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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2009 WAIRC 00166

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 00166
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER J L HARRISON
HEARD	**:**	MONDAY, 23 FEBRUARY 2009
DELIVERED	**:**	FRIDAY, 3 APRIL 2009
FILE NO.	**:**	FBA 8 OF 2008
BETWEEN	**:**	COLIN HILL
		Appellant
		AND
		COMMISSIONER, CORRECTIVE SERVICES, DEPT. OF CORRECTIVE SERVICES
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Public Service Appeal Board**
Coram	**:**	**Commissioner P E Scott - Chairman**
		Mr R Grigoroff - Board Member
		Mr B Dodds - Board Member
Citation	**:**	**(2008) 88 WAIG 1896**
File No	**:**	**PSAB 7 of 2007**

CatchWords:

Industrial Law (WA) - Appeal against decision of the Public Service Appeal Board - Jurisdiction of the Full Bench to hear appeals from Public Service Appeal Board under the *Industrial Relations Act 1979* (WA) - Submissions from parties received on question of jurisdiction - *State Government Insurance Commission v Johnson* (1996) 76 WAIG 4142 applied - No jurisdiction to hear appeal - Appeal dismissed.

Legislation:

Industrial Relations Act 1979 (WA) – Part II Division 2, Part II Division 2E, s49, s49(1), s49(2), Part IIA, Part IIA Division 2, s80C, s80C(1), s80D, s80E(2), s80G, s80H(1) s80H(2), s80H(3), s80H(4), s80H(7), s80I, s80I(1)(a)-(c), s80I(1)(d), s80I(1)(e), s80K, s80K(3), s80L, s80L(1), s80L(2), s80W, s90

Result:

Appeal dismissed

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr D J Matthews (of Counsel), by leave

Solicitors:

Appellant	:	Not applicable
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

Ex parte Minister for Corrective Services (1993) 9 WAR 534

Pilcher v H B Brady & Co Pty Ltd [2005] WASCA 159

Sealanes (1985) Pty Ltd v Foley (2006) 86 WAIG 1239

State Government Insurance Commission v Johnson (1996) 76 WAIG 4142

Titelius v Public Service Appeal Board and Others [1999] WASCA 19

Case(s) also cited:

Nil

Reasons for Decision

RITTER AP:

Introduction

1 By a notice of appeal dated 10 September 2008 the appellant sought to appeal against a decision of the Public Service Appeal Board (the PSAB) made on 20 August 2008. The appellant's application had been dismissed by the PSAB.

The Proceedings in the Full Bench

2 After the filing of the notice of appeal, the appeal was not progressed in the ordinary way by the filing of appeal books. There was also a serious question as to whether the appellant could appeal against the decision of the PSAB. That is, whether the Full Bench had the jurisdiction to hear such an appeal.

3 Accordingly, the appeal was listed for a directions hearing on 23 February 2009. At the directions hearing the Full Bench brought to the attention of the parties the reasons for decision of the Full Bench in *State Government Insurance Commission v Johnson* (1996) 76 WAIG 4142. As will be later elaborated upon, in that decision the Full Bench held there was no right of appeal from a decision of the PSAB to the Full Bench.

4 Accordingly, at the directions hearing orders were made for the parties to file and serve written submissions on the question of jurisdiction.

The Submissions on Jurisdiction

5 Written submissions were filed and served by the appellant on 16 March 2009. Unfortunately these submissions did not, in any way, address the question of jurisdiction or the decision in *Johnson*. Instead, at some length, the appellant put forward arguments which were submitted supported the appeal.

6 The respondent's written submissions were filed and served on 19 March 2009. It was submitted that in *Johnson* it was decided the effect of s49(1) and (2) of the *Industrial Relations Act 1979* (WA) (*the Act*) was that no appeal could be made to the Full Bench from a decision of the PSAB because the PSAB did not fall within the meaning of "Commission" for the purposes of s49. The respondent accepted that *Johnson* was not binding on a later Full Bench "but there must be very persuasive reasons to depart from it". It was contended the appellant's submissions did not advance any arguments against the decision in *Johnson*. Accordingly it was argued *Johnson* should be followed and the appeal dismissed.

Analysis

7 The respondent's analysis of the decision in *Johnson* is correct. The Full Bench decided there was no right of appeal to the Full Bench against a decision of the PSAB. (See Sharkey P at 4143, (Coleman CC agreeing) and Fielding SC at 4143). In his reasons at 4143, Sharkey P said, correctly in my respectful opinion, that the interpretation of *the Act* which he favoured was supported by Malcolm CJ in *Ex parte Minister for Corrective Services* (1993) 9 WAR 534 at 540-541. Sharkey P then quoted an apposite paragraph from the reasons of Malcolm CJ.

8 As conceded by the respondent, an earlier decision of the Full Bench is not binding. However it would generally only be departed from if it was thought to be "plainly wrong" or "plainly incorrect". (See *Pilcher v H B Brady & Co Pty Ltd* [2005]

WASCA 159 per Steytler P, Wheeler, Roberts-Smith, McLure and Pullin JJA at [24]-[26], applied in *Sealanes (1985) Pty Ltd v Foley* (2006) 86 WAIG 1239 at [93]). In my opinion the decision in *Johnson* should not be departed from as it was correctly decided.

9 Appeals to the Full Bench are governed by s49 of *the Act*. Relevantly s49(1) and (2) provide:

> "**49. Appeals to Full Bench from decision of Commission under this Act**
>
> (1) In this section ***"the Commission"*** means the Commission constituted by a commissioner, but does not include the Commission exercising jurisdiction under section 80ZE.
>
> (2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission."

10 Accordingly an appeal only lies to the Full Bench against a decision of the Commission when "constituted by a commissioner".

11 The PSAB is established by s80H(1) of *the Act* which is within Part IIA. This part is headed "Constituent authorities". Section 80C of *the Act* provides definitions for some of the words and expressions used in Division 2 of Part IIA. Section 80C(1) provides that: "***'Board'*** means the Commission constituted as a Public Service Appeal Board established under this Division".

12 Section 80H(1) provides that the PSAB is established "within and as part of the Commission". Section 80I sets out the jurisdiction of the PSAB. Section 80H(2) provides that the "Board shall consist of 3 members". Sections 80H(3) and 80H(4) provide for the qualifications for membership of the three members. Section 80H(3) provides that for appeals referred under s80I(1)(a), (b) or (c), the members of the PSAB shall be "the President", an employer's representative and an employee's representative. Accordingly decisions made by a PSAB constituted under s80H(3) are not, in any way, made by a commissioner.

13 For appeals referred to the PSAB under s80I(1)(d) or (e), s80H(4) provides that the members of the PSAB are a Public Service Arbitrator, an employer's representative and an employee's representative. Section 80H(7) provides that: "In subsection (4) ***public service arbitrator*** means a commissioner who is, for the time being, a public service arbitrator appointed under section 80D".

14 Section 80K of *the Act* is headed "Proceedings of Boards". Section 80K(3) states that the "jurisdiction of a Board shall be exercised by all the members sitting together and when the members are divided in opinion on a question, the question shall be decided according to the decision of the majority of the members". As I have said, two of the members of the PSAB are to be an employer's and employee's representative respectively. Accordingly a decision of a PSAB constituted under s80H(4) could be comprised by a majority of these members, with a commissioner sitting as the Public Service Arbitrator dissenting.

15 Section 80L is headed "Certain provisions of Part II Division 2 to apply". Part II Division 2 is headed "General jurisdiction and powers of the Commission". Section 80L(1) provides:

> "**80L. Certain provisions of Part II Division 2 to apply**
>
> (1) Subject to this Division the provisions of sections 22B, 26(1) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 34(3) and (4) and 36 that apply to and in relation to the exercise of the jurisdiction under this Act of the Commission constituted by a commissioner shall apply, with such modifications as are prescribed and such other modifications as may be necessary, to the exercise by a Board of its jurisdiction under this Act."

16 Section 49 of *the Act*, which is in Part II Division 2E is not referred to in s80L of *the Act* or any other section dealing with the PSAB. Additionally, s80L(1) uses the words "Commission constituted by a commissioner" in contradistinction to "the Board". This makes it clear in my opinion that the legislative intention is that the PSAB is not "the Commission constituted by a commissioner". The PSAB is, from the definition of "Board" in s80C(1) and the contents of s80H(1) of *the Act*, part of the Commission, but it is plainly not the Commission "constituted by a commissioner" for the purposes of s49. It is the Commission constituted by the PSAB which has the three members set out in either s80H(3) or (4).

17 The position of appeals against decisions of the PSAB to the Full Bench may be contrasted to that of the Public Service Arbitrator. The Arbitrator is a member of the Commission and appeals to the Full Bench are specifically referred to in s80G of *the Act*, in a way which makes it clear that appeals to the Full Bench lie, other than in respect of a decision of the Arbitrator on a claim mentioned in s80E(2) of *the Act*. Additionally, appeals against decisions of the Railways Classification Board, another constituent authority of the Commission, are specifically dealt with in s80W of *the Act*.

Conclusion

18 For these reasons, in my opinion a decision of the PSAB is not a decision of "the Commission constituted by a commissioner". Accordingly the appellant does not have any right to appeal to the Full Bench against a decision of the PSAB under s49 of *the Act* and the Full Bench has no jurisdiction to hear such an appeal.

Disposition

19 The appeal must therefore be dismissed.

BEECH CC:

20 I have read in advance the draft reasons of his Honour the Acting President and can shortly state my reasons for agreeing with him. The issue in this matter is whether a decision of the Public Service Appeal Board (PSAB) is able to be appealed to the Full Bench of the Commission. As the respondent points out, this issue was extensively considered in *State Government Insurance Commission v. Johnson* (1996) 76 WAIG 4142. In my view, that decision is correct in finding that the PSAB does not fall within the meaning of "Commission" as that is used in s 49(1) of the Act; the PSAB is not the Commission constituted by a Commissioner.

21 The correctness of the decision is, in my respectful view, wholly supported by the decision of Malcolm CJ in *Titelius v. Public Service Appeal Board and Others* [1999] WASCA 19. In that matter, the Supreme Court of Western Australia considered whether or not a prerogative writ was available for the purpose of judicial review for jurisdictional error on the part of the PSAB. Malcolm CJ (at [4]) observed that the PSAB is constituted under s 80I of the *Industrial Relations Act, 1979* (the Act) and like the Promotions Appeal Board, the PSAB is established "within and part of the WA Industrial Relations Commission" and that no appeal lies from the PSAB to the Commission under s 49(2) of the Act or to the Industrial Appeal Court under s 90.

22 In this matter, Mr Hill seeks to appeal a decision of the PSAB to the Full Bench of the Commission under s 49 of the Act. There is no right of appeal for the reasons I have set out above. I agree with the Order to issue.

HARRISON C:

23 I have had the benefit of reading the reasons to be published by his Honour the Acting President. I agree with those reasons and the order proposed.

2009 WAIRC 00155

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COLIN HILL
	APPELLANT
	-and-
	COMMISSIONER, CORRECTIVE SERVICES, DEPT. OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 3 APRIL 2009
FILE NO/S	FBA 8 OF 2008
CITATION NO.	2009 WAIRC 00155

Decision	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr D J Matthews (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 23 February 2009, and having heard Mr C Hill on his own behalf as appellant, and Mr D J Matthews (of Counsel), by leave on behalf of the respondent, and reasons for decision having been delivered on 3 April 2009, it is this day, 3 April 2009, ordered that:

1. The appeal is dismissed

By the Full Bench

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00123

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2009 WAIRC 00123
CORAM	**:**	THE HONOURABLE M T RITTER, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER P E SCOTT
HEARD	**:**	TUESDAY, 17 FEBRUARY 2009
DELIVERED	**:**	TUESDAY, 17 MARCH 2009
FILE NO.	**:**	FBA 10 OF 2008
BETWEEN	**:**	MARK GREAME IRELAND
		Appellant
		AND
		IAN JOHNSON
		CEO OF THE DEPARTMENT OF CORRECTIVE SERVICES
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**(2008) 88 WAIG 2154**
File No	**:**	**B 85 of 2008**

CatchWords:

Industrial Law (WA) - Appeal against decision of the Commission - Claim for denied benefits under a contract of employment - Prisoner - Prisoner worked as cook whilst imprisoned pursuant to s95 of the *Prisons Act 1981* (WA) and reg 43 of the *Prisons Regulations 1982* (WA) - Whether prisoner an employee - Work within context of statutory scheme - Intent to enter into employment contract - No intent to contract - Appeal dismissed

Legislation:

Industrial Relations Act 1979 (WA) - s7, s29(1)(b)

Prisons Act 1981 (WA) – s3, s69, s69(b), Part IX, s95, s95(1) s95(2), s95(2)(b), s95(2)(f), s95(2)(g), s95(4), s110, s110(1)(f), s110(1)(h), s110(1)(i), s110(1)(u)

Prisons Regulations 1982 (WA) – reg 43, reg 43(1), reg 43(3), reg 44, reg 45(1), reg 45(2), reg 45A, reg 45B, reg 45B(2), reg 47, reg 50, reg 61

Income Tax Assessment Act 1936 (Cth)

Minimum Conditions of Employment Act 1993 (WA)

Occupational Safety and Health Act 1984 (WA)

Workplace Relations Act 1996 (Cth)

Result:

Appeal dismissed

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr D J Matthews (of Counsel), by leave

Solicitors:

Appellant	:	In person
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in reasons:

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 355

Conway v GSL Custodial Services Pty Ltd [2005] AIRC 792

Ermogenous v Greek Orthodox Community of SA Inc (2002) 209 CLR 105

Hall v Whatmore [1961] VR 225

Haseldine v State of South Australia (2007) 96 SASR 530

Helmers v Department of Corrective Services [1997] 14 NSWCCR 248

Moncrieff v The State of South Australia (1982) 49 (Part 2) SAIR 30

Morgan v Attorney-General [1965] NZLR 134

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

Pullin v Prison Commissioners (1957) 1 WLR 1186

State of New South Wales v Watzinger [2005] NSWCA 329

Yates v The State of Western Australia [2008] WASCA 144

Zappia v The State of South Australia (Department of Correctional Services) (1993) WCATR 30

Case(s) also cited:

Building Workers' Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104

Chalmers v The Commonwealth of Australia (1946) 73 CLR 19

Collier v Australian Construction and Welding Services (2005) 86 WAIG 112

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

Miles v Brendon Penn Nominees Pty Ltd (2006) 86 WAIG 1343

Phillips v Price [2007] WASC 54

Smith v Corrective Services Commission of New South Wales (1980) 147 CLR 134

State of New South Wales v Napier [2002] NSWCA 402

Stevens v Brodribb Sawmilling Company Pty Ltd (1985) 160 CLR 16

Reasons for Decision

RITTER AP:

Introduction

1 The appellant filed two applications against the respondent at the Commission. Both applications were made under s29(1)(b) of the *Industrial Relations Act 1979* (WA) (*the Act*). The applications claimed, respectively, that the appellant had been unfairly dismissed from his employment with the respondent and that he had not been "paid a remuneration and superannuation package and other benefits" to which he was entitled under his contract of employment. Both applications were dismissed. This was on the basis that the Commission decided the appellant had not, as claimed, been the employee of the respondent.

The Appeal

2 The notice of appeal said the decision appealed against was that in the unfair dismissal application. At the hearing of the appeal however the appellant clarified that he sought to appeal against the decision in the denial of contractual benefits application. Accordingly the Full Bench decided the notice of appeal should be amended so that the decision appealed against was that in application B 85 of 2008 and not U 85 of 2008. An order reflecting this will be published concurrently with the reasons of the Full Bench.

Factual Background

3 The appellant was, between 16 November 2005 and 15 July 2008, a prisoner in the custody of the respondent, firstly at Hakea Prison and secondly at Wooroloo Prison. It was within this period of time that the appellant asserted he was the employee of the respondent. The appellant was a remand prisoner at Hakea Prison between approximately 16 November 2005 and late September or early October 2007. The appellant was then sentenced to a term of imprisonment and transferred to Wooroloo Prison. He remained in that prison as a sentenced prisoner until his release on 15 July 2008.

4 During the period of time he was in prison the appellant was engaged in work. The appellant contended that the work was performed in accordance with a contract of employment. He first did cleaning work at Hakea Prison. This was followed by work in the prison kitchen. This included preparing meat in what was called the meat room and general kitchen work. After he was transferred to Wooroloo Prison the appellant again worked in the kitchen and became head cook. He continued to work at Wooroloo Prison as head cook until his release on 15 July 2008.

5 The appellant's work at Hakea Prison commenced after he made a written application, on the appropriate form, to be "employed" at the prison. A copy of a proforma of the form, which the appellant signed and provided to the relevant officer at the prison, was in evidence at first instance. It was called a "C 101 form" by the appellant. It was headed "Ministry of Justice", with a subheading of: "Application for Remand Prisoners to be Employed at Prison". The form commenced with

boxes in which prisoner details were to be inserted. The form then set out "Prison regulations" 61 and 43(3). These will be referred to later. The form then relevantly provided:

> "(1) I HEREBY MAKE application to be put to such employment as may be approved by the Superintendent
>
> I understand that such employment will not alter any status as a Remand Prisoner, and the application is made so that I may be paid gratuities, and occupy my time in prison.
>
> I understand that the time thus spent does not count as part of any sentence that may be imposed, and does not entitle me to remission with respect to same.
>
> I understand that I may be required to be employed in the capacity of general worker (Cleaning, gardening or in any miscellaneous work as may become available from time to time) or as directed by any Officer of the prison.
>
> Should this application be approved I shall remain in employment during the period of my imprisonment at the prison. A further election not to work must be made to the Superintendent in writing on a form C. 101."

6 There was then a place for the prisoner to sign and date the form.

7 A second section of the form was a request which could be signed by the prisoner advising that he did not wish to be employed in the "services or industries of the prison".

8 At the bottom of the form were boxes which were to be marked to signify the approval or non-approval of the application. There was then a space for the form to be signed and dated by the superintendent or OIC (officer in charge). It was as a result of the submission of such an application and the approval of it that the appellant first commenced work at Hakea Prison.

9 In exchange for the work which the appellant did when a remand and sentenced prisoner, he was credited with gratuities. These were in the form of daily payments. The amount of the gratuity increased during the course of the appellant's imprisonment. Evidence of some of the gratuities he was credited with were contained in a statement which was received as an exhibit at first instance. As will be set out, the requirement to pay and the amount of the gratuities were contained in prison regulations.

10 In addition to the form C 101 the following documents were received in evidence at first instance:

(a) As mentioned above, a statement of the gratuities credited to the appellant for the period 16 November 2005 to 2 August 2006.

(b) A prisoner safety and training record, signed by the appellant. This was however for a period of imprisonment earlier than that which was the subject of the applications to the Commission.

(c) A Ministry of Justice industries "employability evaluation" of the appellant for the period 5 October 2007 to 14 July 2008. This was for the appellant's work as head cook at Wooroloo. This included employability ratings in the categories of interpersonal skills, attitude and behaviour, effort/motivation, responsibility, communication, quality of work, safety practices, academic skills, problem solving and adaptability. There was also a section for general comments.

(d) A statement of attainment dated 3 December 2007 which recorded that the appellant had fulfilled the requirement of following workplace safety procedures.

(e) A document headed "Statement of Claim" which set out some of the issues which the appellant put before the Commission at first instance.

The Prisons Act

11 The *Prisons Act 1981* (WA) and the *Prisons Regulations 1982* (WA) applied to the appellant when he was a remand and sentenced prisoner. The preamble to the *Prisons Act* states that it is:-

> "An Act to make provision for the establishment, management, control, and security of prisons, the custody and welfare of prisoners and for related matters and to repeal the *Prisons Act 1903*."

12 In s3 of the *Prisons Act* a prisoner is defined to include a person committed to prison for punishment and a person who is on remand for trial.

13 Part IX of the *Prisons Act* is presently headed "Prisoner wellbeing and rehabilitation." Included in this part is s95 of the *Prisons Act*. The present s95 commenced on 4 April 2007. (See *Prisons and Sentencing Legislation Amendments Act 2006* (WA), s32 and the Western Australian *Government Gazette*, No 63 (3 April 2007) 1491). Accordingly both the present and former s95 of the *Prisons Act* applied to the appellant during the relevant time he was a prisoner.

14 Part IX was formerly headed: "Welfare programmes for prisoners", and the former s95 was in the following terms: -

> **"95. Preparation and implementation of activity programmes**
>
> (1) Without prejudice to the generality of the responsibility of the chief executive officer for the welfare of prisoners conferred on him by

section 7(1), the chief executive officer may provide services and programmes for the welfare of prisoners at every prison and, in particular, services and programmes may be designed and instituted with the intention of providing-

(a) counselling services and other assistance to prisoners and their families in relation to personal and social matters and problems;

(b) opportunities for prisoners to utilise their time in prison in a constructive and beneficial manner by means of educational and occupational training programmes and other means of self improvement; and

(c) opportunities for work, leisure activities, and recreation.

(2) Participation in and use of services provided under this section shall be voluntary, except that, unless a prisoner is medically unfit, he may be required to work."

15 The present s95(2) provides that services and programmes may be designed and instituted with the intentions specified in s95(2)(a)-(h). Of present relevance are s95(1) and s95(2)(b), (f) and (g), as follows:

"**95. Preparation and implementation of activity programmes**

(1) Without limiting the responsibility of the chief executive officer for the welfare of prisoners conferred by section 7(1), the chief executive officer may arrange for the provision of services and programmes for the wellbeing and rehabilitation of prisoners.

(2) In particular, services and programmes may be designed and instituted with the intention of —

…

(b) enabling prisoners to acquire knowledge and skills that will assist them to adopt law abiding lifestyles on release; and

…

(f) providing opportunities for prisoners to utilise their time in prison in a constructive and beneficial manner by means of educational and occupational training programmes and other means of self improvement; and

(g) providing opportunities for work, leisure activities, and recreation …

…"

16 The present s95(4) provides that: "As long as a prisoner is medically fit the prisoner may be required to work".

17 In my opinion there is no material difference between the former and the present s95 of the *Prisons Act* in deciding whether the appellant was the employee of the respondent.

18 Section 69 of the *Prisons Act* sets out minor prison offences. Included as s69(b) is an offence of being a prisoner who is "idle, negligent or careless in his work".

19 Section 110 of the *Prisons Act* provides the Governor with authority to make regulations. Relevantly, s110(1)(f), (h), (i) and (u) provide authority to make regulations:

"…

(f) regulating the custody, classification, separation, diet, instruction, health, employment, discipline, medical and other treatment of prisoners; and

…

(h) making provision for the classification of labour performed by prisoners; and

(i) prescribing the gratuities that may be credited to prisoners and the conditions upon which gratuities may be so credited; and

…

(u) regulating the treatment of prisoners on remand …

…"

The Prisons Regulations

20 The *Prisons Regulations* have been made in accordance with the authority provided in s110 of the *Prisons Act*. Relevantly, regulation 43 provides:

> "**43. Work**
>
> (1) Subject to subregulation (2), a prisoner who is able to work may be employed as the superintendent directs.
>
> (2) A prisoner on remand shall not be required to work.
>
> (3) A prisoner on remand may apply in writing to the superintendent to work and, if such application is granted, the prisoner may, be employed in the prison in which he is confined, and be credited with gratuities accordingly."

21 Regulation 44 provides for the labour performed by prisoners to be classified by the chief executive officer in accordance with levels from 1 to 5. Criteria for each level is set out. Regulation 45(1) sets out the rate of gratuities for the levels. The highest gratuity is for level 1, descending to the lowest gratuity for level 5. Regulation 45(2) provides for the variation of the gratuities in accordance with the Consumer Price Index. Regulation 45A provides that a "prisoner shall be allocated such level of labour as is determined by the chief executive officer". Regulation 45B sets out circumstances within which prisoners are not to work or be credited with gratuities.

22 Regulation 47 provides limits upon the expenditure of gratuities by a prisoner. Regulation 50 provides that the amount of gratuities which remain credited to prisoners upon their discharge are to be made available to them.

23 Regulation 61, referred to in the C 101 form, provides that: "A remand prisoner shall keep his cell and any other area used by remand prisoners in a thorough state of cleanliness".

The Commissioner's Reasons for Decision

24 As I have said, the applications were dismissed at first instance on the basis that the appellant was found not to be the "employee" of the respondent in accordance with the definition contained in s7 of *the Act*. As stated by the Commissioner in his reasons at [17], for the denial of contractual benefits claim, the appellant was required to establish that he was an employee and had been denied benefits to which he had been entitled under his contract of employment.

25 The Commissioner quoted relevant sections and regulations from the *Prisons Act* and *Prisons Regulations* respectively.

26 At [23] the Commissioner said that for a valid contract of employment to be formed and to operate, there was a requirement for there to be "a valid offer and acceptance; an intention by the parties to the contract to enter into contractual relations; that the parties to the contract have a legal capacity to contract; that there be mutual promises by the parties one to the other in the form of consideration; and that the contract have lawful objects". The Commissioner cited *Cheshire and Fifoot's Law of Contract* (8th Aust ed, 2002) 9-54.

27 The Commissioner then said that whether a prisoner can be an employee "in law" has been considered in a number of Australian, United Kingdom and United States of America authorities.

28 The Commissioner at [26] quoted a lengthy passage from one of these cases: *Moncrieff v The State of South Australia* (1982) 49 (Part 2) SAIR 30 at 33. Included in the passage was a relevant quotation from the reasons of the court in *Pullin v Prison Commissioners* (1957) 1 WLR 1186 at 1190.

29 The Commissioner also cited *Zappia v The State of South Australia (Department of Correctional Services)* (1993) WCATR 30, *Helmers v Department of Corrective Services* [1997] 14 NSWCCR 248, *Morgan v Attorney-General* [1965] NZLR 134, *Hall v Whatmore* [1961] VR 225 at 233 and *State of New South Wales v Watzinger* [2005] NSWCA 329. Authorities from the United States of America were also cited.

30 The Commissioner's reasoning was contained in [32]-[34] which are as follows:

> "32. With respect, I agree with the conclusions reached in the authorities referred to above and in the context of the present proceedings, I see no reason to depart from the general principles set out in them. I am not satisfied in this case that the applicant has established on the evidence, circumstances materially different from those considered in the authorities referred to above. That is, I am not persuaded that a prisoner, either on remand or once sentenced, can be an employee as a matter of fact and law. In this case, there is no evidence before the Commission to establish, or from which it can be inferred, that the applicant and the respondent intended to enter into the contractual relationship of employer and employee.
>
> 33. Furthermore, even if there was evidence of such an intention, there was present in the arrangement no consideration as an essential element of the formation of a contract of service. The payment of a gratuity under the relevant provisions of the Prisons Regulations 1982, set out above, does not in any way, equate with the payment of a wage or salary which is a fundamental characteristic of a contract of service. The gratuity is not payable in connection with the formation or operation of any contract, rather, it is payable by operation of the Prison Regulations and only as a consequence of the applicant's imprisonment.

> 34. It is also clear that once sentenced, the applicant was required to work under the Prisons Regulations, and if the applicant demonstrated idleness, neglect or carelessness in his work, as a prisoner, he would have been guilty of a minor prison offence under s 69 of the Prisons Act 1981 and subject to an appropriate punishment. This in itself is entirely inconsistent with the principle of freedom to contract in the ordinarily understood sense in the commercial world."

The Notice of Appeal

31 The notice of appeal contained seven grounds. The grounds were fairly wordy and to some extent repetitive but contain the following relevant assertions:

(a) The Commissioner did not properly take into account the contents of the C 101 form and the appellant's status as a remand prisoner.

(b) The authorities cited by the Commissioner dealt only with sentenced prisoners and not remand prisoners.

(c) The appellant was credited with gratuities because of an employment contract entered into by him with the respondent; not as a consequence of his imprisonment.

(d) The Commissioner failed to adequately take into account the documents about safety and training.

(e) The Commissioner erred in failing to take into account that the gratuities credited to the appellant formed part of his taxable income in accordance with the *Income Tax Assessment Act 1936* (Cth).

(f) The Commissioner failed to take into account that the *Occupational Safety and Health Act 1984* (WA) covered all workers in the State of Western Australia.

32 The appellant elaborated on each of these points in his written and oral submissions. These will be described below. I mention at this stage however that although he placed emphasis upon his position when a remand prisoner, the appellant also maintained he was still an employee after being sentenced.

The Additional Documents

33 At the hearing of the appeal, the appellant sought to put before the Full Bench additional documents. The appellant said, and it was accepted by counsel for the respondent, that these documents were not available to him at the time of the hearing at first instance. The documents were received by the Full Bench on the basis that they would be considered as to whether they should be taken into account in determining the appeal. The documents were:

(a) Pages 2 and 3 of a letter about the appellant by the then Director General of the Ministry of Justice dated 24 February 1995.

(b) A document headed "Bakery Safety Instructions and Health Requirements" which was undated.

(c) An extract of apprenticeship records from the Western Australian Department of Training about the appellant dated 11 March 1996.

(d) A Department of Corrective Services "Kitchen, Safety, Training and Workshop Employment Record" form.

(e) A document headed "Dress Requirements For Kitchen Workers" which was undated.

The Appellant's Submissions

34 In his submissions the appellant emphasised the use of the word "employed" in regulation 43(1) and 43(3) of the *Prisons Regulations* (T7). He submitted, in effect, that the word was used in its legal, contractual sense. Accordingly once he was "employed", in accordance with the regulation, he became the employee of the respondent.

35 The appellant also referred to the wording of the C 101 form (T7). It was submitted that this contained an offer by a prisoner to be employed which could then be and was in his case, accepted by the superintendent. It was therefore a voluntary agreement. This was supported by regulation 61 of the *Prisons Regulations.* The appellant argued, in effect, that this made it clear that a remand prisoner's obligations, absent an agreement to work, were very limited (T7). The appellant submitted that after he decided to make the application to be employed and this was accepted, there was a promise by the respondent to employ him (T10).

36 The appellant also submitted that the prison authorities provided safety equipment, tools, training and clothing and exercised control over their workers, consistent with an employment relationship (T8-9). It was also contended that after the agreement was made and the prisoner commenced working, he was provided with remuneration for that work (T9).

37 The appellant also asserted that there were sections of the *Occupational Safety and Health Act* which applied to him when working at the prisons. It was contended that this was also indicative of an employment contract (T10).

38 He also contended his position was supported by a report by the Office of the Inspector of Custodial Services at Hakea Prison dated September 2007. The appellant read several paragraphs of this report to the Full Bench at the hearing of the appeal.

39 The appellant argued the *Minimum Conditions of Employment Act 1993* (WA) applied to him (T14). He submitted that the *Minimum Conditions of Employment Act* took precedence over the *Prisons Regulations* and, in effect, the minimum wage set under the *Minimum Conditions of Employment Act* should have applied to him (T15-16).

40 The appellant referred to the occupational safety and health documents which were before the Commissioner and the additional documents placed before the Full Bench (T18). These were also argued to be indicative of an employment

relationship. For example it was submitted that "as you are employed you have an obligation to work safely in the environment" (T18).

41 The appellant, without objection, also informed the Full Bench that the gratuities he was credited with when working at prisons were taken to be part of his taxable income in the 2005-2006 financial year. The appellant referred the Full Bench to the definition of "income" under the *Income Tax Assessment Act*. He submitted that the taking into account of his gratuities as part of his taxable income was again consistent with an employer-employee relationship (T20).

42 As I have said, the appellant emphasised his position when a prisoner on remand, and the voluntary nature of his engagement to work. He also submitted however that he remained an employee when working as a sentenced prisoner. The appellant argued there was, at that time, still a voluntary element in performing the work. For example he referred to the use of the word "may" in regulation 43(1) of the *Prisons Regulations*. That is, a prisoner "may be employed" (T21). He submitted this word showed there was a discretionary element in making a decision that the prisoner would work. The appellant also referred to occupational safety and health documents which applied to sentenced prisoners who were to work. It was contended that before sentenced prisoners could work they were required to sign these documents. It was submitted that the prisoner could refuse to work by not signing these documents (T21). It was therefore argued, in effect, that there was a voluntary element to the working arrangement (T21). It was also submitted that the provision of training in the area of occupational health and safety and the requirement to comply with food and hygiene regulations (in the kitchens) was indicative of an employment relationship (T22, 25).

The Respondent's Submissions

43 The respondent submitted the appellant was not employed when either a remand or sentenced prisoner. It was submitted that the "regime of work within the prison system is purely a statuary scheme to be used as a management tool in relation to prisoners" (T25). It was submitted that the regime of work was a regulatory one to serve the purpose of keeping prisoners active and not becoming a "nuisance" (T25).

44 Counsel for the respondent emphasised the preamble to the *Prisons Act*. He also placed reliance upon the source of the authority to make regulations about prisoners doing work. Section 110(1)(f) of the *Prisons Act* was referred to. Submissions were made about the other words used in that paragraph as well as "employment". It was submitted that the "power to establish a regime of work is referred to amongst other things which clearly go to management, welfare and custody of prisoners" (T26).

45 The respondent also referred to the joint reasons of Gaudron, McHugh, Hayne and Callinan JJ in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 105 at [24]. It was submitted that an intention to contract was essential to the creation of a legally enforceable right or duty. It was submitted, relying on *Ermogenous* at [25], that the search for an intention to create contractual relations requires an objective assessment of the state of affairs between the parties. That search may take into account the subject matter of the agreement, the status of the parties to it, their relationship to one another and other surrounding circumstances. It was argued that taking into account the relevant circumstances in this instance showed there was no intention on behalf of the respondent to enter into contractual relations with the appellant. This was because of the context of the control and management of prisons and providing for the custody and welfare of prisoners.

46 It was submitted there were differences between the regime provided for under the *Prisons Regulations* and a conventional employment relationship. For example the regulations set out the amounts of the gratuities which were to be credited, which were significantly lower than the minimum wage (T26).

47 Reliance was also placed upon regulation 45B(2). Counsel said this subregulation allows for "a circumstance in which a person is forced to work without pay" (T26). Additionally, s69 of the *Prisons Act* meant that a person could commit a minor prison offence if they did not properly carry out their work (T26).

48 Counsel for the respondent also submitted that form C 101 was not consistent with an employment relationship. It was argued that the remand prisoner applies for approval to work and the superintendent, if he/she approves the application, then decides what work is to be done. This was different from a conventional employment relationship where someone applies for specific work (T27).

49 The respondent placed limited reliance upon the authorities relied upon by the Commissioner at first instance. Referring to *Ermogenous*, the respondent's counsel said that the High Court had emphasised that one should avoid using presumptions to supply the answer to whether there was an intention to create legal relations. It was contended that the specific circumstances need to be considered. It was submitted that the preferable approach was for the Full Bench to simply look at the statuary scheme and accept that properly characterised the regime of work was simply a management tool. It was not intended to create an employment relationship (T28).

50 The appellant made submissions in reply which emphasised some of his primary arguments. The reply does not need to be separately summarised.

Analysis

51 The determination of the appeal turns upon whether the Commissioner erred in deciding the appellant was not the employee of the respondent. This was for both the period when the appellant was in prison on remand and then a sentenced prisoner.

52 In my opinion the key to deciding the issue is the context of the relationship between the appellant and the respondent. At all material times, the appellant was in prison because of orders made by a court. For the period when the appellant was in prison on remand, it may be inferred that this was because of an order refusing bail, or alternatively because he was unable to meet court imposed conditions of bail.

53 Whilst he was in prison, the prison authorities were required to act towards the appellant in accordance with the *Prisons Act* and *Prisons Regulations*. It was within the context of that statutory regime that the appellant was engaged to work by prison authorities. The context of that relationship, within the statutory regime, cannot be ignored. That is, the parties cannot be considered as if the statutory duties and limitations of their relationship did not exist.

54 As emphasised by the respondent, the *Prisons Act* is as stated in its preamble, an Act to make provision for, amongst other things, the control of prisons and the custody and welfare of prisoners. That purpose is reflected in the relevant subsections of s95 of the *Prisons Act* which I earlier quoted. The same may be said of the power to make regulations about "employment" and prescribing gratuities which may be credited to prisoners. Although the word "employment" is used in s110(1)(f) of the *Prisons Act*, it must be construed within the context of the paragraph in which it is used and the legislation as a whole. As stated by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69], "the process of [statutory] construction must always begin by examining the context of the provision that is being construed". (See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 355 at 381-2, quoted by Steytler P in *Yates v The State of Western Australia* [2008] WASCA 144 at [50]). The context of s110(1)(f) of the *Prisons Act* is the management of prisons and the welfare of the prisoners.

55 Additionally "employment" is a word which has shades of meaning. Its meaning is not restricted to a person being employed in the sense of being a party to a contract of employment. It can mean "the state of being employed"; with "employed", in turn having a meaning of "to use the services of … keep busy or at work". (*The Macquarie Dictionary* Online Edition, 5 March 2009). That is, "employed" can mean to be engaged to do work in the absence of a contract. In my opinion this is the meaning of "employment" in the context of s110(1)(f) of the *Prisons Act*. This also fits with the use of the word "work" in both the former and present s95 of the *Prisons Act*.

56 Similar reasoning applies to the use of the word "employed" in subregulations 43(1) and 43(3) of the *Prisons Regulations*. The emphasis of the regulation is on "work", not in my opinion upon "employment" in accordance with a contract of employment. Therefore I do not accept the appellant's argument that the word "employed" has a contractual meaning in the *Prisons Act* and *Prisons Regulations*. This view is supported by the reasoning in *Helmers* at page 6. It was there held that the use of the word "employment" in the applicable prisons legislation did not support an argument that a sentenced prisoner was subject to a contract of employment and therefore a "worker" within the relevant workers' compensation legislation.

57 I accept the appellant's submission that when he was a remand prisoner there was an element of choice about him becoming "employed". The *Prisons Act* and *Prisons Regulations* make it clear that a remand prisoner cannot be required to work. Form C 101 contains two aspects however which in my opinion are significant. The first is that the remand prisoner does not make an application for a specific position. As stated in the form the application is made so that the prisoner "may be paid gratuities, and occupy my time in prison". The form provides that the prisoner may be employed in the capacity of general worker, or as directed by prison officers. Secondly the form says that "employment will not alter any status as a Remand Prisoner …". Both of these aspects support the conclusion that there was no employment contract.

58 It is through this form that the appellant was engaged to work when a remand prisoner. Its contents form part of the objective assessment of the state of affairs between the parties. Consistently with *Ermogenous*, this should be considered in deciding whether there has been an intention to create legal relations. In my opinion the context to which I have referred and the contents of form C 101 point clearly to there being no intention to create legal relations. This conclusion is supported by the authorities including *Helmers* at page 8 and *Moncrieff* at page 33. Both of these were relied upon by the Commissioner. There are other authorities which also support this conclusion.

59 One of these is *Conway v GSL Custodial Services Pty Ltd* [2005] AIRC 792. There, Whelan C at [45] accepted there was no intention to create legal relations where a prisoner was engaged by prison authorities to work, when both a remand and sentenced prisoner. This authority is significant in that the context within which the issue was considered was that of employee entitlements under the *Workplace Relations Act 1996* (Cth). Additionally, as I have said the applicant was both a remand and then a sentenced prisoner, like the appellant. It was specifically held at [44] that the relationship between the applicant and the respondent did not substantially alter when his status changed from that of a remand prisoner to a sentenced prisoner. It was said that the "relationship was one of custodian and prisoner". In my opinion this is an accurate description of the position for the entire period with which we are concerned about for the appellant. As stated in *Conway* at [45], although the prison authorities owed the appellant "a duty of care by virtue of the fact that he was in their care and control, they did not merely by providing him with the opportunity to work become his employer". Again this was despite the fact that there was an element of choice in Mr Conway entering into a work program. (See for example [4], [13] and [16]).

60 Another relevant authority is *Haseldine v State of South Australia* (2007) 96 SASR 530. This was a decision of the Full Court of the Supreme Court of South Australia. There, the issue was whether a sentenced prisoner who had been injured when working could succeed in an action for negligence and/or breach of statutory duty. Both parties accepted there was no relationship of employer and employee. The relationship was that of "the State" and prisoner. The Full Court endorsed this. (See for example the reasons of Gray J at [38] and White J at [79]). White J at [79] said the plaintiff was not an employee working under a contract of service and "the work performed by a prisoner in a prison environment is not performed pursuant to a contract of any kind". His Honour cited *Watzinger* and *Helmers*.

61 In other authorities it has been accepted that although there may be an element of choice in a prisoner working or being accepted for work this does not mean that their status is that of an employee. For example in *Helmers* the sentenced prisoner applied for a transfer to a minimum security prison so that he might be able to work. Although it was recognised there was an element of choice in him doing this, it was held there was no contract of service. (See page 6). In *Morgan*, a decision of the Supreme Court of New Zealand, a sentenced prisoner made a request for outside work and was then allocated a job. It was decided however that he was not an employee. (See page 137). In *Haseldine*, the prisoner was accepted to work at an outside camp (see Gray J at [12] and [49]); but as stated, it was accepted he was not an employee.

62 The element of choice was removed when the appellant became a sentenced prisoner. He could then be required to work. I do not accept the appellant's argument that there was a voluntary element in a prisoner working under regulation 43(1) of the *Prisons Regulations*. The use of the word "may" gives a superintendent a discretionary power to direct a sentenced prisoner to work. Once the prisoner is so directed however, he or she may not refuse to do so. This is confirmed by s69 of the *Prisons Act*, which makes it a prison offence to not properly perform work.

63 In his submissions, the appellant emphasised that whilst working he was subject to the direction and control of prison authorities. It was submitted that this was consistent with a contract of employment. Whilst this may be so, it is also consistent with a State (prison authorities) - prisoner relationship. That context, I reiterate, cannot be removed from the situation. Within that context, direction, control, provision of equipment and the like did not mean there was a contract of employment. The same view was taken in *Watzinger* at [123].

64 Additionally, in my opinion it cannot be said that the gratuities which the appellant was credited with, for his work, were "consideration" in accordance with the law of contract. The crediting of gratuities was part of the applicable statutory regime. It cannot be likened to an employer/employee position where generally there is some negotiation about the quantum of salary or wages. In support of this proposition, the authorities have consistently held that gratuities are not consideration or wages. (For example see *Helmers* at page 8, *Moncrieff* at pages 34-35 and *Conway* at [11] and [38]).

65 Although I accept the respondent's submission that care must be taken in transposing the reasoning from other decisions to the present situation, in my opinion the reasons referred to soundly support my own conclusions. It is also significant that in none of the authorities cited, from England, New Zealand, other Australian States or the Australian Industrial Relations Commission, has there been support for a contention that either a remand or sentenced prisoner is an employee when engaged in work.

66 I have also considered the submissions of the appellant about occupational safety and health training, including signing applicable documents and the requirement to observe healthy and safe practices. Again these circumstances did not mean there was a contract of employment. They were present to try and reduce the risk of illness or injury; in part because of the duty of the prison authorities to look after the safety and welfare of prisoners, prison officers and others working in or visiting the prisons.

67 I also very much doubt the appellant's assertion that there were sections of the *Occupational Safety and Health Act* which specifically applied to him when engaged in work at the prisons. Even if they did however this did not change the status of the appellant to that of an employee.

68 I also do not accept the appellant's argument that the *Minimum Conditions of Employment Act* applied to him. The application of that Act is premised upon a person being an employee. Whether it applied to the appellant begged the question of whether he was an employee, rather than providing an answer to that question. The fact that the *Prisons Act* and *Prisons Regulations* provide a specific regime for prisoners to engage in work and provide statutorily set gratuities for engaging in that work make it clear in my opinion that the intention of the legislature is that a working prisoner is not an employee, so that the *Minimum Conditions of Employment Act* does not apply to remand or sentenced prisoners.

69 I also do not accept the appellant's argument that the *Income Tax Assessment Act* supports his contention that he was an employee. Whether or not his gratuities fell within the definition of "income" under that Act is a separate question to whether he was the employee of the respondent.

70 I have also considered the additional documents presented to the Full Bench. Most if not all, do not throw any light on the issue on which the appeal turns. Some are not even applicable to the time period relevant to the appeal. Also, none impacted upon the statutory context of the regime for prison work or the compelling reasons supporting the conclusion that the appellant was not an employee.

71 For these reasons I accept the respondent's submission that the Commissioner did not err. I do not accept the appellant's contentions to the contrary.

72 In my opinion the appeal must be dismissed.

Orders

73 In my opinion the following orders should be made:

1. The notice of appeal be amended so that the decision appealed against is that made in application B 85 of 2008 and not U 85 of 2008.
2. The appeal is dismissed.

BEECH CC:

74 I have read the Reasons for Decision of his Honour, the Acting President and I agree with those reasons and have nothing to add.

SCOTT C:

75 I have had the benefit of reading the Reasons for Decision of the Acting President. I agree with those Reasons and the Orders proposed, and have nothing to add.

2009 WAIRC 00121

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK GREAME IRELAND
	APPELLANT
	-and-
	IAN JOHNSON
	CEO OF THE DEPARTMENT OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 17 MARCH 2009
FILE NO/S	FBA 10 OF 2008
CITATION NO.	2009 WAIRC 00121

Decision	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr D J Matthews (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 17 February 2009, and having heard Mr M G Ireland on his own behalf as appellant, and Mr D J Matthews (of Counsel), by leave, on behalf of the respondent, and reasons for decision having been delivered on 17 March 2009, it is this day, 17 March 2009, ordered that:

1. The notice of appeal be amended so that the decision appealed against is that made in application B 85 of 2008 and not U 85 of 2008.
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 00125

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT - MEMBER CFMEUW
	APPLICANT
	-v-
	KEVIN NOEL REYNOLDS, THE SECRETARY - THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS
	FIRST RESPONDENT
	-and-
	DARREN KAVANAGH
	SECOND RESPONDENT
	-and-
	WAYNE NICHOLSON RETURNING OFFICER WA ELECTORAL COMMISSION
	THIRD RESPONDENT
	-and-
INTERVENER	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 18 MARCH 2009
FILE NO/S	PRES 2 OF 2009
CITATION NO.	2009 WAIRC 00125

Result	Orders and directions
Representation	
Applicant	In person
First Respondent	Mr K J Bonomelli (of Counsel), by leave
Second Respondent	No appearance
Third Respondent	Ms N Eagling (of Counsel), by leave
Intervener	Mr R C Kenzie QC, by leave and with him Mr T J Dixon (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 18 March 2009, and having heard Mr R P Mcjannett on his own behalf as applicant, Mr K J Bonomelli (of Counsel), by leave, on behalf of the first respondent, Ms N Eagling (of Counsel), by leave, on behalf of the third respondent, and Mr R C Kenzie QC, by leave and with him Mr T J Dixon (of Counsel), by leave, on behalf of the intervener, it is this day, 18 March 2009, ordered that:

1. The Construction, Forestry, Mining and Energy Union of Workers is granted leave to intervene in these proceedings.
2. The application by the intervener to summarily dismiss the application be listed for hearing on 8 April 2009 at 10am.
3. Written submissions in support of the application for summary dismissal of the application be filed and served by the intervener and the respondents by 10am on 26 March 2009.
4. Written submissions by the applicant in opposition to the application for summary dismissal be filed and served by 10am on 2 April 2009.

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

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 00167

ANIMAL WELFARE INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 3 APRIL 2009
FILE NO/S	APPL 4 OF 2009
CITATION NO.	2009 WAIRC 00167

Result	Award varied
Representation	Ms J. O'Keefe, on behalf of Liquor, Hospitality and Miscellaneous Union

Order

HAVING heard Ms J. O'Keefe, on behalf of the Liquor, Hospitality and Miscellaneous Union, the Commission, pursuant to the powers conferred on it under s 40B of the *Industrial Relations Act 1979*, hereby orders –

> THAT the Animal Welfare Industry Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 3rd day of April 2009.

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

SCHEDULE

1. Clause 2. - Arrangement: Delete this clause and insert the following in lieu thereof:

2. - ARRANGEMENT

2. Clause 18. – Rates of Pay: Delete this subclause (1) of this clause and insert the following in lieu thereof:

(1) The minimum weekly rate of wage per week payable to an employee covered by this award shall include the base rate plus the arbitrated safety net adjustments reflected hereunder:

Classification	**$ per week**
Introductory (not exceeding 3 months)	557.40
Level 1 (87.4%)	596.40
Level 2 (92.4%)	608.55
Level 3 (Cert III) (100%)	651.20
Level 4 (Cert IV) (110%)	707.32
Level 5 (Diploma.) (119.4%)	760.07

3. Schedule A - Parties to the Award: Delete this Schedule and insert the following in lieu thereof:

SCHEDULE A - NAMED PARTIES TO THE AWARD

Liquor, Hospitality and Miscellaneous Union, Western Australian Branch

Ascot Veterinary Hospital, Belmont

St. Francis Veterinary Hospital, Osborne Park

Melville Animal Hospital, Melville

Swanbourne Veterinary Hospital, Swanbourne

(formerly Messrs I.J. Miller and M.J Grandison)

Royal Society for the Prevention of Cruelty to Animals, Malaga

4. Schedule B - Respondents: Delete this Schedule.

2009 WAIRC 00143

BRADKEN BASSENDEAN (WA) WAY FORWARD ENTERPRISE AWARD 2003

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 30 MARCH 2009
FILE NO/S	APPL 5 OF 2009
CITATION NO.	2009 WAIRC 00143

Result	Award varied
Representation	No appearances

Order

WHEREAS on 11 February 2009 the Commission on its own motion created this application pursuant to s 40B of the *Industrial Relations Act*, 1979 (the Act) to vary the above Award;

AND WHEREAS the proposed variations are to ensure that the Award does not contain provisions that are obsolete or which need updating;

AND WHEREAS on 27 February 2009, the Commission advised the named parties to the Award and the persons mentioned in s 40B(2) of the Act, of its intention to vary the Award below and the scope of the variations;

AND WHEREAS on 27 February 2009 the Commission advised it would sit on 23 March 2009 to hear submissions from the parties;

AND WHEREAS on 23 March 2009 there were no appearances;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 40B of the *Industrial Relations Act 1979*, hereby order –

THAT the BRADKEN Bassendean (WA) Way Forward Enterprise Award 2003 be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 30th day of March 2009.

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

SCHEDULE

1. Clause 4.2 - Wages: - Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Ordinary Wage Rates

Employees covered by this Award shall be classified at a level as specified by this clause and paid the ordinary wage rate, expressed as an hourly rate, applicable to their classification according to the schedule below, cross-referenced to subclause 4.2 (4) for the detail of wage increases and applicable dates:

Employee Classifications	Relativity to C10	Ordinary Hourly Wage Rate
		$
C7	115%	27.1096
C8	110%	25.9916
C9	105%	24.8732
C10	100%	23.7555
C11	92.40%	22.0561
C12	87.40%	20.9380
C13	82%	19.7306

Note: For continuity and industry consistency, the classification structure used is consistent with that contained in the Metal Trades (General) Award – Part 1 with some local modifications.

2009 WAIRC 00154

THE HORTICULTURAL (NURSERY) INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 31 MARCH 2009
FILE NO/S	APPL 20 OF 2009
CITATION NO.	2009 WAIRC 00154

Result	Award varied
Representation	No appearances

Order

WHEREAS on 11 February 2009 the Commission on its own motion created this application pursuant to s 40B of the *Industrial Relations Act*, 1979 (the Act) to vary the above Award;

AND WHEREAS the proposed variations are to ensure that the Award does not contain provisions that are obsolete or which need updating;

AND WHEREAS on 27 February 2009, the Commission advised the named parties to the Award and the persons mentioned in s 40B(2) of the Act, of its intention to vary the Award below and the scope of the variations;

AND WHEREAS on 27 February 2009 the Commission advised it would sit on 23 March 2009 to hear submissions from the parties;

AND WHEREAS on 23 March 2009 there were no appearances;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 40B of the *Industrial Relations Act 1979*, hereby order –

THAT The Horticultural (Nursery) Industry Award be varied in accordance with the following schedule and that such variations shall have effect from the first pay period commencing on or after the 31st day of March 2009.

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

SCHEDULE

1. Clause 2. - Arrangement: Delete this clause and insert the following in lieu thereof:

2. - ARRANGEMENT

26. Definitions
27. Payment of Wages
28. Effect of 38 Hour Week
29. Award Modernisation/Enterprise Agreements
30. Training
31. Dispute Settlement Procedure

Appendix 1. - Make Up of Total Wage

Schedule A - Named Parties to the Award

Schedule B - (deleted)

Schedule B - (deleted)

2. Clause 4. - Term: Delete this clause.

3. Clause 5. - Wages: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Adult Employees

	Rate Per Week $
Trainee	557.40
Horticultural Employee Grade 1	557.40
Horticultural Employee Grade 2	561.07
Horticultural Employee Grade 3	577.83
Horticultural Tradesperson Grade 1	634.20
Horticultural Tradesperson Grade 2	654.29
Horticultural Tradesperson Advanced	674.28

4. Schedule A - Named Parties to the Award: Delete this Schedule and insert the following in lieu thereof:

SCHEDULE A – NAMED PARTIES TO THE AWARD

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

Advanced Nursery

All Palms Nursery

Benara Nurseries

Bush Berry Farm

Dawson Garden Centres WA

Garden Harmony Vale Nurseries, Arlima Pty Ltd

Nursery Australia Pty Ltd

5. Schedule B - Respondents to the Award: Delete this Schedule.

6. Schedule B - Parties to the Award: Delete this Schedule.

7. Delete the words "DATED at Perth this 4th day of May, 1983."

CANCELLATION OF—Awards/Agreements/Respondents—

2009 WAIRC 00129

MEAT INDUSTRY (NORTHWEST ABATTOIRS) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 23 MARCH 2009
FILE NO/S	APPL 13 OF 2008
CITATION NO.	2009 WAIRC 00129

Result Award cancelled

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 16th day of April, 2008 of an intention to make an order cancelling the award;

AND WHEREAS at the 19th day of March, 2009 there were no objections to the making of such an order;

NOW THEREFORE, I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, pursuant to the powers conferred by s 47 of the *Industrial Relations Act*, 1979 do hereby order that the following award be cancelled:

MEAT INDUSTRY (NORTHWEST ABBATOIRS) AWARD

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

NOTICES—Award/Agreement matters—

2009 WAIRC 00177

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. 556 of 2005

APPLICATION FOR VARIATION OF AN AWARD TITLED

"CLEANERS AND CARETAKERS AWARD, 1969"

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 affecting area of operation and scope provisions are published hereunder.

Clause 3. – Area and Scope: Delete this clause and insert in lieu.

(1) This award applies to all employees (as defined in s 7 of the Industrial Relations Act 1979) in the callings set out in Clause 12. – Wages who are employed in Western Australia by churches, clubs, local government, societies and/or organisations and private industry employers other than constitutional corporations.

(2) Notwithstanding the provisions of subclause (1) above, this Award shall not apply to any employee who:

(a) carries out the duties of a verger in a church; or

(b) is otherwise subject to the terms and conditions of the:

(i) Cleaners and Caretakers (Car and Caravan Parks) Award 1975;

(ii) Contract Cleaners Award, 1986; or

(iii) Security Officers' Award

Note:

The 'callings' as referred to in the Wages Clause are:

Attendant;

Lift Attendant;

Security Guard;

Restroom/Toilet Attendant;

Security Guard/Cleaner;

Cleaner;

Window Cleaner;

Security Guard (mobile); and

Caretaker.

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

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

8 April 2009

2009 WAIRC 00187

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 10 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"WESTERN AUSTRALIAN TAFE LECTURERS' GENERAL AGREEMENT 2008"

NOTICE is given that an application was made to the Commission, on 8 April 2009, by the Governing Council of Central TAFE and others and the "The State School Teachers' Union of W.A. (Incorporated)" under the *Industrial Relations Act 1979* for registration of the above named Agreement.

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

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by this General Agreement are:

5.1.1 The State School Teachers' Union of Western Australia Inc; and

5.1.2 the employers listed in Schedule N – Employer Parties.

5.1.3 This Agreement applies to employees of the employers within Western Australia, who are members or are eligible to be members of the union.

SCHEDULE N - EMPLOYER PARTIES

The following employer parties will be bound by this Agreement:

Governing Council of Central TAFE

Governing Council of Central West TAFE

Governing Council of Challenger TAFE

Governing Council of CY O'Connor TAFE

Governing Council of Great Southern TAFE

Governing Council of Kimberley TAFE

Governing Council of Pilbara TAFE

Governing Council of South West Regional College of TAFE

Governing Council of Swan TAFE

Governing Council of West Coast TAFE

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

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

8 April 2009

LONG SERVICE LEAVE—Boards of Reference—Special—

2009 WAIRC 00109

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WELLDRILL

APPLICANT

-v-

CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD

RESPONDENT

CORAM COMMISSIONER S WOOD

HEARD THURSDAY, 5 FEBRUARY 2009

DELIVERED THURSDAY, 12 MARCH 2009

FILE NO. BOR 4 OF 2008

CITATION NO. 2009 WAIRC 00109

CatchWords	Construction Industry Long Service Leave – Appeal – Activities of company – Construction Industry Portable Paid Long Service Leave Act 1985, ss 3, 30 – Industrial Relations Act 1979 (WA) s 48
Result	Applicant not an employer "in the construction industry" within the meaning of the Construction Industry Portable Paid Long Service Leave Act 1985
Representation	
Applicant	Mr W G Spyker of Counsel
Respondent	Mr D P Winch of Counsel

Reasons for Decision

1 This application is an appeal under section 50(b) of the Construction Industry Portable Paid Long Service Leave (CIPPLSL) Act 1985. The applicant company, Welldrill, seeks a review of the decision of the Construction Industry Long Service Leave Payments Board (the Board) that it be registered under that Act. The Board's letter of 22 October 2008 states:

> "**Re: Construction Industry Portable Paid Long Service Leave Act 1985: Employer registration**
>
> Your correspondence of 21 October 2008 has been received and your comments noted.
>
> As explained in our correspondence of 26 September 2008 the definition of **construction industry** in the above Act includes "...works for the storage or supply of water..."
>
> The drilling of water wells is obviously "works for the supply of water" and accordingly the work carried out by your employees does fall within the definition of **construction industry**.
>
> Consequently you are required to be registered with the Board as an employer engaging in work within the **construction industry** and you are required to submit quarterly returns along with any necessary contributions.
>
> Should you wish to appeal this you may do so by contacting the W.A. Industrial Relations Commission and applying for a Board of Reference hearing under the Industrial Relations Act 1979.
>
> If you do intend applying for a Board of Reference hearing it is essential that you advise the Board in order to avoid possible legal proceedings for failing to lodge returns.
>
> Any discussion or correspondence relating to this matter should be addressed to the undersigned on 9476 5409."

2 The requirement for registration of employers appears in s.30 of the CIPPLSL Act as follows:

> **"30. Registration of employers and employees**
>
> (1) Every natural person, firm or body corporate that is an employer in the construction industry (whether or not he or it carries on any other business) shall register as an employer under this Act."

The remainder of s.30 is not relevant for the purpose of deciding this application.

3 Section 3(1) of the CIPPLSL Act defines "construction industry" in the following terms:

> **"construction industry"** means the industry —
>
> (a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —
>
> (i) buildings;
>
> (ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles;
>
> (iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation;
>
> (iv) works for the storage or supply of water or for the irrigation of land;
>
> (v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises;
>
> (vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials;
>
> (vii) bridges, viaducts, aqueducts or tunnels;
>
> (viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos;
>
> (ix) pipelines;
>
> (x) navigational lights, beacons or markers;
>
> (xi) works for the drainage of land;
>
> (xii) works for the storage of liquids (other than water) or gases;
>
> (xiii) works for the generation, supply or transmission of electric power;
>
> (xiv) works for the transmission of wireless or telegraphic communications;
>
> (xv) pile driving works;

(xvi) structures, fixtures or works for the use on any buildings or works of a kind referred to in subparagraphs (i) to (xv);

(xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and

(xviii) fences, other than fences on farms;

(b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;

(c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,

but does not include —

(d) the carrying out of any work on ships;

(e) the maintenance of or repairs or minor alterations to lifts or escalators; or

(f) the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer who is not substantially engaged in the industry described in this interpretation;"

4 In arguing whether Welldrill is an employer 'in the construction industry' both parties relied on the decision of Ipp J in *Aust-Amec Pty Ltd t/a Metlab Mapel & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* 62 IR 412. In that decision the principal issue was whether the employers were obliged to be registered under s.30 of the CIPPLSL Act. Ipp J analysed the provisions in ss.3, 30 and 34 of the CIPPLSL Act and determined that:

> "an employer who is required to register under s 30(1) must not only be a person who so "engages persons as employees in the construction industry" (by virtue of the definition of "employer" itself) but must, also, by reason of the requirements of s 30(1), be an employer in the construction industry. The only difference, under the Act, between employers, simpliciter, and employers who are required to be registered, is the additional element of being "in the construction industry" that is applicable, by s 30(1), to the latter. It follows, in my opinion, that some meaning must be given to the phrase "in the construction industry" in s 30(1)."

In that matter the issue was whether the work done by the employers could be classified as "maintenance" as that term is used in the definition of construction industry.

5 The key issue then in this appeal is whether the work undertaken by Welldrill and its employees can be said to be "for the storage and supply of water" and therefore be "in the construction industry". The respondent submitted that there are other aspects of s.3(a) notably subclauses (vi), (viii), (ix) and (xvii), which also apply. I do not agree, but I will come to that in due course.

Evidence

6 The only evidence is that of Mr Peter Chegwidden, the owner and director of Welldrill. He says that the nature of his business is exploration drilling [Exhibit A1]. He says:

> "Basically, exploration drilling for us is to find out whether there's particular mineral, if we're doing mineral drilling, or the particular water, if there's water drilling, whether there's a resource there. Exploration means looking for a resource." (T3)

7 Apart from administration staff the business employs four drillers and six offsiders. They operate from a factory in Henderson and maintain their own fleet of equipment which includes 3 drilling rigs, 15 trucks, mud pumps, compressors and various other equipment for the drilling rigs. At present the rigs are doing exploratory water drilling which involves installing a series of monitor bores so that the mining companies can gather information for planning. Since September 2006 he estimated that the company has drilled approximately 1,000 holes. None of these were extraction holes.

8 Mr Chegwidden says that under EPA regulations monitoring bores are required outside a mine site. Water monitoring is undertaken to assess water table levels, salinity and stygafauna. Testing for water depth or taking grab samples is undertaken by hydrologists or scientists and not by Welldrill. Welldrill drills the hole, installs a casing and does the headworks on top of the hole so that the hole is not run over and destroyed. Welldrill does not install pumps or piping and is not registered to do so.

9 Welldrill also drill exploration holes. These are a series of holes in a zone marked by the geologist or hydrologist to ascertain whether there is water in that location. Generally exploration bores will be backfilled and left to nature. The backfilling is done immediately upon a decision not to install the site as a monitoring bore. Basically monitoring holes and exploration holes are the same; some holes are turned into monitoring holes and some are backfilled. The monitoring hole has a concrete plinth installed around the hole with a lockable secure capping system.

10 There are larger bores which are drilled for water extraction and a larger screen is installed in these to accommodate a pump. Before drilling a hole the driller must sight the permit for that hole. The licence is different for a monitoring bore than for an extraction bore. Monitoring bores cannot have pumps installed in them as they are usually a 50 millimetre construction and nobody makes a pump that size. Extraction bores would, "usually start around about 150 millimetres ID of casing upwards, as against a 50 millimetre ID casing".

11 Under cross-examination, Mr Chegwidden's evidence was that Welldrill did not engage in dewatering services. They drill holes at the planning stage before any mine site is established. The holes that are drilled have utility for someone in the future to use as a bore or a source of water supply. Welldrill does not revisit the site and hence does not know what the holes are used for. Mr Chegwidden in answer to questions explained the process of mud rotary drilling in detail, and how aquifers are screened and holes are flushed clean.

12 Mr Chegwidden was then asked:

> "You've got your specific aquifer that you've screened off and it can be used for ever and a day as a monitoring hole for whatever purpose the owner of that hole really wants?---Yeah, as long as the owner changes the licence over from the specific licence it's currently got on it." (T21)

And again

> "Okay. So I take it that what that is referring to is development work that was carried out by Welldrill on the Redhill project. And that development is the process of ensuring that the well that you've drilled or the bore that you've drilled is going to be capable of supplying water?---No, development is air lifting. That's all we're doing. We're doing air lifting under instruction from the hydrology company.
>
> So the air lifting - - -?---Till the finds are gone from the hole.
>
> - - - is cleaning out so that the well is free of contamination?---That's correct.
>
> Because if you were going to be taking water out of the well or extracting water from the well at any time, you want it to be clean not contaminated?---No finds in there so they can get an accurate sample.
>
> That's a requirement of what you do - - -?---Yes.
>
> - - - to make sure it's free from contaminants?---That's correct." (T21-22)

13 Mr Chegwidden says that Welldrill do not do any test pumping, this work is subcontracted out, but not by Welldrill. This work is undertaken after the hole is completed. He was asked:

> **"MR WINCH:** You'll see that paragraph 3, starting with the words, "The project," reads:
>
> The project water demand for mineral processing is projected to be between 10 and 14 gigalitres per annum for the life of the project. ARL are planning to install a water supply bore field adjacent to the Fortescue River where it crosses Ashburton Coastal Plain to source part of the project water demands. A program of bore installation and testing has been designed to allow the quantification of the total water resources available in the Fortescue River aquifers.
>
> Now, I don't expect you to be able to tell me what ARL ultimately did with the bore holes that you drilled, but it's plain in the contract that what they were contemplating is a water supply and bore field, which the exploration and monitoring holes that you went out and drilled under the contract were designed to, if you like, provide them with information to see if there's going to be sufficient water available for the purposes of the mining operations or the processing operations?---Yeah. It was the installation and testing to see if the aquifer could sustain it.
>
> Yes?---That's right; testing.
>
> Exactly?---Yep.
>
> So the intent was that … the intent from reading this is that that aquifer that you were testing was to be developed into a water supply bore field. And I think we spoke before … leaving this contract for the moment, I think we spoke before about dewatering services that … in mines now … I understand you've got some experience in the mining industry. You understand how the mining process works from a water control perspective. And in your experience if a mining company engage you to drill holes around where an open-cut mine was going to be installed or operations were going to be commencing for the purposes of identifying where the aquifer level was, that would be reasonable to expect that part of the reason at least would be so the mining company has knowledge of how much water they need to extract from the ground, at what level in order to be able to bring the water table, the aquifer level, below that at which they want to mine?---Yes, that's correct. That's what … some of the reasons for the holes." (T24)

14 The drills crews do maintenance on their equipment and vehicles, especially as they work in remote locations. He does not return to the holes once drilled and does not know if a hole is used subsequently for the supply or extraction of water. Currently 70% of their work involves water-well drilling. The remainder of the work is, "purely exploration for sample drilling". All the work is for the purpose of determining if and where the water is on-site.

15 In re-examination Mr Chegwidden's evidence is that exploration holes have a six-inch casing, monitoring holes are 50 millimetres in diameter and an extraction hole would be up to 520 millimetres in diameter. There is a definite design for a production hole. He says to his knowledge none of the holes drilled by Welldrill are production holes as he does not know what they have later been used for and the drilling licences were all for exploration.

Submissions

16 Mr Spyker for the applicant submitted that the appeal is against the decision of the Board to require Welldrill to register as an employer for the purposes of that CIPPLSL Act. He submitted that the decision appealed is the decision of the Board as represented in the Board's letter of 22 October 2008; as opposed to whether Welldrill could be said to otherwise fall within the

provisions of the Act as an employer. He referred to the terms of the letter and s.50 of the CIPPLSL Act which states, "All claims arising out of the requirement that an employer register under this Act may be made to the Board of Reference". If the grounds for registration go beyond the letter of 22 October 2008 then the applicant submitted that they had no notice of that.

17 Mr Spyker submitted that the evidence shows that Welldrill is not carrying out works for the supply of water. The holes are drilled for the monitoring of ground water levels, to take grab samples and for environmental monitoring. That is the purpose of the work and no permanent structure is left. The work is done before a mine is constructed or a decision taken to mine. This is also apparent from the stated purpose of the registered business.

18 Mr Winch for the respondent submitted that the task of the Commission was to determine whether registration under the CIPPLSL Act is required. The Commission is not required to examine the reasons for decision of the Board. It is a de novo appeal. He submitted that the issue was to determine whether Welldrill must be an employer in the construction industry and the relevant part of the definition includes, "works for the storage or supply of water or for the irrigation of land". He submitted, "There is no other purpose for which the holes, wells, bores constructed by the applicant can be used other than for the supply of water, the drainage of land or the extraction of materials". There is no requirement under the act for the works to be of a permanent nature. In any event the holes drilled by the applicant are permanent in nature, piping is installed and the holes are capped and locked. The activities undertaken by Welldrill are those prescribed in the award.

19 Mr Winch referred to s.3 of the CIPPLSL Act and submitted that at least subclauses (iv), (vi), (viii), (ix) and (xvii) apply directly to the work carried out by the applicant. A monitoring hole is created for the purpose of taking a grab sample. This is sufficient to bring the applicant's work within subclause (vi). The monitoring and production holes can only be for the supply of water, hence this work falls under subclause (iv). In respect of subclause (viii) Welldrill's employees repair and maintain equipment. The drilling rigs have to be installed.

Considerations

20 A question arose, perhaps due to questions from the Commission, as to whether the Commission's task in this appeal was simply to review the decision of the Board, or more generally to consider whether Welldrill fell under the terms of the CIPPLSL Act. Of course, any assessment is to be based upon matters raised in the application and at hearing, not on a more general investigation of Welldrill's activities. On this issue, I would agree with the submissions of the respondent. I have looked unsuccessfully to see whether, at the introduction of s.50 of the CIPPLSL Act or s.48 of the Industrial Relations Act 1979, Parliament had anything to say which might illuminate this point. The 'appeal' is not described in anyway. The task then is simply to assess the activities of the applicant and apply these facts to the relevant provisions of the CIPPLSL Act.

21 It is apparent from all of Mr Chegwidden's evidence that Welldrill operates mobile rigs at remote sites, prior to the development of any minesite, to drill exploration and monitoring holes for water. He says uncontradicted that of the approximately 1,000 holes his company has drilled, none of these have been extraction holes. Hydrologists or other scientists then test the water, water levels and stygafauna. Whilst the work is obviously more complex than this simple description suggests, the description is appropriate for the totality of Welldrill's work. Any other activities undertaken by Welldrill, be they administrative, financial or maintenance are undertaken in support of this drilling. The question then is whether this drilling can be said to be 'works for the storage and supply of water'.

22 This question is answered by Mr Chegwidden's evidence. A driller sights a license prior to drilling a hole. He drills an exploration hole or a monitoring hole. An exploration hole is back filled. A monitoring hole is cased and locked. Production or extraction holes require a larger diameter. Welldrill does not install pumps.

23 It is then difficult, given this evidence, to support the conclusion of the Board that the drilling undertaken by Welldrill is "obviously work for the supply of water". It may be that at some later stage some of these monitoring holes are converted to production holes, but that is not apparent from the evidence and it would be wrong therefore for the Commission to conclude that. Equally, there is no evidence that Welldrill is involved in any work that involves storage of water. Any temporary pooling of water is only done as an aide to the drilling.

24 Whilst it is plain from the Board's letter of 22 October 2008 that the Board considers s.3(1)(a)(iv) applies to Welldrill's activities, the respondent submitted also that other subclauses apply. The evidence is that some piping is installed in monitoring holes to keep the hole open. However, no pipelines are installed or constructed (as per subclause (ix)). The evidence is that the mobile rig is set up in preparation for drilling and post drilling is removed from site and a lockable casing is left on monitoring holes. In my view, it is drawing a long bow to suggest this work can be said to be constructing, erecting or installing a drilling rig (as per subclause (viii)) or the preparation of a site for that purpose (as per subclause (xvii)). The evidence is instead that the drilling rig is moved around a site to drill multiple holes. Finally, the evidence is that the grab samples are not taken by Welldrill but by hydrologists or scientists (as per subclause (vi)), if in fact a grab sample could be said to fall within the terms of that subclause, which I doubt. If, as I have found, none of those subclauses apply, then the question of maintenance applying to any of them is irrelevant. Section 3(a) reads such that the construction, installation or maintenance etc. must apply to one of the items in the subclauses. In any event the maintenance is to ensure the vehicles and drilling rigs function well.

25 In light of the foregoing it is the decision of this Board of Reference that at the material time the Applicant was <u>not</u> required to register under s.30 of the CIPPLSL Act as an employer.

2009 WAIRC 00127

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WELLDRILL
	APPLICANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 20 MARCH 2009
FILE NO.	BOR 4 OF 2008
CITATION NO.	2009 WAIRC 00127

Result	Applicant not an employer "in the construction industry" within the meaning of the Construction Industry Portable Paid Long Service Leave Act 1985
Representation	
Applicant	Mr W G Spyker of Counsel
Respondent	Mr D P Winch of Counsel

Declaration

HAVING heard Mr W G Spyker of Counsel on behalf of the applicant and Mr D P Winch of Counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby declares:

THAT at the material time the applicant was not required to register under s.30 of the Construction Industry Portable Paid Long Service Leave Act 1985 as an employer.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 00137

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICTOR BRISCAN
	APPLICANT
	-v-
	IAN KEENAN (IAN KEENAN LPG GAS CONVERTERS)
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
HEARD	WEDNESDAY, 14 JANUARY 2009, TUESDAY, 10 FEBRUARY 2009, TUESDAY, 17 MARCH 2009
DELIVERED	TUESDAY, 17 MARCH 2009
FILE NO.	B 167 OF 2008
CITATION NO.	2009 WAIRC 00137

CatchWords	Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment – Wages not paid - No Award coverage – Annual leave accrual to be paid - Application granted – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Application granted.
Representation	
Applicant	Mr V Briscan on his own behalf
Respondent	No appearance

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings,

taken from the transcript as edited by the Commission)

1 The applicant claims that he was employed by the respondent for the period from 25 August 2008 until 23 October 2008. He says that he was engaged on work in the respondent's business which is of converting motor vehicles to LPG gas, that he is a gas fitter by trade and had discussed the prospect with the respondent of his undertaking training and obtaining a licence to be engaged in the work concerned.

2 During discussions it was verbally agreed that he would be paid $27.50 per hour and for the first two weeks he was paid on time. Subsequently there were delays of up to about three weeks in receiving payments. He also says that he gave notice but that subsequent work became available and he continued working for a further period of two weeks after he had given notice. He received some further payments however he says that he did not receive payment for a period of four days being the period the 13th to 19th October 2008 totalling $1,306.25 as a gross figure. He also says that he was not paid for holiday pay nor was he paid for superannuation and he is not aware of whether superannuation contributions have been made into his superannuation fund.

3 There is no evidence which contradicts the applicant's evidence and I accept what he says as true.

4 As to the issue of award coverage the applicant has made his best endeavours to ascertain whether he is covered by an award. It would appear that there is an award which covers some of the work undertaken but not necessarily in the calling in which he has undertaken it and there is some lack of clarity as to the industry. I refer here to the *Metal Trades (General) Award*, an Award of this Commission. In the circumstances I find that the applicant's work was not covered by an award and the claim he makes is not a claim under an award.

5 An applicant may bring a claim to this Commission in respect of his not being 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 (s 29(1)(b)(ii) of the *Industrial Relations Act 1979*). I am satisfied that those circumstances apply to the applicant in this case. I find that he has been denied a contractual benefit of payment for the period 13 to 19 October 2008 and that the respondent owes to him the amount of $1,306.25 less an amount payable to the Australian Taxation Office.

6 As to the question of annual leave, it would appear from the applicant's payslips, although there has been no evidence of any discussion between the parties which would found a contractual term, that there was an accrual for holiday pay. Those payslips indicate, for example, in a payslip for the period 6 October to 12 October an accrual of 4.019 hours pay. Another from 29 September to 5 October 2008 indicates an accrual of 3.40 hours pay. I intend to order that the respondent pay to the applicant the holiday pay accrual due to him in accordance with those payslips. However, I am unable, at this point to identify exactly what that payment is to be as there are some inconsistencies which I would like to examine further. Accordingly, I will issue supplementary reasons in that regard.

2009 WAIRC 00146

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	VICTOR BRISCAN
	APPLICANT
	-v-
	IAN KEENAN (IAN KEENAN LPG GAS CONVERTERS)
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	MONDAY, 30 MARCH 2009
FILE NO.	B 167 OF 2008
CITATION NO.	2009 WAIRC 00146

Catchwords	Industrial Law (WA) - Contractual benefits claim - Entitlements under contract of employment – Annual leave accrual to be paid – *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	Application granted.
Representation	
Applicant	Mr V Briscan on his own behalf
Respondent	No appearance

Supplementary Reasons for Decision

1 On 17 March 2009 I issued Extempore Reasons for Decision in this matter in which I indicated that due to some inconsistencies and lack of clarity with the record of annual leave accruals due to the applicant that I would examine that matter further and issue supplementary reasons in that regard.

2 I have examined the pay slips submitted by the applicant and set out below is a table which deals with that matter. There is some inconsistency in the calculation of the accruals so there is some error in the calculation of the year to date ("YTD") figure and I have added a column which corrects that calculation.

Summary of Payslips for Victor Briscan regarding leave accruals

Pay Period	Leave - Hours	Leave – YTD	*Corrected Leave - YTD*
25/8/08 – 31/8/08	3.654	3.65	*3.65*
1/9/08 – 7/9/08	3.654	7.31	*7.31*
8/9/08 – 14/9/08	4.192	11.50	*11.50*
15/9/08 – 22/9/08	4.030	18.62	*15.53*
22/9/08 – 27/9/08	4.070	25.77	*19.60*
29/9/08 – 5/10/09	3.400	25.10	*23.00*
5/10/08 – 9/10/08	3.400	25.10	*26.40*
6/10/08 – 12/10/08	4.010	33.19	*30.41*
13/10/08 – 19/10/08	3.650	36.85	*34.06*
20/10/08 – 26/10/08	2.615	35.81	*36.67*

3 Accordingly I find that the applicant is due, in accordance with the accruals provided in his pay slip, the corrected total of 36.67 hours pay on account of annual leave. At his ordinary rate of $27.50 per hour this is an amount of $1008.43 less tax.

4 Accordingly, the applicant is due the amounts of $1,306.25 as wages and $1008.43 as accrued annual leave and an order shall issue for the payment of that amount by the respondent.

2009 WAIRC 00183

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES VICTOR BRISCAN

APPLICANT

-v-

IAN KEENAN (IAN KEENAN LPG GAS CONVERTERS)

RESPONDENT

CORAM COMMISSIONER P E SCOTT

DATE THURSDAY 9 APRIL 2009

FILE NO/S B 167 OF 2008

CITATION NO. 2009 WAIRC 00183

Result Order issued.

Representation

Applicant Mr V Briscan on his own behalf

Respondent No appearance

Order

HAVING heard the applicant on his own behalf and there being no appearance on behalf of the respondent the Commission hereby orders:

1. That within 14 days of the date hereof, the respondent shall pay to the applicant:

   (a) an amount of $1,306.25 less any amount payable to the Australian Taxation Office as being wages due but not paid; and

   (b) an amount of $1008.43 less any amount due to the Australian Taxation Office being accrued annual leave.

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

2009 WAIRC 00135

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL FILIPPI
	APPLICANT
	-v-
	ROADWISE TRAFFIC CONTROL
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 26 MARCH 2009
FILE NO/S	APPL 1209 OF 2004
CITATION NO.	2009 WAIRC 00135

Result	Application discontinued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Mr G Paull of counsel

Order

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr G Paull of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2009 WAIRC 00124

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN OLIVER FITZGERALD
	APPLICANT
	-v-
	DAVID MORTON, BUNNINGS WAREHOUSE
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 18 MARCH 2009
FILE NO/S	U 12 OF 2009
CITATION NO.	2009 WAIRC 00124

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 20th day of January 2009 beyond the 28 days allowed by the Act; and

WHEREAS on Friday, the 20th day of February 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the Applicant sought until 5.00pm on Friday the 5th day of March 2009 to consider his position and advise the Commission if he wished to proceed or the matter would be dismissed and this was agreed; and

WHEREAS on Friday the 5th day of March 2009 the Applicant contacted the Commission and requested a further week to consider his position and advise how he wished to proceed; and

WHEREAS nothing was heard from the Applicant by 5.00pm on Friday the 13th day of March 2009; and

WHEREAS on Monday the 16th day of March in a telephone call to the Commissioner's Associate the Applicant advised that he wished to discontinue the application and would not take it further;

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 00150

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRYSTI GUEST
	APPLICANT
	-v-
	KIMBERLEY LAND COUNCIL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	MONDAY, 16 FEBRUARY 2009, FRIDAY, 27 FEBRUARY 2009
DELIVERED	MONDAY, 30 MARCH 2009
FILE NO.	U 161 OF 2008
CITATION NO.	2009 WAIRC 00150

CatchWords	Unfair Dismissal – Jurisdiction – Constitution Corporation – Trading activities – Portion of income earned from trade – onus – Industrial Relations Act 1979 ss.22 and 29(1)(b)(i) – Federal Workplace Relations Act 1956 ss.5, 6 and 16
Result	Commission has jurisdiction
Representation	
Applicant	Mr S Millman of Counsel
Respondent	Mr D Jones as agent

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). The applicant, Ms Krysti Guest, alleges that the respondent, the Kimberley Land Council (KLC), dismissed her summarily and unfairly on 27 October 2008. The respondent claims that they are a trading corporation and hence outside the jurisdiction of this Commission courtesy of the Federal Workplace Relations Act 1996 (specifically ss.5, 6 and 16). It is not necessary to recite these provisions. The real contest between the parties is that the respondent says that the KLC, whilst it receives the majority of its funds from Government grants, does engage in trade in that, on average, 29.8% of its income has been derived from providing services to third parties, mainly mining companies. The applicant says that the KLC does not engage in commercial activities. It is a public beneficial institution which operates tax free, has a statutory status and exists primarily to serve the native title interests of indigenous groups in the Kimberleys. It is then for the Commission to decide whether the KLC should be categorised as a 'trading corporation' for the purposes of s.51(xx) of the Australian Constitution.

2 It is common ground or uncontested that the KLC is a Native Title Representative Body (NTRB) as provided for under the Federal Native Title Act 1993 (NTA). They receive grant monies from the State and Commonwealth Governments. Both parties agree that activities undertaken due to these grant monies do not qualify as trading activities. The KLC represents the interests of 29 of the 32 (Annual Report 2007-2008, page 15) native title applicants in the Kimberleys, and act for these groups in "future act" matters. These future act matters are a creation of the NTA whereby third parties undergo a regime specified in the NTA to obtain access to land. The KLC also undertakes Work Program Clearances (WPCs) whereby monies are paid to the KLC, by predominantly mining companies to engage indigenous interests in site and land clearances.

3 There is a dispute between the parties as to the level of income derived from these WPCs and the basis for them. The respondent says they stem from the State Aboriginal Heritage Act (AHA) and do not form part of the NTRB work undertaken by the respondent. The applicant says that all work of the KLC has a statutory base in that their work involves protection of land. Their statutory status as an NTRB enables them to undertake these WPCs. They are in fact initiated through the future act process.

4 Both parties rely substantially on the decision of the Industrial Appeal Court in the *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* [No 2] [2008] WASCA 254 (the *ALS* case).

Evidence

5 Evidence was given by the applicant, Ms K Guest, and by Mr N Hunter, Deputy Chief Executive Officer, Mr R De Silva, Chief Financial Officer, and Mr R Powrie, Principal Legal Officer, for the respondent.

6 The relevant evidence of Mr Hunter in his statement [Exhibit A1] is:

> "4. The goods and services provided by the KLC arise out of an area of work referred to as Future Acts work. This includes heritage and work program clearances, negotiations with prospectors, mining companies, tourism operators and other proponents of Future Acts. Apart for partial funding for a paralegal this work is totally self funded and generates significant income for the KLC.
>
> 5. As a result of the increased demand for future acts work the KLC has been required to modify its structure to recognise the importance of trading in goods and services to the KLC. I have been assisting in the creation of a specialised unit within the KLC, known as the Agreements Unit. This unit has been operating informally for the past 3 years in response to the increasing demand for goods and services, particularly as a result of the recent mining boom in Western Australia.
>
> 6. Previously this work was undertaken primarily by 1 Future Acts lawyer and the paralegal, with other KLC lawyers assisting as demand required. However, with the increased demand the KLC management decided to introduce the Agreements Unit. This unit currently has budgeted positions for 2 lawyers, 1 anthropologist, 1 administrative officer, 1 paralegal, 1 project officer and 1 field officer. We also rely heavily on external consultants to assist with the demand. We have plans to further expand this Unit in the current financial year."

7 At hearing, under cross-examination, he agreed that the KLC was incorporated originally under the Aboriginal Councils and Associations Act with charitable objects. He agrees that the core role of the NTRB is the, "facilitation and assistance of native title claims and future act agreements and negotiations". Aboriginal people are not charged for those services. He says:

> "we run a Land and Sea activity and through that we're trying to set up our business operating units or to function as a proper business. It runs activities like we … for example, we have a range of programs that runs … contract services, for example, through the (indistinct) Quarantine Services where we operate a fee for service operation doing some of the work for them. It may involve services to DEC, to the Department for Environmental Conservation through our ranger modelling which we're currently progressing and I've actually organised to set up a … or we're talking about setting up a business structure that provides these services where we contract services and operate them as a business; examples like that. We've had the ranger program running business services. For example, at the last combined organisations meeting at … on the Gibb River area we've had the ranger projects run contract services and charges for its services. So those are the types of services I'm talking about." (T 16)

8 Fees are charged for putting together meetings, certain staff resources and use of equipment and office accommodation. These fees are predominantly charged to cover costs. The KLC is not funded for future act work. The process for future act work is:

> "Look, the mining boom has generated the environment for different mining companies to want to do exploration on lands that are either … or subject to claims and so they … the processes that they could write to the KLC and we would then organise a budget in terms of costing out what it requires to go and do a clearance on that area. And that's not funded, as I said. That part of it isn't funded. We have to do up a separate budget that … to resource the future act work." (T23-24)

9 Mr Hunter's evidence does not shed light on the income earned from this work except that in re-examination Mr Hunter says the WPC work is not funded by the State or Federal Government. This work forms 30 to 40% of the total KLC income. The mining companies typically write to the KLC but they do not have to come through the KLC.

10 Mr De Silva's evidence can be best summarised by attachment D of his witness statement:

"Kimberley Land Council – Analysis of Income 2002/03 to 2007/08

Financial Year	Total Income	Income from Services	Percentage Services/Total
2002/03	$8,034,626	$1,685512	21.0%
2003/04	$9,292,883	$2,655,178	28.6%
2004/05	$8,357,500	$3,900,713	46.7%
2005/06	$7,934,199	$1,942,400	24.5%
2006/07	$9,723,683	$2,683,625	27.6%
2007/08	$15,936,898	$4,816,407	30.2%
Average for the 6 Year period	$9,879,965	$2,947,306	29.8%"

11 Mr De Silva says that the future acts function is not funded by the State or Commonwealth Governments. The WPCs are paid for predominantly by mining companies. This type of work is referred to as self generated income. Activity generated income is where NTRB assets are used to generate income. There is no break–up of the non-NTRB income in the annual report, however, he says the income comes from clearances for mining companies.

12 Mr De Silva was asked by the Commission to explain the $3.9 million in income listed in Note 2B, page 83 of the Annual Report. He stated, "It will be mostly for funding of clearances, but there could be a little bit extra but I can't give you a break down from that figure from the annual report".

13 Mr De Silva was asked under cross-examination to explain the figures in Note 2B and Note 19, page 91 of the same report. Note 19 is listed as Schedule of Grants for the year ended 30 June 2008. He agreed that approximately $13 million in grants had been obtained that year from State and Federal Governments. His answers at T32 and T33 in explaining the accounts are somewhat confusing and indefinite. The cross-examination on this point concludes as follows:

> "Precisely. Precisely, Mr De Silva. Which means that they're released for the current year … if that unexpended hadn't been included, it would have been 19.9 million. That's the second column on note 19, isn't it. And that's why the third column on note 19 is only 15.7 million?---The - - -
>
> The discrepancy of 4.2 million is akin to your discrepancy of the unexpended grants contained in column 1 on note 2?---On note 2?
>
> Note 2, page 83?---Yes, that's right. Yeah.
>
> Yep?---So on page 83 total from grants is 10 million.
>
> Yep?---Others is 4.8, so the total is 15.
>
> Yep. Which is the total that we have on page 92, 15.7, column 3?---(indistinct)
>
> 15.7. The reason, Mr De Silva, that you can't point to anywhere in the annual report … the reason you can't point to anywhere in the annual report that tells us where you got the $3.9 million from for non-NTRB services is because all of that money comes from the grants that are listed in note 19. Isn't that the case?---Just let me check that.
>
> Mr De Silva, the annual report invites of no other conclusion … invites of no other conclusion than that the money that you describe as income from services for non-NTRB functions has in fact been received by the KLC in the form of grants. The detail in this annual report is contained in note 19. And in fact there's nowhere else in the annual report … this is correct, isn't it? There's nowhere else in the annual report that tells us where that money comes from?---Can I correct that one? The figure you are referring to, 15 million, is what we received but in the actual report we had not expected 5 million, so the net figure is 10 million. So that's the assumption I have taken when we take - - -
>
> No, no. No, that's not correct though, Mr De Silva, because 19 million was supposed to come in in grants and the unexpended portion brings the grants down to 15 million?---That is true." (T33)

14 Mr Powrie's evidence is that the Department of Family, Community Services and Indigenous Affairs (FaCSIA) only fund the KLC to do NTRB work. FaCSIA require the KLC to recover costs from third parties because the department will not fund the KLC to do certain things. He described the non-NTRB work as including the AQIS contract which is part of the KLC's Land and Sea Unit. He went on to state:

> "They administer it on behalf of various ranger groups. That contract has absolutely nothing to do with native title work whatsoever. It is work, for example, checking flotsam and jetsam, you know, that wash up on the beach, check for borers, insects, illegal materials. They keep an eye out for noxious weeds, introduced pests, illegal fishermen, illegal immigrants, so a whole range of services that have got nothing to do with native title work and that is contracted out by the Commonwealth government to various bodies. It just so happens in the Kimberley region the KLC tendered and won the contract." (T43)

15 Mr Powrie referred also to fire management projects and various research agreements as non-NTRB work and said that they do not generate much income. The bulk of the non-NTRB income is from WPC's. He explained the WPC process as follows:

> "The … under the Aboriginal Heritage Act anybody who does anything that may breach that act … sorry, does anything that disturbs a cultural site or an archeological site is in breach of the Aboriginal Heritage Act. So that's totally separate from the Native Title Act. So in order for … when mining companies approach the KLC, they issue what they call a section 29 notice. It's a … and that is a future act … what we call a future act notice. Generally speaking, the vast bulk of those are simply exploration tenements and exploration licences. They come to the KLC under our native title rep body functions. We have to notify the traditional owners, the various claim groups, and we … so we send them all notices. And that's where our job basically finishes at that point. We have a number of standing instructions from various claim groups that if we do receive those notices then we are to send what we call a heritage protection agreement out to the various mining companies and try and ask them to negotiate with us for community benefits and the Rules of engagement if they want to go on to the country to explore.
>
> Do they have to negotiate with the KLC?---No, they don't. It's … there is absolutely no … sorry. In limited circumstances there is a right to negotiate that the traditional owners have. In some instances they have a right to comment, but the vast majority of them … once an exploration licence is granted, that's the end of it. There's nothing we can do to stop it, but we negotiate with the mining companies irrespective of that and the basis upon which we negotiate with them … really, our only negotiating point is the fact that if they go out and undertake exploration and in the process damage a cultural site or disturb Aboriginal culture in some way, then they will be in breach of the Heritage Act. As a result of that, we invite them to engage us to undertake clearance work for them and this is totally separate. There's no obligation under the Native Title Act for them to do that. The traditional owners … a number of traditional owners … the majority of them have … as I said, have given us standing instructions to do that on their behalf separate from the native title functions. But there's no obligation for them to do that either. In fact, a number of native title groups engage separate lawyers to negotiate those agreements on their behalf on a fee for service basis and we do the same. So it is entirely … from our perspective, it's entirely a fee for service basis." (T43-44)

16 Mr Powrie says this non-NTRB income averages 30% of total income. This figure includes income from WPCs and contracts with governments. There is a margin above cost recovery of 15 to 20% placed on the work. These funds are retained

separately. They are shown in annual reports as income from other sources but the KLC is not required to report on them. It is referred to as self generated income as opposed to activity generated income which has to be acquitted against grant conditions. He went on to explain this difference as follows:

> "Now, I think there was a question asked by Mr Millman referring to, I think, page 40 of the 2008 report, a sum of 915,000 was generated as activity generated income in table 5?---Yes. Yes.
>
> Can you give the Commission an indication of what you believe that money was for and how it was accounted for in the annual report?---Yes, thank you. The … I'll try and explain this simply, but it's … whenever in the past when we've been under funded and under-resourced, where future act notices came into the KLC, if we were holding a native title claim group meeting, we would often take the work program clearance sort of work to those meetings just purely for efficiencies. We would often ask mining companies or whatever to fund part of that meeting. That would help defray our native title costs and that's … but because it was piggybacking on the native title claim group meeting we were already holding, any income we generated on the back of that is called activity generated income. And that income has to be acquitted under the funding guidelines from the Commonwealth.
>
> So that - - -?---It's not - - - - - -
>
> income - - -?---It's treated as native title rep body funding.
>
> Native title body funding?---Correct.
>
> As distinct from non-native title body funding?---That's correct. Yep. Sorry, can I just add to that? Where a mining company comes to us with a large proposal and we don't have native title rep body meetings planned, then we ask those mining companies to fund that meeting totally and we send them a budget and they pay for that meeting. That is self-generated income. It's not activity generated income because it is solely arising out of the work program clearance schedules. It has nothing to do … it's not piggybacking on the back of our other native title rep body functions." (T45)

17 To emphasise this point the respondent tendered an email [Exhibit R6]. Mr Powrie in the email dated 15 May 2008 to Mr M Walker, was seeking clarification of 'activity generated income' and says as follows:

> "Where an NTRB does Work Program Clearances for mining and exploration companies (for example) and charges on a fee for service basis but does not use NTRB funding or resources this is considered 'self generated income' and need not be acquitted under the PFA".

Mr Walker was in accord with the above statement.

18 Section 29 notices under the NTA (i.e. future act notices) are received by the KLC in their capacity as an NTRB under the NTA. Mr Powrie says the KLC's principal function under the NTA is, "to protect native title rights and interests. That's what we do. But that doesn't mean that we get funded to carry out all of those functions. They are there … it's the range of functions that we are empowered to undertake." (T49)

19 As for future acts matters, as indicated, Mr Powrie says that the KLC's obligation finishes when they forward the notices to claimants. The KLC is not obliged under the NTA to then participate in future acts matters and agreements. Mr Powrie says that the KLC does not have a statutory obligation to represent native title interests in future acts negotiations.

> "So you're discharging a statutory function. You're getting a fee, which you're using to cover the costs that you're incurring?---Well, no, let's go back a few steps. Responding to a future act notice, for example, if it's an expedited procedure notice that comes in - - -
>
> Yep. One that doesn't attract the right to negotiate process?---No, not necessarily. It's just one where the state says - - -
>
> An exploration licence?---Well, excuse me. It's where the mining company makes an application and says, "This is not going to affect native title. Can you just expedite this proceeding. We don't need to do a heritage clearance," those sorts of things. We respond to those and say, "No, we object as a matter of principle to all expedited procedures," and we negotiate as part of our statutory function in relation to expedited procedures. Where they are just a normal section 29 notice, we discharge our function by sending it to the claim group. What then happens is we issue a … what they call a heritage protection agreement which lists, "These are the rules of engagement. If you want to engage with us," and the only thing we have to negotiate with is the Heritage Act, that's the only … that's the hook we say, "If you don't engage with us, you will run the risk of … you run the risk of breaching the Heritage Act." There is no obligation on the mining company to negotiate with us for exploration and there is … and we have no rights to insist they do. And the traditional owners have no obligation to seek our assistance.
>
> Well - - -?---They do so because of our expertise and because of our networks.
>
> Yeah. You issue - - -?---It's got nothing to do with native title funding." (T52-53)
>
> ……..
>
> "But the participation in the process is still as a result of you being the NTRB. The notification wouldn't go to you unless you were acting on behalf of the native title claim groups in the Kimberley?---That's correct." (T54)

20 Ms Guest's evidence in her statement [Exhibit A1] is as follows:

> "1. Notification of future acts is given to an NTRB regardless of whether an existing native title application exists.
>
> 2. Funding for NTRBs is akin to legal aid funding for native title claimants in the recognition and protection of native title.

3. Since 1994 the KLC has been recognised as an NTRB and its primary activities are to undertake statutory NTRB functions. The 2007-2008 Annual Report states that the organisation's priorities for that financial year were the:

   - Lodgement and finalisation of native title applications
   - Responding to future act notices
   - Negotiation of agreements and
   - Protection and recognition of native title.

   Each year since at least the 2003 Annual Report, this set of priority activities has been identical. These activities are encompassed by the NTA 'facilitation and assistance' function. KLC's other statutory functions are undertaken as required.

4. The KLC has developed strategies to seek to negotiate priority actual or anticipated future acts (attracting the right to negotiate) whilst maintaining a litigation timetable. The key strategy is to seek funding grants additional to the main NTRB funding grant from the Commonwealth and/or the State and/or future act proponents for negotiation of specific future acts matters.

5. The overwhelming majority of KLC negotiations are in response to "future act notices" particularly mineral exploration notices. The standard form of agreement reached is a 'Native Title and Heritage Protection Agreements' (NTHPAs), which provides native title claimants/holders consent to a future act, usually under certain conditions. A standard condition is that a work program clearance is undertaken to ensure no cultural heritage concerns relate to the development. For the proponent, NTHPAs also discharge their obligations under the State Aboriginal Heritage Act.

6. The process for a standard NTHPA is that the KLC receives a future act notice from the State or Commonwealth in relation to proposed activity. The KLC Future Acts Officer logs the notice onto a future acts database and sends copies of the notice to each named applicant on a claim or a prescribed body corporate. If the area subject to the notice is the subject of a native title claim, KLC project staff organise the future act to be placed on the next native title claim group meeting and subsequently organise the meeting. The Future Acts Legal Officer attends the meeting with project staff, explains the notice and takes instructions. Native title claimants may require the proponent to attend a subsequent meeting to further explain the proposed activity. Under instruction, the KLC Future Acts Legal Officer then seeks to negotiate an NTHPA with the proponent. The Future Acts Legal Officer may also be required to attend regular formal meetings with the NNTT in relation to the future act notice. Once the NTHPA is settled, it is signed off by senior KLC management.

7. Any 'work program clearance' is then organised by KLC project staff, under supervision of the KLC project manager and undertaken either by the KLC staff anthropologist or a consultant anthropologist usually with KLC project staff assisting.

8. If the area subject to the future act notice is not the subject of a native title claim, instructions are taken from traditional owners for the area as to whether they wish to file a new native title application covering the area of the proposed future act. Both taking instructions and preparing a new application requires extensive work by KLC legal, anthropological and project staff.

9. Funding for the negotiation of these 'standard' future act agreements is mixed.

   - Commonwealth NTRB funding covers: the project staff who organise native title claim group meetings and organise and assist WPCs; the future acts legal officer who negotiate the agreements; senior management who overview and finalise the process; and corporate staff who organise all financial matters.
   - The State Office of Native Title provides funding for a Future Act Officer whose primary function is to undertake the statutory notification function to relevant native title claim groups of future act notices and maintenance of a future acts database. They also provide support to the Future Acts Legal Officer in relation to NNTT 'call overs' of each future act matter. The State provides such funding in recognition of the under-funding of NTRBs ,the importance of future acts being dealt with expeditiously for developers and in recognition that most future act notices are issued by the State government.
   - WPCs are funded by the developer and are budgeted at cost recovery for KLC staff resources (sometimes a loss sometimes a small profit). Cost recovery is required because the Commonwealth takes the view that the KLC's statutory functions do not extend to undertaking such clearance processes, only notification of future acts and negotiation of agreements whereas 'work program clearances' considered to be in response to a proponent's obligation under the State Aboriginal Heritage Act. From the perspective of native title claimants/holders, the distinction between native title and cultural heritage is erroneous hence the description of Native Title and Heritage Protection Agreements."

21 At hearing, the applicant, in evidence, says that the Indigenous Land Use Agreements (ILUA) are part of the future act regime of the NTA. The NTRB has certain functions which are prescribed in the NTA. If these functions are not performed then the KLC would lose its status as an NTRB. The facilitation and assistance function and the protection of native title are the two main functions. Work in pursuance of these functions has to be prioritised and a future act which will extinguish native title receives higher priority. Funding also affects the level of activities undertaken. Ms Guest was asked about income for the KLC and the exchange was as follows:

"… the proportion of income that's generated under the Aboriginal Heritage Act and under the Native Title Act in terms of the income that's generated by the KLC?---Well, I think the way to answer that question is explaining the primary agreements that the KLC makes … the primary … the way in which what's called work program clearances attach to agreement attach to agreements that are … that the Kimberley Land Council makes. That can be divided into two things. There are … the agreements can be divided into two things. There are the agreements in relation to expedited procedure … you know, acts which attract the expedited procedure. They're exploration licences, but I think … mineral exploration licences. They're standard sort of negotiations … small scale negotiations that the KLC is involved in and then there are the large major agreement, future act negotiations that are set out in the front of the annual report. So put them to one side and just … if we just focus on for a minute the exploration licences … mineral exploration licences. The way in which the KLC tries to get agreement and avoid the application of expedited procedure is through the standard Kimberley Land Council agreement called The Native Title and Heritage Protection Agreement, which it presents to a grantee party once we've been notified of the future act. Basically, a native title and heritage protection agreement will allow the consent of the registered native title claimants to the doing of an act, thus avoiding right to negotiate procedures for both sides in consideration, I guess, for two conditions … for a range of conditions that are under the agreement. The two main conditions that cause consternation for grantee parties, and which are negotiated, is the … a condition of community benefits. Community benefits is based on the native title foundation that an act is happening over someone's country and therefore in recognition of the fact that, you know, whatever the act is, the … an exploration licence, it's happening on someone's country. In recognition of that then the company should pay benefits to the community of native title holders. The benefits can be all sorts of different things. They can be 5 per cent of annual on-ground exploration costs or they can be things like giving an office or grading a road or whatever. I mean, it obviously depends on what time of exploration licence it is, how big it is, the funds available to the company, et cetera, as part of the negotiation. That's the first sort of main part of the condition of the native title and heritage protection agreement. The other condition is that a work … a KLC work program clearance has to be undertaken and this is where I think the links that you're talking about were made in the evidence previously." (T78)

She went on to explain:

"So work program clearances were developed as a way of ensuring that senior Aboriginal people had the right to be able to speak about what could happen on their country in a culturally appropriate way. So what happens is that a company will give a detailed work program about what exactly they want to do on an area. There will be … there will be … a clearance sort of party will go out. I think it's a maximum of, say, four senior law boss … male law bosses and four women law bosses, but it might be less in certain circumstances, go out with an anthropologist and look at the country, go through the work program and make sure that every … make … decide whether those activities can take place, whether some of them can take place or they can take place on conditions. That's quite a different model to the other model of work clearances, which is often called site identification. Site identification is that publicly a site is identified as an important site. It's on a register that's kept by the Department of Indigenous Affairs, who looks after the Aboriginal Heritage Act, and so people know of those areas and they can avoid them. Under a KLC work program clearance, the … there's no information given as to what an area is, why it's been cleared or not cleared. It just said cleared or not cleared and that flexibility allows Aboriginal people to … you know, the reality of … the spiritual potency of country is that you don't have one little place here or there that is important." (T78-79)

22 Ms Guest says the making of native title and heritage protection agreements is a statutory function as an NTRB, it is founded on the primary right to speak for country. The overwhelming majority of WPC's are undertaken in response to a future act. She says:

"---Protection agreement, sorry, NTHPA; there's a list of things you have money for: money for staff, money for anthro … and anthro … money for traditional owners to go out in country, and transports costs and those kinds of things. When we were negotiating that budget with the state, the admin fee of 15 per cent that is put on a native title and heritage protection agreement for the work program clearance, which is meant to cover the work done in the administrative parts of the KLC, was taken out because the state was already funding the negotiation for the large ILUA because it was a … you know, an ILUA importance to the state. The state was negotiating it, so there was no 15 per cent funding in that." (T81)

"---But it's funding for a rep body function that the Commonwealth is saying, "Well we … you can either wait for a long time to do … undertake that function or you can do it on this very limited amount of money." The state jumps in and says, "Well, obviously we want this function done. We want Ord to go ahead. We want the gas negotiations to go ahead," for example, "and so we will fund you to ensure that … to ensure that you can undertake your statutory function in appropriate manner." So it's a discharge of statutory function. It's not a commercial arrangement?---Oh, absolutely; absolutely. It's a future act negotiation. All those agreements are triggered by future acts or anticipated future acts. The Ord agreement was triggered by compulsory acquisition notices for - - - " (T82)

"my understanding was the distinction made between … activity generated income is income either from FaCSIA for the NTRB grant or income generated somehow from the funds that come from FaCSIA for the NTRB grant. Self-generated income is non-FaCSIA grant income or associated income. Self-generated income therefore would be the funds that … the grants that KLC receives from the state government or from grantee parties in relation to those major proposals, so Ord has millions of dollars. The annual report last year or this year says that $7 million has been given to the KLC for this gas negotiation." (T83)

"Mr Hunter in his evidence said that these are predominantly in relation to staff resourcing, arranging meetings, use of equipment, office accommodation and predominantly those fees are charged to cover costs. Would you agree with that?---Yeah, but that … yes, I would agree with that, but that's only … that's in relation to small … that's in relation to the

> exploration licences. They're very small scale. There might be 77 of them done this year or 70 or something agreements done. They're very small … they're very small scale. They are not the big major agreements. That is not where the major funding … the self-generated funding is coming from. It's coming from those really big grants to do - - - From the Commonwealth and state governments?---From the … from the state … no, I was … and from the state government or from a grantee party like Inpex, who I think has given KLC funding to do … to undertake certain parts of its negotiations." (T83-84)

23 Under cross-examination the applicant was asked:

> "And I put to you that the work program clearances, whilst it might have a flavour of a future act, is not really a future act as required under the native title, but rather it's of … it's a clearance program that is subject to the Aboriginal Heritage Act?---No, I don't agree with that at all. Well, why don't you agree with it?---Well, a future act isn't an act that's done under the Native Title Act. A future act is a … something that could be done and there are processes under the Native Title Act to ensure that that activity can be done validly. As I said … and I'm happy to reiterate it … the vast majority of future act notices that the KLC gets are exploration, mineral exploration licences and that the way under the right to negotiate procedures that are in … that are legally required, the KLC seeks to engage the grantee party in a Native Title and Heritage Protection Act. They'll give their consent to the doing of the act in return for two … for a range of conditions; the two major ones being community benefits and the undertaking of a work program clearance. A work program clearance does not stand alone. It does not exist outside of the umbrella of the Native Title and Heritage Protection Act in practice at the KLC." (T85)

24 She was asked about the non-NTRB money and replied as follows:

> "No. No. It's grant funding from … some of it's from the state, some of it's from Arc Energy, some of it's from Aztec, some of it's from Pluton. It's grants to do certain things in relation to future acts or proposed future acts. That's what it is. But the vast majority in that particular … in this particular year, the most money was by far the money for the gas negotiations. Now - - -?---Gas has nothing to do with heritage at the moment." (T95)

Submissions

25 Mr Jones submitted that the rules of the KLC [Exhibit R1] allowed that organisation to do, "just about anything in furtherance of its objectives as outlines in the rules". This includes conducting commercial activities quite apart from its NTRB functions. The volume of the WPC work, that is the non-NTRB work, is significant. There is a clear distinction in the accounts between native title income and non-native title income. On the evidence of Mr Powrie there is a difference between activity generated income and self-generated income. The latter amounts to $4.816 million in income in the 2008 accounts and derives predominantly from WPCs. This is not part of the native title function. Mr De Silva's evidence [Exhibit R3, Attachment D] is that this income has averaged 29.8% of the total income of the KLC for the last six years. The evidence of Mr De Silva and Mr Powrie is that profit in the order of 15 to 20% is made on the WPC work. KLC provides services to mining companies and invoices these companies for the work. The character of this activity is trading.

26 Mr Jones referred to paragraph 68 of the *ALS* case and submitted it was clear that an organisation does not have to make a profit to be trading and can be a public benevolent institution. The overall test in the current activities test. He referred also to paragraph 66 of that decision where Steytler P quotes O'Callaghan SDP in the matter of *Pellow v Umoona Community Council Inc* [2006]. He submitted as per that decision there is a clear distinction between monies provided by Government and monies earned from other activities. The KLC received $15.389 million in grant monies last year. Mr Jones submitted that, "a lot of that money includes income derived from activities which are piggybacking off native title". This is the evidence of Mr Powrie. However, $4.816 million is income derived from non-representative body work. This is a significant and growing portion of the total income.

27 Mr Millman submitted that the WPCs derive from future act applications under the NTA, and not the AHA. This is the clear evidence of Ms Guest and Mr Powrie under cross-examination refused to address the question as to how much of the WPC activity was purely AHA related. Mr Powrie said the question was irrelevant. The WPC work is mainly undertaken following a s.29 application under the NTA and hence this work is undertaken in fulfilment of a statutory function and is not trading activity.

28 The respondent bears the onus of proof to establish that they are a trading corporation. For their case to succeed they must prove that the non-NTRB work is significant and that it is commercial. They have failed to do so. There is no evidence as to where the $4.8 million has been generated. *Jones v Dunkel* (1959) 101 CLR 298 invites the Commission to draw an adverse inference if a party seeking to demonstrate a point fails to call evidence. Mr Hunter did not know where the $4.8 million came from and his evidence is unreliable. Mr Powrie was not in a position to comment upon where the money came from and Mr De Silva could not say "where this $4.8 million is generated from in terms of fees for services". Mr De Silva's evidence under cross-examination is that when you look at note 19 on page 92 of the 2008 annual report he agrees that the total income is roughly equivalent to the total grants from Commonwealth and State Governments.

29 The non-NTRB work is also not commercial in nature. There is no safe evidence upon which the Commission can conclude that the KLC generated $4.8 million in income from the sale of goods and services. The respondent cannot point to anything to identify where this $4.8 million came from. The applicant submits that all the KLC's money comes from grants and it is split arbitrarily between NTRB and non-NTRB functions. The applicant says that this non-NTRB work, which includes making agreements, future acts and WPCs is all undertaken in fulfilment of KLC's statutory functions.

30 The activity generated income which may be commercial in nature is not significant. In 2008 it was $167,212, in 2007 it was $150,037. That was about 1% and 1.5% of income respectively. This percentage is not a "sufficiently significant portion of its overall activities as to merit its description as a trading corporation". Mr Millman submitted, "the reference to income from goods and services in the annual report appears to be merely a reference to funds that are received outside of the FaCSIA, the OIPC grant".

31 The KLC's rules do not forbid commercial activities, however, they do forbid distribution of profits to members. The organisation was established for a charitable purpose and it enjoys PBI status and hence pays no tax (except FBT and GST). These characteristics are not normally associated with a trading corporation. The monies which the KLC receive from miners upon invoice do not denote a commercial activity as the KLC is the only statutory organisation in a position to discharge this function. This was the same difficulty faced by the *ALS* in that case. Mr Millman stated:

> "NTRB's are established to facilitate the Commonwealth statutory native title scheme and must undertake mandatory statutory functions, the most important of which is the facilitation and assistance of native title claims and future act negotiations and agreements. The 2008 KLC annual report states that, "Activities under this function are its predominant activities." And no matter how hard they might try, the respondent can't escape from what they've said elsewhere as far as its predominant activity." (T113)

Considerations

32 I should say credibility of witnesses is not an issue in this matter, and neither party raised the issue in closing. I am confident that each of the witnesses gave evidence to the best of their abilities. The issue is more to do with how far the evidence generally, and in particular the evidence as to income, actually takes me in resolving the key question of whether the KLC is engaged in 'trading'.

33 The relevant passages of the majority decision in the *ALS* case, for the purposes of this matter, are as follows:

> "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].
>
> 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.

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."

34 The relevant statutory functions of an NTRB under the NTA are as follows:

"203B Functions of representative bodies

General

(1) A representative body has the following functions:

(a) the ***facilitation and assistance functions*** referred to in section 203BB;

(b) the ***certification functions*** referred to in section 203BE;

(c) the ***dispute resolution functions*** referred to in section 203BF;

(d) the ***notification functions*** referred to in section 203BG;

(e) the ***agreement making function*** referred to in section 203BH;

(f) the ***internal review functions*** referred to in section 203BI;

(g) the functions referred to in section 203BJ and such other functions as are conferred on representative bodies by this Act.

Other laws may confer functions

(2) The functions conferred on a representative body by this Act are in addition to, and not instead of, any functions conferred on the representative body (whether in its capacity as a representative body or otherwise) by or under:

(a) any other law of the Commonwealth; or

(b) a law of a State or Territory.

Representative bodies to perform functions

(3) Except as mentioned in section 203BB, 203BD or 203BK, a representative body must not enter into an arrangement with another person under which the person is to perform the functions of the representative body.

Priorities of representative bodies

(4) A representative body:

(a) must from time to time determine the priorities it will give to performing its functions under this Part; and

(b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;

but must give priority to the protection of the interests of native title holders.

203BA How functions of representative bodies are to be performed

Functions to be performed in a timely manner

(1) A representative body must use its best efforts to perform its functions in a timely manner, particularly in respect of matters affected by:

(a) the time limits under this Act; or

(b) time limits, under another law of the Commonwealth or a law of a State or Territory, that are relevant to the performance of its functions.

Maintenance of organisational structures and processes

(2) A representative body must perform its functions in a manner that:

(a) maintains organisational structures and administrative processes that promote the satisfactory representation by the body of native title holders and persons who may hold native title in the area for which it is the representative body; and

(b) maintains organisational structures and administrative processes that promote effective consultation with Aboriginal peoples and Torres Strait Islanders living in the area for which it is the representative body; and

(c) ensures that the structures and processes operate in a fair manner, having particular regard to the matters set out in paragraphs 203AI(2)(a) to (f).

203BB Facilitation and assistance functions

General

(1) The facilitation ***and assistance functions*** of a representative body are:

(a) to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications; and

(b) to assist registered native title bodies corporate, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:

(i) native title applications;

(ii) future acts;

(iii) indigenous land use agreements or other agreements in relation to native title;

(iv) rights of access conferred under this Act or otherwise;

(v) any other matters relating to native title or to the operation of this Act.

Facilitation and assistance functions only exercisable on request

(2) A representative body must not perform its facilitation and assistance functions in relation to a particular matter unless it is requested to do so.

Facilitation and assistance functions only exercisable within a representative body's area

(3) A representative body can only perform its facilitation and assistance functions in relation to a matter that relates to land or waters:

(a) that are wholly within the area for which the body is the representative body; or

(b) that are partly within that area.

If paragraph (b) applies, the body must not perform the functions for the part of the land or waters that is outside that area except in accordance with section 203BD.

Consent required if matters relate to same land or waters

(4) If:

(a) a registered native title body corporate or a person who holds or may hold native title requests that a representative body represent the body or the person (the ***new body or person***) in relation to a particular matter that relates to particular land or waters; and

(b) the representative body is already representing another body or person (the ***original body or person***) in relation to one or more other matters that relate wholly or partly to that land or those waters;

the representative body must not represent the new body or person unless the representative body has obtained consent, from the original body or person, for the representative body also to represent the new body or person to the extent that the other matters relate to the land or waters.

"Briefing out" matters that relate to the same land or waters

(5) Subsection (4) does not prevent a representative body from facilitating the representation of a body or person, in relation to a particular matter, by entering into an arrangement with another person under which the other person represents the body or person in relation to that matter.

Definition

(6) In this section and section 203BC:

matter means a native title application, or a consultation, mediation, negotiation or proceeding of a kind referred to in paragraph (1)(b)."

35 The vision of the KLC, as shown in the Annual Report is:

> "The Kimberley Land Coucil is a community organisation which has been working for and with Traditional Owners of the Kimberley; to get back country, to look after country and to get control of our future, for 30 years."

36 The objects of the KLC as explained in their rules (annexure A to Mr Hunter's statement) are as follows:

> "**Objects**
>
> To provide direct relief from poverty, sickness, destitution, helplessness, distress, suffering and misfortune among the Aboriginal Traditional Owners and Custodians of the Region without discrimination.
>
> In recognition of these severe problems, the Association shall advance its objects by the following means:
>
> a) to ascertain the wishes, aspirations and opinions of the Traditional Owners and Custodians in relation to the management, use and control of their traditional lands within the Region and to seek where practicable, to give effect to those wishes, aspirations and opinions.
>
> b) to protect the interests of Traditional Owners and Custodians in relation to the management, use and control of their traditional lands within the Region.
>
> c) to facilitate the acquisition of secure land tenure
>
> d) to facilitate the maintenance and promotion of Aboriginal Law and Culture
>
> e) to facilitate the development of education, employment, job training, health, and housing services, community planning and research generally.
>
> f) to carry on, undertake, take part or engage in any transaction or act, matter or thing of any kind whatsoever (whether specifically mentioned or referred to or not) without any restriction to the nature or description thereof, which may seem to the Association to further the objects of the Association.
>
> g) to provide professional and/or other services by the engagement of staff or consultants to ensure the carrying out of the objects referred to."

37 In applying the principles enunciated at paragraph 68 of the *ALS* case the respondent has concentrated on the proportion of income earned by way of what they say is a trading activity. This is as opposed to considering also the purpose of the KLC and its broader activities and structure. These features must be factored into any assessment.

38 Some of the features of the ALS, as expressed in paragraphs 70 and 71 of the *ALS* case, appear similar to those of the KLC. The KLC is a public benevolent institution, enjoys tax concessions and receives the bulk of their funding from governments like the ALS; albeit the KLC is involved primarily in securing traditional lands as opposed to general legal representation. Both cannot distribute monies to members by way of bonus, dividends or otherwise. Both have fairly general discretion to operate in pursuit of their goals. Both must account significantly to government for the monies spent. The services provided to indigenous Australians are provided free of charge.

39 The purpose of the KLC is most clearly expressed in its vision. It is to get back country, look after country and control "our future". It is a purpose founded on securing land as a basis for the past, present and future. This is hardly on its face a commercial vision.

40 The activities undertaken by the KLC are clearly different to those of the ALS. The respondent undertakes a broad range of activities. The best description of these activities are seen in the Annual Report and the evidence of Ms Guest. The Annual Report states on page 14 under Output 1 – Facilitation and Assistance, the following:

> "The major core function of the KLC continued to be the provision of facilitation and assistance to native title claimants, native title holders and registered Native Title bodies corporate in the preparation and progression of Native Title applications, including facilitating and providing representation in consultation, mediation and negotiation for agreements."

41 If one looks at the annual report in its entirety, although there are activities which are not related clearly to native title, the overwhelming bulk of the reported activity has to do with native title, whether that be assisting claimants, making agreements or complying with legislative functions under the NTA.

42 The KLC reports that at the end of 2008, 80 staff were employed and they spent about $4.9 million on consultancies (refer page 48). Mr Hunter's evidence is that increased demand in future acts work meant the KLC established an Agreements Unit which is staffed by 7 people and relies heavily on external consultants. It would seem from Mr Powrie and Ms Guest's evidence that two of those staff are funded by the State and Federal Governments. Therefore, less than 10% of employed staff are engaged in future acts work.

43 In summary, the purpose, the structure and the majority of activities and resources of the KLC are not directed towards, or support a view, that the organisation is engaged in commerce or might be considered to be a 'trading' corporation.

44 However, Steytler P stated in the *ALS* case at paragraph 68(3), "In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to activities carried on with a view to earning revenue and includes trade in services". In this fashion, I accept that if the KLC is engaged, through their WPCs, in providing services to mining companies for the clearance of land, and receives monies for these activities, then this is a form of trading in services. The explanation of the services is reasonably consistent across the witnesses and involves setting a budget for consultations and perhaps on-ground inspections and involves use of staff, equipment and consultants. This description is not especially detailed, however, it is sufficient to find that the KLC does provide services to mining companies. There is common evidence also that the KLC

charges for these services. The applicant confirmed this in her evidence. Mr De Silva and Mr Powrie say that the activity earns a profit of 15 to 20%. Ms Guest refers to this as an administration charge. This in my view is sufficient to characterise that activity, the WPC activity involving mining companies, as 'trading'.

45 Mr Millman submitted that the activity is not commercial. This is based primarily on the viewpoint that the services are provided due to a statutory obligation. The issue of whether the WPC's are a statutory obligation has a number of aspects. Ms Guest says that they derive from future act notifications and are a subset of these procedures. Mr Powrie says that they derive from the State Heritage Act and in any event the statutory obligation for future acts under the NTA extends only to forwarding the notifications to claimants. Ms Guest's evidence receives support from Mr Hunter who says at paragraph 4 of his statement, "The goods and services provided by the KLC arise out of an area of work referred to as Future Acts work". He goes on to explain this more fully but his explanation does not detract from his view that the services arise out of future acts work. The description in the NTA of what is required of an NTRB in respect of future acts supports Mr Powrie evidence that in effect the KLC acts as a mailbox and forwarder of notifications. However, to separate this from the negotiations which then take place and suggest that one has a statutory base and the other activity does not is not logical in my view. Ms Guest is correct in my view, and the weight of evidence suggests, that the WPC's derive from the future act process and this has a statutory base in the recognition of the KLC as an NTRB. To put this point in contrast, in light of all the evidence I doubt that Mr Powrie could contemplate a situation where another body was recognised in the Kimberleys as the NTRB, and did the future act notifications but the KLC did the WPCs. To be fair though this proposition was not put to him.

46 More importantly, I do not consider the submission by counsel for the applicant as to the importance of the statutory obligations to be relevant in deciding this matter, except in so far as it bears on the purpose and broad activities of the KLC. There are many instances of commerce where a company has been provided with a lease, license, permit or some other instrument pursuant to a statute, and perhaps in a monopoly position, to engage in the provision of goods or services. Telecommunications and the sale of agricultural products are two of the more obvious examples. The fact that the KLC has achieved recognition under the NTA is a product of public policy and the operation of that Act. It is not correct then to say that the subsequent activities undertaken by the KLC cannot be commercial because they stem from the NTA.

47 If I then look at the case of the respondent in terms of the income earned from these activities. Both Mr Jones in closing and Mr De Silva in evidence refer only to the non-NTRB income and use a figure of $4.86 million. The non-NTRB income is shown on page 83 of the 2007-2008 Annual Report under Note 2B as follows:

	2008	2007
	$	$
Services NTRB Functions	914,896	535,081
Services non-NTRB Functions	3,901,511	2,148,544
Rental received	51,680	44,752
Total rendering of Services	4,868,087	2,728,377

48 The non-NTRB income is shown only as $3.9 million. The $914,896 figure represents activity generated income, not self-generated income. Both Mr Powrie and Mr De Silva agreed under cross-examination that the $4.86 million in income is not described in detail anywhere in the audited accounts. I will refer only to these accounts as they have the same structure as the accounts of earlier years and so any findings on these figures will suffice for the earlier accounts.

49 The figure for 2008 of approximately $4.86 million is the income upon which the respondent's case for lack of jurisdiction rests. Mr Powrie in answer to questions from the Commission says that he does not know, from his own knowledge, whether the bulk of the non-NTRB income was generated from work program clearances. He knows the monies from WPCs are banked separately from native title funding. He does not see the finances arising from the WPCs but he has a role in setting fees and at times discussing variants to the budgets put forward to mining companies. Mr De Silva says that he does not know the work involved in WPCs in any detail. The WPCs are mostly funded by mining companies. In his evidence in chief there was the following exchange:

> Grants income is listed as 15.389 million?---Yes. And other income for services is 4.816 million?---Yes, that's right. What services did you provide to third parties to generate that type of income?---Once there would be the intervention, which is required for the clearance activities. And are those activities connected with … or rather, are they quite distinct from activities or functions done by KLC under the native … sorry, NTRB?---I think it's separate because it's not funded by the state, so it's actually a separate area. So you … you said you think it's separate. Can you be more definite? Can you state with - - -? ---Because it is actually not covered by the native title activities, so it is separate. And is this what has been referred to as self-generated income?---Yes, that's right. And this income you receive mainly from mining companies?---Yep; mostly from mining companies. (T28)

50 Later Mr De Silva is asked in relation to annexure D of his statement:

> "And you're quite confident that those figures that you have calculated accurately present the amount of income that is generated from non-NTRB work?---Yes. From the annual reports, yes." (T28)

51 The difficulty is that annexure D to Mr De Silva's statement includes income shown above of $4.86 million, yet Note 2B displays that only approximately $3.9 million of this is for non-NTRB functions. Services for NTRB functions make up the bulk of the remainder being approximately $915,000. It is Mr De Silva's evidence under cross-examination that the NTRB services are referred to as activity generated income, not self generated income. The difference being that activity generated income is generated using NTRB assets and has to be acquitted to the Commonwealth Government. Self generated income does not. This accords with the evidence of Mr Powrie. Therefore as a percentage of total income the self generated income

would be about 24.5%, not 30.2% of total income for the KLC, for that year. This is a small point in the overall assessment of the KLC and its activities.

52 More importantly, Mr De Silva was asked under cross-examination if the non-NTRB services, ie the $3.9 million in income, is detailed in the Annual Report and he replied that it was not. He was asked, "what the services for the non-NTRB function made up of?" He replied, "To my knowledge it is for clearances to the mining companies". He said it should not include any Land and Sea money because they are straight grants.

53 Mr De Silva was cross-examined on a comparison of grant monies listed in Note 19 at pages 91 and 92, and the income figures listed in Note 2B on page 83. The evidence on this point is not sufficiently clear. However, Mr De Silva's incomplete and indefinite responses call into doubt his earlier statement that the non-NTRB monies is predominantly generated from services provided to mining companies under the WPCs or that it is not shown anywhere in the report. The applicant submits that the $3.9 million listed in Note 2B as non-NTRB services is comprised of grant monies. I consider that this submission has some merit in so far as it is probable that the $3.9 million is covered by Note 19.

54 I note that the distinction between NTRB and non-NTRB in the accounts is whether Commonwealth Government monies are used, not whether Government monies (ie State and Commonwealth Government monies are used). Mr Powrie's evidence is that non-NTRB monies do not have to be accounted for with the Commonwealth, hence there is no detail provided in the Annual Report. He says also that the Commonwealth does not fund future act activities hence the State has provided monies. In other words, the NTRB/non-NTRB distinction is a product of the accounts and distinguishes Commonwealth monies; it does not necessarily signify that non-NTRB monies arose from commercial activities as opposed to Government grants.

55 Mr Powrie under cross-examination was asked about the detail of the non-NTRB income. He says that it is not relevant. I consider this answer to be based on the arrangement for funding the KLC has with the Commonwealth in that the KLC is not required to account to the Commonwealth for their self-generated income. He later says that such information could be collated but has not in that it would take sometime and the KLC has been involved in changes to their internal systems. There was no evidence or submission that the information would be sensitive commercially as per s.33(3) of the Act. In any event such information was not presented to the Commission. The respondent bears the onus to bring forward sufficient evidence to prove their case.

56 Mr Millman for the applicant submitted that the Commission was entitled to make an adverse inference from the failure of the respondent to present such information (*Jones v Dunkel*). I consider the issue to be more one of whether the evidence presented by the respondent, especially the evidence as to self generated income (which is largely the evidence of Mr De Silva) sustains the respondent's case or is sufficient for the Commission to make a finding as to the level of trading activities undertaken by the respondent.

57 I turn to an analysis of the financial figures in the 2007-2008 Annual Report. Note 19 on page 91 is headed 'Schedule of Grants'. Column 2 is headed 'Released Current Year' and totals $19,880,383 for the year. This then is seemingly the total of all grants received in that year. Column 1 represents monies brought forward, column 2 represents monies received, column 3 represents monies expended and column 4 is the product of 1 plus 2 less 3, and so represents monies carried forward into the next year. Mr De Silva agreed under cross-examination to the proposition that '19 million was supposed to come in grants and the unexpended portion brings the grants down to 15 million'. The total expense for the year (column 3) is $15,723,800. In other words Note 19 not only shows all grants, it also shows all expenditure.

58 The total expense figure in Note 19 approximates the 'Total Expenses' figure of $15,748,789 in the Income Statement at page 71 for the year 2008. That statement refers to notes, including notes 2A & 2B. Those notes at page 83 are headed 'for the year ended 30 June 2008 (continued)", hence I assume the comparisons are based on like with like years. The total income at page 71 is $15,936,898. The point is that Note 19 appears to show all income and expenditure for the year. The details in the accounts concerning the $4.86 million which are said to be absent by Mr De Silva and Mr Powrie, appear to be actually present in Note 19. The total income figures at page 83 are classified differently but appear to be approximately what is shown in Note 19 at pages 91 and 92.

59 Note 19 also has other details of interest. On page 92 under column 2 there is a heading 'State Gas Research' and the amount is $7,286,647. From Mr De Silva's evidence this figure would seem to equate to the State grant as he agrees that grant was $7 million and no other grant figure comes close, except for the approximate $6 million in monies from FaCSIA. If one then compares the headings below the heading 'Stage Gas Research' to material in the Annual Report it would seem probable that those headings represent private interests, including mainly mining interests. Some of the headings include the words future acts, heritage or agreements. I do not know, but it appears, that these figures may represent monies from WPCs. The bottom notation is headed 'Self-generated – Other'. The point is there appear to be items in Note 19, most likely Column 2, which can be said to be self-generated income and which go to comprise the $3.9 million. However, Mr De Silva says $4.86 million in income comes mostly from mining companies and when one looks at the figures in Column 2 it is hard to sustain this conclusion. I suspect instead that some State Government money may be incorporated in this figure for WPC work.

60 In saying this I am mindful that the matter before me is a question of jurisdiction; does the Commission have power to hear the merits of the unfair dismissal claim. An option would be for the respondent to be given a further opportunity to present the information which Mr Powrie says is available, but will take time to extract, about the payments of mining companies for WPCs. The applicant has claimed, and still claims reinstatement, even though she has shifted to Melbourne for personal reasons. Towards that end counsel for the applicant has pressed for the Commission to deal with this matter expeditiously. In my view it would indeed be harder for an applicant to sustain an argument about the practicability of reinstatement if the elapse of time between dismissal and substantive hearing was considerable. This says nothing about the merits of the applicant's claim. I am mindful also that the Commission is not for the purposes of this matter an investigative authority. Both parties are represented at hearing and the hearing was adjourned to a second day to complete the matter. The respondent chose to call

further evidence after hearing the complete evidence of Mr Hunter and Mr De Silva. They had the opportunity to seek leave to introduce further evidence on the second day of hearing or make an application for an adjournment if they had wanted to do so. They chose only to seek leave to introduce an email. The parties are responsible for their own cases.

61 I conclude that I cannot, on the evidence before me, find that the respondent has earned $3.9 million (let alone $4.86 million) a year in activities which could be classed as trading activities. In that sense the respondent has failed to discharge the onus upon them. In light of this, and in conjunction with the comments I have made as to the purpose, structure and broader activities of the KLC, I therefore find that the Commission has jurisdiction to hear and determine the applicant's claim.

2009 WAIRC 00147

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DOREEN MOON
	APPLICANT
	-v-
	BEVAN O DONNELL
	BUNGAREE LAUNDRY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 30 MARCH 2009
FILE NO	U 18 OF 2009
CITATION NO.	2009 WAIRC 00147

Result	Application discontinued

Order

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

WHEREAS a conciliation conference was convened on 13 March 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 20 March 2009 that she wanted to discontinue the application;

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 00122

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WAYNE LINDSAY REYNOLDS
	APPLICANT
	-v-
	BRIERTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 17 MARCH 2009
FILE NO	U 190 OF 2008
CITATION NO.	2009 WAIRC 00122

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 5 March 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.

2009 WAIRC 00181

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACQUELINE ELIZABETH ROBINS
	APPLICANT
	-v-
	DEANNE AND JONATHAN MARLOW
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 8 APRIL 2009
FILE NO/S	U 170 OF 2008
CITATION NO.	2009 WAIRC 00181

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 4th day of December 2008; and

WHEREAS on the 7th day of April 2009 the applicant's representative filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

2009 WAIRC 00161

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACK ALEXANDER ROLLISTON
	APPLICANT
	-v-
	MR IAN KEENAN OF IAN KEENAN LPG GAS CONVERTERS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	WEDNESDAY, 4 MARCH 2009
DELIVERED	THURSDAY, 2 APRIL 2009
FILE NO.	U 151 OF 2008
CITATION NO.	2009 WAIRC 00161

CatchWords	Termination of employment – Harsh, oppressive or unfair – Summary dismissal – Contest regarding wages – Whether misconduct – Procedural fairness– Reinstatement impracticable - Compensation awarded – Industrial Relations Act 1979 (WA) s.29(1)(b)(i)
Result	Applicant dismissed unfairly; Compensation awarded
Representation	
Applicant	Mr P Rolliston
Respondent	No appearance

Reasons for Decision

1 This is an application pursuant to s.29(1)(b)(i) of the Industrial relations Act 1979 ("the Act"). The applicant, Mr Jack Rolliston, worked as a Trainee Vehicle LPG Gas Converter for the respondent. He was dismissed on 8 October 2008, without notice, after working for the respondent for just over 3 months. He says in his application:

> "I feel that I was unfairly dismissed as I had approached Mr Keenan to ask what was happening about my wages as no one in the workshop had been paid for two weeks and the next pay day was only two days away. I was also concerned that none of the promises that Mr Keenan had made to get me when he approached me to work for him seem likely to be honoured. I advised him that I had found out that it was illegal for me to be doing the work as I was doing it without the preliminary licence required by The Department of Energy and where does that leave me if something goes wrong? I told him that all I had to do a two week course at Midland TAFE and then I could get this compulsory temporary Gas Fitters Licence. He said that he would not send me because I would not pass. I tried to explain to him that it was not a case of passing but of going to this course where I would be given the theory and then the licence so that I could legally do the work. I advised him that I was so concerned that I had in fact enrolled into TAFE the week before and my father was going to pay the $1500 odd that it cost. He did not address any of my questions but sacked me on the spot. The Department of Energy controls the electrical and gas fitting industries and the licences that are required by each. If I can find out what the process is for me to be trained to be a LPG Gas converter and the licences needed then one would think Mr Ian Keenan would also know as he is an industry that is strictly controlled. I recently found out that Mr Keenan advised one of the workshop staff the day before that if any one bothered him about the wages he would sack them. I don't consider that asking about my pay and when I could expect it to be paid and asking him about the licensing process is unreasonable, especially as my father had offered to pay for the TAFE course and is certainly not a reason for instant dismissal.
>
> There was no probation period attached to my employment with Ian Keenan LPG Gas Converters and as I had been there for three and a half months when I was dismissed, the event took place outside the standard industrial probationary period."

2 The applicant attached a letter to his application which stated:

> "This statement has been written for Mr Jack Rolliston in support of his application for Unfair Dismissal against Mr Ian Keenan of Ian Keenan LPG Gas Converters Unit 6 Number 19 Innovation Circuit Wangara 6065.
>
> Mr Jack Rolliston is a 20 year old who was employed by Mr Ian Keenan of Ian Keenan LPG Conversions 6/19 Innovation Circuit Wangara as a trainee LPG Gas Fitter.
>
> Mr Jack Rolliston commenced work on 1/7/2008 with Ian Keenan LPG Gas Converters Unit 6 Number 19 Innovation Circuit Wangara 6065 after being approached by Mr Ian Keenan. Mr Ian Keenan offered Mr Jack Rolliston the position in which he was employed and which Mr Ian Keenan had laid out in front of witnesses of how Jack Rolliston would receive training by Ian Keenan LPG Gas Converters Unit 6 Number 19 Innovation Circuit Wangara 6065 as a vehicle LPG Gas Fitter and the process in which Jack Rolliston would gain the qualifications in that trade. Time periods and pay levels were laid out as were the tool and work requirements that would be needed by Jack Rolliston. He informed Jack Rolliston he would start on $20.00 per hour and once he was able to fit LPG tanks and lines that pay rate would rise to $28.00 per hour. Once he had completed his training his wages would be $38.00 per hour. As a result Jack Rolliston left his Greens Keeping Apprenticeship with the Royal Perth Golf Club and commenced employment with Mr Ian Keenan of Ian Keenan LPG Gas Converters at the beginning of July 2008. He purchased a number of tools, tool box, safety boots, etc to a value in excess of $1,200 and this represented the basics required by Mr Ian Keenan.
>
> The training structure that was laid out consisted of a preliminary period of a few weeks in which Mr Jack Rolliston was to carry out fabrication and fitting of gas tanks and to gain familiarisation with the workshop and its operations. After a few weeks he would graduate to fitting gas conversions under a tradesman and this did eventuate as promised and was the arrangement until Mr Rolliston ceased work at Ian Keenan LPG Gas Converters. However the corresponding increase in wages did not eventuate nor did the TAFE training which is so necessary for him to be legally able to do this work. It was starting to become apparent that he was being used as cheap labour and that training was secondary. In an effort to secure his training he enrolled privately in Midland TAFE to do the LPG Gas fitting course at his expense on 8/10/2008 although this is now likely to be cancelled.
>
> Mr Jack Rolliston approached Mr Ian Keenan on a number of occasions about TAFE Training, his wages and his legal position but was brushed off on each occasion and told to continue with the fitting of the conversions. Mr Jack Rolliston became more and more concerned about this lack of training and the fact that he did not have a licence of any type to allow him to fit the systems. Mr Ian Keenan is required to keep a diary of the gas fitting that Mr Rolliston had carried out as part of his training and which is required by law as part of the business gas fitting licence, but failed to do so.

Wages were often days or even as much as a week late but no wages have been payed for the last two weeks and they were well inside the third pay week without any explanation or promise of payment. Mr Rolliston questioned Mr Ian Keenan about this, his training and when payment could be expected as he had financial commitments living costs to address. He also questioned why money had been deducted from his wages the previous week without any notification or explanation. Mr Ian Keenan did not address any of Mr Jack Rolliston's concerns but sacked him on the spot. He has not received a pay slip or any explanation of this short fall apart from "you were sick". However the only time off Mr Rolliston had during those weeks were the result of metal shavings entering his eye which was the result of a work place accident and were he was treated by a doctor as workers compensation with all the accompanying documentation and follow up visits. The final visit however Mr Ian Keenan would not allow Jack Rolliston to attend as he was too busy so he knew well of this injury. This dismissal was not accompanied by any pay slips, payout of the wages still owed, holidays or the workers compensation reimbursement as the cost of the doctor's visits had been born by Mr Rolliston due to the doctors policy of immediate payment.

A check has also reviled that there has been no superannuation payed into the nominated fund by Mr Keenan at all.

Mr Jack Rolliston worked for Ian Keenan of Ian Keenan LPG Gas Converters from 1/7/2008 to 8/10/2008 which is a period of just over 14 weeks. There was no probation period either discussed or in writing and the reasons for Mr Jack Rolliston's dismissal appear to come from Mr Ian Keenan's statement of the 7/10/2008 in front of all of the employees of Ian Keenan LPG Gas Converters that if anyone questioned him about the wages he would sack them."

3 At hearing, under oath, the applicant was asked to read carefully through his application and check whether all details were true and correct. The applicant advised the Commission that those were his words and all that he had written was correct. The applicant does not seek reinstatement but seeks compensation.

4 This matter came on for conference on 18 December 2008 at which time Mr Keenan was represented by Mr R Gifford, as agent. The Notice of Answer and Counterproposal stated:

"Alleged Unfair Dismissal

The respondent company denies that it unfairly dismissed the applicant, on Thursday 9 October 2008, and denies that any compensation is due.

On that date, the applicant was dismissed the misconduct, without notice or pay in lieu.

Earlier that day, the Managing Director, Ian Keenan, had taken the applicant's pay and pay slip to him, whereupon a discussion ensued over the pay being two days short. The Managing Director explained that the pay had been made up in accordance with the time sheet prepared by the applicant, which did not record the two days as having been worked.

This caused the applicant to become argumentative, leading to him following the Managing Director into his office. Once in the office, the applicant started yelling and kicked the office filing cabinet. The actual words stated by the applicant to the Managing Director were: 'You're a fucking fat old cunt that cannot manage to do anything. I fucking hate you, you useless cunt".

The Managing Director then told the applicant to pack up his tools and leave the premises, and in that way effected the applicant's summary dismissal for misconduct for his grossly abusive conduct toward him.

Entitlements claimed

Following upon the dismissal the applicant was paid proportionate annual leave in error, as it was not an entitlement due as a result of his dismissal for misconduct.

In consideration of this position, the outstanding two days pay from the applicant's last week's work remain unpaid.

All superannuation contributions have been duly paid.

Temporary Gas Fitters License

The applicant, in terms of the work which he undertook, was never required to be the holder of a temporary gas fitters license. This would only arise in circumstances where a full gas conversion, including the installation of the gas lines, was undertaken. He never undertook such a role.

He was initially involved in the installation of brackets and later involved in the installation of tanks and convertors. He was never responsible for the installation of gas lines and he had not acquired the skills to enable him do so. He was therefore not ready to undertake the TAFE course in question.

Doctor's visits — reimbursement

In the case of the incident involving the applicant's eye, no workers compensation claim was ever lodged. For that reason the accounts relating to his visits to the doctors were never required to be presented to the company for reimbursement.

Vehicle use — reimbursement

The applicant was never required by the company to utilise his own vehicle for company business. He simply elected to do so. The company had a Barina van available to employees, including him, for such company business.

5 The matter did not settle in conference. At that time the respondent confirmed that he operated as a sole trader and hence jurisdiction was not in issue. The matter was set down for hearing on 4 March 2009. Mr Gifford wrote to the Commission on 25 February 2009 in the following terms:

"As the Commission is aware, this organisation has been acting to date on behalf of Ian Keenan LPG Gas Converters in relation to the above matter. A hearing date for the matter has been set for Wednesday 4th March 2009, at 10:30am.

> We advise that since the date of the Conference held before Commissioner Wood on Thursday 18 December 2008, we have been unable to secure any instructions from Ian Keenan concerning the hearing.
>
> Further, we understand he has closed his business down, although we have had no confirming advice to that effect. He has not endeavoured to communicate with us at all concerning this action.
>
> Our attempts at communicating with him have been to no avail.
>
> It accordingly follows that we are quite unable to continue to act an as agent on his behalf in this matter. We therefore hereby seek leave of the Commission to withdraw from the proceedings listed for 4th March 2009 and any subsequent proceedings, as an agent acting on his behalf."

6 At hearing the respondent did not attend. The Commission, after hearing the evidence of Mr Rolliston and submissions from his father, Mr Peter Rolliston, advised the applicant that the transcript of the hearing would be forwarded to Mr Keenan and he be given an opportunity to reply. On 10 March 2009 my Associate sent a letter to Mr Keenan at the address on record being Unit 6/19 Innovation Circuit, Wangara WA 6065 in the following terms.

> "I refer to the above mentioned matter and the hearing held on 4 March 2009, at which time there was no appearance by the respondent. Please find enclosed a copy of the transcript of the proceedings and the Exhibits. Should you wish to make any submissions please do so in writing by close of business Tuesday, 24 March 2009.
>
> If you do not choose to provide a submission by the above mentioned date, then the Commission will determine the matter in the absence of any submission by the respondent."

This letter was returned to the Commission on 24 Match 2009 marked, "No longer at this address".

7 At hearing Mr Peter Rolliston advised the Commission that the respondent's businesses at Port Kennedy and Wangara had closed. The equipment had gone from the units and he did not know the whereabouts of Mr Keenan. He had made inquiries as to whether the business was in administration or liquidation and it was not.

8 The applicant gave evidence that he got full-time employment on 25 December 2008 on an annual salary of $42,000. He did some work for a week for a family friend and was paid $700. He received no other income since the time of his dismissal until he secured full-time employment. He did attend for interview with Skilled and was looking for labouring jobs. He looked through the internet and newspapers for jobs and made inquiries about a plasterer's apprenticeship. He telephoned also a school which had advertised for ground staff. His wages whilst he worked for the respondent were $20 per hour for an average of 48 hours per week giving a total of $960 gross per week.

9 The applicant says of his dismissal:

> "Yeah, I gave - I filled out all the workers compensation papers at the doctor's office and was given … the papers to Ian, and I never received anything back, so. He also said that I kicked the filing cabinet at the argument that took place in the office. The argument didn't take place at the office at all. I did … he did take me into the office and said that I … he actually told me that I was sick for those two days, so I walked out of the office and mumbled to myself, "This wouldn't happen if it was a bit better organised." Walked out of the workshop. He followed me, he yelled at me, "What did you say?" and I said to him, "This wouldn't happen if you were better organised. You're going to go out of business," and I walked away to continue doing my job, and he told me, "You're fired," so I turned around and told him, "You effing," I just let fly then. I did not kick the filing cabinet. As I remember, the filing cabinet is behind his desk. I don't see why he would put down I kicked it if I had to walk past it then kick it, then walk back out the office. (T5)

10 Mr Rolliston says that he was handed the following pay advice by Mr Keenan's wife about one week after his dismissal (Exhibit A2). The advice states:

> "Please find enclosed details of your final salary including holiday pay, sick pay and superannuation.
>
> | | | |
> |---|---|---|
> | 9.5 hours normal pay @$20.00 | = | $190.00 |
> | 51.53 hours holiday pay @ $20.00 | = | $1030.60 |
> | 1.09 hours sick pay @ $20.00 | = | $21.80 |
> | | | $1242.40 gross |
> | | | - $277.00 tax |
> | Total | | $965.40 |
>
> Superannuation @ 9% = $72.00
>
> This amount will be credited to your bank account on 20th October 2008."

11 The applicant says that he has checked with his superannuation provider and the superannuation has not been paid. Mr Rolliston says that he was required to do work for which he required a gas fitters license. He sought to enrol in TAFE, at his father's expense, to get his qualification but Mr Keenan was not happy about this and refused to sign the papers. Mr Keenan said he would not pass the course. Mr Rolliston says he had to use his own car for work and hardly ever received reimbursement. Mr Rolliston says that he was never spoken to about his work during his employment except for instruction on how to do a job. The applicant says that Mr Keenan "lost his head off at me once before" in relation to a task involving picking up some parts when Mr Keenan changed his mind, but Mr Rolliston was already on his way back to the workshop. Mr Rolliston says that Mr Keenan yelled at him and abused him.

12 I have no difficulty in accepting the evidence of Mr Rolliston. He gave his evidence in a straightforward and honest manner and responded directly to all questions. It is apparent from his evidence that he was dismissed summarily by his employer on 8 October 2008 after he had challenged his employer about unpaid wages and other matters. I accept that following his dismissal

an argument ensued between Mr Rolliston and Mr Keenan during which Mr Rolliston abused Mr Keenan and swore at him. However, there was no apparent reason for the dismissal and no reason was offered then or later. Mr Rolliston's evidence is that he was never counselled or warned about his work, except for one incident when Mr Keenan suffered a change of mind and then abused Mr Rolliston because the matter to do with parts had not worked out satisfactorily. I find that Mr Rolliston was dismissed unfairly and harshly (see *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* 65 WAIG 385).

13 Mr Rolliston does not seek reinstatement and it is not practicable as the Commission is advised that the business has closed. Mr Rolliston has another job which he says, he commenced on 25 December 2008. His salary is $42,200 per annum gross. Mr Rolliston was not paid any notice and received only some back pay, and wages for annual leave and sick leave [Exhibit A2], albeit Mr Rolliston says the superannuation was not paid and some wages are still owed. This application, however, is a claim for unfair dismissal and for compensation arising from that dismissal. It is not a claim for denied contractual benefits arising from the employment relationship.

14 The period from 9 October to 24 December 2008 inclusive is a period of exactly 11 weeks. His income whilst employed by Mr Keenan was $960 gross per week. I find that Mr Rolliston sought to mitigate his loss by the efforts he undertook in search of work following his dismissal. He managed only to earn $700 during this period. I would therefore calculate the compensation as follows: 11 weeks on $960 equals $10,560 less $700 gives a total of $9,860 gross less any taxation payable to the Commissioner for Taxation. This amount should be paid by the respondent to the applicant within 7 days of the order.

2009 WAIRC 00182

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACK ALEXANDER ROLLISTON
	APPLICANT
	-v-
	MR IAN KEENAN OF IAN KEENAN LPG GAS CONVERTERS
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 9 APRIL 2009
FILE NO	U 151 OF 2008
CITATION NO.	2009 WAIRC 00182

Result	Applicant dismissed unfairly; Compensation awarded
Representation	
Applicant	Mr P Rolliston
Respondent	No appearance

Order

HAVING heard Mr P Rolliston on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby:

DECLARES that the applicant, Jack Alexander Rolliston, was harshly and unfairly dismissed by the respondent on the 8th day of October 2008;

DECLARES that reinstatement is impracticable;

ORDERS that the said respondent do hereby pay, as and by way of compensation the amount of $9,860.00 to Jack Alexander Rolliston, less any taxation that may be payable to the Commissioner of Taxation within 7 days from the date of this order.

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

2009 WAIRC 00148

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TANYA LEANNE TRUSCOTT
	APPLICANT
	-v-
	PAUL FIRTH WANNEROO SPORTS AND SOCIAL CLUB
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 30 MARCH 2009
FILE NO	U 24 OF 2009
CITATION NO.	2009 WAIRC 00148

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 19 March 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 00126

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JESSICA WILLET
	APPLICANT
	-v-
	IAN MORGAN OF CAFFISSIOMO
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 18 MARCH 2009
FILE NO/S	B 155 OF 2008
CITATION NO.	2009 WAIRC 00126

Result Withdrawn by leave

Order

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

WHEREAS on 22 December 2008 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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Lee Travis Hayden	Waminda Aboriginal Corporation	U 192/2007	Commissioner J L Harrison	Concluded
Lydia Hayden	Waminda Aboriginal Corporation	U 193/2007	Commissioner J L Harrison	Concluded
Theresa So Man Kwok	The Chung Wah Association Inc.	U 183/2008	Senior Commissioner J H Smith	Discontinued

CONFERENCES—Matters arising out of—

2009 WAIRC 00119

DISPUTE RE CLASSIFICATION OF UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)

APPELLANT

-v-

DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE TUESDAY, 17 MARCH 2009

FILE NO PSAC 41 OF 2007

CITATION NO. 2009 WAIRC 00119

Result Consent order issued

Order

WHEREAS this is an application pursuant to Section 44 of the Industrial Relations Act 1979; and

WHEREAS the Public Service Arbitrator issued an order dated Friday, 5 September 2008 that in part stated that *"Application PSAC 41 of 2007 shall remain open to deal with any dispute arising from the classification determination of the two Senior Cardiac Technician positions at Royal Perth Hospital and Fremantle Hospital"*; and

WHEREAS a further conference was convened by the Public Service Arbitrator on the 4th day of March 2009 for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached agreement on the disputed matters; and

WHEREAS the parties agreed that an order should be issued by the Public Service Arbitrator reflecting that agreement;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act 1979, and by consent, hereby orders that:

1. SENIOR CARDIAC TECHNICIAN, FREMANTLE HOSPITAL & HEALTH SERVICE, POSITION NUMBER 346, LEVEL 5:

1.1 Prior to 8th November 2007 the classification structure at Fremantle Hospital was Cardiac Technician Level 3/4 and Senior Cardiac Technician Level 5;

1.2 In recognition of the work value issues identified in the October 2007 Cardiac Scientific Officer Submission, Cardiac Technicians Level 3/4 became Cardiac Scientific Officer Level 4/6;

1.3 In order to maintain the classification relativity and in recognition of the general work value changes for the profession, Position Number 346 is to be classified Level 7 and retitled Senior Cardiac Scientific Officer, with effect from 8th November 2007;

1.4 In order to clarify the role and responsibilities of this role as they have been with effect from 8th November 2007, the Job Description Form submitted to the South Metropolitan Health Service as part of a reclassification application for this position is agreed to have had effect from 8th November 2007;

1.5 It is noted that structural changes are taking place within Cardiology at Fremantle Hospital and agreement to Level 7 as at 8th November 2007 is without prejudice to any future current date assessment of the classification in light of these changes.

2. SENIOR CARDIAC TECHNICIAN, ROYAL PERTH HOSPITAL, POSITION NUMBER 103388, LEVEL 6

2.1 Prior to the conversion of the Cardiac Technicians Level 3/4 to Cardiac Scientific Officer Level 4/6 the classification of the Senior Cardiac Technician had been determined at Level 6 (a two level classification difference);

2.2 Cardiac Scientific Officers have been accepted as a health profession and must be classified in accordance with the level descriptors arising from P18 of 2003;

2.3 The Senior Cardiac Technician at RPH is responsible for the Cardiac Scientific Officer profession at RPH and satisfies the Level 8 descriptor, ie "Coordination of a professional service within a defined health service";

2.4 Other Supervisor positions within Cardiology at RPH, ie Cardiac Ultrasound and Cardiac Catheter, are classified Level 8;

2.5 In order to maintain classification relativity and in recognition of the general work value changes for the profession Position Number 103388 is to be classified Level 8 and retitled Supervisor Cardiac Scientific Services, with effect from 8th November 2007.

3. The Application be and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, West Australian Branch, Industrial Union of Workers	Department of Health Health Industrial Relations Service	Wood C	C 12/2009	26/03/2009	Dispute re to intention to place supervisor in engineering workshop	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Department of Education and Training	Wood C	C 6/2009	23/02/2009	Dispute re declassification and reduction of hours for a union member	Concluded
The Australian Rail, Tram and Bus Industry Union of Employees West Australian Branch	Public Transport Authority	Smith SC	C 96/2006	27/11/2006 4/09/2007 12/10/2007 29/11/2007 13/08/2008	Dispute regarding rostering issues.	Concluded
The Australian Rail, Tram and Bus Industry Union of Employees Western Australian Branch	Public Transport Authority	Smith SC	C 31/2008	26/08/2008	Dispute re negotiations for an industrial agreement	Concluded
The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Main Roads	Harrison C	C 39/2008	3/12/2008 19/01/2009	Dispute re Application clause 59 - discipline of the Main Roads AWU Enterprise Bargaining Agreement 2007	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Disability Services Commission	Wood C	PSAC 6/2009	N/A	Dispute re suspension of a Union member	Discontinued
The Civil Service Association of Western Australia Incorporated	The Chairman of the Western Australian Sports Centre Trust	Wood C	PSAC 31/2008	N/A	Dispute re employment of union member	Concluded

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Western Australia Police Recruits in Training and Transitional Officers Shift Rostering and Penalties Industrial Agreement 2008 PSAAG 1/2009	(Not applicable)	Commissioner of Police	The Western Australian Police Union of Workers	Commissioner P E Scott	Application dismissed
WA Health - LHMU - Aboriginal and Ethnic Health Workers Industrial Agreement 2009 AG 7/2009	(Not applicable)	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner S Wood	Agreement registered
Public Transport Authority (Transit Officers) Industrial Agreement 2009 AG 9/2009	(Not applicable)	Public Transport Authority of Western Australia AND The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	(Not applicable)	Senior Commissioner J H Smith	Agreement registered
Royal Flying Doctor Service of Australia, RFDS Western Operations Medical Practitioners Industrial Agreement 2008 AG 8/2009	31/03/2009	Australian Medical Association (Western Australia) Incorporated	Royal Flying Doctor Service (Western Operations)	Commissioner P E Scott	Agreement registered
Western Australian Fire Service Enterprise Bargaining Agreement 2008 AG 5/2009	27/03/2009	Fire and Emergency Services Authority of Western Australia AND United Firefighters Union of Australia West Australian Branch	(NOT APPLICABLE)	Commissioner J L Harrison	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2009 WAIRC 00133

APPEAL AGAINST THE DECISION TO DISMISS DUE TO MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOAN LOUD
	APPELLANT
	-v-
	SOUTH METRO AREA HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR D EACOTT - BOARD MEMBER
DATE	TUESDAY, 24 MARCH 2009
FILE NO	PSAB 23 OF 2008
CITATION NO.	2009 WAIRC 00133

Result Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the18th day of February 2009 the Board convened a conference for the purpose of scheduling; and

WHEREAS the appeal was listed for hearing and determination on the 23rd day of March 2009; and

WHEREAS on the 19th day of March 2009 the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

That this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2009 WAIRC 00132

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHAN MARITZ WILLERS AND ORS
	APPLICANTS
	-v-
	WORKCOVER, WESTERN AUSTRALIAN AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 24 MARCH 2009
FILE NO	PSA 24 OF 2007, PSA 25 OF 2007, PSA 26 OF 2007, PSA 27 OF 2007, PSA 28 OF 2007, PSA 29 OF 2007, PSA 30 OF 2007, PSA 31 OF 2007, PSA 32 OF 2007, PSA 33 OF 2007, PSA 34 OF 2007, PSA 43 OF 2007
CITATION NO.	2009 WAIRC 00132

Result Consent Orders issued

Order

WHEREAS this is a reclassification appeal made pursuant to *the Industrial Relations Act* 1979; and

WHEREAS on Monday, the 23 day of March 2009, the applicants sought Consent Orders from the Public Service Arbitrator and the respondent indicated agreement to the terms proposed by the applicants;

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

1. No later than close of business, Thursday, 26 March 2009 the respondent employer provide its completed List of Agreed Facts to the applicants.
2. No later than close of business, Monday, 30 March 2009 the parties file at the Western Australian Industrial Relations Commission a completed List of Agreed Facts.
3. This matter be set down for a report back conference as a matter of urgency as soon as possible after 30 March 2009 in order to discuss and obtain directions for the progression of the applications.

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