertook not to cause the hearing of related proceedings in the Commission to be recommenced before the resolution of the appeal. The respondent also undertook that 'any delay caused by this adjournment would not be taken into account, or be discounted, should [the respondent] ultimately be successful on the substantive matter and be entitled to compensation'. The court decided, particularly having regard to the undertakings given by the respondent and there being no opposition to the adjournment, that the hearing of the appeal should be adjourned to a date to be fixed. The court also stated that there appeared to be a question as to whether or not the Full Bench was correct to categorise the activities of the appellant as being trading activities. The President stated that if the issue was to be agitated on the hearing of the appeal then the respondent should file a notice of contention raising the issue.

3 The appeal has subsequently been listed for hearing on 18 January 2008. The appellant applied on 6 December 2007 for the directions referred to above.

4 The respondent opposes the directions sought by the appellant and proposes the following directions:

1. The respondent file a notice of contention by 31 January 2008;
2. The respondent file and serve appeal books and outlines of submissions by 28 February 2008.
3. The hearing be rescheduled to March 2008.

5 The respondent relies upon an affidavit sworn by him on 16 December 2007. In that affidavit the respondent deposes that he has been threatened by one Jones who was formerly employed by the appellant, is a past President of the appellant and was until September 2007 a member of the appellant's executive committee. The respondent swears that on 28 November 2007 Jones said to the respondent that he was angry that the respondent was involved in litigation with the appellant and made threats to the respondent. The respondent swears that he was shocked and frightened by Jones' threats and fears for his personal safety. The respondent says that he has reported Jones' threats to the Western Australian Police Service. The respondent swears that in consequence of Jones' threats to him he has been unable since 28 November 2007 to address himself to the legal research he needs to conduct to prepare court documents for this appeal. The respondent says that because of the disruption to his life caused by Jones' threats he will be unable to prepare and file court documents in this appeal until late January 2008 at the earliest.

6 I do not, of course, make any findings concerning the allegations made by the respondent in his affidavit. Furthermore, the matters alleged by the respondent, if established, do not demonstrate that the respondent could not have prepared a notice of contention by now.

7 In exercising its discretion to grant an adjournment the court is concerned to balance any prejudice to the parties which arises from an adjournment and the public interest in the proper use of resources provided for the administration of justice.

8 The respondent has not prepared a notice of contention and will be prejudiced if he is required to do so within seven days or early in the new year.

9 The appellant does not consent to the respondent's proposed adjournment and directions but does not object to orders to that effect. Furthermore, it would not be reasonable to require the respondent to file any notice of contention or outline of submissions before Christmas and any such documents served on the appellant in the new year would leave the appellant with little time to consider and respond to them prior to a hearing of the appeal on 18 January 2008.

10 The issue to be raised by the notice of contention is an important one and it is in the public interest as well as the interest of the parties that the parties and the Minister have a proper opportunity to consider and prepare submissions on the issue.

11 In all the circumstances it is appropriate to adjourn the hearing of the appeal on 18 January 2008. I make the following orders:

1. The hearing of the appeal on 18 January 2008 be vacated;
2. The hearing of the appeal be listed on a date to be fixed no earlier than 1 April 2008;
3. On or before 31 January 2008 the respondent shall file and serve any notice of contention that he intends to rely upon on the hearing of the appeal.
4. On or before 28 February 2008 the respondent shall file and serve any supplementary appeal books that are necessary for the determination of any issue raised by a notice of contention filed by the respondent;
5. On or before 28 February 2008 the respondent shall file and serve an outline of submissions in response to the outline of submissions filed by the appellant on 9 October 2007 and in support of any issue raised by the respondent in a notice of contention.
6. On or before 20 March 2008 the appellant and the Minister shall file an outline of submissions in response to any outline of submissions filed and served by the respondent in support of any issue raised by the respondent in a notice of contention.

[2008] WASCA 254

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) -v- LAWRENCE [No 2] [2008] WASCA 254
CORAM	**:**	STEYTLER P
		PULLIN J
		LE MIERE J
HEARD	**:**	12 JUNE 2008
DELIVERED	**:**	10 DECEMBER 2008
FILE NO/S	**:**	IAC 4 of 2007
BETWEEN	**:**	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)
		Appellant
		AND
		MARK JAMES LAWRENCE
		Respondent
		THE MINISTER FOR CONSUMER AND EMPLOYMENT PROTECTION
		Intervener

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	RITTER AP
		BEECH CC
		SMITH SC
Citation	**:**	[2007] WAIRC 00435
File No	**:**	FBA 1 of 2007

Catchwords:

Constitutional law - *Commonwealth Constitution* s 51(xx) - Trading corporations - Activities - Whether Aboriginal Legal Service engaged in 'trade' - Non-profit organisation - Gratuitous provision of a public welfare service at government expense - Funded under a contract with the Commonwealth Government

Constitutional law - *Commonwealth Constitution* s 51(xx) - Trading corporations - Whether trading activities significant or substantial proportion of overall activities

Industrial Relations - Industrial Appeal Court - Jurisdiction - Industrial Relations Commission's determination of its own jurisdiction - 'Industrial matter'

Legislation:

Commonwealth Constitution s 51(xx), s 109

Industrial Relations Act 1979 (WA), s 7(1), s 23(1), s 23A(1), s 24(1), s 86(1), s 90(1)

Workplace Relations Act 1996 (WA), s 4, s 5, s 6, s 16

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant	:	Mr T H F Caspersz & Ms A Beaumont
Respondent	:	Dr C N Kendall
Intervener	:	Mr R J Andretich

Solicitors:

Appellant	:	Blake Dawson
Respondent	:	Curwood & Co Pty Ltd
Intervener	:	State Solicitor for Western Australia

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

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [2007] WAIRC 00435

Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169

Bank of New South Wales v The Commonwealth (1948) 76 CLR 1

Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325

Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1

E v Australian Red Cross Society (1991) 27 FCR 310

Fencott v Muller (1983) 152 CLR 570

Fowler v Syd-West Personnel Ltd [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998)

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; (2007) 166 IR 196

Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10

J S McMillan Pty Ltd v Commonwealth (1997) 77 FCR 337

Lawrence v Aboriginal Legal Service of Western Australia (Inc) [2006] WAIRC 05849

Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579

Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290

New South Wales v Commonwealth (2006) 229 CLR 1

Pellow v Umoona Community Council Inc [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006)

Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243

R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc) (1979) 143 CLR 190

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533

Ransom v Higgs [1974] 1 WLR 1594

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134

State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

1 **STEYTLER P**: This appeal turns upon the question whether the appellant, the Aboriginal Legal Service of WA (Inc), is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

How the issue arose

2 The respondent worked for the appellant. On about 21 July 2006 his employment was terminated. He alleges that this was done harshly, oppressively or unfairly in breach of s 23A(1) of the *Industrial Relations Act 1979* (WA) (State Act). He filed a claim accordingly in the Western Australian Industrial Relations Commission (Commission). The appellant contended that the Commission lacked the jurisdiction to hear the claim. It submitted that it was a constitutional corporation for the purposes of the *Workplace Relations Act 1996* (Cth) (Commonwealth Act) because it was a trading corporation for the purposes of s 51(xx) of the Constitution. If that was so, the Commonwealth Act applied to the exclusion of the State Act.

Commissioner Kenner's decision

3 The jurisdictional question came before Commissioner Kenner of the Commission. He held that the appellant was not a trading corporation and that the Commission consequently had jurisdiction: ***Lawrence v Aboriginal Legal Service of Western Australia (Inc)*** [2006] WAIRC 05849.

The decision of the Full Bench

4 The appellant appealed to the Full Bench of the Commission (Full Bench). It dismissed the appeal: ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence*** [2007] WAIRC 00435.

5 The appellant's funding comes almost exclusively from the Commonwealth of Australia, represented by the Attorney General's Department (Department), under a contract dated 13 April 2005 (contract). The contract essentially requires the appellant to provide legal services to indigenous Australians in consideration of the funding provided by the Commonwealth. The Full Bench held that the entering into, and performance of, the contract by the appellant constituted trading, but that the provision of the legal services required by the contract did not. The Full Bench went on to say [331]:

> The providing of the legal services is not just the predominant activity of the appellant. It permeates through and enshrouds all that it does. The obtaining of funds from the department, although involving trading, is not an independent trading activity to enable the appellant to carry out a non trading activity. The two are inextricably linked. The funds obtained are required to be used for an activity which is not trading. This affects the extent, in a qualitative sense, of the trading with the department as against the activities of the appellant as a whole. When the activities of the appellant are considered as a whole, in the words of Mason J in ***Adamson*** [***R v The Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)*** (1979) 143 CLR 190] trading activities do not 'form a sufficiently significant proportion of its overall activities to merit its description as a trading corporation'. Put slightly differently, to use the process of Toohey J in ***Hughes*** [***v Western Australian Cricket Association Inc*** (1986) 19 FCR 10], from evaluating the extent of the trading activities against the totality of activities, we have reached the conclusion that the trading activities are not so significant to give the appellant 'the character of a trading corporation'.

Grounds of appeal, notice of contention and procedural issues

6 The grounds of appeal are prolix and, in some respects, difficult to fathom. Essentially, they amount to the single proposition that, having found that the entry into, and performance of, the contract was a trading activity, the Full Bench should have gone on to find that the appellant was a trading corporation.

7 In its notice of contention, the respondent contends that the Full Bench erred in finding that the appellant's entry into, and 'partial performance of', the contract amounted to trading for the purposes of s 51(xx) of the Constitution.

8 As was the case before the Full Bench, the Minister for Consumer and Employment Protection (WA) (Minister) sought, and was granted, leave to intervene. Also, because the matter involves the interpretation of the Commonwealth Constitution, at each stage of the proceedings notices were issued pursuant to s 78B of the *Judiciary Act 1903* (Cth). None of the Attorneys-General has chosen to intervene.

The preliminary issue

9 A preliminary issue arose whether this court has jurisdiction to hear the appeal. The appellant and the respondent submit that it has. However the Minister submits that it does not have jurisdiction.

10 This court has very limited jurisdiction to hear and determine appeals. Such jurisdiction as it has is given by s 86(1) of the State Act. That section provides that the court has jurisdiction to hear and determine appeals under s 90 and s 96K. Section 96K is not presently relevant. Section 90(1) reads as follows:

> Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not on an industrial matter;
>
> (b) erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground.

11 The appellant's contention that the Full Bench was wrong to find that the appellant is not a trading corporation for the purposes of s 51(xx) of the Constitution, and that the Commission consequently had jurisdiction, seems to me to be justiciable by this court under s 90(1)(a).

12 The source of the Commission's jurisdiction is essentially s 23(1) of the State Act. That section provides that the Commission 'has cognizance of and authority to enquire into and deal with any industrial matter'. The State Act defines an industrial matter 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(1). Under s 24(1) of the State Act the Commission has jurisdiction to determine, in any proceedings before it, whether any matter to which those proceedings relate is an industrial matter.

13 Section 16 of the Commonwealth Act provides that that Act is intended to apply to the exclusion of a State or Territory industrial law 'so far as [it] would otherwise apply in relation to an employee or employer'. The word 'employee' is defined in s 5(1) of the Commonwealth Act as meaning an individual employed by an employer. The word 'employer' is defined in s 6(1) as meaning 'a constitutional corporation, so far as it employs, or usually employs, an individual … '. A 'constitutional corporation' is one to which s 51(xx) of the Constitution applies: s 4(1) of the Commonwealth Act. Section 4(1) of the Act also provides that the State Act is a State industrial law.

14 The parties agree that, because the Commonwealth Act applies to industrial matters as between constitutional corporations and their employees to the exclusion of the State Act (so far as the State Act would otherwise apply in relation to an employee or employer), the effect of s 109 of the Constitution is that, so far as the State Act purports to give to the Commission jurisdiction to deal with industrial matters concerning relations between a constitutional corporation and its employees, or one of them, it is invalid. That, in turn, means that, if the Full Bench was wrong to find that the appellant was not a trading corporation, then its decision that the Commission had jurisdiction to embark upon the appellant's claim was also wrong 'in that the matter the subject of the decision is not on [sic] an industrial matter'. This would be so because the word 'employer(s)' in s 7(1) does not extend to a constitutional corporation and the word 'employee(s)' does not extend to a person employed by a constitutional corporation.

15 It is unnecessary to consider whether s 90(1)(b) is applicable. Section 90(1)(c) is not applicable.

Is the appellant a trading corporation?

16 That brings me to the question whether there was an error of the kind contended for. In order to answer that question, it is necessary to give some attention to the appellant's constitution, its activities, the nature of its funding arrangements and the contract entered into with the Department.

The appellant's constitution

17 The appellant is an association incorporated under the *Associations Incorporation Act 1895* (WA). Its objects, identified by cl 4 of its constitution, are:

> To provide direct relief to all Aboriginals from poverty, suffering, destitution, misfortune, distress and helplessness caused directly or indirectly by their involvement with the laws of the Commonwealth or States of Australia and all matters ancillary thereto …

Clause 4 goes on to specify the methods by which these objects are to be achieved. As might be anticipated, there are many of them. The first of them is the provision of 'legal assistance to Aboriginals in Western Australia'. Amongst the others is a power (cl 4(r)) 'to receive and spend grants of money from the Government of the Commonwealth … '.

18 Clause 5 provides for the general powers of the appellant. These are provided for the purpose of carrying out its objects. One of them is to 'enter into any arrangements with any Government … that may seem conducive to the [appellant's] Objects, or any of them; and to … carry out, exercise and comply with any such arrangements … '.

19 Clause 6(1) requires that the income and property of the appellant, derived from whatever source, be applied solely and exclusively towards the promotion of its objects and that 'no portion' is to be 'paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit, to Members of the [appellant]'. Similarly, cl 34 provides that the appellant's funds are to be applied in carrying out its objects.

The appellant's activities

20 As might be expected, the principal activity of the appellant is the provision of legal services to Aboriginal clients. The appellant has been in operation, and has provided these services, for over 30 years. Its 2006 Annual Report (which was tendered in evidence) reveals that it has offices in 18 locations across Western Australia and that, in the year covered by the report, its staff provided legal assistance in over 27,000 matters. The appellant deals with criminal law, family law and other matters, including such areas as criminal injuries compensation, debts, motor vehicle accidents, personal injuries and fatal accident claims. It has been involved in a number of law reform initiatives. It has also obtained funding to enable it to monitor the implementation of the recommendations made by the Royal Commission into Aboriginal Deaths in Custody. It employs around 30 lawyers and some 26 court officers who, while not legally trained, are permitted by s 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) to represent clients in court. These court officers also conduct prison visits and provide community education.

21 The appellant is classed as a public benevolent institution. It enjoys tax concessions accordingly. It is endorsed as a deductible gift recipient.

The appellant's funding

Prior to 2005

22 Until 2003, the appellant's activities were funded by grants provided through the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC was abolished in 2003. After that, the appellant received funding from ATSIC's successor body, the Aboriginal and Torres Strait Islander Services (ATSIS). It applied for, and was given, grants by that body.

Post-2005

23 In 2005, the Commonwealth Government changed its funding arrangements. It decided that, henceforth, funding for legal services provided to indigenous people throughout Australia was to be allocated under a competitive tender process. It consequently put out a request for tender for the provision of legal aid services to indigenous Australians in Victoria and Western Australia. The appellant put in a successful (and perhaps the only) tender for the provision of services in Western Australia. That led to its entry into the contract with the Commonwealth under which, as I have said,

it obtains almost all of its funding. Nearly all of its activities are carried out under that contract. The appellant's only other sources of funding are a very limited amount provided by the Western Australian State Government and money received from those few clients who have the means to contribute to their legal costs.

24 Commissioner Kenner, at first instance, made an uncontested finding that the evidence established that the request for tender was not put out in order to obtain bids based upon competitive prices. Rather, the Department set the amount of funding available over the term of the proposed contract. There is no real contest between the parties concerning the fact that the purpose of the tender process was to ensure, as best that could be done, that there would be greater accountability and efficiency in the expenditure of the legal aid funding provided by the Commonwealth.

The contract with the Commonwealth

25 The contract with the Commonwealth is dated 13 April 2005. It commenced operation on 1 July 2005. Its duration was for a term of three years, unless terminated earlier and subject to the Department's discretionary right to offer to extend it for a further period or periods of up to three years.

26 Recital A of the contract records that the Department 'wishes to engage organisations to provide the Services with the aim of improving the access of indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens'. The 'Services' are identified in cl 3, which provides a detailed set of prescriptions. Amongst these is a requirement that the appellant must assess whether each person applying to it for provision of legal assistance under the contract is indigenous, or an indigenous group or body, or a person or body to whom services might be provided that will be of direct and substantial benefit to an indigenous person or group or body (eligible clients). An assessment is required to be made whether each eligible client satisfies the 'Means Test' (a procedure that is designed to identify 'the relatively small minority of indigenous people who have the personal means to finance their own legal aid assistance without suffering undue hardship').

27 Having satisfied itself accordingly, the appellant is required to ensure that services are made available to the client under the terms of the contract. These detail the nature of the services to be provided, the priority to be accorded to different categories of eligible clients and a range of other matters. The appellant is required to provide services only to those eligible clients who satisfy the means test. It must use any contributions paid by clients in respect of costs to enhance the quality of the services provided.

28 Clause 3.4 provides that the appellant may provide services to a non-indigenous eligible client only where it can be shown that the services will be provided in accordance with the contract and that there will be a direct and substantial benefit to one or more indigenous persons, or indigenous groups or bodies.

29 The appellant is required to comply with the conditions, priorities, procedures and other requirements specified in a document headed 'Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians'. This document (Policy Directions), as amended by the Department from time to time, is incorporated into the contract.

30 The contract prescribes the minimum number of 'clients/cases' to be handled in different areas and the types of services that must be supplied in each of the metropolitan, regional and remote areas. Clause 3.10 provides that the appellant must liaise with the Department's contract manager and comply with any directions from him 'as reasonably required from time to time'.

31 Fees are provided for by cl 4 of the contract. These are payable in instalments and the appellant is required to submit invoices in respect of them. The fees are payable by way of an establishment payment of $1,448,441, payable on the commencement date, and thereafter by monthly service payments made on the last day of each month during the contract period, starting from the end of the first month after the commencement date. In the first year there are to be 12 payments of $482,813.50 each. In the second year there are to be 12 payments of $651,654.08 each. In the third year there are to be 12 payments of $698,153.25 each. The total contract value is expressed to be $23,439,890.96.

32 Clause 4.7 provides that the appellant must not seek payment from any other source for providing the same legal services to the same eligible client for which the appellant will be paid under the contract.

33 Clause 4.8(a) gives to the Department the right to defer or reclaim payment or reduce the amount of any instalment of the fees payable if, and for so long as, the appellant has not completed or delivered the part of the services to which the instalment relates in the manner required under the contract.

34 Clause 11.1 gives to the Department the right, at any time, by notice to terminate all or part of the contract immediately for any reason. Clause 11.6 provides for the implementation of sanctions if the appellant should fail to satisfy any of the terms and conditions of the contract.

35 By cl 20.1, the appellant acknowledges that it is not, by virtue of the contract, 'an officer, employee, partner or agent of the Department' and that it does not have 'any power or authority to bind or represent the Department'.

36 There is a wide range of other obligations imposed upon the appellant by the contract. These include such matters as the obligation to give the Department access to its premises, documents and records and to cooperate with and permit the Department to audit any aspect of the appellant's compliance with its obligations under the contract or of its provision of the services (cl 16.1(b)).

37 The Policy Directions commence with an introduction, the first four paragraphs of which read as follows:

> 1.1 Aboriginal and Torres Strait Islander people experience far higher rates of adverse contact with the justice system than do other Australians, and are incarcerated at significantly higher rates than non-Indigenous people. They are also one of the most profoundly disadvantaged groups in Australian society, falling well below relevant national benchmarks on virtually every measure

of well-being and socioeconomic status (Steering Committee for the Review of Government Service Provision 2003, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra).

1.2 As part of a broader strategy designed to address both the causes and the effects of Indigenous disadvantage, the Attorney-General's Department (the Department) administers a number of inter-related programs in the broad field of Law and Justice. These include a national program of Legal Aid for Indigenous People (the subject of these *Policy Directions for the Delivery of Legal Aid Services to Indigenous Australians* (*Policy Directions*)) and a range of complementary programs in the areas of Law and Justice Advocacy, Family Violence Prevention Legal Services and Prevention, Diversion and Rehabilitation. These programs were previously administered by Aboriginal and Torres Strait Islander Services (ATSIS). Details of these programs may be found in ATSIS' Annual Report for 2003-04.

Objectives

1.3 The primary objective of the Legal Aid for Indigenous People program is to improve the access of Indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens. It is the role of other programs and policy strategies - administered variously by the Department, other Commonwealth agencies and State and Territory Governments - to deal with the underlying sources of Indigenous disadvantage and thereby to reduce the incidence of adverse contact with the justice system. The leaders of all Australian Governments have committed themselves to a program of strategic policy action designed to reduce the level of Indigenous disadvantage in Australian society (Council of Australian Governments, Communiqués of 3 November 2000 and 5 April 2002).

Legal Aid Services Program

1.4 Under the grant arrangements to be gradually phased out from 1 July 2005, the Department has provided grant funding of some $42.9m annually to a national network of 25 Aboriginal and Torres Strait Islander Legal Services (ATSILS). This network has delivered legal aid services at some 94 separate service sites across Australia, and in 2002-03 provided legal representation to 69,292 Indigenous people in 113,698 case and duty matters. Grant funding to ATSILS has been provided on an annual basis and has been subject to a range of specified terms and conditions, including compliance with the terms of a Legal Services Policy Framework (*Policy Framework for Targeting Assistance Provided by Aboriginal and Torres Strait Islander Legal Services*, Law and Justice Group, June 2004 issued by the Aboriginal and Torres Strait Islander Services).

38 The Policy Directions go on to deal, in detail, with such matters as eligibility for assistance, priorities for assistance, services to be provided, means testing and client contributions, recovery of costs, administrative requirements and performance and accountability requirements. There is also detailed provision concerning the standard for the provision of legal services. Amongst many other requirements, accessibility and cultural sensitivity are said to be fundamental to the effective provision of legal services for indigenous Australians. Various obligations are required to be met in order to ensure that services are delivered in a culturally sensitive and appropriate manner.

Relevant principles

39 There are five frequently cited decisions of the High Court as regards the test to be applied in determining whether or not a corporation should be categorised as a 'trading corporation' for the purposes of s 51(xx) of the Constitution. These have followed a variable course.

40 In ***R v Trade Practices Tribunal; Ex parte St George County Council*** (1974) 130 CLR 533, two of the majority (Menzies and Gibbs JJ) emphasised the importance of the purpose for which a corporation was formed. Menzies J considered that the fact that a corporation trades 'is clearly insufficient by itself to bring it within the classification of a trading corporation' (553). He found that the County Council, which engaged in the supply of electricity, existed in 'its original and existing character' for local government purposes (551) and that, although it traded, it was not a trading corporation (554). Gibbs J said that, in s 51(xx), the word 'trading' formed part of a composite expression and indicated the essential attribute of the kind of corporation to which it referred (561). On this view, a trading corporation was one 'formed for the purpose of trading' (562). The mere fact that it traded did not make it a trading corporation. The third member of the majority, McTiernan J, appears to have taken a different approach. He said that the words in question are 'a trading corporation' and not 'any trading corporation' and that it could 'hardly be contended that the legislature intended any corporation which trades' to be encompassed within those words (546). However, his judgment appears to have turned upon the proposition that Parliament had intended to legislate with respect to a 'free enterprise corporation' and that it was too remote a deduction to draw, from the general words 'trading corporation', that the legislature intended to make a body within the central government of a State, or a local authority, amenable to the jurisdiction of the Trade Practices Tribunal because it was a supplier of goods or services within the State (547).

41 The minority (Barwick CJ and Stephen J) placed emphasis on the activities of the corporation at the time of assessment. Barwick CJ said that the description 'trading corporation' referred 'not to the purpose of incorporation but to the activities of the corporation at the relevant time' (539, 541 - 543), although he added that the power to trade must be within the corporate charter (542). He accepted that the application of this test did not mean 'that a corporation which to

any extent engages in trade is a trading corporation' (543). Stephen J similarly considered that the description 'trading corporation' is one of 'actual or intended activities' (568). He regarded 'matters domestic to the County Council' as irrelevant to the question whether it was a trading corporation (568).

42 The dissenters in ***St George County Council*** gained the upper hand in ***R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)*** (1979) 143 CLR 190 (***Adamson***). Barwick CJ said that the 'only sure guide to the nature of the company is a purview of its current activities, a judgment as to its nature being made after an overview of all those activities' (208). He went on to say (208):

> I remain of the firm conviction that for constitutional purposes a corporation formed within the limits of Australia will satisfy the description 'trading corporation' if trading is a substantial corporate activity. Its activities rather than the purpose of its incorporation will designate its relevant character. But so to say assumes that such trading activities are within its corporate powers, actual or imputed. It is the corporation which satisfies the description which is the subject matter of the power. Thus its corporate capacity or incapacity cannot be ignored. But once it is found that trading is a substantial and not a merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.

43 Mason J, with whom Jacobs J agreed, preferred the view of Barwick CJ in ***St George County Council*** that 'it is not necessary that a corporation be formed for trading or financial purposes and that "the activities of a corporation at the time a law of the Parliament is said to operate upon it will determine whether or not it satisfies the statutory and therefore the constitutional description"' (233). He added that not every corporation which is engaged in trading activity is a trading corporation and that the trading activity of a corporation may be so slight and so incidental to some other principal activity that it could not be described as a trading corporation (234). He said that whether the trading activities of a particular corporation are sufficient to warrant its being characterised as a trading corporation is 'very much a question of fact and degree' (234).

44 Gibbs J adhered to what he had said in ***St George County Council*** (212 - 213). However, he went on to say that if, contrary to his opinion, the activities of a corporation at the relevant time determine whether it satisfies the constitutional test, it is the predominant and characteristic activity that has to be considered (213).

45 Stephen J, too, seemingly adhered to what he had said in ***St George County Council*** (219). He added that, as all who participated in that case agreed, 'to engage in trade is not in itself to be a trading corporation' (220).

46 Subsequently, in ***State Superannuation Board v Trade Practices Commission*** (1982) 150 CLR 282, Mason, Murphy and Deane JJ summarised the effect of ***Adamson*** as follows (303 - 304):

> First, the majority of the Court (Barwick CJ, Mason, Jacobs and Murphy JJ), rejecting the argument that the purpose for which a corporation is formed is the sole or principal criterion of its character as a trading corporation, concluded that the relevant character of the football leagues and the football club was to be ascertained by reference to their established activities ((1979) 143 CLR, at pp 208 - 211, 233 - 237, 239 - 240). In adopting this view their Honours disapproved the approach taken by the majority in ***St George*** which placed emphasis on the purpose for which the County Council was formed (see, for example, p 562).
>
> Secondly, the judgments of the majority in ***Adamson*** make it clear that, in having regard to the activities of a corporation for the purpose of ascertaining its trading character, the Court looks beyond its 'predominant and characteristic activity' (cf p 213 per Gibbs J). Barwick CJ ((1979) 143 CLR, at p 208) spoke of making a judgment 'after an overview' of all the corporation's current activities, the conclusion being open that it is a trading corporation once it is found that 'trading is a substantial and not a merely peripheral activity'. Mason J ((1979) 143 CLR, at p 234) said that it 'is very much a question of fact and degree' having earlier stated ((1979) 143 CLR, at p 233) that the expression is essentially 'a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation.'
>
> Murphy J ((1979) 143 CLR, at p 239) said 'As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation'. Indeed, it was essential to the majority's approach and to its rejection of ***St George*** that a corporation whose trading activities take place so that it may carry on its primary or dominant undertaking, eg, as a sporting club, may nevertheless be a trading corporation. The point is that the corporation engages in trading activities and these activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade. As the carrying on of that undertaking requires or involves engagement in trading activities, there is no difficulty in categorizing the corporation as a trading corporation when it engages in the activities.
>
> Indeed, we would go on to say that there is nothing in ***Adamson*** which lends support for the view that the fact that a corporation carries on independent trading activities on a significant scale will not result in its being properly categorized as a trading corporation if other more extensive non-trading activities properly warrant its being also categorized as a corporation of some other type.

47 Gibbs CJ and Wilson J summarised ***Adamson*** as follows (294):

> In our opinion, the case is authority for the proposition that a corporation whose principal activity is trading is a 'trading corporation' within s 51(xx). Barwick CJ, Mason J and Jacobs J clearly grounded their decision on that view of the activity of the prosecutors. Murphy J was content to say that their

> trading activities were substantial. So far as obiter dicta is concerned, while it is true that Mason J, with Jacobs J concurring, adopted a relative test in terms of a 'sufficiently significant proportion of overall activities' ((1979) 143 CLR, at p 233) and Murphy J in terms of 'not insubstantial' ((1979) 143 CLR, at p 239), the remaining four members of the Court (Barwick CJ, Gibbs, Stephen and Aickin JJ) all either expressly or in our opinion implicitly indorsed the predominant and characteristic activity test.

They went on to express their own view of the approach that should be taken (294 - 295):

> We should now state the view which we take of the proper approach to the question of characterizing a trading or financial corporation for the purposes of s 51(xx) and the *Trade Practices Act*. If the matter were free of authority, we would favour in substance the view expressed by Gibbs J in ***St George***. As a matter of language, s 51(xx) seems to us to identify distinct types of corporations, thereby alluding more to their nature and purpose than to the activities in which they engage. Of course a consideration of what corporations do may well be relevant to a determination of their nature and purpose; but to concentrate exclusively or primarily on the current activities of a corporation in the process of classification is to construe the legislative power as a power with respect to trading or financial activities rather than as a power with respect to certain types of corporation.
>
> However, the matter is not free of authority. We regard ourselves as bound by ***Adamson*** to give greater weight to the current activities test than we would otherwise have thought appropriate. On the other hand, the process of characterization is not to be narrowly pursued. It calls for a consideration of all the circumstances touching the corporation in question before one can determine whether it satisfies the constitutional description. Such an approach is in our view necessarily implicit in a process of characterization and we do not understand ***Adamson*** to deny it.

48 In ***Fencott v Muller*** (1983) 152 CLR 570, Gibbs CJ (who, with Wilson & Dawson JJ, was in dissent on the question whether a corporation, Oakland Nominees Pty Ltd, was a trading or financial corporation) said that the words 'foreign', 'trading' and 'financial', which govern 'corporations' in s 51(xx), indicate that the paragraph refers only to corporations of particular kinds and that those words make it necessary to consider the character of the corporation which, in turn, may be discovered by considering what it does and what it is intended to do (588). He went on to say (588 - 589):

> But a corporation cannot take its character from activities which are uncharacteristic, even if those activities are not infrequently carried on. It may indeed be wrong to insist on finding activities that are 'primary' or 'predominant', but it is equally wrong to be satisfied with activities that are 'substantial', if the latter activities do not, in all the circumstances, show that the corporation has a character which the Constitution requires. It is true that the question will often be one of degree.

Gibbs CJ returned to the issue of purpose of formation (589 - 590). He said that this will be particularly relevant when the corporation has not yet begun, or has only just commenced, the activities which it was intended to carry on but that the width with which an objects clause of a company's memorandum of association is customarily drafted might render it an inadequate and misleading guide. He said that to accept that the intended, as well as the actual, functions of the corporation are relevant for the purpose of determining its character does not mean that only the memorandum of association might be looked at for that purpose. Rather, the whole of the evidence as to its intended operations is relevant.

49 Mason, Murphy, Brennan and Deane JJ, who formed the majority, said that the 'activities test' was the relevant test to determine the character of a corporation (600 - 601). However, they went on to say (601 - 602):

> The majority judgments in [***Adamson***] which held that the established activities of the football league concluded its character as a trading corporation did not suggest that trading activities are the sole criterion of character. Absent those activities, the character of a corporation must be found in other indicia. While its constitution will never be completely irrelevant, it is in a case such as the present where a corporation has not begun, or has barely begun, to carry on business that its constitution, including its objects, assumes particular significance as a guide …

50 Wilson J regarded the activities of the corporation and its intended purpose as being relevant to its characterisation (611). He said that the purpose is not necessarily to be found in the scope and range of the objects contained in its memorandum of association. He agreed with the views of Gibbs CJ as to how the task of characterisation was to be pursued (611).

51 Dawson J, too, touched upon the issue of purpose. He said (623):

> If purpose is initially relevant in determining character, it must remain relevant after a corporation has commenced to engage in some or all of its eventual activities. True it may be that these activities may throw more light upon the true nature of the corporation than can any purpose which may be expressed in the formation of a corporation, but that is far from excluding the purpose of its formation, if it can be ascertained, as a factor of relevance for the purposes of s 51(xx) once the corporation has commenced to function actively. If that were not so, the approach would be a pea and thimble one which would serve to confuse rather than assist in the solution of the problem.

He went on to say (623 - 624):

> The fact that the objects and powers are sufficiently wide to enable the corporation to undertake trading and financial activities does not indicate purpose and to regard them as doing so, in my view, would be to confuse capacity with purpose. As Barwick CJ remarked in ***Adamson's Case*** ((1979) 143 CLR, at p 208):

> 'In modern times having regard to the diversification of corporate activity and the virtual elimination of ultra vires from the law relating to companies registered under the Companies Acts, eg, s 20 of the *Companies Act 1961* (NSW), the nature of a company may not be discernible from a perusal of its memorandum.'

His Honour went on to say:

> 'The only sure guide to the nature of the company is a purview of its current activities, a judgment as to its nature being made after an overview of all those activities.'

If by the last statement his Honour was suggesting that the current activities of a company are the exclusive guide to its nature, then it is a viewpoint which is not shared by a majority of the Court. But what his Honour does say serves to demonstrate that in searching for the proper classification of a company it may not always be fruitful to resort to its memorandum of association, especially in the case of a company incorporated under one of the Companies Acts with wide objects and powers intended to enable the corporation to engage in an extended variety of activities, some of which may be described as trading or financial and some of which may not. The fact that the corporation in question has not engaged in activities of any significance cannot endow its memorandum with a relevance which disappears upon the commencement of business. If the objects of a corporation point to its nature, they continue to do so whether or not it commences and continues to pursue them. However, in this case, having regard to the capacity of the corporation in question to exercise its functions with or without engagement in trading or financial activities, I can find no indication in its objects or powers that it is properly to be described as a trading or financial corporation.

52 In the ***Commonwealth of Australia v The State of Tasmania*** (1983) 158 CLR 1 (***Tasmanian Dam case***), the court considered whether a statutory body corporate, the Hydro Electricity Commission (HEC), was a trading corporation within the meaning of s 51(xx) of the Constitution. A majority (Mason, Murphy, Brennan & Deane JJ) held that it was. Gibbs CJ and Dawson J dissented in this respect. Wilson J found it unnecessary to decide the question.

53 Mason J, in finding that the HEC was a trading corporation, referred (155) to what had been said by Barwick CJ in ***St George County Council*** (541) to the effect that the connection of a corporation with the government of a State would not take it outside s 51(xx). He also referred (156) to what had been said by the majority in ***Adamson***, to the effect that a trading corporation whose trading activities take place so that it may carry on some other primary or dominant undertaking (which is not trading) may nevertheless be a trading corporation. Murphy J once again said that the constitutional description of trading corporations includes bodies incorporated for the purpose of trading and also those which trade (179). He regarded the HEC as a trading corporation both by virtue of its constitution and its activities which, he said, made it a major trader (179). Brennan J regarded the trading activities of the HEC as being a substantial part of its overall activities, if not the predominant part, and said that, consistently with the views which had prevailed in earlier cases, the HEC must be held to be a trading corporation (240). Deane J referred to what had been said by the majority in ***Adamson***, in particular to the effect that a corporation will be a trading corporation when its trading activities form a sufficiently significant proportion of its overall activities so as to merit its description as such (293). He concluded that, whatever other descriptions might be applied to the HEC, in the context of its overall activities it was a trading corporation.

54 Gibbs CJ, in his dissenting judgment, regarded the HEC as 'a corporation sui generis' (117). He said that its activities included trading (it supplied electricity for profit) on a substantial scale, but also included the construction, on a large scale, of generating plants and works for the distribution of electricity to enable it to keep Tasmania supplied with electricity (117). He said that, in this respect, it discharged a public function of vital importance to the State. He added that it performed other governmental functions of less importance. He considered that to describe the Commission as a 'trading corporation' was to rob those words of all distinctive meaning. Dawson J found it unnecessary to consider whether the HEC was a trading corporation. However, he went on to say that, had he needed to do so, he would have come to the same conclusion in that respect, and for the same reasons, as Gibbs CJ (318).

55 Other courts have since considered the issue. However, before turning to these, I propose first to refer to an earlier case, ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** (1978) 36 FLR 134---, decided after ***St George County Council,*** but before ***Adamson***. Bowen CJ said (139):

> The terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements (***W & A McArthur Ltd v State of Queensland*** ((1920) 28 CLR 530 at p 547)). The word 'trade' is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing (***Commissioners of Taxation v Kirk*** ([1900] AC 588 at p 592) per Lord Davey; ***W & A McArthur Ltd v State of Queensland*** ((1920) 28 CLR 530)). The commercial character of trade was mentioned more recently by Lord Reid in ***Ransom v Higgs*** ([1974] 1 WLR 1594). His Lordship there said: 'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services ([1974] 1 WLR at p 1600)'.

He also said, when addressing the 'mutuality' that he found to have been present in that case on the part of the applicants in relation to their members, that it 'excludes the commercial element which is a necessary part of "trade or commerce"' (142). In his judgment, Deane J also mentioned the element of commerciality (167).

56 In ***Ransom v Higgs*** [1974] 1 WLR 1594, referred to by Bowen CJ in the extract that I have quoted from his judgment, Lord Wilberforce made the following comments concerning 'trade' (1610 - 1611):

> 'Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed.

57 That brings me to some of the later cases.

58 In ***E v Australian Red Cross Society*** (1991) 27 FCR 310, Wilcox J was called upon to consider whether or not the Australian Red Cross Society and the Royal Prince Alfred Hospital were trading corporations. The applicant had contended, amongst other things, that the Society, and its New South Wales Division, although making no charge for the blood supplied by them, conducted blood transfusion activities which constituted substantial businesses by which they supplied valuable commodities, blood and blood products, in return for large payments. The applicant pointed to the fact that the Society received from governments a total of $44,965,328 in respect of its blood transfusion services, of which the New South Wales Division received more than $10 m. Wilcox J said, of these contentions (343):

> These were, of course, substantial sums. They were earned only because the respondents are prepared to carry on blood transfusion services at a scale, in terms of labour and resources, greater than that of many organisations which are undoubtedly 'trading corporations'. But I do not think that it is appropriate to describe the gratuitous provision of a public welfare service, substantially at government expense, as the conduct of a 'trade'. It is pertinent to recall the words of Stephen J in ***St George County Council*****:** 'It is the acts of buying and selling that are at the very heart of trade', and also to remember the distinction he made in respect of the distribution of electricity free of charge. In relation to the supply of blood, it seems to me that the first and second respondents do not engage in trading activities. They engage in a major public welfare activity pursuant to agreements with the Commonwealth and the various State governments under which they will be reimbursed most of their costs.

59 When considering the position of the Royal Prince Alfred Hospital, Wilcox J accepted a submission that, despite the adoption of the 'activities' test, the purpose for which the corporation was formed retained some relevance (344). However, when he examined the scale of the hospital's trading activities, he regarded them as 'substantial' enough to require that the hospital should be regarded as a trading corporation (345).

60 In ***Mid Density Development Pty Ltd v Rockdale Municipal Council*** (1992) 39 FCR 579, Davies J considered whether the Municipal Council of the Shire of Rockdale was a trading or financial corporation and, hence, subject to the provisions of the *Trade Practices Act 1974* (Cth). He expressed the test, as it applied to the circumstances before him, in the following way (584):

> The issue is, therefore, whether Rockdale's trading activities or financial activities formed a sufficiently significant proportion of its overall activities as to justify its description as a trading or financial corporation. The adjectives 'significant' and 'substantial' were considered in the context of characterisation in ***Deputy Commissioner of Taxation (Cth) v Stewart*** (1984) 154 CLR 385 at 390, 397 and 399- 400. The activities must be of a sufficiently significant or substantial scale as to confer the character of 'trading' or 'financial' upon the corporation. The relationship between the activities relied upon and the overall activities of the corporation, and the extent of those activities in comparison to the extent of the corporation's activities overall are relevant.

Importantly, he also said that the 'carrying out of a function of government in the interests of the community is not a trading activity' (585).

61 A subsequent appeal was successful. However, it was unnecessary for the Full Federal Court to consider whether the Council engaged in trade: ***Mid Density Developments Pty Ltd v Rockdale Municipal Council*** (1993) 44 FCR 290.

62 In ***J S McMillan Pty Ltd v Commonwealth*** (1997) 77 FCR 337, Emmett J was required to consider a similar question in respect of the Australian Government Publishing Service (AGPS). AGPS was the primary publisher, printer and distributor of Commonwealth parliamentary and government information and was a business unit within the Department of Administrative Services of the Commonwealth. The services provided by AGPS included a package (described as 'package 3') which included core parliamentary and government printing, general government printing, graphic design and editorial services. Emmett J said, in this respect (355):

> Even if AGPS has not been providing services to arms of the Commonwealth Government on a profit-making basis, the services which it has been providing are services of the nature which an entity carrying on a business could well provide. Regularly and systematically providing services of the nature of the services comprised in package 3 is carrying on a business. General printing services, dispatch and distribution services, graphic design services and editorial services are activities comprising the carrying on of business albeit that they are provided in connection with government.
>
> The Commonwealth contended that, in providing those services, AGPS was undertaking functions which are inherently functions of government such that they cannot be considered a trading activity, much less the carrying on of a business: see, for example, ***Mid Density Development Pty Ltd v Rockdale Municipal Council*** (1992) 39 FCR 579 at 585. Clearly, there is a distinction between those functions of a Government which are purely governmental or regulatory and those functions which entail the carrying on

> of business. However, that contention appears to confuse the two aspects of the Commonwealth's involvement in the package 3 services. Insofar as the Commonwealth, in the guise of the Department of the Senate, the Department of the House of Representatives and other departments, utilises the services provided or procured by AGPS, it does so in the carrying out of governmental functions. It could not be said that the Commonwealth in those guises is carrying on a business. It is acquiring the services systematically and regularly, but only for the purpose of governing.
>
> However, in its guise as AGPS, the Commonwealth is doing what any citizen or private trader might do, namely, providing those services for remuneration. That remuneration may or may not be a commercially adequate remuneration. Further, those services are being provided to the Commonwealth in its governmental guises. Nevertheless, I consider that the Commonwealth, in providing those services, is carrying on a business within the meaning of s 2A.

63 In ***Fowler v Syd-West Personnel Ltd*** [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998)-, the respondent corporation was established to create and operate a long-term employment programme for people with intellectual disabilities and to place other workers in employment. Most of its income comprised grants from the Commonwealth Department of Health and Family Services. The relationship between the respondent and the Department was governed by a contract which required the respondent to use the funding only for the provision of services under the contract in accordance with the *Disability Services Act 1986* (Cth) and the Minister's funding priorities. McIntyre VP, after referring to a number of the cases, including ***E***, concluded that the respondent was not a trading corporation. He reached this conclusion upon the basis that the respondent was engaged in the gratuitous provision of a public welfare service substantially at government expense which, he said, was not the conduct of a 'trade'.

64 In ***Quickenden v O'Connor*** [2001] FCA 303; (2001) 109 FCR 243, the court (Black CJ, French & Carr JJ) held that the University of Western Australia was a trading corporation by virtue of its substantial trading activities, such as the buying, selling and renting of property, the sale of publications and services and the operation of the Festival of Perth [49], [51] (Black CJ & French J), [109] (Carr J). However, Black CJ and French J considered it questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act 1988* (Cth) (HEF Act) amounted to trading. They said, in this respect [50] - [52]:

> The University also submitted that the fees charged by it for courses are fees for services notwithstanding that they are regulated by legislation and ministerial guidelines. So it was said that under the *Higher Education Funding Act* the regulation of fees is a condition of receiving Commonwealth grants and not a requirement imposed directly by law. The guidelines themselves, it is said, do not limit the University in such a way as to deny the fees the character of payment for services and facilities provided in the courses offered by the University. No limits are imposed on the number or content of the courses nor on their promotion or design, nor on ancillary matters such as accommodation and other student benefits which may attract potential students. Specifically, in respect of payments made by the Commonwealth to the University under the *Higher Education Funding Act* it is said that they should properly be characterised as revenue from trading activities. The argument is put thus. Some students pay HECS contributions directly to the University. That is, they pay a fee for services rendered to them. In 1995 fees paid in this way amounted to $8.849 million. HECS payments by the Commonwealth to the University in that year amounted to $17.318 million. Those payments, it was submitted, should also be characterised as revenue derived from trading.
>
> It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory. For present purposes, however, this aspect of the claimed trading activities can be disregarded. For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does. The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.
>
> It may be added that the characterisation of a body corporate as a trading corporation is a matter of fact and degree. Dr Quickenden has been unable to point to any error in that assessment on the part of the learned primary judge. As to the status of the University as a financial corporation that too is established on the evidence. His Honour's reasons and findings in that respect also are not shown to have been in error.

65 Carr J disagreed with the majority as regards the provision of educational services under the HEF Act. He said [106]:

> Although it is not necessary for me to decide, in my view there were other aspects of the University's activities which could be characterised as trading. Judicial notice can, I think, be taken of the fact that these days universities compete for students. The competition may be more intense within a particular State, but it certainly extends overseas and probably extends interstate. The Higher Education Contribution Scheme, in essence, works as follows. Relevantly, if the University wishes to participate in

> the Scheme it is obliged to charge fees to the students for the provision of education. If a student elects to pay those fees to the University directly and immediately out of his or her own funds the student gets a discount of 25 per cent, with the Commonwealth paying the balance to the University. Otherwise the student borrows the amount of the fees from the Commonwealth (which the Commonwealth pays to the University on the student's behalf) and subsequently repays that loan when he or she earns certain levels of income. The evidence was that the University derived, in the year ended 31 December 1997, an amount of $29.5 million under the Higher Education Contribution Scheme. I would regard that as being a trading activity.

66 In ***Pellow v Umoona Community Council Inc*** [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006), the respondent council, which was incorporated under the *Associations Incorporation Act 1985* (SA), engaged in activities which included the provision of a housing programme, a youth programme, an alcohol strategy, a child-care centre, a Centrelink agency, an advocacy service and other relief or aid facilities for local communities. O'Callaghan SDP distinguished between grant funded social service activities and agency arrangements involving a charge on a government department for the provision of a designated service. He said, in this respect [29]:

> The fact that the Council is incorporated in accordance with its constitution to undertake activities directed at the public good does not automatically take it outside the scope of being a trading corporation. Rather, consistent with the authorities, it is the activities in which it is involved which will determine whether it is, or is not, a trading corporation. In this respect there is a difference between grant funded social service activities such as the Coober Pedy Alcohol Strategy, including the Sobering Up Centre, and the provision of services on an agency basis for Government instrumentalities such as Centrelink. The Centrelink services appear to be undertaken by the Council on an agency basis and must be regarded as trading activities notwithstanding that the Council may have entered into these arrangements with the objective of improving social services for the local community. They differ from a grant in that the agency arrangement involves a charge on a Government department for the provision of a designated service which the department would be otherwise required to provide at its own cost. This is consistent with common arrangements for the delivery of traditional government services through private providers. For instance, the provision of job search services by a private provider involves trading as the provider makes a charge or even bids to the Government for the right to provide that service. In these instances the trade is actually constituted by the provision of the commodity or service. It reflects a commercial undertaking. In contrast, grant funding is provided for defined purposes which cannot be defined as commercial activities.

67 In ***Hardeman v Children's Medical Research Institute*** [2007] NSWIRComm 189; (2007) 166 IR 196, the New South Wales Industrial Court (Wright, Walton & Boland JJ) considered whether the respondent, a company limited by guarantee incorporated under the *Corporations Act 2001* (Cth), was a trading or financial corporation. Among the principles accepted by the court was one that 'trading activities' generally connote activities of a commercial nature involving, in essence, the exchange of goods or services for reward. The court analysed the trading activities of the respondent as a proportion of its total activities and concluded that it was not a constitutional corporation ([21] - [22]). The court said that there was no indication from the respondent's annual report, organisational structure, staff arrangements or its objects that gave rise to the impressions that trading activities were engaged in to a 'substantial', 'not insubstantial' or 'sufficiently significant' degree [22].

68 The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 - 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 - 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott*** (589); ***Quickenden*** [52], [101]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

Application of the principles

69 It is important to bear in mind, at the outset, that s 51(xx) of the Constitution does not give to the Commonwealth a power to legislate with respect to trading, or even with respect to trading by corporations: ***State Superannuation Board*** (295) (Gibbs CJ and Wilson J). It gives a power to legislate with respect to some, but not all, corporations, including those that are classified as trading corporations: ***St George County Council*** (543) (Barwick CJ), (546) (McTiernan J).

70 The appellant in the present case was set up to perform what are best described as public welfare services. As is apparent from cl 4 of its constitution, its function is to provide direct relief to indigenous people from 'poverty, suffering, destitution, misfortune, distress and helplessness caused directly or indirectly by their involvement with [the law] … '. It was for this purpose that it was given power to provide legal assistance to indigenous persons and to receive and spend grants from the Commonwealth. It exists for no other purpose and there is no suggestion that its activities had ever deviated from those necessary to achieve its primary purpose in the public interest.

71 That, of itself, is not determinative. However, there are other factors which point against the appellant's trading character. As I have said, its constitution requires that all of its income and property, derived from whatever source, be applied exclusively towards the 'promotion' of its objects and its members are not to receive any form of profit, bonus or dividend. There is no suggestion that the appellant earns, or tries to earn, any form of profit, bonus or dividend. Nor is there any suggestion that it profits from, or tries to profit from, its activities under the contract so as to fund any other activities that are permitted under its constitution. There is no suggestion, even, that it undertakes any other activities of any significance at all. Also, I have said that it is classed as a public benevolent institution and that it enjoys tax concessions accordingly. Its services are provided only to those it has been set up to help and it does not compete for those, or any other, clients.

72 There is nothing in its funding arrangements that alters any of this. Although the appellant tendered for its funding contract, the tender was not one based on price. Rather, as I have said, the whole process was designed to enhance efficiency in respect of services funded by government. The recitals to the contract, and the provisions to which I have referred, make it plain that the funding is designed to ensure that indigenous Australians have access to high quality and culturally appropriate legal aid services so as to enable them fully to exercise their legal rights as Australian citizens. Those who are given access to these services must demonstrate both that they are eligible persons and that they satisfy a means test establishing that they are unable to pay for their legal services. The overwhelming majority of the services are provided free of any charge. If contributions can be made towards expenses, they must be used to enhance the quality of the services provided. Services under the contract are overseen, and controlled, by Government. Although fees are paid on invoice, this is merely an accounting device and the fees must be provided in the pre-ordained sums, so long as the contracted services are provided. The Policy Directions make it plain that the funding is provided in order to achieve a welfare function in fulfilment of government policy.

73 The services performed by the appellant under the contract are essentially the same services, with the same welfare or public interest purpose, as had previously been the case. Also, as had previously been the case, the funding still came primarily from government. The only change of any substance was that the nature and quality of the services were controlled under the contract rather than by grant conditions. Although, theoretically, a private law firm intending to derive some profit from the contract might have tendered for it, that has no bearing on the characterisation of the appellant. It remained the same public interest, non-profit organisation that had previously performed welfare services of the same kind.

74 None of these factors, taken individually, necessarily has the consequence that the appellant is not a trading corporation. A trading corporation can contract with government to provide a charitable or welfare function in fulfilment of government policy. Ordinarily, the provision of large scale legal and allied services, for reward, is trading and the fact that it is not done for profit is not determinative of its character, as I have said. However, when all of the factors to which I have referred are taken together, it cannot be said that what is done by the appellant has a commercial character. Rather, its activities, including its entry into the contract, seem to me to be removed from ordinary concepts of trade or trading, whether for reward or otherwise, in much the same way as those of a government-run legal aid agency. As I have stressed, its services are provided, in all but the most exceptional cases, free of charge: ***St George County Council*** (569). They are provided for altruistic purposes, not shared by ordinary commercial enterprises (***Ku-ring-gai*** (160) (Deane J)), under a constitution which requires the appellant to act only in furtherance of the altruistic objects. The appellant engages in a major public welfare activity pursuant to an agreement with the Commonwealth under which it will be re-imbursed for most of its costs: ***E*** (343) (Wilcox J); ***Fowler***. Although its services have been 'purchased' by the Commonwealth under the contract, its activities continue to lack a 'commercial aspect': ***Hardeman*** [26]; ***J S McMillan*** (355) (Emmett J); ***Ku-ring-gai*** (142) (Bowen CJ), (167) (Deane J). It follows from what I have said that the appellant is not a 'trading corporation' for the purposes of s 51(xx) of the Constitution and the notice of contention succeeds. The Commission has jurisdiction to determine the issue before it.

75 This conclusion makes it unnecessary for me to determine whether if, as the Full Bench found [318], the 'entering into and performance of the contract' with the Commonwealth was a trading activity, the Full Bench erred in holding that trading was not a substantial corporate activity of the appellant. However, I will comment, very briefly, on that issue.

76 Generally speaking, if a corporation trades, and its trading activities are 'substantial' or 'significant', it will fall within the ambit of the Commonwealth's legislative powers, as I have said. If the Full Bench was right in its conclusion that the entering into, and performance of, the contract by the appellant constituted trading, it seems to me that it must have been in error in concluding that the appellant was nonetheless not a 'trading corporation'.

77 The performance of the contract was, as I have stressed, close to the entirety of what the appellant did. That appears to have been recognised by the Full Bench. They say that what the appellant provided for the government under the contract were 'specifically directed and highly controlled services which enhance a particular … policy' [319]. This is plainly a reference to the legal aid services provided by the appellant to indigenous people. However, the Full Bench goes on, immediately, to say that all of the activities of the appellant need to be assessed and that these 'include the provision of legal representation to indigenous people for which they are not charged' [320]. This activity, being, as I have said, the activity that constitutes performance of the contract, is said not to amount to trading [320]. Consequently (and notwithstanding what it said in [318]), it seems as if the Full Bench treated the making of the contract as an act of trading, but that it regarded the performance of the contract by the appellant, so far as it involved the provision of free legal assistance to indigenous people, as not amounting to trade. In my respectful opinion, that is a distinction that is conceptually unsustainable. If the contract was entered into in the course of trade, contrary to the conclusion at which I have arrived, then, it seems to me, so too were the acts that were done in performance of that contract. These acts were, as I have said, undoubtedly a substantial part of the appellant's activities.

Conclusion

78 I would dismiss the appeal.

79 **PULLIN J**: I agree with Steytler P, for the reasons that he gives, that the appeal should be dismissed.

80 The President, in his reasons, has identified the relevant authorities bearing on the subject and the factors which, taken together, lead me also to the conclusion that the appellant was not, at the relevant time, a trading corporation.

81 The High Court authorities on the subject, set out in the president's reasons, grapple with the issue about whether the activities, rather than the purpose of incorporation, are determinative of the issue and whether relevant activities must be 'substantial' or 'primary' or 'not insubstantial'. Other cases of the Federal Court and in England also referred to in the president's reasons emphasise the ordinary meaning of the word 'trade' which, as Bowen CJ said in ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134***---, at 139, is 'Commonly used to denote operations of a commercial character.'

82 The usual meaning of the word 'commercial' is 'capable of being sold' or 'preoccupied with profits or immediate gain': *Macquarie Dictionary*. The decision about whether a corporation is a trading corporation is a qualitative judgment which involves the balancing of many factors which, taken individually, may point either to or against the conclusion that the particular corporation is a trading corporation. Whether the operations or activities of the corporation produce a profit or are intended to produce a profit may not be determinative, but it will often be an important relevant factor. It is one of the important relevant factors in this case. The president has drawn the factors together in [74] of his reasons.

83 **LE MIERE J**: I have had the advantage of reading in draft the reasons of Steytler P. I agree that this court has jurisdiction to hear the appeal for the reasons stated by the president.

84 The president has set out the essential facts and circumstances giving rise to this appeal. It is unnecessary for me to repeat them. As the president states, this appeal turns upon the question whether the appellant is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

Respondent applies for relief for unfair dismissal

85 The respondent applied to the Western Australian Industrial Relations Commission for relief on the grounds that he had been harshly, oppressively or unfairly dismissed from his employment as a solicitor with the appellant. The appellant contended that it is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and s 4 of the *Workplace Relations Act 1996* (Cth) (the WRA) and that consequently the Commission did not have jurisdiction to hear and determine the respondent's application.

86 At first instance Kenner C held that the respondent was not a trading corporation. The commissioner said the issue to be resolved was how the activities of the appellant are to be characterised. The commissioner referred to the appellant's contention that the provision of legal services to Indigenous persons in this State in return for which the Commonwealth pays the appellant, is trading. The respondent contended that the activities of the appellant were a gratuitous provision of welfare services, with the means by which those services were funded being a matter of form and peripheral to the essential enquiry to be undertaken by the Commission. Kenner C found that the appellant was not acting on a commercial basis and that the tender process was not truly competitive. Despite the contractual form of the arrangement, the commissioner characterised it as a funding agreement that provided for the gratuitous provision of a public welfare service, substantially at government expense. Kenner C described the fact that the Commonwealth was invoiced as 'simply an administrative mechanism by which the funding was dispersed'. Kenner C found that the appellant does not, in reality, charge fees to the Commonwealth for the service it provides.

87 The appellant appealed to the Full Bench on the ground that the Commission erred in fact and in law in determining that the appellant was not a trading corporation when the Commission failed to appreciate and give effect to

the fact that the three year contract between the Commonwealth and the appellant for the purchase by the Commonwealth of the appellant's services to Indigenous persons, and the corresponding sale by the appellant to the Commonwealth of such, constituted trading activity engaged in by the appellant.

88 The Full Bench said that the determination of the appeal depends in part upon the meaning of 'trading' and whether the entering into, performance of and payment under the contract between the Commonwealth and the appellant (the Contract) constitutes trading.

89 The Full Bench found that the entering into and performance of the Contract by the appellant constituted trading with the Commonwealth but that the appellant is not a trading corporation. The Full Bench reached that decision by treating the provision of funds by the Commonwealth to the appellant pursuant to the Contract and the delivery of legal services by the appellant to its clients as discrete activities. The Full Bench found that the provision of funds by the Commonwealth to the appellant pursuant to the Contract constituted trade because the Commonwealth paid money and received value in return, being the benefit of the appellant carrying out a service for a part of the community in attempting to fulfil a policy of the government. The Full Bench found that the delivery of services by the appellant to its clients was not trading activity because there was no exchange of value between the appellant and its clients. The Full Bench concluded that the appellant was not a trading corporation because the trading activity of entering into the Contract and receiving funds from the Commonwealth was not significant compared to the appellant's non-trading activities of providing free legal services to its clients.

Did the Full Bench err?

90 The Full Bench erred in treating the provision of funds by the Commonwealth to the appellant and the use of those funds by the appellant to provide services to its clients as discrete activities. The Full Bench itself acknowledged that the two were inextricably linked. The appellant provides services to its clients. Those services are provided in performance of the appellant's obligations under the Contract and in accordance with the terms and conditions of the Contract. The fees paid by the Commonwealth under the Contract are paid in consideration for the appellant providing to its clients the services specified in the Contract and provides the resources for the appellant to deliver those services. The provision of services by the appellant to its clients cannot be treated as an activity discrete from the payment of fees by the Commonwealth to the appellant under the Contract when characterising the activities of the appellant. In determining whether the appellant is a trading corporation, it is necessary to have regard to the activities of the appellant as a whole. I now turn to that question.

Legal principles

91 In ***R v Trade Practices Tribunal; Ex parte St George County Council*** (1974) 130 CLR 533 a majority of the High Court held that the council was not a trading corporation. The majority decision was based on a 'nature and purpose test' - that is, the nature and purpose of the council was not found to be 'trading activities'. Barwick CJ and Stephen J in dissent held that the council was a trading corporation using a test based on the 'substantial trading activities' of the council.

92 In ***R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc)*** (1979) 143 CLR 190 (***Adamson***) the High Court held that a corporation will be a trading corporation if trading is a substantial corporate activity. The court declined to apply the nature and purpose test. Mason J said of a 'trading corporation':

> Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation (233).

93 The 'activities test' has been applied ever since: ***State Superannuation Board v Trade Practices Commission*** (1982) 150 CLR 282; ***Fencott v Muller*** (1983) 152 CLR 570; ***Commonwealth of Australia v The State of Tasmania*** (1983) 158 CLR 1(***Tasmanian Dam case***); ***New South Wales v Commonwealth*** (2006) 229 CLR 1 (***Work Choices case***) at [157], [158].

94 The 'activities test' raises two issues. The first is whether an activity of a corporation is to be characterised as trading or non-trading. The second concerns the level of trading activity that is necessary for the corporation to be characterised as a trading corporation.

95 'Trade' and 'trading' are ordinary words that must take their meaning from their context. The first meaning of 'trade' in the fourth edition of the Macquarie Dictionary is 'the buying and selling, or exchanging, of commodities, either by wholesale or by retail, within a country or between countries'. In ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** (1978) 36 FLR 134--- (***Re Ku-ring-gai***) Bowen CJ said that the terms 'trade' and 'commerce' in the phrase 'in trade or commerce' in s 47 of the *Trade Practices Act 1974* (Cth) are ordinary terms which describe 'all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements' (139). Bowen CJ said that the word 'trade' is used with its accepted English meaning: 'traffic by way of sale or exchange or commercial dealing'. His Honour went on to say that the word covers intangibles such as banking transactions as well as the movement of goods and persons. Deane J said of the terms 'trade' and 'commerce':

> The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of the development of trade, commerce and commercial communication, the terms are clearly of the widest import … They are not restricted to dealings or communications which can properly be described as being at arms length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance

> between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making (167).

96 In ***Bank of New South Wales v The Commonwealth*** (1948) 76 CLR 1, 381 Dixon J said that in s 92 of the Constitution the meaning of 'trade' is much wider than the buying and selling of goods and its history emphasises rather use, regularity and course of conduct than concern with commodities.

97 In ***Adamson*** Barwick CJ said:

> Trade for constitutional purposes cannot be confined to dealing in goods or commodities. Its full parameters may be difficult of definition. But the commercial nature of an activity is an element in deciding whether the action is in trade or trading (209).

98 Most people who trade intend or wish to make a profit. But it is not essential to the carrying on of trade that the corporation should make a profit, nor is it necessary that the corporation should desire or wish to make a profit. In ***Adamson*** Mason J said:

> I do not limit the concept of trading to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue (235).

99 References to trading activities connoting activities of a commercial nature are to be found in a number of authorities including ***Re Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 19 - 20 and ***E v Australian Red Cross Society*** (1991) 27 FCR 310, 343.

100 The Macquarie Dictionary definitions of 'commerce' include 'trade, business'. The Macquarie dictionary definitions of 'commercial' include 'capable of returning a profit'. To the extent that 'commerce' is a synonym for 'trade', the word does not help to determine the meaning of trade. To the extent that the words 'commerce' or 'commercial' connote profit-making they do not provide a guide to the relevant meaning of trade because trade may be carried on even though there is no intention to make a profit.

101 In ***Re Ku-ring-gai*** Bowen CJ said:

> The commercial character of trade was mentioned more recently by Lord Reid in ***Ransom v Higgs***. His Lordship there said:
>
> > 'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.'
>
> Moreover the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct (139). (footnotes omitted)

102 In ***Bevanere*** Morling, Neaves and Spender JJ held that where a company sold its business of a cosmetic clinic as a going concern, the sale constituted conduct in trade or commerce within the meaning of that expression in s 52 of the Trade Practices Act. The court referred to dicta of Deane J and Bowen CJ in ***Re Ku-ring-gai*** concerning the meaning of 'trade' and 'commerce'. The court referred to a series of United States decisions under consumer protection legislation in which it had been held that a private sale of property by an individual is not conduct in trade or commerce except if done in the course of a business activity or otherwise arising in a 'business context'.

103 The commercial nature of an activity may be an element in deciding whether the activity is a trading activity. But in that context commercial refers to activities which earn revenue and are conducted in a business-like way rather than with a view to profit.

104 Each case where it is necessary to determine whether an activity of a corporation is a trading activity must be decided on its own facts. The approach of the courts in the cases to which I have referred has been to examine the facts and look for the presence or absence of characteristics or indicia of trade. The most important indicium is whether the corporation is engaged in the buying or selling or exchange of goods or services or valuable intangibles.

105 An intention to make a profit supports trading but is not a necessary feature of trading. In ***Adamson*** Mason J treated all of the activities of the Western Australian National Football League and the South Australian National Football League which produce revenue as trading activities although they were not engaged in with an intention to make a profit. The earning of revenue is an indicium of trading activity. The earning of revenue is usually associated with commercial activity.

106 Carrying on an activity in a commercial or business-like way is an indicium of trade. Repetition and regularity of the activities and organisation of activities in a business-like manner may be significant.

107 The second part of the activities test is whether the level of trading activity is sufficient to constitute the corporation a trading corporation. In ***Adamson*** Mason J described the required level of trading activities to be 'a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation'. Murphy J held that the trading activity must not be insubstantial. In ***State Superannuation Board v Trade Practices Commission***, Mason, Murphy and Deane JJ said:

> [A] corporation whose trading activities take place so that it may carry on its primary or dominant undertaking may nevertheless be a trading corporation … [A]ctivities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade (304).

108 Notwithstanding the rejection of the 'nature and purpose test' by the High Court in ***Adamson***, there are references in the authorities to the relevance of the objects and purposes of a corporation. Those references must be understood in the context of the facts and the arguments presented in the case. In ***Fencott v Muller*** (1983) 152 CLR 570, Mason, Murphy, Brennan and Deane JJ had regard to the objects and purpose of the corporation in circumstances where the corporation was a shelf company that had not yet begun trading. Mason, Murphy, Brennan and Deane JJ said that where a corporation has not begun, or has barely begun, to carry on business its constitution, including its objects, assumes particular significance (601 - 602).

Application of the principles

109 The predominant activity of the appellant is to provide legal advice and representation and related services to its clients under and in accordance with the Contract.

110 The Contract is entitled 'Contract for the provision of legal aid services for Indigenous Australians in Western Australia'. The parties are the appellant (described as the Provider) and the Commonwealth represented by the Attorney-General's Department (Department). The recitals include:

> A. The Commonwealth wishes to engage organisations to provide the Services with the aim of improving the access of Indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens.
>
> B. The Provider has fully informed itself about the Services and has submitted a response to the Legal Services Contract Request for Tender dated 13 November 2004 (the RFT).
>
> C. The Commonwealth has agreed to engage the Provider to provide the Services upon the terms and conditions contained in this Contract.

111 The Contract is a comprehensive document of 27 sections, many of which consist of multiple clauses and paragraphs, together with schedules. The Contract is for a period of three years unless terminated earlier and is subject to extension for a further period or periods of up to three years. The Services are defined to include legal advice and representation covering criminal, civil and family law matters. The Contract provides that when providing the Services, the Provider must, amongst other things, comply with the conditions, priorities, procedures and other requirements specified in the Policy Directions document.

112 The Contract sets out the minimum of each type of service that is to be provided during each year of the contract. For example, in the first year legal case work representation and assistance is to include a minimum of 9,100 criminal law cases, 250 family law cases and 340 civil law cases in the metropolitan area.

113 Clauses 3.10 and 3.11 provide that the Provider must liaise with, and comply with any directions from, the Contract Manager as reasonably required from time to time, including any directions related to the performance of the Services. The Contract Manager is an officer of the Department.

114 Clause 4 provides detailed conditions relating to the fees to be paid to the appellant. The appellant is to be paid an initial sum on the commencement date of the contract and thereafter monthly payments in arrears on the last day of each month during the contract period. The amount of each of the monthly payments in the first year are fixed and thereafter the fixed monthly payments increase in the second and third years of the contract. The appellant is required to submit an invoice for each instalment of the fees.

115 Clause 11 provides for the Commonwealth to terminate the contract. Clause 11.1 provides that the Commonwealth may, at any time by notice, terminate all or part of the Contract immediately for any reason. In the event of the Commonwealth terminating the contract in that fashion it will only be liable to pay any instalment of fees relating to Services that are completed before the date of the notice and reimburse any of the appellant's expenses unavoidably incurred by the appellant relating entirely to the Services not covered by the instalment of fees relating to services completed before the date of the notice. There are also contractual provisions entitling the Commonwealth to terminate the contract if the appellant fails to satisfy any of the terms or conditions of the contract and in other circumstances.

116 The first question is whether the activity of the appellant in providing assistance, legal advice and representation and related services to its clients under and in accordance with the Contract is a trading activity. There is a tripartite arrangement between the Commonwealth, the appellant and its clients. However, it does not matter whether the Commonwealth or the appellant's clients are engaged in trading activities. The question is whether the appellant is.

117 The activity of providing assistance, legal advice and representation and related services to clients in consideration for fees paid by the Commonwealth under and in accordance with the Contract is trading. It consists of providing valuable services to clients in consideration for receiving fees from the Commonwealth. It does not matter that the appellant is paid by a different person than it provides the services to. Many corporations indisputably engaged in trading are paid by one person or organisation to provide services to a different person or persons.

118 There is nothing about the intrinsic nature of the services provided by the appellant to its clients that makes the activity of providing those services a non-trading activity. The providing of legal services is, or is capable of being, an activity in trade: see ***Adamson*** per Murphy J (240). The nature of the activities - that is, the provision of legal and related services to clients - is similar to that carried out by private law firms.

119 The providing of services for reward is at the very heart of trade. The activity of providing services to its client earns the appellant revenue. Earning revenue from carrying out an activity is characteristic of trade.

120 The appellant carries out it activities on a relatively large scale. In the three year period of the contract the appellant is to receive approximately $23.4 million from the Commonwealth for providing services to its clients. The appellant has approximately 18 office premises around the State. The appellant employs approximately 30 legal practitioners and approximately the same number of court officers. A court officer is a person employed to represent clients on minor matters and help to facilitate instructions to legal practitioners and assist with things like language and local knowledge.

121 Such evidence as there is of the appellant's organisation and operations shows that the appellant carries out its activities in a business-like way. The appellant carries out its activities with the repetition and regularity characteristic of business-like activities. The activities of the appellant are organised in a business-like manner. The services are delivered by legal practitioners and court officers operating out of regional offices. The appellant invoices the Commonwealth for the services it provides at the end of each month. It is apparent that the appellant keeps books and records characteristic of a business. That may be inferred from the accounts incorporated in the appellant's annual report and the auditors' certification of those accounts.

122 Having regard to the nature of the activity of providing services to its clients, the revenue earned from that activity, the manner in which the activity is carried out and the contractual context in which it is conducted, the activity of providing services to its clients is on the face of it a trading activity.

123 The respondent and the Minister submit that the principal activity of the appellant is non-trading. The appellant is an altruistic or pro bono body that carries out its activities for the public benefit, or a section of it. The appellant does not and does not intend to make a profit and could not distribute any profit to its members. It is submitted that the revenue received by the appellant is really in the nature of public funding by the government.

124 A corporation whose trading activities take place so that it may carry out its primary or dominant undertaking may nevertheless be a trading corporation. Activities do not cease to be trading activities because they are entered into in the course of, or for the purpose of, carrying on a primary or dominant undertaking not described by reference to trade: ***State Superannuation Board v Trade Practices Commission*** (304). In the ***Tasmanian Dam case*** the High Court held that the Hydro-electric Commission, a Tasmanian statutory corporation, was a trading corporation notwithstanding that its operations are largely conducted in the public interest.

125 The appellant is a non-profit organisation. But if the corporation carries on trading activities to a sufficient level the fact that it is a non-profit organisation does not mean that it is not a trading corporation. In recent years in Australia there has been a significant increase in outsourcing, corporatisation and privatisation of government service provision and an accompanying diminution in the delineation between the public and private sectors. In addition there has been an increase in the number and operations of non-government not-for-profit organisations. Non-profit organisations vary from school parents associations to organisations like the Australian football leagues that carry on large scale operations that earn large amounts of revenue. Some not-for-profit organisations buy or sell goods or services on a large scale, employ large numbers of employees, have a large amount of capital and conduct their affairs in a business-like way similar to that of large profit-making corporations. That a corporation is a not-for-profit organisation may be relevant in characterising its activities where those activities are otherwise equivocal or it has not begun to carry out those activities but where its activities are on the face of it trading activities the organisation is a trading corporation notwithstanding that it is a not-for-profit organisation.

126 In this case the activities of the appellant have the indicia of trading. Those activities do not cease to be trading activities merely because the appellant is a not-for-profit organisation.

127 The respondent submitted that before the appellant entered into the Contract to provide the specified services to its clients, the appellant provided a similar service to its clients that was funded by government grants. The respondent submitted that the character of the respondent's activities did not change because it entered into the Contract.

128 In 'The meaning of "trading or financial corporations": Future directions' (2008) 19 PLR 110 Nicholas Gouliaditis makes the following observation:

> [T]he authorities seem to establish that revenue from grants should not count as trade. That must be correct. However, there is a growing trend for grants to take the forms of contracts, especially funding provided to non-profit organisations and municipal corporations. Whether the contract is in truth a trade arrangement or simply a mechanism to provide funding will turn on the facts of each case. But activities undertaken pursuant to a grant in the guise of a commercial arrangement should not be taken to be trading activities (127).

129 As Gouliaditis points out whether the arrangement between the government and the non-profit organisation is a trade arrangement or simply a mechanism to provide funding will turn on the facts of each case. It is necessary to examine the arrangement at the relevant time. In this case, the relevant time is after the Contract had been entered into. Entering into the Contract brought about a fundamental change in the relationship between the government and the appellant. After entering into the Contract the relationship was a contractual one. The appellant provides services to its clients on the terms and conditions of and in fulfilment of the obligations imposed upon it by the Contract. It is not helpful to consider whether or not the appellant was engaged in trading activities at an earlier time when it delivered services free of the obligations imposed upon it by the Contract.

130 Kenner C found that the appellant was not acting on a commercial basis and that the tender process was not truly competitive. The commissioner described the service provided by the appellant as a public welfare service and found that the means by which those services are funded is a matter of form and the fact that the Commonwealth was invoiced was simply an administrative mechanism by which the funding was dispersed. The commissioner found the appellant does not, in reality, charge fees to the Commonwealth for the service it provides.

131 The evidence is that the tender process was a competitive process. The Commonwealth, through the Department, issued a request for tender. The tender document stated that the Australian Government was seeking to purchase a range of legal aid services for Indigenous Australians. The document stated that the Department will ensure that the tendering process is fair and equitable and that it had appointed the Australian Government Solicitor to act as an independent legal process advisor (or Probity Auditor) to the tender.

132 Mr Eggington, the Chief Executive Officer of the appellant, gave evidence that there was a pre-contract meeting held by the Department attended by anyone who was interested in putting in a tender. Mr Eggington said that in addition to the appellant, representatives of two other groups attended the meeting. One was the Chief Executive Officer of the Legal Aid Commission and the other was a representative of a private legal firm. Mr Eggington did not know whether or not either of those groups, or anyone other than the appellant, lodged a tender.

133 There is nothing to suggest that the tender process was not a competitive tender process. If the appellant was the only body that submitted a tender, that does not mean that the process was not a competitive tender process. Nor is the tender process non-competitive or not commercial because the Commonwealth specified the total amount of fees that was available for payment to the successful tenderer. Tenderers may compete in relation to the services provided, the quality of the services provided, the manner in which the services are provided and the manner in which the contract is performed as well as by in relation to price.

134 The submissions of the respondent and the Minister are to the effect that the fees paid to the appellant by the Commonwealth were in form a contractual payment but in reality a grant. There is nothing to suggest that the Contract is a sham. That is, there is nothing to suggest that the Contract was executed by the appellant and the Commonwealth with the intention to give to third parties the appearance of creating legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create.

135 In this case the proper approach is to consider the relationship between the government and the non-profit organisation and the contract under which money is paid by the government to the organisation. If the contract is not a sham then whether the contract is a trade arrangement must be determined by considering the terms of the contract and the legal rights and obligations it creates. In this case, a consideration of the relationship between the Commonwealth and the appellant and the Contract leads to the conclusion that the arrangement is a trade arrangement.

136 The Contract, in its terms, and in the way in which it operated, provides for the appellant to provide the defined services in consideration of fees to be paid by the Commonwealth. The appellant is required to deliver a minimum number of specified services to Indigenous clients. The Contract creates a relationship between the Commonwealth and the appellant which has the indicia of a commercial relationship in the sense that the appellant is to provide defined services in consideration of receiving specified fees and the provision of the services and the receipt of the fees is prescribed by detailed contractual conditions giving rise to legal rights and obligations.

137 For the reasons stated, I find that the activity of the appellant in providing services to its clients in consideration of the payment of fees under and in accordance with the Contract is trading.

Is the appellant a trading corporation?

138 A corporation is a trading corporation if its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation. In this case the delivery of services to its clients in consideration for the payment of fees under and in accordance with the Contract is the predominant activity of the appellant. It is a trading activity.

139 In determining whether a corporation is a trading corporation, the primary focus is on the activities of the corporation. The purposes for which a corporation is formed may be relevant in determining its character. That may be so when the corporation has not yet begun, or has only just commenced, the activities which it was intended to carry on. However, where, as here, a consideration of the whole of the activities carried on by the corporation lead to the conclusion that it is a trading corporation, that finding is not to be negated by a consideration of the purposes for which the corporation was formed. The appellant is a trading corporation.

Conclusion

140 I would allow the appeal.

2009 WAIRC 00045

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO FBA 1/2007 GIVEN ON 16 MAY 2007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC)
	APPLICANT
	-v-
	MARK JAMES LAWRENCE
	RESPONDENT
CORAM	**STEYTLER J**
	PULLIN J
	LE MIERE J
DATE	TUESDAY, 3 FEBRUARY 2009
FILE NO/S	IAC 4 OF 2007
CITATION NO.	2009 WAIRC 00045

Result	Appeal dismissed
Representation	
Appellant	Blake Dawson
Respondent	Curwood & Co Lawyers

Order

The Appeal is dismissed.

[L.S.]

(Sgd.) J SPURLING,
Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2009 WAIRC 00056

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 00056
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		SENIOR COMMISSIONER J H SMITH
HEARD	**:**	MONDAY, 1 SEPTEMBER 2008; FURTHER WRITTEN SUBMISSIONS FILED 10 NOVEMBER 2008, 17 NOVEMBER 2008, 19 NOVEMBER 2008, 21 NOVEMBER 2008, 9 DECEMBER 2008, 10 DECEMBER 2008, 17 DECEMBER 2008
DELIVERED	**:**	THURSDAY, 5 FEBRUARY 2009
FILE NO.	**:**	FBA 7 OF 2008
BETWEEN	**:**	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Appellant
		AND
		COMMISSIONER CORRUPTION AND CRIME COMMISSION
		First Respondent
		AND
		THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
		Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Public Service Arbitrator**
Coram	**:**	**Commissioner P E Scott**
Citation	**:**	**(2008) 88 WAIG 265;**
		Supplementary Reasons for Decision: (2008) 88 WAIG 662
File No	**:**	**PSACR 27 of 2006**

CatchWords:

Industrial Law (WA) - Appeal against decision of the Public Service Arbitrator – Application for leave to intervene in appeal - Application dismissed.

Redundancy and redeployment - Further submissions about application of regulations 4AA and 4A of the *Public Sector (Redeployment and Redundancy) Regulations 1994* (WA) - Submissions provided - Construction of notice requirements in reg 4AA(1) and reg 4A(2) - Regulations 4AA and 4A did not apply - No decision taken to abolish office and make officer surplus to requirements - Notice not required to be provided to officer - Appeal dismissed.

Legislation:

Industrial Relations Act 1979 (WA): s66, s80E(2), s80F, s80F(2), s80F(4)

Corruption and Crime Commission Act 2003 (WA): s179(1), s180(3)

Interpretation Act 1984 (WA): s41(1)

Public Sector Management (Redeployment and Redundancy) Regulations 1994 (WA): reg 4AA, reg 4AA(1), reg 4AA(2), reg 4A, reg 4A(2), reg 4A(2)(a), reg 4A(2)(b), reg 4A(3), reg 4A(4), reg 5, reg 15, reg 16

Result:

Application for leave to intervene dismissed and appeal dismissed

Representation:

Counsel:

Appellant	:	Mr W Claydon
First Respondent	:	Mr M Hemery (of Counsel), by leave
Second Respondent	:	Mr R Andretich (of Counsel), by leave

Solicitors:

Appellant	:	N/A
First Respondent	:	Talbot Olivier Lawyers
Second Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Nil

Case(s) also cited:

Australian Bank Employees Union v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch (1990) 70 WAIG 2086; (1990) 33 IR 61

Banaszczyk v Minister for the Public Sector Management [2004] WAIRC 12626

Civil Service Association of Western Australia (Incorporated) v Director General, Department of Justice [2003] WAIRC 9245

Food Preservers Union of Western Australia v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch [2001] WASCA 136; (2001) 24 WAR 89; (2001) 104 IR 393

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 129 IR 270

Ross v Corruption and Crime Commission [2007] WAIRC 960; (2007) 87 WAIG 2450

Ross v Corruption and Crime Commission [2007] WAIRC 968; (2007) 87 WAIG 2460

Supplementary Reasons for Decision

RITTER AP:

1 In this appeal there are two issues which require further consideration. The reasons of the Full Bench were published on 22 October 2008. The outcome was that before final orders could be made, additional submissions were required. In paragraph [202] of my reasons, which was agreed with by Beech CC and Smith SC, I said:

> "202 The parties did not make submissions upon what the Arbitrator should have done or the Full Bench should do if it was decided that regs 4AA and 4A(2) applied to Mr Ross whilst he was employed by the CCC, but the balance of *the PSMRRR* did not apply to Mr Ross and the CCC once his employment with that organisation ceased."

2 The parties have, after being given the time they requested to do so, filed written submissions on this issue.

3 In addition an application has been filed by Mr Ross to intervene in the appeal. It is necessary to deal with this application first. The application was supported by a letter from Mr Ross setting out the reasons for wanting to intervene. Submissions were also filed in support of the application. Essentially the reason for the application was that Mr Ross was concerned the appellant was no longer representing his interests in the way he would like. In particular he had been informed by the appellant's industrial officer that, because of the interests of its broader membership, it did not intend to appeal against the decision of the Full Bench.

4 When invited to make submissions, the appellant and the CCC both opposed the application. The Minister neither opposed nor supported it.

5 In my opinion the application to intervene should not be granted. There are two reasons for this. The first is that s80F of *the Industrial Relations Act 1979* (WA) (*the Act*) limits the people and entities who may refer matters to the Arbitrator. The circumstances in which a government officer may themselves refer claims are limited to those set out in s80F(2) and 80F(4). Neither of those subsections applied in the present case. With respect to s80F(2), the reasons why the claim was not of a type set out in s80E(2) were set out in my primary reasons at [134]. With respect to s80F(4), the present claim is clearly not of that type.

6 In my opinion where the intention of the legislature is clearly that the government officer may not refer a claim of the present type to the Arbitrator, it would be inappropriate for the Full Bench to undermine that intent by allowing the government officer to intervene in an appeal. In applications like the present, the government officer must be represented by his/her organisation.

7 The second reason is linked to the first. It is for the appellant to represent the interests of Mr Ross in the appeal. It should do so in accordance with its rules. Mr Ross complains that he has been informed the appellant will not appeal against the decision of the Full Bench. The appellant has said it does not consider it to be in accordance with the broader interests of its membership to appeal against the decision. This is a decision which the appellant is entitled to make. If Mr Ross contends the decision has not or will not be made in accordance with the appellant's rules, he may be able to make an application under s66 of *the Act*. But the possible disagreement about whether or not an appeal should be instituted does not provide a reason to grant leave to Mr Ross to intervene. This is particularly so when, as explained above, Mr Ross was precluded from making an application to the Arbitrator.

8 As to the submissions made in response to [202] of my primary reasons, the appellant submitted the CCC had not complied with either reg 4AA or 4A(2) of the *PSMRRR*. The appellant contended the appropriate remedy was to order the CCC to pay to Mr Ross the difference between 12 weeks' pay at level 9 and 12 weeks' pay at level 7.3. The latter was what Mr Ross was paid by the CCC after 1 September 2006. The circumstances in which this occurred are explained in my primary reasons at [62]-[75].

9 Reliance upon reg 4A of the *PSMRRR* can be readily disposed of. In general terms, reg 4A(3) provides for an employee to be paid one week's pay for each week, or part of a week in which he/she did not get notice of redundancy in accordance with reg 4A(2). Regulation 4A(4) makes it clear however that this entitlement only arises if the employee accepts "an offer made under regulation 6, 15 or 16". Each of these regulations provides for employees to voluntarily agree to severance payments. None of these regulations applied to Mr Ross as he did not enter into any such agreement. Accordingly the entitlement to payment in lieu of notice provided for in reg 4A(3) does not or did not apply to Mr Ross.

10 Additionally, for the reasons set out below, with respect to reg 4AA, the circumstances in which obligations under reg 4A would arise, did not apply to Mr Ross.

11 Regulation 4AA of the *PSMRRR* has been quoted in my primary reasons. Sub-regulation 4AA(1) and (2) provide for notice of information to be given to an employee in certain circumstances. Those circumstances are described in reg 4AA(1) of the *PSMRRR*. They are that:

> (a) the office, post or position of an employee is to be abolished; and
>
> (b) the employee may become surplus to the requirements of the department or organisation.

12 The CCC made the following submission about regulation 4A of the *PSMRRR*; but it also applies to regulation 4AA. The submission was that the two conditions described in the sub-regulation must occur simultaneously. The appellant, in reply, submits that this is not stated in the sub-regulation. Additionally, the appellant submits that if this requirement were imported into the sub-regulation, it could allow employing authorities to circumvent the application of the regulation.

13 In my opinion reg 4AA(1) of the *PSMRRR* focuses upon the "determination" which is made by the employing authority. That determination needs to include the two circumstances described in the sub-regulation. Although in my opinion the two circumstances need not necessarily be decided simultaneously, they need to form part of the same decision, event or set of circumstances.

14 Both conditions of reg 4AA(1) were not present when the decision recorded in the CCC's letter to Mr Ross dated 16 January 2006 was made. This is because Mr Ross was clearly not surplus to requirements at that time and there was no suggestion that he might become so. In turn this was because he was offered another "office, post or position" within the CCC. Accordingly there was no obligation on 16 January 2006 to provide notice to Mr Ross in accordance with reg 4AA of the *PSMRRR*.

15 The CCC also submits that as reg 4AA was only gazetted and therefore, by virtue of s41(1) of the *Interpretation Act 1984* (WA), commenced on 8 August 2006, it could not operate with respect to what occurred on 16 January 2006. Whilst there is obvious force in this submission, it is unnecessary to determine it.

16 With respect to the decision recorded in and/or the contents of its letter dated 1 September 2006, the CCC submits that no obligation under reg 4AA of the *PSMRRR* arose. It is submitted that on this occasion there was no abolition of any office, post or position so as to satisfy the first condition of reg 4AA(1) and accordingly trigger the notice requirement. This is because the office previously held by Mr Ross had been abolished on 16 January 2006 and after that was not occupied by any person. As stated, on 16 January 2006 Mr Ross was not surplus to requirements as he was offered another position. This was not accepted by him. The letter to Mr Ross dated 1 September 2006 said Mr Ross had ceased being an officer of the CCC when he rejected the offer of the level 8 position. Accordingly he was from that date onwards to be paid at the rate of level 7.3, until he was redeployed.

17 I accept the submission of the CCC that the obligations in reg 4AA of the *PSMRR* were not engaged by what occurred on 1 September 2006. No office, post or position was then abolished. The level 9 position which had been occupied by Mr Ross had been earlier abolished. The level 8 position, which had been offered to Mr Ross was maintained. He had made it clear he did not want this position, which was offered to him, and therefore his employment with the CCC ended.

18 Accordingly, in my opinion the appropriate orders which should be made are:

1. The application by Mr Ross to intervene in the appeal is dismissed.
2. The appeal is dismissed.

BEECH CC:

19 I agree with the decision of His Honour, the Acting President in relation to Mr Ross' application to intervene. I also agree that the appeal should be dismissed for the following reasons.

20 I firstly look at whether Mr Ross was entitled to be given the 12 weeks' written notice in r 4A(2) of the *Public Sector Management (Redeployment and Redundancy) Regulations 1994*; I then consider the fact that he did not in fact receive that notice. In order to be entitled to the 12 weeks' written notice in r 4A(2), both Mr Ross' "office, post or position" would have to have been abolished (r 4A(2)(a)) and Mr Ross also would have to become surplus to the requirements of the Corruption and Crime Commission ("the CCC") (r 4A(2)(b)). I commence by referring to the letter Mr Ross received from the CCC dated 16 January 2006.

21 Putting aside the point whether the regulations were then in effect, the letter informed Mr Ross that the position he occupied had been reclassified, that it had been determined to amend the classification of "this new position" to level 8, that the previous title of the position had been retained, that there was a revised job description form, that Mr Ross' remuneration was to remain at level 9 during the life of the current contract between the CCC and Mr Ross and that all other terms and conditions of employment remained unchanged.

22 On the face of the CCC's letter of 16 January 2006, it is apparent that the level 9 position occupied by Mr Ross was abolished. This brings the CCC's action within r 4A(2)(a). Was Mr Ross himself surplus to the requirements of the CCC as required by r 4A(2)(b)? He was offered another position one level lower with the same terms and conditions of employment and he would continue to be paid at level 9 for the life of his current contract. The CCC evidently not only wished to retain him as an employee, they wished to retain him in a similar position in the same Directorate. On the facts of this matter, it is difficult to conclude that as at 16 January 2006 Mr Ross was surplus to the requirements of either his department or the organisation. I conclude that as at 16 January 2006 the CCC was under no obligation to give Mr Ross the 12 weeks' written notice contained in r 4A(2). A different conclusion might be available if the facts were that the position offered was one that was quite unsuitable for or demeaning to him and was simply a device by an employer to deliberately avoid attracting the operation of r 4A(2).

23 I next consider whether the CCC's letter of 1 September 2006 changes the position. It is a comprehensive nine-page letter. Relevantly, the letter notes the 16 January letter and states the CCC's position that its effect was to terminate Mr Ross' appointment to the CCC's staff under s 179(1) of the *Corruption and Crime Commission Act, 2003* ("CCC Act") in the level 9 position on grounds of redundancy. It also noted the CCC's intent to employ Mr Ross in the newly created level 8 position. It noted that Mr Ross had not accepted the offer and that the offer had either lapsed or, due to Mr Ross' attitude to the position, it was now withdrawn.

24 The letter goes on to refuse Mr Ross' request to be allowed to return to work in another level 9 position within the CCC, to say that the CCC considers that upon his rejecting the level 8 position Mr Ross has ceased to be an officer of the CCC for the purposes of s 180(3) of the CCC Act and that the CCC has registered Mr Ross for redeployment. It sets out the CCC's understanding of the arrangements pending redeployment and Mr Ross' sick leave entitlements. It sets out and rejects its understanding of Mr Ross' position which is that he considers he is entitled to sue the CCC for his remuneration and other entitlements under his contract. In doing so, the CCC observes in the context of damages that if Mr Ross' employment was indeed terminated on 16 January 2006 by reason of redundancy, any statutory right to 12 weeks' notice of redundancy had been fully compensated for by the CCC having continued to pay Mr Ross for at least that period of time.

25 Other than for indicating what was going to happen from 1 September 2006 forward, and providing the CCC's understanding of what had occurred to that date, the letter does not change the fact of the abolition of the level 9 position and the offer of the level 8 position which occurred on 16 January 2006. Up to 1 September 2006 Mr Ross had not accepted the offer. The consequent lapse or withdrawal of the offer on 1 September 2006 occurred because he evidently was not going to accept the offer. This does not mean that Mr Ross was then surplus to the requirements of either his department or the organisation in the sense required by r 4A(2)(b); the CCC had shown every indication to that time that he was not surplus to its requirements. The refusal of the offer was Mr Ross' position, not the position of the CCC.

26 The letter of 1 September therefore did not change the position that both r 4A(2)(a) and (b) did not apply to Mr Ross' circumstances. If I am wrong in this conclusion and, as the CSA urges in its submission, Mr Ross was indeed entitled under

r 4A(2) to be given the 12 weeks' written notice, I then consider the fact that he did not receive that notice. This is dealt with by the Minister in his submission. The submission draws attention to rr 4A(3) and (4) which I now set out:

> (3) An employee who does not get such notice is entitled to one weeks' pay for each week, or a part of a week, of notice that he or she did not get.
>
> (4) Payment of an entitlement under subregulation (3) may only be made if the employee accepts an offer made under regulation 6, 15 or 16.

27 The point is simply made that as a matter of fact Mr Ross did not get the 12 weeks' written notice. The entitlement of an employee in those circumstances is set out in (3) and subject to meeting the requirements in (4). The entitlement may only be paid if Mr Ross accepted an offer made under rr 6, 15 or 16 which all relate to voluntary severance. Sub-regulations 4A(3) and (4) do not apply to the facts of Mr Ross' case and accordingly even if it could be said, contrary to my conclusion, that Mr Ross had been entitled under r 4A(2) to be given 12 weeks' written notice, the same regulations which would have provided that entitlement do not now entitle him to payment in lieu of not having receiving it.

28 Accordingly, I would dismiss the appeal.

SMITH SC:

29 I have had the benefit of reading the supplementary reasons to be published by the Acting President and the Chief Commissioner. For the reasons they give, I agree the application by Mr Ross to intervene and the appeal should be dismissed and I have nothing further to add.

2009 WAIRC 00054

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPELLANT
	-and-
	COMMISSIONER CORRUPTION AND CRIME COMMISSION
	FIRST RESPONDENT
	-and-
	THE MINISTER FOR PUBLIC SECTOR MANAGEMENT
	SECOND RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
DATE	THURSDAY, 5 FEBRUARY 2009
FILE NO/S	FBA 7 OF 2008
CITATION NO.	2009 WAIRC 00054

Decision	Application for leave to intervene dismissed and appeal dismissed
Appearances	
Appellant	Mr W Claydon
First Respondent	Mr M Hemery (of Counsel), by leave
Second Respondent	Mr R Andretich (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 1 September 2008, and having heard Mr W Claydon on behalf of the appellant, Mr M Hemery (of Counsel), by leave, on behalf of the first respondent and Mr R Andretich (of Counsel), by leave, on behalf of the second respondent, and reasons for decision having been delivered on 22 October 2008 and supplementary reasons for decision having been delivered on 5 February 2009, it is this day, 5 February 2009, ordered that:

1. The application by Mr Ross to intervene in the appeal is dismissed.
2. The appeal is dismissed.

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00041

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 00041
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J H SMITH
HEARD	**:**	THURSDAY, 20 NOVEMBER 2008; FINAL WRITTEN SUBMISSIONS RECEIVED 1 DECEMBER 2008 AND 4 DECEMBER 2008
DELIVERED	**:**	MONDAY, 2 FEBRUARY 2009
FILE NO.	**:**	FBA 9 OF 2008
BETWEEN	**:**	THE DEPARTMENT OF EDUCATION AND TRAINING Appellant AND PETER HANS WEYGERS Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner P E Scott**
Citation	**:**	**(2008) 88 WAIG 1838**
File No	**:**	**APPL 118 of 2006**

CatchWords:

Industrial Law (WA) - Appeal pursuant to s49 of the *Industrial Relations Act 1979* (WA) against decision of the Commission - Government officer - School psychologist - Disciplinary action for breach of discipline pursuant to Part V, *Public Sector Management Act 1994* (WA) - Procedural fairness - Onus of proof - Whether documents relevant to inquiry not provided to employee - Commissioner erred in deciding this could not be ascertained and therefore procedural unfairness established.

Cross contention by respondent - Procedural fairness - Whether procedural fairness denied - Content of procedural fairness - Authorities considered - Whether practical injustice occurred - Origninal complaints, with inconsistances to later documents not provided - Possible submissions on credibility - Practical injustice established - Appeal dismissed.

Legislation:

Industrial Relations Act 1979 (WA) – Section 49

Public Sector Management Act 1994 (WA) – Part V, Part V Division 3, s78(2), s86, s86(4), s86(8), s86(9)

Migration Act 1958 (Cth) – Section 422B, s427(6), s427(6)(a)

Result:

Appeal dismissed

Representation:

Counsel:

Appellant	:	Mr R Andretich (of Counsel), by leave, and with him Ms R Hartley (of Counsel), by leave
Respondent	:	Mr R I Viner QC, by leave, and with him Mr D Wee (of Counsel), by leave

Solicitors:

Appellant	:	Solicitor for the State of Western Australia
Respondent	:	Chan Galic Barristers & Solicitors

Case(s) referred to in reasons:

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

Brighton Council v Compost Tasmania Pty Ltd [2000] TASSC 49; (2000) 109 LGERA 190

Bromby v Offenders Review Board (1990) 51 A Crim R 249

Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576

FAI Insurances Ltd v Winneke (1982) 151 CLR 342

Heatley v Tasmanian Racing and Gaming Commission (1977) 137 CLR 487

Kanda v Government of Malaya [1962] AC 322

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

McGovern v Ku-Ring-Gai Council [2008] NSWCA 209

Mijatovic v Legal Practitioners Complaints Committee [2008] WASCA 115

Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475

NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 76 ALD 56

National Companies and Securities Commission v News Corporation Ltd. [1984] HCA 29; (1984) 156 CLR 296

NIB Health Funds Limited v Private Health Insurance Administration Council [2002] FCA 40; (2002) 115 FCR 561

Official Solicitor to the Supreme Court v K [1965] AC 201

Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476

Re Macquarie University; Ex parte Ong (1989) 17 NSWLR 113

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

Reg. v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group [1969] HCA 10; (1969) 122 CLR 546

Rose v Bridges (1997) 79 FCR 378

South Australia v O'Shea [1987] HCA 39; (1987) 163 CLR 378

Stead v State Government Insurance Commission [1986] HCA 54; 161 CLR 141

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152; (2006) 81 ALJR 515; (2006) 231 ALR 592

Twist v Randwick Municipal Council (1976) 136 CLR 106

WABZ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 204 ALR 687

Case(s) also cited:

Johnston v Mance [2003] WAIRC 8318 (6 May 2003)

Re Railway Appeal Board; Ex parte the Western Australian Government Railways Commission [1999] WASCA 63; (1999) 21 WAR 1; (1999) 92 IR 70

Reasons for Decision

RITTER AP:

Introduction

1 In these reasons, to avoid confusion I will refer to the respondent as Mr Weygers, given that he was the applicant at first instance. For the same reason I will refer to the appellant as either the appellant or the DET.

The Order

2 This is an appeal pursuant to s49 of the *Industrial Relations Act 1979* (WA) (*the Act*). It is an appeal against an order of the Commission made on 5 September 2008. The terms of the order were:

> "That the finding that the charges against Mr Weygers were proved and the penalties imposed upon him by [the DET] are a nullity."

The Charges and Penalties

3 As I will set out, the charges were of four breaches of discipline. The penalties were a reprimand, fine, reduction in the level of classification and transfer from being the school psychologist at Glendale Primary School. This was where the charges occurred. The charges and penalties were purportedly proved and imposed under the procedures set out in Part V, Division 3 of the *Public Sector Management Act 1994* (WA) (*the PSMA*). The application by Mr Weygers to the Commission, against the charges and penalties, was made pursuant to s78(2) of *the PSMA*.

4 The decision that Mr Weygers had been found to have committed breaches of discipline was conveyed to him by letter dated 31 March 2006 from Mr Alby Huts, the executive director of human resources of the DET. The letter said Mr Huts had found that Mr Weygers had committed a breach of discipline of the following charges:

1. On 17 February 2004 at Glendale Primary School, Mr Weygers sexually harassed Ms Fiona Kelly, Deputy Principal, and made inappropriate verbal comments.
2. On 17 February 2004 at Glendale Primary School Mr Weygers made inappropriate verbal comments of a sexual nature to Ms Amanda Pickersgill, a teacher.
3. On 17 February 2004 at Glendale Primary School Mr Weygers made inappropriate verbal comments of a sexual nature to Ms Fiona Kelly, deputy principal.
4. On 17 February 2004 at Glendale Primary School, Mr Weygers made inappropriate verbal comments of a sexual nature to Ms Caroline Horrocks, a pre-primary teacher.

5 The letter also included particulars of the claims which supported each charge. The letter said Mr Weygers' conduct constituted breaches of discipline under *the PSMA*, breaches of principles 2 and 3 of the *Western Australian Public Sector Code of Ethics*, breaches of s1 and s5(2) of the *Staff Conduct Policy* of the DET and breaches of parts 1 and 2 of the *Sexual Harassment Resolution for Employees and Students Policy* of the DET.

6 After receiving submissions from Mr Weygers' solicitors about the action which should be taken as a consequence of the charges being proved, Mr Weygers was advised by letter dated 6 October 2006 of the penalties imposed. That letter was from Mr Kim Ward, acting executive director of human resources of the DET.

Basis of Commissioner's Decision

7 The Commissioner's decision that the charges and penalties were a nullity was based upon a finding that there was a denial of natural justice or procedural fairness. This finding was made because of the possibility that adverse material had been provided to Mr Burgess, who had inquired into the charges, but not to Mr Weygers. Mr Burgess had been appointed by a letter from Mr Huts dated 8 September 2005. The appointment of Mr Burgess followed a report being provided to Mr Huts by an investigator, Mr Baskwell. He had been appointed by the DET to initially investigate the complaints made against Mr Weygers.

The Letter to Mr Burgess

8 In his letter to Mr Burgess, Mr Huts relevantly said:

(a) Mr Burgess was to conduct a disciplinary inquiry under s86(4) of *the PSMA*.

(b) He should prepare a report including "finding and recommendation" as required by s86(8) of *the PSMA*.

(c) Specifically, that: "I have enclosed a copy of the relevant information gathered to date in this matter for your information".

(d) He would advise Mr Weygers that Mr Burgess would contact him shortly to discuss the steps to be taken in the inquiry and any interviews or meetings which Mr Weygers "will be" requested to attend.

The Evidence of Mr Burgess

9 In evidence given by Mr Burgess to the Commissioner, he said he did not have a record of the "relevant information" which he was sent with the letter from Mr Huts. Additionally, there was no record kept by the DET of what that information was. Irrespective of the outcome of the appeal, it would clearly have been preferable for a list of the enclosed "relevant information" to have accompanied the letter to Mr Burgess, so there was a proper record of this.

10 Mr Burgess was called to give evidence by senior counsel for Mr Weygers. This followed the service of a witness summons upon Mr Burgess to provide documents. In response to the summons Mr Burgess wrote to the Commission on 9 November 2007 and produced a bundle of documents which he said was in his possession and about his inquiry into Mr Weygers' disciplinary charges.

11 Mr Burgess gave the following relevant evidence when examined in chief:

(a) When an inquiry was concluded he forwarded all relevant information to the agency which had appointed him to do the inquiry (T14).

(b) By relevant information he meant the documents which were listed in an appendix to his report (T14).

(c) On an earlier occasion Mr Burgess had been advised by the DET not to return all of the documents that he had received from them prior to conducting an inquiry (T14).

(d) After submitting his inquiry report he kept his files and remaining documents for about 12 months. He then destroyed, by fire, any document which had a staple in it (T14).

(e) Documents which did not have a staple in he used as scrap paper for other work (T14).

(f) As to how the documents were destroyed Mr Burgess said that he "generally lit a match and just set fire to them" (T15).

(g) Mr Burgess said he had "an open fire" and that he put the documents "on the fire and a match is put to it" (T15).

(h) From what was contained in his inquiry report it appeared he received a copy of the report of Mr Baskwell but as he said in his report he did not read it (T16).

12 The following relevant evidence was given in cross-examination:

(a) Mr Burgess said he "would expect" the investigation file, up to the time of his appointment in September 2005, was provided to him by the DET (T18).

(b) If Mr Burgess referred to a document in his report which the department had provided to him he did not annexe it to the report, but if it was a document which arose out of an interview he had conducted it was included in an appendix to the report (T19).

(c) Any documents provided by the department which he relied on were referred to in his report (T19).

(d) Mr Burgess interviewed Mr Weygers and a record of the interview was annexed to the report (T19).

(e) Although he could not specifically remember the interview it was his normal practice to put all allegations or charges to a respondent (T19).

13 In re-examination Mr Burgess agreed with the proposition that the substance of the complaints he put to Mr Weygers in the interview were about the charges received from the department which had been stapled together and which Mr Burgess did not now have (T20).

The Asserted Denial of Procedural Fairness

14 At the hearing before the Commissioner there were two limbs to the complaint of a denial of procedural fairness. The first was that Mr Weygers had not been provided with the initial written records made by two of the teachers who were the subject of and had made the complaints about the behaviour of Mr Weygers, as well as a letter from the principal of Glendale Primary School to the DET about the complaints. (I will give these documents the collective description, "the teachers' first documents"). They were provided to Mr Burgess but not Mr Weygers so he did not have the opportunity to respond to or make submissions about them. I will later elaborate upon this complaint. It is sufficient at this stage to say that the Commissioner did not accept the argument.

15 The second limb was about other documents possibly supplied to Mr Burgess by Mr Huts which fitted the description "relevant information" in his letter and which Mr Weygers was not provided with.

The Finding of Denied Procedural Fairness on the Second Limb

16 The Commissioner said in her reasons at [78] that given Mr Burgess' evidence and the documentary evidence available it was unable to be determined what was enclosed as being "relevant information". Later in the same paragraph the Commissioner said it was "not known whether Mr Burgess had access to particular information adverse to Mr Weygers about which Mr Weygers did not know or upon which Mr Weygers had no opportunity to comment".

17 At [79] to [82] the Commissioner critically said:

> "79 The respondent says that there is nothing submitted by Mr Weygers as to what he would have put to Mr Burgess differently had the documents provided to Mr Burgess been disclosed to him, and that in fact there is nothing he can put.
>
> 80 I do not agree with that approach on the basis that because it is not known what material was provided to Mr Burgess, it cannot be known what else, if anything, Mr Weygers might have put to Mr Burgess. He may have put more, or put something different, or he may not.
>
> 81 Although the applicant refers to adverse material, the problem in this case is in the absence of any degree of certainty about what material was provided to Mr Burgess it cannot be concluded that Mr Weygers was afforded natural justice, because it is not known whether adverse material was supplied. Having said that, the question arises in passing as to why, given the separation in the *PSM Act* of the investigation and inquiry processes, the inquirer was provided with more than the complaints of the complainants and the details of the charges? Why would he have the Baskwell Report?
>
> 82 Accordingly, I conclude that due to the lack of certainty as to what *relevant information* was provided to Mr Burgess, there is no certainty that Mr Weygers was not denied procedural fairness. In those circumstances, I must conclude that he was denied procedural fairness." (emphasis in original)

18 The Commissioner then said the parties agreed that the hearing before the Commissioner could not cure this "deficit" [(83)]. After citing *Official Solicitor to the Supreme Court v K* [1965] AC 201 at 209, *Brighton Council v Compost Tasmania Pty Ltd* (2000) 109 LGERA 190 and *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at 506 the Commissioner decided that "the failure to disclose adverse material is a denial of natural justice" ([84]) and the "effect of the denial of procedural fairness' upon the decision made by the DET was that it was "regarded, in law, as no decision at all" ([85]) (quoting from *Plaintiff S157*). The Commissioner then concluded it was appropriate to make the order which was later made.

The Grounds of Appeal

19 In a schedule attached to the notice of appeal there were three grounds as follows:

> "1. The Commissioner erred in law in deciding because it could not be determined what information was provided to the Inquirer the Respondent was denied procedural fairness.
>
> 2. The Commissioner erred in fact in finding that there was a possibility that the Inquirer may have been provided with "relevant information" which may not have been disclosed to the Respondent.
>
> 3. The Commissioner erred in law and in fact by finding the Respondent has been denied procedural fairness when no proper factual basis was established upon which it could be said that the Inquirer was or might have been influenced by material not disclosed to the Respondent."

20 The grounds of appeal each attack the reasons of the Commissioner at [79]-[82].

The Submissions on the Appeal

(a) The Appellant's Submissions

21 Firstly, it was argued that it was possible to ascertain the only relevant information in the possession of the DET, which could have been provided to Mr Burgess with the letter, were documents which had been contained in the file of the DET about the complaints and charges involving Mr Weygers. At the hearing on 17 October 2007 counsel for the DET told the Commissioner that this was so, upon "instructions" (T7). No objection was taken to him so doing. Also, a letter from the State Solicitor's Office to the solicitors for Mr Weygers dated 10 October 2007 was in evidence. It was signed by counsel for the DET and said the DET had undertaken inquiries and advised him that "it appears that Mr Burgess received the documents on the file, which was provided for your inspection, up to the time of his appointment".

22 The appellant submitted therefore that the only documents which, by looking at the file, could have been provided to Mr Burgess and not to Mr Weygers, prior to Mr Burgess completing his inquiry, were the teachers' first documents. These were the subject of the first limb of Mr Weygers' argument which was dismissed by the Commissioner.

23 The appellant also referred to the contents of the report of Mr Burgess which was before the Commissioner. The report lists the documents he relied upon. It was submitted that no evidence was adduced to establish that Mr Burgess had relied upon any evidence outside of what was referred to in his report, and that did not include any documents which Mr Weygers was not provided with apart from the teachers' first documents. Accordingly it was submitted the Commissioner erred because there was no evidence which could establish that, apart from the teachers' first documents, there were any other relevant material which was provided to Mr Burgess and/or relied upon, but not provided to Mr Weygers.

24 Secondly, it was argued that the mere existence of undisclosed material was not in any event sufficient to establish either the reality or appearance of a denial of procedural fairness. It was submitted there was an onus on the party making an assertion of a denial of procedural fairness, to establish it. In support, the appellant relied upon *Bromby v Offenders Review Board* (1990) 51 A Crim R 249 at 279. It was submitted the onus had not been discharged by Mr Weygers.

(b) Mr Weygers' Submissions

25 In his submissions, senior counsel for Mr Weygers relied upon the proposition that the existence of undisclosed material in the hands of the decision maker is sufficient to sustain a breach of procedural fairness; citing *Kioa v West* (1985) 159 CLR 550 per Brennan J at 629, *Bromby* per Kirby P at 267 and 269 and *NIB Health Funds Limited v Private Health Insurance Administration Council* (2002) 115 FCR 561 per Allsop J at 584-586. Relying upon what Brennan J said in *Kioa* at 629, senior counsel also submitted that:

(a) Because of the description of "relevant information", what was provided was, by inference, "credible, relevant and significant" and the non-disclosure created a "real risk of prejudice" (per Brennan J in *Kioa* at 629).

(b) Mr Burgess saying he did not rely upon any material not referred to or annexed to his report, was not to the point given, as Brennan J said the person affected "will be neither consoled nor assured to be told that the prejudicial information was left out of account" (at 629).

26 It was also submitted the Commissioner had been correct in deciding as a matter of fact that no-one knew what all of the "relevant information" was.

27 Senior counsel also cited *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [40] in support of the proposition that for inquisitorial proceedings, which he argued included Mr Burgess' inquiry, it was not "useful to speak in terms of onus of proof" (see *SZBEL* at [40]).

Analysis of the Grounds of Appeal

28 In my opinion the grounds of appeal have been established. With respect, the Commissioner was in error in deciding that it could not be ascertained what other "relevant information" might have been provided to Mr Burgess. Putting to one side the teachers' first documents, the only other documents which could reasonably be inferred to have been provided to Mr Burgess were those on the departmental file. That this was so was before the Commissioner, in the form of the statement to her by counsel for the DET together with the letter dated 10 October 2007. As Mr Weygers' counsel did not identify any other relevant documents which could have been or were provided to Mr Burgess, the factual finding made by the Commissioner was not open.

29 I also accept that the Commissioner, with respect, erred in deciding at [82] that there was a denial of procedural fairness because there was "no certainty that Mr Weygers was not denied procedural fairness". This was in error because the Commissioner misdirected herself that there was an onus upon the DET to establish with "certainty" that there was not a denial of procedural fairness.

30 As simply stated by Aronson et al in *Judicial Review of Administrative Action* (3rd ed, 2004) at 470:

> "Regardless of how 'fairness' is assessed, it is clear that the onus of establishing that the standard has not been met will lie upon the party who seeks to prove breach of natural justice. It must be shown that the procedures proposed or adopted by the decision-maker were 'unfair in the circumstances'."

31 At the end of this paragraph, the authors cite *Rose v Bridges* (1997) 79 FCR 378 at 386, a decision of Finn J. At that page his Honour said:

> "It is important to emphasise at the outset that it is insufficient for the applicants to prove that better or fairer procedures could have been adopted by

> Mr Bridges. They must show that those proposed were unfair in the circumstances."

32 In turn these observations were applied by Branson J in *NAMJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 56 at [69]. Her Honour also there cited *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 per Gleeson CJ at [36].

***Lam*, Practical Injustice and Unfairness**

33 *Lam* was about an alleged denial of procedural fairness because a departmental officer, involved in the chain of decision making, had not followed a statement of intention to take a particular procedural step. It was alleged this constituted a denial of procedural fairness by way of the defeating of a "legitimate expectation". However as Gleeson CJ said at [36]:

> "No attempt is made to show that the applicant held any subjective expectation in consequence of which he did, or omitted to do, anything. Nor is it shown that he lost an opportunity to put any information to argument to the decision-maker, or otherwise suffered any detriment."

34 This clearly indicates the person claiming a denial of procedural fairness must establish it.

35 Whilst on *Lam*, I will mention now that during the hearing of the appeal I drew to the attention of counsel the comments by Gleeson CJ at [34] and [37] where his Honour said:

> "[34]
>
> …
>
> The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed.
>
> …
>
> [37] A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations … Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

36 In written submissions for Mr Weygers, made after the hearing of the appeal, it was argued that the reasoning in *Lam* was restricted to the context of an asserted defeating of a legitimate expectation.

37 I do not accept this. The observations made by Gleeson CJ are broadly applicable in determining whether there has been a denial of natural justice. This is borne out by the reasons of Basten JA in *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209 at [96] and Martin CJ in *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115 at [3] and [4].

38 In *McGovern*, Basten JA said at [96]:

> "[96] Nevertheless, there may be cases in which it can be concluded that the denial of an opportunity to respond to a matter 'could have had no bearing on the outcome of the trial of an issue of fact': *Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141 at 145–146. An applicant who agrees he or she could have said nothing if afforded an opportunity, has suffered no material injustice: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [36]–[38] (Gleeson CJ), [106] (McHugh and Gummow JJ), [114], [122] (Hayne J) and [149] (Callinan J)."

39 In *Mijatovic*, Martin CJ said at [3] and [4]:

> "3 It is well established that the precise content of the requirements of procedural fairness in any particular case will depend critically upon the statutory framework within which the relevant power falls to be exercised, and the facts and circumstances of the particular case - see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152. Because of the large variety of statutory frameworks in which the obligation to provide procedural fairness arises, and the infinite variety of factual circumstances in which the determination of the precise content of the requirements of procedural fairness might arise, it is impossible to lay down a universally valid test or norm which can be applied to determine whether procedural fairness has been provided in each and every case - see *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, at 503 - 504, (cited with approval in *SZBEL*).
>
> 4 A court required to determine whether a decision maker has departed from the requirements of procedural fairness must therefore analyse all facts and circumstances relevant to the purported exercise of the power, viewed in the context of the statutory framework conferring

> the relevant power, for the purposes of ascertaining whether there has been practical injustice in the particular case - *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 at [37]."

40 Buss JA at [55] made similar observations and cited *Lam*.

Onus of Proof and *SZBEL*

41 Additionally, I do not accept the submission of senior counsel for Mr Weygers about *SZBEL*. The High Court was there referring to the onus of proof in inquisitorial proceedings which senior counsel likened to the inquiry by Mr Burgess. The High Court was not referring to the different issue of whether it could be established, in a court or tribunal, that there had been a denial of procedural fairness. That was what was in issue before the Commission.

42 The grounds of appeal have been established.

The Cross Contention

43 That is not the end of the matter however. This is because in the written submissions by senior counsel for Mr Weygers there was a "cross contention". Although there had been no prior notice of the "cross contention", counsel for the appellant did not assert there was any unfairness in this. He did submit however that what was asserted to be a "cross contention", was not of this ilk, but in affect an appeal against the decision made by the Commissioner.

44 I do not accept this. I have set out above the order and accordingly the decision made by the Commission. It would be nonsensical for Mr Weygers to lodge an appeal against this decision, which was entirely in his favour. What is relied upon by senior counsel for Mr Weygers is properly described as a "cross contention". It was asserted the decision of the Commission "can and should be upheld on the additional ground that the failure of the department and Mr Burgess to disclose to the respondent the statements and correspondence by Ms Kelly, Ms Pickersgill and Ms Taylor given to and relied upon by Mr Burgess breached the requirements of procedural fairness, thereby rendering the disciplinary action taken against the respondent to be void".

45 These are the teachers' first documents. Ms Kelly and Ms Pickersgill were two of the teachers involved in the charges set out earlier. Ms Perisse Taylor was the principal of Glendale Primary School. As I have said it was the lack of provision of the teachers' first documents which was at the heart of the first limb of the asserted denial of procedural fairness at first instance.

The Commissioner's Decision on the First Limb

46 This limb was considered and decided in paragraphs [72]-[77] of the reasons of the Commissioner. At [72] the Commissioner said the authorities established that natural justice should be afforded to a person the subject of a disciplinary process but the question was whether it was denied to Mr Weygers by him not having access to the teachers' first documents. The Commissioner then referred to the statutory scheme contained in Part 5 of *the PSMA* which is headed "Substandard Performance and Disciplinary Matters". The Commissioner said at [73] that the scheme is:

> "… not an adversarial process, it is not one which allows the person against whom complaints are made to cross-examine or to challenge witnesses other than by making his or her own statements and/or being interviewed by the person charged with finding the facts. It is a process of investigation, of gathering information, analyse and accessing the information and forming conclusions at to the fact. The inquiry process is the same. The legislative scheme requires the person to be provided with such information about the allegations or breaches of discipline as will enable the person to respond. The information to be provided includes, time and place, the person against whom the breach was committed as is 'necessary to inform the respondent of the nature of that breach of discipline'. I conclude that it is a process designed to, and does, provide the person accused of the breach of discipline with nature justice. Yet it does not require that the person be provided with the evidence."

47 The Commissioner then quoted from my reasons in *Health Services Union of Western Australia (Union of Workers) v Director General of Health* (2008) 88 WAIG 543 at [183] and [184] which were as follows:

> "183 It is important to acknowledge this, as the requirements of natural justice and the consequences of any breach depend upon the particular statutory power being exercised and the individual facts and circumstances. As stated by Brennan J in *Kioa* at 612:
>
> > 'The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.'
>
> 184 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 the High Court in joint reasons said at [26]:
>
> > 'It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given

> to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case.'"

48 In paragraphs [75]-[77] the Commissioner reasoned in this way:

> "75 The statutory scheme in this case sets out a clear and detailed process with specific requirements as to what the person is required to be provided with in order to enable them to respond to the allegations. In this case those requirements have been met.
>
> 76 From the outset Mr Weygers was provided with the information 'necessary to inform (him) of the nature of (the) breach(es) of discipline' and the particulars and he responded in detail. In addition, by the time he responded to the charges, he also had 'perused' the statements of the complainants provided to Mr Baskwell.
>
> 77 In the circumstances of the statutory scheme, and the requirement to provide natural justice, I find that Mr Weygers was provided with the information and particulars of the alleged breaches of discipline to enable him to respond to them as required by the statutory scheme. He was not required to be provided with the statements and correspondence for that to occur. Therefore I find that in regard to the respondent's refusal to provide those to him, Mr Weygers was not denied natural justice."

The Commissioner Erred

49 In my opinion and with respect the Commissioner was in error in her reasoning in paragraph [77]. This is because the Commissioner tested whether Mr Weygers had been denied natural justice or procedural fairness by deciding whether the statutory scheme required him to be provided with the documents which he had not been. With respect, this ignored the point made in my reasons in *Health Services Union* and the quotations from *Kioa* and *SZBEL*, that the content of procedural fairness depends upon the facts and circumstances of the particular case, within the context of the statutory framework. The same point is made by Martin CJ in *Mijatovic* quoted above. The approach adopted by the Commissioner would only be correct in law if the requirements of procedural fairness or natural justice were entirely satisfied by the statutory scheme. Such a position is rare and would usually require an express statement in the legislation to that effect. (See for example s422B of the *Migration Act 1958* (Cth)).

50 A case which illustrates the point is *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 687. (Section 422B of the *Migration Act* was not applicable to this decision). There, an applicant before the Refuge Review Tribunal was denied legal representation when she appeared to give evidence. Section 427(6) of the *Migration Act* provided that a person appearing before the tribunal to give evidence was not entitled to be represented by any other person. However French and Lee JJ said at [67]:

> "[67] The effect of the cases referred to is that s 427(6)(a) applies to applicants for review who appear before the tribunal to give evidence. An applicant so appearing is 'not entitled … to be represented before the Tribunal by any other person'. But that is a statement about entitlements. It does not exclude the rules of procedural fairness in so far as they may require representation in the circumstances of a particular case. By way of analogy it has been held that, at certain decision-making levels in the exercise of power under the Migration Act, there is no general requirement for an oral hearing but that the circumstances of a particular case might require such a hearing if procedural fairness is to be observed …"

51 Accordingly as I have said the Commissioner erred in her process of reasoning on the first limb.

The Appellant's Response to the Cross Contention

52 Faced with this prospect, counsel for the appellant submitted in effect that there had not been any practical or procedural unfairness in not providing the teachers' first documents to Mr Weygers.

53 To determine the cogency of this argument it is necessary to consider the content of the teachers' first documents and the process of the investigation and inquiry leading to the findings made by Mr Burgess. These findings were required to be adopted by Mr Huts and Mr Ward pursuant to s86(9) of *the PSMA*.

The Teachers' First Documents

54 As set out earlier each of the charges against Mr Weygers arose out of conduct at the Glendale Primary School on 17 February 2004.

55 The teachers' first documents were:

(a) An email sent by Ms Kelly to Ms Taylor dated 18 February 2004.

(b) A statement by Ms Pickersgill dated 17 February 2004.

(c) A letter from Ms Taylor to Mr Denton, the manager of the Complaints Management Unit of the DET on 18 February 2004.

(a) Ms Kelly's Email

56 Ms Kelly's email said she entered the staff room at 12:30pm on 17 February 2004 and Mr Weygers was sitting talking to Ms Pickersgill. She said Mr Weygers looked at her and turned back to Ms Pickersgill. Ms Kelly said that although "his look seemed to be a bit prolonged and made me feel a little uncomfortable I dismissed it as his attempt to place me (we had worked together at the Perth DEO several years ago …)". Ms Kelly said that almost immediately Mr Weygers stood up and approached her. Ms Kelly said that "his conversation commenced with comments such as (not word perfect): 'haven't you become a beautiful, flourishing woman now. Your [sic] a mother now and so womanly, I was always in love with the younger you and the wet look that you wore with your hair. Like you're wearing now'".

57 Ms Kelly said that as these comments were made "he was looking me up and down, checking out my whole body and making me feel extremely uncomfortable. I felt he was uncomfortably close and moved away from him trying to place the corner of the pigeon holes between him and me". Ms Kelly said she tried to turn the conversation to more appropriate matters. There was discussion about the students being referred to Mr Weygers. Ms Kelly said:

> "Whilst discussing these students and a previous female student know [sic] to us both he made several inappropriate comments of a sexual nature, including how Marilyn Monroesque the student was and commenting that if he were her age (the students [sic]) he would like to go her, although her personality would be too much of a handful for him."

58 Ms Kelly said she was then thankful when called away by Ms Taylor and Ms Pickersgill. Ms Kelly concluded her email by saying how inappropriate and disconcerting she found the comments to have been.

(b) Ms Pickersgill's Statement

59 Ms Pickersgill's statement was dated 17 February 2004. The statement referred to a discussion with Mr Weygers in the staff room of the school at 12:30pm. Ms Pickersgill said she and Mr Weygers were discussing a student as a follow up from an earlier case conference. Ms Pickersgill said that Mr Weygers mentioned he knew the student's mother from previously working with the student and had since "met her through Youth Hostel Meetings". Ms Pickersgill recorded that Mr Weygers said: "She was the type of woman that back then, 1970's he would have had great sex with – Great sex – no emotion attached. They (all the women are the same type at the Youth Hostels) are all the same". Ms Pickersgill said she continued the conversation as it returned to the student and his mother in general.

60 She then said that later, at 12:35pm, Ms Kelly walked into the staff room. There was a conversation about whom Ms Kelly was and then Mr Weygers asked her age. He asked was she "25/26" and Ms Pickersgill said she did not know but she, Ms Pickersgill, "may be older than" her. Ms Pickersgill's statement then recorded Mr Weygers "made the following remarks maybe not word perfect but absolutely implying the following: he had a crush on her about 5/6 years ago. She was just a girl before she had children. She's now had children and she is a ? (I thought he said beautiful) woman. He looked her up and down her body from across the table. She was standing up wearing a long dark navy slimline dress". Ms Pickersgill said she excused herself and then went to speak to Ms Taylor. Mr Weygers began following her, but then walked to Ms Kelly and began talking to her. Ms Pickersgill said to Ms Taylor that she, Ms Taylor, may want to rescue Ms Kelly from her conversation. She then went with Ms Taylor to her office and was asked to document what had happened. Ms Pickersgill returned to the staff room where Mr Weygers and Ms Kelly were talking. Ms Pickersgill asked Ms Kelly if she could see her when she was available, about a different matter, and Ms Kelly completed her conversation and met her in the "deputies office" to do so.

(c) Ms Taylor's Letter

61 Ms Taylor said in her letter that its purpose was to bring to Mr Denton's attention complaints from her staff arising from a first visit to the school by Mr Weygers, the new school psychologist. The letter outlined the events which were reported to Ms Taylor. Under the heading of 17 February 2004 Ms Taylor said that at approximately 12:30pm in the staff room, Ms Pickersgill asked to meet with her as a matter of urgency. She said it was private and Ms Taylor "assessed by her appearance it was causing some anxiety". In the office it became clear that Ms Pickersgill was quite distressed. Ms Pickersgill said that Mr Weygers had "made some comments which had left her feeling extremely uncomfortable and upset". Ms Taylor said Ms Pickersgill further explained some of the comments and her statement. Ms Taylor said Ms Pickersgill was at that moment equally concerned that Ms Kelly had been approached by Mr Weygers after her conversation with him. Ms Taylor said that about three minutes after this Ms Kelly left Mr Weygers and went to her office. Ms Taylor said she followed Ms Kelly and "determined from her demeanour that she too was distressed". Ms Taylor said Ms Kelly reported she was feeling "quite repulsed and concerned by comments Mr Weygers had made to her". Ms Taylor said she asked Ms Kelly to document the conversation in full. Ms Taylor said that Ms Pickersgill and Ms Kelly had "no opportunity to collude their statements prior to this point and both wrote them immediately and independently".

62 Under the heading 18 February 2004, Ms Taylor referred to the pre-primary teacher Ms Horrocks who had that day asked to see her. Ms Horrocks had explained she had been left feeling "uncomfortable and shocked" as a result of a meeting with Mr Weygers the day before. She said that this was as a result of "not any one, but a series of inappropriate comments; for example she had explained to him a student had returned to her class from the LDC (language development centre) and was looking for strategies to assist her. Mr Weygers then allegedly looked at the child's enrolment details and stated, 'Mum's at home, Dad's a real estate agent, he's obviously touching her up'".

63 Ms Taylor said she asked Ms Horrocks to document her concerns. (There was no evidence of Ms Horrocks doing so).

64 Ms Taylor then said she met again with Ms Pickersgill who was "still distressed, and continued the discussion from the day before". Ms Taylor recorded that Ms Pickersgill said she remembered other inappropriate comments Mr Weygers had made such as, "in reference to the mother they had just met, 'I would like to do home visits with her, but I can't because she would just say I sexually assaulted her and then it would be her word against mine'". Ms Taylor said that Ms Pickersgill had recorded the additional comments as she recalled them in her "personal diary". (There is no evidence the diary was given to Mr Burgess).

65 Ms Taylor then detailed discussions she had that day with Ms Kelly about how she was feeling.

The Key Question

66 As I have indicated, the key question is whether the teachers' first documents not being provided to Mr Weygers by the DET or Mr Burgess occasioned any practical injustice and accordingly procedural unfairness. To decide this it is necessary to look in more detail at the chain of events and what Mr Weygers was given.

The First Letter about the Complaints

67 The DET first made complaints about Mr Weygers' conduct on 22 March 2004. This was in a letter from Mr Paul Albert, Director General of the DET, to Mr Weygers. The letter provided Mr Weygers with an explanation of the disciplinary processes which would be followed as well as the suspected breaches of discipline. Four allegations in the same form as the charges that were later found proved were set out in the letter. Under each charge there were details which were said to be by "way of further clarification". With respect to the **first allegation** the letter said:

> "… it is claimed that whilst in the staff room you said to Ms Kelly 'haven't you become a beautiful, flourishing woman now. You're a mother now and so womanly, I was always in love with the younger you and the wet look that you wore with your hair, like you're wearing now', or words to that effect. You made these comments whilst looking Ms Kelly up and down, making her feel extremely uncomfortable."

68 For the **second allegation** the clarification was:

> "… it is claimed when speaking with Ms Pickersgill in the school staff room following a case conference regarding [A, a student] you referred to [A's] mother [B] as, 'the type of woman that back then, 1970s, I would have had sex with – great sex – no emotion attached', and that 'they (all woman at the Youth Hostels) are all the same', or words to that effect. You also stated that 'I would like to do home visits with her, but I can't because she could just say I sexually assaulted her and then it would be her word against mine', or words to that effect."

69 For the **third allegation** the clarification was:

> "… it is claimed that during the discussion with Ms Kelly regarding a student, [C], whom you had both known when she was 11 years old at Duncraig primary school, you stated that [C] was 'Marilyn Monroesque and I would like to go for her, although she may be too much of a handful for me', or words to that effect."

70 For the **fourth allegation** the clarification was:

> "It is claimed that during Ms Horrocks' discussions with your regarding a student [D] you looked at [D's] enrolment details and stated, 'Mums at home, Dads a real estate agent, he's obviously touching her up', or words to that effect."

The Solicitor's Response

71 Mr Weygers' solicitors responded to the letter from Mr Albert by letter dated 19 April 2004. It is not necessary to descend to the details of the letter. It is sufficient to note that Mr Weygers denied each allegation. The letter also sought copies of statements and correspondence in the possession of the DET about the complaints. From that time onwards, via a series of requests and Freedom of Information (FOI) applications, Mr Weygers sought access to the teachers' first documents. The DET continually denied access however until the proceedings in the Commission commenced.

The Baskwell Investigation

72 Mr Albert replied by letter dated 30 April 2004. He advised that a formal investigation would be conducted by Mr Baskwell. Mr Baskwell obtained statutory declarations from Ms Kelly, Ms Pickersgill and Ms Horrocks. By letter dated 5 August 2005 Mr Huts reported upon the Baskwell investigation to Mr Weygers. The letter said the findings of the investigation were that Mr Weygers appeared to have committed serious breaches of discipline in respect of the allegations set out in the letter dated 22 March 2004, excepting two matters. The first was about the particular in the second allegation of what Mr Weygers said about home visits. The second was, in allegation four, that the conduct was now particularised as being "somebody's touching her up or words to that effect", and not what was set out in the letter to Mr Weygers dated 22 March 2004.

73 The letter then said Mr Weygers would be charged with committing breaches of discipline and an inquiry may be held. The letter also said a copy of Mr Baskwell's report was enclosed. However by reply dated 16 August 2005, Mr Weygers' solicitors said that a copy of the report had not been enclosed. The letter also said that Mr Weygers denied each charge. A letter from Mr Weygers' solicitors to the DET dated 1 September 2005 then referred to Mr Baskwell's investigation report having been perused. Accordingly it seems to have been provided by then.

The Baskwell Report Critique

74 A submission about Mr Baskwell's report was made by or on behalf of Mr Weygers to Mr Burgess ("the Baskwell report critique"). However from the evidence of Mr Burgess and the contents of his report, he did not read the critique. In the Baskwell report critique there were a number of complaints about the procedures used in the preparation of the report. The Baskwell report critique referred to the statutory declarations made by Ms Pickersgill, Ms Kelly and Ms Horrocks. For present purposes, relevant points made were:

(a) There was a difference between what Ms Pickersgill had said in her statutory declaration about possible accusations of sexual assault if home visits were made, as against what was said in the initial letter of complaint from the department.

(b) Why was Ms Pickersgill's alleged contemporaneous record of her conversation with Mr Weygers not submitted with the report?

(c) If it was found that Ms Horrocks said Mr Weygers made no reference to the occupation of either of the student's parents, why was reference made to this in the letter of complaint from the department?

(d) It was arguable this discrepancy may have a bearing upon the credibility of Ms Horrocks.

(e) Why was a copy of the contemporaneous "record which Ms Kelly made of the alleged incidents, not annexed to the Statutory Declaration"?

(f) As to the second complaint of Ms Pickersgill, again, why was a copy of her contemporaneous record not annexed to the statutory declaration?

(g) No statutory declaration had been obtained from Ms Taylor.

(h) If, as said in the statutory declaration, Ms Pickersgill was sure about what she said about the parent and kept a record of this, why was Ms Pickersgill uncertain about what was said about the parent and home visits?

(i) Ms Pickersgill's credibility was affected because of the difference in what she claimed that Mr Weygers had said about the parents.

(j) It was submitted that Ms Pickersgill's credibility was an issue and her corroboration of Ms Kelly's allegations could also be challenged and questioned on the grounds of credibility.

(k) Ms Horrocks now asserted there was no reference to the occupation of the parents of the students despite the previous statement in the complaint provided in the letter to Mr Weygers that he allegedly said "Mum's at home, Dad's a real estate agent".

(l) This "inconsistency therefore raises the issue of Ms Horrocks' credibility".

(m) The statement in Mr Baskwell's report that each of the complainants appeared to have a clear and comprehensive recollection of the events and presented as credible witnesses should therefore be challenged in Ms Horrocks' case.

75 The Baskwell report critique therefore continued to ask for the teachers' first documents. It also tried to make submissions based upon differences between the statutory declarations and the first letter which contained the allegations.

Mr Burgess and the Baskwell Report Critique

76 The Baskwell report critique was referred to on page 9 of the report of Mr Burgess under the heading "Investigation Plan". It said Mr Weygers had been interviewed by Mr Burgess in the company of his solicitor and a clerk. The report said a statement was drawn up and sent electronically to Mr Weygers' solicitors, with an opportunity to provide a response. The report said the document was not signed and returned. The report then said that Mr Weygers and his solicitors were advised that Mr Baskwell's report had not been and would not be read by him, because the inquiry was a new and separate process. Nevertheless, the report said Mr Weygers provided via his solicitors, a number of pages which referred Mr Burgess to the previous investigation and issues he wished to draw to Mr Burgess' attention. (This was the Baskwell report critique). Mr Burgess said an analysis of Mr Baskwell's investigation was not within the direction supplied to him under s86(4) of *the PSMA* and "no action was therefore taken on Mr Weygers' apparent attempt to review and take into account the preceding investigation". Accordingly Mr Burgess did not take into account the Baskwell report critique, including its analysis of the statutory declarations.

The Burgess Report and the Teachers' First Documents

77 The report of Mr Burgess referred to interviews he had conducted with Ms Taylor, Ms Pickersgill, Ms Horrocks, Ms Kelly and Mr Weygers. Signed statements were contained in the appendix to the report. Mr Burgess also summarised, in the body of his report, the interviews he held with Ms Pickersgill, Ms Horrocks, Ms Taylor and Ms Kelly. Under the heading "Documentation" on page 30 of the report, parts of the teachers' first documents were quoted. When Mr Weygers received the report, this was the first time he received specific notice that the documents existed. The report summarised the conflicting evidence and made findings about what had occurred. In each instance the facts asserted by the complainants were accepted over that of Mr Weygers. Accordingly, each charge was found proved.

Mr Weygers' Interview by Mr Burgess

78 Attached to the report of Mr Burgess was a document headed "Revised Summary of an Interview" between Mr Burgess and Mr Weygers held on 8 December 2005. It appears to have been signed by both of them.

79 It was submitted by counsel for the appellant that the contents of the teachers' first documents were sufficiently put to him during the interview so as to satisfy the requirements of procedural fairness.

80 For example, the following was put to Mr Weygers:

> "What is your response to a claim whilst in the staff room you said to Ms Kelly 'Haven't you become a beautiful, flourishing woman now. You're a mother now and so womanly, I was always in love with the younger you and the wet look you wore with your hair, like you're wearing now', or words to that effect: you made these comments whilst looking Ms Kelly up and down, making her feel extremely uncomfortable."

81 Mr Weygers denied this and added some detail.

82 Mr Burgess then put to Mr Weygers:

> "What are your comments to a statement you looked Ms Kelly up and down at least four times?"

83 As to this Mr Weygers said he did "not recall looking her up and down and certainly not in any sexual way whatsoever".

84 Mr Burgess then asked Mr Weygers about "a statement that you stood up when Ms Kelly entered the room and you made your way around the perimeter of the room towards Ms Kelly and then engaged her in conversation?" Mr Weygers said the comment contradicted the evidence of Ms Pickersgill and Ms Kelly in their statutory declarations.

85 Mr Burgess then asked Mr Weygers for his comment about the statement that he leered at Ms Kelly. Mr Weygers also denied that.

86 Mr Burgess also asked Mr Weygers for his comment about:

> "A statement when you were talking to Ms Kelly in the staff room at Glendale Primary School on 17 February 2004 you moved close to Ms Kelly, in her personal space, too close for her so she stepped backwards one step at a time and you kept on walking forward one step at a time as she did?"

87 Mr Weygers said this was not true.

88 Mr Burgess also asked Mr Weygers for his response about the claim that when discussing a student with Ms Kelly he had said "[the student] was 'Marilyn Monroesque and I would like to go for her, although she may be too much of a handful for me', or words to that effect". Mr Weygers denied saying that he would like to "go for her" but did make a comment that, given something Ms Kelly had said about the student's mother's sexual relations, the situation was "like Marilyn Monroe meaning the Norma Jean syndrome". (This was said by Mr Weygers to be a recognised psychological condition).

89 Mr Burgess asked Mr Weygers about Ms Pickersgill. He replied "I am not aware of who Amanda Pickersgill is but I did speak to a teacher". Mr Burgess asked Mr Weygers:

> "What are your comments to a claim 'when speaking with Ms Pickersgill in the school staff room following a case conference regarding [the student], that you referred to [the student's mother] … as 'the type of woman that back then, 1970s, I would have had sex with – great sex – no emotion attached' and that 'they (all women at the Youth Hostels) are all the same', or words to that effect?"

90 Mr Weygers said it was totally untrue.

91 Mr Burgess also asked Mr Weygers whether he had said to Ms Pickersgill that he, "used to have a crush on Ms Kelly 5 or 6 years before when you both worked at District Office and she was a lovely young girl or something to that effect but now she had had children she was this beautiful woman". Mr Weygers denied this and said he had never had a crush on Ms Kelly.

92 Mr Burgess also asked Mr Weygers about "Caroline Horrocks". Mr Weygers said that he had no recollection of anyone called "Caroline Horrocks" but said he had spoken to a teacher who could have been her. Mr Burgess asked Mr Weygers for his comments about a claim that during a discussion with Ms Horrocks regarding a student he looked at the students' enrolment details and said, "somebody is obviously touching her up", or words to that effect.

93 Mr Weygers denied that and referred to a difference in the statutory declaration signed by Ms Horrocks when she alleged he said "someone is probably touching her up". Mr Weygers also referred to paragraph [15] of Ms Horrocks' statutory declaration in which she said he did not make any reference to the occupation of either of the student's parents, even though the allegation had been made in the first letter to him from the department. He also said he would not have made a statement about anyone "touching up a child" without evidence.

94 The interview then records Mr Burgess asking if he could be provided with a copy of Ms Horrocks' statutory declaration and Mr Weygers saying that it was his understanding that Mr Burgess already had a copy of the report prepared by Mr Baskwell containing the statutory declaration and what Ms Horrocks alleged he had said. (Given this and the earlier reference by Mr Weygers to the statutory declaration, it might be considered surprising that Mr Burgess did not look at them, but there is no separate complaint about that). The interview then records Mr Burgess simply saying "are there any other comments you wish to make". A number of other matters were then raised by Mr Weygers and discussed with Mr Burgess. As part of this Mr Weygers is recorded as saying that although Ms Pickersgill and Ms Kelly swore that they had made contemporaneous written records of their conversations with him, none of the records were annexed to the statutory declarations. As to a suggestion by Mr Weygers that people at Glendale Primary School had set him up, Mr Burgess asked who was involved. Mr Weygers said he could not speculate as he believed he had not been provided with all of the information relating to the complaints.

The Statutory Declarations

95 As I have said, Mr Weygers had as part of Mr Baskwell's report been provided with the statutory declarations made by Ms Kelly, Ms Horrocks and the two by Ms Pickersgill.

(a) Ms Kelly's Statutory Declaration

96 In her statutory declaration, Ms Kelly said when she first saw Mr Weygers sitting next to Ms Pickersgill she said "Mr Weygers looked from the conversation and gave me a prolonged look in which his eyes moved from my head to toe on at least two occasions". She then said Mr Weygers got up, walked around the table and engaged in conversation with her. Ms Kelly said he "again undertook to look at me in a prolonged manner wherein his eyes roamed from my head to feet". Ms Kelly said Mr

Weygers made comments about their previous work together and then said, "Haven't you become a beautiful flourishing woman now. You are a mother now and so womanly, I was always in love with you and the wet hair look that you wore in your hair, like you're wearing now". Ms Kelly said she attempted to move away but Mr Weygers continued to follow her and invade her personal space. There was further conversation including one about a student. Ms Kelly said Mr Weygers described the student as Marilyn Monroesque and said were he her age he would like to "go her" but she would have been too much for him to handle. Ms Kelly described how she went into the office of Ms Taylor and was instructed to document what had occurred. Ms Kelly said she did that within an hour.

(b) Ms Pickersgill's First Statutory Declaration

97 In her first statutory declaration Ms Pickersgill said Mr Weygers sat next to her in the staff room on 17 February 2004. There was a conversation about a student they had held a case conference about. Mr Weygers said he knew the student's mother. He said he had not realised when dealing with the student at an earlier school that he and the mother were involved in the same organisation. Ms Pickersgill said Mr Weygers mentioned Youth Hostels or Youth Hostels Australia. She said Mr Weygers had said that at some stage he held a high profile position in the organisation. She said that during the conversation Mr Weygers said the mother "was the type of woman that back then (in the 1970s) he would have had sex with – great sex, no emotion". Ms Pickersgill said she documented the comment shortly after she left Mr Weygers and could confirm that the words she repeated were the words used. Ms Pickersgill described how she felt.

98 Ms Pickersgill said she noticed Ms Kelly walking into the staff room. Ms Pickersgill said Mr Weygers proceeded to look at Ms Kelly in a manner she "would describe as undressing her from top to toe". She said it was not a glance but that he looked her up and down several times very slowly. Ms Pickersgill said she found that behaviour revolting. Ms Pickersgill said Mr Weygers said some things about Ms Kelly including that "he had a crush on her 5 or 6 years ago. She was just a girl before but now she has had children she is a beautiful woman". Ms Pickersgill said she objected to Mr Weygers' comments, thanked him for his time for the case conference and excused herself. She described approaching Ms Taylor and said she observed Mr Weygers speaking to Ms Kelly and Ms Kelly looking uncomfortable. Ms Pickersgill suggested to Ms Taylor that she rescue Ms Kelly from Mr Weygers. Ms Taylor and Ms Pickersgill then went to her office where she described to her what had happened. Ms Taylor asked her to document what had occurred and she did.

(c) Ms Pickersgill's Second Statutory Declaration

99 In her second statutory declaration Ms Pickersgill referred to whether Mr Weygers had said anything about not wanting to do home visits with the mother because she may accuse him of sexual assault. Ms Pickersgill said she recalled Mr Weygers making a general comment about home visits. Her recollection of the "context of the comment" was him saying "you had to be careful these days when undertaking home visits" or words to that effect. He said words to the effect that home visits were no longer permitted. Ms Pickersgill said she did not recall Mr Weygers saying he was concerned about the mother making allegations about sexual assault against him. Her recollection was that "he had a general concern that false accusations could be raised in the media".

(d) Ms Horrocks' Statutory Declaration

100 In her statutory declaration, Ms Horrocks described a discussion with Mr Weygers about a student on 17 February 2004. She said she told Mr Weygers the student had "toilet troubles". Ms Horrocks said that, without any preliminaries or apparent justification, Mr Weygers said words to the effect that "somebody is probably touching her up". Ms Horrocks said Mr Weygers did not justify the comment by making reference to the occupation of either of the parents of the student. Ms Horrocks then set out what she then did, culminating in making an oral report to Ms Taylor.

Consideration and Analysis of the Cross Contention

101 As I have said earlier the resolution of the cross contention depends upon whether it can be established that Mr Weygers suffered any practical injustice from not being provided with the teachers' first documents. If these documents simply contained information that Mr Weygers had otherwise been provided with and could respond to in his interview with or statement or submissions to Mr Burgess, then in my opinion it could not. Senior counsel for Mr Weygers argued against this proposition. He submitted the mere failure to provide the documents in itself was a denial of procedural fairness. As I have said I do not accept that. The issue boils down to whether Mr Weygers was denied the opportunity of using the teachers' first documents in a way which may have assisted his defence to the charges.

102 In the joint reasons of the High Court in *SZBEL* at [29] their Honours quoted with approval a passage from the reasons of the Full Federal Court (Northrop, Miles and French JJ) in *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 which included the following:

> "Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker."

103 In my opinion Mr Weygers and/or his legal advisors could have made submissions about the contents of the teachers' first documents, in addition to those which could have been made as a result of receiving the documents he was provided with, in his defence to the charges. It does not have to be established that Mr Weygers and/or his advisors would have taken the opportunity or made the best use of it. The loss of the opportunity is sufficient. (See the authorities discussed, and the result in *Health Services Union* at [114]-[122], [188]-[189] and [196]). I reach this conclusion because:

(a) There are differences between what is contained in the teachers' first documents as against what was said in the complaints, charges, statutory declarations and by Mr Burgess in the interview.

(b) To the extent that Mr Weygers was able to comment upon any differences between the complaints as recorded in the first letter and the statutory declarations, in the Baskwell report critique, this was not considered by Mr Burgess.

(c) Specifically, submissions on the following could have been made:

(i) Why Ms Pickersgill made no complaint to Ms Taylor, initially, about Mr Weygers' saying the mother would say he sexually assaulted her if he did a home visit. This claim was in Ms Taylor's letter, but not Ms Pickersgill's first statement. Accordingly that statement was different to and contradicted her statutory declaration.

(ii) In her email dated 18 February 2004 Ms Kelly's description of the first look that Mr Weygers gave her was quite different to that contained in her statutory declaration.

(iii) The letter by Ms Taylor, outlining what Ms Horrocks told her was inconsistent with what Ms Horrocks later said in her statutory declaration. This was with respect to the occupations of the child's parents and that it was the child's father who was "obviously touching her up". Although a submission was made about this in the Baskwell report critique, Mr Burgess did not read that.

(iv) Ms Taylor's letter said she asked Ms Horrocks to document her complaints but it seems she did not do so. Submissions could have been made about that.

104 Again in my opinion it is not to the point that not all of these things were central to the charges against Mr Weygers or that he had been provided with the gravamen of the complaints from the start. The points I have listed relate to the facts of what happened. Submissions could have been made about them. Those submissions would largely have been about the credibility or reliability of the complainants and what they said occurred.

105 As emphasised in the authorities earlier cited, the particular facts and circumstances of the case are important in assessing the content of procedural fairness and whether there has been a contravention. In the present case the assessment by Mr Burgess of the credibility and reliability of the complainants and Mr Weygers was crucial to his factual findings. Accordingly, any additional information which Mr Weygers could and should have been provided with, which could have assisted the submissions he might have made on this topic, were significant. The failure to provide the teachers' first documents to Mr Weygers therefore caused unfairness. The deliberate and prolonged refusal to provide the documents, despite requests, only added to this. In the terms of Gleeson CJ in *Lam*¸ there was a "practical injustice".

106 For these reasons, in my opinion the cross contention has been established.

Conclusion

107 Accordingly, although the grounds of appeal are established the appeal must be dismissed.

108 Regrettably, therefore, the charges against Mr Weygers have not been fairly inquired into and the Commissioner's order must stand. I say regrettably as the charges were serious and the procedural error was a basic one which should not have occurred.

109 Finally as was accepted during the hearing, the appellant should properly have been named the Director General of the Department of Education and Training. As then indicated an order will be made to correct this.

BEECH CC:

110 The Department of Education and Training appeals the decision of the Commission at first instance on the following three grounds:

1. The Commissioner erred in law in deciding because it could not be determined what information was provided to the Inquirer the Respondent was denied procedural fairness.
2. The Commissioner erred in fact in finding that there was a possibility that the Inquirer may have been provided with "relevant information" which may not have been disclosed to the Respondent.
3. The Commissioner erred in law and in fact by finding the Respondent has been denied procedural fairness when no proper factual basis was established upon which it could be said that the Inquirer was or might have been influenced by material not disclosed to the Respondent.

111 The order made by the Commission at first instance followed the Commissioner's conclusion at [82] of her Reasons (AB 59) that due to the lack of certainty as to what relevant information was provided to Mr Burgess, there is no certainty that Mr Weygers was not denied procedural fairness and in those circumstances she must conclude that he was denied procedural fairness.

112 The Department argues in the first ground of the appeal that there was no lack of certainty as to what relevant information was provided to the inquirer, Mr Burgess because on the evidence before the Commission at first instance, it was clearly possible to ascertain that the only relevant information in the possession of the Department up until the inquiry was concluded comprised the complaints made by the teachers to the principal about Mr Weygers (contained in an email and a statement (AB 121, 122) which I shall refer to as the teachers' emails), a letter written by the principal containing a further allegation reported to her by a teacher (AB 119, 123) and the report of the investigator Mr Baskwell.

113 The attention of the Full Bench was drawn to a letter sent to the solicitors for Mr Weygers on 13 June 2007 (AB 131) which states that the Department provided a copy of the file relevant to the disciplinary action in order to avoid any suspicion that documents relevant to Mr Weygers have not been provided.

114 Further, Mr Andretich, who represented the Department in the proceedings at first instance, had submitted in those proceedings (AB 67) that he had contacted the Departmental officers and on the basis of advice he received, Mr Burgess would have

received a number of documents, but in particular received the contents of the disciplinary file up to the date he was appointed; that seemed to have been the practice and that submission had not been disputed. Mr Andretich had submitted that what had been provided to Mr Burgess was therefore ascertainable on that basis.

115 The Department concedes that although a copy of Mr Baskwell's report had been provided to Mr Weygers, copies of the teachers' emails had not been provided. The Department states however that Mr Weygers had been provided with copies of the teachers' statutory declarations which were subsequently made by them. As a consequence, not only was Mr Weygers made aware of the complaints made against him, the documents he was given were documents given on oath and were thus of greater value than the teachers' emails.

116 For his part, Mr Weygers states that there is no Departmental record of what was sent to Mr Burgess therefore the only persons who know what relevant information was given by the Department to him are Mr Huts, Executive Director, Human Resources who sent the relevant material to him, and Mr Burgess himself. Mr Huts did not give evidence. Mr Burgess did give evidence but it was to the effect that whilst he has supplied the material still in his possession to the Commission, it is incomplete and he is unable to recall what else was provided.

117 Mr Weygers' primary position is that the existence of undisclosed material in the hands of the decision maker is sufficient to sustain a breach of procedural fairness. The Department had provided Mr Burgess with what was expressly described as "relevant information", that is information relevant to the charges laid against Mr Weygers. The "relevant information" was not disclosed to Mr Weygers. Thus, there must have been a real risk of prejudice in the decision making process given that the Department, and Mr Burgess, did not disclose to Mr Weygers the material given to Mr Burgess expressly said to be relevant to the charges laid.

118 I have concluded the following. At the heart of the Department's case is the submission that the mere existence of undisclosed material is not sufficient to establish "either the reality or the appearance of a denial of natural justice". In every case there is the theoretical possibility of a decision-maker relying upon undisclosed material but this is insufficient for a court to act upon. The onus is on the party raising the issue to establish a denial of natural justice has occurred or can reasonably be inferred from the established facts and this onus was not discharged by Mr Weygers.

119 It is not disputed between the parties to this matter that the Director General is obliged to observe the rules of natural justice when exercising the power under the *Public Sector Management Act, 1994* (PSMA) to investigate the allegations and decide whether Mr Weygers has committed the offences alleged against him. The Director General acted under s 86 of the PSMA. There is nothing in that section which would derogate from the requirement on the Department to observe natural justice in conducting its investigation into the allegations made against Mr Weygers. In *F.A.I. Insurances Ltd v Winneke* (1982) 151 CLR 342 Mason J said at 360:

> The fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power (*Twist v Randwick Municipal Council* (1976) 136 CLR 106, at p.109; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487, at p.499).

120 The rules of natural justice are flexible, requiring fairness in all the circumstances, including the nature of the power exercised and the statutory provisions governing its exercise: *Kioa v West* [1985] HCA 81 per Gibbs CJ at [11]; (1985) 60 ALJR 113 at 118.

121 What natural justice requires in any case was commented upon in *South Australia v O'Shea* [1987] HCA 39; (1987) 163 CLR 378 where Wilson and Toohey JJ observed at [22]:

> …But it may be said that the answer to the question as to what natural justice requires in any particular case that is governed by statute will depend to a large extent upon the particular statutory framework within which the question arises. As Mason J. (as his Honour then was) said in *Kioa v. West*, at pp 584-585:
>
> > "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 C.L.R. 475, at pp.503-504, Kitto J. pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on 'the particular statutory framework'. What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting: *Reg. v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, at pp 552-553; *National Companies and Securities Commission v News Corporation Ltd.* [1984] HCA 29; (1984) 156 CLR 296, at pp 311, 319-321."

122 It is therefore necessary to look at the circumstances of the particular case in order to determine whether Mr Weygers has, or has not, been denied natural justice. Relevantly, the circumstances are that Mr Weygers was suspected of having committed four breaches of discipline. The allegations that he had done so were made by two teachers who made records (the emails referred to earlier in these Reasons) on the day of the discussion they had had with Mr Weygers. The details of each allegation

they made were contained originally in a letter to him from the Department on 22 March 2004 (AB 517). Mr Weygers responded to the allegations on 19 April 2004 (AB 505).

123 The teachers subsequently made statutory declarations which contained details of the allegations (AB 398 and following). Mr Weygers was provided with copies of those statutory declarations and he took their contents into account when he was interviewed by Mr Burgess. At AB 245 for example, Mr Weygers was asked to comment about a statement regarding a teacher, his reply included the point that the statement "contradicts the evidence … in their statutory declarations" (and see also references to the statutory declaration at AB 249). (Mr Weygers also referred to the statutory declarations in the revised summary of interview with Mr Burgess (AB 311, 312, 317, 319)). Mr Weygers was interviewed by Mr Burgess and the detail of the allegations were put to him, and he responded.

124 In the absence of any challenge by Mr Weygers to the submission from the Department that what had been provided to Mr Burgess was ascertainable by reference to the Departmental file, and although Mr Burgess' evidence is that he was unable to recall what else was provided to him, what was provided can only have been material that was on the departmental file. Therefore the Commission at first instance erred in concluding that it was not possible to know what information had been provided to Mr Burgess. The Commissioner's conclusion that Mr Weygers was denied procedural fairness because she was unable to conclude what relevant information was provided to Mr Burgess was therefore not one that was open on the evidence.

125 In addition, a person alleging a denial of natural justice bears an onus of establishing that it has occurred: *Bromby v Offenders' Review Board* (1990) 51 ACrimR 249 per Clarke and Handley JJA at 278, 279; *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [45]. Denial of natural justice is not to be assumed to have occurred. The person who bears the onus has to discharge that onus.

126 The departmental file, excluding documents subject to legal professional privilege but including the teachers' emails and the principal's letter, was made available for examination by Mr Weygers and his solicitors. However it was not provided to Mr Weygers until after the Department found him guilty of the conduct alleged. It is not apparent why the Department did not provide the teachers' emails and the principal's letter to Mr Weygers when requested to do so by his solicitors. The Department should have done so and its failure to do so has lead directly to the claim that Mr Weygers was denied natural justice.

127 I am far from convinced however that the Department's failure to provide copies of the teachers' emails and the principal's letter to Mr Weygers denied him natural justice when he was made aware of the allegations against him in sufficient detail for him to have a proper opportunity to comment upon them.

128 The authorities referred to by the parties support the conclusion that Mr Weygers was not denied natural justice in these circumstances. On the facts in *Kioa* (referred to earlier) Gibbs CJ held that Mr Kioa was not entitled to an opportunity to be heard in relation to matters which the Minister's delegate was not obliged to consider. He observed, however, that if a contrary view was taken and the rules of natural justice were applicable, Gibbs CJ was satisfied there was no breach of the rules in that case (at [19]; (1985) 60 ALJR at 120).

129 His Honour considered the argument that Mr Kioa was entitled to respond to statements in paragraphs 20 to 26 of the submission made to the Minister's delegate in that matter. His Honour observed:

> With two possible exceptions there was nothing in any of those paragraphs which was new and which could not have been dealt with in the material submitted on behalf of the appellants.

130 Mason J, in that matter, held at [40]; ALJR at 128:

> In this respect recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it.

His Honour held that comments in paragraphs 21 and 22 of the submission were matters in respect of which fairness demanded that Mr Kioa should have been given the chance of replying.

131 His Honour Wilson J at [22]; ALJR 135 stated that it was not necessary to show that the allegation contained in paragraph 22 did work to the prejudice of Mr Kioa; it is enough to show that the way was open for it to do so. His Honour Brennan J at [38]; ALJR 147 held that the failure to give Mr Kioa an opportunity to deal with the allegation in paragraph 22 left a risk of prejudice which ought to have been removed. The failure to do so amounted to a non-observance of the principles of natural justice. Deane J at [8]; ALJR 149 similarly held that Mr Kioa should have been given the opportunity of dealing with any matters raised against him and his wife, including those particular paragraphs referred to.

132 None of the justices in *Kioa*, in my respectful view, dealt with the express issue of whether Mr Kioa should have been shown the documents themselves which contained the allegations; their concern was that Mr Kioa should have been given an opportunity to respond to the allegations contained, or matters raised, in them. I do not regard *Kioa* as supporting the respondent's position that the mere existence of undisclosed material in the hands of the decision-maker is sufficient to sustain a breach of procedural fairness.

133 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 231 ALR 592; (2006) 81 ALJR 515 the High Court examined whether the appellant in that matter had been accorded natural justice by the Refugee Review Tribunal when it failed to indicate that it did not accept his argument. The Court held that the Tribunal (per [30]) had not given a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of the three determinative issues arising in relation to the decision under review. It cited with approval the following passage of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

134 In my respectful view, this decision illustrates that Mr Weygers' right was to "rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker". On the facts of this matter, that was done even though copies of the teachers' emails and the principal's letter were not provided to him. It was done because the adverse material they contained was either provided to him or put to him.

135 In *Bromby v Offenders' Review Board* (cited above), the court dealt with the procedures of the Offenders' Review Board. The majority, Clarke and Handley JJA held that the central point was that the members who constituted the Board during the review proceedings had been, or might have been, influenced by material in the possession of two of their number which the appellant's solicitor had had no opportunity to answer either by evidence or submission. The court held that the Board was bound by procedural fairness to give the parolee an opportunity to deal with all the material on which it proposes to act in reaching its decision. If in the consideration of its decision it determines to have regard to material which was not canvassed in the hearing itself, it must give the parolee an opportunity to deal with that material before concluding its review.

136 In that matter, the relevant documents had not been made available and the contents of those documents were not contained in any other material which had been supplied to the applicant and upon which he had had an opportunity to comment. This is in contrast to the facts in this matter where, even though the teachers' emails and the principal's letter had not been supplied to Mr Weygers, the contents of them that were relevant to the allegations had been put to Mr Weygers either in other correspondence or in the interview held with him by Mr Burgess.

137 Mr Weygers also cited in support *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40; (2002) 115 FCR 561. That was a case where relevant material had not been disclosed to a party affected by a decision. It is to be distinguished from the facts of this case. Mr Weygers does not point to any relevant material in the teachers' emails and the principal's letter which had not already been put to him and which he had been given an opportunity to respond.

138 Similarly, the facts in *Brighton Council v Compost Tasmania Pty Ltd; Cooper & Ors v Compost Tasmania Pty Ltd* [2000] TASSC 49 to which the respondent referred are significantly different to the facts in this matter. Underwood J held that the Resource Management and Planning Appeal Tribunal had failed to comply with an obligation in the applicable legislation. The obligation imposed upon the Tribunal arose with respect to a document to which it proposed to have regard in reaching a decision in the appeal. Accordingly, it was incumbent upon the Tribunal to identify such documents at or prior to the hearing. The Tribunal did not do this with respect to a particular report. The report contained material which was not contained in a corresponding report which had been identified (see at [27] of that decision).

139 In *re Macquarie University; ex parte Ong* (1989) 17 NSWLR 113 a letter was withheld from Dr Ong which contained adverse allegations against him (see above citation at page 135E). The issue was that Dr Ong was at least entitled to an opportunity to answer the allegations against him and for that purpose to know at least their general nature (*Ibid* at page 135G). The adverse material had not been the subject of the particulars adopted in the inquiry, and was not the subject of any report; Dr Ong was given no opportunity to answer the adverse material. Again, that is not the case here because Mr Weygers was given that opportunity.

140 I therefore consider the Department's position correct when it submits that the mere existence of undisclosed material is not sufficient to establish the reality or the appearance of a denial of natural justice. What was required was that Mr Weygers be made aware of the allegations against him in sufficient detail for him to have a proper opportunity to comment upon them.

141 To put it another way, if the material which was supplied to Mr Weygers contained the allegations against him in sufficient detail, and the material contents of the documents not supplied to him were contained within the material that was supplied, then the provision of the teachers' emails and the principal's letter would not have added anything material to the information already provided.

142 This therefore requires a comparison between the relevant material in the teachers' emails and the principal's letter and in the material which was provided to Mr Weygers.

143 The breaches of discipline which the inquirer found that Mr Weygers had committed are set out in the letter from the Department to Mr Weygers of 31 March 2006 (AB 208). The letter sets out four breaches of discipline; the nature of each breach is set out in a paragraph which commences with the words "By way of further clarification".

144 In relation to the first allegation, in the email of 18 February 2004 (AB 122) the first teacher records Mr Weygers saying:

> Haven't you become a beautiful, flourishing woman now. Your (*sic*) a mother now and so womanly, I was always in love with the younger you and the wet look that you wore with your hair. Like your (*sic)* wearing now.
>
> (my underlining)

145 The two words underlined above do not appear in the teacher's statutory declaration at AB 402. However those words are contained in the allegation as set out in the Department's letter of 22 March 2004 to Mr Weygers (AB 517). They also are included in the allegation as contained in the letter from the Department to Mr Weygers of 5 August 2005 (AB 364). Those words were also in the allegation put to Mr Weygers by Mr Burgess (AB 245, 311). I note that Mr Weygers' denial of the allegation was a total denial that a conversation of that nature occurred. It was not a denial where those words were material to the denial.

146 Thus, a comparison between the material relevant to the first allegation contained in the teacher's email and the material which was provided to Mr Weygers does show a difference in the words used in the comment which he is alleged to have made to the teacher. However, the two words which are omitted from the statutory declaration are in the other material which was supplied, or put, to him; he did have the opportunity to respond to the allegation including those words, and did so.

147 Further, although the omission of those words from the allegation in the statutory declaration would have been apparent to him if he had been given the teacher's email, their omission from the allegation in the statutory declaration was equally ascertainable from the fact of their inclusion in the material which had been supplied to him.

148 I therefore conclude that in relation to the first allegation, the failure of the Department to provide the teacher's email to Mr Weygers did not deny him natural justice because he was made aware of the allegation against him in sufficient detail for him to have a proper opportunity to comment upon it.

149 In relation to the second allegation, the second teacher's statement of 17 February 2004 (AB 532) records Mr Weygers saying the words "They (all the women are the same type at the Youth Hostels) are all the same" however those words are not contained in the teacher's subsequent statutory declaration (AB 410). Those words are however contained in the allegation set out in the original letter from the Department outlining the allegation to Mr Weygers (AB 517) and to which he responded (AB 506). Those words were put to Mr Weygers, and he responded, by Mr Burgess (AB 248 and 315).

150 Thus, a comparison between the material relevant to the second allegation contained in the teacher's statement and the material which was provided to Mr Weygers, and upon which he had the opportunity to respond, shows that those words in the teacher's statement were put to him. Also, the fact that the statutory declaration omitted those words would have been apparent from a comparison of the statutory declaration with the Department's original letter (AB 517).

151 Further, Mr Weygers' response (AB 506) is a specific denial of saying anything about that particular teacher, or anything about women in youth hostels being the same. Therefore, the those words in the statement which were not contained in the teacher's statutory declaration are not themselves a matter of significance in the overall context because the allegation and the denial do not turn upon the precise words alleged to have been said.

152 I therefore conclude that in relation to the second allegation, the failure of the Department to provide the second teacher's statement to Mr Weygers did not deny him natural justice because he was made aware of the allegation against him in sufficient detail for him to have a proper opportunity to comment upon it.

153 In relation to the third allegation, the first teacher's email (AB 122) alleges that Mr Weygers' comments included the words "…if he were her age he would like to go her, although her personality would be too much of a handful for him". In the teacher's statutory declaration (AB 403) the words are said to have been "…were he her age he would like to 'Go her' but she would have been too much for him to handle".

154 In the original letter from the Department outlining the allegation to Mr Weygers (AB 518) and to which Mr Weygers responded (AB 506) the words used were described as being: "… 'and I would like to go for her, although she may be too much of a handful for me' or words to that effect". That wording was put to Mr Weygers by Mr Burgess (AB 247, 314).

155 The wording in the allegation put to Mr Weygers was qualified by the words "or words to that effect". I therefore conclude that in relation to the third allegation, the failure of the Department to provide the teacher's email to Mr Weygers did not deny him natural justice because he was made aware of the allegation against him in sufficient detail for him to have a proper opportunity to comment upon it.

156 In relation to the fourth allegation, the teacher's allegation is set out in the principal's letter (AB 119). The words used were described as including a comment allegedly made by Mr Weygers regarding the occupations of the parents. The allegation, with that comment, was contained in the Department's original letter to Mr Weygers at AB 518. Mr Weygers denied making the comment in his response at AB 506.

157 In the teacher's subsequent statutory declaration, the allegation did not contain the comment regarding the occupations of the parents (AB 422). In fact, the statutory declaration stated expressly that Mr Weygers did not justify a comment he made by making any reference to the occupations of the parents. This difference in the teacher's allegation set out in the principal's letter and as contained in the statutory declaration was noted by Mr Weygers in his statement (AB 396). That he was aware of the difference is shown in his reply to the statutory declaration (AB 328). I also note that in the interview held by Mr Burgess with Mr Weygers the difference between the words originally alleged against Mr Weygers and the statutory declaration was discussed (AB 316, 317).

158 The matters relevant to the fourth allegation contained within the principal's letter had therefore been put to Mr Weygers and he had had an opportunity to respond even though the principal's letter itself was not provided to him. I therefore conclude that in relation to the fourth allegation, the failure of the Department to provide the principal's letter to Mr Weygers did not deny him natural justice because he was made aware of the allegation against him in sufficient detail for him to have a proper opportunity to comment upon it.

159 Mr Weygers submits that it is providing the documents themselves which is necessary because not providing them would deprive him of the opportunity to examine for himself any differences in the content of the document and the content of the material actually supplied; an examination may provide an opportunity for the cross-examination of the teachers and the principal which may have assisted in Mr Weygers' defence to the charges.

160 In my view the comments of Brennan J in *Kioa* are helpful here. His Honour stated at [1985] HCA 81 at [38]; (1985) 60 ALJR 113 at 147:

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise (*Kanda v. Government of Malaya* (1962) AC 322, at p 337; *Ridge v. Baldwin*, per Lord Morris at pp 113-114; *De Verteuil v. Knaggs*, at pp 560, 561). The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by enquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. As Lord Diplock observed in *Bushell v. Environment Secretary*, at p 97:
>
> > "To 'over-judicialise' the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair."
> >
> > …

161 I respectfully apply those comments here. What was required of the Department was to provide Mr Weygers with an opportunity to deal with relevant matters adverse to his interests which intended to take into account when deciding the allegations made against him. This was done. The allegations were put to Mr Weygers in more detail than the "general nature" required in *re Macquarie University; ex parte Ong* (referred to above). All of the material which was supplied, together with the interview of him by Mr Burgess, provided Mr Weygers with the detail of the allegations and he was given the opportunity to respond.

162 Therefore, the provision of the documents themselves in circumstances where their material content had already been disclosed to Mr Weygers was not necessary. To require their provision to Mr Weygers so that there may be an opportunity for the cross-examination of the teachers and the principal which may have assisted in Mr Weygers' defence to the charges is an attempt to incorporate the procedures of adversary litigation and their non-provision does not necessarily invalidate the process which has occurred (per Brennan J, above).

163 Mr Weygers had been given the opportunity to "deal with adverse information that is credible, relevant and significant to the decision to be made" (in the words of Brennan J). In my view, the Department adopted a procedure which was fair when viewed as a whole: *Firlayis v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 725 at [22].

164 For the above reasons, I consider the grounds of appeal have been made out.

Contention by Mr Weygers

165 Mr Weygers contends that the decision at first instance can and should be upheld on the additional ground that the failure of the Department and Mr Burgess to disclose to the respondent the teachers' emails and the principal's letter which were given to and relied upon by Mr Burgess breached the requirements of procedural fairness thereby rendering the disciplinary action taken against the respondent to be void.

166 In support of his contention, Mr Weygers emphasises that Mr Burgess had received and acted upon the complaints and correspondence from the teachers and the principal. He emphasises that the affording of natural justice includes an opportunity to be given to deal with adverse information that is credible, relevant and significant.

167 In particular, Mr Weygers states that the Commission at first instance erred in relying on him having been provided with the information necessary to inform him of the nature of the breaches of discipline and the particulars. Mr Weygers says that confuses the issue. The description of the nature of the breach and its particulars is not "evidence" of the breach, and it is the evidence of the alleged breach to which the rules of natural justice are directed requiring disclosure.

168 For the reasons I have given in relation to the appeal brought by the Department, I do not consider the contention can be made out. The most that can be said is that the teachers' emails, and the principal's letter which were used as the basis for the initial complaint, and which then led to the statutory declarations, were not disclosed. However, the complaints made against Mr Weygers were complaints made by his employer. They were based upon allegations made by teachers with whom Mr Weygers had spoken; they were provided to Mr Weygers and he was given the opportunity to comment upon them. I can detect no error on the part of the Commission at first instance as alleged in the contention.

169 I would uphold the appeal and quash the decision at first instance.

170 If I am wrong in the conclusion I have reached, I wish to add that I have had the advantage of reading in advance the Reasons for Decision of the Senior Commissioner and I indicate my agreement with her conclusion that even though the findings and penalty have been declared a nullity, it does not mean that the inquiry under s 86 of the PSMA cannot either be reopened or alternatively recommenced (as a new inquiry by another enquirer appointed by the appellant), the error corrected and fresh findings made as to whether breaches of discipline have been committed by Mr Weygers.

SMITH SC:

171 The issues and circumstances of this case and grounds of appeal are set out in the reasons for decision of the Acting President and I need not repeat them. For the reasons given by the Acting President I agree the grounds of appeal have been established. I also agree that the appeal should be dismissed as the cross contention has been established.

172 No rigid rules apply as to what is required by the obligation to provide procedural fairness as the concept of fair play requires flexibility in each matter. However, if it can be found that there is some practical injustice to a person who has been the subject of an adverse finding in that a procedural step was not taken when representations were made which resulted in the person losing an opportunity to advance his or her case the adverse finding should not stand (see *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1, Gleeson CJ at [3]).

173 I agree that with the Acting President that during the process of the inquiry into the charges against Mr Weygers, Mr Weygers suffered a practical injustice as he lost the opportunity to make submissions about the matters going to the credibility of the complainants because he was not provided with copies of:

(a) An email sent by Ms Kelly to Ms Taylor dated 18 February 2004.

(b) A statement by Ms Pickersgill dated 17 February 2004.

(c) A letter from Ms Taylor to Mr Denton, the manager of the Complaints Management Unit of the Department of Education and Training on 18 February 2004.

(the teachers' first documents)

174 To be provided with the teachers' first documents and thus an opportunity to make submissions was a procedural step that Mr Weygers was entitled to, as it could be contended that these documents raise inconsistencies going to the credibility of the complainants when compared to other documents considered by Mr Burgess who held the disciplinary inquiry pursuant to s 86(4) and (8) of the *Public Sector Management Act 1994* (*PSMA*). The rules of procedural fairness are about what is fair in the circumstances of each case. In this matter at the heart of the findings made by Mr Burgess were findings that the versions of comments by Ms Kelly, Ms Pickersgill and Ms Horrocks were preferred to Mr Weygers' version of comments. These findings were critical to the findings that each of the four allegations against Mr Weygers were made out. It is clear from the report of Mr Burgess that in assessing the credibility of Ms Kelly, Ms Pickersgill and Ms Horrocks he did not consider whether there were any inconsistencies between the teachers' first documents which were made contemporaneously and statements made by each of them many months later. By not providing copies of the teachers' first documents Mr Weygers could not have brought the inconsistencies to the attention of Mr Burgess. It is immaterial that Mr Burgess had copies of these documents and could have had regard to them.

175 It is well established that except where issues of confidentiality arise information that is credible, relevant and significant to the decision should be disclosed (*Kioa v West* (1985) 159 CLR 550, Brennan J at 629). What is credible, relevant and significant is not concerned with whether the information will ultimately be accepted by the decision maker as credible or the weight to be given to such information (see *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88). Clearly the contents of the teachers' first documents are relevant and significant in the sense that they set out the basis of the allegations against Mr Weygers. In this matter whilst Mr Weygers could have made a submission that the complaints made by Ms Kelly, Ms Pickersgill and Ms Horrocks should not have been accepted as credible, it does not mean that such a submission would necessarily be successful. The outcome of such a submission cannot be speculated on by the Full Bench as it would be the matter for the inquirer acting under s 86 of the *PSMA* to have regard not only to the submission but to all of the relevant circumstances going to credibility of the complaints and the complainants.

176 I also agree with the Acting President's observations that it is regrettable that the charges against Mr Weygers have not been fairly enquired into as the charges were serious. However even though the findings and penalty have been declared a nullity, it does not mean that the inquiry under s 86 of the *PSMA* cannot either be reopened or alternatively recommenced (as a new inquiry by another enquirer appointed by the appellant), the error corrected and fresh findings made as to whether breaches of discipline have been committed by Mr Weygers. The Commission's order at first instance did not declare the charges against Mr Weygers a nullity or quash the charges in any way. Consequently by making the order that the findings that the charges were proven and the penalty imposed is a nullity, Mr Weygers is placed in the position prior to the making of the impugned decisions, that is, prior to the conclusion of the inquiry under s 86 of the *PSMA* (see the effect of an order to nullify the act of an employing authority made pursuant to the provisions of the *PSMA* in *Health Services Union of Western Australia (Union of Workers) v Director General of Health as the Metropolitan Health Service and Ors* (2008) 88 WAIG 543).

2009 WAIRC 00040

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING
	APPELLANT
	-and-
	PETER HANS WEYGERS
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 2 FEBRUARY 2009
FILE NO/S	FBA 9 OF 2008
CITATION NO.	2009 WAIRC 00040

Decision	Appeal dismissed
Appearances	
Appellant	Mr R Andretich (of Counsel), by leave, and with him Ms R Hartley (of Counsel), by leave
Respondent	Mr R I Viner QC, by leave, and with him Mr D Wee (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on Thursday, 20 November 2008, and having heard Mr R Andretich (of Counsel), by leave, and with him Ms R Hartley (of Counsel), by leave on behalf of the appellant, and Mr R I Viner QC, by leave, and with him Mr D Wee (of Counsel), by leave on behalf of the respondent, and reasons for decision having been delivered on 2 February 2009, it is this day, 2 February 2009, ordered that:

1. The name of the appellant is amended to, Director General of the Department of Education and Training.
2. The appeal is dismissed

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 00024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2009 WAIRC 00024
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
HEARD	**:**	THURSDAY, 25 SEPTEMBER 2008, FRIDAY, 26 SEPTEMBER 2008, MONDAY, 27 OCTOBER 2008, TUESDAY, 28 OCTOBER 2008, WEDNESDAY, 29 OCTOBER 2008, THURSDAY, 30 OCTOBER 2008, FRIDAY, 31 OCTOBER 2008, TUESDAY, 16 DECEMBER 2008
DELIVERED	**:**	FRIDAY, 23 JANUARY 2009
FILE NO.	**:**	PRES 3 OF 2008, PRES 4 OF 2008, PRES 5 OF 2008, PRES 6 OF 2008
PARTIES		BEN RICHARD THOMPSON
		APPLICANT
		-and-
		KEVIN NOEL REYNOLDS - THE SECRETARY
		FIRST RESPONDENT

-and-

THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

-and-

WARWICK GATLEY AM, THE RETURNING OFFICER, WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

PRES 3 OF 2008

-AND-

BRIAN BYRON

APPLICANT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY

FIRST RESPONDENT

-and-

THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

-and-

WARWICK GATLEY AM, THE RETURNING OFFICER, WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

PRES 4 OF 2008

-AND-

SEAN MALCOLM

APPLICANT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY

FIRST RESPONDENT

-and-

THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

-and-

WARWICK GATLEY AM, THE RETURNING OFFICER, WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

PRES 5 OF 2008

JIM JOSEPH MELLOR

APPLICANT

-and-

THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS ("CFMEUW")

FIRST RESPONDENT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY, CFMEUW

SECOND RESPONDENT

-and-

WARWICK MCLEAN GATELY AM - ELECTORAL COMMISSIONER, WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

-and-

WAYNE NICHOLSON - RETURNING OFFICER (CFMEUW ELECTIONS), WESTERN AUSTRALIAN ELECTORAL COMMISSION

FOURTH RESPONDENT

PRES 6 OF 2008

CatchWords:

Industrial Law (WA) - Section 66 applications in relation to alleged irregularities in connection with election of organisation's offices – Alleged nominations wrongly rejected – Alleged member wrongly precluded from voting - Order that no further step be taken in election pending hearing and determination of applications - Evidence requires broader inquiry - Coexistent but distinct - State branch of federal organisation and State organisation – Organisations managed and administered 'as one and the same'.

Membership fees – Members paid single membership contribution to both State and federal organisations - Payment of membership contributions into a 'general account' held by federal organisation – 'Direct debit' method of payment encouraged by organisation's executive not permitted by rules.

Financial membership and eligibility to vote - "Continuously" financial members and eligibilty to nominate.

Whether irregularities in the conduct of the election – Accuracy of electoral roll – Basis on which the executive and secretary decided financiality of members – Membership contributions invalidily increased.

Membership under the rules of the organisation discussed – s71 certificate - whether election to proceed – Election to proceed – Minutes of proposed orders required.

Legislation:

Industrial Relations Act 1979 (WA): s7(1), s62, s60(1), s63(1), s63(2), s64B, s64C, s64D, s65, s66(1), s66(2), s66(2)(e), s66(2)(e)(i), s66(2)(f), s66(4), s71, s71(4), s71(5), s71(5)(a)

Workplace Relations Act 1996 (Cth) (the WRA): Schedule 10

Industrial Arbitration (Union Election) Regulations (1980)

Result:

Minutes of proposed orders required

Representation:

Counsel:

Applicants	Mr P G Laskaris (of Counsel), by leave, and with him Mr T Kucera (of Counsel), by leave, and Mr I C Latham (of Counsel), by leave
First Respondent	Mr K J Bonomelli (of Counsel), by leave
Second Respondent	Mr R C Kenzie QC (of Counsel), by leave, and with him Mr T J Dixon (of Counsel), by leave
Third Respondent in PRES 3-5 of 2008	Ms N Eagling (of Counsel), by leave, and Mr R Bathurst (of Counsel), by leave
Third Respondent and Fourth Respondent in PRES 6 of 2008	Ms N Eagling (of Counsel), by leave, and Mr R Bathurst (of Counsel), by leave

Solicitors:

Applicants	:	Leask & Co.
First Respondent	:	Jeremy Noble Barristers & Solicitors
Second Respondent	:	Slater & Gordon Lawyers
Third Respondent in PRES 3-5 of 2008	:	State Solicitor for Western Australia
Third Respondent and Fourth Respondent in PRES 6 of 2008	:	State Solicitor for Western Australia

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Case(s) referred to in reasons:

Allen v Sideris (1984) 3 FCR 548

Bailey v Krantz (1984) 13 IR 326

BLPPU v CMETU (2001) 81 WAIG 2722

Harken v Dornan (1992) 72 WAIG 1727

Moore v Doyle (1969) 15 FLR 59

Re Bailey; Re Transport Workers Union of Australia (Victorian Branch) (1997) 79 IR 1

Re Carter; Re Federated Clarks Union of Australia, Victorian Branch (No 1) (1989) 32 IR 1

Re Collins; Ex parte Hockings (1989) 167 CLR 522

Stacey v Civil Service Association of Western Australia (Inc.) [2007] WAIRC 568 (2007) 87 WAIG 1229

The Queen v Gray; Ex parte Marsh (1985) 157 CLR 351

Case(s) also cited:

ALAEA [2005] FCA 18, 139 IR 268

Commonwealth of Australia v Verwayen (1990) 170 CLR 394

Craine v Colonial Mutual Fire Insurance Co. Ltd (1920) 28 CLR 305

Finlayson v Carr [1978] 1 NSWLR 657

Forbes v SPSFWA [1998] FCA 1210

Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641

Hansch v Transport Workers' Union of Australia [2000] FCA 473

Kammins Ballrooms Co. Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850

Krantz v The Federated Clerks' Union of Australia (1984) 5 FCR 416

Larratt v Bankers and Traders Insurance Co. Ltd (1941) 41 SR (NSW) 215

Leveridge v Shop Distributive and Allied Employees' Association (1977) 17 ALR 145

Lovell v Federated Liquor and Allied Industries Employees' Union of Australia (1978) 22 ALR 704

Prichard Re; Federated Clerks Union of Australia (1985) 12 FCR 66

R v Holmes; Ex parte Public Service Association of New South Wales (1977) 140 CLR 63

Re CWU [1996] IRCA 300

Re Election for Office in Transport Workers Union of Australia, Western Australia Branch (1992) 40 IR 245

Re Elections of Offices In the New South Wales Branch of the Transport Workers' Union of Australia v Re Alleged Irregularities In the Conduct of Those Elections [1990] FCA 43

Re Elliot [1999] FCA 1616

Re FCAIEU; Ex parte Farrow (1976) 27 FLR 430

Re Ivory (1993) 41 FCR 267

Re Keeley; Ex parte Kingham (1995) 1 ICRC 311

Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld) (1995) 184 CLR 620

Re Stapleton (1983) 50 ALR 293

Re TWUWA (1989) 89 ALR 575

Re Western Australian Principals' Federation [2008] WAIRC 1285

Rennie v Bunn; Bunn v Good [1997] IRCA 102

Robertson v CSA (2003) 83 WAIG 3938

Sharp v Sutton (1996) 73 IR 185

State of Victoria v Sutton (1998) 195 CLR 291

Sutton v Sharp (1994) 1 IRCR 259; 57 IR 102

Sutton v Sharp (No 2) (1995) 62 IR 121

Sutton v Sharp (No 3) [2000] IRCA 1

The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9) [2008] WASC 239

Thompson v Palmer (1933) 49 CLR 507

Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387

Ward v Williams (1982) 4 IR 78

Williams v Ward (1984) 8 IR 234

Reasons for Decision

RITTER AP:

Introduction

1 The second respondent (the CFMEUW) is an organisation registered under the *Industrial Relations Act 1979* (WA) (*the Act*). This proceeding is an inquiry, under s66(1) and (2) of *the Act*, into alleged irregularities in connection with the election for offices in the CFMEUW.

2 The inquiry commenced as four separate applications. In PRES 3-5 of 2008 the alleged irregularity was that the nominations of Mr Thompson, Mr Byron and Mr Malcolm for the office of an organiser were wrongly rejected by the Returning Officer. In PRES 6 of 2008 the alleged irregularity was that Mr Mellor was wrongly not included on the roll of electors. As there was a commonality or linking of issues in PRES 3-5 and PRES 6, they were consolidated into a single proceeding.

3 Mr Thompson, Mr Byron and Mr Malcolm were part of what was known as the "Renew the CFMEU" team. Mr Mellor was also a "Renew the CFMEU" team supporter. That team sought, at the election, to challenge the first respondent (Mr Reynolds) and other people on his "team" who nominated for offices. Mr Darren Kavanagh, the leader of the "Renew the CFMEU" team, had nominated for the position of secretary.

4 The Construction, Forestry, Mining and Energy Union, Construction and General Division, Western Australian Divisional Branch (the CFMEU) is a State branch of an organisation registered under the *Workplace Relations Act 1996* (Cth) (*the WRA*). The CFMEU is not associated with the CFMEUW under *the Act*, although the two organisations have similar membership coverage.

5 At the time of the commencement of the applications the CFMEU was also due to have an election. In that election Mr Kavanagh challenged Mr Reynolds for the position of divisional branch secretary and other members of the "Renew the CFMEU" and "Reynolds" teams stood for other offices. The CFMEU elections took place in November 2008 and the results were declared on 21 November 2008. The outcome was that Mr Reynolds and members of his team were elected to each contested position.

6 The applicants in PRES 3-6, on 27 November 2008, applied for leave to discontinue their applications. The applications to discontinue have not as yet been decided. This is to avoid any jurisdictional complications for the election inquiry which the proceeding has evolved into.

7 Due to evidence which was given, it became apparent that more questions emerged, of possible irregularities, than just those which were within the framework of the four filed applications. At the time I colloquially referred to the evidence, which will be later described, as opening a "can of worms". During the hearing this then became a catch-phrase to describe the emergent issues from that evidence. As a consequence, the proceedings evolved into a broader election inquiry under s66(2)(e) of *the Act*. Each of the parties agreed that it was within the jurisdiction contained in s66(2)(e) of *the Act* for this to occur. There were then issues and questions which I settled, with the co-operation of the parties, to provide a sound framework for the future conduct of the inquiry. These will be later described.

8 At the conclusion of the hearing of the inquiry the primary issues, as later set out, were whether an election should be held at all, given the outcome of the CFMEU election, and if so the basis on which it should be conducted.

The Jurisdictional Background

9 Each of the applications comprising PRES 3-6 were based upon the jurisdiction which the President has under s66(2)(e) of *the Act* to inquire into any election for an office in an organisation "if it is alleged that there has been an irregularity in connection with that election".

10 The word "organisation" is defined in s7(1) of *the Act* to mean an organisation that is registered under Division 4 of Part II. The CFMEUW is an organisation so registered. The word "office" is defined in s7(1), of *the Act* to mean, amongst other things, "an office within the organisation for the filling of which an election is conducted within the organisation". The election which PRES 3-5 sought an inquiry into is the election for the offices of "organiser" of the CFMEUW.

11 The "structure" of the CFMEUW is set out in rules 16-22. Rule 16(3) provides:

> "(3) Subject to Rule 17 of these Rules there shall be six (6) Organisers, who shall be elected every four (4) years by and from the financial members of the Union."

12 As organisers for the CFMEUW are elected, the office of organiser is an "office" in accordance with the definition in s7(1) of *the* Act. The election in which Mr Mellor alleged there was an irregularity was the election of all "offices" in the CFMEUW which had been due to take place in 2008.

13 "Irregularity" is defined in s7(1) of *the Act* as follows:

> '***irregularity'***, "in relation to an election for an office, includes a breach of the rules of an organisation, and any act, omission, or other means by which the full and free recording of votes, by persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;"

14 It was not in dispute that what was asserted in PRES 3-6 of 2008 constituted alleged irregularities for the purpose of s66(2)(e) of *the Act.*

Procedural Background

15 The applications in PRES 3-5 were filed on 11 September 2008. PRES 6 was filed on 18 September 2008. Each application was initially programmed to proceed to hearing on an expedited basis so that the then present timetable for the election of organisers and other offices in the CFMEUW could continue as set by the Returning Officer. That timetable was in accordance with the rules of the CFMEUW and will be later described. Initially, at directions hearings, orders were made for:

(a) The consolidation of PRES 3, PRES 4 and PRES 5 of 2008 into a single proceeding. This allowed a single set of documents to be filed and a single hearing to occur.

(b) Notice of the applications and an opportunity to be heard to be provided to each of the 10 people who had nominated for the office of organiser and whose nominations were accepted by the Returning Officer. (Strictly this was not an order but an informal direction. None of these people notified any intention to be heard).

(c) The filing and service of affidavits by the parties.

(d) The parties providing written advice to my associate and the other parties as to whether and if so which witnesses who had sworn or affirmed affidavits were required for cross-examination at the hearing.

(e) The filing and service of outlines of submissions.

(f) The third respondent (the Returning Officer) to "not take any further step in [the] conducting of the elections, in accordance with the rules of the second respondent, until the hearing and determination of the proceeding or further order".

16 The last order has remained in place.

17 On 17 September 2008 Mr Robert Mcjannett filed an application to be joined as a party to the proceeding. Mr Mcjannett is a member of the CFMEUW and had nominated for the position of assistant secretary. (He also unsuccessfully stood for the position of assistant secretary in the CFMEU election). Mr Mcjannett was not a member of either the "Renew the CFMEU" or "Reynolds" teams. The purpose of his application was to facilitate the making of submissions to try and ensure the timetable for the elections would not be disturbed. In his application Mr Mcjannett set out the reasons for wanting to make these submissions. One was Mr Mcjannett's nomination as assistant secretary. The other reasons do not need to be here mentioned. The application of Mr Mcjannett was brought before me on 22 September 2008 and adjourned to the first day of the substantive hearing. It was later dismissed at a directions hearing on 5 December 2008.

18 Of the respondents, only the CFMEUW filed a notice of answer and counter-proposal in PRES 3-5 of 2008. The position of Mr Reynolds and the Returning Officer was that they would simply abide by the decision of the Commission. The CFMEUW's notice of answer and counter-proposal attached relevant documents and said that "it would appear that the [relevant applicant] had not been continuously financial during the period 4 September 2007 and 4 September 2008, as required by rule 23(1)". This position was initially maintained by the CFMEUW at the hearing; that is, each of the applicants in PRES 3-5 had not been entitled to nominate because of their lack of the financial status as required by the rules of the CFMEUW. It softened however after the application to discontinue was filed. With respect to PRES 6, the CFMEUW did not file a notice of answer and counter-proposal. Its position however, as set out in affidavits, was that Mr Mellor was not on the electoral roll as he had not been a financial member.

The Rules of the CFMEUW

19 The rules were attached to an affidavit of Mr Ian Botterill sworn on 19 September 2008. Mr Botterill was appointed by Mr Gately, the third respondent in Pres 3 of 2008, to be the "Substitute Returning Officer" for the election.

20 Rule 1 provides:

> "**1 - NAME**
>
> The Union is an organisation of employees which shall be known as "The Construction, Forestry, Mining and Energy Union of Workers" ("the Union")."

21 Rule 3 sets out the objects of the CFMEUW. Objects 3(1), (8), (13) and (15) all provide for things to be done for the benefit of "members". Rule 3(18) provides for the following object:

> "**3 - OBJECTS**
>
> The objects for which the Union is established are, by the provision and distribution of funds, and by all other lawful means:-
>
> …
>
> (18)To affiliate with, amalgamate with, co-operate with, or assist any person or body which has any object similar to any of the objects of the Union, including obtaining certificates or entering into agreements pursuant to section 71 of the Industrial Relations Act (WA) 1979 as amended or like provisions, making applications pursuant to the provisions of section 72A of the Industrial Relations Act (WA) 1979 as amended or like provisions and entering into agreements with organisations registered pursuant to Commonwealth Industrial Relations legislation."

22 This object has not been acted upon. Evidence about this will later be described.

23 Rules 4-9 appear under the heading "Membership". Rule 4 deals with "Eligibility for Membership". In general terms the rule specifies the type of employment that members are to be engaged in. Rule 5 obliges members to register a postal address with the CFMEUW. Rule 6 provides for a register of members to be kept by the secretary. This says:

> "**6 - REGISTER OF MEMBERS**
>
> A Register of Members shall be kept by the Secretary. The Register shall show the names and addresses of all members, the date of joining the Union and of resignation or demise, or the date when he or she otherwise ceased to be a member of the Union, and all entrance fees, contributions, levies and fines and all other fees paid into and benefits received from the funds of the Union by all members. The Register shall be purged on not less than four occasions in each year by striking off the names of members whose membership has ended under Rule 8 of these rules."

24 Rule 7 provides for members who have been "struck off" to regain membership. To do so they must pay an entrance fee of all of their "arrears" when they were "struck off". Rule 8 is about the termination of membership. Relevantly, with respect to the financial position of a member, rules 8(2) and (3) provide:

> "(2) Where a member's subscription has expired and has not been renewed, on expiration of a period of three months, the membership is terminated but the member shall be responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.
>
> (3) Notice of resignation does not relieve a member from liability for any fees, contributions, levies or fines which may become payable during the notice period." (Notice of resignation is referred to in rule 8(1)).

25 Rule 9 provides for a "clearance card", signed by the secretary, to be provided to a member who is "working in another industry or leaving the Union". Rules 10-15 of the rules are under the heading "Finance". Rule 10 provides for entrance fees and contributions. Rule 10(1)-(5) are about applications by and the admission of candidates to become members. Rule 10(6)-(10) provide for contributions and other payments to be made by the members. Rule 10 is as follows:

> "**10 - ENTRANCE FEES AND CONTRIBUTIONS**
>
> (1) A candidate for membership of the Union shall forward or cause to be forwarded to the Secretary of the Union the entrance fee together with an application on the form prescribed for that purpose in the Schedule hereto stating the full name and address of the candidate and bearing the signature of the candidate and that of a witness to the candidate's signature.
>
> (2) The entrance fee to the Union payable by all applicants shall be not less than twenty dollars ($20.00) or such other sum as determined by the Executive.
>
> (3) Subject to subrule (4) of this Rule, upon receipt by the Secretary of the application and entrance fee he or she shall sign and date the application and the candidate shall be deemed to be a member of the Union as from the date of receipt of such application and entrance fee by the Secretary and shall be liable from that date for payment of the contributions, levies, fines and fees payable by members of the Union (subject to the exceptions contained in these Rules).
>
> (4) Notwithstanding anything contained in these Rules the Secretary shall have, and is hereby given, the power to refer any application for membership to the Executive for consideration and decision, in which case the candidate shall not become a member until notified to that effect in writing by the Secretary.
>
> (5) Should the Executive decide against the admission of the candidate the candidate shall have the right of appeal to the following General Meeting of the Union which shall have the power to grant or reject the application or to defer it until the next succeeding General Meeting for final decision. The date of such decision of the General Meeting, where favourable to the candidate, shall be deemed to be the date of his or her admission to membership of the Union.
>
> (6) Every member shall pay such contributions, fines, fees and levies as may be prescribed by the Rules for the time being of the Union.
>
> (7) Upon payment of the contributions, fees and any fines or levies that have been imposed a member shall receive a half-yearly ticket. A new member shall receive a copy of these Rules on request.

(8) Any member losing his or her ticket shall, upon application to the Secretary and on payment of five dollars ($5.00) be granted a duplicate ticket.

(9) (a) Contributions shall be payable half yearly in advance in March and September of each year. The Executive shall decide as at the date of the amalgamation the amount of contributions to be paid until July of the next year, and thereafter the Executive shall decide each year in the month of July the amount of Union contributions to be paid for the following twelve months. Total annual contributions shall be based on one percent (1%) of the All Industry Groups (Adult Males) Average Weekly Earnings as shown in the Australian Bureau of Statistics, Earnings Indexes or like indicator for June in the preceding year;

(b) Each new member of the Union shall be liable to contribute immediately on admission to membership, his or her contributions, (in addition to the entrance fee) for the unexpired portion of the half-year in which his or her application for membership is made and thereafter shall pay in the same way as existing members PROVIDED THAT any person admitted to membership during the last six weeks of any half-year ending on 31 March or 30 September may at the discretion of the Secretary of the Union be relieved of his or her liability to pay contributions for that half-year;

(c) Any member of the Union not making his or her payment in accordance with this Rule shall be deemed unfinancial and shall lose all privileges of membership and shall be liable to be sued for his or her arrears without notice. He or she shall not again become a financial member entitled to any privilege of membership until all arrears have been paid. Any member is entitled, if he or she so desires, to pay for two half-years' contributions at the same time. Notwithstanding any provision of this Rule, every member of the Branch who is financial on the day the Returning officer calls for nominations shall be eligible to vote;

(d) All contributions, fines, fees or levies shall be paid by any member to any of the authorised collectors of the Union, (including authorised workplace delegates) or to the Secretary of Union, but to no other person or member. No receipt shall be valid unless given in or on the form prescribed by the Union.

(10) The Executive shall have power, upon the case being properly presented to it, to cancel the whole or any part of a member's contributions or arrears caused by unavoidable distress or sickness."

26 Rule 10(1) refers to the "Schedule" to the rules. This in the following form:

"**THE SCHEDULE**

APPLICATION BY CANDIDATE FOR MEMBERSHIP

I .....

of .....

HEREBY APPLY to become a member of The Construction, Forestry, Mining and Energy Union of Workers, an Organisation of Employees registered under the Industrial Relations Act (WA) 1979.

DATED the ..... day of ....., 20……

Date of receipt by Secretary: the ..... day of .....,

20……

Signature of Secretary .....

Signature of Applicant .....

Signature of Witness ....."

27 Rules 11-15 are about the imposition of levies and fines, the property and funds of the union, the financial year, the appointment of an auditor and provision of a financial report. Rule 12 is:

"**12 - PROPERTY AND FUNDS OF THE UNION**

Subject to the control of the Union by General Meeting the funds and property of the Union shall be under the control of the Trustees. They shall be invested in the name of the Union by way of current account or on fixed deposit in the Commonwealth Savings or Trading Bank or such other bank, Building Society, Credit Union or other financial institution, or Government issued securities, or by way of investment in other securities or equities as the Executive may determine and notify to the Secretary."

28 As stated previously, rules 16-22 are under the heading "Structure". Rule 16(1) sets out those officers who comprise the "Executive" of the CFMEUW as being the:

> "President, Secretary, two (2) Assistant Secretaries, Senior Vice President, Vice President, Treasurer, two (2) Trustees, and two (2) Ordinary Executive Members who shall be elected every four (4) years by and from the financial members of the Union."

29 I have already referred to rule 16(3) about the election of organisers. As to the powers and duties of the executive, rule 16(4)-(8) provides:

> "(4) The Secretary, two (2) Assistant Secretaries, the President and Organisers shall be paid such salary as shall be fixed from time to time by a General Meeting. The Secretary shall be the Principal Officer of the Union. In the event that an Organiser also holds a position on the Executive he or she shall only be entitled to one salary being the higher salary of the two positions.
>
> (5) The Executive shall meet at least once a fortnight and a quorum shall consist in all cases of five (5) members.
>
> (6) A report of the Executive shall be submitted to each General Meeting of the Union.
>
> (7) In all matters that shall arise between General Meetings of the Union and subject to the control of General Meetings of the Union the Executive shall have the control and conduct of the business of the Union and shall act on its behalf in all matters. It shall have the daily management of the business of the Union. It shall be bound to observe the decisions of General Meetings of the Union.
>
> (8) No power shall be delegated to the Executive to cancel any meeting authorised by the members, or to expend any portion of the Union funds other than for administrative expenses and current wages, or to dispose of any property of the Union unless the approval of the Union has been sought and obtained at a General Meeting of the Union."

30 Rules 23-24 are under the heading "Elections". Rules 23(1)-(19), (22), (30), (36) and (37) are relevant and are as follows:

"**23 - ELECTION OF EXECUTIVE AND ORGANISERS**

> (1) All candidates for election to any office shall be financial members of the Union continuously for one year immediately preceding the next closing date for nominations.
>
> (2) No member shall be eligible to hold more than one office on the Executive.
>
> (3) No member shall be eligible to nominate for more than one office on the Executive at any periodical election.
>
> (4) 2004 and every fourth year thereafter shall be known in these Rules as the "election year".
>
> (5) The Executive shall not later than 31 May in each election year, appoint a Returning Officer (who shall not be the holder of any office in, and not be an employee of the Union but who shall have the qualifications for nomination required by subrule (1) of this Rule) for the purpose of conducting the election in accordance with these Rules.
>
> (6) The Returning Officer shall call for nominations by advertising in at least one daily newspaper circulating widely within the State no later than 31 July of each election year.
>
> (7) The date of commencement of the period for lodging nominations shall be 21 August in each election year. The closing date for nominations shall be at a time and place or in a manner fixed by the Returning Officer and mentioned in the advertisement but the closing date shall be 4 September in each election year.

(8) The Returning Officer shall obtain from the Secretary a list of the persons eligible to vote.

(9) The Returning Officer shall check the list with records at the Union office and shall compile a roll of members eligible to vote, containing the names, addresses and membership number of all such members.

(10) Every member of the Union who is financial on the day on which the Returning Officer calls for nominations shall be eligible to vote.

(11) Nominations must be in writing, signed by the candidate and endorsed by at least two financial members and must be made at the time, place and in the manner mentioned in the advertisement.

(12) The Returning Officer shall have the power in accordance with these Rules to accept or reject such nominations; provided that if the Returning Officer rejects any nomination the following provisions shall have effect:

(a) The Returning Officer shall notify the person concerned of the defect in the nomination; and

(b) The Returning Officer shall where it is practicable to do so, give the person concerned the opportunity if possible of remedying the defect within not less than seven (7) days of notification; and

(c) If the person concerned within such period is able to and does in fact remedy the defect in the nomination in accordance with these Rules, the Returning Officer shall thereupon accept such nomination.

(13) Where after the closing of nominations there is only one valid nomination for a single office or only sufficient valid nominations for multiple offices, the Returning Officer shall declare such nominee or nominees duly elected to the office or offices concerned at the General Meeting referred to in subrule (36) of this Rule.

(14) Where after the closing of nominations there is no valid nomination for a single office or insufficient valid nominations for multiple offices, the Returning Officer shall report the fact to the Union which shall declare that an extraordinary vacancy or vacancies exist in that office or offices and shall treat such vacancy or vacancies as a casual vacancy or vacancies pursuant to Rule 24 of these Rules.

(15) Where after the closing of nominations there are more candidates than the number required for any office, the Returning Officer shall place the candidates' names on the ballot paper. The order in which names are to appear on the ballot paper shall be drawn by the Returning Officer in the presence of two (2) Trustees of the Union.

(16) The Returning Officer shall order the printing of sufficient ballot papers for the purpose of the election, and if practicable, shall be present during the printing of all such ballot papers. Ballot papers shall be printed showing the full names of the Candidates for the respective offices and such ballot papers shall contain voting instructions.

(17) The Returning Officer shall obtain all such ballot papers with a certified statement of the number of ballot papers printed. Each ballot paper shall be initialled by the Returning Officer before distribution. All ballot papers shall be printed on watermark paper and the Returning Officer shall be responsible for ensuring that every ballot paper is properly watermarked before being forwarded to the member. On a count of ballot papers, only those which bear the watermark and the initials of the Returning Officer shall be counted.

(18) The Returning Officer shall fix dates when the ballot shall open and close. The period between the opening and closing date of the ballot shall not be less than twenty-one (21) days nor more than twenty-eight (28) days and the count of ballot papers shall be completed not later than 30 October in each election year.

(19) The Returning Officer shall forward by pre-paid post to each financial member so as to reach such member not less than fourteen (14) days before the closing of the ballot, a ballot paper and other ballot material in a sealed envelope and provide for the return of the ballot paper without expense to the member.

…

(22) The Returning Officer shall as soon as practicable after the closing of the ballot, collect the ballot box and convey the ballot box to an office selected by the Returning Officer, open the box, collect the ballot papers and proceed to count the ballot papers until the ballot is finished.

…

(30) Subject to the provisions of the Industrial Relations Act (WA) 1979 and the Industrial Arbitration (Union Election) Regulations, 1980 the decision of the Returning Officer shall be final.

(36) The Returning Officer shall declare the result of the election at a General Meeting of the Union to be called not more than twenty-one (21) days after the count is completed. At the General Meeting the Returning Officer shall provide a report of the election to the General Meeting and such report shall show the number of votes cast for each candidate, the number of informal votes and the number of ballot papers issued but not returned up until the time the ballot closed.

(37) The members of Executive and organisers declared elected unopposed by the Returning Officer, or declared elected pursuant to subrule (13) of this Rule, shall assume office on the first day after the declaration of the result of the election."

31 Last year was an "election year" under rule 23(4). Additionally because of the order I made, in accordance with s66(2)(e), (f) and s66(4) of *the Act*, and set out earlier, the election has not been able to take place by the date provided for in the rules.

32 The basis upon which Mr Thompson, Mr Byron and Mr Malcolm were said not to be entitled to nominate was because they did not meet the requirements of rule 23(1).

33 Rule 25 sets out the "Duties of Executive and Organisers". Relevantly rule 25(2) says of the secretary:

"(2) Secretary

The Secretary, who shall be the Principal Officer of the Union, shall:

(a) attend all meetings of the Union and prepare documents for Union and executive meetings and for the Auditor and Trustees;

(b) conduct and file all correspondence and summon members to all meetings;

(c) issue all summonses and keep all documents and accounts, books and papers belonging to the Union;

(d) submit to the President any urgent information he or she may officially receive and the President, together with the Secretary, shall decide on the best course to be pursued until the next meeting of the Executive;

(e) keep a register of the names and addresses of the officers and members of the Union;

(f) in conjunction with any one of the Trustees sign all cheques;

(g) the Secretary may sue or be sued on behalf of the Union;

(h) the Secretary shall be the principal spokesperson for the Union."

34 Rule 25(3)(b), (c) and (d) and 25(5) says, about the treasurer and trustees:

"(3) Treasurer

The Treasurer shall:

…

(b) receive all moneys and pay the them into the bank account of the Union immediately, with the exception of petty cash not exceeding five hundred dollars ($500.00) at any one time;

(c) keep a distinct and intelligible account of all moneys received and expended, with vouchers detailed therefore;

(d) submit a statement of his or her receipts and expenditure every three months to the members of the Union attending a General Meeting;

…

(5) Trustees

Any one of the Trustees shall sign all cheques in conjunction with the Secretary."

35 Rules 26 and 27 are about "Meetings". Rule 26(1) relevantly provides:

"**26 – GENERAL MEETINGS**

"(1) The Union shall hold General Meetings for the transaction of business on the second Wednesday of each calendar month at such time and place as the Executive or the Secretary may fix. The days on which such General Meetings are held may be varied by the Executive or the Secretary, provided that the Union shall hold a General Meeting at least once each calendar month. Where such variation is made a notice of the time and place of the meeting shall be given. Members may be notified of the varied time of the General Meeting by notice given:-

(a) In any newspaper circulated widely in the State;

(b) In any journal issued by the Union;

(c) To workplace delegates at addresses for notices kept at the office of the Union;

(d) By letter, circular, telegram or written notice to the members;

(e) By telephone; or

(f) By any one or more of the above means."

36 Rule 26(6) provides that a quorum for "Any Special General or Ordinary General meeting" is 30 members.

37 Rule 27 sets out the procedure at general meetings. Rule 27(1)(a) says that the first thing in the "order of business" is the reading of the minutes of the "previous General Meeting". I mention this as it implies that minutes of the general meetings will be kept. Under the heading "Miscellaneous", rule 31 provides:

"**31 - RETURNS TO REGISTRAR**

The Secretary shall annually furnish the Registrar of the Industrial Relations Commission with the duly audited statement of receipts and expenditure and balance sheet of the assets and liabilities of the Union, together with such other information required to be submitted to the Registrar, in accordance with the Industrial Relations Act (WA) 1979 as amended."

38 There are no other rules relevant to the proceeding.

Affidavits

39 The following affidavits were filed on behalf of the applicants:

(a) Mr Thompson dated 16 September 2008.

(b) Mr Byron dated 16 September 2008.

(c) Mr Malcolm dated 16 September 2008.

(d) Mr Mellor dated 21 September 2008.

(e) Mr Douglas Heath, builders labourer and "Kavanagh team" member, dated 22 September 2008.

40 The following affidavits were filed on behalf of the third and fourth respondent:

(a) Mr Botterill dated 19 September 2008.

(b) Mr Botterill dated 23 September 2008.

(c) Mr John Spurling, Registrar of the Commission, dated 23 September 2008.

(d) Ms Susan Bastian, Deputy Registrar of the Commission, dated 23 September 2008.

41 The following affidavits were filed on behalf of the CFMEUW in what has become the consolidated proceeding:

(a) Ms Peta Arnold, office manager of the CFMEU/CFMEUW, dated 22 September 2008 (Ms Arnold's first affidavit).

(b) Ms Arnold dated 22 September 2008 (Ms Arnold's second affidavit).

(c) Ms Arnold dated 23 September 2008 (Ms Arnold's third affidavit).

(d) Ms Arnold dated 24 September 2008 (Ms Arnold's fourth affidavit).

(e) Ms Amanda Dunn, CFMEU/CFMEUW receptionist, dated 23 September 2008.

(f) Mr Reynolds dated 20 October 2008.

The Course of the Proceedings

42 The substantive hearing of the inquiry commenced on 25 September 2008. Counsel for Mr Thompson, Mr Byron and Mr Malcolm made an opening submission. Mr Thompson and Mr Byron then gave their evidence and were cross-examined.

43 Ms Arnold was then interposed because Mr Malcolm was unavailable to give evidence until later that day. Ms Arnold completed her evidence in chief and was part way through being cross-examined when Mr Malcolm then became available and gave evidence. It was during the evidence of Ms Arnold given on that day that the "can of worms" was opened.

44 By the end of 25 September 2008 I decided that contrary to what had previously been contemplated, the hearing and determination of what was then separately PRES 3-5 of 2008 and PRES 6 of 2008 could not take place by 30 September 2008, so as to enable the then-existing election timetable to proceed. Accordingly it was decided that on the following day Ms Arnold would complete her evidence and then evidence would be given by Ms Dunn. Following that the hearing would be adjourned until 30 September 2008 so that consideration could be given to setting an appropriate framework for and the programming of the broader inquiry. The hearing proceeded as planned on 26 September 2008.

45 On 30 September 2008, after hearing submissions from the parties, the questions which I had drafted were settled and then formed the framework for the inquiry. (I will call them the "Inquiry Questions". They are later reproduced). The hearing was then adjourned so additional evidence could be brought before the Commission. The affidavit of Mr Reynolds was then filed. It provided, in detail, the response of the CFMEUW to the "can of worms" and Inquiry Questions.

46 On 27 October 2008 the affidavit of Mr Mellor was received as an exhibit and explained by his counsel. He was not cross-examined. In addition, other affidavits were received as exhibits and objections to some paragraphs of the affidavit of Mr Reynolds were heard and determined.

47 On 28 October 2008 submissions were made by the CFMEUW that fairness dictated it be provided with the potential irregularities at issue in the inquiry. I accepted the submission and prepared a draft schedule which was distributed to the parties. The schedule was finalised on 29 October 2008 after hearing submissions from the parties. It is later reproduced.

48 Mr Reynolds then commenced giving evidence. Mr Reynolds' evidence took the rest of 29 October 2008, all of 30 October 2008 and part of 31 October 2008. That completed the oral evidence.

49 Mr Latham, one of the counsel for the applicants, then made some preliminary closing submissions about the nature and extent of the jurisdiction of the President under s66 of *the Act*. An outline of the submissions was also provided. Programming orders were then made for the filing of submissions and a further hearing. That hearing was scheduled to take place on dates to be fixed in February 2009.

50 After the hearing was adjourned, and upon reflection, I formed the view that it was in the interests of all concerned, including the members of the CFMEUW, that the inquiry be determined more expeditiously. Accordingly after hearing from the parties the timetable was adjusted to lead to the hearing of final submissions on 16 December 2008.

51 In the interim, the outcome of the election of officers in the CFMEU occurred, and Mr Thompson, Mr Byron, Mr Malcolm and Mr Mellor filed their applications for leave to discontinue. These applications were first heard on 5 December 2008. As I have said, to avoid any jurisdictional complications, they were stood over until 16 December 2008. At the same time I revoked the order which had been made requiring the applicants to file written submissions. I also said they did not need to play an active role at the hearing on 16 December 2008. One of their counsel did attend, as a matter of courtesy, on that day.

52 Final submissions were filed on behalf of the third and fourth respondents on 26 November 2008. Final submissions were filed on behalf of the CFMEUW on 11 December 2008. Mr Reynolds simply adopted the submissions of the CFMEUW. The hearing of final submissions duly occurred on 16 December 2008.

53 I then reserved my decision.

The Inquiry Questions

54 By corrected order dated 3 October 2008 the broader framework for the inquiry was established by the following orders:

> "1. PRES 6 of 2008 be consolidated into the same proceeding as PRES 3-5 of 2008.
>
> 2. The proceedings continue on the basis that as part of, or in addition to the applications which have been filed, the following be inquired into by the Commission:-
>
> (1) (a) What, if anything did the executive of the second respondent decide in July of each of 2006, 2007 and 2008 to be the contributions to be paid by the members of the second respondent for the "following 12 months" in accordance with rule 10(9)(a) of the Rules of the second respondent. ("the Rules").

(b) What, if anything, did the executive of the second respondent otherwise decide in the years 2006, 2007 and 2008 in relation to the contributions to be paid by members of the second respondent, and what if anything, is the relevance of this to deciding the financial members of the second respondent.

(2) What was the basis upon which the first respondent decided and declared in returns to the Commission in 2007 and 2008 that the number of members of the second respondent was 7,702 and 8,471 respectively.

(3) The reason why, when, by whom and the basis upon which it was decided that members of the second respondent could pay their contributions by direct debit or in any method other than that described in rule 10(9)(a) of the Rules.

(4) What was the basis upon which the first respondent and/or the second respondent decided who the members, financial members and "financial members of the union continuously for one year" were, for the purposes of rule 10(9)(c), rule 23(1) and rule 23(10) of the Rules, on 23 July 2008 and 4 September 2008.

(5) With respect to the payment by members of the second respondent of any contributions or purported contributions under rule 10(9)(a) of the Rules or otherwise:

(a) Were the contributions deposited into or credited to an account with any financial institution(s).

(b) If the answer to (5)(a) is yes, what was the style and title of the account(s) and the owner of the funds in the account(s).

(c) What impact, if any, do the answers to questions (5)(a) and (5)(b) have in deciding who were and are the members and financial members of the second respondent, and whether a member was entitled to nominate for election in accordance with rule 23 of the Rules.

(6) The basis upon which it should be determined as at 23 July 2008 and/or 4 September 2008:

(a) Who were the members of the second respondent.

(b) Who were the financial members of the second respondent.

(c) Who were the people entitled to nominate for offices in accordance with rule 23 of the Rules.

(7) The proper construction of the Rules with respect to membership, financial membership, eligibility to nominate for offices in elections and eligibility to vote in elections for offices.

(8) What orders should be made, if any, in PRES 3-5 of 2008 and PRES 6 of 2008 to determine the applications or otherwise pursuant to s66(2)(e) and s66(2)(f) of the *Industrial Relations Act 1979* (WA).

…."

55 The Inquiry Questions will be given the above numbers, excluding the "2" and the brackets. For example, was order 2(2), will be referred to as Inquiry Question 2.

Schedule of Possible Irregularities

56 The schedule of possible irregularities which was settled after hearing submissions dated 29 October 2008 is as follows:

"1. In this schedule:

(a) The second respondent in PRES 3 of 2008 is called the "*CFMEUW*".

(b) The "*rules*" are the rules of the CFMEUW lodged with the Commission.

(c) In the quoted rules, the CFMEUW is called "*the Union*".

(d) The Construction Forestry Mining and Energy Union, Construction and General Division, Western Australian Division Branch is called the "*CFMEU*".

(e) "Member" where appropriate includes any purported member.

(f) "KNR" means the affidavit of Mr Kevin Noel Reynolds, which is exhibit R2F in these proceedings.

(g) The "*election*" is the 2008 election of the executive and organisers of the CFMEUW.

(h) The *Industrial Relations Act 1979* (WA) is called the "*the Act*".

(i) The "*questions*" mean the questions set out in order 3 of the corrected order made on 3 October 2008.

(j) The content of the brackets at the end of the sub-paragraphs of paragraph 4, set out the number of the paragraphs of KNR which give rise, in possible combination with other evidence, to the alleged irregularities.

(k) The "*secretary*" means the secretary of the CFMEUW.

2. The Commission, constituted by the Acting President, is under s66 of *the Act* inquiring into alleged irregularities in connection with the election.

3. The alleged irregularities are those set out in the applications filed in PRES 3-6 of 2008, and those which may possibly arise from the questions.

4. Based on the evidence received to date, the possible irregularities arising from the questions are whether there has been in 2007 and 2008 a failure or possible failure to follow these rules and/or sections of *the Act*:

(a) Rule 10(1), insofar as applications for membership may not be in the form prescribed for that purpose in the schedule to the rules (KNR [59]).

(b) Rule 10(1) insofar as entrances fees and contributions may not have been forwarded to or receipted by the CFMEUW (KNR [59]).

(c) Rule 10(9)(a), in that the executive did not decide in June of 2006, 2007 or 2008 "the amount of Union contributions to be paid until July" of the following year (KNR [80]).

(d) Rule 10(9) and rule 27 insofar as there may have been a failure to decide upon or properly minute or record increases in six monthly membership contributions (KNR [81]-[86]).

(e) Rule 6 and rule 23(2)(e) and/or also s63(1) and s63(2) of *the Act* insofar as the secretary and the CFMEUW as an organisation may not have kept a register of members in that:

(i) The register did not properly show the details required by rule 6.

(ii) The register did not show all the members or show the date of the cessation of membership, because the register was not kept and maintained by the proper application of the rules of the CFMEUW about membership and the termination of membership in accordance with rules 8 and 10(9)(a)-(c) (KNR [87]-[92], [129]).

(g) Rule 10(9)(a) in that contributions were not made or required to be made half yearly in advance and instead were also solicited and received by way of "direct debit" or "payroll deduction" instalments (KNR [105]-[110]).

(h) With respect to 4(b) it will be relevant to consider:

(i) The bank account into which membership contributions have been deposited.

(ii) Whether that banking of the membership contributions has been:

(aa) Authorised by a General Meeting; and/or

(ab) in accordance with the rules, and in particular rules 10(6) and 10(9).

5. The Inquiry will need to consider:

(a) Whether, for the purposes of rules 10(9)(c), 23(1) and 23(8)-23(10) and having regard to any irregularities that may be established whether:

(i) There are presently, and/or;

(ii) There were as at 23 July 2008, and/or;

(iii) There was as at 4 September 2008:

(aa) any members of the CFMEUW;

(ab) any members of the CFMEUW who are or were financial;

(ac) any members of the CFMEUW who are or were continuously financial; or

(ad) any members of the CFMEUW who are or were eligible to vote in the election.

(b) In particular, question 5(a) will arise if one or more of these irregularities is established:

(i) No membership contributions have been paid to and/or received by the CFMEUW.

(ii) No membership contributions have been set in accordance with rule 10(9).

(iii) Membership contributions have not been paid as "prescribed by the Rules" in accordance with rule 10(6).

(iv) There has been no valid decision made by the CFMEUW under its rules to increase membership contributions, permit a joint application to become a member of the CFMEUW and the CFMEU and to solicit or accept "*direct debit*" or "*payroll deductions*" contributions, not in accordance with rule 10(9)."

Background to the Election

57 This information is primarily taken from the affidavits of Mr Botterill. On 14 May 2008 Mr Reynolds wrote to the Registrar of the Commission requesting the conduct of an election for positions in the CFMEUW. On the following day a Deputy Registrar of the Commission wrote to Mr Gately to request that the Western Australian Electoral Commission (WAEC) conduct the election pursuant to s69(4) of *the Act*. On 9 June 2008 Mr Gately appointed Mr Wayne Nicholson as the Returning Officer for the election. Mr Nicholson established an election timetable providing for:-

(a) The electoral roll to close on 23 July 2008.

(b) An advertisement detailing the election being published on 23 July 2008.

(c) Nominations for offices opening on 21 August 2008 and closing on 4 September 2008.

(d) Election packages being mailed out to voters on 23 September 2008.

(e) The poll closing on 16 October 2008.

58 On 13 August 2008 Mr Botterill was appointed as a Substitute Returning Officer because Mr Nicholson became unavailable due to the calling of the State Parliamentary election.

59 In or about early September 2008 nominations were received by the WAEC from, amongst others, Mr Thompson, Mr Byron and Mr Malcolm, for the position of organiser. Mr Botterill formed the view that Mr Thompson, Mr Byron and Mr Malcolm were not continuously financial members of the CFMEUW as required by the rules as a condition for nomination. Accordingly Mr Botterill informed them they were not entitled to nominate and he had rejected their nominations.

60 On 2 September 2008 Mr Mellor sent an email to the WAEC saying he had been informed that his name was not on the membership list of the CFMEUW. He requested the WAEC conduct "an investigation to confirm my eligibility and reinstate me to the roll". Mr Nicholson made inquiries of the CFMEUW and Ms Arnold and formed the view that Mr Mellor was unfinancial and therefore not entitled to be on the electoral roll. Mr Mellor was informed of this by letter from Mr Gately dated 3 September 2008.

61 It was these facts and circumstances which gave rise to the filing of applications PRES 3-6 of 2008.

The Claims of Mr Thompson, Mr Byron, Mr Malcolm and Mr Mellor

62 Whilst, given the course of the proceedings, it is unnecessary to make some of the findings which would have been required if the applicants had wanted to proceed with their applications, a summary of their claims provides relevant background to the evidence which has been received. The following is taken from the documents filed, affidavits, oral evidence of the witnesses and documentary exhibits.

Mr Thompson

63 Mr Thompson is employed as a rigger. He said he had been a member of the CFMEUW and CFMEU since 21 July 2003. He had the same membership number for each union. Attached to his affidavit were copies of his membership tickets for the periods ending 30 September 2008 and 31 March 2009 respectively. On neither of these tickets was there any mention of the CFMEUW. They both only referred to the "CFMEU – Construction and General Division" or the "CFMEU".

64 Mr Thompson said he paid his membership fees in full each time they fell due. Most recently he paid membership fees using a Gold Visa credit card he has with the National Bank. Attached to his affidavit were copies of his credit card statements for the period 27 September 2007 to 26 October 2007 and 27 March 2008 to 24 April 2008. The statements recorded that on 2 October 2007 there was a "transaction processed" of a debit of $295 to the "CFMEU, East Perth". Also, on 10 April 2008 there was a transaction processed to the "CFMEU, East Perth" for $295.

65 Mr Thompson also attached to his affidavit a copy of a letter dated 2 October 2007. The letter was from Mr Reynolds. The letterhead was "CFMEU – Construction and General Division". The letter commenced with the salutation "Dear Member", thanked Mr Thompson for his payment, said he was a "financial member" and entitled to many benefits including "free ambulance cover, journey cover, travel insurance, legal cover, funeral benefit [sic]". The letter included details of the receipt of Mr Thompson's payment of $295. A letter and receipt in the same terms, dated 10 April 2008, was also attached to Mr Thompson's affidavit. The dates of the receipts on the letters were the same as those for the corresponding transactions appearing upon the credit card statements.

66 Mr Thompson said these were not however the dates that he tendered payment of his membership fees. Mr Thompson explained that in or about late August or early September 2007 and in or about late February or March 2008 he received a renewal notice from the "CFMEU - Construction and General Division" to pay membership fees for a six month membership term. On both occasions Mr Thompson said he spoke to a "woman from the membership section at the union office". He said he quoted his membership number and details and paid the membership fees with his credit card. He was certain he did this prior to Sunday, 30 September 2007 and Monday, 31 March 2008 respectively. As set out earlier, these dates are significant given the requirement for payment of membership fees six months in advance.

67 Finally Mr Thompson annexed his nomination form dated 2 September 2008 and the letter of rejection from the WAEC on 10 September 2008. This said he was unable to nominate as he had not been continuously financial.

The CFMEUW's Response to Mr Thompson's Claim

68 In the notice of answer and counter-proposal (the answer) the CFMEUW attached a printout of Mr Thompson's membership history and documents showing credit card payments made on or about 2 October 2007 and 10 April 2008 respectively. The answer said it "appears from these documents that [Mr Thompson] was two working days late in making payment of his six monthly contribution in advance in September 2007 as required by rule 10(9)(a), and 6 working days late in making payment of his six monthly contribution in advance in March 2008 as required by rule 10(9)(a)". The answer said if this was correct "it would appear that [Mr Thompson] had not been continuously financial during the period 4 September 2007 and 4 September 2008, as required by rule 23(1)".

69 The position of the CFMEUW was amplified in the affidavits of Ms Arnold and Ms Dunn. In her first affidavit Ms Arnold said she had seen the membership payment records for Mr Thompson, Mr Byron and Mr Malcolm and that all of them were in arrears for "some amount during the course of the relevant 12 month period". Ms Arnold said her understanding was that payments must be received prior to the terms commencing on 1 April and 1 October each year, for members to be continuously financial. Ms Arnold said, from the records attached to the answer, Mr Thompson paid after the commencement of the two terms within the applicable 12 month period.

70 Ms Arnold, in her first and second affidavits, and Ms Dunn, in her affidavit, gave evidence and produced office records. They illustrated the system for receiving payments and to support the inference that Mr Thompson paid after the relevant dates in September 2007 and March 2008.

Mr Byron

71 Mr Byron's claim differed from that of Mr Thompson. He paid his membership contributions by direct debit instalments. Mr Byron is employed as an industrial blaster/painter. He said he was a member of both the CFMEUW and the CFMEU and had a single membership number. Attached to his affidavit was a copy of what he said was his current "CFMEUW membership ticket". This was in the same form as the ticket belonging to Mr Thompson, in that it was headed and only mentioned the "CFMEU". Mr Byron said he had been a member of the CFMEUW and the CFMEU since 30 September 1980. This included a period of approximately 15 years when he was a member of the Western Australian Builders' Labourers' Plasters and Painters Union (BLPPU). This organisation had been registered under *the Act* but no longer exists.

72 Mr Byron said in June 1998 he signed a direct debit form to pay his membership fees to the BLPPU. The amount has increased over time. He paid $7, then $10 and then $13. The direct debits were paid out of an account Mr Byron has with the United Credit Union. Attached to his affidavit were copies of his "online bank statements" for the account for the period 4 February 2007 to 10 September 2008. Between 27 August 2007 and 7 September 2008, $13 was paid by direct debit, every week. This was 54 weeks of payments totalling $702 in membership fees. Mr Byron noted the six monthly membership fee of $295 gave an annual membership fee of $590.

73 Mr Byron said he had, at the beginning of each new six month membership term, received a membership ticket. Mr Byron said that neither the CFMEUW nor the CFMEU had at any time notified him that his membership fees were in arrears or money was due and owing to either union. Mr Byron then described the lodgement of his nomination form and its rejection by Mr Botterill.

The CFMEUW's Response to the Claim of Mr Byron

74 In its answer, the CFMEUW attached a copy of Mr Byron's membership financial history. It said that from the document Mr Byron was $5.50 in arrears at the end of September 2007, until the situation was rectified by his payment on 3 October 2007. He had not therefore paid the whole of the six monthly contributions in advance in September 2007, as required by rule 10(9)(a). Accordingly Mr Byron had not been continuously financial during the period 5 September 2007 to 4 September 2008 as required by rule 23(1). One of the documents attached was headed "Membership Master Inquiry", "CFMEU - - Const & Gen". This recorded Mr Byron's details, said he had joined on 30 September 1980 and that he was in arrears in the amount of $54.50. The document seems to provide that the request for the information was made on 12 September 2008. The "member financial history inquiry" of Mr Byron for the "CFMEU - - Const & Gen" was consistent with what was asserted in the notice of answer.

75 In her first affidavit Ms Arnold referred to the membership records of Mr Byron and said this showed he was in arrears for some time during the relevant 12 month period.

Mr Malcolm

76 Mr Malcolm is employed as a scaffolder/builders labourer. He asserted he was a member of the CFMEUW and the CFMEU, and had a single membership number. His membership tickets were attached to his affidavit. They were in the same form as those of Mr Thompson and Mr Bryon. He also paid his membership fees by direct debit. Mr Malcolm said he joined both unions while he was working as a builder's labourer on 7 May 2007. He said he signed a direct debit form and arranged to begin paying his union membership fees by weekly direct debits of $20 per week. That amount was reduced to $12 per week on 26 May 2008. Mr Malcolm said the reduction in the payment occurred because an "administrative officer" telephoned him and told him the amount of his direct debits was so high that his membership fees were significantly in credit.

77 Mr Malcolm said that under the direct debit arrangement he authorised "the CFMEU" to make weekly direct debits from his savings account with the National Australia Bank. Mr Malcolm attached to his affidavit copies of his bank statements for the period 17 January 2007 to 15 September 2008. The bank statements showed the direct debits described in the affidavit. The bank statements initially recorded the relevant transactions as payment of "union dues" to "Cfmeu Constructi [sic]". Later the transactions were recorded as being "union dues" to the "CFMEU". Mr Malcolm referred to the membership fees of the CFMEUW being $295 for six months or $590 per year. He said that from 7 May 2007 to 19 May 2008 he had paid $20 per week on 54 occasions totalling $1,080. Between 27 August 2007 and 7 September 2008 he paid $1,255 in membership fees by direct debit. Mr Malcolm said that at no time since becoming a member of the CFMEUW and the CFMEU had he received notification that his "membership fees were in arrears or that money was due and owing to the CFMEUW…"

78 Also attached to Mr Malcolm's affidavit was a "direct debit card" headed "CFMEU". This set out Mr Malcolm's number, his name and that he had commenced direct debit contributions on 7 May 2007.

79 Mr Malcolm also described the lodgement and rejection of his nomination.

Response by the CFMEUW to Mr Malcolm's claim

80 In its answer the CFMEUW attached a print out of Mr Malcolm's membership financial history. It showed Mr Malcolm was $236 in arrears at the end of September 2007 and that he remained in arrears until 19 December 2007. The CFMEUW said that, accordingly, he had not paid the whole of the six monthly contributions in advance by September 2007 as required by rule 10(9)(a). Additionally, he was $11 in arrears at the end of March 2008 until the situation was rectified by a payment on 3 April 2008, so that he had not at the time paid the whole of his six monthly contributions in advance in March 2008 as required by rule 10(9)(a). Accordingly, Mr Malcolm was not continuously financial during the period 5 September 2007 to 4 September 2008 as required by rule 23(1). Attached to the answer were documents in the same form as those which were annexed to the answer in response to Mr Byron's application. They were consistent with the answer to Mr Malcolm's claim

81 Ms Arnold in her first affidavit gave evidence to the same effect as that which she did about Mr Byron.

Mr Mellor

82 Mr Mellor's claim was that he was wrongly excluded from the electoral role which had been prepared for the election.

83 Mr Mellor said he had been a member of the CFMEUW and the CFMEU since 25 August 2005. His membership fees had been paid by direct debit since 4 September 2006. Mr Mellor also had a single membership number. He commenced employment with the CFMEU on 22 August 2005 as the media, communications and campaigns officer for both the CFMEUW and CFMEU. Attached to his affidavit was a copy of his first "CFMEU" membership ticket, in the same form as those earlier described. Mr Mellor said that when he became a CFMEUW member, membership fees were $281 for six months or $562 per year. Mr Mellor also attached his membership tickets and/or letters of receipt for the periods ending 31 March 2009, 30 September 2008, 31 March 2008 and 30 September 2007 . Each of the letters was headed "CFMEU – Construction and General Division".

84 Mr Mellor said that until September 2006 he received an invoice for his monthly membership fees and paid them in full at the "CFMEUW office" using his MasterCard. Then, from about late August/early September 2006 he submitted a direct debit form to the "CFMEUW union membership officer" and paid his fees by weekly direct debit. This commenced on 4 September 2006 in the amount of $11 per week. Attached to Mr Mellor's affidavit were copies of his Members Equity Bank InterestME Savings Account statements for the relevant periods.

85 Mr Mellor said he only signed one direct debit form authorising the payment of membership fees. Attached to his affidavit was a copy of the cover page, page 1 and pages 61 and 62 of issue 1 of the Autumn 2006 *Construction Worker* Journal ("the Journal"). On the cover page of the Journal is a logo of a person in a hard hat holding the Southern Cross flag and underneath is written "CFMEU" in bold letters. At the bottom of the page there is a small reproduction of this on a facsimile membership card, urging people to "use your CFMEU benefits".

86 Pages 61 and 62 form a single document about membership benefits, joining the unions and includes a membership application form. There is also a copy of the membership card reproduced on the front cover of the Journal. There is also a cartoon with a caption saying that when people join "the CFMEU they never stand alone". A number of "CFMEU" membership benefits are set out. The pages also included a message from Mr Reynolds as the "CFMEU WA Secretary" which is signed by him as the "Secretary WA Branch CFMEU Construction Division".

87 The pages include a "cut out, fold, seal & mail", "application for CFMEU membership" form and a "direct debit request". The membership application is not in the form of the schedule to the rules of the CFMEUW. The application is addressed to both the CFMEUW and the CFMEU. The form said the undersigned "hereby apply to become a member of the above named union, [sic] and agree to conform to the rules of the union [sic]". I note the singular and not plural was used.

88 The direct debit request was an authorisation to debit an account "to pay Construction Forestry Mining and Energy Union". The authorisation was to the "CFMEU user ID 102216 to arrange for any amount CFMEU may debit or charge …". The form also referred to the then annual membership amount of $562 and half yearly membership of $281. The form provided for a weekly payment "(minimum $20/wk)" to be inserted. The form said that by signing the direct debit request, the person acknowledged "having read and understood the terms and conditions governing the debit arrangements between you and the CFMEU as set out in this Request and in your Direct Debit Request Service agreement". There was then a place for the form to be signed and the specification of the date on which the first deduction was to be made.

89 Also attached to Mr Mellor's affidavit was a copy of a letter dated 6 June 2007 advising him that his direct debit deductions would increase to $12 per week effective 18 June 2007. The letter was signed by Ms Linda Pallott as "Membership Officer". The letter had the CFMEU logo on the top right hand corner and at the bottom said "Construction Forestry Mining Energy Union Construction and General Division". The letter said the increase would be processed automatically and any queries in relation to the matter should be dealt with prior to the relevant date.

90 Mr Mellor said that between 24 September 2007 and 15 September 2008 he made 51 weeks of payments of $12 per week totalling $612 in membership fees. Mr Mellor said that neither the CFMEUW nor the CFMEU had notified him that his membership fees were in arrears at any time since he started paying his membership fees by direct debit.

91 Mr Mellor then described how he became aware that he was not on the list of union members eligible to vote and what he did about that.

Response by the CFMEUW to Mr Mellor's claim

92 As I have said, the CFMEUW did not file a notice of answer and counter-proposal in response to the application to Mr Mellor. Instead its position was set out in the fourth affidavit of Ms Arnold. Ms Arnold said she was aware Mr Mellor was not included in the list of members eligible to vote in the CFMEUW election. She understood that in order to be able to vote a member had to be financial at the date the Returning Officer called for nominations. That date was 23 July 2008. Ms Arnold said in order to be financial under the rules the member must have paid their fees for their "union ticket" in advance for the six month union term.

93 Ms Arnold said "members who pay by way of direct debit and who have not paid a sufficient amount during the course of a term to, at the end that term, cover the amount due for the next term will be in arrears once the new term begins". She said they "will only be financial once they paid enough to cover the fee for the new term". Ms Arnold said there were about 400 CFMEUW members in this category.

94 Ms Arnold said members who were in arrears in the sense just described were able to access membership services and benefits, but the right to vote was treated differently given the contents of the rules. Attached to Ms Arnold's affidavit was a flyer about getting "a barrow load of first-class work and family benefits". The flyer seems to be in the same form as the document contained in the Journal which I earlier described. The flyer refers to being a member of the "CFMEU".

95 Ms Arnold also attached to her affidavit a printout of an inquiry into Mr Mellor's financial history. She said that this recorded that as at 23 July 2008 Mr Mellor was not financial. On 21 July 2008 Mr Mellor was recorded as being $30 in arrears. He continued to be in arrears until 11 August 2008 when he was briefly in credit. The financial history then records another $295 being due. This appeared on the record on 22 August 2008, although the amount was not due until the end of the union term on 30 September 2008. Accordingly Mr Mellor was in fact not in arrears from 11 August 2008 until the end of September 2008.

96 The record confirms that Mr Mellor's direct debit payments commenced on 5 September 2006. Payments of $11 per week continued until 20 June 2007 when the amount was increased to $12 per week. Ms Arnold said Mr Mellor was required to pay $281 by the end of September 2006 to maintain his financial status for the following term. Instead he had made four payments of $11 during September 2006 amounting to $44.

97 Ms Arnold said at the rate of $11 per week over six months or 26 weeks, Mr Mellor's total payments were "$286 over the course of the term plus $44 made prior to the commencement of the term". She said that if Mr Mellor had paid by a lump sum over the same period he would have paid $281 at the end of September 2006 with the second payment of $281 at the end of March 2007. This meant a total of $562 was paid over the same period. Ms Arnold said that where payments were made in the way in which Mr Mellor had, there was a period where the member was not financial at the commencement of the term. They would however be financial for a period of time toward the end of the term.

The Can of Worms

98 The evidence which I described as opening a can of worms was primarily that of Ms Arnold during her cross-examination by counsel for the applicants. Of primary relevance is the following evidence:

(a) Ms Arnold said she was an employee of the "CFMEU C & G" (which is the CFMEU) which paid her wages (T83).

(b) There is no separate membership fee payable by a member of the CFMEU and a member of the CFMEUW (T85).

(c) As a consequence, Ms Arnold answered the question of what the half yearly membership fee for the CFMEUW was by saying there "is no half yearly membership fee for the CFMEUW" (T85).

(d) Ms Arnold oversaw the payment of "union dues … to the CFMEU" (T87, T88).

(e) All attachments to her second affidavit were "about the CFMEU" (T88, T89).

(f) For example pages 27 to 40 of the attachments to her second affidavit were computer printouts of monies received "from members of the CFMEU" (T91).

(g) Also, the attached pages 3 to 26 related to the manual office processing of credit card payments received from "members of the CFMEU" (T91).

(h) Direct debits to "the CFMEU C & G" were set up about 10 years ago (T91).

(i) At the beginning of six monthly terms, letters and receipts were sent by the "federal union" to its members. For example, a letter to Mr Thompson dated 2 October 2007 (T96, T97).

(j) When half yearly memberships are to be increased the executive of the "federal union" passes a resolution increasing the amount and the resolution is acted upon by administrative staff (T99).

(k) In June 2007 the "executive of the federal union" resolved to increase the six monthly membership contributions (T101).

(l) When asked about the application form in the Journal, Ms Arnold said: "I don't want to be rude but I don't actually take notice of the wording up the top of the thing whether it's CFMEU, CFMEUW, it's CFMEU to me all that's… that I work with, I'm sorry" (T103).

(m) A member is only given one number for the two unions (T103).

(n) There are no separate records kept for members of the "state union as distinct from members of the federal union" (T103).

(o) Membership fees from direct debit arrangements are paid to a bank account held by the "federal union" (T104).

99 The quoted passages of (d)-(g) and (i)-(k) are propositions which were put to Ms Arnold by the applicants' counsel and agreed with by her.

100 Not long after this evidence was given there was a break in proceedings. Upon resumption I made my first reference to the "can of worms". I said, "… it may well be the case or it could be the case that there are in fact no financial members of the state branch of the union [sic-CFMEUW] and I say that because the evidence seems to reveal that every payment from every member has been to and received by the federal union [CFMEU]. If that's right I'm not sure where it leads".

101 After some discussion Ms Arnold continued with her evidence and then Mr Malcolm gave evidence before the end of the day of the hearing.

The Affidavit of Mr Reynolds

102 The affidavit of Mr Reynolds was filed consequent upon directions which were made after the settling of the Inquiry Questions. It was a lengthy affidavit comprising 32 pages of text and a number of attachments. Mr Reynolds affidavit covered these topics: his background, the CFMEUW and its predecessors, the amalgamation of the State Builders Labourers Federation with the Federal Construction Forestry Mining and Energy Union, state union amalgamations, the Federal Construction Mining and Energy Union, the separate existence of the CFMEUW, membership, separate jurisdictions, meetings, rights of entry, assets, and a s71 certificate. Mr Reynolds' affidavit also covered the Inquiry Questions. I will now summarise the affidavit and Mr Reynolds' oral evidence.

(a) Mr Reynolds' Background

103 Mr Reynolds deposed that he was the secretary of the CFMEUW and authorised to swear the affidavit on its behalf. He is also the divisional branch secretary of the CFMEU. Mr Reynolds has been the secretary of the CFMEUW and its predecessor organisations since 1974. In 1974 Mr Reynolds became the secretary of the "state based Builders Labourers Federation" (the BLFWA). In the same year he also became the secretary of the Western Australian branch of the Australian Building Construction Employees and Australian Builders Labourers Federation (the Federal BLF). The Federal BLF was registered under the then applicable federal legislation.

104 When cross-examined Mr Reynolds agreed it was an obligation of the secretary of a union to have knowledge of the rules and to have the rules available to be used as and when necessary (T386). Based on earlier cross-examination, Mr Reynolds also accepted his working knowledge of the rules of the CFMEUW and the CFMEU was not "as good as it should be" (T386). Mr Reynolds also acknowledged it was part of the responsibilities of the State secretary under the rules of the CFMEUW to prepare or supervise the preparation of minutes of executive meetings (T427).

(b) The Federal BLF and Amalgamations

105 During the 1990s union amalgamations occurred as a consequence of the deregistration of the Federal BLF. Mr Reynolds received a letter from the Hon Peter Cook, the then Federal Minister for Industrial Relations, dated 9 January 1991 giving, in Mr Reynolds' words, "the Federal BLF the period of 8 years to amalgamate with a Federal registered union or face the consequences". Relevant negotiations occurred, against a backdrop of, as described by Mr Reynolds, a "genuine fear that an amalgamation may lead to the stripping of assets accumulated by the state based BLF into the new hands of the new Federal amalgamated union which may well have the controlling hand".

106 On 15 February 1991 the BLFWA, the Building Workers Industrial Union of Australia, the Federated Engine Drivers and Firemen's Association of Australasia and the Construction Mining and Energy Workers' Union of Australia (WA Branch) entered into an agreement to prepare the way for an amalgamation with the "Federal CMFEU". A second agreement was signed in 1994 between the Federal BLF and the CFMEU with a similar aim. A sub agreement applicable to Western Australia was also negotiated and agreed between the BLFWA, the CFMEU and others ("the WA Agreement"). This was dated 30 March 1994. As a result of the amalgamation agreements, the Federal BLF ceased to exist in 1994. Clause 6 of the WA Agreement expressly provided that the assets of the BLFWA would remain under the control of the state registered union. Clause 5 of the WA Agreement also provided there would be only one application and one subscription fee paid by members of the BLFWA in order to become a member of the CFMEU.

107 On 14 November 1994 the Full Bench of the Commission certified an amalgamation between the following unions, which had been registered under *the Act*:

(a) The BLFWA;

(b) The Operative Painters and Decorators Union of Australia, Western Australian Branch, Union of Workers; and

(c) The Operative Plasterers and Plaster Workers Federation of Australia, (Industrial Union of Workers) Western Australian Branch.

108 The registration of the Western Australian Builders' Labourers, Painters and Plasterers Union of Workers (BLPPU) was then cancelled.

(c) The Creation of the CFMEUW and the Previous Election

109 Mr Reynolds' affidavit described additional negotiations and amalgamations, including delays, culminating in an amalgamation between the BLPPU and the Construction Mining Energy Timberyards Sawmills and Woodworkers Union of Western Australia – Western Australian Branch (CMETU) which created the CFMEUW (see *BLPPU v CMETU* (2001) 81 WAIG 2722). As part of this process the rules of the CFMEUW were registered with the Commission.

110 Mr Reynolds said that each year since 2001 the CFMEUW had filed audited accounts with the Commission in accordance with s65 of *the Act*. Copies of the accounts for the years 2001 to 2007 were attached to his affidavit.

111 Mr Reynolds also said that since 2001 the only other election for the CFMEUW was in 2004 when Mr Reynolds (and others) were elected unopposed and there was no requirement for members to vote.

112 When cross-examined Mr Reynolds, said he believed each of the amalgamating unions had financial members (T362). Additionally, as part of his role as secretary of the newly amalgamated union, he had in his office the records of the two unions. It was from those records that the initial list of members of the CFMEUW was created (T362). Mr Reynolds said that a small percentage of the members who were on the initially created list of CFMEUW members were still members of it (T362).

113 Mr Reynolds said that arising out of the agreements through which the CFMEUW was created, it was agreed there would be only one joining fee and contribution for members (T407). Mr Reynolds said "the whole idea of amalgamation was to get away from having two unions and having two different organisations" (T481). This answer was given during questions that I asked Mr Reynolds about the apparent contradiction between the need for a separate State registered organisation and the joint functioning of the CFMEU and the CFMEUW. This topic will be returned to later.

(d) The CFMEU

114 Mr Reynolds also explained that the CFMEU was formed as a result of amalgamations during the 1990s. A number of unions amalgamated along industry lines to form "the Divisions of the CFMEU". Each division operates autonomously with its own membership, executive, resources, industry policies and campaigns. The CFMEU is also divided into state branches. Attached to Mr Reynolds' affidavit was a copy of the rules of the CFMEU. Also attached was a copy of the CFMEU Construction and General Division Rules. Mr Reynolds said the CFMEU Construction and General Division Western Australia Divisional Branch (CFMEU) has constitutional coverage of the building construction trades in Western Australia. .

(e) CFMEU Finances

115 At [45] and [46] of his affidavit Mr Reynolds said:

> "45. The Western Australia Divisional Branch pays a percentage of its membership earnings to the federal body of the CFMEU on a 6 monthly basis in accordance with Rule 23 of the CFMEU Rules ("**Sustentation Fee**"). These payments are made in the form of a cheque sent to the Federal CFMEU Office in Sydney.

> 46. The Sustentation Fee is currently 15% of membership fees taken in by the Western Australia Divisional Branch. In 2007 the Sustentation Fees paid to the CFMEU's National Office amounted to $390, 000."

116 Mr Reynolds also attached the audited accounts of the CFMEU, prepared in accordance with rule 36 of the Divisional Branch Rules.

(f) Section 71 Certificate

117 In his affidavit Mr Reynolds referred to rule 3(18) of the rules of the CFMEUW. He said he understood "the consequence of obtaining such a certificate is to integrate the administration and official positions held in the respective state and federal unions".

118 Mr Reynolds said at [77] and [78] of his affidavit:

> "77. In 2001 at the time of the creation of the CFMEUW, the legal requirements relating to the amalgamation were handled by Dwyer Durack. That retainer was terminated shortly after 2001.
>
> 78. I cannot now say why a s. 71 certificate was not obtained but I believe that when Allan Drake-Brockman (the Union's primary advisor in relation to Industrial Relations matters) left Dwyer Durack the Union lost a significant amount of experience and knowledge."

119 Mr Reynolds also said that the CFMEUW had applied for transitional registration pursuant to Schedule 10 to *the WRA*. This was granted on 7 April 2008.

120 In cross-examination, Mr Reynolds said he knew of the decision of *Moore v Doyle* (1969) 15 FLR 59. Mr Reynolds commented:-

> "Now, sure there was the ability to get a section 71 certificate, which we instructed our solicitors to do, and our solicitors didn't do it and they left it and there was a mess … our lawyers, who were Dwyer Durack at the time, then Slater and Gordon, all our in-house lawyers ... all of our ... our accountants … none of them have ever told us there's anything wrong with any of this." (T418)

121 Mr Reynolds said that when the amalgamation occurred in 2001 there was the ability to get a s71 certificate "and it didn't happen, and we've basically operated as though we did have one".

122 In this evidence and other evidence which Mr Reynolds gave, he tried to deflect responsibility for what he there described as the "mess". In truth however, as the secretary of the CFMEUW and its principal officer under the rules, it was the responsibility of Mr Reynolds to ensure that a s71 certificate was obtained.

123 Later Mr Reynolds said that once Mr Drake-Brockman ceased working for Dwyer Durack the CFMEUW lost a person "who had all the knowledge and experience". This was because he was "the union's solicitor, regular solicitor" (T423). Mr Reynolds also confirmed however that he had not instructed Slater and Gordon to proceed with a s71 certificate (T423). He said that Slater and Gordon had been the solicitors of the CFMEUW for roughly eight years (T424).

124 Later I asked Mr Reynolds about the object of the CFMEUW contained in rule 3(18). Mr Reynolds said "it had always been a problem from day one, even with the old BLF, about the State Union and the Federal Union. So I was made aware in them [sic] times that there was a remedy to it [the s71 certificate]…and Mr Drake-Brockman made us aware of that…" (T477). I asked Mr Reynolds about his knowledge of an application for a s71 certificate not proceeding. He then said "to be honest with you, it sort of got forgotten because it was never an issue" (T478). This evidence is not consistent with the evidence that it was a "problem from day one".

125 Mr Reynolds then referred to the accountants of the CFMEU and the CFMEUW and intimated that they had not raised any problems about the two organisations. He also referred to the Commission and the "Federal Commission" receiving returns. He said none "of this has ever been raised as a problem by the State Commission. I mean, the election was called last time, there was no questions [sic] raised there, and then it's just all blown up now" (T478). This evidence provides another example of Mr Reynolds not readily accepting that something problematic was his responsibility.

(g) Separate Existence of the CFMEUW

126 Under this heading in his affidavit Mr Reynolds acknowledged that the CFMEU and the CFMEUW were commonly referred to as "simply 'the CFMEU' in WA". They were run out of the same office in Royal Street, East Perth and were previously co-located in Moore Street, East Perth. Mr Reynolds said at [50]:

> "50. As far as I am concerned, it was always the intention of each of these bodies to preserve their separate functioning and identity. This is critical for a number of reasons but it is especially necessary in order to properly represent the interests of the members who may, at any one time, be employed in either the State jurisdiction or the Federal jurisdiction."

127 Relevantly, Mr Reynolds also said the following about the distinction or non-distinction between the CFMEU and CFMEUW:

(a) The staff of the CFMEU and the CFMEUW are paid from the "CFMEU C & G Division" account. There is however no manner of "identifying staff as employees of the CFMEUW as distinct from the CFMEU". Mr Reynolds considers the staff to be jointly employed.

(b) At [57] of his affidavit, Mr Reynolds said:

> "57. Funds derived from membership fees are held in an account named 'Construction Forestry Mining Energy Union Construction Division General Account'. This account is in fact a consolidated revenue account and the monies are used for both CFMEU and CFMEUW purposes (**Consolidated Account**). This has happened since the time of the 1994 WA Agreement"

(c) The cost of proceedings before a court or commission, and legal representation in the form of wages to in-house counsel and the costs of briefing external representation, are both paid for with monies out of the consolidated account.

(d) The form contained in the Journal was created to serve as a single membership application form. Mr Reynolds said that as an alternative to completing the form in the Journal, a single card could be filled in at the office to join both the CFMEU and the CFMEUW. Once the card was completed and signed and the member had paid their joining fee they were accepted as a member into both unions (T370).

(e) Mr Reynolds' intention has always been to recognise the admission of members into both the CFMEU and the CFMEUW. The single application fee, currently $60 plus GST, has been taken as full payment for the admission required under both the CFMEU and CFMEUW rules.

(f) Mr Reynolds has "attempted" to hold a general monthly meeting of the CFMEU and the CFMEUW on the second Wednesday of each month and a fortnightly meeting of the "Executives". General monthly meetings are required under the rules of the CFMEUW but not those of the CFMEU. The meetings are conducted as single meetings of both unions.

(g) The minute book which records the meetings refers to the "CFMEU" but matters relevant to both unions have been dealt with at the meetings in accordance with the practice of Mr Reynolds. Examples were given in the affidavit.

(h) Organisers employed by the CFMEU/CFMEUW represent both unions on construction sites in Western Australia. A right of entry under the state system has been used in the past to investigate alleged safety breaches on "federal" work sites covered by Australian Workplace Agreements or Certified Agreements, under *the WRA*.

(i) The CFMEUW has retained the ownership of assets which were the property of the BPLLU and the "forerunner unions that amalgamated to form that entity". The CFMEUW holds over $25 million worth of assets in the form of property holdings and shares. These are not jointly held with the CFMEU.

(j) The CFMEUW has a number of separate bank accounts in its name and the CFMEU also has its own bank accounts and some separate assets.

(k) The main income for the CFMEU and the CFMEUW is generated by membership fees which are paid into the consolidated account.

128 Mr Reynolds also gave evidence on this topic when cross-examined and asked questions by me.

129 As to the finances of the CFMEUW, Mr Reynolds said that each year as "State secretary" he made sure separate accounts were drawn up for both the CFMEU and the CFMEUW (T400). For the financial return filed under *the WRA* dated 30 June 2008 there was recorded an amount for "Wages - Office holders". Mr Reynolds agreed that this amount was all of the wages of the elected and appointed officials of both the CFMEU and the CFMEUW (T400). Conversely, in the accounts of the CFMEUW filed with the Commission for the year ending 31 December 2007, the accounts recorded that no "remuneration is paid by the Union to key management personnel who are remunerated by a related entity, CFMEU Construction and General Division, WA branch" (T402).

130 In cross-examination Mr Reynolds also agreed with the proposition that in its accounts, for the year ending 31 December 2007, the CFMEU was recorded as having received subscriptions in the amount of $4,794,384. This was for all subscriptions for both the CFMEU and the CFMEUW. Mr Reynolds said the "same fee is paid for both [the CFMEU and the CFMEUW] as per the court decision" (T405). When asked what court decision he was referring to, Mr Reynolds said that when the amalgamation was "done" there was a provision in the agreement saying there would be one fee and he thought this agreement had been ratified by the "Federal Commission" (T406). Mr Reynolds then indicated the agreement he had in mind was the WA Agreement (T407).

131 The account which Mr Reynolds said in his affidavit was a "consolidated account", received payments by members of both the CFMEU and the CFMEUW (T408). It was put to Mr Reynolds that he called it "a general account but it's an account that is owned and operated by the [CFMEU]". Mr Reynolds agreed with this. Mr Reynolds was also directed to [57] of his affidavit quoted above. It was put to him that this was not correct. Mr Reynolds agreed (T408). Mr Reynolds said that contrary to what was contained in the affidavit he called it a "general account" and not a "consolidated account". Asked why that description was used in the affidavit, Mr Reynolds said that it "was a name my lawyers must have given me when I went through it. It's called a general account by everyone in our organisation" (T408). Mr Reynolds was then asked whether the

use of the description "consolidated account" gave the impression that the account was operated by both the CFMEU and the CFMEUW. Mr Reynolds reiterated that he did not think of the name and the account was used for "everything" (T408). Mr Reynolds tried to illustrate this by saying that if "we pay bills for the Federal legals, and there's plenty of that, we pay it out of there" (T408). It was put to Mr Reynolds that this was not correct. He was shown the accounts for the CFMEU for the year ending 31 December 2007 and those for the CFMEUW for the same year. The documents showed that in both accounts, expenditure on legal costs had been incurred and paid for.. Mr Reynolds then suggested that the legal costs recorded for the CFMEUW might have been for the Construction Skills Training Centre. Counsel then directed Mr Reynolds' attention to additional information in the accounts which suggested this evidence was not correct. When faced with these documents and information, Mr Reynolds prevaricated somewhat in his replies. Eventually however he agreed with the proposition that the legal costs of the CFMEUW did not include anything to do with the Construction Skills Training Centre (T410). Mr Reynolds also said there was a bank account operated by the CFMEUW which was separate and distinct from the "general account" operated by the "CFMEU" (T413).

132 Mr Reynolds was also asked about an income line in the CFMEUW accounts for the year ending 31 December 2007 under the heading "107 levy". Mr Reynolds said this amount of $733,784 was for the legal costs of 107 members, in responding to an application taken by the Australian Building and Construction Commissioner, in the Federal Court. This arose out of action taken on a site covered by Federal Enterprise Bargaining Agreements (T413-415). Mr Reynolds was asked why the money was put into an account of the CFMEUW. Mr Reynolds said he "wanted to make sure it was held in Western Australia". Mr Reynolds was then asked whether he meant that he "wanted to make sure that that levy, that those monies, were the property of the Western Australian state organisation". Mr Reynolds responded that he "wanted to make sure no-one else could get their hands on it …" (T414).

133 Mr Reynolds was also shown a document annexed to his affidavit headed the "Statement of Cash Flows" of the CFMEUW for the year ending 31 December 2007. Under the subheading CFMEUW was the line "Receipts from members and other sources" of $2,843,862. It was put to Mr Reynolds that this would be a more accurate line if the words "Members and" were removed because this was not a receipt of that amount from "members of the State organisation". Mr Reynolds replied: "Now you point it out I think the auditors got it wrong" (T415). Mr Reynolds then agreed that when he read the document earlier he "didn't pick up on that" (T416).

134 Mr Reynolds was also asked about [18] of his affidavit and his assertion that there was a fear that an amalgamation might lead to the stripping of assets accumulated by the State based BLF into the hands of the new Federal amalgamated union. Mr Reynolds said he held that position for "quite a long time and I particularly had for quite a long time after the amalgamation back from 2001 onwards. There's been some changes in the leadership in our national organisation and that's now changed my opinion, so I don't have that fear any more, but that was certainly one of the things that concerned me at the time, but I think there's a lot of other reasons why we wanted to maintain a state based union" (T417). When asked about the keeping of separate accounts for the two organisations, Mr Reynolds said they "were one and the same, and they had to lodge accounts with the State Commission and accounts with the Federal Commission, and the auditors knew that, and it was up to them how they prepared those audits, and that's what they did … what I told them to do was to comply with all the requirements…" (T417).

135 Mr Reynolds said that another reason why it was important to preserve the separate functioning and identity between the CFMEU and the CFMEUW was because the latter has considerably more assets than the former (T398).

136 Mr Reynolds also said the employees of the CFMEU and CFMEUW were "paid out of an account operated by the federal organisation" (T398). (This was the account he called the general account). The elected officials of the CFMEU and the CFMEUW were also paid out of the same account. Mr Reynolds did not however accept that this could lead to a blurring of the separate functioning and identity of the two organisations (T398).

137 I put to Mr Reynolds that although there was a need for the two organisations, the difficulty was "in the way that they have been intermingled, if you like. That becomes difficult now to try and work out, for example, who are the members of the union". Mr Reynolds replied, what "about the other 50 or 60 unions? They must have the same difficulty" (T481). With respect, this did not answer the question. Shortly after that Mr Reynolds said that "the whole idea of amalgamation was to get away from having two unions and having two different organisations. The whole idea was to amalgamate and get away from that". The difficulty with this assertion by Mr Reynolds is that it contradicts [50] of his affidavit quoted above.

138 Mr Reynolds agreed with the proposition that the main income stream for the CFMEU was generated by membership fees paid into "the Federal organisation's account, which [he called] the general account" (T438). Mr Reynolds accepted therefore that what was in [75] of his affidavit was incorrect (T438). Asked why [75] contained what it did, Mr Reynolds again said that the affidavit was written "with assistance, what was in my mind was that when all the State subscriptions from people joining the State union and all of the subscriptions from the people joining the Federal union, right, go into what's called here the consolidated account … which we now know as the general account" (T439).

139 With respect to meetings, Mr Reynolds was shown a document headed "Construction, Forestry, Mining and Energy Union Construction and General Division" minutes dated 14 May 2008. Mr Reynolds said it was the minutes of the meeting of the CFMEU branch and management committee. He also said "it would be" a copy of the minutes of an executive meeting of the State organisation. Mr Reynolds was asked how he could tell it was both. Mr Reynolds said all of the meetings were run as joint meetings of the CFMEU and the CFMEUW (T380). He agreed that there was no rule in either the rules of the CFMEU or the CFMEUW which permitted simultaneous meetings of these two bodies. Mr Reynolds said joint meetings were held for the purpose of "efficiency" (T381). Accordingly the heading of the minutes dated 14 May 2008 contained an error insofar as it suggested it was not a meeting of the CFMEUW (T381).

140 Mr Reynolds was asked about paragraph [66] in his affidavit in which said he attempted to hold meetings of the executive of the organisations fortnightly. Mr Reynolds answered that he was assisted by his solicitors in putting the affidavit together

and that it was "untrue to say that we hold them fortnightly". Prompted that he used the word "attempt" at [66] of his affidavit Mr Reynolds said, "this is a bad scene but if you go back further you'll find that we do hold them [more regularly] … This [2008]… seems to have been a bad year" (T436).

141 Mr Reynolds was also asked questions about the minutes headed as being those of the CFMEU dated 31 October 2001. Resolution 13 referred to an increase in the joining fee to $60 from 1 December 2001. It recorded a "report on union fees" and a decision that "union dues rise with CPI and joining fee rises [sic] to $60 on 1st December 2001". It was put to Mr Reynolds that because of the form of the minutes it could not be ascertained whether the increase applied to the CFMEU or the CFMEUW. Mr Reynolds said it "certainly applies to the Federal Union" because of the heading on the minutes, which was Construction, Forestry, Mining and Energy Union Construction and General Division" (T430). Mr Reynolds then appeared to accept that it did not apply to the CFMEUW because when he had been taken to the 2007 financial accounts of that union there was no mention of any revenue received by the CFMEUW from members for membership or joining fees (T430). It was then put to Mr Reynolds, and he agreed, that the application form in the Journal established that a person would apply to become a member of both unions when it was filled in (T430). Asked again about the minutes on 31 October 2001 and whether it related to only the CFMEU Mr Reynolds said, referring to the WA Agreement, "it applied to both" (T431).

142 There was a similar record in the minutes of the "Construction Forestry Mining and Energy Union Construction and General Division" held on 31 January 2005 to increase "union dues" in line with "CPI movement". Mr Reynolds said that six monthly membership contributions had most recently been increased to $295 in March 2007 without "a formal decision of the executive being noted in the minutes". Only one decision was made each time there was a membership increase which became a single membership fee applicable to both the CFMEU and the CFMEUW.

143 Mr Reynolds accepted that the rules required subscriptions to be paid six months in advance and that people who paid by way of the direct debit system were ordinarily going to be in arrears for the "next three months"(T479). Mr Reynolds also accepted that despite this there was no step taken to remove these people as members under rule 8(2) (T479). I also asked Mr Reynolds about rule 10(9)(c) and suggested that according to the rule the direct debit and payroll deduction members would be deemed unfinancial. Mr Reynolds said the rule was not workable. For example, the employers of people on payroll deductions often work on a 90 day system so that they will deduct during each week, and keep deducting, but will only forward payment to the union after 90 days (T479).

(h) Mr Reynolds' Evidence about the Inquiry Questions

144 As I have said Mr Reynolds in his affidavit provided answers to the Inquiry Questions. A summary is as follows:

(1) (a) What did the CFMEUW executive decide in 2006-2008 to be the contributions to be paid by members for the "following 12 months" in accordance with rule 10(9)(a)?

145 The CFMEUW executive did not set any such contribution.

(1) (b) What, if anything, did the CFMEUW executive otherwise decide in 2006-2008 in relation to a contribution to be paid by the members and what, if anything, is the relevance of this to deciding the financial members?

146 When cross-examined Mr Reynolds admitted he was not aware that there was a requirement under the CFMEUW rules to set a contribution for the membership fee payable by members in July of each year (T425).

147 Mr Reynolds was also asked questions about [83] of his affidavit where he said the executive raised membership dues in accordance with the CPI on 31 January 2005. It was pointed out to Mr Reynolds that the singular "executive" was used in the minutes. He was asked which executive he was referring to and he answered that "from the minutes it's headed up C and G Division"; meaning the CFMEU (T440).

148 As to the increase in membership contributions which took place "without a formal decision of the executive being noted in the minutes", referred to at [84] of his affidavit, Mr Reynolds was asked how that came about. Mr Reynolds said he "would have worked out what the rate was, asked the industrial people to get me the CPI rate, we'd have worked out what the rate was, instructed the office manager that they [sic] would be the new rate for that period commencing whatever date it was". Mr Reynolds said he would work out the amount himself even when it went to the branch management committee (T441-442). Similar evidence was given at T482.

(2) What was the basis on which Mr Reynolds decided and declared to the Commission in 2007 and 2008 that the number of members of the CFMEUW were 7,702 and 8,471 respectively?

149 Mr Reynolds' evidence on this question was based upon his instructions to and information received from Ms Arnold. Membership numbers were retrieved from computer records. These records showed members as unfinancial if they were "technically in arrears as they have not paid their six monthly membership contribution up front". Mr Reynolds had, over time, given directions to Ms Arnold and the office staff to "treat all members paying by regular instalments as financial even if they are technically in arrears". Mr Reynolds has taken the number of members to be those who had paid their six monthly contributions on time and those that are on the regular direct debit or payroll deduction system regardless of whether it is shown on the database that they are technically in arrears.

150 Accordingly, the total membership figure submitted to the Commission in his statutory declarations has consisted of "all members who are recorded as currently paying some or all of their membership fees in the year ending 30 December of the relevant year". The membership figures are obtained by extracting information from the membership database showing the current members that have no arrears, current members that have a weekly direct debit and current members that have a regular payroll deduction. The statutory declarations had been prepared by in-house legal staff and filed in accordance with s63(2) of *the Act*.

151 The membership numbers as recorded in the statutory declarations filed with the Commission were also provided to the accountants of the CFMEU/CFMEUW.

152 Mr Reynolds was asked in cross-examination about the return filed with the Commission on 30 January 2008. Mr Reynolds said that he normally read through statutory declarations and he thought he would have adopted the same practice on that occasion (T366). Mr Reynolds was asked what steps he took to ascertain that as of 1 January 2008 there were 8,471 members of the CFMEUW. Mr Reynolds said that he "would have" asked the office solicitor, Ms Kylie Bowe, to prepare the statutory declaration and she "would have" checked with the office manager and filled out the details. Mr Reynolds did not personally go to the records of the CFMEUW to ascertain the number but relied upon information from other people (T366).

153 I also asked Mr Reynolds questions about this topic. In particular I asked about the number of members on the returns including "direct debit people and the payroll deduction people who … may not be financial in accordance with the rules". In my opinion, Mr Reynolds did not then directly answer these questions (see T483). He ultimately confirmed that his direction to Ms Arnold in preparing the returns was to treat members paying by regular instalments as financial, even if they were technically in arrears. In contrast, he accepted that people who were technically in arrears would have been excluded from the electoral roll given the instructions he gave to Ms Arnold for its preparation (T483).

(3) Why, when and on what basis was it decided that members of the CFMEUW could pay their membership contributions by direct debit or in any other method other than that described in rule 10(9)(a)?

154 By way of background Mr Reynolds explained that direct debit was introduced by the BLPPU in or about 1998. Payroll deduction by an employer has been in use for as long as Mr Reynolds could remember. Mr Reynolds said: "No decision was ever made by the executive of the CFMEUW to implement direct debits". The system has simply continued from that which had applied prior to the amalgamation which created the CFMEUW. Direct debiting was recognised by the CFMEU following an amendment to its rules in March 2008. Mr Reynolds said he had only become aware "since these proceedings commenced, that the federal rule change exposed a deficiency in CFMEUW rules" (T452). Mr Reynolds readily accepted that under the rules of the CFMEUW there was no provision for direct debit or payroll deduction payments for membership subscriptions (T452).

155 Mr Reynolds also gave evidence about increases of amounts of direct debits to match increases in membership fees (T455). Mr Reynolds confirmed that people who were paying regularly by direct debit or payroll deduction were given all of the services and facilities that members are entitled to. This occurred as long as they were paying regularly (T455). He said there are also a few members who come into the office and pay instalments during the year, who were treated as financial members (T455).

156 Mr Reynolds was cross-examined about his evidence that he only became aware of the "deficiency in the CFMEUW rules" about direct debits since the proceeding commenced. He elaborated that the "deficiency" in the CFMEUW rules was that the CFMEU rules had been changed to allow people on payroll deduction or direct debit to get a vote at the election. Mr Reynolds said he only became aware of that amendment when the proceeding started (T466). A little later he said that around 23 July 2008, when he instructed Ms Arnold to prepare the list of electors, he became aware there were members in Western Australia who would not get a vote in the election for the CFMEUW (T467).

157 Mr Reynolds gave the following answers to questions that I asked him (T467):

> "But there had been people on direct debit and payroll deductions in Western Australia for a number of years hadn't there? --- Yes.
>
> But you didn't think that any of them would get a vote if there was an election? --- No, and they haven't before.
>
> Do members know that? Sorry, do you - does the union office and you as secretary take steps to inform members of that? --- It's sort of only come to my attention out of all of this now, but there hasn't … there wasn't an election in 2004.
>
> No? --- So … and I think there was only an election in 2001, the federal scene, but the … the rules, as I said, the rules are the rules. The rules say you have to be fully financial on that date. That's what the rules say and members can avail themselves of the rules."

158 In my opinion this final statement of Mr Reynolds was, to put it colloquially, "a bit rich". This is because Mr Reynolds, as the secretary and principal officer of the CFMEUW, clearly did not have regard to the rules in the way in which he should have, in making the decisions which he and the executive purported to make, and in the way the CMFEUW has been administrated.

159 I also took Mr Reynolds to the letter to Mr Mellor signed by Mr Reynolds and dated 26 February 2007. Mr Reynolds agreed that the letter referred to Mr Mellor as a financial member and set out some of the benefits for members. The membership ticket which was attached to Mr Mellor's affidavit said it entitled him to "all of the benefits afforded to financial members of the union". Mr Reynolds agreed that one of the benefits afforded to financial members of the union was the right to vote (T469). With reference to the phraseology "as a financial member", I asked Mr Reynolds whether it was implicitly if not expressly said that Mr Mellor was a financial member. Mr Reynolds said that when a person was on regular payroll (or direct debit) deductions they were treated as a financial member (T469).

(4) The basis on which Mr Reynolds and/or the CFMEUW decided who the members, financial members and "financial members of the union continuously for one year" were, for the purposes of rules 10(9)(c), 23(1) and 23(10), on 23 July and 4 September 2008.

160 Mr Reynolds said he was informed that Ms Arnold provided this information to the WAEC and he agreed with the content of Ms Arnold's third affidavit. Mr Reynolds said the question under rule 23(10), of members being financial "on the day" nominations were called meant that members who were recorded as being in arrears were "technically unfinancial" as the rules required a six month subscription to be paid in advance and in full. The list of financial members provided to the WAEC was accordingly different from those contained in the most recent statutory declarations filed with the Commission. Mr Reynolds was informed that over 2,000 people were decided to be unfinancial by the WAEC as a result of the database search which was carried out. These were in the following categories:

> "(a) Members who pay by direct debit but are in arrears: 404.
>
> (b) Members who pay by payroll deductions but are in arrears: 269.
>
> (c) People who owed money and simply had not paid anything for a time:
>
> (i) People owing less than $295: 168.
>
> (ii) Apprentices that owed $89 or more: 20.
>
> (iii) People owing $295 or more: 1996."

161 Mr Reynolds also gave evidence of his discussions with Ms Arnold about the preparation of the electoral roll. Mr Reynolds said he was aware there were people who were paying off their accounts, one way or another, who would not be financial on 23 July 2008. By financial he meant anyone "who had a zero balance or were in credit to the union" (T463). Mr Reynolds confirmed his position was that he would like members who had been paying contributions by direct debit or payroll deduction to get a vote (T468). Mr Reynolds' belief was that members who paid by direct debit and were in arrears because they had not paid their six monthly subscriptions in advance were technically unfinancial but "hard done by". Mr Reynolds said he would welcome a decision which would allow them to vote in the election as they are treated as members of the CFMEUW for all other purposes. Mr Reynolds said the issue was "an anomaly that has not turned up before". He accepted that during 2008 the CFMEUW did not make a decision to notify members on direct debits or payroll deductions that if they were not up to date according to the CFMEUW's internal accounting records, at the date an election was called, the members would not get a vote (T470).

162 Mr Reynolds did not however think that somebody in the position of Mr Thompson, (according to the records of the CFMEUW), would be hard done by in not getting a vote at the election. This is because he had paid a six monthly contribution, but had done so late (T489).

(5) With respect to the payment by members of the CFMEUW of any membership contributions or purported membership contributions:

(a) Were they deposited or credited to an account with a financial institution?

(b) If yes, what style of account and what was its title, and who was the owner of the funds of the account(s)?

(c) What impact if any do the answers in 5(a) and (b) have in deciding who were and are members and financial members of the CFMEUW, and whether a member was entitled to nominate for election in accordance with rule 23?

163 The contributions were deposited into the "consolidated" account. Mr Reynolds said the CFMEU and the CFMEUW "jointly controlled the funds" of the account. The assets of the CFMEUW and the CFMEU were under the control of their executives.

164 Questions (6) – (8) did not require evidence to be given by Mr Reynolds.

Membership Under the Rules

165 As set out earlier there are two concepts under the rules of the CFMEUW which are relevant for the purpose of elections. The first is that a member is eligible to vote if they are "financial on the day the returning officer calls for nominations…". (Rule 10(9)(c) and rule 23(10)). Secondly, candidates for election to any office must be "financial members of the union continuously for one year immediately preceding the next closing date for nominations". (Rule 23(1)). The rules therefore contemplate a distinction between a "financial" member and a member who is "continuously" financial for a year preceding the closing date for nominations. Rule 10(6) requires members to make payment of contributions, fines, dues and levies "as may be prescribed for the time being by the union". Rule 10(9)(a) provides for the payment of contributions. It is the payment of contributions which makes a member "financial". Rule 10(7) provides that upon payment the member shall receive a half-yearly ticket.

166 Rule 10(9)(c) provides that members not making payments in accordance with rule 10(9) are "deemed unfinancial and shall lose all privileges of membership …". The sub-rule provides the member "shall not again become a financial member entitled to any privilege of membership until all arrears have been paid". As mentioned the sub-rule then goes on to provide that being financial on the day the Returning Officer calls for nominations gives rise to an eligibility to vote.

167 In my opinion to be "continuously" financial, for the year prior to the calling of nominations, a member must make their contributions in accordance with rule 10(9)(a), so that they are paid half yearly in advance in March and September of each year. As stated by Gray J in *Re Carter; Re Federated Clarks Union of Australia, Victorian Branch (No 1)* (1989) 32 IR 1,

28, to be continuously financial "the member concerned must never have lost the status of being a financial member at any stage during the relevant period". Rule 23(1) also has the effect that a person who has been a member for less than a year immediately preceding the closing date for nominations, cannot nominate for office.

168 In contrast, in order to be eligible to vote, a member simply must be financial on the day the Returning Officer calls for nominations, in the sense of having, by that date, met their financial contributions for the relevant six monthly period and not being otherwise in arrears in the payment of their contributions. For example, the executive of the CFMEUW may have decided under rule 10(9)(a) that the amount of the contribution to be paid for the 12 months following July of that year is to be $600. Accordingly, contributions of $300 would be required to be paid in March and September for the member to be "financial". Unless members did so they could not be "continuously financial" for the purposes of rule 23(1). If the Returning Officer then called for nominations to office on 21 August, any member who had by that time paid the amount of $300 for the period from March to September, and who was not otherwise in arrears in their contributions, would be eligible to vote.

169 The effect of this is that members who purported to pay their contributions by way of direct debit or payroll deductions would very likely not be financial on the date nominations were called. This would be so unless that member was sufficiently in credit, so that the payments which they had made by way of direct debit or payroll deduction had the effect that they were up to date with their six monthly financial contributions by the relevant date, or they were paying more than the minimum amount per week to total the six month contribution. Regrettably therefore members who have been encouraged by the executive to and have purported to make their contributions by direct debit or payroll deductions are likely to be disenfranchised. This is despite the fact that they have been otherwise treated as financial members.

170 This is however but one example of the difficulties which have emerged because of the failure of Mr Reynolds and the executive to ensure that the rules of the CFMEUW were properly applied with respect to membership. The failures have included:

(a) Encouraging and receiving direct debit and payroll deduction membership contributions when there is no provision for the same under the rules of the CFMEUW. Contrary to the evidence of Mr Reynolds, this problem existed long before the rules of the CFMEU were amended in March 2008 to allow for direct debit contributions.

(b) Failure to comply with rule 10(9)(c) insofar as members who were not financial, because they were paying their contributions by way of direct debit or payroll deductions, were treated as financial members; with one exception, when the rule said that they should be "deemed unfinancial". The exception is that when it came to the preparation of an electoral roll, these members were excluded. This was different from the preparation of the returns for the Commission when members whom Mr Reynolds said were "technically unfinancial" were included in the membership numbers submitted.

(c) The executive did not decide in July of each year the amount of the contributions to be paid for the following 12 months, contrary to rule 10(9)(a).

(d) The way in which the membership of the CFMEUW has been administered has not taken into account rule 8(2) and rule 7 of the rules. Rule 8(2) refers to the expiry of a member's "subscription" and their responsibility for payment of "subscriptions". Although this is a different word from "contribution", it seems plain that they are the same thing under the rules. The CFMEUW has not been administered on the basis that a person whose contribution is in arrears for a period of three months after the requirement for payment in March and September has their membership terminated (rule 8(2)). I acknowledge however may be some difficulty in the application of this rule in conjunction with rule 10(9)(c) and the prospect of a previously unfinancial member becoming financial and therefore eligible to vote by the date of the calling for nominations for election.

(e) The administration of the membership of the CFMEUW has not occurred in accordance with s64B – s64D of *the Act*. The sections provide:

> "**64B. Membership to end if subscription not paid**
>
> (1) Where —
>
> (a) a period in respect of which a subscription has been paid to an organisation for a person's membership of the organisation expires; and
>
> (b) no subscription to continue or renew that membership has been paid to the organisation before, or within 3 months after, that expiry,
>
> that membership ends by operation of this subsection at the end of that 3 month period.
>
> (2) Subsection (1) does not apply if the membership has already ended under section 64A or under the rules of the organisation.
>
> **64C. Effect of sections 64A and 64B in relation to rules**
>
> (1) The ways of ending membership of an organisation set out in sections 64A and 64B are in addition to any ways of ending that membership provided for in the rules of the organisation.

> (2) The ending of membership of an organisation under section 64A or 64B has effect despite anything in the rules of the organisation.
>
> **64D. Purging the register**
>
> The rules of an organisation shall provide for the register referred to in section 63 to be purged on not less than 4 occasions in each year by striking off the names of members whose membership has ended under section 64A or 64B or under the rules."

171 Section 64D of *the Act* requires an organisation's membership register to be purged on not less than four times each year by the striking off of members whose membership has ended because of s64B of *the Act*. Similar problems therefore arise in (e) to those noted in (d). Members who are not financial for three months into the next payment period, because they are making direct debit contributions, are not treated as having their membership ending and being struck off the membership register.

172 It is the failure to ensure that the CFMEUW was properly administered in accordance with the rules, by Mr Reynolds and the executive, which has caused some of the problems which have now become apparent. The fact that the problems have only now crystallised does not mean that they should have been allowed to occur, remain and fester.

173 It is also relevant to comment at this stage that the CFMEUW is not an under-resourced organisation in which a small executive has battled against the odds to exist and function. As set out in the affidavit of Mr Reynolds, the CFMEU and the CFMEUW have approximately 27 staff members in Western Australia including elected organisers and also legal officers. It also has significant financial resources and has the capacity to and/or has engaged accountants, solicitors and counsel to provide assistance, advice and representation when required.

174 Other difficulties have occurred because the CFMEUW has not been satisfactorily run and administered by Mr Reynolds and the executive as an organisation under *the Act* and independently from the CFMEU. Pursuant to s60(1) of *the Act* the CFMEUW, upon its registration became and is for the purposes of *the Act* "a body corporate" by its registered name. It is a separate legal entity from that of the CFMEU which was formed under and governed by *the WRA* and predecessor Commonwealth legislation. The CFMEUW has not however been treated in this way.

175 This has occurred with respect to :

(a) The conjoint meetings of the CFMEUW and the CFMEU, which is not contemplated under the rules of the former.

(b) The failure to set separate entrance fees and contributions.

(c) The failure to properly distinguish between being a member of each organisation. As a consequence, only a single membership ticket has been issued to members.

(d) There has been a joint application form for membership of the two organisations.

(e) Contributions which were purported to be paid for membership of both unions were deposited into a single account in the name of and controlled by the CFMEU.

176 There is nothing in the rules of the CFMEUW which contemplates (c)-(e).

177 In the evidence of Mr Reynolds and the submissions of the CFMEUW it was asserted that the single entrance fee and contributions to both organisations could be traced to the terms of the WA Agreement. I think this point has limited weight. The relevant clause of the WA Agreement was very specific and limited in the time and circumstances in which it would operate. The relevant clause of the WA Agreement is clause 5 which provided:

> "5. The members of the BLFWA shall be and become members of the CFMEU Construction Labourers, Plasters and Painters Divisional Branch without the necessity to pay entrance fees or dues over and above the dues payable to the BLFWA".

178 The clause only applied to then members of the BLFWA and only with respect to their membership of the second organisation described in the clause. It does not have application in relation to the present administration of the CFMEUW in accordance with its rules or to the presently existing or new members of that organisation.

179 I have earlier referred to the failure of the executive of the CFMEUW to set contributions in accordance with rule 10(9)(a) of the rules. Indeed the executive has not set a yearly contribution since 31 January 2005. Even then, this decision was not strictly made in accordance with the rules. Firstly, the decision was not made in July 2005 as contemplated in rule 10(9)(a). Secondly the minutes of the meeting on 31 January 2005 do not provide for a decision as to the "amount of contributions" to be paid. They merely record that "dues be increased in line with the CPI movement". Thirdly this does not of itself indicate that, in accordance with rule 10(9)(a), contributions were based upon "1% of the All Industry Groups (Adult Males) Average Weekly Earnings as shown in the Australian Bureau of Statistics, Earnings Indexes or like indicator for June in the preceding year". Fourthly, the minutes are headed "Construction Forestry Mining and Energy Union Construction and General Division". The relevant item in the minutes refers to "union membership" and "union dues". There is nothing in the minutes to indicate that this decision was to apply to the CFMEUW as well as the CFMEU.

180 Whilst these problems are of concern, it is the uncontradicted evidence of Mr Reynolds that the meeting did also constitute a meeting of the executive of the CFMEUW and the decision taken was to apply to contributions for membership of the CFMEUW. Accordingly, albeit not without hesitation, I am of the opinion that contributions for membership of the

CFMEUW were validly set by the executive on 31 January 2005. There is a difficulty in establishing from the minutes the amount of the raised membership "dues". However the uncontradicted evidence of Mr Reynolds was that from September 2005 the decision was put into effect by the requirement for a payment of a six monthly contribution of $281. I accept the amount of the contribution was validly set despite the executive meeting being in January 2005 and not July 2005 as contemplated by rule 10(9)(a). I do not accept that it is the intention of the rules as a whole to necessarily make invalid a decision of the executive in January, as opposed to July, to increase contributions. This is particularly so when, based upon the evidence of Mr Reynolds, the increase did not apply until after July, in September 2005.

181 Mr Reynolds' evidence was that the contributions increased "without a formal decision of the executive" in March 2007 to $295. I do not accept that this occurred validly in accordance with the rules. Indeed this was conceded by the CFMEUW in its closing submissions. The rules do not contemplate a decision to increase membership contributions being made by anyone other than the executive. Accordingly, in my opinion the financial status of members should be determined on the basis that the six monthly contribution which was and is payable, since September 2005, is $281.

182 It is of course highly problematic that the accounts, membership database, payments by members and assessment of their financial status has been premised on the contribution being $295 and not $281 per six months, since March 2007. Relevant to the inquiry, the financial status of members who have been regarded as unfinancial on the basis of the required contribution being $295 per six months, will need to be reassessed by the CFMEUW.

183 Any other complications and issues which may have arisen because of the CFMEUW and its members acting on the basis that the membership contributions were $295 per six months, from March 2007, is beyond the scope of the present inquiry.

184 I have earlier referred to the evidence of Mr Reynolds in which he referred to the "mess" which he said occurred because of the failure to obtain a s71 certificate. In my opinion this description is not unfair given the situation which has arisen because of the failure to separately administer the CFMEUW, in accordance with its rules, and the failure to properly apply the rules to the members of the CFMEUW as outlined above. Further and as indicated earlier, the responsibility for this primarily lies, not with the past or present solicitors, in-house lawyers or accountants of the CFMEUW. The responsibility lies directly with Mr Reynolds and the executive. To repeat, the secretary is the principal officer of the union (rule 16(4) and rule 25(2)).

185 The prospect of obtaining a s71 certificate is not something that has recently arisen. It was, as set out earlier, contained within the rules of the CFMEUW from the time when it was first registered.

186 Notwithstanding this, as I have quoted earlier, Mr Reynolds said it was always the intention of the CFMEUW and the CFMEU "to preserve their separate functioning and identity". Mr Reynolds said this was "critical" in his affidavit at [50]. At [64] of his affidavit Mr Reynolds said that the "need to maintain separately registered state and federal unions has always been very important". What has problematic and in part lead to the "mess" however is that Mr Reynolds and the executive of the CFMEUW have not administered that organisation as a separate body.

Answers to the Inquiry Questions

Inquiry Question 1

187 With respect to question (1)(a), as set out above the executive of the CFMEUW did not make any decisions in July of 2006 – 2008 about the contributions to be paid by members for the "following 12 months" in accordance with rule 10(9)(a) of the rules. As to question 1(b), the executive of the CFMEUW did not otherwise make any decisions in 2006-2008 about the contributions to be paid by members of the CFMEUW. The attempt by Mr Reynolds on his own to increase the amount of contributions in 2007 was not in accordance with the rules and invalid. The financial status of members should be ascertained on the basis that the amount of six monthly contributions required to be paid is $281.

Inquiry Question 2

188 I have earlier described the evidence of Mr Reynolds about this. It is apparent that, as he conceded, the membership numbers declared in the returns included people who were "technically unfinancial" because their method of making contributions was by direct debit or payroll deduction. It is beyond the scope of the present inquiry to consider whether there are any ramifications which flow from this.

Inquiry Question 3

189 I have set out the limited evidence given by Mr Reynolds on this topic. In the end however the answer to this question does not take matters very far. This is because, quite simply, payment of membership contributions by direct debit or any method other than that described in rule 10(9)(a) of the rules is, of course, contrary to the rules and should not have been permitted, let alone encouraged, by Mr Reynolds and the executive of the CFMEUW.

Inquiry Question 4

190 I have summarised the evidence of Mr Reynolds and Ms Arnold about the basis upon which the CFMEUW decided who were members, financial members and financial members continuously for one year for the purpose of rules 10(9)(c), 23(1) and 23(10). Given what I have said earlier, these determinations could be inaccurate in taking the amount required to be paid for six monthly contributions as $295 and not $281. The same may be said for the Returning Officer in his determination of those persons who were entitled to nominate and in deciding who was entitled to vote, consequent upon being provided with a roll of electors.

Inquiry Question 5

191 As set out earlier the contributions of members were deposited into a bank account named "Construction Forestry Mining Energy Union Construction Division General Account". As clarified in Mr Reynolds' oral evidence, this account is referred to by him and others as the "general account" and not a "consolidated account" as described in his affidavit. From the

evidence it appears the money from this account is used for both CFMEU and CFMEUW purposes. It would also appear that the owner of the funds in the account is the CFMEU; although it is unnecessary to make a final determination on this issue for the purposes of this inquiry. Indeed it would be inappropriate to do so given the lack of all relevant evidence.

192 The more important question for present purposes is that contained in inquiry question 5(c). That is, given the answers to 5(a) and (b), is there any resultant impact in deciding who are the financial members of the CFMEUW? As is clear from what I have earlier written, this issue has troubled me since the "can of worms" was first opened.

193 From the available evidence, it seems clear that contributions are paid by members of the CFMEUW to representatives or employees of the CFMEU and/or the CFMEUW for the purpose of becoming a member or maintaining financial membership of both organisations. This evidence includes that of Mr Reynolds, the direct evidence from each of Mr Thompson, Mr Byron, Mr Malcolm and Mr Mellor and the form of the application to become a member, contained in the Journal. The latter is an application to join both organisations. My conclusion is reinforced by the evidence of Mr Reynolds that, for example, a construction worker may readily move between what is colloquially described as "federal" and "state" worksites; or there may from day to day be "federal" or "state" issues which arise on a worksite. For example, although the terms and conditions of employment for a construction worker on a site may generally be governed by an instrument under *the WRA*, a "state" issue like occupational safety and health may also arise on the site.

194 In addition, from the evidence of Mr Reynolds, the payment of contributions is received as the payment of a contribution to both organisations. To some extent, as indicated by Mr Reynolds, this system has emerged from the way in which the CFMEU and the CFMEUW were created; and the terms and the intent of the WA Agreement. In their submissions, the CFMEUW emphasised what it described as the "unique set of circumstances" which commenced with the deregistration of the Federal BLF in the 1980s. It was submitted that the history was fundamental to matters going to intent, including the operation of the CFMEUW. *Allen v Sideris* (1984) 3 FCR 548 was heavily relied upon as establishing the correctness of an approach of considering the present administration of an organisation or organisations through a paradigm which takes into account the relevant history. Whilst I accept this, it should not be forgotten that the obligations of Mr Reynolds and the executive were to administer the CFMEUW in accordance with its rules, not from an understanding as to how they thought the organisation was intended to operate.

195 The relevance of the intention of the payer and the payee in determining membership was emphasised by Gray J in *Bailey v Krantz* (1984) 13 IR 326 at 383-384. The following two passages of his Honour's reasons at 384 are in my opinion apposite to the present inquiry:

> "A member paying one sum of money, which he or she believed was all that he or she was obliged to pay, would expect that all obligations arising under both sets of rules would be met from that sum of money, and that any further decisions made to spend that sum of money would be made in accordance with both sets of rules.
>
> …
>
> If no intention may legitimately be inferred on the part of the payers, then it may be proper to look at the intention of the payees. These are, in effect, the elected officials, whose obligation it is to comply with both sets of rules. Their intentions in receiving monies from members must necessarily be constrained by their duties to obey both sets of rules."

196 As to the final sentence in this passage of Gray J, it is unnecessary in the present inquiry to determine whether there has been any contravention of the rules of the CFMEUW by the depositing of the contributions of members into the account held by the CFMEU. What is relevant is that I accept that payments made by members, deposited into the general account, were payments made and received as contributions towards financial membership of the CFMEUW.

Inquiry Question 6

197 The determination of who are or were the financial members and continuously financial members of the CFMEUW should be done in accordance with the rules. I have earlier set out what I consider to be the proper construction of the rules for this purpose. Inquiry question 6 is premised upon the dates of 23 July 2008 and 4 September 2008 being relevant. Whilst for the reasons earlier set out these dates have historical relevance, given the postponement of the election this does not necessarily remain so. I will later return to this issue.

Inquiry Question 7

198 I have earlier set out what I regard to be the proper construction of the rules about membership, financial membership, eligibility to nominate for offices in elections and eligibility to vote. It is unnecessary to elaborate upon that earlier discussion.

Inquiry Question 8

199 This question is about the orders which should be made in the proceeding. As neither Mr Thompson, Mr Byron, Mr Malcolm nor Mr Mellor wish to continue with their applications, no orders should be made specifically about the entitlement of the first three to nominate and the entitlement of Mr Mellor to vote. I am presently of the view that, for the purposes of certainty, orders to this effect should be made. I will later discuss the issue of what, if any, other orders should be made to determine the inquiry pursuant to s66(2)(e) and s66(2)(f) of *the Act*.

Irregularities

200 I have earlier set out the meaning of "irregularity" as defined in s7(1) of *the Act.* Section 66(2)(e) and s66(2)(f) of *the Act* are a code in that these subsections contain all of the President's jurisdiction and powers to make orders or directions about election irregularities. (*Stacey v Civil Service Association of Western Australia (Inc.)* (2007) 87 WAIG 1229 at [255]-[262]; [272]-[274]; [279] and *Harken v Dornan* (1992) 72 WAIG 1727). From the terms of s66(2)(e), the making of a finding that there is or has been an irregularity is a necessary condition before the types of orders described in that subsection or s66(2)(f) may be made.

201 Although the definition of "irregularity" in s7(1) of *the Act* is inclusive, the definition includes a very fulsome description of those things which could constitute an "irregularity" in relation to an election for office. The structure of the definition is such that for there to be an irregularity there needs to have been a particular action or state of affairs and a particular consequence. The action or state of affairs can be:

(a) A breach of the rules of an organisation; or

(b) Any act, omission, or other means.

202 The consequence, is either

(a) The full and free recording of votes, by persons entitled to record votes and no other persons; or

(b) A correct ascertainment or declaration of the results of the voting,

is or is attempted to be, prevented or hindered.

203 The definition of "irregularity" is not materially different from that is which has applied in Commonwealth industrial legislation and considered, for example, by the High Court in *The Queen v Gray; Ex parte Marsh* (1985) 157 CLR 351 and *Re Collins; Ex parte Hockings* (1989) 167 CLR 522.

204 In *Marsh*, Gibbs CJ at 368 said:

> "The notion of an irregularity, in relation to an election, involves the idea of some departure from some rule, established practice or generally accepted principle governing the conduct of the election".

205 These observations were applied by the members of the High Court in *Collins.*

206 The observations of Gray J in *Re Bailey; Re Transport Workers Union of Australia (Victorian Branch)* (1997) 79 IR 1 at 7-9 are of particular assistance to the present inquiry. In *Re Bailey*, his Honour was in part considering whether the removal of unfinancial members from the computer records of the organisation constituted an irregularity. The relevant rules were such that unless they remedied their unfinancial status prior to the closing time for nominations on 29 November 1994, they would not have been entitled to vote. Their lack of financial status could have been remedied by the payment of arrears of contributions. If this had occurred by the relevant date, entitlement to vote would have followed. His Honour said at 7-8:

> "There was, however, no obligation to be found in the rules of the union, or arising otherwise, to send an account to an unfinancial member in respect of the contributions for 1994. Conversely, the failure to send accounts to these members whose unfinanciality extended over three years or more did not deprive any of them of the opportunity to vote. They were deprived of the right to vote by the operation of r 21 because they were unfinancial. It was open to any of them to remedy that situation, as I have said. There is no evidence that any sought to do so. In these circumstances, the removal of the names from the computerised membership records could not amount to an irregularity in relation to the subject elections. I therefore terminated the inquiry with respect to this alleged irregularity on the first day of the hearing".

207 This paragraph is of particular assistance as it reasons that if a person is not entitled to vote (or be nominated) because of a proper application of the rules of an organisation, that is not an irregularity. In terms of the definition in s7(1) of *the Act* there will have been no breach of the rules of the organisation. Furthermore there will not have been any act, omission or other means by which the full and free recording of votes "by persons entitled to record votes, and no other persons" has been prevented or hindered. This applies to members who have, for example, paid contributions by direct debit but who are unfinancial.

208 Senior counsel for the CFMEUW accepted the correctness of the observations by Gray J in *Re Bailey***.** It was submitted however that his Honour's discussion did not cover the present situation. That is because here, Mr Reynolds and the executive of the CFMEUW encouraged and purported to authorise the receipt of membership contributions made by way of direct debit or payroll deduction, when the rules did not. (T560). Furthermore, these members were regarded as financial and received all of the benefits of financial membership, apart from being included on the electoral roll. As I have said the fact that this has occurred is quite regrettable. Whilst I accept that this type of issue was not discussed in *Re Bailey*, in my opinion it remains the position that if members have paid by direct debit are unfinancial, this does not constitute an "irregularity" in accordance with *the Act.* That is because, as I have said the proper application of the rules to determine who is a financial member cannot, axiomatically, mean that there has been a breach of the rules or any other act by which "the full and free recording of votes…" or a correct ascertainment or declaration of the results of the voting, is or is attempted to be prevented or hindered.

The Alleged Irregularities

209 I have earlier set out in full the schedule of possible irregularities. In determining whether the possible irregularities identified in paragraph 4 of the schedule have occurred, I apply what I have just described about the meaning of "irregularity". In addition, I have also discussed and considered the Inquiry Questions and facts necessary to determine whether the alleged irregularities have occurred.

210 From what I have said it is apparent that in my opinion what is contained in paragraphs 4(a), (b), (c), (d), (e), (g) (there is no (f)) and (h) do not of themselves constitute irregularities.

211 The only irregularity which may be established is that which stems from the fact that the CFMEUW has been acting on the basis that the amount of six monthly contributions is $295, when as I have said the last valid setting of a six monthly contribution was in the amount of $281. To the extent that any electoral roll which was or is prepared and did or does not include as an elector a person who was financial having regard to a required contribution of $281 per six months, an irregularity has or will occur. This is an irregularity because it will involve a breach of the rules and/or the prevention of the recording of a vote by a person entitled to do so.

212 Additionally, determining the financiality of members must be done on or by reference to the actual date under consideration and not some earlier date when the notice was sent. This is to prevent a wrong decision that someone was not financial, as exemplified by Ms Arnold's evidence about Mr Mellor, from August to the end of September 2008, described earlier.

213 Accordingly, if there is to be an election, the electoral roll must be prepared on the above basis.

214 This, together with what I have said earlier about direct debit and payroll deduction payments means that unless by the relevant date a member has paid the amount of $281, as his/her six monthly contribution, and are not otherwise in arrears to the CFMEUW, he/she will not be entitled to vote.

The Section 71 Solution

215 It was submitted by the CFMEUW that the appropriate outcome to the present inquiry was to make orders that the election not occur and that instead the "CFMEUW be directed to make application forthwith for a certificate under s71 of *the Act* and to prosecute its application with expedition". It was contended that in the event a s71 certificate was not granted by the Commission, then orders be made for the conduct of the election.

216 The basis of this submission was that because of the election of Mr Reynolds and his team in the Federal sphere, the membership had spoken. Additionally, Mr Kavanagh and other members of the "Renew the CFMEU" team endorsed this approach. It was submitted that in the formal votes counted in the Federal election, the "Renew the CFMEU" and Reynolds' teams received a total of over 93% of the votes of members who chose to vote. I was also informed that of the 3813 formal ballot papers, Mr Mcjannett received 245 first preference votes for the position of assistant secretary.

217 It was also submitted:

(a) It has, since its creation, been an object of the CFMEUW to apply for and be granted a s71 certificate under rule 3(18).

(b) Instructions to apply for a s71 certificate had been given to solicitors; albeit more than eight years ago (T478).

(c) *The Act* does not contemplate that a s71 certificate may not be applied for and granted during a pending election inquiry and the provision of the certificate would have the effect, from s71(5) of *the Act*, of removing the need for an election.

(d) It was not in the public interest to have an election under *the Act* because, given the way in which the CFMEU and the CFMEUW have structured their operations and dealt with their assets, the organisations could be fractured by a result which was inconsistent with the recent Federal election.

(e) The difficulties involved in the application of rule 6 and s64B - s64D of *the Act* would be obviated if a State election was avoided and a s71 certificate issued.

218 I have given careful consideration to these submissions. I have decided however that it would be inappropriate to make the order sought by the CFMEUW. This is because:

(a) Although the rules of the CFMEUW include the object contained in rule 3(18), this has not been acted upon since the coming into existence of the CFMEUW.

(b) At all relevant times in the inquiry, the CFMEUW, Mr Reynolds and the applicants were aware that two elections were proceeding. No one, prior to the making of final submissions, contended that the inquiry should remain pending until the outcome of the Federal election was known. Additionally it was not until then submitted that making an application for a s71 certificate was the panacea to the problems which have emerged.

(c) The members of the CFMEUW are entitled, in accordance with its rules, to have an election for offices. It would take a strong reason for the Commission to make an order that this not occur. The fact that problems have emerged, because of the failure of Mr Reynolds and the executive to administer the CFMEUW in accordance with its rules, does not constitute such a reason.

(d) Indeed, in my opinion the members should be able to have an election where they can, if they desire, consider and judge the actions of Mr Reynolds and the executive. To not allow an election would be

tantamount to saying that because of the failure by the executive of the CFMEUW to manage the organisation in accordance with its rules, the members should be denied the right to consider whether they should be re-elected. This could not be properly permitted by the Commission in my opinion.

(e) The evidence before me does not establish that there is either:

(i) A coincidence of offices in the CFMEU and the CFMEUW; or

(ii) A coincidence of nomination for positions in the CFMEU and the CFMEUW elections.

(f) In relation to (ii), to decide not to conduct a State election would deny those people who had their nominations for an office accepted by the Returning Officer the opportunity of being elected to those offices. There is insufficient information before me to establish that this is what all of those people would now want to occur.

(g) There is insufficient information before me to establish that the outcome sought by the CFMEUW is that which would be desired by its members and financial members.

(h) In addition there is a public interest in the election for offices in the CFMEUW occurring in accordance with its rules.

(i) An application for a s71 certificate would in itself involve and problems. This is because:

(i) In order for the certificate to be granted, the Full Bench would need to come to the conclusion that the qualification of persons for membership of the CFMEU and the CFMEUW were substantially the same. It is inappropriate for me to assume or pre-empt what the decision of the Full Bench on this issue might be.

(ii) The evidence does not establish that the CFMEU is an organisation the rules of which prescribe offices which are the same as those contained in the rules of the CFMEUW. Under s71(4) of *the Act* this involves, that for every office in the CFMEUW, there is a corresponding office in the CFMEU.

(iii) In order for a s71 certificate to be granted, the rules of the CFMEUW would need to be altered pursuant to s62 of *the Act* (s71(5)(a)). If this were to occur it could be a time-consuming process. Additionally the process would, in accordance with rule 36 of the rules and *the Act*, require a decision to this effect to be made by the members. This is problematic because people making contributions by direct debit or payroll deduction and who have been treated as members, may well not be financial members, for the reasons earlier outlined.

(j) The people entitled to vote in the State election may well be different from the Federal election electors. This is because of the different rules for determining financial membership.

Conclusions

219 For these reasons, in my opinion there should still be an election of offices under the rules of the CFMEUW. The election and its timetabling will however need to be modified to take into account the delays which have occurred because of the inquiry. It is necessary to set a date for the calling of nominations. At this stage I would favour this date being such that members who are unfinancial will have the opportunity to become financial. To facilitate this it would seem to me to be appropriate for the CFMEUW to send a circular to each member who may not be financial because of their payments being made by direct debit or payroll deduction, of the need for them to become financial, by a particular date, if they are to vote in any election, and providing the amount which they need to pay to the CFMEUW to do so. Additionally, in determining the financial status of members, the CFMEUW will need to rectify its register so that it reflects a membership contribution of $281 per six months and not $295. I will need information on how this can best occur and by when it might be reasonably yet expeditiously achieved. That will be relevant to the setting of a timetable for the election.

220 There are also issues identified by the Returning Officer in his final submissions. My preliminary view is that new nominations should be called for. Also, people who have become members or financial members since 23 July 2008 and before the date on which nominations are called should be entitled to vote. I also favour, in accordance with rule 23(18), that the period between the opening and closing of the ballot be 21-28 days. I also favour an order being made that the CFMEUW provide the WAEC with a list of persons eligible to vote in accordance with these reasons.

221 In my opinion it is appropriate for the parties to bring to the Commission minutes of proposed orders to facilitate the carrying out of the election in accordance with these reasons. A directions hearing has been scheduled for 28 January 2009 at 9.30am at which the parties' minutes and submissions on the appropriate orders can be received and heard.

2009 WAIRC 00027

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES BEN RICHARD THOMPSON

APPLICANT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY

FIRST RESPONDENT

-and-

THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

-and-

WARWICK GATLEY AM, THE RETURNING OFFICER
WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

PRES 3 OF 2008

-and-

BRIAN BYRON

APPLICANT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY

FIRST RESPONDENT

-and-

THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

-and-

WARWICK GATLEY AM, THE RETURNING OFFICER
WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

PRES 4 OF 2008

-and-

SEAN MALCOLM

APPLICANT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY

FIRST RESPONDENT

-and-

THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION OF WORKERS

SECOND RESPONDENT

-and-

WARWICK GATLEY AM, THE RETURNING OFFICER
WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

PRES 5 OF 2008

JIM JOSEPH MELLOR

APPLICANT

-and-

THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS (“CFMEUW”)

FIRST RESPONDENT

-and-

KEVIN NOEL REYNOLDS - THE SECRETARY, CFMEUW

SECOND RESPONDENT

-and-

WARWICK MCLEAN GATELY AM - ELECTORAL COMMISSIONER, WESTERN AUSTRALIAN ELECTORAL COMMISSION

THIRD RESPONDENT

-and-

WAYNE NICHOLSON - RETURNING OFFICER (CFMEUW ELECTIONS), WESTERN AUSTRALIAN ELECTORAL COMMISSION

FOURTH RESPONDENT

PRES 6 OF 2008

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 28 JANUARY 2009
FILE NO/S	PRES 3 OF 2008, PRES 4 OF 2008, PRES 5 OF 2008, PRES 6 OF 2008
CITATION NO.	2009 WAIRC 00027

Decision	Declaration and Orders
Appearances	
Applicants	Mr P G Laskaris (of Counsel), by leave, and with him Mr T R Kucera (of Counsel), by leave
First Respondent	Mr K J Bonomelli (of Counsel), by leave
Second Respondent	Mr T J Dixon (of Counsel), by leave, and with him Mr S A Millman (of Counsel), by leave
Third Respondent in PRES 3-5 of 2008	Ms N Eagling (of Counsel), by leave
Third Respondent and Fourth Respondent in PRES 6 of 2008	Ms N Eagling (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 28 January 2009, and having heard Mr P G Laskaris (of Counsel), by leave, and with him Mr T R Kucera (of Counsel), by leave, on behalf of the applicants, Mr K J Bonomelli (of Counsel), by leave, on behalf of the first respondent, Mr T J Dixon (of Counsel), by leave, and with him Mr S A Millman (of Counsel), by leave, on behalf of the second respondent, and Ms N Eagling (of Counsel), by leave, on behalf of the third respondent in PRES 3-5 of 2008, and the third respondent and the fourth respondent in PRES 6 of 2008, it is this day, 28 January 2009, ordered and declared that:

1 An irregularity has occurred in the compilation of the roll for the 2008 election for the officers of the Construction, Forestry, Mining and Energy Union of Workers ("CFMEUW") being an election for the offices of President, Senior Vice President, Vice President, Secretary, two (2) Assistant Secretaries, Treasurer, two (2) Trustees, two (2) Ordinary Executive Members and six (6) Organisers.

2 An election proceed pursuant to Rule 23 of the CFMEUW Rules for all offices and such election be arranged by the Registrar and the Electoral Commissioner appointed under section 69 of the *Industrial Relations Act 1979* (WA) in accordance with the following scheme and timetable:

(i) The CFMEUW shall send by no later than 13 February 2009 a circular to each member who may not be financial because of their payments being made by direct debit or payroll deduction, of the need for them to become financial by 25 March 2009 in order to be able to vote in the election. The circular shall, for each member, set out the amount required to be paid in order to become financial. In determining the financial status of the members concerned, the CFMEUW shall do so on the basis that the half yearly contribution is $281.00.

(ii) On 27 March 2009 the CFMEUW shall provide the Western Australian Electoral Commission with a list of persons eligible to vote in the election. The list is to be prepared in accordance with the Reasons for Decision of his Honour Acting President Ritter dated 23 January 2009 in these proceedings.

(iii) On 27 March 2009 an advertisement be placed in *The West Australian* newspaper inviting nominations for the said offices in accordance with the provisions of Rule 23(6) of the Rules of the CFMEUW.

(iv) Nominations are to open on 17 April 2009.

(v) Nominations are to close on 1 May 2009.

(vi) The ballot is to commence on 22 May 2009.

(vii) The ballot is to conclude on 19 June 2009.

3 Until the new election is concluded, each of the persons currently incumbent in the respective offices of the President, Senior Vice President, Vice President, Secretary, two (2) Assistant Secretaries, Treasurer, two (2) Trustees, two (2) Ordinary Executive Members and six (6) Organisers shall each hold his respective office and shall be deemed for all purposes to have held such office in the CFMEUW since their election and/or appointment and each shall be a member of and shall be deemed for all purposes to have been a member of the Executive of the CFMEUW at all material times.

4 There be no orders made in relation to the specific claims of Mr Thompson, Mr Byron, Mr Malcolm and Mr Mellor.

5 There be liberty to apply on three (3) days' notice.

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

2009 WAIRC 00051

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
	APPLICANT
	-and-
	THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 4 FEBRUARY 2009
FILE NO/S	PRES 1 OF 2009
CITATION NO.	2009 WAIRC 00051

Decision	Orders and directions
Appearances	
Applicant	Mr R Andretich (of Counsel), by leave
Respondent	Mr K Trainer, as agent

Order

This matter having come on for hearing before me on 3 February 2009, and having heard Mr R Andretich (of Counsel), by leave, on behalf of the applicant, and Mr K Trainer, as agent, on behalf of the respondent, it is this day, 4 February 2009, ordered that:

1. Subject to compliance with order 3 and the Acting President being satisfied that the respondent is viable, there be constituted an interim Executive Committee of the respondent consisting of five competent financial members nominated by the respondent and approved by the Acting President.

2. The proposed interim Executive Committee will if constituted have all of the powers and duties of a properly constituted Executive Council under the rules of the respondent until further order or there is an Executive Committee constituted in accordance with the rules.

3. Within 14 days of the date of this order, the respondent shall:

   (a) provide the Acting President and the applicant with a list of the current members of the respondent as at the date of the list, prepared in accordance with section 63 of the *Industrial Relations Act 1979* (WA);

   (b) provide the Acting President and the applicant with a report revealing the current financial position of the respondent; and

(c) provide to the Acting President and the applicant the names, personal details and qualifications of the nominees for membership of the interim Executive Committee and a statement signed by the nominees that they will accept the appointment.

4. The application otherwise be adjourned to 24 February 2009 at 10am.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2009 WAIRC 00020

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY RESIDENTIAL COLLEGE SUPERVISORY STAFF AWARD 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	AND
	COUNTRY HIGH SCHOOL HOSTELS AUTHORITY
	APPLICANTS
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	SENIOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 21 JANUARY 2009
FILE NO/S	P 38 OF 2008
CITATION NO.	2009 WAIRC 00020

Result	Varied
Representation	
Applicants	Mr S Farrell for The Civil Services Association of Western Australia Incorporated and Ms L Wiese (as agent) on behalf of Country High School Hostels Authority

Order

HAVING heard Mr S Farrell for the applicant, The Civil Services Association of Western Australia Incorporated, and Ms L Wiese as agent on behalf of the applicant, Country High School Hostels Authority, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the Country High School Hostels Authority Residential College Supervisory Staff Award 2005 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 January 2009.

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

SCHEDULE

1. Clause 3. – Arrangement:

A. Delete the words "42. Study Leave" and insert the following in lieu thereof:

42. Study Assistance

B. Delete the words "50. Copies of the Award" and "51. Parties to the Award" and insert the following in lieu thereof:

50. Access to Information and Resources
51. Copies of the Award
52. Parties to the Award

2. Clause 8. – Contract of Service: Delete paragraph (b) of subclause (3) of this clause and insert the following in lieu thereof:

(b) The provisions of subclause (2) of this clause shall also apply in respect to part-time employees.

3. Clause 10. – Part-Time Employment: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) An employee who is employed on a part-time basis shall be paid the appropriate hourly rate based on the actual number of rostered hours worked. These rates are contained within Schedule A – Salaries and do not include the 25% loading allowance as per Clause 14. – Salaries of this Award at subclauses (3) and (4).

4. Clause 11. – Fixed-Term Contract Employees: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) The Authority may employ employees for a fixed-term subject to subclause (4) of this clause.

5. Clause 12. – Casual Employment: Delete subclause (4) of this clause and insert the following in lieu thereof:

(4) The conditions of employment, leave and allowances provided under this Award, with the exception of bereavement and carer's leave, shall not apply to a casual employee. The hours worked by a casual employee shall be paid as per Schedule A – Salaries of this Award. The rates include a 20% casual loading but do not include the 25% loading allowance as per Clause 14. – Salaries of this Award at subclauses (3) and (4). However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

6. Clause 14. – Salaries:

A. Delete sub-paragraph (iv) of paragraph (c) of subclause (2) of this clause and insert the following in lieu thereof:

(2) (c) (iv) Should the college regain the higher grading after two (2) years the College Manager and Senior Supervisor(s) shall be reinstated to the equivalent incremental point at which their salary was pegged and either the provisions of sub-paragraphs (ii), (iii) or (v) of paragraph (c) of subclause (2) of this clause shall apply.

B. Delete sub-paragraph (v) of paragraph (c) of subclause (2) of this clause and insert the following in lieu thereof:

(v) Should the college retain the higher grading the College Manager and Senior Supervisor(s) shall continue to receive the salary increments applicable to the grading/classification.

(vi) For the purposes of this clause:

"On Call" means a period of time when an employee is required to remain on-site and be immediately contactable in readiness to deal with situations of an essential nature.

"Essential Nature" means circumstances urgent in nature and may mean attending to ill residents, emergency situations and accidents.

C. Delete paragraph (d) of subclause 4 of this clause and insert the following in lieu thereof:

(d) annual base salary add 25% loading allowance = total annual salary.

7. Clause 19. – District Allowance:

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

(4) An employee who has a dependant shall be paid double the district allowance prescribed by subclause (3) of this clause for the district, town or place in which the employee's headquarters is located.

B. Insert the following new subclause (13) after subclause (12) of this clause:

(13) District Allowance is payable to casual employees on an hourly rate basis in accordance with the following formula:

$$\frac{\text{Appropriate Annual District Allowance Rate}}{1} \times \frac{12}{313} \times \frac{1}{75}$$

C. Renumber existing subclause (13) of this clause to subclause (14).

D. Renumber existing subclause (14) of this clause to subclause (15).

8. Clause 20. – Disturbance Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Where an employee is transferred and incurs expenses in the areas referred to in subclause (2) of this clause as a result of that transfer, then the employee shall be granted a disturbance allowance and shall be reimbursed by the Authority the actual expenditure incurred upon production of receipts or such other evidence as may be required.

9. Clause 22. – Motor Vehicle Allowance: Delete subclauses (2) and (3) of this clause and insert the following in lieu thereof:

(2) (a) An employee who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment shall be reimbursed in accordance with the appropriate rates set out in Part I of Schedule C – Motor Vehicle Allowance of this Award for journeys travelled on official business and approved by the Authority or an authorised employee.

(b) An employee who is reimbursed under the provisions of paragraph (a) of subclause (2) of this clause will also be subject to the following conditions:

(i) for the purposes of paragraph (a) of subclause (2) of this clause an employee shall be reimbursed with the appropriate rates set out in Part 1 of Schedule C – Motor Vehicle Allowance of this Award for the distance travelled from the employee's residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day;

(ii) where an employee in the course of a journey travels through two (2) or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part 1 of Schedule C – Motor Vehicle Allowance of this Award;

(iii) where an employee does not travel in excess of 4,000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4,000 kilometres shall be paid to the employee provided that where the employee has less than 12 months' qualifying service in the year then the 4,000 kilometre distance will be reduced on a pro rata basis and the allowance calculated accordingly;

(iv) where a part-time employee is eligible for a payment of an allowance under paragraph (a) of subclause (2) of this clause such allowance shall be calculated on the proportion of total hours worked in that year by the employee to the annual standard hours had the employee been employed on a full-time basis for the year;

(v) an employee who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of his/her vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the employee is unable to provide the motor vehicle or a replacement;

(vi) the Authority may elect to waive the requirement that an employee supply and maintain a motor vehicle for use on official business, but three (3) months' written notice of the intention so to do shall be given to the employee concerned.

(3) (a) Subject to subclause (2) of this clause, an employee who is not normally required to supply and maintain a motor vehicle as a term of employment and who is required to relieve an employee required to supply and maintain a motor vehicle as a term of employment shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part I of Schedule C – Motor Vehicle Allowance of this Award for all journeys travelled on official business and approved by the Authority where the employee is required to use the vehicle on official business whilst carrying out the relief duty.

(b) For the purposes of paragraph (a) of this subclause an employee shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part 1 of Schedule C – Motor Vehicle Allowance of this Award for the distance travelled from the employee's residence to place of duty and the return distance travelled from the place of duty to residence except on a day where the employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.

(c) Where an employee in the course of a journey travels through two (2) or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part 1 of Schedule C – Motor Vehicle Allowance of this Award.

(d) For the purpose of this subclause the allowance prescribed in sub-paragraphs (iii) and (iv) of paragraph (b) of subclause (2) of this clause shall not apply.

10. Clause 23. – Relieving Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) When an employee, who is required to relieve or perform special duties in accordance with subclause (1) of this clause is authorised by the Authority to travel to the new locality in the employee's own motor vehicle such employee shall be reimbursed for the return journey as follows:

(a) An employee who is required to supply and maintain a motor vehicle as a term of employment for the period of relieving or special duties shall be reimbursed the appropriate rate prescribed by subclause (2) of Clause 22. – Motor Vehicle Allowance of this Award for the distance necessarily travelled.

(b) Where the employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be on the basis of one half of the appropriate rate prescribed by subclause (4) of Clause 22. – Motor Vehicle Allowance of this Award. Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.

11. Clause 24. – Removal Allowance: Delete the entire clause and insert the following in lieu thereof:

24. – REMOVAL ALLOWANCE

(1) When an employee is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be reimbursed:

(a) The actual reasonable cost of conveyance of the employee and dependants.

(b) The actual cost (including insurance) of the conveyance of an employee's household furniture effects and appliances up to a maximum volume of 45 cubic metres provided that a larger volume may be approved by the Authority in special cases.

(c) An allowance of $532.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the Authority is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,188.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $181.00.

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

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

(2) An employee who is transferred solely at their own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the Authority prior to removal.

(3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the employee's motor vehicle. If authorised by the Authority to travel to a new locality in the employee's own motor vehicle, reimbursement shall be as follows:

(a) Where the employee will be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause (2) of Clause 22. - Motor Vehicle Allowance of this Award.

(b) Where the employee will not be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of one half (½) of the appropriate rate prescribed by subclause (3) of Clause 22. - Motor Vehicle Allowance of this Award.

(c) Where an employee or their dependants have more than one vehicle, and all the vehicles are to be relocated to the new residence, the cost of transporting or driving up to two vehicles shall be deemed to be part of the removal costs.

(d) Where only one vehicle is to be relocated to the new residence, the employee may choose to transport a trailer, boat or caravan in lieu of the second vehicle. The employee may be required to show evidence of ownership of the trailer, boat or caravan to be transported.

(e) If the employee tows the caravan, trailer or boat to the new residence, the additional rate per kilometre is to be 3.5 cents per kilometre for a caravan or boat and 2.0 cents per kilometre for a trailer.

(4) The employee shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the Authority, who may authorise the acceptance of the more suitable: Provided that payment for a volume amount beyond 45 cubic metres shall not occur without the prior written approval of the Authority.

(5) The Authority may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an employee, with prior approval of the Authority, disposes of their household furniture effects and appliances instead of removing them to the new headquarters: Provided that such payments shall not exceed the sum which would have been paid if the employee's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.

(6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $989.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Authority.

(7) Receipts must be produced for all sums claimed.

(8) New appointees to the Authority shall be entitled to receive the benefits of this clause if they are required by the Authority to participate in any training course prior to being posted to their respective positions in the service. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.

(9) The Authority may agree to provide removal assistance greater than specified in this award and if in that event that the employee to whom the benefit is granted elects to leave the position, on a permanent basis, within twelve months, the Authority may require the employee to repay the additional removal assistance on a pro rata basis. Repayment can be deducted from any monies due to the employee.

(10) For the purposes of subclause (9) of this clause, "elects to leave the position," means the employee freely chooses to leave the position in the ordinary course of promotion, transfer or resignation and this necessitates the Authority obtaining a replacement employee.

12. Clause 28. – Annual Leave:

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

(1) Each employee is entitled to four (4) weeks annual leave for each year of service. Employees shall be paid the 25% loading allowance provided for in Clause 14. - Salaries of this Award at subclauses (3) and (4), while on annual leave.

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

(2) Entitlement

(a) An employee employed after the first day of January in any year is entitled to pro rata annual leave for that year calculated on a daily basis. At the end of each calendar day of the year the employee will accrue 0.411 hours of paid annual leave provided the maximum accrual will not exceed 150 hours for each completed calendar year of service.

(b) Where employers have systems in place which record and report pro rata accrual of annual leave entitlements in a manner other than prescribed by this clause, that method of accrual may continue provided the system provides the same accrual over a full year. Employers must ensure that upon the cessation of employment, all pro rata annual leave entitlements accrued are equivalent to the pro rata annual leave entitlement provided by paragraph (a) of this subclause.

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

(8) (a) Subject to paragraph (b) of this subclause a loading of 17.5% of normal salary is payable to employees proceeding on annual leave, including accumulated annual leave. As set out in sub-paragraph (i) of paragraph (f) of this subclause, this loading is payable in addition to the 25% loading as set out in subclause (3) of Clause 14. – Salaries of this Award.

(b) The loading is paid on a period of four (4) weeks per year. Payment of the loading is not made on additional leave granted to employees including Between Term Leave provided for in Clause 29. – Between Term Leave of this Award.

(c) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the salary applicable on the day the leave commenced. The maximum loading payable shall be that applicable on the day the leave is commenced.

(d) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an employee can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.

(e) A pro rata loading is payable on periods of approved annual leave less than four (4) weeks.

(f) The 17.5% loading is calculated on the rate of salary the employee receives at the commencement of leave under Schedule A – Salaries, of this Award, and where applicable, the salary shall include the following:

(i) 25% loading allowance as detailed in subclauses (3) and (4) of Clause 14. – Salaries, of this Award;

(ii) District Allowance; and

(iii) Higher Duties Allowance, but only where the specific conditions of Clause 21. - Higher Duties Allowance of this Award are satisfied.

(g) Where payment in lieu of accrued or pro rata annual leave is made on the death, dismissal, resignation or retirement of an employee, a loading calculated in accordance with the terms of this clause is to be paid. Provided that no annual leave loading shall be payable in respect of pro rata annual leave paid on resignation or where an employee is dismissed for misconduct.

(h) Part-time employees shall be paid a pro rata loading at the salary rate applicable.

13. Clause 30. - Long Service Leave: Delete subclause (9) of this clause and insert the following in lieu thereof:

(9) For the purposes of subclause (8) of this clause, the calculation of the amount due for long service leave accrued and for pro rata long service leave shall be made at the rate of salary of an employee at the date of retirement or resignation or death, whichever applies. Lump sum payments shall include the 25% loading allowance as provided for in Clause 14. – Salaries of this Award at subclauses (3) and (4). The 25% loading allowance shall be paid to employees while on long service leave.

14. Clause 35. - Bereavement Leave:

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

(1) Employees including casuals shall on the death of:

(a) the spouse or de facto partner of the employee;

(b) the child, step-child or grandchild of the employee;

(c) the parent, step-parent or grandparent of the employee;

(d) the brother, sister, step brother or step sister; or

(e) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family.

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an employee the Authority may exercise discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

B. Insert the following new provisions after subclause (5) of this clause:

(6) Travelling time for Regional Employees

(a) Subject to prior approval from the Authority, an employee entitled to bereavement leave and who, as a result of such bereavement, travels to a location within Western Australia that is more than 240 km from their workplace will be granted paid time off for the travel period undertaken in the employee's ordinary working hours up to a maximum of 15 hours per bereavement. The Authority will not unreasonably withhold approval.

(b) The Authority may approve additional paid travel time within Western Australia where the employee can demonstrate to the satisfaction of the Authority that more than two days travel time is warranted.

(c) The provisions of subclause (6) of this clause are not available to employees whilst on leave without pay or sick leave without pay.

(d) The provisions of paragraphs (a) and (b) of subclause (6) of this clause apply as follows.

(i) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee for each full year of service and pro rata for any residual portion of employment.

(ii) An employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro rata basis for the period of employment.

(iii) A part time employee shall be entitled to the same entitlement as a full time employee for the period of employment, but on a pro rata basis according to the number of ordinary hours worked each fortnight.

(iv) For casual employees, the provisions apply to the extent of their agreed working arrangements.

15. Clause 38. – Emergency Service Leave: Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) An employee, who during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses (2), (3) and (4) of this clause.

16. Clause 40. – Defence Force Reserves Leave: Delete subclauses (1) to (4) inclusive of this clause and insert the following in lieu thereof:

(1) The Authority must grant leave of absence for the purpose of Defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.

(2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.

(3) Application for leave of absence for Defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the employee shall provide a certificate of attendance to the Authority.

(4) Paid Leave

(a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.

(b) Part-time employees shall receive the same paid leave entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(c) On written application, an employee shall be paid salary in advance when proceeding on such leave.

(d) Casual employees are not entitled to paid leave for the purpose of Defence service.

(e) An employee is entitled to paid leave for a period not exceeding 105 hours on full pay in any period of twelve months commencing on 1 July in each year.

(f) An employee is entitled to a further period of leave, not exceeding 16 calendar days, in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal salary. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the employee.

17. Clause 42. – Study Leave: Delete the entire clause and insert the following in lieu thereof:

42. – STUDY ASSISTANCE

(1) (a) To ensure the maintenance of a trained public sector the Authority may provide an employee with paid study leave and/or financial assistance for study purposes in accordance with the provisions of this clause.

(b) Employees are not eligible for study assistance if they have previously received study assistance for an approved course from the Authority. Further study assistance towards additional qualifications may, however, be granted in special cases, at the discretion of the Authority.

(2) Study Leave

(a) An employee may be granted time off with pay for study purposes at the discretion of the Authority.

(b) In every case the approval of time off to attend lectures and tutorials will be subject to:

(i) agency convenience;

(ii) employees undertaking an acceptable formal study load in their own time;

(iii) employees making satisfactory progress with their studies;

(iv) the course being an approved course as defined by subclause (5) of this clause;

(v) the course being of value to the agency; and

(vi) the Authority's discretion when the course is only relevant to the employee's career in the service and being of value to the State.

(c) Part-time employees are entitled to study leave on the same basis as full time employees, with their entitlement calculated on a pro rata basis. Employees working shift work or on fixed term contracts have the same access to study leave as all other employees.

(d) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.

(e) Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed in paragraph (d) of subclause (2) of this clause.

(f) Where an employee is undertaking approved study via distance education and/or is not required to attend formal classes, the Authority may allow the employee to access study leave up to the maximum annual amount allowed in paragraph (d) of subclause (2) of this clause.

(g) Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

(h) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the employee's own time, except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part-time year or stage and this does not entail five hours formal study.

(i) In cases where employees are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.

(j) In agencies which are operating on flexi-time, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.

(k) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the employee's normal place of work.

(l) An employee shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the Authority may decide otherwise.

(m) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.

(n) An employee performing service with the Australian Defence Force is not entitled to study leave for any period of service with the Australian Defence Force that they receive defence force reserves leave as provided for by Clause 40. – Defence Force Reserves Leave of this Award.

(o) A service agreement or bond will not be required.

(3) Financial Assistance

(a) The Authority may reimburse an employee for the full or any part of any reasonable cost of enrolment fees, Higher Education Contribution Surcharge, compulsory text books, compulsory computer software and other necessary study materials for studies commenced during their employment.

(b) Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of enrolment and costs incurred, and the remaining half shall be reimbursed following production of written evidence of successful completion of the subject for which reimbursement has been claimed.

(c) The Authority and employee may agree to alternative reimbursement arrangements.

(4) Cadets and Trainees

(a) Agencies are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a university or college of advanced education. Employees who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(b) This assistance does not include the cost of textbooks or Guild and Society fees.

(c) An employee who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

(5) Approved Courses for Study Purposes

(a) For the purposes of subclauses (2) and (3) of this clause, the following are approved courses:

(i) Degree or associate diploma courses at a university within the Australia;

(ii) Degree or diploma courses at an authorised non-university institution;

(iii) Diploma courses provided by registered training organisations, including TAFE;

(iv) Two-year full time certificate courses provided by registered training organisations, including TAFE;

(v) Courses recognised by the National Authority for the Accreditation of translators and Interpreters (NAATI) in a language relevant to the needs of the public sector; and

(vi) Secondary courses leading to the Tertiary Entrance Examination or courses preparing students for the mature age entrance conducted by the Tertiary Institutions Service Centre.

(b) For the purposes of paragraph (a) of subclause (5) of this clause:

(i) The term 'university' includes recognised Australian universities and recognised overseas universities as defined by the *Higher Education Act 2004* (WA);

(ii) An authorised non-university institution is a non-university institution that is authorised under the *Higher Education Act 2004* (WA) to provide a higher education course; and

(iii) A registered training organisation is an organisation that is registered with the Training Accreditation Council or equivalent registering authority and complies with the nationally agreed standards set out in the Australian Quality Training Framework (AQTF).

(c) An employee who has completed a diploma through TAFE is eligible for study assistance to undertake a degree course at a university within Australia or an authorised non-university institution.

(d) An employee who has completed a two year full time certificate through TAFE is eligible for study assistance to undertake a diploma course specified in sub-paragraph (iii) of paragraph (a) of subclause (5) of this clause or a degree or diploma course specified in sub-paragraphs (i) or (ii) of paragraph (a) of subclause (5) of this clause.

(6) Full Time Study

(a) Subject to the provisions of paragraph (b) of subclause (6) of this clause, the Authority may grant an employee full time study leave with pay to undertake:

(i) post graduate degree studies at Australian or overseas tertiary education institutions; or

(ii) study tours involving observations and/or investigations; or

(iii) a combination of postgraduate studies and study tour.

(b) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:

(i) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclauses (2) and (5) of this clause and Clause 39. - Leave without Pay of this Award.

(ii) It must be a highly specialised course with direct relevance to the employee's profession.

(iii) It must be highly relevant to the agency's corporate strategies and goals.

(iv) The expertise or specialisation offered by the course of study should not already be available through other employees employed within the agency.

(v) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.

(vi) A fixed term contract employee may not be granted study leave with pay for any period beyond that employee's approved period of engagement.

(c) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.

(d) Where an outside award is granted and the studies to be undertaken are considered highly desirable by the Authority, financial assistance to the extent of the difference between the employee's normal salary and the

value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the Authority.

(e) The Authority supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.

(f) Where recipients are in receipt of a living allowance, this amount should be deducted from the employee's salary for that period.

(g) Where the Authority approves full time study leave with pay the actual salary contribution forms part of the agency's approved average staffing level funding allocation. The Authority should bear this in mind if considering temporary relief.

(h) Where study leave with pay is approved and the Authority also supports the payment of transit costs and/or an accommodation allowance, the Authority will gain approval for the transit and accommodation costs as required.

(i) Where employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the Authority together with some local transit and accommodation expenses providing it meets the requirements of paragraph (b) of subclause (6) of this clause. Each case is to be considered on its merits.

(j) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for employees under the award.

18. Clause 43. – Witness and Jury Service: Delete paragraph (c) of subclause (2) of this clause and insert the following in lieu thereof:

(c) An employee granted leave of absence on full pay as prescribed in paragraph (b) of subclause (2) of this clause is not entitled to retain any juror's fees but shall pay all fees received into Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the Director.

19. Clause 50. – Copies of the Award: Delete the entire clause and insert the following in lieu thereof:

50. – ACCESS TO INFORMATION AND RESOURCES

(1) The parties recognise that information technology resources have major implications for industrial and human resource functions within the workplace.

(2) The Authority recognises the need to provide appropriate information to all employees, so it is accessible in the workplace in either electronic or hard copy format.

(3) Where the Authority utilises information technology as the means of communicating to employees, the Authority must ensure that where employees do not have access to technology, then alternative methods of providing this information will be used.

(4) The information includes, but is not limited to policies and practice guidelines, human resource manuals, awards and agreements, internal agency news bulletins and updates and job opportunities.

20. Clause 51. – Parties to the Award: Delete the entire clause and insert the following in lieu thereof:

51. – COPIES OF THE AWARD

The employee shall be entitled to have access to a copy of the Award. The Authority shall make sufficient copies available for this purpose.

21. Clause 52. – Parties to the Award: Immediately following Clause 51. – Copies of the Award insert a new clause as per the following:

52. – PARTIES TO THE AWARD

Country High School Hostels Authority

and

The Civil Service Association of Western Australia Incorporated.

22. Wherever the word "employer" or "department" appears as referring specifically to the Authority, replace with "Authority". Similarly, for example "an agency" or "any agency" becomes "the Authority" as appropriate.

23. Wherever the word "officer" appears as referring specifically to an employee, replace with "employee".

2009 WAIRC 00026

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY RESIDENTIAL COLLEGE SUPERVISORY STAFF AWARD 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED AND COUNTRY HIGH SCHOOL HOSTELS AUTHORITY **APPLICANTS** **-v-** (NOT APPLICABLE) **RESPONDENT**
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	WEDNESDAY, 28 JANUARY 2009
FILE NO/S	P 38 OF 2008
CITATION NO.	2009 WAIRC 00026

Result Correction Order issued

Correction Order

WHEREAS an error occurred in an Order in this matter that was deposited in the Office of the Registrar on Wednesday, 21 January 2009, the Commission, in order to correct that error and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT Point 6A. of the said Order in P 38 of 2008 be amended to read as follows:

A. Delete sub-paragraph (iv) of paragraph (c) of subclause (2) of this clause and insert the following in lieu thereof:

(iv) Should the college regain the higher grading after two (2) years the College Manager and Senior Supervisor(s) shall be reinstated to the equivalent incremental point at which their salary was pegged and either the provisions of sub-paragraphs (ii), (iii) or (v) of paragraph (c) of subclause (2) of this clause shall apply.

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

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 00023

GOVERNMENT WATER SUPPLY, SEWERAGE AND DRAINAGE EMPLOYEES AWARD 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** WATER CORPORATION **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 23 JANUARY 2009
FILE NO/S	APPL 73 OF 2008
CITATION NO.	2009 WAIRC 00023

Result Award Varied

Order

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

THAT the Government Water Supply, Sewerage and Drainage Employees Award 1981 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of December 2008.

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

SCHEDULE

1. Clause 10. – Special Rates and Provisions: Delete this clause and insert the following in lieu thereof:

10. - SPECIAL RATES AND PROVISIONS

(1) Meter Fitters' Vehicle Allowance

A Meter Fitter who in the course of his/her duties has to ride a motor cycle or drive a motor vehicle shall receive $9.90 per week extra.

(2) An employee who regulates and controls vehicular traffic in thoroughfares shall receive an allowance of $2.00 per shift above his/her usual rate.

(3) Offensive Allowance

(a) An allowance of $4.20 per day shall be paid to each employee who comes into contact with filth during the operation of cleaning out septic tanks, sand pits, ripple chambers, suction chambers of sewerage pumping stations or in de-ragging of sewerage pumps.

(b) An employee (other than a sewerage maintenance employee) employed on offensive work in connection with working in or about old sewers or working in ground where fumes arise from decomposed material or from any other cause shall be paid an allowance of 26 per cent of his/her ordinary time rate.

(4) Dirt Money

46 cents per hour extra shall be paid to an employee when engaged on work which is agreed to be of an unusually dirty nature.

(5) Confined Spaces

An employee working in a compartment, space or place the dimensions of which necessitate working in a unusually stooped or otherwise cramped position, or without proper ventilation, shall be paid an allowance of 56 cents per hour whilst so engaged.

(6) Underground Allowance

An employee required to work underground on tunnelling or shaft sinking shall be paid an amount of $2.00 per day or shift, in addition to any other amount prescribed for such employee elsewhere in this Award. Where a shaft is to be sunk to a depth greater than six metres the payment of the underground allowance shall commence from the surface. The allowance shall not be payable to employees engaged upon "cut and cover" work at a depth of 3.5 metres or less or to employees in trenches or excavations.

"Shaft" means an excavation over 1.8 metres deep with a cross sectional area of less than 13.4 square metres.

"Tunnelling" shall include all work performed in a tunnel until it is commissioned.

(7) Well Work

An employee required to enter a well nine metres or more in depth for the purpose, in the first instance, of examining the pump, or any other work connected therewith, shall receive an amount of $2.55 for such examination and $0.98 per hour extra thereafter for fixing, renewing or repairing such work.

(8) Hot Work

An employee who works in a place where the temperature has been raised by artificial means to between 46°C and 54°C shall be paid 46 cents per hour or part thereof, and to more than 54°C - 54 cents per hour or part thereof, in addition to any other amount prescribed for such employee elsewhere in this Award. Where such work continues for more than two hours the employee shall be entitled to 20 minutes' rest after every two hours' work without loss of pay, not including the special rate provided by this subclause.

(9) Height Money

An employee shall be paid an allowance of 41 cents per hour, in addition to the ordinary rate, on which the employee works at a height of nine metres or more above the nearest horizontal plane.

(10) Drivers' Licences

Initial issue or additional classifications of drivers' licences required by the employer shall be paid for by the employer. In addition the employer shall allow the employee sufficient time off with pay to take the requisite test.

(11) Explosive Powered Tools Allowance

An employee qualified in accordance with the laws and regulations of the State to operate explosive powered tools shall be paid an allowance of $1.05 cents per day on which such tools are used.

(12) Any employee actually working a pneumatic tool of the percussion type shall be paid 38 cents per hour extra whilst so engaged.

(13) Fumes

An employee required to work in a place where fumes of sulphur or acid or other offensive fumes are present shall be paid an allowance of 41 cents for each hour worked.

(14) An employee using a steam or water cleaning unit shall be paid an allowance of 46 cents per hour whilst so engaged.

(15) Wet Places

(a) An employee required to work in a wet place or during wet weather shall be provided with rubber boots and adequate waterproof clothing, including waterproof head covering so as to protect the employee from getting wet.

Such waterproof clothing and rubber boots shall be replaced as required, subject to fair wear and tear in the service of the employer.

(b) Any employee working in a wet place shall be paid an allowance of $2.15 per day in addition to the ordinary rate, irrespective of the time worked unless his/her classification expressly includes an allowance for wet pay.

(c) A place shall be deemed to be wet when it is agreed that water (other than rain) is continually dropping from overhead to such an extent that it would saturate the clothing of an employee if waterproof clothing was not provided or when the water in the place where the employee is standing is over 2.5 centimetres deep.

(d) Where the employer directs work to continue during rain, the employer may, if adequate protective clothing is supplied the employee, require the employee to continue working. For such work the employee shall be paid an allowance of 25% of the ordinary rate.

(16) Handling Lime Cement or Flyash

Any employees involved in the handling of dry cement, lime or flyash shall be paid $2.40 per day.

(17) Hot Bitumen

An employee handling hot bitumen or asphalt or dipping materials in creosote, shall be paid 56 cents per hour extra.

An employee shall be provided with gloves and overalls and with oil or other solvents suitable for the removal of the above materials.

(18) Pesticides and Toxic Substances

(a) An employer who requires an employee to use a pesticide or toxic substance shall -

(i) inform the employee of any known health hazards involved; and

(ii) pursuant to the relevant Acts and Regulations, ascertain whether and, if so, what protective clothing and/or equipment should be worn during its use.

(b) Pending advice obtained pursuant to the relevant Acts and Regulations, the employer may require the pesticide or toxic substance to be used, if the employee is informed of any safety precautions specified by the manufacturer of the pesticide and instructs the employee to follow those precautions.

(c) The employer shall supply the employee with any protective clothing or equipment required pursuant to paragraph (a) or (b) hereof and, where necessary, instruct him/her in its use.

(d) An employee required to wear protective clothing or equipment for the purposes of this subclause shall be paid 56 cents per hour or part thereof while doing so unless the union and the employer agree that by reason of the nature of the protective clothing or equipment the employee does not suffer discomfort or inconvenience while wearing it, or in the event of disagreement, the Board of Reference so determines.

(e) An allowance is not payable under this subclause if the advice obtained pursuant to subparagraph (a)(ii) hereof in writing indicates that protective clothing or equipment is not necessary.

(19) Asbestos

An employee using materials containing asbestos or working in close proximity to any employee using such material shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority.

Where such safeguards include the mandatory wearing of protective equipment, i.e. combination overalls and breathing equipment or similar apparatus, any such employee shall be paid 57 cents per hour extra whilst so engaged.

(20) Shotfirers Allowance

An employee being a permit holder, responsible for the proper handling of explosives and the conducting of firing shall be paid an allowance of $5.00 per shift.

(21) The work of an electrical fitter shall not be tested by an employee of a lower grade.

(22) An Electronic Tradesperson, an Electrician - Special Class, an Electrical Fitter and/or an Armature Winder or an Electrical Installer who holds and in the course of employment may be required to use a current 'A' grade or 'B' grade

licence issued pursuant to the relevant Regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $18.30 per week. Provided that an employee appointed to the DC classification structure as contained in Clause 38. - Wages, of this Award shall not receive this allowance as the wage rate contained in the DC classification structure includes a component for licence allowance.

(23) Special Rates Not Cumulative

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely the highest for the disabilities so prevailing. Provided further that this subclause shall not apply to confined space, dirt money, height money, hot work or wet work the rates for which are cumulative.

(24) Special Disability Not Otherwise Provided For in This Award

Where a union representing a particular group of employees claims the existence of special disability not otherwise provided for in this Award, representatives of the employer and the union shall confer with a view to agreeing upon an appropriate special rate. In the event of agreement not being reached, the matter may be referred to the Western Australian Industrial Relations Commission.

(25) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 55 cents per closet per week.

(b) For the purposes of this subclause, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(c) All such employees shall be supplied with rubber gloves on request.

(26) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this clause, be paid an allowance of $1.84 per hour whilst so engaged.

(27) Spray Application Painters

A painter engaged on any spray applications carried out in other than a properly constructed booth approved by the Department of Occupational Health, Safety and Welfare shall be paid 46 cents per hour or part thereof in addition to the rates otherwise prescribed in this Award.

(28) Fuel, Kerosene and Water

Electric pump attendants and pumping station assistants shall be supplied with free water and in lieu of fuel and kerosene be paid $5.90 per week or such other amount as may be agreed between the parties or determined by the Board of Reference.

(29) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 32 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces and noise.

(b) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to him/her shall be decreased proportionately.

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

(d) For the purpose of this subclause foundry work shall mean -

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials or by shell moulding, centrifugal casting or continuous casting; and

(ii) where carried on as an incidental process in connection with and in the course of production to which subparagraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(aa) non-ferrous die casting (including gravity and pressure);

(bb) casting of billets and/or ingots in metal moulds;

(cc) continuous casting for metal into billets;

(dd) melting of metal for use in printing;

(ee) refining of metal.

(30) Fluoride Allowance

An employee who is required to handle fluoride shall be paid an allowance of $4.30 per week. This allowance shall only be payable to an employee who was formerly covered by the Government Water Supply (Kalgoorlie Pipeline) Award No. 15 of 1981.

2. Clause 12. – First Aid Attendant: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) An employee who is a qualified first aid attendant and is appointed by the employer to carry out first aid duties in addition to normal duties, shall be paid an additional rate of $1.80 per day.

3. Clause 14. – Travelling Time and Allowances: Delete subclause (3)(a) of this clause and insert the following in lieu thereof:

(a) For travelling daily to and from the job within a radius of 50 kilometres of the G.P.O. Perth - an allowance of $17.15 per day.

4. Clause 17. – Tea Breaks, Meal Hours, Refreshments: Delete subclause (6)(a) of this clause and insert the following in lieu thereof:

(6) (a) An employee required to work overtime for more than 1.5 hours without being notified on the previous day or earlier that he/she will be so required to work shall either be supplied with a meal by the employer or paid $11.90 but payment need not be made to employees residing in the locality of the work who can reasonably return home for meals.

5. Clause 26. – Distant Work – Construction: Delete subclauses (6) & (7) of this clause and insert the following in lieu thereof:

(6) An employee to whom the provisions of subclause (1) of this clause apply shall be paid an allowance of $33.35 and for any weekend he/she returns home from the job but only if -

(a) the employer or his/her agent is advised of the intention not later than the Tuesday immediately preceding the weekend in which the employee so returns;

(b) he/she is not required for work during that weekend;

(c) the employee returns to the job on the first working day following the weekend; and

(d) the employer does not provide or offer to provide suitable transport.

(7) Where an employee, supplied with board and lodging by the employer, is required to live more than 800 metres from the job, he/she shall be provided with suitable transport to and from that job or be paid an allowance of $14.60 per day, provided that where the time actually spent in travelling either to or from the job exceeds 20 minutes, that excess travelling time shall be paid for at ordinary rates whether or not suitable transport is supplied by the employer.

6. Clause 38. – Wages: Delete subclauses (6), (7) & (8) of this clause and insert the following in lieu thereof:

(6) Tool Allowance

(a) Engineering Trades

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

(aa) $12.80 per week to such tradesperson; or

(bb) in the case of an apprentice a percentage of $12.80 being the percentage which appears against the year of apprenticeship in subclause (5) of this clause.

(ii) Any tool allowance paid pursuant to paragraph (i) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in subclause (2) of this clause.

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

(iv) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer if lost through the negligence of the employee.

(b) Building Trades

In addition to the rate of pay prescribed in this clause for a Painter or a Signwriter, such employee shall be paid a tool allowance of $4.50 per week in accordance with the provisions of the Building Trades (Government) Award.

(7) Leading Hands

An employee placed in charge of -

(a) Metal Trades

(i) Three and not more than 10 other employees shall be paid $23.00 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $35.20 per week extra.

(iii) More than 20 other employees shall be paid $45.40 per week extra.

(iv) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees shall be deemed a Leading Hand and shall be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than 10 other employees.

(b) Building Trades

(i) Three and not more than 10 other employees shall be paid $35.40 per week extra.

(ii) More than 10 and not more than 20 other employees shall be paid $47.10 per week extra.

(iii) More than 20 other employees shall be paid $59.00 per week extra.

(8) Construction Work Allowance

(a) Subject to the provisions of this clause, an employee specified in this clause shall be paid an allowance at the rate of $21.50 per week to compensate for disabilities when actually engaged on construction work on site (as defined).

(b) "Construction Work" for the purpose of paragraph (a) hereof, shall mean and include all work performed on site on the construction, alteration, repair or maintenance of roads, reservoirs and drainage works, pipelines, water and sewerage mains and services. It shall not include the following classes of work -

(i) work in, around and/or adjacent to any workshop, depot, yard, treatment works, nursery or other similar establishments;

(ii) work in, around and/or adjacent to pumping stations for less than two hours;

(iii) gardening operations; or

(iv) driving vehicles, floats or fork lifts when that driving is not directly associated with construction work (as defined) for less than four hours on the day.

(c) An employee referred to in paragraph (a) of this subclause who is employed on construction work (as defined) for less than one week shall be paid for each day so employed, 1/5th of the said allowance.

(d) Provided that an employee under this clause who is engaged in the construction, or alteration of any building, structure or other civil engineering project which is carried out in areas excluded in paragraph (b) of this subclause shall be paid a construction allowance at the rate of $10.80 per week.

2009 WAIRC 00022

JENNY CRAIG EMPLOYEES AWARD, 1995

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	JENNY CRAIG WEIGHTLOSS CENTRES
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 23 JANUARY 2009
FILE NO/S	APPL 47 OF 2008
CITATION NO.	2009 WAIRC 00022
Result	Award varied

Order

HAVING heard Ms J O'Keefe on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Jenny Craig Employees Award, 1995 (No. 1 of 1994) be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of December 2008.

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

SCHEDULE

1. Clause 9. – Special Rates and Conditions:

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

(1) All employees will receive a laundry allowance of $8.10 per week.

(B) Delete subclause (4)(a) and (4)(b) of this clause and insert the following in lieu thereof:

(4) In addition to the wages prescribed by this award, all employees shall be entitled to be paid the following:

(a) when facilitating workshops a minimum payment of $1.24 per client; and

(b) for the number of clients seen

1 to 14 clients	$2.40 per client
15 or more clients	$3.19 per client; and

(C) Delete subclause 8(c) of this clause and insert the following in lieu thereof:

(8) (c) A year for the purpose of this clause shall commence on the first day of July and end on the thirtieth day of June next following.

Rates of Hire for the use of the employee's own vehicle on the employer's business.

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement(in cubic centimetres) Over2600cc	Over1600cc-2600cc	1600cc & Under
	Cents per Kilometre		
Metropolitan Area	82.7	71.7	63.6
South West Land Division	85.1	73.8	65.5
North of 23.5 ^{o} South Latitude	93.2	81.4	72.4
Rest of the State	88.0	76.3	67.6

Schedule 2 - Motor Cycle Allowances

Distance Travelled During a Year on Official Business	Rate cents/km
Rate per kilometre	28.7

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

2. Clause 14. – Overtime: Delete subclause (3)(a) of this clause and insert the following in lieu thereof:

(3) (a) Subject to the provisions of paragraph (b) of this subclause an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $10.20 for a meal and if, owing to the amount of overtime worked, a second or subsequent meal is required, the employee shall be supplied with such meal by the employer or paid $7.00 for each meal so required.

2008 WAIRC 01749

LAUNDRY WORKERS' AWARD, 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ALSCO LINEN SERVICE PTY LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 22 DECEMBER 2008
FILE NO/S	APPL 72 OF 2008
CITATION NO.	2008 WAIRC 01749

Result Award varied

Order

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

THAT the Laundry Workers' Award 1981 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 9th day of December 2008.

(Sgd.) P E SCOTT,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 20. – Meal Money: Delete this clause and insert the following in lieu therefore:

20. – MEAL MONEY

(1) An employee required to work overtime for more than two hours without being notified on the previous day or earlier, that he/she will be so required to work, shall be supplied with a meal by the employer or paid $9.75 for a meal.

(2) If the amount of overtime required to be worked necessitates a second or subsequent meal, the employer shall, unless he/she has notified the employee concerned on the previous day or earlier that such second or subsequent meal will also be required, provide such meals or pay an amount of $9.75 for each second or subsequent meal. No such payments need be made to employees living in the same locality as their workshops who can reasonably return home for such meals.

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

2. Clause 22. – Allowances: Delete subclause (1) of this clause and insert the following in lieu thereof

(1) Where an employee is required to sort foul linen an extra allowance of 45 cents per hour will be paid whilst so employed on this type of work.

3. Clause 22. –Allowances: Delete subclause (2)(c) of this clause and insert the following in lieu thereof:

(c) Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres)		
	Over 2600cc	Over 1600cc-& 2600cc	1600cc Under
	Rate per kilometre (Cents)		
Metropolitan Area	88.4	76.9	68.0
South West Land Division	90.9	78.9	70.1
North of 23.5^{o} South Latitude	99.7	86.9	77.5
Rest of the State	93.8	81.5	72.3

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate ¢/km
Rate per kilometre	30.5

Motor vehicles with rotary engines are to be included in the 1600-2600cc.

2009 WAIRC 00010

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH

DATE WEDNESDAY, 14 JANUARY 2009

FILE NO/S APPL 127 OF 2008

CITATION NO. 2009 WAIRC 00010

Result Varied

Representation

Applicant Mr G Ferguson

Respondent Ms J Bishop

Order

HAVING heard Mr G Ferguson on behalf of the applicant and Ms J Bishop on behalf of the respondent, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 14 November 2008.

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

SCHEDULE

1. Clause 4.3. - Suburban Electric Railcar Allowance: Delete paragraph (a) of subclause 4.3.1 of this clause and insert the following in lieu thereof:

4.3.1 (a) An employee qualified in the operation of electric suburban railcars and who, for any shift or part of a shift is rostered to work as driver on the suburban rail system shall, for the whole of that shift, be paid the following rate of allowance in addition to the appropriate rate of pay.

		Rate per week
(1)	First Year	$34.70
(2)	Thereafter	$35.00
(3)	Special Case	$35.50

2009 WAIRC 00011

PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2008

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH

DATE WEDNESDAY, 14 JANUARY 2009

FILE NO/S APPL 131 OF 2008

CITATION NO. 2009 WAIRC 00011

Result Varied

Representation

Applicant Ms J Bishop

Respondent Mr G Ferguson

Order

HAVING heard Ms J Bishop on behalf of the applicant and Mr G Ferguson on behalf of respondent, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006 be varied in accordance with the following schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 1 December 2008.

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

SCHEDULE

1. Clause 5.1. - Shift Work: Delete subclause 5.1.1 of this clause and insert the following in lieu thereof:

5.1.1 The employer may, if the employer so desires, work any part of its business on shifts in accordance with the following provisions;

(a) On an afternoon shift which commences before 1800 hours and the ordinary time of which concludes at or after 1830 hrs, an employee will be paid an allowance of $2.29 an hour on all time paid at ordinary rate.

(b) On a night shift, which commences at or between 1800, and 0359 hours, an employee will be paid an allowance of $2.66 an hour on all time paid at ordinary rate.

(c) On an early morning shift, which commences at or, between 0400 and 0530, an employee will be paid an allowance of $2.29 an hour on all time paid at ordinary rate.

(d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $2.66 for any shift where the ordinary time commences or finishes at or between 0101 hours and 0359 hours.

(e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.

NOTICES—Award/Agreement matters—

2009 WAIRC 00065

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 7 of 2009

APPLICATION FOR VARIATION OF AN AWARD ENTITLED

"CLUB WORKERS' AWARD, 1976"

NOTICE is given that an application on the Commission's own motion has been made under s 40B of the Industrial Relations Act 1979 to vary the above Award.

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

Clause 4. – Scope: Delete this clause and insert in lieu.

4. - SCOPE

This award shall apply to all workers employed in the callings described in Clause 21. – Wages of this award, in any club licensed to sell liquor, pursuant to the Liquor Control Act, 1988.

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

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

13 February 2009

2009 WAIRC 00047

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 3 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"CMI INDUSTRIAL AGREEMENT NOVEMBER 2008"

NOTICE is given that an application was made to the Commission, on 16 January 2009, by Combined Metal Industries under the Industrial Relations Act 1979, for the registration of the above named Agreement.

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

3. – AREA, SCOPE AND PERIOD OF OPERATION

(1) This agreement applies in Western Australia to and is binding on the employer, all employees engaged in the classifications in Schedule A and the AMWU.

The classifications prescribed in SCHEDULE A. – WAGES & ALLOWANCES are:

Production Employee – Under 18;

Production Employee – 18 years & over probationary;

Production Employee – 18 years & over permanent employee (base rate); and

Production Employee – Tradesperson (base trade rate);

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

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

20 January 2009

2009 WAIRC 00064

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 3 of 2009

APPLICATION FOR VARIATION OF AN AWARD ENTITLED

"HOTEL AND TAVERN WORKERS' AWARD, 1978"

NOTICE is given that an application on the Commission's own motion has been made under s 40B of the Industrial Relations Act 1979 to vary the above Award.

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

Clause 4. – Scope: Delete this clause and insert in lieu.

4. - SCOPE

This award shall apply to all employees employed in the callings described in Clause 21. – Wages of this award, in any establishment, or part thereof licensed pursuant to the Liquor Control Act, 1988 with a Hotel Licence, Hotel Restricted Licence, Tavern Licence, or Special Facility Licence granted pursuant to that Act and the Liquor Control Regulations, 1989.

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

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

13 February 2009

2009 WAIRC 00048

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 2 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"LHMU – DISABILITY SERVICES COMMISSION – DISABILITY SUPPORT WORKERS INDUSTRIAL AGREEMENT 2008"

NOTICE is given that an application was made to the Commission, on 16 January 2009, by the Disability Services Commission, under the Industrial Relations Act 1979, for the registration of the above named Agreement.

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

5. – AREA, INCIDENCE AND PARTIES BOUND

5.1 This agreement applies throughout the State of Western Australia and is binding on the employees in the classifications prescribed in Clause 19 – Classification and Wage Rates.

5.2 The parties to this agreement are:

(a) The Liquor, Hospitality and Miscellaneous Union, WA Branch.

(b) The Disability Services Commission.

19. – CLASSIFICATION AND WAGE RATES

The employee classifications in this agreement are:

Cleaner;

Domestic;

Gardener (Other);

Kitchen Attendant;

Laundry Worker;

Gardener (only one employed);

Handyperson;

Client Assistant Services Transport;

Cook (other);

Cook (only one employed);

Domestic Supervisor (Pyrton);

Driver (less than 3 tonnes);

Bus Driver (less than 25 passengers);

Driver (over 3 tonnes);

Bus Driver (over 25 passengers);

Horticulturist;

Cleaning Services Supervisor (Pyrton); and

Tradesperson Cook.

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

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

23 January 2009

2009 WAIRC 00066

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 12 of 2009

APPLICATION FOR VARIATION OF AN AWARD ENTITLED

"NURSES' (DAY CARE CENTRES) AWARD 1976"

NOTICE is given that an application on the Commission's own motion has been made under s 40B of the Industrial Relations Act 1979 to vary the above Award.

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

Clause 3. – Scope: Delete this clause and insert in lieu.

3. - SCOPE

This award shall apply to workers who are registered or entitled to be registered under the Nurses and Midwives Act 2006 and who are employed by the respondents by virtue of Division 2 of the Child Care Services (Child Care) Regulations 2006.

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

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

16 February 2009

INDUSTRIAL MAGISTRATE—Claims before—

2009 WAIRC 00037

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES DIANE ROBERTSON

APPLICANT

-V-

ROBERT PEMBERTON

CLAIMANT

-and-

CIVIL SERVICE INSURANCE AGENCY PTY LTD

FIRST RESPONDENT

-and-

TONI WALKINGTON

SECOND RESPONDENT

-and-

BRENDON HEWSON

THIRD RESPONDENT

-and-

DEREK SPRAY

FOURTH RESPONDENT

CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	28 JANUARY 2009
DELIVERED	FRIDAY, 30 JANUARY 2009
FILE NO.	M 31 OF 2008
CITATION NO.	2009 WAIRC 00037

CatchWords	Application for leave to inspect a court record and obtain a copy of the same pursuant to s81F(4) of the Industrial Relations Act 1979 (IRA); Whether s81F(4) applies to a matter heard and determined under the Workplace Relations Act 1996 utilising the practice and procedure provided in the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 made pursuant to the IRA; Meaning of General Jurisdiction.
Result	Application refused
Legislation:	Workplace Relations Act 1996.
	Industrial Relations Act 1979.
	Industrial Magistrates Court (General Jurisdiction) Regulations 2005.
	Practice Direction No. 2 of 2005 issued by the Chief Magistrate on 2 May 2005.
Case(s) referred to in Decision:	
	Melrose Farm Pty Ltd t/as Milesaway Tours v Milward and Miles and Miles t/a Milesaway Tours v Milward (2008) 88 WAIG 1751.
Case(s) also Cited:	
	Nil
Applicant	Mr G McCorry of *Labourline – Industrial and Workplace Relations Consulting* appeared as agent for the Applicant
Respondent	Mr P Fraser, Counsel instructed by *Ilberys Lawyers*, appeared for the Respondents

Reasons for Decision

1 On 22 December 2008 Diane Robertson lodged an application under s81F(4) of the ***Industrial Relations Act 1979*** (IRA) seeking leave to inspect and obtain a copy of a document which was exhibited during the hearing of proceedings in this claim.

2 Section 81F(4) of the IRA provides:

> *A person who is not a party to the proceedings may, with the leave of the court, inspect or obtain a copy of any document that is part of the court's record of the proceedings.*

3 The Applicant, who is not a party with respect to this claim, seeks leave to examine exhibit 20 and to be given a copy of part of that exhibit. She consents to an order being made restraining her from disclosing the contents of that document to any person other than the Council of the Civil Service Association of WA Inc (CSA) and any government authority with jurisdiction to inquire into the matters disclosed therein. In that regard s81F(7) enables this court, when giving leave under s81F(4), to impose conditions on the person's access to information, including a condition prohibiting or limiting the publication or use of the information.

4 The Applicant, a former president of the CSA and a former chairperson of the First Respondent, understands that part of exhibit 20 may indicate possible impropriety by officials of the CSA in respect of Australian Taxation Office matters. She is concerned that if any impropriety has occurred that it will reflect adversely upon the CSA, its management and members. She seeks to examine and copy the document in order to bring it to the attention of the Governing Council of the CSA and any other relevant authority.

5 The application is opposed by the Respondents on technical grounds. They assert that the application under s81F(4) cannot be entertained because that provision does not empower this court to give a person who is not a party to the claim, brought under the ***Workplace Relations Act 1996*** (WRA) an ability to inspect and copy documents received in proceedings.

6 Section 81F(2) provides, inter alia, that s81F(4) applies in respect of an Industrial Magistrate's Court's record of proceedings under its general jurisdiction (as defined in section 81CA). "*General jurisdiction*" is defined in s81CA(1) of the IRA to mean jurisdiction under sections 77, 80(1) and (2), 83(1) to (7), 83A, 83B(1) to (9), 83E(1) to (8), 96J, 97V(3), 97VJ(3), 97YC, 97YG, 110, 111 or 112 of the IRA or Part IV of the ***Long Service Leave Act 1958***.

7 The Respondents point out that this claim was brought and determined not as part of this court's general jurisdiction but rather in its capacity as an "*eligible court*" as defined in section 717 of the WRA. Its powers to deal with this claim and to order penalties and/or other remedies sought were not derived from the IRA but rather from the WRA. Therefore, in dealing with this claim, this court was not exercising its general jurisdiction. What it did fell outside of what is defined to be its general jurisdiction. In those circumstances s81F(4) can have no application . The mere utilisation of the general jurisdiction practice and procedure in dealing with this claim did not bring it within its general jurisdiction.

8 By Practice Direction No. 2 of 2005 the Chief Magistrate directed that in the absence of a prescribed procedure for dealing with Commonwealth claims, the practice and procedure to be followed by the Industrial Magistrate's Court in cases involving Commonwealth law (other than with respect to small claims) is that provided by the ***Industrial Magistrates Court (General Jurisdiction) Regulations 2005*** (the regulations). The power to issue that practice direction was not sourced from any particular statutory provision but rather the court's inherent power to regulate its own practice and procedure. Indeed His Honour the Chief Magistrate expressed that to be so.

9 The Applicant argues that s81CA(2) enabled the Chief Magistrate to make the aforementioned practice direction which had the effect of bringing Commonwealth claims within the general jurisdiction of this court. With respect, I disagree. The Chief Magistrate's ability to issue the practice direction was not derived from the IRA. Accordingly I reject the Applicant's contention that what was said by His Honour Le Miere J in ***Melrose Farm Pty Ltd t/as Milesaway Tours v Milward*** **and** ***Miles and Miles t/a Milesaway Tours v Milward (2008) 88 WAIG 1751*** concerning the regulations has application in this matter.

10 Practice Direction No. 2 of 2005 does not have the effect of bringing Commonwealth claims within this court's general jurisdiction as defined in s81CA(1). The utilisation of the practice and procedure provided by the regulations does not change the character or the nature of proceedings brought under Commonwealth law which clearly falls outside this court's general jurisdiction as defined. Given that s81F(4) only has application to matters falling within this court's general jurisdiction, this court is without power to order what is sought.

11 The application is accordingly refused.

G Cicchini
Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 00017

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SARAH JANE DOMANSKI
	APPLICANT
	-v-
	T SHIRTS GALORE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 20 JANUARY 2009
FILE NO	U 126 OF 2008
CITATION NO.	2009 WAIRC 00017

Result Application dismissed for want of prosecution

Order

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

WHEREAS the matter was listed for a show cause hearing on 20 January 2009 and the applicant was advised that failure to attend would lead to the application being dismissed; 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 the application be and is hereby dismissed for want of prosecution.

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

2009 WAIRC 00030

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TANIA EDMONDSON
	APPLICANT
	-v-
	ROCKINGHAM GOLF CLUB
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 29 JANUARY 2009
FILE NO	U 168 OF 2008
CITATION NO.	2009 WAIRC 00030

Result Application discontinued

Order

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

WHEREAS the applicant advised the Commission on 12 January 2009 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.

2009 WAIRC 00021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SIMON JAMES ESTALL
	APPLICANT
	-v-
	TOTAL NISSAN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 22 JANUARY 2009
FILE NO/S	U 185 OF 2008
CITATION NO.	2009 WAIRC 00021

Result Withdrawn by leave

Order

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

WHEREAS on 16 January 2009 the applicant filed a Notice of Discontinuance in relation to 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 withdrawn by leave.

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

2009 WAIRC 00016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG FERGUSON
	APPLICANT
	-v-
	CANNING VALE WEAVING MILLS LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 JANUARY 2009
FILE NO/S	B 165 OF 2008
CITATION NO.	2009 WAIRC 00016

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the Industrial Relations Act 1979 filed on the 26th day of November 2008; and

WHEREAS on the 19th day of January 2009, 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.

2009 WAIRC 00015

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG FERGUSON
	APPLICANT
	-v-
	CANNING VALE WEAVING MILLS LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 20 JANUARY 2009
FILE NO/S	U 165 OF 2008
CITATION NO.	2009 WAIRC 00015

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979 filed on 26th day of November 2008; and

WHEREAS on the 19th day of January 2009, 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.

2009 WAIRC 00058

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEVE HAINES
	APPLICANT
	-v-
	MIDWEST VANADIUM PTY. LTD
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	FRIDAY, 6 FEBRUARY 2009
FILE NO/S	B 149 OF 2008
CITATION NO.	2009 WAIRC 00058

Result Application dismissed

Order

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

WHEREAS by a letter dated the 12th day of December 2008 the Commission directed the applicant to advise the Commission of his intentions regarding the application no later than 4.00 pm on the 31st day of December 2008 and that if he had not contacted the Commission by that time it would be assumed that he did not wish to proceed with the application and an order of dismissal would issue; and

WHEREAS by 4.00 pm on the 31st day of December 2008, the Applicant had failed to contact the Commission; and

WHEREAS by a Notice of Hearing dated the 15th day of January 2009, the Commission advised the applicant that a hearing would be convened on the 3rd day of February 2009 at 9.15am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 3rd day of February 2009 there was no appearance for or by the applicant;

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

THAT this matter be and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner.

[L.S.]

2008 WAIRC 01724

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATASHA LEE HICKMOTT
	APPLICANT
	-v-
	LORNA WOODS
	T/AS THE WA INSTITUTE OF BEAUTY THERAPY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	FRIDAY, 15 AUGUST 2008, THURSDAY, 13 NOVEMBER 2008
DELIVERED	FRIDAY, 12 DECEMBER 2008
FILE NO.	B 65 OF 2008
CITATION NO.	2008 WAIRC 01724

Catchwords	Industrial law – Alleged denied contractual benefits – Principles applied – Order issued – *Industrial Relations Act 1979 (WA) s 29(1)(b)(ii), s 83(3); Minimum Conditions of Employment Act 1993 (WA) s 5, s 7.*
Result	Decision issued
Representation	
Applicant	In person
Respondent	Ms L Woods

Reasons for Decision

1. This is an application pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that on or about 18 December 2007, she was denied certain contractual benefits. The benefits claimed include annual leave in the sum of $1,524.00; annual leave loading in the sum of $693.00; and payment of wages for one day in the sum of $206.25. The total claimed is $2,423.25.

2. The respondent opposes the applicant's claims. Alternatively, if any moneys are owing, it is said that the applicant was overpaid in respect of paid public holidays in the sum of $765.00 and such sum should be set-off against any moneys found to be owing to the applicant.

Relevant Law

3. Section 29(1)(b)(ii) of the Act provides as follows:

> ***29. By whom matters may be referred***
>
> *(1) An industrial matter may be referred to the Commission —*
>
> *"(b) in the case of a claim by an employee*
>
> *(i) …*
>
> *(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order, to which he is entitled under his contract of employment, by the employee."*

4. The onus is on the applicant to establish, on the balance of probabilities, that as an employee, she has been denied a benefit by way of an entitlement under her former contract of service with the respondent, and the benefit does not arise under an award or order of the Commission: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704.

The Evidence

5. The evidence adduced by both the applicant and the respondent was brief and in part, less than clear.

6. The applicant testified, and it was not in dispute, that she was employed by the respondent which is a beauty therapy school, as a lecturer, from in or about August 2006 until on or about 17 December 2007. It was also common ground that the applicant was employed on a part time basis working 24 hours per week, over four days, and was paid at an agreed rate of $27.50 per hour. The applicant was paid weekly. As at termination of her employment, the applicant was paid a gross weekly wage of $660.00 per week.

7. In support of her claim, the applicant produced an unsigned document, tendered as exhibit A1, which was, as I understood the evidence, an extract from a manual of some kind, which was said to specify the terms and conditions of the applicant's employment, at least in part. Whilst from the terms of exhibit A1, under clause 7-Trainers Obligations, it would appear that this document was intended for a person working as an independent contractor, on the evidence of Ms Woods, it was clear that the parties agreed that the applicant would be engaged as an employee. The relevant part of this document (hand written notations omitted) provides as follows:

> ***" 7. Trainers Obligations***
>
> *The Trainer shall make its own arrangement to cover in a proper and adequate manner:*
>
> - *Superannuation considerations*
> - *Taxation deductions including for income tax and payroll tax*
> - *Sickness*
> - *Holiday pay and holiday pay loading*
> - *Works (sic) Compensation Insurance*
> - *Professional Indemnity Insurance*
>
> *The WA INSTITUTE BEAUTY THERAPY shall have no obligation to the Trainer with respect to any of the above matters.*"

8. Whilst the fourth dot point under clause 7-Trainers Obligations, said to reflect the part of the agreed terms and conditions of the applicant's employment, refers to "Holiday pay and holiday pay loading", Ms Woods denied there was any discussion of annual leave loading. This was not disputed on the applicant's evidence. A hand written notation refers to

"four weeks per year" initialled by Ms Woods. Ms Woods' evidence as to this issue was that it was only very late in the applicant's employment that she raised the question of a 17.5% annual leave loading. Ms Woods said she contacted "Wageline" and she was informed that the applicant had no entitlement to such a loading. She accordingly did not pay it.

9. The applicant's claim in relation to payment for annual leave appears to relate to her evidence that she took no leave for 2007, despite the oral testimony of Ms Woods that the applicant took two weeks annual leave in July 2007, supported by an entry in the respondent's time and wages book, tendered as exhibit R1. This record shows that the applicant was paid the sum of $1,320.00 gross, and an entry next to this says "2 week Hol's", resulting in a net payment of $1,007.00. The time and wages record refers to cheque number 8908 as the cheque issued for this sum, which according to the respondent's bank account records, tendered as exhibit R2, was cashed on 2 July 2007.

10. It was the applicant's assertion that she was required to work over this two week period, at least for some of the time, setting up for the following semester's teaching. Her evidence also was that she spent some time working at home in this regard. This was also disputed by Ms Woods. She testified that there was no requirement for the applicant to work over this period.

11. The applicant's claim in respect of one days pay for 17 December 2007 refers to her attendance at work on that day to assist in the supervision of examinations for students. The applicant said that she spent the entire day at work. This was disputed by the respondent. Ms Woods said that at best, the applicant worked only one half to three quarters of a day as she finished early after the examination and left the premises to attend a social function with others.

12. Additionally, it was Ms Woods' evidence that on checking her payroll records, she had previously overpaid the applicant for three public holidays they being Easter, Labour Day and Queen's Birthday 2007, in relation to which she referred to the cheques issued in the applicant's favour.

Consideration

13. I am satisfied on the evidence and I find that the applicant and the respondent agreed that the applicant receive four weeks annual leave per annum. Annual leave so provided is an entitlement to take leave from work and be paid at the employee's ordinary rate of salary for that period.

14. On the evidence, I am not satisfied that there was any entitlement under the applicant's contract of service for pro rata annual leave or payment in lieu of leave not taken as a matter of common law, that is recoverable in these proceedings. The matter was never raised by the parties and, subject to what I say below about statutory entitlements, generally there is no warrant to imply such a term: *Lyons Advertising Service v Nerad* (1981) 61 WAIG 854. As a matter of common law, annual leave not taken is lost in the absence of an agreement to the contrary: *HAW Jones Pty Ltd v Neille* [1967] WAR 181.

15. With the enactment of the Minimum Conditions of Employment Act 1993 (WA) ("the MCE Act"), Part 4 Division 3 provides for entitlements of all employees to minimum periods of annual leave and the conditions for its taking, including payment in lieu of leave not taken. By s 5 such minimum conditions are taken to be implied into every contract of service not covered by an award or employer-employee agreement. By the combined effect of s 7 of the MCE Act and s 83(3) of the Act, such entitlements may only be enforced in the Industrial Magistrates Court and not otherwise.

16. I am also satisfied on the evidence and I find that the applicant was provided with two weeks annual leave in July 2007. That she was paid for this leave is clear from exhibit R1 and the respondent's bank account records tendered in evidence. What the applicant really asserts, is that despite being paid for this leave, she undertook some work during this time and therefore she should, in effect, receive a credit for it.

17. The difficulty for the applicant is that she needs to establish on the evidence, that there was a requirement for her to work over this period by some agreement between her and the respondent to this effect. I am not satisfied on the evidence that there was any such arrangement in place. The fact that the applicant herself said that she was only present at the respondent's premises for some of the time, and spent the rest of the time at home supports the respondent's contention that there was no requirement on the applicant to attend for work over this period. Moreover, the respondent's time and wages record, exhibit R1, is inconsistent with the applicant's testimony that she had no leave at all during 2007.

18. In terms of exhibit A3, the applicant's final "payslip", this was a hand written document dated 17 December 2007 prepared by Ms Woods. In it reference is made to "Holiday Paid" and a calculation of annual leave entitlements over 22 weeks in the gross sum of $1,116.00. Additionally, reference is made to a "Bonus" of $2000.00, which Ms Woods said was paid to the applicant to retain her services at a time when it appeared the applicant may have intended to leave the respondent's employ. The total net payment reflected in exhibit A3, is $2,285.00. Whilst the applicant testified that she had not seen this document before and did not receive the money referred to in it, a corresponding entry in the respondent's time and wages book exhibit R1, for 17 December 2007, reflects a net "wage" payment of $2,285.00 by cheque number 9297. This cheque was presented on the next day, 18 December 2007, and the respondent's bank account was debited by that amount.

19. From exhibit A3, given that the applicant worked until about mid December 2007, which was some two weeks short of a full calendar year, I see no reason to doubt the calculation made by the respondent in respect of the applicant's annual leave entitlement for the half year July to December 2007. In short, I am not persuaded as to the applicant's annual leave claim. It appears the applicant was paid her entitlements in this regard. In any event, as I have noted above, any claim by the applicant for pro rata annual leave by payment in lieu of leave not taken, cannot be pursued under s 29(1)(b)(ii) of the Act on the facts of this case. The applicant would need to pursue that matter under s 83 of the Act.

20. In relation to the applicant's claim for 17.5% loading in the sum of $462.00 similarly, I am not persuaded on the evidence there was any agreement that the applicant be paid such a loading. For employees in the applicant's position, not being covered by an award or industrial agreement, annual leave loading is not a condition that would normally be implied. An

express term is required. Whilst exhibit A1 refers to "Holiday pay and holiday pay loading", that document, plainly on its terms, was a document intended for arrangements entered into between the respondent and independent contractors, and not an employee such as the applicant. Moreover, if the applicant had such an agreement with the respondent, there was no evidence of it before the Commission. Indeed, the evidence is to the contrary. The handwritten notation by Ms Woods only refers to annual leave. One would have thought if the matter of loading had been discussed and agreed, exhibit A1 would reflect it. It does not. Additionally, is the evidence of Ms Woods which I accept, that the applicant seemed to raise the issue of annual leave loading as an afterthought.

21. As to the applicant's claim in respect of her final day of employment on 17 December 2007, whilst there is some conflict on the evidence, I accept that the applicant did attend for work on that day and she should be paid the agreed rate for a day's work of $165.00 gross. At one stage in the proceedings it seemed that Ms Woods accepted that she owed the applicant this sum for her last day of employment.

22. As to the respondent's claim that she had overpaid the applicant for three public holidays, the evidence is insufficient to establish this contention. In any event, there is considerable doubt that the Commission would be able to entertain a set-off in the present circumstances: *Conti Sheffield Real Estate v Brailey* (1992) 72 WAIG 1965; *BGC Australia Pty Ltd v Phippard* (2002) WAIG 2013.

23. An order issues accordingly.

2008 WAIRC 01735

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATASHA LEE HICKMOTT
	APPLICANT
	-v-
	LORNA WOODS T/AS WA INSTITUTE OF BEAUTY THERAPY
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 18 DECEMBER 2008
FILE NO/S	B 65 OF 2008
CITATION NO.	2008 WAIRC 01735

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms L Woods

Order

HAVING heard the applicant on her own behalf and Ms L Woods on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the respondent pay to the applicant the sum of $165.00 gross within 21 days.

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

2008 WAIRC 01688

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATALIE JEAN HODSON
	APPLICANT
	-v-
	SHOPPENHANGERS PTY LTD T/AS C RESTAURANT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 3 DECEMBER 2008
FILE NO/S	B 152 OF 2008
CITATION NO.	2008 WAIRC 01688

Result	Order issued
Representation	
Applicant	In person
Respondent	Mr T Carmady of counsel

Order

Having heard Ms Hodson on her own behalf and Mr T Carmady 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 amended to read "Shoppenhangers Pty Ltd t/as C Restaurant".
2. THAT the application be and is hereby adjourned to a date to be fixed by the Commission.

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

2009 WAIRC 00032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICTORIA ANNE HOPE
	APPLICANT
	-v-
	CYRUS MISTRY
	EASY MIGRATE CONSULTANCY SERVICES
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 28 JANUARY 2009
FILE NO/S	U 178 OF 2008
CITATION NO.	2009 WAIRC 00032

Result	Application dismissed

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the Industrial Relations Act 1979 filed on the 11th day of December 2008; and

WHEREAS by a letter dated the 24th day of December 2008 the Commission directed the applicant to respond to the issue of jurisdiction raised in the respondent's Notice of Answer and Counter Proposal and to advise the Commission of her intentions regarding the application no later than 4.00 pm on the 16th day of January 2009. The letter also advised the applicant that if she had not contacted the Commission by that time it may be assumed that she did not wish to proceed with the application and an order of dismissal may issue; and

WHEREAS on the 27th day of January 2009 the applicant filed a Notice of Discontinuance in relation to the application;

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

THAT this matter be and is hereby dismissed.

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

2009 WAIRC 00057

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK LEVESON-GOWER
	APPLICANT
	-v-
	AG DIRECT SALES T/A SUMMIT FERTILISERS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 5 FEBRUARY 2009
FILE NO	B 141 OF 2008
CITATION NO.	2009 WAIRC 00057

Result	Application discontinued
Representation	
Applicant	Mr M Leveson-Gower
Respondent	Mr I Curlewis of Counsel

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 14 January 2009 at the conclusion of which the matter was adjourned; and

WHEREAS the applicant advised the Commission on 23 January 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.

2009 WAIRC 00036

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR RUSSELL L COLEMAN
	APPLICANT
	-v-
	SMS CONTRACTING PTY LTD (ABN 48 102 662 162), SCAFFOLDING MANAGEMENT SERVICE (ABN 86 681 379 430) MARK WELSH (DIRECTOR) & BRAD WILLIS (DIRECTOR)
	RESPONDENTS
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 30 JANUARY 2009
FILE NO/S	U 14 OF 2009
CITATION NO.	2009 WAIRC 00036

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	In person
Respondent	Ms G Howe

Order

Having heard Mr R L Coleman on his own behalf and Ms G Howe on behalf of the respondents the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

1. THAT the application be and is hereby dismissed for want of jurisdiction.

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

2009 WAIRC 00025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA JUNE PROPERJOHN
	APPLICANT
	-v-
	GEOF & KAY WARREN AMARRAGE PTY LIMITED (CAPRICE'S)
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 21 JANUARY 2009
DELIVERED	WEDNESDAY, 21 JANUARY 2009
FILE NO.	U 153 OF 2008
CITATION NO.	2009 WAIRC 00025

CatchWords	Unfair dismissal – Jurisdiction – Federal Act – Trading corporation
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr W A Clark
Respondent	Mr G A Warren

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings, as edited by the Commissioner)

1 This matter concerns the jurisdiction of the Commission to hear a claim for unfair dismissal. The applicant named the respondent as Geof & Kay Warren – Amarrage Pty Limited (Caprice's). The respondent in the Notice of Answer and Counterproposal claimed that, "Caprice's restaurant is exempt from unfair dismissal claims, employing less than a hundred employees". It went on to state several other matters, which are not relevant to today's proceedings, and said that the claim was made after the 28 day time limit. On the face of the application the date of dismissal is listed as 20 October 2008, and the stamp of the Commission on the application is 12 November 2008. Hence the matter is within the 28-day time limit.

2 The question of jurisdiction arises and was pursued by the respondent. The respondent as named by the applicant appears to be a proprietary limited company. The unchallenged evidence today of Mr Warren, on behalf of the respondent, is that the employer of the applicant is Amarrage Pty Ltd and trades as Caprice's restaurant. Exhibit R1 displays the certificate of registration of the company. The certificate reads, "This is to certify that Amarrage Pty Ltd, Australian company number 107186514 is a registered company under the Corporations Act 2001 and is taken to be registered in Western Australia. The company is limited by shares. The company is a proprietary company." The date of commencement of registration was 26 November 2003. The other part of the exhibit is an Australian Business Register and refers to the legal name of the trustee for the Jay's family trust. The two documents tendered are seemingly in some conflict.

3 However, it is the applicant who has named the employer, being Amarrage Pty Ltd. The respondent company, on the unchallenged evidence of Mr Warren, trades wholly and solely in pursuit of buying and selling food. In terms of profit the restaurant breaks even at present. On the evidence before me I find that the respondent is, in fact, a trading corporation. That being the case, since 27 March 2006, when the amendments to the Federal Workplace Relations Act 1996 came into force, this

Commission does not have jurisdiction to deal with claims of unfair dismissal involving trading corporations. There are limited exceptions to this provided in the Federal regulations, but this application does not fall within these exceptions.

4 As I do not have jurisdiction I must issue an order dismissing the application for want of jurisdiction. That order will issue later today.

2009 WAIRC 00019

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LINDA JUNE PROPERJOHN
	APPLICANT
	-v-
	GEOF & KAY WARREN AMARRAGE PTY LIMITED (CAPRICE'S)
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 21 JANUARY 2009
FILE NO	U 153 OF 2008
CITATION NO.	2009 WAIRC 00019

Result	Dismissed for want of jurisdiction
Representation	
Applicant	Mr W A Clark
Respondent	Mr G A Warren

Order

HAVING heard Mr W A Clark on behalf of the applicant and Mr G A Warren on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed for want of jurisdiction.

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

2009 WAIRC 00029

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT 'BOB' RICHARDSON
	APPLICANT
	-v-
	HAULEX WARREN SCOTT
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 29 JANUARY 2009
FILE NO	U 150 OF 2008
CITATION NO.	2009 WAIRC 00029

Result	Application discontinued
Representation	
Applicant	Mr R Richardson
Respondent	Mr D Hopkins

Order

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

WHEREAS a conciliation conference was convened on 15 December 2008 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 19 January 2009 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Alexander Buchan	Bellevue Print	U 177/2008	Senior Commissioner J H Smith	Withdrawn
Judith Hill	Geraldton Family Violence Legal Protection Service	U 143/2008	Commissioner S J Kenner	Discontinued
Tania Christine Hassett	Woolworths Beechboro	B 117/2008	Senior Commissioner J H Smith	Withdrawn

CONFERENCES—Matters arising out of—

2009 WAIRC 00014

DISPUTE RE DISCIPLINE OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH
DATE FRIDAY, 16 JANUARY 2009
FILE NO/S C 3 OF 2009
CITATION NO. 2009 WAIRC 00014

Result Interim Order made
Representation
Applicant Mr G Ferguson and Mr P Woodcock
Respondent Mr B Appleby and Ms J Bishop

Interim Order

WHEREAS the Applicant filed on 15 January 2009 an application under s 44 of the *Industrial Relations Act 1979* (the Act) for an order restraining the respondent from terminating the employment of Mr Nicholas Burgess, who is a member of the union and employed by the respondent as a Senior Transit Officer, prior to finalizing another investigation into alleged misconduct by the Supervisor and Acting Supervisor of Mr Burgess;

AND WHEREAS Mr Burgess was provided with a notice by the respondent to provide reasons why he should not be dismissed and Mr Burgess provided those reasons to the respondent on 15 January 2009;

AND WHEREAS pursuant to clause 2.11.3 of the *Public Transport Authority Railway Employees Enterprise Agreement 2006* the respondent is required to make a final decision in relation to one of the charges of breach of discipline against Mr Burgess by 17 January 2009;

AND WHEREAS the applicant claims that the alleged actions of the Supervisor and Acting Supervisor have a direct bearing on the actions taken by Mr Burgess and would mitigate the actions of Mr Burgess and that there is a witness to the events that has yet to be interviewed;

AND WHEREAS whilst the respondent's representatives have agreed to interview an additional witness in relation to the investigation of the Supervisor and Acting Supervisor the respondent does not agree that any evidence that could be collected will assist Mr Burgess;

AND WHEREAS the Commission is satisfied that the rules of procedural fairness require that Mr Burgess be entitled to pursue the opportunity of making a mitigatory submission in the event that the investigation into the Supervisor and Acting Supervisor reveals that the Supervisor and Acting Supervisor should have intervened in relation to the actions of Mr Burgess. Consequently, the Commission is of the opinion it should make an order pursuant to s 44(6)(ba), (bb) and (6a)(b) of the Act to delay the conclusion of the charges against Mr Burgess by extending the time the respondent is required to make a final decision in respect of the charges against Mr Burgess under clause 2.11.3 of the *Public Transport Authority Railway Employees Enterprise Agreement 2006* to enable the investigation into the charges against the Supervisor and Acting Supervisor to be concluded.

NOW pursuant to the powers vested in it and pursuant to s 44 of the Act, the Commission hereby orders that:

(a) The three (3) calendar months prescribed under clause 2.11.3 of the *Public Transport Authority Railway Employees Enterprise Agreement 2006* for making a final decision be varied by substituting the time of three (3) calendar months and fourteen (14) days in respect of the application of clause 2.11.3 to Mr Nicholas Burgess.

(b) There be liberty to both parties to apply to vary this order on 24 hours notice;

(c) This order is to remain in force until 2 February 2009.

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

2009 WAIRC 00034

DISPUTE RE DISCIPLINE OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH
DATE FRIDAY, 30 JANUARY 2009
FILE NO/S C 3 OF 2009
CITATION NO. 2009 WAIRC 00034

Result Interim Order varied
Representation
Applicant Mr G Ferguson
Respondent Mr B Appleby

Interim Order

By consent Order 2009 WAIRC 00014 made on 16 January 2009 be and is hereby varied as follows—

1. The words "fourteen (14)" in paragraph (a) of the Order be deleted and the words "twenty-one (21)" be substituted.
2. The words "2 February 2009" in paragraph (c) of the Order be deleted and the words "9 February 2009" be substituted.

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

2009 WAIRC 00028

DISPUTE RE PROPOSED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DEPARTMENT OF EDUCATION AND TRAINING

APPLICANT

-v-

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER
DATE THURSDAY, 29 JANUARY 2009
FILE NO. PSAC 1 OF 2009
CITATION NO. 2009 WAIRC 00028

Result	Recommendation issued
Representation	
Applicant	Ms A Young
Respondent	Ms J Gaines

Recommendation

WHEREAS on 28 January 2009 the applicant made an application to the Public Service Arbitrator ("the Arbitrator") for an urgent compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 28 January 2009 an urgent compulsory conference was convened by the Arbitrator at which the Arbitrator was informed that industrial action is to be taken by the respondent and its members, employees of the applicant, engaged as school support staff in government schools throughout the State on 2 February 2009;

AND WHEREAS the parties informed the Arbitrator that the issue in dispute concerns the workload, staffing levels and resources available to school support staff in government schools;

AND WHEREAS the applicant informed the Arbitrator that the taking of industrial action by the respondent and members or persons eligible to be members of the respondent will cause significant disruption to the operations of government schools throughout the State on the first day of the school year for 2009 and will impact on its obligations under the School Education Act 1999;

NOW THEREFORE the Arbitrator having regard for the public interest and the interest of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to the powers vested in it by the Act hereby recommends-

(1) THAT the respondent and its members and those eligible to be members employees of the applicant not take industrial action of any kind on 2 February 2009.

(2) THAT the employees of the applicant engaged as school support staff members of or eligible to be members of the respondent continue to work in accordance with their contracts of service.

(3) THAT the respondent and each of its officials take all necessary and reasonable steps to inform its members and those eligible to be members of this recommendation.

(4) THAT the substantive issue of workload and workload management for school support officers employed in government schools throughout the State be the subject of a further s 44 compulsory conference(s) as soon as practicable on a date(s) and time(s) to be determined by the Arbitrator.

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

2009 WAIRC 00035

DISPUTE RE PROPSED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	FRIDAY, 30 JANUARY 2009
FILE NO/S	PSAC 1 OF 2009
CITATION NO.	2009 WAIRC 00035

Result	Order issued
Representation	
Applicant	Mr J Serich
Respondent	Ms J Gaines

Order

WHEREAS on 28 January 2009 the applicant made an application to the Public Service Arbitrator ("the Arbitrator") for an urgent compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 28 January 2009 an urgent compulsory conference was convened by the Arbitrator at which the Arbitrator was informed that industrial action is to be taken by the respondent and its members, employees of the applicant, engaged as school support staff in government schools throughout the State on 2 February 2009;

AND WHEREAS the parties informed the Arbitrator that the issue in dispute concerns the workload, staffing levels and resources available to school support staff in government schools;

AND WHEREAS the applicant informed the Arbitrator that the taking of industrial action by the respondent and members or persons eligible to be members of the respondent will cause significant disruption to the operations of government schools throughout the State on the first day of the school year for 2009 and will impact on its obligations under the School Education Act 1999;

AND WHEREAS the Arbitrator in an endeavour to assist the parties in the resolution of the issues in dispute issued a recommendation on 29 January 2009 to the effect that the industrial action as proposed not take place and that the issues in dispute be progressed further by conciliation under s 44 of the Act;

AND WHEREAS the applicant informed the Arbitrator that it would accept the recommendation but it was not accepted by the respondent;

NOW THEREFORE the Arbitrator having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to the powers vested in it by the Act, hereby orders-

(1) THAT each of the employees of the applicant members of or eligible to be members of the respondent engaged in work as school support staff at government schools throughout the State who are proposing to participate in industrial action concerning matters the subject of these proceedings on and from Monday 2 February 2009 desist from taking such industrial action and continue to work in accordance with their contracts of service and refrain from commencing or taking part any industrial action in respect of this matter until this order is revoked.

(2) THAT the respondent and each of its officials shall take all necessary steps to ensure that normal work continues in accordance with the terms of paragraph (1) of this order including but without limiting the generality of this obligation to:

(a) inform the employees of the terms of this order; and

(b) counsel the employees as to compliance with the terms of paragraph (1) of this order.

(3) THAT the substantive issues of workload and workload management for school support officers employed at government schools throughout the State be the subject of a further s 44 compulsory conference(s) as soon as practicable on a date(s) and time(s) to be determined by the Arbitrator.

(4) THAT the applicant or the respondent may, on giving 24 hours notice to the other, apply to the Arbitrator to vary, revoke or otherwise set aside the terms of this order.

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

2009 WAIRC 00043

DISPUTE RE PROPOSED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 30 JANUARY 2009
FILE NO/S	PSAC 1 OF 2009
CITATION NO.	2009 WAIRC 00043

Result	Correcting order issued
Representation	
Applicant	Mr J Serich
Respondent	Ms J Gaines

Correcting order

WHEREAS on 28 January 2009 the applicant made an application to the Public Service Arbitrator ("the Arbitrator") for an urgent compulsory conference pursuant to s 44 of the Industrial Relations Act 1979 ("the Act");

AND WHEREAS on 28 January 2009 an urgent compulsory conference was convened by the Arbitrator at which the Arbitrator was informed that industrial action is to be taken by the respondent and its members, employees of the applicant, engaged as school support staff in government schools throughout the State on 2 February 2009;

AND WHEREAS the parties informed the Arbitrator that the issue in dispute concerns the workload, staffing levels and resources available to school support staff in government schools;

AND WHEREAS the applicant informed the Arbitrator that the taking of industrial action by the respondent and members or persons eligible to be members of the respondent will cause significant disruption to the operations of government schools throughout the State on the first day of the school year for 2009 and will impact on its obligations under the School Education Act 1999;

AND WHEREAS the Arbitrator in an endeavour to assist the parties in the resolution of the issues in dispute issued a recommendation on 29 January 2009 to the effect that the industrial action as proposed not take place and that the issues in dispute be progressed further by conciliation under s 44 of the Act;

AND WHEREAS the applicant informed the Arbitrator that it would accept the recommendation but it was not accepted by the respondent;

NOW THEREFORE the Arbitrator having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question, pursuant to the powers vested in it by the Act, hereby orders-

(1) THAT each of the employees of the applicant members of or eligible to be members of the respondent engaged in work as school support staff at government schools throughout the State who are proposing to participate in industrial action concerning matters the subject of these proceedings on and from Monday 2 February 2009 desist from taking such industrial action and continue to work in accordance with their contracts of service and refrain from commencing or taking part any industrial action in respect of this matter until this order is revoked.

(2) THAT the respondent and each of its officials shall take all necessary steps to ensure that normal work continues in accordance with the terms of paragraph (1) of this order including but without limiting the generality of this obligation to:

(a) inform the employees of the terms of this order; and

(b) counsel the employees as to compliance with the terms of paragraph (1) of this order.

(3) THAT the substantive issues of workload and workload management for school support officers employed at government schools throughout the State be the subject of a further s 44 compulsory conference(s) as soon as practicable on a date(s) and time(s) to be determined by the Arbitrator.

(4) THAT the applicant or the respondent may, on giving 24 hours notice to the other, apply to the Arbitrator to vary, revoke or otherwise set aside the terms of this order.

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

2009 WAIRC 00012

DISPUTE RE TERMINATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION WA BRANCH

APPLICANT

-v-

A.L. CARVER, G.M. CARVER, J.G. CARVER & N.R. LANGAN (A PARTNERHIP - ABN 25 690 124 349) TRADING AS CUDDLES CHILD CARE CENTRE RIVERVALE

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE THURSDAY, 15 JANUARY 2009

FILE NO/S C 43 OF 2008

CITATION NO. 2009 WAIRC 00012

Result	Order Issued
Representation	
Applicant	Mr M Aulfrey
Respondent	Ms K Oliver

Consent Order

WHEREAS this is an application pursuant to s44 of the *Industrial Relations Act 1979* ("the Act"); and

WHEREAS on 8 January 2009 the Commission conducted a conciliation conference between the parties pursuant to s44 of the Act; and

WHEREAS after the conference a settlement was reached between the parties in relation to the applicant's claim for compensation to be paid to its members Ms Coussens and Ms Nielson; and

WHEREAS under this settlement the respondent agreed to pay Ms Coussens an amount of $1188 gross into her bank account by electronic funds transfer in full and final settlement of this application by no later than the close of business 23 January 2009 and the respondent agreed to pay Ms Nielson an amount of $1411.87 gross into her bank account by electronic funds transfer in full and final settlement of this application by no later than the close of business 23 January 2009;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, and by consent, hereby orders:

1. THAT the respondent pay Ms Coussens $1188 gross by electronic funds transfer into her bank account in full and final settlement of this application, by no later than the close of business 23 January 2009.
2. THAT the respondent pay Ms Nielsen $1411.87 gross by electronic funds transfer into her bank account in full and final settlement of this application, by no later than the close of business 23 January 2009.

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

2009 WAIRC 00013

DISPUTE RE UNFAIR, HARSH AND OPPRESSIVE DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	A.L. CARVER, G.M. CARVER, J.G. CARVER & N.R. LANGAN
	(A PARTNERSHIP - ABN 25 690 124 349)
	TRADING AS CUDDLES CHILD CARE CENTRE LOCKRIDGE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 15 JANUARY 2009
FILE NO/S	C 1 OF 2009
CITATION NO.	2009 WAIRC 00013

Result	Order Issued
Representation	
Applicant	Mr M Aulfrey
Respondent	Ms K Oliver

Consent Order

WHEREAS this is an application pursuant to s44 of the *Industrial Relations Act 1979* ("the Act"); and

WHEREAS on 15 January 2009 the Commission conducted a conciliation conference between the parties pursuant to s44 of the Act; and

WHEREAS at the conference a settlement was reached between the parties in relation to the applicant's claim for annual leave to be paid to its member Ms Sowden; and

WHEREAS under this settlement the respondent agreed to pay Ms Sowden an amount of $1947.40 gross into her bank account by electronic funds transfer in full and final settlement of this application by no later than the close of business 23 January 2009 and the respondent also agreed to provide Ms Sowden with a statement of service by no later than the close of business 23 January 2009;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, and by consent, hereby orders:

1. THAT the respondent pay Ms Sowden $1947.40 gross by electronic funds transfer into her bank account in full and final settlement of this application, by no later than the close of business 23 January 2009.
2. THAT the respondent provide Ms Sowden with a statement of service by no later than the close of business 23 January 2009.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Department for Planning and Infrastructure	Wood C	PSAC 36/2008	17/12/2008	Dispute re alleged misconduct of union member	Concluded

PRACTICE NOTES—

2009 WAIRC 00049

INDUSTRIAL MAGISTRATE'S COURT

PRACTICE DIRECTION NO. 1 OF 2009

WORKPLACE RELATIONS ACT 1996

This Practice Direction issued 30 January 2009 replaces Practice Direction

No. 2 of 2005 and is to take effect immediately.

This Practice Direction which relates to the Workplace Relations Act 1996 (Commonwealth) is made pursuant to the court's power to regulate its own proceedings.

1. Claims (except small claims) made in the Industrial Magistrate's Court pursuant to the provisions of the Workplace Relations Act 1996 (Commonwealth).

The Industrial Magistrate's Court is "*an eligible court*" within the meaning of section 717 of the Workplace Relations Act 1996 (Commonwealth) (the WRA) for the purpose of sections 719 to 723 (inclusive) and any other relevant provision of the WRA. Those provisions enable, inter alia, the Industrial Magistrate's Court to hear and determine claims for the imposition of a penalty or penalties for a breach or breaches of an "*applicable provision*", claims for damages, interest and other relief.

The State has no power to prescribe how court proceedings relating to enforcement of Commonwealth laws shall be conducted. The Commonwealth has not prescribed a practice or procedure to be followed. In the absence of express provision, the Court may regulate its own practice and procedure.

The practice and procedure to be followed in cases involving Commonwealth law shall therefore be that provided for by the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005, with such modifications as are necessary or desirable in the circumstances as may be directed by the Industrial Magistrate.

2. Small Claims under Sections 724 and 725 of the Workplace Relations Act 1996

In the absence of any express provisions in the WRA the Court may regulate its own practice and procedure. Accordingly the following practice and procedure shall be followed with respect to small claims. I direct that proceedings be instituted and responded to by use of Forms A to D inclusive set out in the schedule hereto.

Procedure Generally

The practice and procedure as provided for by the Industrial Magistrates Courts (General Jurisdiction) Regulations 2005 (the regulations) shall apply with such modifications as are necessary except in so far as they may be inconsistent with this practice direction.

(i) Forms

The forms in the schedule hereto shall be used with respect to a claim made under the Small Claims Procedure. Where no specific form is otherwise provided for under this procedure the forms provided for in the regulations shall be used.

(ii) Claim

The claimant shall complete his or her claim using Forms A to D. After lodging the same with the Court the claim shall be served upon the respondent within 30 days or such further period as may be allowed by the Clerk of the Industrial Magistrate's Court (the Clerk) upon application.

(iii) Response

The respondent to an action which is dealt with under this procedure must lodge a response to the claim within 21 days of service if the respondent's address for service is within 1000 kilometres of the Perth Industrial Magistrate's Court or within 28 days if the respondent's address for service is more than 1000 kilometres from the said Court. The respondent must also serve the claimant with a copy of the response, bearing the Court's seal, within 14 days of filing the response.

(iv) Service

The method of service of documents under this procedure shall be the same as that provided for by Part 9 of the regulations.

(v) Pre-trial Conference

If the orders sought in a claim are not admitted in the response lodged, the Clerk is to list the claim for a pre-trial conference as soon as practicable.

The pre-trial conference procedure shall be the same as that provided for by Part 4 of the regulations except that regulation 19 shall not apply.

SCHEDULE

FORM	TITLE OF FORM
A	Claim – Court Copy
B	Claim – Claimant's Copy
C	Claim – Respondent's Copy
D	Response

Forms A to D inclusive are annexed hereto.

Dated at Perth this the 30th day of January 2009.

Chief Stipendiary Magistrate

Claim – Workplace Relations Act – Small Claims Procedure	Form A Court Copy

Court Use Only	Court at:	Claim No:
	To be served no later than:	

Claimant	Name:		
	Address:		
		Postcode:	Telephone:
	Address for service by post:		
			Postcode:
	Address for service by email:		
	Address for service by fax:		

Respondent *Attach Form 28 if necessary*	Name:	
	Address:	
	Postcode:	Telephone:

Election for Small Claims Procedure	I, the claimant in this matter, elect to have this matter dealt with using the Small Claims Procedure provided for in the Workplace Relations Act 1996.

Grounds *Attach statement of claim if desired* *(Tick the appropriate box)*	This claim is made because the respondent has failed to comply with: ☐ An award (specify) _____ ☐ A certified agreement specify) _____ _____ ☐ An order (specify) _____ ☐ The Workplace Relations Act 1996 (specify) _____ _____

Details of Failure to Comply *(Attach further sheet if desired)*	The Respondent has failed to comply with the award/agreement/order/Workplace Relations Act 1996 in the following way: _____ _____ _____

Orders Sought *(Tick the appropriate box)*	The Respondent: ☐ Pay monies due in the sum of $ _____ ☐ Pay pre-judgment interest. ☐ Pay a penalty to be imposed by the court. ☐ Do something else (specify) _____ _____

Signature: _____ Date: _____

Issued by the Industrial Magistrate's Court, Level 16, 111 St George's Terrace PERTH. Telephone 9420 4467. www.imc.wa.gov.au

Seal of the Court:

Date lodged…….

Time lodged…….

IMC 01/09

Claim – Workplace Relations Act – Small Claims Procedure	Form B Claimant's Copy

Court Use Only	Court at:	Claim No:
	To be served no later than:	

Claimant	Name:		
	Address:		
		Postcode:	Telephone:
	Address for service by post:		
			Postcode:
	Address for service by email:		
	Address for service by fax:		

Respondent *Attach Form 28 if necessary*	Name:	
	Address:	
	Postcode:	Telephone:

Election for Small Claims Procedure	I, the claimant in this matter, elect to have this matter dealt with using the Small Claims Procedure provided for in the Workplace Relations Act 1996.

Grounds *Attach statement of claim if desired* *(Tick the appropriate box)*	This claim is made because the respondent has failed to comply with: ☐ An award (specify) _____ ☐ A certified agreement (specify) _____ _____ ☐ An order (specify) _____ ☐ The Workplace Relations Act 1996 (specify) _____ _____

Details of Failure to Comply *(Attach further sheet if desired)*	The Respondent has failed to comply with the award/agreement/order/Workplace Relations Act 1996 in the following way: _____ _____ _____

Orders Sought *(Tick the appropriate box)*	The Respondent: ☐ Pay monies due in the sum of $ _____ ☐ Pay pre-judgment interest. ☐ Pay a penalty to be imposed by the court. ☐ Do something else (specify) _____ _____

Signature: _____ Date: _____

Issued by the Industrial Magistrate's Court, Level 16, 111 St George's Terrace PERTH. Telephone 9420 4467. www.imc.wa.gov.au

Seal of the Court:

Date lodged…….

Time lodged…….

IMC 01/09

Claim – Workplace Relations Act – Small Claims Procedure	Form C Respondent's Copy

Court Use Only	Court at:	Claim No:	
	To be served no later than:		
Claimant	Name:		
	Address:		
		Postcode:	Telephone:
	Address for service by post:		
			Postcode:
	Address for service by email:		
	Address for service by fax:		
Respondent *Form 28 attached if necessary*	Name:		
	Address:		
	Postcode:	Telephone:	
Election for Small Claims Procedure	I, the claimant in this matter, elect to have this matter dealt with using the Small Claims Procedure provided for in the Workplace Relations Act 1996.		

Grounds

Attach statement of claim if desired

(Tick the appropriate box)

This claim is made because the respondent has failed to comply with:

☐ An award (specify) _____

☐ A certified agreement (specify)_____

_____

☐ An order (specify)_____

☐ The Workplace Relations Act 1996 (specify) _____

_____

Details of Failure to Comply

(Attach further sheet if desired)

The Respondent has failed to comply with the award/agreement/order/Workplace Relations Act 1996 in the following way: _____

_____

_____

Orders Sought

(Tick the appropriate box)

The Respondent:

☐ Pay monies due in the sum of $ _____

☐ Pay pre-judgment interest.

☐ Pay a penalty to be imposed by the court.

☐ Do something else (specify) _____

_____

Signature: _____ Date: _____

Issued by the Industrial Magistrate's Court, Level 16, 111 St George's Terrace PERTH. Telephone 9420 4467. www.imc.wa.gov.au

Seal of the Court:

Date lodged……..

Time lodged……..

DO NOT IGNORE THIS CLAIM

You must lodge a response with the Industrial Magistrate's Court within 21/28 days of the service of the claim together with the lodgement fee of $_____. You must also serve a sealed copy of your response on the claimant within 14 days of lodging your response. If you do not do so (in the manner explained on the back of this page) the Court may grant the claim by default.

READ CAREFULLY THE IMPORTANT INFORMATION ON THE BACK OF THIS PAGE.

IMC 01/09

IMPORTANT INFORMATION

The parties to this claim, dealt with under the Small Claims Procedure as provided for in the Workplace Relations Act 1996, are not permitted to be represented by lawyers unless the Court otherwise orders.

What you should do:

Introduction :

The claimant is seeking to have the court make orders that will affect you. The details are shown in the box marked "Orders sought" on the front of this page and on any separate sheets attached to this claim. The basis of the claim is specified in the box marked "Grounds" and on any separate sheets attached to this claim.

You must respond to this claim by lodging with the Industrial Magistrates Court at Perth within the time specified at the front of this form the completed Response form (form D) that you have received, together with the lodgement fee specified on the front of this form. You must then serve the claimant with a sealed copy of your response within 14 days of the filing of your response. If you do not do these things, the claimant may obtain judgment against you. This means that the court may grant the orders sought against you in the claim. Unless you can establish that there were good reasons why you did not respond, you cannot have the judgment set aside.

Response :

In responding to this claim you have three options. They are:

Option 1

If you wholly deny the claim and oppose the court making the order or orders sought in the claim, you should tick the box on the Response form, which states:

"The respondent wholly denies the claim and opposes the court granting any order sought in this claim."

You should then sign and date the response copy and ensure that it is lodged with the court before the due date together with the appropriate lodgement fee. If you do this, the court will provide you with a sealed copy of the Response form, which you **must** then serve on the claimant within 14 days of the lodgement of the response.

Option 2

If you admit part of the claim and consent to the court making some but not all of the orders sought in the claim, you should tick the box on the Response form, which states:

"The respondent admits part of the claim and consents to the court making the following order/s
…… but denies the balance of the claim."

You should complete the form at the appropriate place to indicate which part or parts of the claim you admit and which orders you consent to being made. You should then sign and date the response copy and ensure that it is lodged with the court before the due date together with the appropriate lodgement fee. If you do this, the court will provide you with a sealed copy of the Response form, which you **must** then serve on the claimant within 14 days of the lodgement of the response.

Option 3

If you wholly admit the claim and consent to the court making the orders sought in the claim, you should tick the box on the Response form, which states:

"The respondent wholly admits the claim and consents to the court making the orders sought in this claim."

You should then sign and date the response copy and ensure that it is lodged with the court before the due date together with the appropriate lodgement fee. If you do this, the court will provide you with a sealed copy of the Response form, which you **must** then serve on the claimant within 14 days of the lodgement of the response. The court may then make in the absence of the parties the orders sought in the claim. You will be notified of any amount due and when and how it must be paid. If you consent to the imposition of a penalty you will be given an opportunity to be heard and you will be advised of a date and time to appear in court.

What happens next if the Claim or any part of it is denied?

If you choose to respond to this claim by denying the whole or part of the claim, you will be required at a later stage to participate in the court's procedures for dealing with this claim including the requirement to attend a pre-trial conference on a date to be advised. It is important that you comply with the orders of the clerk and the court. If you do not do so the claimant may obtain judgment against you. Unless you can establish that there were good reasons why you did not comply you cannot have the judgment set aside.

Response – Workplace Relations Act – Small Claims Procedure	Form D Response

Court Use Only	Court at Perth:	Claim No:

Claimant	Name:		
	Address:		
		Postcode:	Telephone:

Respondent *Form 28 attached if necessary*	Name:	
	Address:	
	Postcode:	Telephone:
	Address for service by post:	
		Postcode:
	Address for service by email:	
	Address for service by fax:	

Response *Tick the appropriate box*	I,_____(name) the respondent*/the respondent's director*/manager*/secretary*/owner*/solicitor* or agent* (* Delete that which is inapplicable) state as follows: ☐ The respondent wholly denies the claim and opposes the Court granting any order sought in this claim. ☐ The respondent admits part of the claim and consents to the court making the following order/s:_____ _____but denies the balance of the claim. ☐ The respondent wholly admits the claim and consents to the court making all of the orders sought in this claim.

Reasons for opposing the claim/s *(Attach particulars of response if desired)*	

Signature: _____ Date: _____

Lodged in the Industrial Magistrate's Court, Level 16, 111 St George's Terrace PERTH. Telephone 9420 4467. www.imc.wa.gov.au

Seal of the Court:

Date lodged……

Time lodged……

IMC 01/09

PROCEDURAL DIRECTIONS AND ORDERS—

2009 WAIRC 00044

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA LEE LEAHY
	APPLICANT
	-v-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 2 FEBRUARY 2009
FILE NO.	U 188 OF 2008
CITATION NO.	2009 WAIRC 00044

Result	Direction issued
Representation	
Applicant	Mr S Heathcote of counsel
Respondent	Mr N Whitehead of counsel

Direction

HAVING heard Mr S Heathcote of counsel on behalf of the applicant and Mr N Whitehead of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant file and serve further and better particulars of claim by 9 February 2009.
2. THAT the respondent file and serve further and better particulars of answer within 7 days of service of the applicant's particulars of claim.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Country High School Hostels Authority Residential College Supervisory Staff General Agreement 2008 PSAAG 23/2008	29/01/2009	The Civil Service Association of Western Australia Incorporated AND Country High School Hostels Authority	(Not Applicable)	Senior Commissioner J H Smith	New agreement registered

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2009 WAIRC 00046

NOTICE

FUNERAL DIRECTORS' ASSISTANTS' AWARD NO. 18 OF 1962

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, intends, by order, to strike out the following party to the

Funeral Directors' Assistants' Award No. 18 of 1962, namely:-

R. Falkingham

on the grounds that the party is no longer carrying on business as an employer to which the award applies.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote Admin file 60/2008 on all correspondence.

DATED THIS 2nd DAY OF FEBRUARY, 2009.

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