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GENERAL ORDERS—

2009 WAIRC 00417

RESCIND GENERAL ORDER NO. 9/08 & ISSUE NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
(COMMISSION'S OWN MOTION)

PARTIES

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

COMMISSION IN COURT SESSION
COMMISSIONER P E SCOTT
COMMISSIONER S WOOD
COMMISSIONER S M MAYMAN

DATE

MONDAY, 29 JUNE 2009

FILE NO.

APPL 24 OF 2009

CITATION NO.

2009 WAIRC 00417

Result

General Order issued

General Order

HAVING heard Ms E Forrest on behalf of the Honourable Minister for Commerce; Mr J Ridley on behalf of the Chamber of Commerce and Industry of Western Australia (Inc); and Mr A Falconer on behalf of the Trades and Labor Council of Western Australia, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

- (1) THAT each award, industrial agreement or order cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award, industrial agreement or order the location allowance provisions in Schedule B of this General Order.
- (2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2009.
- (3) THAT this General Order replace the General Order in Matter No 9 of 2008 which thereby shall be rescinded.

(Sgd.) P.E. SCOTT,
Commissioner,

[L.S.]

For and On behalf of the Commission In Court Session.

SCHEDULE A

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SCHEDULE B

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

TOWN	PER WEEK
Agnew	\$18.90
Argyle	\$50.10
Balladonia	\$19.20
Barrow Island	\$32.60
Boulder	\$7.90
Broome	\$30.30
Bullfinch	\$8.90
Carnarvon	\$15.50

TOWN— <i>continued</i>	PER WEEK
Cockatoo Island	\$33.20
Coolgardie	\$7.90
Cue	\$19.40
Dampier	\$26.30
Denham	\$15.50
Derby	\$31.50
Esperance	\$5.60
Eucla	\$21.20
Exmouth	\$27.50
Fitzroy Crossing	\$38.20
Goldsworthy	\$16.50
Halls Creek	\$43.90
Kalbarri	\$6.60
Kalgoorlie	\$7.90
Kambalda	\$7.90
Karratha	\$31.50
Koolan Island	\$33.20
Koolyanobbing	\$8.90
Kununurra	\$50.10
Laverton	\$19.30
Learmonth	\$27.50
Leinster	\$18.90
Leonora	\$19.30
Madura	\$20.20
Marble Bar	\$48.30
Meekatharra	\$16.70
Mount Magnet	\$20.80
Mundrabilla	\$20.70
Newman	\$18.10
Norseman	\$16.50
Nullagine	\$48.20
Onslow	\$32.60
Pannawonica	\$24.60
Paraburdoo	\$24.40
Port Hedland	\$26.20
Ravensthorpe	\$10.00
Roebourne	\$36.20
Sandstone	\$18.90
Shark Bay	\$15.50
Shay Gap	\$16.50
Southern Cross	\$8.90
Telfer	\$44.50
Teutonic Bore	\$18.90
Tom Price	\$24.40
Whim Creek	\$31.20
Wickham	\$30.20
Wiluna	\$19.20
Wittenoom	\$42.70
Wyndham	\$47.00

- (2) Except as provided in subclause (3) of this clause, an employee who has:
- (a) a dependent shall be paid double the allowance prescribed in subclause (1) of this clause;
 - (b) a partial dependent shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.

- (3) Where an employee:
- (a) is provided with board and lodging by his/her employer, free of charge; or
 - (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;
- such employee shall be paid $66\frac{2}{3}$ per cent of the allowances prescribed in subclause (1) of this clause.
- The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.
- (4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
- (5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.
- (6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.
- (7) For the purposes of this clause:
- (a) "Dependant" shall mean -
 - (i) a spouse or defacto spouse; or
 - (ii) a child where there is no spouse or defacto spouse;
 who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.
 - (b) "Partial Dependant" shall mean a "dependent" as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.
- (9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

2009 WAIRC 00375

2009 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH SENIOR COMMISSIONER J H SMITH COMMISSIONER P E SCOTT COMMISSIONER S J KENNER COMMISSIONER S M MAYMAN
HEARD	TUESDAY, 19 MAY 2009, WEDNESDAY, 20 MAY 2009
DELIVERED	THURSDAY, 11 JUNE 2009
FILE NO.	APPL 1 OF 2009
CITATION NO.	2009 WAIRC 00375

CatchWords	State Wage order – Commission's own motion – Minimum wage for employees under Minimum Conditions of Employment Act 1993 – Award rates of wage – Award minimum wage – State wage principles – Industrial Relations Act 1979 s 50A
Result	State Wage order issued
Representation	Mr A Lyon and with him Ms J Gardner, for the Minister for Commerce Mr J Ridley, for the Chamber of Commerce and Industry of WA, Inc. Mr D Ellis, of counsel, for the Trades and Labor Council of WA

Reasons for Decision

- 1 This is the unanimous decision of the Commission in Court Session. The Commission is required by s 50A of the *Industrial Relations Act 1979* ("the Act") before July in each year to make a General Order (the State Wage order) setting the minimum wage applicable under s 12 of the *Minimum Conditions of Employment Act 1993* ("MCE Act") to employees who have reached 21 years of age, and to apprentices and trainees. The Commission is also to adjust rates of wages paid under State awards.
- 2 The Commission placed advertisements in two local newspapers on 21, 25 and 26 March 2009 calling for public submissions. The advertisement was also published on the Commission's website and in the WA Industrial Gazette.
- 3 Written submissions were received from the Western Australian Council of Social Services Inc, the Employment Law Centre of WA (Inc), the Australian Retailers Association and the Australian Hotels Association Western Australia. The Commission sat and heard oral submissions and evidence on 19 and 20 May 2009 from the Hon Minister for Commerce, the Chamber of Commerce and Industry of Western Australia (Inc) and the Trades and Labor Council of Western Australia. Copies of all submissions were placed on the Commission's website and the proceedings were webcast.

SUMMARY OF POSITIONS

Western Australian Council of Social Services

- 4 The Western Australian Council of Social Services Inc ("WACOSS") submitted that it is the peak body of the community services sector in WA and noted that many organisations in the community services sector are incorporated entities without significant or substantial trading or financial activities. These bodies are therefore subject to the Commission's jurisdiction. WACOSS stated that it has an interest in ensuring that wages for employees in this sector keep pace with the cost of living and with community standards. WACOSS also has an interest in ensuring that wages for the sector's clients, many of whom live on low incomes, are adequate.
- 5 It seeks to make explicit the link between minimum wages and the community services sector, along with the impact the global economic downturn is having on minimum wage earners in WA. While WACOSS does not dispute the seriousness of the prospect of rising unemployment, WACOSS cannot support the notion that the most vulnerable members of the community should see their living standards eroded by a failure to deliver a sufficient wage increase. It advocates for an increase equal to the movement of the Wage Price Index ("WPI"), being 5.7% in WA over the year till December 2008. This represents an increase of \$31.77 per week. In the absence of a wide ranging review of the basis for minimum wage setting, WACOSS advocates an increase to the minimum wage which will ensure that low income earners are able to maintain their real standard of living over time and that low income earners keep pace with community standards. It pointed out the minimum wage in WA has not kept pace with increases with average earnings.
- 6 WACOSS submitted that WA has the largest gender pay gap of any State in Australia and larger than the national average. The gender pay gap in WA is 27.4% which means that on average, for every dollar earned by a full-time male employee a full-time female employee earns only 72.6 cents.
- 7 WACOSS submitted that it is vital that minimum wages keep pace with the cost of living and community standards in order to avert severe financial hardship for low income employees. WACOSS referred to housing repossessions and difficulties arising from increasing financial stress.

Employment Law Centre

- 8 The Employment Law Centre of WA ("ELC") is a not-for-profit community legal centre which specialises in employment law. It is the only free employment law service in WA offering employment legal advice, assistance and representation. Each year, ELC provides advice and assistance to approximately 4,000 non-unionised employees, many of whom are reliant upon the minimum wage and are described as vulnerable.
- 9 The ELC referred to the economic situation but states that during times of economic uncertainty and rising unemployment, employees become increasingly vulnerable in the workplace as competition for jobs heightens. It submitted that low paid workers may find it difficult to negotiate better conditions and wages; without an appropriate minimum wage employees may be forced to work for lower wages or risk losing their jobs. The minimum wage provides a safety net. The ELC referred to the Consumer Price Index ("CPI") increasing by 3.7% in the 12 months to December 2008 which should be matched by appropriate increases in the minimum wage. The ELC submission included reference to the Henderson poverty line, the disproportionate numbers of casual and part-time workers in the low paid category, and urged the Commission to have special regard to the increase in numbers of these workers reliant on the minimum wage.

Australian Retailers Association

- 10 The Australian Retailers Association ("ARA") presented a written submission in support of its strong recommendation to the Commission that there should be no increase in the minimum wage for 2009. In a comprehensive submission, the ARA suggested that the decision would be "a landmark decision to reflect the unique times the great majority of Australian employers and employees are now experiencing - one with low interest rates, low commodity prices, low consumer confidence, low inflationary forecasts, low GDP growth, growing unemployment levels and significant cash injection via the Commonwealth Government's economic stimulus packages and tax rate changes".
- 11 The ARA believed this would encourage the private sector with an incentive to retain its low skilled workforce at a time of economic stress. In the alternative, the ARA strongly supported deferring the making of a decision until such time as economic and consumer data has stabilised to demonstrate an unequivocal outlook of economic conditions. It pointed out that the decision of the Commission must be taken in light of the most current data and yet that data is changing by the week. It stated that at the time of making the submission, retail sales data is all but indicating a decline in consumer spending and consumer confidence. The ARA referred to the "ARA Australian Retailers Index" based on its most recent survey in March 2009 to submit that Australian retailers recorded deteriorating business confidence in the past quarter, with confidence falling to the lowest level of any industry sector. This was largely related to the current economic downturn. There was relatively stable and improved performance in sales and profitability. The ARA submitted that small retailers would not cope with increased labour costs whether it be due to compliance measures associated with new industrial relations legislation, modern retail awards or an increase in minimum wage rates that flow through to their relevant retail-based pay scales.
- 12 The ARA submitted that the WA has the second highest retail labour force in Australia and that therefore the viability of the retail sector at large has a profound impact on any State employment growth. It submitted that in 2006-07, 14% of workers were employed in the retail trade. Of the employees in WA's retail industry, 55% are female. The majority of workers in the retail industry are aged between 15-24 years (40%) and between 25-44 years (34%). There were almost as many part-time workers in WA's retail trade as there are full-time workers. The ARA's submission noted that over the 10 years to the September quarter 2008, average wages in Accommodation, Cafes and Restaurants and Retail Trade have grown more slowly than the average across all industries. The submission noted that average weekly retail industry earnings between 2004-05 and 2006-07 were higher nationally than in WA. The national average increase over that period was from \$732 to \$812; in WA the corresponding movement was from \$715 to \$769.
- 13 The ARA is a member of the Australian Chamber of Commerce and Industry and supports the submission put by the Chamber of Commerce and Industry of Western Australia (Inc) in these proceedings. It states that it represents the industry which is the most heavily reliant upon Australian Pay and Classification Scales. The ARA asked the Commission to consider whether it is feasible for a mostly unskilled sector such as retail to have minimum rates of pay higher than the State minimum wage. The ARA's members prefer to use the minimum wage as a baseline and let market forces and productivity determine wages above the minimum. The ARA included a submission regarding changes toward the total deregulation of trading hours and its possible effects.

Australian Hotels Association Western Australia

- 14 The Australian Hotels Association Western Australia ("AHA") submitted that it represents over 700 licensees in WA including hotel, tavern, restaurant and special facility licenses. It pointed out that the industry provides over 45,000 jobs, generates \$2 billion for the State economy, pays over \$200 million in taxes and contributes over \$20 million a year to charities and community groups. The AHA submitted that is likely that WA will see the worst of the financial crisis in 2010. The AHA believes that the anticipated increase in unemployment to above 7% and changes to household saving levels will reduce the level of discretionary spending in the economy and hence the aggregate demand for the products and services provided by AHA member businesses. The AHA submitted that real income for low paid workers has been significantly increased due to reductions in interest rates, lower petrol prices, tax changes and the benefits of government economic stimulus packages. It stated that the \$900.00 payment in the second stimulus package is equivalent to about a 3% wage increase for average workers in the industry sector represented by the AHA.
- 15 AHA member feedback has shown that cost increases in this sector have been incurred for a number of reasons. The accommodation sector has had to introduce cost-cutting initiatives to lower room rates in order to attract corporate clients seeking to reduce costs in the current economic climate; the introduction of smoking laws has seen a drop in revenue of between 5% and 30%; there has been a lack of investment in new hotels because of Australia's comparatively high wage levels and low room rates; current levels of hotel occupancy are unlikely to be maintained by 2010 if an additional 1,000 rooms are not able to be provided; many AHA members have lost overnight stays in accommodation as people travel less by car because of cheaper airflights; and cost increases in the hotel supply chain through unaffordable wage increases will not be able to be absorbed in margins.
- 16 Amongst the feedback it has received from its members regarding changes in employment likely to occur over the next 12 months are diminishing employment numbers, salaried staff wages not being increased, and endeavouring to avoid making employees redundant by encouraging the taking of leave and reclassifying employees. The AHA accordingly requests the Commission to decide that it is not appropriate to increase the minimum wage levels this year. The AHA provided a copy of the Accommodation, Cafes and Restaurants Industry Profile which is a research report of the Australian Fair Pay Commission ("AFPC") and drew the Commission's attention to a number of issues raised within it.

The Hon Minister for Commerce

- 17 The submission of the Hon Minister for Commerce ("the Minister") is that the WA Government is strongly committed to flexible, balanced and productive workplaces. This includes a focus on delivering an equitable labour relations system that meets the needs of all employers and employees, while contributing to improvements in productivity, competitiveness and

broader economic performance. The Minister submitted that there should be a flat dollar adjustment to the State adult minimum wage and adult award wage rates based upon the 2008-09 estimated CPI for Perth as published in the 2009-10 State Budget. The Minister submitted that this adjustment would be a responsible and sustainable outcome in the context of the parameters the Commission is required to take into consideration under s 50A of the Act, the current economic climate, the capacity of WA businesses as a whole to afford an adjustment in meeting the needs of the low paid who are subject to the State industrial relations system. The Minister submitted that the appropriate increase is \$19.50 based upon the annual average movement in the CPI for Perth of 3.5%.

- 18 The Minister submitted that for WA's lowest paid employees, the State minimum wage is an important mechanism for providing a reasonable standard of living in the context of living standards generally.
- 19 The Minister submitted that minimum wages have declined relative to average earnings over the past decade in both nominal and real terms. The Minister submitted that the average weekly ordinary time earnings movement over that time was 27.8% whilst over the same period the State minimum wage increased by only 8.1% in real terms. Although the minimum wage in WA has increased by \$184.00 per week over the past decade, the majority of this increase has been accounted for by inflation. In the past year, low paid employees have faced ongoing financial pressure as a result of general inflation, higher housing costs and increases in the cost of essential items. The increase in the Perth CPI of 2.2% to the year to March 2009 is now below the national weighted average of 2.5%.
- 20 The Minister submitted that there have been significant increases in the costs of essential items such as food, housing, health and education. Housing costs of low income households represent a greater proportion of their gross weekly income than other households. Although the housing market appears to have stabilised, housing affordability remains at record lows. The Minister submitted that the proposed increase in line with the Perth CPI movement would maintain the value of the minimum wage and that in the light of current economic conditions such an increase is both affordable and fair.
- 21 The Minister submitted that the decline in recent years in the number of enterprise bargaining agreements registered by the Commission is not linked to minimum wage increases but is due to the introduction of the previous Commonwealth Government's Work Choices legislation, which prevents employers who are constitutional corporations from entering into State industrial agreements. There is thus no evidence to suggest that previous increases to the minimum wage and award wage rates have provided a disincentive to enterprise bargaining.
- 22 The Minister submitted that overall there has been a 10.1% increase in the uptake of apprenticeships in WA between March 2004 and February 2009. The number of apprenticeships commenced between March 2008 and February 2009 has declined by 1,889 from the previous 12 months but it is not clear what is responsible for this reduction as there are many factors that may influence the short term uptake of apprenticeships. The number of traineeships between March 2004 and February 2009 has increased by 20.2%. Previous minimum wage increases for apprentices and trainees ordered by the Commission have not discouraged their uptake in WA.
- 23 In relation to the gender pay gap, the Minister submitted that it is likely that minimum wage rates have kept the gender pay gap relatively stable nationally over the past decade. It notes the WA gender pay gap as currently 27.4%; it is the largest of any State and significantly higher than the national average of 17%.
- 24 The Minister submitted that the Commission should look to maintaining the real value of the minimum wage in the 2009-10 financial year. The current threats to the WA economic outlook make the CPI the most relevant benchmark for minimum wage adjustments in 2009.

Evidence from the Department of Treasury and Finance

- 25 In support of his submission, the Minister called evidence from Nicola Cusworth who is the Director, Macro-Economic Policy within the Department of Treasury and Finance. A primary role of the Department of Treasury and Finance is the compilation of economic analysis and forecasts as well as provision of advice on economic matters for the WA Government. Ms Cusworth traversed the global economic position, the national economy and presented a comprehensive overview of the economic outlook for the State.
- 26 Ms Cusworth described the global economy as probably in its worst economic downturn since the Second World War. She indicated that the global economy will contract in 2009 for the first time since the Great Depression and that the prospects are for a weak recovery in 2010. In relation to the State, she noted that the commodity boom was well and truly over. Nevertheless, the business investment cycle is still increasing because of decisions made one to three years ago. However, there is a lot less work coming through to replace the projects currently underway. Ms Cusworth stated that there were indicators showing different economic trends. The retail sector in particular was very volatile. Although employment showed a strong growth to October, employment growth was tailing off. Considerable uncertainty applied to a number of economic statistics. Ms Cusworth indicated she had never seen such a quick and simultaneous deterioration in economic activity in so many markets around the world. She believed that we are in a period of very substantial uncertainty where a "wait and see" approach was warranted. We will refer in further detail to Ms Cusworth's evidence as it bears upon the decision we have reached.

Chamber of Commerce and Industry of Western Australia (Inc)

- 27 The Chamber of Commerce and Industry of Western Australia (Inc) ("CCIWA") informed the Commission that it is the second largest organisation of its kind in Australia with a membership of over 5,500 organisations in all sectors. Most members are a private business and employ a significant number of employees. Nearly 73% of CCIWA's members employ up to 19 employees. They are located in all geographical regions of WA and approximately 30% are described as being in industries or sectors which are likely to be covered by the State's industrial relations system, including accommodation, cafes and restaurants, health and community services, property services and retail industries. CCIWA is also the direct employer of about 900 apprentices across WA as part of a Group Training Scheme.

- 28 CCIWA requested the Commission not to increase the minimum wage and the award rates of pay because of the rapidly deteriorating economic outlook domestically and internationally as a consequence of the global financial crisis. CCIWA submitted that all sectors of the economy have been affected and it no longer appears sustainable to conclude that minimum wages should increase in each calendar year across all phases of the economic cycle or that increases exceed inflation. It submitted the general uncertainty means the consideration and determination of minimum wage adjustments is made more difficult and forecasting the effects of any decision is more uncertain. CCIWA's approach is therefore one of caution where the paramount concern is to support business to retain and create jobs. The CCIWA supported its submission with a number of documents relating to the State's economy and business surveys. CCIWA referred significantly to the Commonwealth Government stimulus packages which provide a significant boost to low paid workers and submitted that the Commission should take all such relevant Commonwealth and State Government initiatives into account in assessing fair wage standards, living standards and meeting the needs of the low paid.
- 29 CCIWA did not dispute the evidence given to the Commission from the Department of Treasury and Finance regarding the State's economy. CCIWA submitted that labour market conditions across Australia are expected to deteriorate considerably in the near term in line with the slowdown in economic activity. Employment is expected to contract through 2009 and remain weak in 2010. Therefore, in a no or negligible growth scenario, any increase in minimum wages has the potential to increase unemployment. CCIWA quoted from the AFPC 2008 decision regarding the relationship between employment and minimum wages continuing to be contentious.
- 30 CCIWA has revised down its growth forecasts to the WA economy for the next two financial years. The WA economy is expected to grow by just 2% in 2008-09 before contracting by 1% in 2009-10 as the full impact of the global financial crisis is felt locally. CCIWA expects consumer price growth to slow to 3% in 2008-09 and 1¾% in 2009-10.
- 31 CCIWA submitted that employment and other economic indicators are lagging behind the extent of the downturn at present. Varying growth rates across the country have meant that some sectors have been struggling to keep up with the rapid growth in wages that has occurred. Wages growth has been the weakest amongst the services sectors that are not directly benefiting from the resources boom, in particular the retail sector which has had an annual Wage Price Index ("WPI") growth averaging 3.2%.
- 32 CCIWA sees some benefit in enterprise bargaining becoming more focused on achieving efficiencies and flexibilities to ensure sustainable business operations and to stem job losses. A decision about minimum award adjustments should consider the potential implications for enterprise bargaining.
- 33 CCIWA submitted that increasing minimum wages in the current environment will increase business costs at a time when they can least afford it and could lead to further job losses. Businesses paying minimum wages, which are mostly small to medium enterprises, are already experiencing financial difficulties and are having considerable difficulty retaining staff and maintaining former levels of employment. CCIWA's primary position is that there should not be any increase in minimum wages this year due to the lack of clarity on the extent, impact and duration of the global financial crisis and its implications for WA and Australia, together with the significant Commonwealth Government initiatives. If, however, the Commission determines there should be an increase, CCIWA submitted that any such increase should not take effect prior to 1 January 2010. We will refer further to the submission and supporting documentation of the CCIWA where appropriate in the course of these reasons.

Trades and Labor Council of Western Australia

- 34 The Trades and Labor Council of Western Australia ("TLCWA") submitted that an increase to the statutory minimum wage and an increase to award wages equivalent to the movement of the WPI in WA is moderate, sustainable and warranted on economic, industrial and equity criteria. The TLCWA notes that the WPI increased by 5.7% through the year to the 2008 December quarter equating to a flat increase of \$31.77 on the minimum wage. The TLCWA stated that it reserved the right to amend the amount it seeks in accordance with March quarter WPI figures due to be released on 20 May 2009.
- 35 The TLCWA submitted that, despite the global financial crisis, WA's economic performance continues to be strong. At present, unemployment is low, labour participation rates are high, jobs growth continues to be strong and infrastructure investment remains high. It submitted in support a copy of the ACTU's submission to the AFPC in March 2009. It also supported the WACOSS submission.
- 36 TLCWA submitted that despite the economic downturn, real wages in WA are growing and the increase sought by the TLCWA would ensure award wage and minimum wage earners do not fall further behind the rest of the workforce. The TLCWA referred to other factors, including movements in the CPI, households generally considered to be experiencing housing stress and matters going to the need to contribute to improving living standards. The TLCWA referred to the minimum wage in other States and submitted that the Commission should increase the minimum wage by 5.7%.

CONSIDERATION

- 37 In the 2008 State Wage order decision we stated that it was open to conclude on the then available ABS data that approximately 30% of the State's workforce are within the State jurisdiction ((2008) 88 WAIG 773 at [23]). We consider this conclusion remains valid. We also agree with the Minister's conclusion that the State Wage order directly affects approximately 2.2% of WA employees with a further 1.8% indirectly affected.
- 38 The requirement on the Commission to make a State Wage order before 1 July in each year is contained in s 50A of the Act. The considerations set out particularly in s 50A(3) underpin the approach the Commission is obliged to take. Section 50A of the Act was inserted in 2006 (*Labour Relations Legislation Amendment Act No. 36 of 2006 s 14*). In the three State Wage order decisions which this Commission has issued since that time, the Commission has consistently had regard to the state of the WA economy. We said in our 2006 decision ((2006) 86 WAIG 1633) that, in principle, the real value of the minimum wage should be maintained if the economic circumstances of the State permit it. On that occasion, the Commission considered a report prepared for it by Professor David Plowman of the Graduate School of Management, University of Western Australia

regarding the economic effects of past increases to the WA minimum wage. Professor Plowman's report concluded that the State's economic growth moderates, perhaps to a considerable extent, any minimum wage effects. We consider that conclusion, with respect, to have been confirmed by the evidence before us on this occasion.

- 39 In the last three State Wage order decisions, the buoyant state of WA's economy has allowed the Commission to not only maintain the real value of the minimum wage by reference to the CPI movement for Perth to the March quarter prior to the relevant State Wage proceedings, it has also allowed the Commission to grant an increase beyond the amount necessary to merely maintain the value of the minimum wage. In 2008, an amount of \$22.70 would have been required to maintain the level of the minimum wage by reference to the 4.3% increase to the Perth CPI for the year to the March quarter 2008; the \$29.00 increase to the minimum wage awarded by the Commission was an additional amount of \$6.30. This built upon the real increase given to the minimum wage by our 2007 decision. On that occasion, an amount of \$17.65 would have been required to maintain the level of the minimum wage by reference to the 3.5% increase to the Perth CPI for the year to the March quarter 2007; the Commission's increase of \$24.00 represented a real increase to the minimum wage on that occasion of \$6.35. There is no evidence, or submission, that the increases to the minimum wage we have ordered have had any negative consequences on the WA economy or on the level of employment, inflation or productivity in WA. We conclude that to a significant extent this has been due to the buoyant state of the WA economy up to this point.
- 40 Section 50A speaks of the need to ensure that Western Australians have a system of fair wages and conditions of employment, to meet the needs of the low paid and to provide fair wage standards in the context of living standards generally prevailing in the community, as well as the need to contribute to improved living standards for employees. We have met these considerations by maintaining the value of the minimum wage by reference to movements in prices as measured by the CPI, as well as taking into consideration the movements of wages in the community generally. We take these considerations into account on this occasion also. We are also obliged by s 50A(3)(b) and (c) to have regard to the state of WA's economy and to the extent that it is relevant, the state of the national economy in the context of the need to ensure that the WA award framework represents a system of fair wages and conditions of employment.
- 41 The evidence and the supporting material before the Commission, particularly from the Department of Treasury and Finance, but not solely from that source, shows a vastly different economic environment on this occasion from the economic environment on the last three occasions. This is shown too by the supporting material from the CCIWA and from the submissions of the ARA and the AHA. Some indicators show the State to be in a healthy position. WA's Real Gross State Product increased by 5.2% which is higher than the national growth of 3.7%. Real Gross State Income growth over 2007-08 was the fastest of the States at 12%. Perth's CPI for the year to the March quarter was 2.2%. Inflation peaked in September 2008 and is expected to decline markedly over 2009. The WPI for Perth in the year to December 2008 at 5.7% was the fastest growth of the States although the WPI in the retail trade grew by less than the long-run average growth rate.
- 42 However, labour market conditions have started to deteriorate from late 2008. Weakening domestic demand is likely to result in slower wages growth in the next two years. Demand for labour has softened and this is expected to continue in the medium term. Some businesses have implemented hiring freezes and redundancies. The number of short term unemployed has risen sharply. The State's unemployment rate reached 4.9% in March 2009 which is its highest rate since September 2004. Although falls in global commodity prices have been partly offset by the decrease in the Australian dollar since mid-2008, now the dollar has started to pick up while commodity prices continue to decline.
- 43 The level of business investment is likely to remain high for the rest of 2008-09 providing a short-term buffer to the weakening in other sectors, however investment is likely to fall once current projects are completed. The State's labour participation rate is expected to drop from its record high as the labour market deteriorates. The annual average growth rate of the CPI for Perth is expected to soften to 3.5% for the 2008-09 financial year.
- 44 The evidence before us makes it clear that the State's economy, and the national economy, has been significantly affected by what Ms Cusworth has described as probably the worst economic downturn in the global economy since the Second World War. The national economy contracted by 0.5% in the December quarter of 2008. The forecast in WA is for two consecutive years of negative economic growth. WA's economy is in a process of transition from the boom that peaked in 2007-08 to much weaker economic conditions expected in 2009-10. We accept the evidence before us that the effects of the economic boom have somewhat delayed the onset of any downturn in WA's economy so that while at present it is somewhat healthier than the forecasts for the national economy, the outlook for the State's economy for 2009-10 is most uncertain.
- 45 We turn to consider the position in other States following the consideration in 2008 by their industrial tribunals of the minimum wage. These are set out in Table Eleven extracted from the Minister's submission:

Table Eleven
Current Minimum Wage Rates in Each State Jurisdiction⁴⁷

Jurisdiction	State minimum wage	Effective date
New South Wales	\$552.70	27 June 2008
Western Australia	\$557.40	1 July 2008
Tasmania	\$546.10	18 July 2008
South Australia	\$546.65	20 August 2008
Queensland	\$552.00	1 September 2008

- 46 We observe that WA's minimum wage is the highest of any of the States with a difference of \$11.30 between the highest and the lowest minimum wage. No person appearing regarded the difference as significant and we are asked to give it little weight

as an issue when setting the minimum wage in WA. We accept that these differences have occurred because of the differing legislative criteria which each court or tribunal is required to observe, and the differing economic circumstances experienced by each State. WA's minimum wage is also approximately \$13.60 per week higher than the minimum wage payable under the *Workplace Relations Act 1996* (Cth); this too was not seen by any person appearing before us as a matter of significance. We do not attach great weight to these differences in this decision; however we consider these differences may have greater significance in the future as a result of changes to the setting of the Commonwealth minimum wage which are to occur once the *Fair Work Act 2009* (Cth) commences operation on 1 July 2009.

- 47 We take into account the Commonwealth Government's fiscal stimulus packages. The packages themselves are a matter of record. Their significance for these proceedings lies in the fact of them having occurred. They are unprecedented in recent times and thus underline the seriousness of the economic situation facing the nation and therefore this State. We note that they have stimulated consumer spending in December 2008 and January 2009. We have found helpful the quantification of the stimulus packages into weekly or fortnightly dollar terms, especially by the ARA in its table at page 9 of its written submission to us. We observe that these payments are "one-off" in nature and are not designed as a substitute for increases to wages which otherwise might be expected to occur.
- 48 We also regard as relevant the WA Government's recent budget measures designed to give payroll tax relief to small and medium enterprises. These are likely to comprise the majority of unincorporated private sector businesses affected by the WA minimum wage and such relief may assist businesses to retain employment.
- 49 In the current period of uncertainty, we consider that the submissions of CCIWA, supported as they are by the ARA and AHA, that businesses are becoming increasingly pessimistic are to be given some weight. We take note of evidence supporting the submissions from the March quarter 2009 Commonwealth Bank - CCI Survey of WA Business Expectations, and the other documentation of broader scope which accompanied CCIWA's submission. There is support for these submissions in the Minister's submission (Addendum A at page 26) that in recent quarters, business confidence has dropped to its second consecutive record low, that demand for labour has softened and this is expected to continue into the medium term. The ARA points to the deterioration in business confidence for the last quarter being felt particularly in retailing. The AHA points to wages growth being weakest in the services sector. We consider that this shows a lessening in the capacity of employers as a whole who are affected by the WA minimum wage to bear the costs of increased wages, salaries, allowances and other remuneration.
- 50 That does not mean that we accept the submission that there should be no increase to the minimum wage on this occasion. We reiterate our conclusion based upon the Plowman Report that the effect of minimum wage increases upon the level of employment is not certain. The submissions of the Minister on this issue, taken together with those of CCIWA, lead us to conclude that much depends upon the state of the economy overall. Awarding no increase in the WA minimum wage on this occasion will reduce its real value. However, consumer prices in Perth have increased by 2.2% over the last 12 months and are forecast to increase by 3.5% in the current financial year; wages growth measured by the WPI is forecast to grow by 3% over the same period and the minimum wage has declined relative to average earnings over the past decade. We consider it to be inconsistent with the Commonwealth's fiscal stimulus payments stimulating consumer spending to reduce the value of the minimum wage by awarding no increase at all. The minimum wage is an important part of the social safety net and we consider that the requirements upon us in s 50A(3)(a)(ii) and (iii) in particular, to ensure that Western Australians have a fair system of wages which meets the needs of the low paid and provides fair wage standards in the context of living standards generally prevailing in the community, argue against no increase being ordered at all. We take into consideration in accordance with 50A(3)(a)(vii) of the Act the need to provide equal remuneration for men and women for work of equal or comparable value. We have already noted that the current gender gap between men and women's wages in Western Australia remains the largest of any State in Australia. We are of the view that not to increase the minimum wage in 2009 may have a detrimental impact on those women employees in WA who are reliant on the minimum wage.
- 51 We also contrast the current economic crisis with the circumstances of the economic crisis in 1982-83 to which CCIWA referred us. The record shows that on that occasion the Commonwealth and State Governments held that a "wages freeze" was necessary on economic grounds (see (1983) 63 WAIG 257) and in WA, the Parliament enacted the *Salaries and Wages Freeze Act, 1982*. That is not the case on this occasion: there has not been a call from Commonwealth and State Governments generally for a wages freeze. In fact the State Government on this occasion said that an increase to the minimum wage and to award wages based on the movement in the CPI would be a responsible and sustainable outcome in the context of the current economic climate and the capacity of WA businesses as a whole to afford an increase. We also note that notwithstanding the adoption of a policy of wages restraint in January 1983, the WA minimum wage was increased in February 1983 by reference to the movement in the CPI to the September quarter 1982: (1983) 63 WAIG 379, and that the duration of the period of restraint in WA was of only 6 months (see (1983) 63 WAIG 2207).
- 52 Nevertheless, we do accept that in the current environment, there are employers whose cost structures make them vulnerable to wage increases in the sense submitted to us by CCIWA. We have concluded in recognition of this that the one-off effects of the Commonwealth's fiscal stimulus payments paid to, amongst others, low-paid employees, together with the large increase awarded by us in July 2008 do support the present minimum wage continuing past 30 June 2009 for a further 3 months. We consider the 3 month period appropriate given that it is broadly within the time frame during which the other States', and the Commonwealth's, minimum wages are themselves determined. This will not for that period of time increase the cost structure of employers with staff who are paid the minimum wage and will give a longer period of notice to both them and their employees of the minimum wage we intend to set; and it will not postpone the increase significantly beyond the dates at which other minimum wage earners in Australia have usually had their own wages determined.
- 53 As to the increase to be awarded after that time, we have considered the approach of the TLCWA relying as it does upon movements in the WPI. We have given weight to that index in previous decisions because it assists in assessing the minimum wage, and award wages, relative to wage movements generally. We have also considered the issues raised by WACOSS and,

on this occasion, the ELC, particularly in their references to the needs of the low paid including by reference to the Henderson poverty line and their reference to the WPI representing the best measure of community standards of income because it is not subject to variations in the same way as are average weekly earnings figures.

54 In our 2008 decision, when we increased the minimum wage by \$29.00 per week, the largest single increase awarded by the Commission, we stated that although the increase was sustainable on that occasion because of the State's then present and forecast economic performance:

... as the rate of growth in the State's economy begins to slow there may be limited opportunity in the future to not only maintain the real value of the minimum wage but also to provide a real wage increase. ((2008) 88 WAIG 773 at [42]).

55 The vastly different economic evidence before us on this occasion shows that the rate of growth in the State's economy has indeed slowed. We do not consider an increase as proposed by the TLCWA is sustainable having regard to the state of the economy of WA and the capacity of employers as a whole to bear the costs of the increase, particularly employers as a whole who are affected by the WA minimum wage.

56 The Minister has urged upon us an increase to the minimum wage of \$19.50. We understand the basis for the increase advanced by the Minister. Annual average growth is used by the Department of Treasury and Finance in all of its published forecasts of economic indicators to match the budget fiscal analysis which is presented for full financial years. Since the inclusion of s 50A in the Act, evidence provided by successive Ministers relating to the Western Australian economy has consistently relied on annual average measures for most indicators. We consider the use of annual average measures quite appropriate for those purposes and it is also quite appropriate on a future occasion, as it was on this occasion, for the Commission to continue to be informed by the Minister of the movement of economic indicators on an annual average basis given its use by the Department of Treasury and Finance in all of its published forecasts.

57 In considering the Minister's submission, we note that whilst the increase proposed by the Minister is more modest than the \$29.00 increase proposed in 2008, the evidence before the Commission from the Department of Treasury and Finance shows that it is not possible to determine the cost and employment effects of the proposed increase (Addendum A at page 26). Given that the outlook for the State's economy in 2009-10 is most uncertain, it is fair to say that there may well be some measurable effect from the increase proposed by the Minister. On all of the evidence before us, we have reservations about increasing the minimum wage by an amount which is almost the same in dollar terms as the \$20.00 per week awarded by us in 2006 on the basis that the outlook then for the State's economy was strong.

58 An increase of \$12.30 per week will adjust the minimum wage for cost of living changes as measured by the 2.2% growth in the Perth CPI for the year to the March quarter 2009 and thus will maintain its real value by reference to that measure. The record will show that although we consider a wide range of economic indicators in our State Wage order decisions, we have consistently referred to the CPI movement for the year to the March quarter preceding the hearing. We do not wish to be thought of as stating that this is a better measure of the CPI than the annual average method; we suspect that each measure has its strengths and weaknesses. As Chart One of the Minister's supplementary submission shows, on some occasions the annual average growth of the CPI shows a higher measure at a given point in time than the corresponding year-end growth, and on other occasions the opposite is the case. We would not wish to be seen to give weight in one year to a particular CPI measure and to give weight in another year to the alternate CPI measure. We are aware that the annual average method has the disadvantage of being slow to reflect significant change in the CPI; conversely the year-end method may be considered a more volatile method. We agree with the Minister that over the longer term these differences average out, and growth measured by both inflation measures is similar. We do see some value in the Commission being consistent in its decision-making, and for the present in our own decision-making under s 50A as it is currently worded, we propose to give weight to the measure of the CPI over the year to the March quarter of the relevant year.

59 We are confident that increasing the minimum wage by \$12.30 will maintain WA's system of fair wages and conditions of employment, and in doing so meet the needs of the low paid. To the extent that the past increases we have given are thus maintained in their value, the minimum wage to be set should also, to the extent possible in the current adverse State and national economic environments, protect employees who may be unable to reach an industrial agreement, encourage ongoing skills development. We consider this increase is more likely to be within the capacity to pay of employers as a whole.

CONCLUSION

60 We have therefore concluded that:

- (a) The minimum wage will be set at \$557.40 for the period of 1 July 2009 until the first pay period on or after 1 October 2009.
- (b) The minimum wage will be set at \$569.70 from the first pay period on or after 1 October 2009, being an increase of \$12.30 per week.

61 No person appearing submitted that we should not correspondingly adjust rates of wages paid under awards. Given that position, and the role of awards in providing fair wage standards, we will adjust award wages by \$12.30 per week from the first pay period on or after 1 October 2009. The increase will apply only to employees who are paid the award wage; any wage paid over the award wage is able to be used to offset the increase.

THE MINIMUM WEEKLY RATE OF PAY APPLICABLE TO APPRENTICES AND TRAINEES

62 Section 50A(3)(a)(vi) requires the Commission to take into consideration the need to encourage ongoing skills development. The evidence before us shows that previous minimum wage increases for apprentices and trainees have not discouraged their uptake in WA. We accept the Minister's submission (at [35]) that a responsible increase to minimum apprentice and trainee wages, having regard to ss 13 and 14 of the MCE Act, award relativities and the methodology applied by the Registrar in

previous State Wage orders, will not have a detrimental effect on the uptake of training arrangements in the current economic climate.

- 63 No submissions were put to us on this occasion to warrant a departure from the manner by which the Commission has previously set minimum wages applicable to adult apprentices (see (2006) 86 WAIG 3129), and to apprentices and trainees generally. We propose to apply the increase to adult apprentices, other apprentices and to trainees in accordance with the usual practice of the Commission.

Trainees

- 64 Three issues in relation to trainees have arisen in the course of these proceedings. The first issue is the process of adjustment of award trainee wage rates, initially raised by the Commission with the persons appearing in these proceedings. The second issue relates to amendments to the *Vocational Education and Training Act 1996* ("the VET Act"), the effect of which for present purposes, is to remove references to "trainee" in current legislation and incorporate it into an amended definition of "apprentice". The third issue involves updating the list of industry/skills levels set out in Attachment A to the 2008 State Wage order.

1. Award Trainee Rates

- 65 This issue involves the following eleven awards of the Commission which provide traineeship clauses, variously expressed:

- (a) AWU National Training Wage (Agriculture) Award 1994;
- (b) Food Industry (Food Manufacturing or Processing) Award;
- (c) Furniture Trades Industry Award;
- (d) Licensed Establishments (Retail and Wholesale) Award 1979;
- (e) Metal Trades (General) Award;
- (f) Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;
- (g) Printing Award;
- (h) Sheet Metal Workers' Award No. 10 of 1973;
- (i) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;
- (j) Soft Furnishings Award; and
- (k) Vehicle Builders' Award 1971

In each of these awards, the relevant trainee provisions do not provide a formula for the adjustment of trainee rates and the Commission has not been called upon to consider the matter in the past.

- 66 Historically, traineeship rates contained in these awards have been determined, at least initially, in accordance with the National Training Wage Award 2000 (Cth), an award of the Australian Industrial Relations Commission. However, over time, and as a consequence of legislative amendments at both the Commonwealth and State levels, the relationship between the National Training Wage Award 2000 and the traineeship rates contained in these awards has been broken.
- 67 Whilst the issue has been raised with the Minister, CCIWA and TLCWA in previous years, no agreement has been reached between them for a procedure to be followed for the adjustment of award trainee rates of pay. The practice followed by the Registrar of the Commission has been as follows:

Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. The result is then rounded to the nearest dollar. All other rates are increased by a percentage of the unrounded result of the first step. The result is then rounded to the nearest dollar. However, trainees who spend over an average of 20% of their time in approved training, have their wage rates adjusted in accordance with Industry/Skill Level B. Where an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, then the former is adjusted in line with the latter rate in order to maintain consistency.

- 68 On this occasion the Minister submitted that presently, traineeship pay rates vary considerably across State awards resulting in differing provisions. Whilst accepting that standardisation of traineeship rates of pay across State awards may be a desirable objective, the Minister submitted that this may be difficult to achieve in the context of a State Wage order. The Minister submitted that the practice hitherto adopted by the Registrar should be formalised in these proceedings and included as a part of the State Wage order. In this respect, the Minister tendered as Exhibit 5 a proposed draft clause to be incorporated into the State Wage order to provide consistency in adjustment of trainee award wage rates.
- 69 CCIWA, in its initial outline of submissions, expressed some reservations as to the proposal adopted by the Minister, preferring instead an approach based upon considering each award within its history and context in relation to trainee rates of pay, pursuant to s 40B of the Act. However, upon further consideration, CCIWA now agrees in principle with the Minister's proposal to formalise the previous practice for the adjustment of trainee rates of pay and has suggested some minor amendments to the Minister's draft clause.
- 70 For its part, the TLC, on considering the Minister's draft clause, has no objection to the formalisation of the previous practice for the adjustment of trainee rates of pay as proposed.
- 71 The adjustment of rates of pay for trainees in the past has been somewhat problematic. As a consequence of the *Labour Relations Reform Act 2002*, the Act was amended for the Commission to set for the first time minimum rates of pay for apprentices and trainees under the MCE Act.

- 72 In the June 2003 State Wage Case, the Commission determined that in relation to rates of pay for trainees to be established pursuant to s 15 of the MCE Act, two classes of trainee would be established. The first class of trainee is covered by awards and employer/employee agreements and the second class of trainee is award-free. The award-covered class of trainee had the minimum wage determined by reference to the relevant award covering the trainee; the award-free class of trainee had the minimum wage determined by reference to the rates prescribed for trainees in the Metal Trades (General) Award. This is the structure which has operated to date.
- 73 The rationale for the practice applied by the Registrar is based upon the proposition that, on average, trainees spend approximately 20% of their time in structured training and the rate of adjustment to award wages should reflect this.
- 74 There are various approaches that could be taken in relation to the adjustment of traineeship rates contained in awards. One approach involves the Commission of its own motion under s 40B of the Act considering trainee rates of pay for each of the eleven awards identified above. Consideration could then be given, within the framework of the s 40B requirements, after giving the affected parties an opportunity to be heard, as to whether there should be any adjustments to the relevant award rates and if so, what they should be.
- 75 An alternative approach is for adjustments to trainee rates of pay arising from this State Wage order to be by separate application to amend each award in order that the circumstances of each award may be taken into account.
- 76 Either of the above approaches will necessarily delay, possibly considerably, any adjustment in award rates for these classifications, which generally are at the lower end of the award rate pay scales.
- 77 Having considered the issue, and on balance, we are inclined to the view that on this occasion, particularly as the Minster, CCIWA and TLCWA have agreed in principle to incorporate into the State Wage order the practice to date, this approach should be adopted. However, it should not be assumed that this will necessarily occur on the next occasion the Commission is required to set minimum wages under s 50A of the Act. It may be necessary for there to be further consideration of the manner of adjusting trainee award rates of pay, after giving the parties an opportunity to be heard.
- 78 In terms of the drafting of the clause to be inserted into the State Wage order, we prefer the amended form as suggested by CCIWA which results in some minor changes of style rather than of substance.

2. VET Act Amendments

- 79 The second issue relevant to trainees for present purposes relates to amendments to the VET Act which are to come into effect on 10 June 2009 as a consequence of amendments made by the *Training Legislation Amendment and Repeal Act 2008* ("the Amending Act"). The substantive effect of the Amending Act for present purposes is to remove all references to "trainees" in both the Act and the MCE Act and to insert a new definition of "apprentice" contained in s 60A of the VET Act in the following terms:

"Apprentice means the person who is named in a training contract as the person who will be trained under the contract, whether the person is termed an apprentice, a trainee, a cadet, an intern or some other term".

- 80 Additionally, s 15 of the MCE Act, prescribing a minimum weekly rate of pay for trainees, is to be repealed. Thus all references to minimum rates of pay for apprentices, trainees and the like will now be covered by s 14 of the MCE Act, adopting the amended definition of "apprentice" as set out above.
- 81 The net effect of these legislative changes is to remove any separate statutory recognition of "trainees" and incorporate trainees into the broader class of persons undergoing formalised training in accordance with a training contract entered into and registered under the VET Act as amended.
- 82 Consequently, the Minster, CCIWA and TLCWA have proposed, and the Commission agrees, that the form of the State Wage order in relation to minimum wage rates for apprentices and trainees needs to be amended to take into account these legislative changes. In this respect, the Minister helpfully provided to the Commission, by way of Exhibit 6, proposed draft clauses setting out changes to reflect the amendments to the VET Act. These proposed clauses are agreed to by the TLC and only relatively minor amendments are suggested by CCIWA.
- 83 We are satisfied that the draft clauses as proposed by the Minister adequately reflect the legislative amendments, in particular the terms of the new s 60A of the VET Act, and they will be accordingly incorporated into the State Wage order.

3. Industry/Skill Levels

- 84 The final issue relates to the Minister's submission that upon advice from the Department of Education and Training, the industry/skill level classifications table, set out as Attachment A to the 2008 State Wage order, has, as a consequence of the gazettal of new traineeship programmes, become outdated. We thank the Minister for this information and the updated traineeship industry/skill level classifications, as at 5 May 2009, will be incorporated as Schedule 1 to the State Wage order.

THE STATE WAGE PRINCIPLES

Rounding of Allowances

- 85 In its Reasons for Decision in the 2007 State Wage Case ((2007) 87 WAIG 1487 at [140]) the Commission considered two methods of calculation of allowances. These were:

- Method 1 – Two Step Calculation

The amount to be adjusted be calculated by applying the appropriate increase and then rounding to the 'appropriate level'. If any second increase is necessary the same calculation method be repeated.

- Method 2 – One Step Calculation

If multiple increases are warranted, the increases are to be compounded and the total result applied to the figure to be amended.

- An example
 - Assume a weekly wage of \$500.00. The wage has not been increased for two years and the Commission has determined that each yearly increase should be 3.5% in year 1 and 4.0% in year 2.
- Method 1 – Two Step Calculation
 - $$\frac{\$500.00 \times 103.5}{100} = \$517.50$$
 - $$\frac{\$517.50 \times 104.00}{100} = \$538.20$$
- Method 2 – One Step Calculation Compounded
 - $$\$500.00 \times 107.64 = \$538.20$$

NB $107.64 = 103.5 \times 104.00$."

86 After considering the submissions made to it, the Commission held at [144] to [146]:

144 "Taking account of the submissions, and of Kenner C's decision in *The Australian Workers' Union, West Australian Branch, Industrial Union of Workers v. Kalgoorlie Consolidated Gold Mines Pty Ltd and Others* (op. cit. at [139] above), it is appropriate that the Commission provide some guidance to parties so as to avoid disagreements arising out of a relatively mechanical issue such as this. As to whether Method 1 or 2 ought to apply, the outcome in each case ought to be the same. However, rounding or the lack of it, in a series of calculations will affect the result in the long term.

145 The best way to ensure there is no disadvantage to employees in the calculation of rates is to calculate those rates as if they were being calculated each year. Accordingly, Method 1 ought to apply, that is, each increase is to be calculated, then rounded, before the next increase is calculated on the rounded result.

146 In respect of the particular approach to rounding, the consensus view amongst those who addressed the methodology provides an appropriate approach to rounding and ought to be adopted unless there is an agreed, established custom and practise in an industry or for an award, or where arbitration has set a methodology. Accordingly, rounding ought to be applied as follows:

1.
 - (a) Yearly rates are to be rounded to the nearest dollar;
 - (b) Weekly rates are to be rounded to the nearest 10 cents;
 - (c) Daily rates are to be rounded to the nearest 5 cents; and
 - (d) Hourly rates are to be rounded to the nearest 1 cent.
2. Ideally, allowances ought be increased each year. However, where multiple increases are warranted, the increases are to be compounded and a total result applied to the figure to be amended.
3. Where the parties to an award agree that there is a custom and practise to be applied to rounding for that award which varies from the method set out above, then the custom and practise should apply. Alternatively, where arbitration has established a particular method of rounding appropriate to the circumstances, that arbitrated method ought to apply."

87 During proceedings to vary allowances in 2008 it was brought to the Commission's attention that there was an inconsistency between the statement that method 1 should apply to rounding of allowances,

that is, each increase is to be calculated, then rounded, before the next increase is calculated on the rounded result and the statement in paragraph 2 that in the case of multiple increases,

the increases are to be compounded,

which could be inferred to mean that the Commission in the 2007 decision intended that where increases are sought to apply for more than one year, method 2 should be adopted. Plainly that result was not intended as the Commission in 2007 was of the view that method 1 should apply to multiple increases.

88 Although the Minister, CCIWA and TLCWA have made a submission that the 2007 method of calculation of allowances should not change, the Commission is of the view that paragraph 2 should be amended to remove any argument in the future that the formula for the calculation of allowances is ambiguous.

89 In our view paragraph 2 of the formula should read as follows:

2. Ideally, allowances ought be increased each year. However, where multiple increases are warranted, each increase is to be calculated, then rounded, before the next increase is calculated on the rounded result and a total result applied to the figure to be amended.

Principle 9.2 – Minimum Adult Award Wage – Exceptions

90 During the course of the hearing, the Minister raised an issue not contained in his submissions, dealing with that part of Principle 9.2 – Minimum Adult Award Wage, which reads:

"The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate."

91 The Minister suggested that this provision may need to be amended on account of the interrelationship of that part of Principle 9.2, the provisions of the MCE Act in respect of exemptions to the minimum wage, and provisions contained within certain awards and agreements of the Commission.

92 The awards and agreements concerned provide for rates of wages less than the minimum wage in clauses with titles such as "Under-rate, Aged and Infirm Workers" and "Supported Wage". The Minister notes that approximately 100 awards contain clauses providing for under-rate, aged and infirm workers, and 19 awards and a significant number of industrial agreements contain Supported Wage clauses.

93 According to the Minister an agreement between parties made pursuant to the former type of clause to pay a lesser rate may be of no legal effect given the terms of the MCE Act. The Minister also refers to the provisions of the MCE Act having no effect for employees who receive a disability support pension under the *Social Security Act 1991* (Cth) and whose employment is assisted by supported employment programmes (see *Minimum Conditions of Employment Regulations 1993* (WA) ("MCE Regulations") Schedule 1, clause 3).

94 The Minister has suggested that the paragraph referred to above from Principle 9.2 be amended to add:

"... provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*."

The State Wage Principles - Consideration and Conclusion

95 It is notable that neither CCIWA nor TLCWA made submissions regarding this issue, although it had previously been the subject of informal communications from the Minister to them. There has been no suggestion that any particular problems have arisen or that there has been any particular confusion or underpayments arising from the interrelationships referred to above. However, we accept that there is a degree of complexity to the interrelationships between the various provisions which may require that some guidance is specified within the Principles. That complexity commences with the requirement in s 5(2) of the MCE Act which provides:

"A provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect."

96 There are exclusions from the minimum wage provided by the MCE Act. Firstly, persons who receive a disability support pension and whose employment is supported by supported employment services are not employees for the purposes of the MCE Act (see MCE Regulations, Schedule 1, clause 3). Secondly, s 9 of the MCE Act provides that the employer and employee may agree to a weekly rate of pay other than the minimum weekly rate if the employee is either permanently or temporarily mentally or physically disabled and the agreement is in writing.

97 We consider that the MCE Act makes clear that there can be certain arrangements for contracting out of, or exclusions from, the minimum wage, but that it may avoid confusion if Principle 9.2 is amended by the insertion of the provision suggested by the Minister. Accordingly we will amend Principle 9.2 by adding the words:

"... provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*."

98 The issue though of whether those under-rate, aged and infirm workers clauses contained in awards could breach the *Equal Opportunity Act 1984* has merely been raised but has not been addressed before us. This may be a subject upon which interested parties may wish to comment in the future.

MINUTE OF PROPOSED GENERAL ORDER

99 The minute of proposed General Order now issues. A speaking to the minutes, if required, will occur on Friday, 19 June 2009 at 11:30 am. The Commission should be advised by 4:00 pm on Wednesday, 17 June 2009 whether or not a speaking to the minutes is requested.

2009 WAIRC 00402

2009 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ON THE COMMISSION'S OWN MOTION

CORAM

CHIEF COMMISSIONER A R BEECH
 SENIOR COMMISSIONER J H SMITH
 COMMISSIONER P E SCOTT
 COMMISSIONER S J KENNER
 COMMISSIONER S M MAYMAN

DATE

TUESDAY, 23 JUNE 2009

FILE NO.

APPL 1 OF 2009

CITATION NO.

2009 WAIRC 00402

Result

2009 State Wage order issued

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2009 State Wage order and thereby orders as follows:

1. THAT the 2009 State Wage order takes effect on 1 July 2009.
2. THAT the General Order which issued in matter No. APPL 115 of 2007 ((2008) 88 WAIG 782) is rescinded with effect on and from the commencement of the first pay period on or after 1 July 2009.
3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be:
 - (a) \$557.40 per week on and from the commencement of the first pay period on or after 1 July 2009;
 - (b) \$569.70 per week on and from the commencement of the first pay period on or after 1 October 2009.

Apprentices

4. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:
 - (a) in relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.
 - (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the pay periods below:

	<i>Total Rate per Week</i>	
	1 July 2009	1 Oct 2009
<i>Four Year Term</i>		
First year	\$273.50	\$278.67
Second year	\$358.16	\$364.93
Three year	\$488.40	\$497.63
Fourth year	\$573.06	\$583.88
<i>Three and a Half Year Term</i>		
First six months	\$273.50	\$278.67
Next year	\$358.16	\$364.93
Next year	\$488.40	\$497.63
Final year	\$573.06	\$583.88
<i>Three Year Term</i>		
First year	\$358.16	\$364.93
Second year	\$488.40	\$497.63
Third year	\$573.06	\$583.88

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be:
- \$488.40 per week on and from the commencement of the first pay period on or after 1 July 2009;
 - \$497.60 per week on and from the commencement of the first pay period on or after 1 October 2009.

Trainees

6. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship ("trainee") shall be:
- in relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant award where an employer-employee agreement is in force.
 - In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the *Metal Trades (General) Award* contained in Table 1 and Table 2 as follows:

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2009.

Industry/Skill Level A			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	191.00	228.00	281.00
Plus 1 year out of school	228.00	281.00	325.00
Plus 2 years	281.00	325.00	379.00
Plus 3 years	325.00	379.00	434.00
Plus 4 years	379.00	434.00	
Plus 5 years or more	434.00		
Industry/Skill Level B			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	191.00	228.00	272.00
Plus 1 year out of school	228.00	272.00	310.00
Plus 2 years	272.00	310.00	364.00
Plus 3 years	310.00	364.00	416.00
Plus 4 years	364.00	416.00	
Plus 5 years or more	416.00		
Industry/Skill Level C			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	191.00	228.00	262.00
Plus 1 year out of school	228.00	262.00	294.00
Plus 2 years	262.00	294.00	331.00
Plus 3 years	294.00	331.00	371.00
Plus 4 years	331.00	371.00	
Plus 5 years or more	371.00		

Table 2

The following rates of pay apply on and from the commencement of the first pay period on or after 1 October 2009.

Industry/Skill Level A			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	195.00	233.00	287.00
Plus 1 year out of school	233.00	287.00	332.00
Plus 2 years	287.00	332.00	388.00
Plus 3 years	332.00	388.00	444.00
Plus 4 years	388.00	444.00	
Plus 5 years or more	444.00		

Industry/Skill Level B			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	195.00	233.00	278.00
Plus 1 year out of school	233.00	278.00	317.00
Plus 2 years	278.00	317.00	373.00
Plus 3 years	317.00	373.00	426.00
Plus 4 years	373.00	426.00	
Plus 5 years or more	426.00		
Industry/Skill Level C			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	195.00	233.00	269.00
Plus 1 year out of school	233.00	269.00	302.00
Plus 2 years	269.00	302.00	340.00
Plus 3 years	302.00	340.00	381.00
Plus 4 years	340.00	381.00	
Plus 5 years or more	381.00		

- (c) For any class of trainees under this subclause undertaking a traineeship that is not provided for in Attachment A, the minimum weekly rate of pay shall be the rate of pay in Industry/Skill Level C.

Australian Qualification Framework (AQF)

- (d) For a trainee in this class undertaking a AQF4 traineeship the minimum weekly rate of pay shall be the weekly wage rate for an AQF3 trainee at Industry/Skill Levels A, B or C as applicable with the addition of 3.8 per cent of that wage rate.

Part-time and School Based Trainees

- (e) This provision shall apply to trainees who undertake a traineeship on a part-time basis, or as a School Based trainee, by working less than full-time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.
- (i) School Based trainees will receive the relevant wage rate at Skill/Industry Levels A, B and C as applicable, as for School Leavers.
- (ii) The minimum weekly rate of pay for part-time and School Based trainees shall be calculated by taking full-time rates expressed above multiplied by 1.25. This minimum weekly rate of pay for part-time School Based trainees is then divided by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993* to produce a minimum hourly rate of pay.
- (f) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force.
- (g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is entered into and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:

- (i) On and from the commencement of the first pay period on or after 1 July 2009 -
- | | |
|------------------------|-------------------|
| Industry/Skill Level A | \$434.00 per week |
| Industry/Skill Level B | \$416.00 per week |
| Industry/Skill Level C | \$371.00 per week |
- (ii) On and from the commencement of the first pay period on or after 1 October 2009 -
- | | |
|------------------------|-------------------|
| Industry/Skill Level A | \$444.00 per week |
| Industry/Skill Level B | \$426.00 per week |
| Industry/Skill Level C | \$381.00 per week |

7. (a) The rates of pay applicable to trainees under the following awards are to be adjusted in accordance with the formula outlined in sub-clause (b).
- (i) AWU National Training Wage (Agriculture) Award 1994;
- (ii) Food Industry (Food Manufacturing or Processing) Award;
- (iii) Furniture Trades Industry Award;
- (iv) Licensed Establishment (Retail and Wholesale) Award 1979;

- (v) Metal Trades (General) Award;
 - (vi) Motor Vehicles (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;
 - (vii) Printing Award;
 - (viii) Sheet Metal Workers' Award No. 10 of 1973;
 - (ix) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;
 - (x) Soft Furnishings Award; and
 - (xi) Vehicle Builders' Award 1971.
- (b) Trainee rates are adjusted as follows:
- (i) Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.
 - (ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.
 - (iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the former is adjusted in line with the latter rate in order to maintain consistency.

Award Rates of Pay

8. THAT weekly rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by \$12.30 per week on and from the commencement of the first pay period on or after 1 October 2009 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.
9. THAT any increase to wages resulting from this State Wage order on and from the commencement of the first pay period on or after 1 October 2009, unless provided for elsewhere, shall be calculated on the basis that:
- (a) Where the award prescribes an adult fortnightly rate of pay, the fortnightly rate of pay is increased by \$24.60 per fortnight.
 - (b) Where the award prescribes an adult annual rate of pay, the annual rate of pay is increased by \$642.00 per annum.
 - (c) Where the award prescribes an adult hourly rate of pay, the hourly rate of pay is increased by the amount of \$12.30 per week divided by the number of ordinary hours of work prescribed by the relevant award for a full-time employee. Where applicable, casual loadings are to be calculated based on the hourly rate.
10. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of \$12.30 per week to the adult award wage on and from the commencement of the first pay period on or after 1 October 2009.
11. THAT increases under previous State Wage Case decisions prior to 1 October 2009, except those resulting from enterprise agreements, are not to be used to offset this State Wage order increase of \$12.30 per week.
12. THAT on and from 1 October 2009 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:
- (a) deleting the amount of "\$557.40" wherever it appears and inserting in lieu the amount of "\$569.70".
 - (b) Deleting the words "\$488.40 per week on and from the commencement of the first pay period on or after 1 July 2008" in the Adult Apprentices section and inserting in lieu the words "\$497.60 per week on and from the commencement of the first pay period on or after 1 October 2009"
 - (c) Deleting the date "1 July 2008" wherever it appears and inserting in lieu the date "1 October 2009".
 - (d) Deleting the words "2008 State Wage order decision" wherever they appear and inserting in lieu the words "2009 State Wage order decision".
 - (e) Deleting the words:

"The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate."

 and inserting in lieu the words:

"The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*."

Statement of Principles

13. THAT the Statement of Principles – July 2008 under the General Order in matter No. APPL 115 of 2007 be replaced by the Statement of Principles – July 2009 in Schedule 2.

Publication

14. THAT the Registrar publish in the Western Australian Industrial Gazette and on the Commission's website the clauses of the awards varied by Clauses 8-10 of this State Wage order incorporating the amendments made.

(Sgd.) A R BEECH,
Chief Commissioner,
Commission In Court Session.

[L.S.]

ATTACHMENT A**INDUSTRY / SKILL LEVEL A**

TRAINEESHIP TITLE	CERTIFICATE LEVEL
<i>Administration/Business Services</i>	
Business	II & III & IV
Business Administration	III & IV
Business Equipment Servicing	II
Human Resources	IV
Legal Administration	III & IV
Local Government	II & III
Local Government Administration	IV
Marketing	IV
Medical Administration	III
Recordkeeping	III & IV
<i>Beauty</i>	
Beauty Services	III
Beauty Therapy	IV
<i>Civil Construction</i>	
Bituminous Surfacing	II & III
Bridge Construction and Maintenance	III
Civil and Structural Engineering Draftsperson	Diploma
Civil Construction Designer	Diploma
Civil Construction for Entry Level Indigenous Workers	I
Civil Construction Manager	Diploma
Civil Construction Senior Designer	Advanced Diploma
Civil Construction Senior Manager	Advanced Diploma
Civil Construction Supervisor	IV
Foundation Work	III
Pipelaying	III
Plant Operations	III
Railway Construction and Maintenance	III
Road Construction and Maintenance	III
Trenchless Technology	III
Tunnel Construction	III
<i>Community Services and Health</i>	
Aboriginal and Islander Education Worker	III & IV
Aboriginal Child Care Work	III
Aboriginal Environmental Health	II & III
Aged Care Worker	III & IV
Allied Health Assistance	III & IV
Before and After School Care Supervisor	Diploma
Bi-Lingual/Bi-Cultural Community Services Work	II & III
Career Development Officer	III & IV
Child Care Worker	Diploma
Children's Services	III
Client/Patient Support Services	III
Community Care Work	III
Community Services Contact Work	II
Community Services Support Work	II
Community Services Work	II & III & IV
Dental Assisting	III & IV
Disability Work	III & IV

TRAINEESHIP TITLE—continued	CERTIFICATE LEVEL
<i>Community Services and Health—continued</i>	
Enrolled Nursing - Aboriginal	Diploma
Health Service Assistance	III
Health Support Services	II & III
Optical Dispensing	IV
Out of School Hours Care Work	IV
Protective Care Worker	IV
Social Housing Work	III & IV
Sterilisation Services	III
Youth Work	III & IV
<i>Correctional Services</i>	
Correctional Practice	III & IV
Correctional Practice (Custodial)	III & IV
<i>Financial Services</i>	
Financial Services	III & IV
Financial Services (Accounting)	IV
Financial Services (Accounts Clerical)	III
Financial Services (Financial Practice Support)	IV
<i>Floristry</i>	
Floristry	III & IV
<i>Food Processing</i>	
Food Processing	III
Food Processing (Sales)	II & III
Food Processing (Wine)	III
Pharmaceutical Manufacturing	III
<i>Furnishing</i>	
Soft Furnishing	III
<i>Gas Industry</i>	
Gas Industry Advanced Technician	Advanced Diploma
Gas Industry Operations	II, III & IV
Gas Industry Technician	Diploma
Gas Operations	III & IV
<i>General Construction</i>	
Building Maintenance	II
Concreting	III
Dogging	III
Estimating (Housing)	IV
General Construction	II
General Construction (Demolition)	III
Marble and Granite Edge Mason	II
Metal Roofing (Housing)	II
Rigging	III
Scaffolding	III
Site Management	IV
Steel fixing	III
<i>Hospitality</i>	
Croupier	II & III
Hospitality – Accommodation Services	III
Hospitality – Food and Beverage	III
Hospitality – Operations	III
Hospitality – Supervision	IV
<i>Information Technology</i>	
Industrial Technology (Websites)	IV
Information Technology	II & III
Information Technology (Multimedia)	IV
Information Technology (Networking)	IV
Information Technology (Support)	IV
Information Technology (Systems Analysis and Design)	IV
Information Technology (Websites)	IV

TRAINEESHIP TITLE—continued	CERTIFICATE LEVEL
Laboratory Operations	
Laboratory Skills	III
Laboratory Technician	Diploma
Laboratory Techniques	IV
Senior Laboratory Technician	Advanced Diploma
Metal and Engineering	
Draftsperson	V
Engineering – Higher Engineering Trade	IV
Engineering Technician	III
Production Systems (Foundry)	III
Production Systems (General Engineering)	III
Production Systems (Surface Finishing)	III
Museum and Library/Information Services	
Library and Information Services	II & III & IV
Museum Practice	II & III
Plastics, Rubber and Cablemaking/Process Manufacturing	
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Plastics	III
Plastics – Blow Moulding	III
Plastics – Extrusion	III
Plastics – Fabrication	III
Plastics – Film	III
Plastics – Injection Moulding	III
Plastics – Polystyrene	III
Plastics – Rotational Moulding	III
Plastics – Thermoforming	III
Polymer Technology	IV
Process Manufactured Mineral Products	III & IV
Process Manufacturing	III
Process Manufacturing (Rubber - Injection Moulding)	III
Process Plant Advanced Technician	Diploma
Process Plant Operations	III
Process Plant Operations (Maintenance Engineering)	III
Process Plant Technology	IV
Process Support	III
Rubber	III
Rubber – Belt Splicing	III
Rubber – Rubber Lining	III
Property Services	
Property Management	IV
Spatial Services Technician	Diploma
Surveyor	Diploma
Public Services/Public Safety	
Firefighting Operations	III
Government	II & III & IV
Government – Fraud Controller	IV
Government – Investigator	IV
Policing	Diploma
Union Recruitment and Organising	IV
Retail	
Community Pharmacy	III
Retail	III
Telecommunications	
Customer Contact	III & IV
Data and Voice Communications	II & III
Telecommunications	II & III
Telecommunications (Access Network)	II
Telecommunications (Cabling)	II
Telecommunications (Cabling and Customer Premises Equipment)	III
Telecommunications Engineering	IV

TRAINEESHIP TITLE—<i>continued</i>	CERTIFICATE LEVEL
<i>Textile Clothing and Footwear</i>	
Clothing Production	III & IV
Dry Cleaning Operations	III
Early Stage Wool Processing	III
Footwear Repair	III
Laundry Operations	III
Leather Production	III
Textile Fabrication	III
Textile Production	III
<i>Tourism</i>	
International Retail Travel Sales	III
Tourism (Attractions and Theme Parks)	II
Tourism (Guiding)	II & III & IV
Tourism (Sales/Office Operations)	II
Tourism (Visitor Information Services)	III
<i>Transport and Distribution</i>	
Aviation Ground Operations and Service	III
Cash in Transit	III
Integrated Rating	III
Logistics Operations	III
Rail Infrastructure	III
Road Transport	III & IV
Stevedoring	III
Transport and Distribution (Aviation Flight Operations)	III
Transport and Distribution (Marine Engine Driving)	III
Transport and Distribution (Maritime Operations)	III
Transport and Distribution (Maritime Operations – Coxswain)	II
Transport and Distribution (Mobile Cranes)	III
Transport and Distribution (Rail Operations)	III & IV
Warehousing and Storage	III & IV
<i>Water Industry</i>	
Water Operations	III & IV
<i>Wholesale Training Package</i>	
Wholesale	III

INDUSTRY / SKILL LEVEL B

TRAINEESHIP TITLE	CERTIFICATE LEVEL
<i>Aeroskills Industry</i>	
Aeroskills (Aircraft Mechanical)	II
Aeroskills Engineer – Avionics	Diploma
Aeroskills Engineer – Mechanical	Diploma
<i>Animal Care and Management</i>	
Animal Control and Regulation	IV
Animal Studies	II
Animal Technology	III
Captive Animals	III
Companion Animal Services	III & IV
Veterinary Nursing	IV
<i>Asset Maintenance</i>	
Asset Maintenance (Cleaning Operations)	II & III
Asset Maintenance (Fire Protection Equipment)	II & III
Asset Maintenance (Waste Management)	II & III
Fire Alarms Servicing	II
Pest Management Technician	III
<i>Asset Security</i>	
Hazardous Areas	IV
Security Assembly and Setup	II
Technical Security	II & III
<i>Automotive Industry/Retail Service and Repair</i>	
Automotive (Administration)	II & III
Automotive (Administration – Rental Vehicles)	III
Automotive (Aftermarket Warehousing Distribution Operations)	II & III
Automotive (Mechanical)	II

TRAINEESHIP TITLE—continued	CERTIFICATE LEVEL
<i>Automotive Industry/Retail Service and Repair—continued</i>	
Automotive (Sales)	II & III
Automotive (Vehicle Body)	II
Automotive Electrical Technology	II
Automotive Retail Service and Repair (Tyre Fitting)	III
Bicycles	II
Marine	II
Mechanical Driveline	II
Mechanical Engine Overhaul	II
Mechanical Hydraulics	II
Mechanical Machine Assembly	II
Mechanical Transmissions	II
Outdoor Power Equipment	II
Recreational Vehicle Production Assistant	II
Recreational Vehicle Production Team Leader	III
Vehicle Servicing	II
<i>Beauty</i>	
Make-Up Services	II
Nail Technology	II
Retail Cosmetic Services	II
<i>Caravan Industry</i>	
Caravan Park Operations	II & III
<i>Civil Construction</i>	
Civil Construction	II & III
<i>Electricity Supply Industry Generation Sector</i>	
ESI Distribution (Powerline)	III
ESI Generation (Electrical/Electronic)	IV
ESI Generation (Fabrication)	III
ESI Generation (Mechanical)	III & IV
ESI Generation (Operations)	III & IV
ESI Generation (Operations Manager)	Diploma
ESI Generation (Systems Operations)	IV
ESI – Power Systems Manager	Diploma & Advanced Diploma
Lineworker (Transmission)	III
Remote Area Essential Service	II
<i>Electrotechnology</i>	
Appliance Servicing – Refrigerants	II
Computer Assembly and Repair	II
Computer Systems	IV
Computer Systems Engineer	Diploma & Advanced Diploma
Electrical/Electronic Service Technician	Diploma
Electrical Engineer	Diploma & Advanced Diploma
Electronic Assembly	II
Electronics	II
Electronics and Communications Engineering	Diploma & Advanced Diploma
Electrotechnology Systems Electrician	IV
Refrigeration and Air Conditioning Systems	IV
<i>Entertainment/Film TV Radio and Multimedia</i>	
Antennae Equipment	II
Broadcasting (Radio)	III & IV
Broadcasting (Remote Area Operations)	III
Broadcasting (Television)	III & IV
Costume for Performance	IV
Entertainment (Front of House)	II
Live Production Theatre and Events	II
Live Production Theatre and Events (Technical Operations) Audio	III & IV
Live Production Theatre and Events (Technical Operations) Lighting	III & IV
Live Production Theatre and Events (Technical Operations) Vision Systems	III & IV
Multimedia	II & III & IV
Screen	II & III & IV
Venues and Events (Customer Service)	III
Video and Audio Systems	IV

TRAINEESHIP TITLE—continued	CERTIFICATE LEVEL
Extractive Industries/Metalliferous	
Driller	III
Drillers Assistant	II
Drilling (Mining Exploration)	II, III & IV
Engineering Assistant	Advanced Diploma
Extractive Industries Manager	Diploma
Extractive Industries Operator	II & III
Extractive Industries Senior Manager	Advanced Diploma
Field/Exploration Operations	II
Metalliferous Mining Operations (Open Cut)	II & III & IV
Metalliferous Mining Operations (Processing)	II & III & IV
Metalliferous Mining Operations (Underground)	II & III & IV
Metallurgical Technician	Diploma
Metallurgical Technician (Advanced)	Advanced Diploma
Mine Process Supervisor	Diploma
Mining for Entry Level Indigenous Workers	II
Open Cut and Underground Mine Engineering	Diploma
Surveying (Mining and Engineering)	IV
Floristry	
Floristry	II
Food Processing Industry	
Food Processing	II
Food Processing (Wine)	II
Forest and Forest Products Industry	
Forester (Operations)	IV
Forest Growing and Management	II & III
Harvesting and Haulage	II & III
Production Technician (Timber)	IV
Sawmilling and Processing	II & III
Timber Manufactured Products	II & III
Timber Merchandising	II & III
Wool Panel Products	II & III
Furnishing	
Furnishing (Flooring)	II
Furnishing (Polishing)	II
Furnishing (Upholstery)	II
Furniture Making	II
Glass and Glazing	II
Soft Furnishing	II
Gas Industry	
Gas Operations	II
Hospitality Industry	
Hospitality – (Asian Cookery)	II
Hospitality – (Catering Operations)	II
Hospitality – (Commercial Cookery)	II
Hospitality – (Operations)	II
Hospitality – (Patisserie)	II
Laboratory Operations	
Sampling and Measurement	II
Meat	
Meat Processing (Abattoirs)	II
Meat Processing (Boning)	III
Meat Processing (Food Services)	II & III
Meat Processing (General)	III
Meat Processing (Leadership)	IV
Meat Processing (Quality Assurance)	IV
Meat Processing (Rendering)	III
Meat Processing (Slaughtering)	III
Meat Processing (Smallgoods) General	II & III
Meat Processing (Smallgoods) Manufacture	II & III

TRAINEESHIP TITLE—continued	CERTIFICATE LEVEL
<i>Metal and Engineering</i>	
Aluminium Windows and Frames Manufacturing	II
Engineering – Production	II
Winding and Assembly	II
<i>Outdoor Recreation/Community Recreation</i>	
Community Recreation	II & III
Outdoor Recreation	III & IV
<i>Plastics, Rubber and Cablemaking/Process Manufacturing</i>	
Plastics	II
Plastics – Blow Moulding	II
Plastics – Composites	II
Plastics – Extrusion	II
Plastics – Fabrication	II
Plastics – Film	II
Plastics – Injection Moulding	II
Plastics – Polystyrene	II
Plastics – Rotational Moulding	II
Plastics – Thermoforming	II
Process Manufactured Mineral Products	II
Process Manufacturing	II
Process Manufacturing (Cablemaking)	II
Process Manufacturing (Rubber – Injection Moulding)	II
Process Plant Operations	II
Process Support	II
Rubber	II
Rubber – Belt Splicing	II
Rubber – Rubber Lining	II
<i>Plumbing and Services</i>	
Drainage	II
<i>Printing and Graphic Arts</i>	
Desktop Publishing	II
Graphic Arts Services	II
Printing and Graphic Arts (Multimedia)	III
Printing and Graphic Arts (Printing)	IV
Print Production Support	II
Screen Printing	II
Small Offset Printing	II
<i>Retail</i>	
Community Pharmacy	II
Retail	II
Salon Assistant	II
<i>Sport Industry</i>	
Fitness	III & IV
Sport (Career Orientated Participation)	II & III
Sport and Recreation	II & III & IV
<i>Textile, Clothing and Footwear</i>	
Dry Cleaning Operations	II
Footwear Repair	II
Laundry Operations	II
Textile Production (Complex or Multiple Processes)	II
<i>Transport and Distribution</i>	
Aviation Ground Operations and Service	II
Logistics	II
Rail Infrastructure	II
Rail Operations	II
Road Transport	II
Stevedoring	II
Transport and Distribution (Aviation Flight Operations)	II
Transport and Distribution (Marine Engine Driving)	II
Transport and Distribution (Maritime Operations)	II
Warehousing and Storage	II

TRAINEESHIP TITLE—<i>continued</i>	CERTIFICATE LEVEL
<i>Water Industry</i>	
Water Operations	II
<i>Wholesale</i>	
Wholesale	II
<i>Other</i>	
Aluminium Windows and Frames	II
Conservation and Land Management	II & III & IV
Glass Processor	II
Paving	II
Picture Framing	III

INDUSTRY / SKILL LEVEL C

TRAINEESHIP TITLE	CERTIFICATE LEVEL
<i>Agriculture/Rural</i>	
Advanced Wool Handler	III
Agriculture	II & III & IV
Agriculture (Beef Cattle Production)	III & IV
Agriculture (Dairy)	III
Agriculture (Goat Production)	III
Agriculture (Grain Production)	III
Agriculture (Horse Breeding)	III
Agriculture (Pig Production)	III
Agriculture (Rural Merchandising)	III
Agriculture (Sheep and Wool)	III
Agri-food	I
Horticulture (Production)	II & III & IV
Irrigation	II & III & IV
Shearing	II & III & IV
Wool Classing	IV
Wool Clip Preparation	III
Wool Handling	II
<i>Horticulture</i>	
Horticulture	II & III & IV
Horticulture (Arboriculture)	II & III & IV
Horticulture (Floriculture)	II & III & IV
Horticulture (Landscape)	II & IV
Horticulture (Parks and Gardens)	II & IV
Horticulture (Retail Nursery)	II & IV
Horticulture (Turf)	II & IV
Horticulture (Wholesale Nursery)	II & IV
Rural Operations	II & III
<i>Music</i>	
Music	III & IV
Music Industry (Business)	III
Music Industry (Foundation)	II
Music Industry (Technical Production)	III & IV
<i>Racing Industry</i>	
Racing – Advanced Stablehand	III
Racing – Harness Driver	III
Racing – Jockey	IV
Racing – Stablehand	II
Racing – Trackrider	III
<i>Seafood Industry</i>	
Seafood (Aquaculture)	II & III & IV
Seafood (Fisheries Compliance)	III
Seafood (Fishing Operations)	II & III
Seafood (Processing)	II & III
Seafood (Sales and Distribution)	II & III

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER**Awards that do not contain wages and are therefore excluded:**

Alcoa Long Service Leave Conditions Award, 1980
 Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991
 Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987
 The Contract Cleaning (F.M.W.U.) Superannuation Award 1988
 Health Care Industry (Private) Superannuation Award 1987
 Hospital Salaried Officers (Joondalup Health Campus) Award, 1996
 Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award
 Miscellaneous Government Conditions and Allowances Award No A 4 of 1992
 Miscellaneous Workers' (Security Industry) Superannuation Award, 1987
 Ngala Superannuation Award
 Printing (The Sunday Times Guaranteed Employment and Voluntary Retirement) Award, 1983
 Printing (West Australian Newspapers Limited, Guaranteed Employment and Voluntary Retirement) Award
 Printing Industry Superannuation Award 1991
 Public Service Allowances (Fisheries and Wildlife Officers) Award 1990
 Supported Employees Industry Award
 The Swan Brewery Company Limited (Superannuation) Award 1987
 West Australian Petroleum Pty Ltd Long Service Leave conditions Award 1991
 Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984
 Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks' (Racing Industry - Betting) Award 1978 – **Schedule C**
 Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 – **Schedule I**
 Iron Ore Production & Processing (Locomotive Drivers) Award 2006 - The – **Clause 2.1**
 Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 – **Clause 6**
 Shearing Contractors' Award of Western Australia 2003 – **Clause 4.3**

Awards containing transitional provisions to which the General Order does not apply:

Clerks' (R.A.C. Control Room Officers) Award of 1988 – **Appendix A**
 Clothing Trades Award 1973 – **Clause 18**
 Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 – **Schedule F**
 Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 – **Schedule I**
 Egg Processing Award 1978 – **Appendix 4**
 Electorate Officers Award 1986 – **Schedule G**
 Family Day Care Co-Ordinators' and Assistants' Award, 1985 - **Schedule C**
 Gold Mining Engineering and Maintenance Award – **Schedule II and Appendix I**
 Government Officers (Social Trainers) Award 1988 – **Schedule K**
 Government Officers (State Government Insurance Commission) Award, 1987 –
Schedule D
 Government Officers Salaries, Allowances and Conditions Award 1989 - **Schedule P**
 Institution Officers Allowances and Conditions Award 1977, No. 3 of 1977 – **Schedule H**
 Public Service Award 1992 – **Schedule M**
 State Energy Commission of Western Australia Wages and Conditions Award, 1988 – **Schedule 1**

Schedule 2

STATEMENT OF PRINCIPLES – July 2009**1. Application of the Statement of Principles**

- 1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.
- 1.2 In these Principles, wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of employment will be referred to as "wages".
- 1.3 In making a decision in respect of any application brought under these Principles the primary consideration in all cases will be the merits of the application in accordance with equity, good conscience and the substantial merits of the case pursuant to section 26(1)(a) of the Act.
- 1.4 These Principles do not have application to Enterprise Orders made under section 42I of the Act or to applications made under section 40A of the Act to incorporate industrial agreement provisions into an award by consent.

2. (deleted)**3. When an Award may be varied or another Award made without the claim being regarded as above or below Minimum Award Conditions**

- 3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:
 - 3.1.1 To include previous State Wage Case increases in accordance with Principle 4.
 - 3.1.2 To incorporate test case standards in accordance with Principle 5.
 - 3.1.3 To adjust allowances and service increments in accordance with Principle 6.
 - 3.1.4 To adjust wages pursuant to work value changes in accordance with Principle 7.
 - 3.1.5 To adjust wages for total minimum adjustments in accordance with Principle 8.
 - 3.1.6 To vary an award to include the minimum wage in accordance with Principle 9.

4. Previous State Wage Case Increases

- 4.1 Wage increases available under previous State Wage Case Decisions such as structural efficiency adjustments, and previous arbitrated safety net adjustments will, on application, still be accessible.
- 4.2 Minimum rates adjustments may also be progressed under this Principle.

5. Test Case Standards

- 5.1 Test Case Standards in respect of wages established and/or revised by the Commission may be incorporated in an award. Where disagreement exists as to whether a claim involves a test case standard, those asserting that it does, must make an application and justify its referral. The Chief Commissioner will decide whether the claim should be dealt with by a Commission in Court Session.

6. Adjustment of Allowances and Service Increments

- 6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.
- 6.2 Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Case Decisions.
- 6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order in Principle 8.
- 6.4 In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.
- 6.5 Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7.
- 6.6 New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.
- 6.7 Where changes in the work have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant Principles of this Statement of Principles. The relevant Principles in this context may be Principle 7 and Principle 11.
- 6.8 New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of Principle 7 of this Statement of Principles.

7. Work Value Changes

- 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
- 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
- 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
- 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
- 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
- 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.
- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. Total Minimum Rate Adjustments

- 8.1 Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and State Wage order adjustments to be combined so that the award specifies only the total minimum rate for each classification.
- 8.2 By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates or weekly rates. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.
- 8.3 The State Wage order arising from this decision is \$12.30 per week.

9. Minimum Adult Award Wage

- 9.1 A minimum adult award wage clause will be required to be inserted in all new awards.
- 9.2 The minimum adult wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

No employee aged 21 or more shall be paid less than the minimum adult award wage unless otherwise provided by this clause.

The minimum adult award wage for full-time employees aged 21 or more is \$557.40 per week payable on and from the first pay period on or after 1 July 2009; and \$569.70 per week payable on and from the first pay period on or after 1 October 2009.

The minimum adult award wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

Unless otherwise provided in this clause adults employed as casuals, part-time employees or piece workers or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the minimum adult award wage according to the hours worked.

Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the minimum adult award wage.

The minimum adult award wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate, provided that no employee shall be paid less than any applicable minimum rate of pay prescribed by the *Minimum Conditions of Employment Act 1993*.

Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the minimum adult award wage.

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

Apply to the calculation of overtime and all other penalty rates, superannuation, payments during any period of paid leave and for all purposes of this award.

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2009 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases under previous State Wage Case Principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset the minimum wage.

Adult Apprentices

Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than \$488.40 per week on and from the commencement of the first pay period on or after 1 July 2009; and shall not be paid less than \$497.60 per week on and from the commencement of the first pay period on or after 1 October 2009.

The rate paid in the paragraph above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

Where in this award an additional rate is expressed as a percentage, fraction or multiple of the ordinary rate of pay, it shall be calculated upon the rate prescribed in this award for the actual year of apprenticeship.

Nothing in this clause shall operate to reduce the rate of pay fixed by the award for an adult apprentice in force immediately prior to 5 June 2003.

10. **Making or Varying an Award or issuing an Order which has the effect of varying wages or conditions above or below the award minimum conditions**

- 10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle. This may include but is not limited to matters such as equal remuneration for men and women for work of equal or comparable value.
- 10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.
- 10.3 All claims made under this Principle will be referred to the Chief Commissioner for him to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.

11. **New Awards (including interim Awards) and Extensions to an Existing Award**

- 11.1 The following shall apply to the making of wages in a new award (including an interim award) and an extension to an existing award:
 - 11.1.1 In the making of wages in an interim award the Commission shall apply the matters set out in section 36A of the Act.
 - 11.1.2 A new award (including an interim award) shall have a clause providing for the minimum award wage [see Principle 9] included in its terms.
 - 11.1.3 In the extension of wages in an existing award to new work or to award-free work the wages applicable to such work shall ensure that any award or order made:
 - (1) meets the need to facilitate the efficient organisation and performance of work according to the needs of an industry and or enterprises within it, balanced with fairness to the employees in the industry or enterprises; and
 - (2) sets fair wages.

12. Economic Incapacity

- 12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application. It will then be a matter for the Chief Commissioner to decide whether it should be dealt with by a Commission in Court Session.

13. Duration

- 13.1 This Statement of Principles will operate until reviewed under s.50A(1)(d) of the Act.

***Editor's note:**

Please note that the publication of the clauses of the awards varied by clauses 8 - 10 of the State Wage Order incorporating the amendments made will be published in a subsequent gazette.

FULL BENCH—Procedural Directions and Orders—

2009 WAIRC 00385

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION KIMBERLEY LAND COUNCIL	APPELLANT
	-and- KRYSTI GUEST	RESPONDENT
CORAM	FULL BENCH THE HONOURABLE M T RITTER, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 17 JUNE 2009	
FILE NO	FBA 3 OF 2009	
CITATION NO.	2009 WAIRC 00385	

Decision	Appeal adjourned
Appearances	
Appellant	Mr D H Schapper (of Counsel), by leave
Respondent	Mr S Millman (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 16 June 2009, and having heard Mr D H Schapper (of Counsel), by leave on behalf of the appellant, and Mr S Millman (of Counsel), by leave on behalf of the respondent, it is this day, 17 June 2009, ordered that the hearing and determination of the appeal herein be adjourned.

[L.S.]

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

2009 WAIRC 00403

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
KIMBERLEY LAND COUNCIL

APPELLANT

-and-
KRYSTI GUEST

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE M T RITTER, ACTING PRESIDENT
CHIEF COMMISSIONER A R BEECH
COMMISSIONER S J KENNER

DATE TUESDAY, 23 JUNE 2009

FILE NO/S FBA 3 OF 2009

CITATION NO. 2009 WAIRC 00403

Decision Appeal discontinued

Appearances

Appellant Mr D Schapper (of Counsel), by leave

Respondent Mr S Millman (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 16 June 2009, and having heard Mr D Schapper (of Counsel), by leave, on behalf of the appellant, and Mr S Millman (of Counsel), by leave, on behalf of the respondent, and whereas the appellant has filed a notice of discontinuance dated 22 June 2009, it is this day, 23 June 2009, ordered that the appeal be discontinued.

By the Full Bench
(Sgd.) M T RITTER,
Acting President.

[L.S.]

PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 00438

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ROBERT MCJANNETT

APPLICANT

-v-
KEVIN REYNOLDS, SECRETARY – THE CONSTRUCTION FORESTRY MINING & ENERGY
UNION OF WORKERS

FIRST RESPONDENT

SECOND RESPONDENT

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT

DATE TUESDAY, 7 JULY 2009

FILE NO/S PRES 5 OF 2009

CITATION NO. 2009 WAIRC 00438

Result Orders

Representation

Applicant In person

First Respondent Mr K Bonomelli (of Counsel), by leave

Second Respondent Mr R Bathhurst (of Counsel), by leave

Order

This matter having come on for hearing before me on 7 July 2009, and having heard Mr R Mcjannett on his own behalf as the applicant, Mr K Bonomelli (of Counsel), by leave, on behalf of the first respondent, Mr R Bathhurst (of Counsel), by leave, on behalf of the second respondent, and Mr S Millman (of Counsel), by leave, on behalf of the Construction, Forestry, Mining and Energy Union of Workers, seeking leave to intervene, it is this day, 7 July 2009, ordered that:

1. Leave be granted to the Construction, Forestry, Mining and Energy Union of Workers to intervene in this proceeding.
2. On or before 5 August 2009 the applicant file and serve upon the respondents and the intervenor a document setting out the particulars of the application which has been filed, or an application to amend the application, properly particularised.
3. On or before 5 August 2009 the applicant file and serve upon the respondents and the intervenor an affidavit, or affidavits, setting out an outline of the evidence to be adduced in support of the application.
4. The application is adjourned to a directions hearing on 12 August 2009 at 10am.

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00383

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GEOFFREY A. DAVIS AM, RETURNING OFFICER OF THE STATE SCHOOL TEACHERS
UNION OF WA

APPLICANT

-and-

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

RESPONDENT

CORAM

THE HONOURABLE M T RITTER, ACTING PRESIDENT

DATE

TUESDAY, 16 JUNE 2009

FILE NO/S

PRES 4 OF 2009

CITATION NO.

2009 WAIRC 00383

Decision

Orders and Directions

Appearances**Applicant**

In person

Respondent

Mr S Millman (of Counsel), by leave

Order

This matter having come on for directions hearing before me on 10 June 2009, and having heard Mr G A Davis AM on his own behalf as the applicant, and Mr S Millman (of Counsel), by leave, on behalf of the respondent, and the respondent having applied in writing on 10 June 2009 to vary the order made on 10 June 2009, and the applicant having no objection to the order being varied, it is this day, 16 June 2009, ordered that order 1 of the order dated 10 June 2009 be varied as follows:-

1. The directions hearing be adjourned until Thursday, 25 June 2009 at 11:00am.

(Sgd.) M T RITTER,
Acting President.

[L.S.]

2009 WAIRC 00409

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GEOFFREY A. DAVIS AM, RETURNING OFFICER OF THE STATE SCHOOL TEACHERS
UNION OF WA **APPLICANT**

-and-
THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED) **RESPONDENT**

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE THURSDAY, 25 JUNE 2009
FILE NO PRES 4 OF 2009
CITATION NO. 2009 WAIRC 00409

Decision Application discontinued
Appearances
Applicant In person
Respondent Mr S Millman (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 25 June 2009, and having heard Mr G A Davis AM on his own behalf as the applicant, and Mr S Millman (of Counsel), by leave, on behalf of the respondent, it is this day, 25 June 2009, ordered that:

1. The application is discontinued.

[L.S.]

(Sgd.) M T RITTER,
Acting President.**2009 WAIRC 00407**

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
THE REGISTRAR OF THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION **APPLICANT**

-and-
THE DISABLED WORKERS' UNION OF WESTERN AUSTRALIA **RESPONDENT**

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE THURSDAY, 25 JUNE 2009
FILE NO PRES 1 OF 2009
CITATION NO. 2009 WAIRC 00407

Decision Orders and directions
Appearances
Applicant Mr R Andretich (of Counsel), by leave
Respondent Mr K Trainer, as agent

Order

This matter having come on for a directions hearing before me on 25 June 2009, and having heard Mr R Andretich (of Counsel), by leave, on behalf of the applicant, and Mr K Trainer, as agent, on behalf of the respondent, it is this day, 25 June 2009, ordered that:

1. The directions hearing be adjourned to 24 September 2009 at 10:00am.
2. On or before 21 September 2009 the respondent shall file and serve an interim report dealing with the membership, finances, records and structure of the respondent.

[L.S.]

(Sgd.) M T RITTER,
Acting President.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2009 WAIRC 00401

**COUNTRY HIGH SCHOOL HOSTELS AUTHORITY RESIDENTIAL COLLEGE SUPERVISORY STAFF AWARD
2005**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 10 OF 2009

CITATION NO.

2009 WAIRC 00401

Result

Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Country High School Hostels Authority Residential College Supervisory Staff Award 2005 (No PSAA 1 of 2005)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. **Schedule D – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE D - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23.1(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 26.3)	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23.1(b)(ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23.1(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 26.3)	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23.1(b)(ii))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude:			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23.1(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 26.3)	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 23.1(b)(ii))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
		\$		
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 27.5(a))				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (CLAUSE 27.11)				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		
The allowances prescribed in this schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.				

2009 WAIRC 00398

**DEPARTMENT FOR COMMUNITY DEVELOPMENT (FAMILY RESOURCE WORKERS, WELFARE ASSISTANTS
AND PARENT HELPERS) AWARD 1990**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DEPARTMENT FOR COMMUNITY DEVELOPMENT

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 7 OF 2009

CITATION NO.

2009 WAIRC 00398

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 (No. PSAA 1 of 1989)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. Schedule D - Travelling Allowance: Delete this schedule and insert the following in lieu thereof:SCHEDULE D – TRAVELLING ALLOWANCE

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii))
	ALLOWANCE TO MEET INCIDENTAL EXPENSES	\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
	ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL	\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL— <i>continued</i>				
		\$	\$	\$
(6)	Locality North of 26° South Latitude			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 46(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 47(1)(b)(ii))
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
		\$		
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 46(5))				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (CLAUSE 36(12))				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2009 WAIRC 00399

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 8 OF 2009

CITATION NO.

2009 WAIRC 00399

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No 5 of 1983* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. **Schedule H - Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE H - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 42(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 42(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL— <i>continued</i>				
		\$	\$	\$
(6)	Locality North of 26° South Latitude— <i>continued</i>			
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA – South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA – North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 42(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b))
	DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 42(5)(a))			
		\$		
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
	MIDDAY MEAL (CLAUSE 43(11))			
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2. Schedule B - Camping Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE B - CAMPING ALLOWANCE

South of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	38.35
2	Permanent Camp	No cook provided by the Department	51.10
3	Other Camping	Cook provided by the Department	63.90
4	Other Camping	No cook provided	76.70

North of 26° South Latitude

ITEM			RATE PER DAY
1	Permanent Camp	Cook provided by the Department	54.95
2	Permanent Camp	No cook provided by the Department	67.75
3	Other Camping	Cook provided by the Department	80.50
4	Other Camping	No cook provided	93.30

2009 WAIRC 00395

ELECTORATE OFFICERS AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE HONOURABLE SPEAKER OF THE LEGISLATIVE ASSEMBLY AND THE
HONOURABLE PRESIDENT OF THE LEGISLATIVE COUNCIL

RESPONDENTS

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 4 OF 2009

CITATION NO.

2009 WAIRC 00395

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Electorate Officers Award 1986 (No A 18 of 1986)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. Schedule F - Travelling and Transfer Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE F TRAVELLING AND TRANSFER ALLOWANCE

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>
		DAILY RATE	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 39(3))
ALLOWANCE TO MEET INCIDENTAL EXPENSES			
		\$	
(1)	WA - South of 26° South Latitude	13.60	
(2)	WA - North of 26° South Latitude	20.45	
(3)	Interstate	20.45	
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL			
		\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80
(5)	Locality South of 26° South Latitude	195.25	97.65
(6)	Locality North of 26° South Latitude		
	Broome	396.95	198.50
	Carnarvon	246.30	123.15
	Dampier	325.70	162.85
	Derby	302.70	151.35
	Exmouth	284.45	142.25
	Fitzroy Crossing	358.95	179.50
	Gascoyne Junction	211.45	105.75
	Halls Creek	199.45	99.75
	Karratha	502.95	251.50
	Kununurra	310.30	155.15
	Marble Bar	268.45	134.25
	Newman	299.45	149.75
	Onslow	267.45	133.70
	Pannawonica	286.35	143.15

ITEM	PARTICULARS	COLUMN A	COLUMN B
		DAILY RATE	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 39(3))
		\$	\$
(6)	Locality North of 26° South Latitude— <i>continued</i>		
	Paraburdoo	260.80	130.40
	Port Hedland	344.90	172.45
	Roebourne	230.35	115.15
	Shark Bay	186.45	93.25
	Tom Price	297.95	149.00
	Turkey Creek	199.45	99.75
	Wickham	417.95	209.00
	Wyndham	250.45	125.25
(7)	Interstate - Capital City		
	Sydney	288.60	144.30
	Melbourne	278.95	139.45
	Other Capitals	251.50	125.75
(8)	Interstate – Other than Capital City	195.25	97.65
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL			
(9)	WA - South of 26° South Latitude	88.60	
(10)	WA - North of 26° South Latitude	121.85	
(11)	Interstate	121.85	
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.			
(12)	WA - South of 26° South Latitude:		
	Breakfast	16.10	
	Lunch	16.10	
	Dinner	42.75	
(13)	WA - North of 26° South Latitude		
	Breakfast	19.90	
	Lunch	31.80	
	Dinner	49.75	
(14)	Interstate		
	Breakfast	19.90	
	Lunch	31.80	
	Dinner	49.75	
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 39(5)(a))			
(15)	Each Adult	25.95	
(16)	Each Child	4.45	

ITEM	PARTICULARS	COLUMN A	COLUMN B
		DAILY RATE	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 39(3))
		\$	
	MIDDAY MEAL (CLAUSE 40(11))		
(17)	Rate per meal	6.30	
(18)	Maximum reimbursement per pay period	31.50	

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2009 WAIRC 00393

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

ANIMAL RESOURCES AUTHORITY AND OTHERS

RESPONDENTS

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 2 OF 2009

CITATION NO.

2009 WAIRC 00393

Result

Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Government Officers Salaries, Allowances and Conditions Award 1989 (No PSAA 3 of 1989)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

- Schedule J – Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE J - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 52(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude:			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50

ITEM	PARTICULARS	<u>COLUMN A</u>	<u>COLUMN B</u>	<u>COLUMN C</u>
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 52(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 49(1)(b)(ii))
		\$	\$	\$
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (Clause 52. - Transfer Allowance)				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (Clause 53. - Travelling Allowance)				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2. Schedule F – Clause 41 – Camping Allowance: Delete this schedule and insert the following in lieu thereof:

SCHEDULE F - CLAUSE 41. - CAMPING ALLOWANCE

South of 26° South Latitude

ITEM			RATE PER DAY
(1)	Permanent Camp	Cook provided by the Department	38.35
(2)	Permanent Camp	No cook provided by the Department	51.10
(3)	Other Camping	Cook provided by the Department	63.90
(4)	Other Camping	No cook provided	76.70

North of 26° South Latitude

ITEM			RATE PER DAY
(1)	Permanent Camp	Cook provided by the Department	54.95
(2)	Permanent Camp	No cook provided by the Department	67.75
(3)	Other Camping	Cook provided by the Department	80.50
(4)	Other Camping	No cook provided	93.30

2009 WAIRC 00400

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 9 OF 2009

CITATION NO.

2009 WAIRC 00400

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Government Officers (Social Trainers) Award 1988 (PSAA 20/1985)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

- 1. Schedule J - Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE J - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 47(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 47(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 45(2)(b))
		\$	\$	\$
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 47(5)(a))				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (CLAUSE 48(11))				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2009 WAIRC 00396

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE METROPOLITAN HEALTH SERVICE BOARD, HEALTH SERVICES UNION OF
WESTERN AUSTRALIA (UNION OF WORKERS)**RESPONDENTS****CORAM**

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 5 OF 2009

CITATION NO.

2009 WAIRC 00396

Result

Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and the Health Services Union of Western Australia (Union of Workers) and Mr S Barrett and with him Mr A Harper as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Graylands Selby-Lemnos and Special Care Health Services Award 1999 (No PSAA 1 of 1999)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. **Schedule I - Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE I. - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL— <i>continued</i>				
		\$	\$	\$
(6)	Locality North of 26° South Latitude			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 41(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 38(2)(b))
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
		\$		
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 41(5)(a))				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (CLAUSE 42(11))				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2009 WAIRC 00397

INSTITUTION OFFICERS ALLOWANCES AND CONDITIONS AWARD 1977, NO. 3 OF 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

HONOURABLE MINISTER FOR FAMILY AND CHILDREN'S SERVICES, ATTORNEY
GENERAL

RESPONDENTS

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 6 OF 2009

CITATION NO.

2009 WAIRC 00397

Result Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Institution Officers Allowance and Conditions Award 1977, No. 3 of 1977*, be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

1. **Schedule F - Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE F - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 42(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 42(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b))
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL— <i>continued</i>				
		\$	\$	\$
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50
(7)	Interstate - Capital City			
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 42(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 40(2)(b))
	DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 42(5)(a))			
		\$		
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
	MIDDAY MEAL (CLAUSE 43(11))			
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2009 WAIRC 00394

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

CURRICULUM COUNCIL OF WESTERN AUSTRALIA AND OTHERS

RESPONDENTS

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER P E SCOTT

DATE

MONDAY, 22 JUNE 2009

FILE NO/S

P 3 OF 2009

CITATION NO.

2009 WAIRC 00394

Result

Award varied

Order

HAVING heard Mr M Sims on behalf of the Civil Service Association of Western Australia Incorporated and Mr S Barrett and with him Mr A Harper as agent for the respondents, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Public Service Award 1992 (No. PSAA 4 of 1989)* be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after the 17th day of June 2009.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHEDULE

- Schedule I - Travelling, Transfer and Relieving Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE I - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

ITEM	PARTICULARS	COLUMN A	COLUMN B	COLUMN C
		DAILY RATE	DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
		\$		
(1)	WA - South of 26° South Latitude	13.60		
(2)	WA - North of 26° South Latitude	20.45		
(3)	Interstate	20.45		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
		\$	\$	\$
(4)	WA - Metropolitan Hotel or Motel	285.60	142.80	95.20
(5)	Locality South of 26° South Latitude	195.25	97.65	65.10
(6)	Locality North of 26° South Latitude			
	Broome	396.95	198.50	132.30
	Carnarvon	246.30	123.15	82.10
	Dampier	325.70	162.85	108.55
	Derby	302.70	151.35	100.90
	Exmouth	284.45	142.25	94.80
	Fitzroy Crossing	358.95	179.50	119.65
	Gascoyne Junction	211.45	105.75	70.50
	Halls Creek	199.45	99.75	66.50
	Karratha	502.95	251.50	167.65
	Kununurra	310.30	155.15	103.45
	Marble Bar	268.45	134.25	89.50
	Newman	299.45	149.75	99.80
	Onslow	267.45	133.70	89.15
	Pannawonica	286.35	143.15	95.45
	Paraburdoo	260.80	130.40	86.95
	Port Hedland	344.90	172.45	114.95
	Roebourne	230.35	115.15	76.80
	Shark Bay	186.45	93.25	62.15
	Tom Price	297.95	149.00	99.30
	Turkey Creek	199.45	99.75	66.50
	Wickham	417.95	209.00	139.30
	Wyndham	250.45	125.25	83.50

ITEM	PARTICULARS	COLUMN A DAILY RATE	COLUMN B DAILY RATE OFFICERS WITH DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b)) TRANSFER ALLOWANCE FOR PERIOD IN EXCESS OF PRESCRIBED PERIOD (CLAUSE 53(3))	COLUMN C DAILY RATE OFFICERS WITHOUT DEPENDENTS: RELIEVING ALLOWANCE FOR PERIOD IN EXCESS OF 42 DAYS (CLAUSE 50(2)(b))
(7)	Interstate - Capital City			
		\$	\$	\$
	Sydney	288.60	144.30	96.20
	Melbourne	278.95	139.45	92.95
	Other Capitals	251.50	125.75	83.75
(8)	Interstate – Other than Capital City	195.25	97.65	65.10
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	88.60		
(10)	WA - North of 26° South Latitude	121.85		
(11)	Interstate	121.85		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.10		
	Lunch	16.10		
	Dinner	42.75		
(13)	WA - North of 26° South Latitude:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
(14)	Interstate:			
	Breakfast	19.90		
	Lunch	31.80		
	Dinner	49.75		
DEDUCTION FOR NORMAL LIVING EXPENSES (CLAUSE 53(5)(a))				
(15)	Each Adult	25.95		
(16)	Each Child	4.45		
MIDDAY MEAL (CLAUSE 54(11))				
(17)	Rate per meal	6.30		
(18)	Maximum reimbursement per pay period	31.50		

The allowances prescribed in this Schedule shall operate from the beginning of the first pay period commencing on or after 17 June 2009.

2. **Schedule C - Camping Allowance: Delete this schedule and insert the following in lieu thereof:**

SCHEDULE C - CAMPING ALLOWANCE

South of 26° South Latitude

ITEM			RATE PER DAY
(1)	Permanent Camp	Cook provided by the Department	38.35
(2)	Permanent Camp	No cook provided by the Department	51.10
(3)	Other Camping	Cook provided by the Department	63.90
(4)	Other Camping	No cook provided	76.70

North of 26° South Latitude

ITEM			RATE PER DAY
(1)	Permanent Camp	Cook provided by the Department	54.95
(2)	Permanent Camp	No cook provided by the Department	67.75
(3)	Other Camping	Cook provided by the Department	80.50
(4)	Other Camping	No cook provided	93.30

NOTICES—Award/Agreement matters—

2009 WAIRC 00435

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No P 11 of 2009

APPLICATION FOR VARIATION OF AN AWARD TITLED

“INSTITUTION OFFICERS ALLOWANCES AND CONDITIONS AWARD 1977, No. 3 of 1977”

Notice is given that an application was made to the Commission, on 2 June 2009, by the Department of Corrective Services, Department for Child Protection and The Civil Service Association of Western Australia Incorporated under the Industrial Relations Act 1979 to vary the above Award.

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

Clause 4 – Scope: Delete this clause and insert in lieu.

Clause 1.4 – Scope

This Award shall apply to all Government Officers classified as a Juvenile Custodial Officer, Unit Manager or Senior Officer employed by the Commissioner, Department of Corrective Services or the Director General, Department for Child Protection who are members of, or eligible to become members of, The Civil Service Association of Western Australia Incorporated.

Clause 49 – Parties to the Award: Delete this clause and insert in lieu

Clause 9. – Parties to the Award

Commissioner, Department of Corrective Services.

Director General, Department for Child Protection

The Civil Service Association of Western Australia Incorporated.

Schedule A – Salaries: delete reference to Group Workers and replace with Juvenile Custodial Officers.

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

23 June 2009

2009 WAIRC 00436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 35 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED**“PUBLIC TRANSPORT AUTHORITY SALARIED OFFICERS (APEA) AGREEMENT 2008”**

NOTICE is given that an application was made to the Commission, on 30 June 2009, by the Public Transport Authority, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. – APPLICATION AND PARTIES BOUND

- 5.1 This Agreement shall apply to all employees, who are members of or eligible to be members of the Union.
- 5.2 The agreement shall be binding on the:
- Public Transport Authority; and
 - The Association of Professional Engineers, Australia (Western Australia Branch) Organisation of Employees (APEA)

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

3 July 2009

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 00406

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAIME ATKINS

APPLICANT

-v-

DAVE & MARREE CAMPBELL - BRUCE ROCK POST OFFICE

RESPONDENT**CORAM**

COMMISSIONER S WOOD

DATE

WEDNESDAY, 24 JUNE 2009

FILE NO/S

U 156 OF 2008

CITATION NO.

2009 WAIRC 00406

Result Application dismissed for want of prosecution

Representation

Applicant Ms J Atkins (by teleconference)

Respondent No appearance

Order

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

WHEREAS the matter was listed for a show cause hearing on 24 June 2009 and the applicant was advised that failure to attend would lead to the application being dismissed; and

WHEREAS the applicant attended the hearing by teleconference facility and advised the Commission that she wanted the matter to be dismissed;

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

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

(Sgd.) S WOOD,
Commissioner.

[L.S.]

2009 WAIRC 00360

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THERESA JACQUELLINE BEAR	APPLICANT
	-v-	
	DERBY FAMILY HEALING CENTRE MARNIN BOWA DUMBARA ABN 20265298798	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
HEARD	THURSDAY, 14 MAY 2009	
DELIVERED	MONDAY, 8 JUNE 2009	
FILE NO.	U 63 OF 2009	
CITATION NO.	2009 WAIRC 00360	

Catchwords	Termination of employment - Harsh, oppressive and unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles to be applied - Commission satisfied applying principles that discretion should be exercised - Acceptance of referral out of time granted - <i>Industrial Relations Act 1979</i> (WA) s 29(1)(b)(i), s 29(2) and (3)
Result	Extension of time granted
Representation	
Applicant	Ms T Bear (on her own behalf)
Respondent	Ms D Marshall

Reasons for Decision

- 1 On 25 March 2009 Theresa Jacqueline Bear ("the applicant") lodged an application in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") claiming that she was harshly, oppressively or unfairly dismissed on 31 December 2008.
- 2 Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 25 March 2009 and the applicant was terminated on 31 December 2008 it is 56 days out of the required timeframe for lodging a claim of this nature.
- 3 The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not this application should be accepted under s 29(3) of the Act. Section 29(3) of the Act reads as follows:
 - "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."
- 4 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, as follows:
 - "1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
 4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."
- 5 When considering the issue of fairness, Heenan J further observed in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) at 692 the following:

"I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the

applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.”

- 6 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission’s discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

Evidence

- 7 The applicant was employed by the respondent as a carer from 11 April 2000 through to 31 December 2008 and in this role she looked after domestic violence clients and undertook driving duties as required.
- 8 The applicant gave evidence that on 24 December 2008 one of the respondent’s clients, Ms Debbie O’Shea, became upset when the applicant would not drive her to her partner’s place and the applicant stated that she was unable to do so as she had other duties to undertake and because she needed a police clearance to do this given Ms O’Shea was at the women’s shelter. The applicant stated that the following day Ms O’Shea came to the respondent’s premises early in the morning and swore at the applicant and yelled and screamed at her claiming that she had been beaten by her partner because the applicant had not taken her home the previous evening. When the applicant asked Ms O’Shea to be quiet Ms O’Shea “walked straight up to me and was pointing her finger at me, and she poked me on my (sic) side of my cheek” (T4) and because of this contact the applicant stated that she removed Ms O’Shea’s hand from her face. The applicant stated that this was the only time she touched Ms O’Shea. Ms O’Shea stated that Ms Heather Umbagai was present at the time of the incident with Ms O’Shea.
- 9 The applicant stated that after the altercation with Ms O’Shea a colleague Sister Grace Iga approached her to discuss which shift she was working and the applicant stated that during this discussion she asked Sister Grace to talk to Ms O’Shea to calm her down. After Sister Grace had spoken to Ms O’Shea she told the applicant that Ms O’Shea was still shouting and would not listen to her and Sister Grace told the applicant to contact a police officer and she stated that it was only then that Ms O’Shea calmed down and apologised to the applicant.
- 10 The applicant gave evidence that she wrote details about the incident between herself and Ms O’Shea in a hand-over book kept by the respondent and she stated that she wrote that Ms O’Shea had returned to the shelter on 25 December 2008, she had sworn at the applicant and abused her and she had poked the applicant in the face.
- 11 The applicant believed that once Ms O’Shea had calmed down the incident between them was over.
- 12 The applicant gave evidence that the following day she was asked to attend a meeting with the respondent’s committee members and she stated that during this meeting she was told that she should not have hit Ms O’Shea and in response she stated that she did not hit Ms O’Shea. The applicant was then told to take five days off work so that the respondent could contact Ms O’Shea to talk to her about the incident.
- 13 The applicant stated that on 31 December 2008 she was given a letter terminating her on the basis that she had assaulted Ms O’Shea.
- 14 The applicant stated that she never admitted that she hit Ms O’Shea and only conceded that she had removed her hand from her face. The applicant also denied punching Ms O’Shea.
- 15 The applicant stated that after she was dismissed she sought legal advice at the Derby legal aid office however nobody was available. The applicant then visited the Broome Legal Aid office on or about 11 February 2009 and a letter was written on her behalf to the respondent that day asking for her to be reinstated. The applicant confirmed that she was advised at the time that she could make an application claiming that she had been unfairly dismissed. The applicant stated that after she received a letter from the respondent dated 27 February 2009 informing her that it would not revise its decision to terminate her she sought advice about contesting her termination and the relevant forms were sent to her. The applicant stated that she has never been in this situation before and she did not understand the processes and procedures for lodging an unfair dismissal claim. The applicant also stated that she did not realise there was a time limit for lodging an unfair dismissal application. The applicant gave evidence that she “stayed home and felt really bad” after the respondent terminated her employment and that she “didn’t want to do anything”. The applicant also gave evidence that she delayed lodging her application because she wanted to have a meeting with the respondent about her termination and to request reinstatement and this meeting took place at some point.
- 16 The respondent relies on the following information contained in its Notice of Answer and Counter Proposal with respect to the merits of this application.
- 17 The respondent is a not for profit organisation which runs a Supported Accommodation and Assistance Program. The respondent maintains that as its objective is to provide transitional accommodation and related services for victims of family and domestic violence it therefore cannot tolerate any violence on the part of an employee against a client. The respondent maintains that on or about 29 December 2008 a complaint was received by the respondent from Ms O’Shea to the effect that the applicant had “lashed out and punched her with a closed fist on the left side of the jaw”. The respondent investigated this complaint and maintains that in the course of its investigation was provided with statements corroborating Ms O’Shea’s version of events. The respondent maintains that when the applicant was given an opportunity to respond to the allegations against her she told the respondent that she “might have hit” the client, albeit by “mistake”. The respondent argues that given the nature of the respondent’s business, and as it is imperative to have a zero tolerance to any form of violence at the workplace and on the basis of the information available to it, it concluded that on the balance of probabilities the events complained of had taken place and accordingly dismissed the applicant. The respondent maintains that it therefore had good reason to terminate the applicant.

Submissions

- 18 The applicant maintained that her application was lodged outside of the required timeframe because she was unaware of the processes and procedures for making a claim of this nature and she also had limited access to the necessary resources to lodge a claim. The applicant also maintained that because she thought she may be reinstated to her former position this delayed the lodgement of this application. Additionally, she was unaware of a time limit for filing this application.
- 19 The applicant submits that she is a traditional Aboriginal woman with a locational disadvantage as she lives in Derby and as a result this contributed to the late lodgement of her application. The applicant was unable to obtain legal aid or advice about her termination in Derby as there was no one available to assist her at the Derby legal aid office and the applicant stated that she would have contested her application earlier if she could have obtained advice in Derby. The applicant stated that it was not until she was able to travel to Broome on 11 February 2009 to obtain advice from the Broome Legal Aid office that this office sent a letter to the respondent on her behalf. The applicant confirmed that this letter sought the applicant's reinstatement and put the respondent on notice that if she was not reinstated an application claiming unfair dismissal may be lodged. The applicant stated that around the end of February 2009 the respondent advised her that she would not be reinstated and she then made enquiries about contesting her termination and the relevant forms were sent to her. The applicant said it took some time to complete the details required of her in the application because she needed help from her partner to do so and the applicant also stated that her inability to complete her application in a timely manner was affected by health issues she was experiencing at the time.
- 20 The respondent submitted in its Notice of Answer and Counterproposal that the Commission should not allow this application as it was filed in the Commission on 25 March 2009, almost three months out of time. The respondent argues that the Commission should not exercise its discretion under s 29(3) of the Act to extend time within which to file this application on the basis that:
- Contrary to the applicant's advice that she has limited access to resources, the applicant sought and obtained legal advice in relation to her termination on or about 11 February 2009, prompting a letter from Legal Aid to the respondent dated 11 February 2009.
 - The respondent responded to the applicant's request for a review of their decision by letter dated 27 February 2009, addressed to both the applicant and her legal representative.
 - In its correspondence the respondent put the applicant on notice that any claim for unfair termination would be vigorously defended, and that the applicant was already out of time to file an unfair dismissal application.
 - Despite having legal representation on hand and being advised of the timeframes for lodging an unfair dismissal claim the applicant still failed to lodge her claim in a prompt manner causing another four weeks' delay.
 - The respondent submits that the applicant's claim is without merit. The respondent maintains that it had no choice but to terminate the applicant as the respondent provides a refuge for persons suffering domestic violence therefore no form of violence at the workplace can be condoned and the respondent believed, on the information before it, that the applicant had struck Ms O'Shea.
- 21 As the respondent was not represented at the hearing a copy of the transcript was provided to the respondent's representative in Perth and the respondent was given an opportunity to put additional submissions to the Commission however the respondent declined the opportunity to do so.

Findings and conclusions

Credibility

- 22 The applicant gave her evidence in a clear and forthright manner and I formed the view that she gave her evidence to the best of her recollection. I therefore accept the evidence she gave.
- 23 With respect to the issue of merit I have no direct evidence before me to contradict the applicant's version of events about the incident which took place on 25 December 2008 between the applicant and Ms O'Shea. In the circumstances and given that I accept the applicant's recollection about the incident involving Ms O'Shea it may well be the case that there is merit to the applicant's claim that she was unfairly dismissed on 31 December 2009.
- 24 This application was filed 56 days outside of the required timeframe which is a considerable time outside of the required time to file an application of this nature. However I accept the reasons given by the applicant for the delay in lodging this application. I find that the applicant experienced difficulties in obtaining legal advice in Derby given the lack of staff at the Derby Legal Aid office and it is also the case that the closest Legal Aid office available to assist the applicant is over 200 kilometres away in Broome. After obtaining assistance in Broome in mid February 2009, and as the applicant was seeking reinstatement, it was another two weeks before a response from the respondent was received which also delayed the applicant filing this application. I also accept the applicant's claim and I find that she was not initially aware that there was a timeframe for lodging an application of this nature.
- 25 It is clear that the respondent was put on notice in the letter sent by the Broome Legal Aid office on behalf of the applicant on 11 February 2009 that if the applicant was not reinstated the applicant had been advised to make an application with respect to unfair dismissal proceedings. On this basis I find that the respondent was put on notice that an application of this nature could be filed if the parties did not reach agreement that the applicant be reinstated. I also accept the applicant's claim and I find that she sought to negotiate her reinstatement with committee members after her termination and this also delayed the lodgement of her application and I accept the applicant's claim and I find that after the respondent made it clear to her that she would not be reinstated it took some time for her to obtain the relevant forms and as she needed assistance to fill out this form due to health issues at the time this further delayed the filing of this application.

- 26 It is my view that the prejudice suffered by the applicant would be greater than that suffered by the respondent if this application was not accepted by the Commission because on the information currently before me the applicant has a prima facie case for relief if she is successful in her application. Furthermore no disadvantage was highlighted by the respondent in meeting this application.
- 27 When balancing the above findings and when taking into account the relevant factors to consider in an application of this nature I find that it would be unfair not to accept this application. In reaching this view I take into account that there were acceptable reasons for the delay in lodging this application and it is also my view that the respondent will not be prejudiced any more than usual in allowing this application given that the respondent had been advised at least on or around 11 February 2009 that the applicant may contest her termination. It is also the case that there may well be merit to the applicant's claim that she was unfairly terminated. I therefore find that in all of the circumstances it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application and for these reasons an extension of time in order to lodge this application is granted.
- 28 An order will issue to that effect.

2009 WAIRC 00376

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THERESA JACQUELINE BEAR	APPLICANT
	-v-	
	DERBY FAMILY HEALING CENTRE MARNIN BOWA DUMBARA ABN 20265298798	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 11 JUNE 2009	
FILE NO/S	U 63 OF 2009	
CITATION NO.	2009 WAIRC 00376	
Result	Extension of time granted	
Representation		
Applicant	Ms T Bear (on her own behalf)	
Respondent	Ms D Marshall	

Order

HAVING heard the applicant on her own behalf and Ms D Marshall on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT application U 63 of 2009 be and is hereby accepted out of time.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2009 WAIRC 00387

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	TYSON DAWE	APPLICANT
	-v-	
	DAN HUNT INNOTECH SITE SERVICES	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
HEARD	THURSDAY, 14 MAY 2009	
DELIVERED	THURSDAY, 18 JUNE 2009	
FILE NO.	U 77 OF 2009	
CITATION NO.	2009 WAIRC 00387	

CatchWords	Industrial law – Termination of employment – Harsh, oppressive and unfair dismissal – Acceptance of referral out of time – Application referred outside of 28 day time limit – Relevant principles to be applied – Whether Commission has jurisdiction – Trading corporation – Respondent is trading corporation – Commission lacks jurisdiction – Industrial Relations Act 1979 (WA) s 29(1)(b)(i), s 29(2), s 29(3); Commonwealth Constitution s 51(xx); Workplace Relations Act 1996 (Cth) s 16.
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	In person
Respondent	Mr D Hunt

Reasons for Decision

- 1 This is an application pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 (“the Act”) by which the applicant alleges that in or about December 2008, he was harshly, oppressively and unfairly dismissed by the respondent.
- 2 The application was not filed until 16 April 2009, outside of the 28 day time limit prescribed by s 29(2) of the Act. Accordingly, the application was listed for hearing to consider whether the Commission should accept the referral of the application out of time under s 29(3) of the Act.
- 3 As a consequence of the hearing of the application for an extension of time, which was strongly opposed by the respondent, a further issue has arisen out of the proceedings, that being the status of the respondent.
- 4 The respondent is engaged in the industry of plastic welding and performs services at various mining locations throughout the State. As a consequence of matters raised during the hearing, and in further submissions made in response to a request by the Commission, it would appear that the respondent is a trading or financial corporation for the purposes of s 51(xx) of the Commonwealth Constitution and s 16 of the Workplace Relations Act 1996 (Cth) (“the WR Act”).
- 5 The respondent is an Australian proprietary company limited by shares with an ACN 129665863. The respondent’s further submission is to the effect that the business is a trading corporation, and trades under the name of “Innotech Site Services Pty Ltd.” Accordingly, in the respondent’s submission, it falls within the Commonwealth jurisdiction under the WR Act.
- 6 Whilst not commenting on this matter specifically, the applicant in his further submission requested the Commission to determine the issue of jurisdiction but nonetheless considered that he had a good claim against the respondent for unfair dismissal.

Conclusion

- 7 I am satisfied from the material before the Commission that the respondent is a trading corporation for the purposes of the WR Act and therefore by reason of s 16(1) of the WR Act, the Commission’s jurisdiction is ousted. Whilst it is regrettable that this matter has arisen at a relatively late stage, the Commission cannot proceed to hear and determine the application in circumstances where the respondent is not amenable to the Commission’s jurisdiction under the Act. In the circumstances I make no observations in relation to the merits of the applicant’s request that the time for filing the application be extended.
- 8 In all the circumstances the application must be dismissed.

2009 WAIRC 00388

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION TYSON DAWE	APPLICANT
	-v- DAN HUNT INNOTECH SITE SERVICES	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 18 JUNE 2009	
FILE NO/S	U 77 OF 2009	
CITATION NO.	2009 WAIRC 00388	

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	In person
Respondent	Mr D Hunt

Order

Having heard the applicant in person and Mr D Hunt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed for want of jurisdiction.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2009 WAIRC 00418

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DR VINCENT CUSACK BA (HONS) PHD	APPLICANT
	-v-	
	HON NICK GRIFFITHS MLC (PRESIDENT) AND MR MALCOLM PEACOCK (CLERK) OF THE LEGISLATIVE COUNCIL	RESPONDENT
CORAM	COMMISSIONER S WOOD	
DATE	29 JUNE 2009	
FILE NO/S	U 61 OF 2009	
CITATION NO.	2009 WAIRC 00418	

Result	Application discontinued
Representation	
Applicant	Ms E Scarff (of counsel)
Respondent	Mr S Heathcote (of counsel)

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 12 May 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 16 June 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.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2009 WAIRC 00420

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION OLIVA M. HERRERA	APPLICANT
	-v-	
	ABAXA (AKA REDSET INVESTMENTS) PTY LTD	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH	
DATE	MONDAY, 29 JUNE 2009	
FILE NO/S	B 50 OF 2009	
CITATION NO.	2009 WAIRC 00420	

Result	Dismissed
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Order

WHEREAS on 12 March 2009 the applicant applied to the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act) for alleged loss of contractual entitlements;

AND WHEREAS on 20 April 2009 the Commission wrote to the applicant advising that unless she provided written submissions as to why this Commission may have jurisdiction to hear and determine her claim or she contacted the Commission within 28 days, the Commission may make an order dismissing the application;

AND WHEREAS on 27 May 2009, the Commission wrote to the applicant advising her that if the Commission did not hear from her within 14 days of 27 May 2009, the Commission would make an order dismissing his application;

AND WHEREAS on 29 June 2009, the applicant had not contacted the Commission in respect of this matter nor filed a Notice of withdrawal or discontinuance;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, hereby orders —

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Senior Commissioner.

2009 WAIRC 00419

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

OLIVA HERRERA

APPLICANT

-v-

ABAXA (AKA REDSET INVESTMENTS PTY LTD)

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH

DATE MONDAY, 29 JUNE 2009

FILE NO/S U 50 OF 2009

CITATION NO. 2009 WAIRC 00419

Result	Dismissed
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Order

WHEREAS on 12 March 2009 the applicant applied to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) for relief alleging harsh, oppressive or unfair dismissal;

AND WHEREAS on 20 April 2009 the Commission wrote to the applicant advising that unless she provided written submissions as to why this Commission may have jurisdiction to hear and determine her claim or she contacted the Commission within 28 days, the Commission may make an order dismissing the application;

AND WHEREAS on 27 May 2009, the Commission wrote to the applicant advising her that if the Commission did not hear from her within 14 days of 27 May 2009, the Commission would make an order dismissing his application;

AND WHEREAS on 29 June 2009, the applicant had not contacted the Commission in respect of this matter nor filed a Notice of withdrawal or discontinuance;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, hereby orders —

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Senior Commissioner.

2009 WAIRC 00389

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
HELENA HOLLAND

APPLICANT

-v-

BANASZAK LEGAL

RESPONDENT

CORAM COMMISSIONER S WOOD
DATE THURSDAY, 18 JUNE 2009
FILE NO B 191 OF 2008
CITATION NO. 2009 WAIRC 00389

Result Application discontinued
Representation
Applicant Ms H Holland
Respondent Ms D Banaszak

Order

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

WHEREAS a conciliation conference was convened on 24 February 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 10 June 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.

[L.S.]

(Sgd.) S WOOD,
Commissioner.

2009 WAIRC 00421

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
JOSHUA LEE NOTLEY

APPLICANT

-v-

INSPIRATIONAL GARDENS - (DAMIAN JOHNSON, DIRECTOR)

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH
DATE MONDAY, 29 JUNE 2009
FILE NO/S U 31 OF 2009
CITATION NO. 2009 WAIRC 00421

Result Dismissed
Representation
Applicant In person
Respondent Ms G Johnson

Order

WHEREAS on 20 February 2009 the applicant applied to the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) for relief alleging harsh, oppressive or unfair dismissal;

AND WHEREAS on 12 May 2009 the Commission convened a conference between the parties pursuant to s 32 of the Act at which the respondent stated that the legal entity which employed the applicant was D & G Johnson Pty Ltd as trustee for The Damian Johnson Family Trust trading as Inspirational Gardens;

AND WHEREAS on 12 May 2009 the Commission wrote to the applicant and enclosed a copy of *Visser v Eral Pty Ltd as trustee for the Prestige Products Unit Trust trading as Compleat Angler & Camping World Rockingham* (2007) WAIG 2850, advising that he is to advise the Commission within 28 days whether or not he is of the view this Commission has jurisdiction to hear and determine his claim;

AND WHEREAS on 15 June 2009 after no response to the letter dated 12 May 2009 had been received from the applicant, the Commission wrote to the applicant advising him that if the Commission did not hear from him within seven (7) days of 15 June 2009, the Commission would make an order dismissing his application;

AND WHEREAS on 29 June 2009, the applicant had not contacted the Commission in respect of this matter nor filed a Notice of withdrawal or discontinuance;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the Act, hereby orders —

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) J H SMITH,
Senior Commissioner.

2009 WAIRC 00386

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RODNEY PAUL OKELY

APPLICANT

-v-

CBH GROUP

RESPONDENT

CORAM

COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 17 JUNE 2009

FILE NO/S

U 70 OF 2009

CITATION NO.

2009 WAIRC 00386

Result

Application dismissed

Order

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

WHEREAS on the 28th day of May 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS on the 3rd day of June 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Commissioner.

2009 WAIRC 00391

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CORNELIUS NIELSEN	APPLICANT
	-v-	
	DAVID GRAY AND CO PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 19 JUNE 2009	
FILE NO/S	U 75 OF 2009	
CITATION NO.	2009 WAIRC 00391	

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Ms Ainslie Robinson

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2009 WAIRC 00382

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PETER JOHN WESTON	APPLICANT
	-v-	
	NARROGIN HAY PTY LTD GREG RAMSAY	RESPONDENT
CORAM	COMMISSIONER S WOOD	
HEARD	MONDAY, 11 MAY 2009	
DELIVERED	MONDAY, 11 MAY 2009	
FILE NO.	U 3 OF 2009	
CITATION NO.	2009 WAIRC 00382	

Catchwords	Termination of employment – Harsh, oppressive and unfair dismissal – Jurisdictional challenge – Commission lacks jurisdiction - Application dismissed - <i>Industrial Relations Act 1979 s.29(1)(b)(i); Workplace Relations Act 2006 s 5, s 6 and s 16; Corporations Act 2001</i>)
Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr P J Weston
Respondent	Mr D Jones as agent

Reasons for Decision

- 1 These are the published version of the reasons for decision issued at hearing on 11 May 2009. The applicant lodged a claim for unfair dismissal in both the Federal and State Industrial Commissions. The Federal claim was out of time and was subsequently not accepted by the Federal Commission. The respondent in this jurisdiction lodged a jurisdictional objection stating that they are a constitutional corporation and, by virtue of the Federal Workplace Relations Act 1996, the employment relationship does not fall within this jurisdiction.

- 2 The respondent led evidence that Narrogin Hay Pty Ltd was the employer of Mr Weston [Exhibit R2 and R3], and is a proprietary company, limited by shares and registered under the Federal Corporations Act 2001 [Exhibit R1]. Mr Ramsay for the respondent gave evidence that the business was concerned with the production and sale of hay for a profit. None of this evidence was challenged by the applicant. Mr Weston claimed that the respondent is a subsidiary company of another company. This point was supported by Mr Ramsay, but has little relevance for this matter.
- 3 I find as follows. The employer of Mr Weston is Narrogin Hay Pty Ltd. The true respondent has been identified as the employer in the application, albeit the application includes also the name of Mr Greg Ramsay (the Manager of the applicant). It is common ground that Narrogin Hay Pty Ltd was the employer of Mr Weston. I find that Narrogin Hay Pty Ltd is a registered company under the Federal Corporations Act 2001. The company produces and sells hay for profit as its prime business. In that sense, the company conducts a trade in goods. By virtue of s.5, 6 and 16 and of the Federal Workplace Relations Act 1996 this Commission then has no jurisdiction over this employment relationship and specifically the claim for unfair dismissal. I find that I do not have jurisdiction to deal with this claim and hence the claim is dismissed for want of jurisdiction.

2009 WAIRC 00279

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER JOHN WESTON

APPLICANT

-v-

NARROGIN HAY PTY LTD GREG RAMSAY

RESPONDENT

CORAM

COMMISSIONER S WOOD

DATE

TUESDAY, 12 MAY 2009

FILE NO.

U 3 OF 2009

CITATION NO.

2009 WAIRC 00279

Result Application dismissed for want of jurisdiction

Representation

Applicant Mr P J Weston

Respondent Mr D Jones as agent

Order

HAVING heard Mr P J Weston on his own behalf and Mr D Jones on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the application be and is hereby dismissed for want of jurisdiction.

(Sgd.) S WOOD,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Colin Neil Turner	Colin Michael Hewitt (Alias) Michael Colin Hewitt Red Hen Catering Services	B 181/2008	Senior Commissioner J H Smith	Discontinued
Sue Robinson-Grone	Kalamunda Community Care Inc	B 139/2008	Chief Commissioner A R Beech	Discontinued

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
LHMU - Disability Services Commission Enrolled Nurses and Assistants in Nursing Industrial Agreement 2008 AG 28/2009	12/06/2009	Disability Services Commission	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Commissioner S Wood	Agreement registered
Public Transport Authority (Transwa) Enterprise Agreement 2009 AG 32/2009	26/06/2009	The Chief Executive Officer, Public Transport Authority and The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	(Not applicable)	Senior Commissioner J H Smith	Agreement registered
Public Transport Authority Railway Employees Industrial Agreement 2009 AG 31/2009	26/06/2009	The Chief Executive Officer, Public Transport Authority and The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	(Not applicable)	Senior Commissioner J H Smith	Agreement registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2009 WAIRC 00427

DECLARATION PURSUANT TO SECTION 42H

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT**CORAM**

SENIOR COMMISSIONER J H SMITH

DATE

FRIDAY, 3 JULY 2009

FILE NO.

APPL 46 OF 2009

CITATION NO.

2009 WAIRC 00427

Result

Declaration issued

Declaration

HAVING heard The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch and the Public Transport Authority, and by consent, the Commission pursuant to the powers vested in it pursuant to s 42H of the *Industrial Relations Act 1979*, hereby declares that bargaining has ended between the applicant and the respondent.

[L.S.]

(Sgd.) J H SMITH,
Senior Commissioner.

NOTICES—Appointments—**2009 WAIRC 00432**APPOINTMENTPUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner PE Scott to be the Public Service Arbitrator for a further period of two years from the 22nd day of June, 2009.

Dated the 19th day of June, 2009.



CHIEF COMMISSIONER A.R. BEECH

2009 WAIRC 00431APPOINTMENTADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a further period of one year from the 26th day of June, 2009.

Dated the 19th day of June, 2009.



CHIEF COMMISSIONER A.R. BEECH

2009 WAIRC 00451**NOTICE OF APPOINTMENT**

In accordance with the requirements of Section 81D(1) of the Industrial Relations Act 1979

SUSAN IVEY BASTIAN

Is hereby appointed as the CLERK OF THE INDUSTRIAL MAGISTRATES COURT with effect from 10 July 2009.



JOHN SPURLING

CHIEF EXECUTIVE OFFICER

PUBLIC SERVICE APPEAL BOARD—

2009 WAIRC 00381

APPEAL AGAINST THE DECISION MADE ON 31 DECEMBER 2008 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

HENRYK DWORZANSKI

APPELLANT

-v-

ANNE NOLAN DIRECTOR GENERAL DEPARTMENT OF INDUSTRY AND RESOURCES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER P E SCOTT - CHAIRMAN
MS L MCKAY - BOARD MEMBER
MR P MAHLER - BOARD MEMBER

HEARD

THURSDAY, 2 APRIL 2009, FRIDAY, 3 APRIL 2009

DELIVERED

TUESDAY, 16 JUNE 2009

FILE NO.

PSAB 1 OF 2009

CITATION NO.

2009 WAIRC 00381

CatchWords

Appeal against the decision to terminate employment - Substandard performance - Termination of employment - Performance issues - Performance assessment process - Qualifications of assessment panel - Requirements of the position - *Public Sector Management Act 1994 s 79(3)(c)* - *Industrial Relations Act 1979*

Result

Appeal dismissed

Representation

Applicant

In person

Respondent

Mr D Matthews (of counsel)

Reasons for Decision

- 1 These are the unanimous Reasons of the Public Service Appeal Board (the Board).
- 2 The appellant, Henryk Dworzanski, appeals to the Board against the respondent's decision to dismiss him on account of substandard performance.

Background

- 3 Mr Dworzanski originally applied for the position of Petroleum Engineer level 7 within what was then the Department of Industry and Resources but was unsuccessful in that application. However, soon after a position as a Production Engineer level 7 became available and Mr Dworzanski was offered that position in June 2002, he accepted that offer and commenced work on the 22 July 2002 (Exhibits R 21 and R 22). This position was within the Resources Branch of the Petroleum Division of the Department of Industry and Resources (the Department).
- 4 The role of the Production Engineer level 7 to which Mr Dworzanski was appointed is described in the job description form as having the following key responsibilities:
 - “● Reports on petroleum production operations and production tests, to ensure they are performed according to legislation, approved standards and good oil field practice.
 - Analyses the results of data from production wells, and evaluates reservoir production characteristics.
 - Prepares production forecasts.
 - Prepares production of decline curve analysis for royalty income prediction.”

(Exhibit R 20)

- 5 The Context Statement in the Statement of Duties says:

“The Petroleum Division (of the Department of Mineral and Petroleum Resources) develops policy, information systems, a legislative framework and administrative processes for the Western Australian offshore and onshore petroleum industries in order to enhance and promote the petroleum prospectivity of WA, facilitate access to land, meet community standards in the management of risks to people and the environment, and ensure the community receives appropriate returns for the extraction of its petroleum resources.”

- 6 The Summary of Duties sets out in general terms and in descending order of performance a list of reporting, monitoring, inspecting, analysing, reviewing plans and providing advice and recommendations duties. The essential criteria for the position include "(a) tertiary qualification, preferably in engineering or science"; "(e)xtensive experience in oil and gas production operations" and, importantly, "(h)ighly developed interpersonal skills" and "(h)ighly developed written skills including the ability to produce high quality, detailed technical reports".
- 7 A Performance Assessment for permanency was undertaken by Mr Dworzanski's manager Rod Dedman in January 2003. Mr Dedman's comment in the performance assessment form was "Henryk is meeting most of the tasks assigned to him but still requires considerable supervision and direction" (Exhibit R 23), and he was recommended for permanency.
- 8 On the 25 June 2003 a Performance Assessment was undertaken for the purpose of determining whether Mr Dworzanski should receive a salary increment. This was undertaken by his manager, Reza Malekzadeh (also referred to as Reza Malek). He did not recommend an increment. His Comment on Rating was that:
- "Henryk has not been able to perform most of the requirements of his duties without close supervision. He was assigned a Barrow Island field reserves review and Perseus reservoir review and he did not meet the deadline and the results were not satisfactory."
- (Exhibit R 24)
- 9 A Performance Assessment for Increment Advancement was undertaken on 22 July 2004 also by Mr Malek and he recommended an increment although in two out of four standards he marked Mr Dworzanski as requiring improvement. Mr Malek's "(c)omments on recommendation and action to be taken" were:
- "Henryk requires improvement to work effectively as a team member. On a number of occasions when he was supposed to complete his tasks on time he failed to do so such as the BI reserves project and Perseus review. However his performance is improving slowly + he has been involved in metering audits."
- 10 The salary increment was recommended and implemented (Exhibit R 25).
- 11 On 6 June 2006, Reza Malek sent a memorandum to Bill Tinapple the Director of the Division (Exhibit R 26). The subject of the memorandum was Mr Dworzanski's performance. In this memorandum Mr Malek referred to previous assessments of Mr Dworzanski's competency and the requirement to work with close supervision. He noted that he had tried to tailor the job to other skills claimed by Mr Dworzanski in his curriculum vitae. He said that he had initially refused to agree with Mr Dworzanski's pay increments since Mr Dworzanski's performance was not satisfactory. However he said that since "HR insisted for a closure later on I signed this paper reluctantly". His memorandum continues with comments that Mr Dworzanski is not able to perform his duties in a satisfactory manner and finishes in the following terms:
- "Overall, he consistently failed to perform his assigned tasks to the requirements of his position or to perform them correctly without close supervision. This proves that he is not qualified for such position. L7 officers must be able to perform without close day to day supervision. The tasks assigned to him during his course of work with the Resources Branch were all in line with his claims of meeting such criteria during his interview and his application for this position. However, his performance clearly indicates that he has inadequate knowledge, exposure and experience in these areas of claimed expertise and in spite of several requests by Branch Management to further his knowledge in his relevant field he shows little or no interest to do so.
- In conclusion since he has not been able to do his last task as production monitoring without large mistakes, he left me with no other option but to delegate this responsibility to another technical officer and I intend to assign this task to another person as soon as possible. Therefore he will not have any assigned tasks with the Branch anymore and it is recommended to abolish his position and make Henryk redundant."
- (Exhibit R 26)
- 12 Attached to this memorandum were various documents including comments regarding the performance assessments and Mr Dworzanski's responses, examples of Mr Dworzanski's work and copies of other communications within the branch.
- 13 On 6 September 2006 Mr Malek again sent a memorandum to Mr Tinapple regarding Mr Dworzanski's performance management (Exhibit R27). On this occasion he noted that Mr Dworzanski had had an opportunity to respond to the performance issues raised with him, that there had "been a great deal of leniency afforded to Mr Dworzanski in terms of the tasks required and the time allowed for him to complete them to the point it has significantly impacted the achievement of the Branch objectives". It notes that in line with policy the position benefited from the payment of an Attraction Benefit of \$24,300 per annum. This Attraction Benefit is said to relate to the position not the employee. Mr Malek believed that given the time taken and the efforts during the management of the performance process, he did not believe that he could facilitate an improvement in Mr Dworzanski's performance. He requested that "a formal performance management action process is undertaken to determine if Mr Dworzanski is capable of undertaking the full duties of his position to the required standards".
- 14 Mr Tinapple gave evidence that given the length of time Mr Dworzanski's performance had remained an issue, the requirement for ongoing supervision, and the efforts made to overcome the issue, he endorsed the recommendation and forwarded it to the Director General of the Department on 6 September 2006. Mr Tinapple supported the recommendation for a formal assessment of Mr Dworzanski's performance (Transcript page 31 and Exhibit R 25). The Director General agreed and consequently an assessment was to be undertaken.
- 15 Mr Tinapple then met with Mr Dworzanski and Ms Carol Fuller, the Manager of Human Resources Services on 26 October 2006. Mr Tinapple proposed to Mr Dworzanski that there were four projects that were suitable for the purpose of assessing Mr Dworzanski's performance and his ability to meet the requirements of the level 7 position and Mr Dworzanski was invited to select one of the projects to undertake as part of his assessment. Mr Dworzanski chose the Barrow Island Enhanced Oil Recovery (EOR) Evaluation Project. The evidence indicates that during the meeting of 26 October 2006, a discussion was held

as to how the assessment was to be undertaken and Mr Tinapple “would undertake the role of assessing the engineering component of the project” (Exhibit R 3) and an overall assessment would be made by Mr Tinapple with input and consultation with the Human Resources personnel. Ms Fuller made notes of the meeting of 26 October 2006 including that after Mr Tinapple left:

“I had further discussions with Henryk to ensure he was fully aware of the possible outcomes of this process. I advised that where there were gaps between expected and demonstrated performance standards there were several options the Department could consider. These could range from training and development through to demotion or dismissal in the worst cases, however he would have an opportunity to provide feedback and comments if there was an adverse report prior to any further action being taken. I emphasised the importance of the Performance Assessment as an opportunity for him to demonstrate his competencies, and confirmed he had the ability to ask for assistance and support during the project” (sic).

- 16 Ms Fuller recorded that Mr Dworzanski said that “he was comfortable with Bill (Tinapple) as the professional assessor, stating that he had considerable respect for him” (Exhibit R 3). Ms Fuller gave evidence that Mr Dworzanski had raised concerns about Mr Malek, and, as part of this process Mr Dworzanski was removed from Mr Malek’s management and reported directly to Mr Tinapple, to ensure that if that situation had been a contributing factor to Mr Dworzanski’s previous performance issues, it would not be so in this case. Mr Malek was not involved in the process.
- 17 Mr Tinapple confirmed his requirements regarding the project chosen by Mr Dworzanski in an email of 1 November 2006 (Exhibit R 29). Mr Tinapple described this project and its significance in his evidence at pages 33-34 of the transcript. The assessment process for this project was over a period of three months and during this time the assessment panel met with Mr Dworzanski six times. Mr Dworzanski’s progress was monitored and discussed on each occasion.
- 18 Mr Dworzanski gave evidence that he has a lot of respect for Mr Tinapple, that “(h)e’s (sic) nice man” (Transcript page 62) and that Mr Tinapple “was trying to be fair” and was very honest (Transcript page 63) but he says that “Mr Tinapple is very busy, and he didn’t have probably time to assess my conclusion and the recommendations” (Transcript page 62). Mr Tinapple was on holidays for 20 days during the assessment process and was not always available. Mr Dworzanski says that he was completely alone in doing the project and did not have a chance to have discussions with anybody else.
- 19 Mr Dworzanski says that the process would have been better if he could have had some input from a person from Shell Texaco, but he says this was rejected. Mr Dworzanski says that the involvement of Ms Liu Jian Hua from within the organisation was not appropriate or helpful because her area of expertise was very narrow, and she was of no assistance to him.
- 20 Mr Dworzanski acknowledged that Mr Tinapple is very knowledgeable in the field of petroleum production in what he referred to as “the high level” but that at the level of technical detail, Mr Tinapple has people “to give him this specific engineering information and expertise”, however he conceded that Mr Tinapple “understands it” (Transcript page 65).
- 21 Mr Tinapple has given evidence that the respondent would have preferred to have some external technical expertise involved in the panel. However, given the nature of the work, the areas from which that technical expertise might have been drawn and the potential for embarrassment at the standard of work performed, that it was not appropriate to obtain external expertise for the panel. In any event, it appears that notwithstanding his protests about the complement of the panel and that Mr Tinapple was the only person on the panel technically competent to assess his performance, Mr Dworzanski’s evidence demonstrates that he has high regard for Mr Tinapple’s expertise and approach.
- 22 Mr Tinapple says that the process was a painful one in which the requirements for the plan Mr Dworzanski was to produce were “ratcheted down”. The process was said to be painful because, according to Mr Tinapple, Mr Dworzanski did not understand the project plan or program. Mr Tinapple says he believed that the project was within the expertise of a level 7 engineer, which is a fairly high level.
- 23 Mr Dworzanski says that his work was judged on a draft, not a final report and therefore was harshly judged. Mr Tinapple says that such a report would not be expected to be the final report but that additional work would be expected to bring it to finalisation. He says that given the number of his staff for whom English is a second language he has no difficulty in having to edit the reports he receives to ensure they are correctly expressed. He described Mr Dworzanski’s report as being “not really of a high level, it’s more like an undergraduate or a high school level report” (Transcript page 41). He says it lacked proper analysis and appropriate recommendations, there were many errors such as the report having three “figure 1s”, and it could have been valuable if it contained “an acceptable analysis, recommendations and conclusions in an appropriate format” (Transcript page 42), “it just didn’t measure up” (Transcript page 44).
- 24 Throughout the process of the assessment, the panel met with Mr Dworzanski to review his work and the progress towards the established milestones. These reviews were recorded and are included in the document “Performance Report – Henryk Dworzanski” signed by Mr Tinapple, Ms Fuller and Mr Bert Linden, Human Resources Consultant on 13 March 2007 (Exhibit R 33). The document also includes “Assessment of Project and Performance”, which sets out a number of aspects including “Positives” and “Concerns/Reservations”.
- 25 The “Positives” were:
 - HD (Henryk Dworzanski) completed assigned project sections within the specified and agreed timelines.
 - Communication skills were appropriate. HD listened to feedback and sometimes adopted suggestions or options for improvement with the project.
 - HD remained enthusiastic throughout the project, particularly about being able to contribute technically to the resolution of emerging issues in Enhanced Oil Recovery.”

26 The “Concerns/Reservations” were:

- “● A large proportion of the EOR report covered background production history and information, rather than in-depth analysis of EOR options. Only 7 pages (of 45) were directly focused on EOR.
- Many conclusions or assumptions were stated, without direct reference to sources or evidence.
- A high degree of emphasis was placed on, and included information from published articles (eg, work undertaken by Chevron, and a 1999 APPEA Journal article) without reference or apparent independent analysis, acknowledgement, or broader comparative research.
- Graphs or Diagrams were not always relevant or supported by explanatory comments, or summary notes.
- From a professional or technical perspective:-
 - It appears that not all EOR options were considered and none were fully assessed, (sic)
 - There was no indication of the depth of EOR research (eg, world-wide search for options; literature reviews; etc) (sic)
 - EOR was the primary focus of the project, yet not the major focus or in-depth part of the resultant report.
 - There appeared to be inconsistencies between comments or statistics in different parts of the report.
 - Some issues raised (eg environmental impact) for EOR methods, were given only brief comment and were not discussed or evaluated for possible impact on the EOR method – for either the company or the State.
 - Conclusions and Recommendations did not include any discussion about possible cost-benefit analysis or the pros and cons associated with each EOR option, for balanced consideration by the Director as to the State’s future strategies for EOR.
 - The quality of the project report was considered sub-standard in terms of layout, grammar & spelling, chapter or section numbering, and general pagination or lack of page numbering.
 - There were no references listed, even though – clearly – many of the figures came from other sources. As presented, the lack of referencing in this report would be unacceptable even at a basic university assignment level.”

27 It also contained a “Summary Comments” and conclusions as follows:

- “● Although the written quality of the EOR project report was not of a high standard, there was reasonable evidence, throughout this project, that HD demonstrated basic technical knowledge and experience as a Production Engineer, however, not deemed suitable for his substantive Level.
- From a professional perspective, the lack of emphasis on research and analysis of potential EOR methods, demonstrated limitations in HD’s capabilities or skill base.
- In the above context, generic competencies for a Level 7 would lead to an expectation that HD would be able to recognise limitations; correctly identify all aspects of the project; identify resources necessary to complete the project; apply an understanding of government needs in solutions; and negotiate to achieve agreed outcomes.
- The standard of work, as demonstrated by this project, was assessed as being below the expected standard required for a L7 Petroleum Engineer with DoIR. The final report, as presented, would not be released or utilised in its current form, due to a wide range of inaccuracies and incomplete analysis.

Findings and Recommendations

1. After independent investigation of Mr Dworzanski’s performance standard, the panel considers his performance to be sub-standard in relation to the requirements of the substantive position he was employed to undertake, at Level 7.
2. Given the above findings, feedback and a copy of this report is provided to Mr Dworzanski, who will have the opportunity to comment on the findings.
3. This report is also to be provided to the General Manager Human Resources for consideration of appropriate action to be taken.
4. Mr Dworzanski will also be informed of available employee support options.”

28 On 4 April 2007 Mr Dworzanski submitted a response in which he:

1. Said that there were serious behaviour problems within the branch (particularly identifying the Branch Manager and Senior Petroleum Technologist) including bullying, victimisation, threats and intimidation used against him. He claimed this was directed at him, and that he was “almost completely isolated from any meetings, presentations or conferences other than branch meetings”. This behaviour towards him is said by him to be directly related to his Personal Planning and Performance Development Process. I take this to mean that his performance has been adversely affected by this behaviour.
2. Commented on the previous assessments and comments regarding his work.
3. Commented on the performance assessment process involving the Barrow Island EOR project. He says that the same project was then being undertaken by Chevron Texaco, referring to the resources available to it, and that finalisation of that project “is expected in a few years time”.

4. He provided some comments critical of the “performance report prepared by HR Consultant” in the following terms:

“I would like to list only a few examples:

- Essential part of my project “Conclusions and Recommendations” was not assessed.
- Title of the project was repeatedly typed wrong (I have mentioned this during our meeting) (sic)
- None of specific technical issues were commented in details and only broad negative statement expressed.
- Final section of my report is different than stated in the HR report and should be: “Conclusions and Recommendation”.
- Assessment of each part of the project is leading to confusion. Positive (verbal) comments I have received during the meeting are not mentioned in the report.
- During the assessment process satisfactory outcomes were notified many times in HR report. Final statements in the report are completely different and contradictory (sic)
- Comments (dot points) used in the columns of the report are not clear and very confusing. Some comments are repeated unnecessarily.”

(Exhibit R 34)

He expressed his “full” satisfaction with the outcome of his study;

5. Responded to comments made by the Senior Production Geologist on 29 July 2005 and commented on a memorandum prepared by the Senior Petroleum Technologist of 15 July 2003.
6. Claimed that his manager had asked non engineering personnel to write negative reports about him, and sought the removal from his personnel file of such negative reports.
- 29 In her evidence, Ms Fuller said that Mr Dworzanski had raised many of these issues before. However, there followed discussion and correspondence between Ms Fuller, Mr Dworzanski and Mr Mick Banaszczyk, the Executive Director, Corporate Support regarding Mr Dworzanski’s complaints (Exhibits R 4, 5 and 6). Ms Fuller’s memorandum to Mr Tinapple of 26 July 2007 (which was copied to Mr Dworzanski) sets out the outcome of that process in the following terms:

“Bill

I have recently met with Henryk Dworzanski regarding the issues he has raised, and discussed with him whether he intended to pursue options for resolution under the DoIR Grievance Resolution policy and process.

Henryk has now signed off on his decision not to seek resolution through a formal grievance process for these issues. However he has requested that all of the documentation he provided is kept on file. He has also indicated he may lodge a formal complaint if there are future incident with his manager (Reza Malekzadel), or others, where he considers their behaviour is not in compliance with relevant DoIR policies in particular the Code of Conduct.

It was agreed that the documents Henryk discovered on his Personal File should be removed as requested. These have now been placed on a confidential file and will be kept in a secure place by the General Manager Human Resources.

As discussed with you, it is advisable to ensure Reza and other Petroleum and Royalties staff are made aware of their responsibilities and expected behaviours under various departmental policies. It would be appropriate to include discussion and agreement on staff management practices through the Performance and Accountability Framework process. I understand you have already commenced this process.

You are very welcome to contact me for any assistance, or clarification on the above information.”

- 30 During the remainder of his time with the respondent Mr Dworzanski did not lodge a formal grievance.
- 31 Mr Dworzanski’s response to the Performance Report resulted in the respondent engaging an independent person, Ms Kath White, to assess the situation to that point. In September 2007, Ms White produced a lengthy and detailed report. She had interviewed Mr Dworzanski; Mr Tinapple; Mr Malek; Mr Steve Walsh, the Senior Petroleum Technologist, Resources Branch; Mr Rod Dedman, former Senior Production Geologist; Ms Jian Hua Liu; and Mr Bert Linden, Human Resource Consultant. Ms White’s Executive Summary states:

“**There are five major findings in this report:**

1. **Mr Henryk Dworzanski does not have the skills to operate effectively in the Level 7 Production Engineer position. His performance in his current position is therefore substandard.**
This is clear from the many reports and the assessment processes. Mr Dworzanski was assessed against the position JDF and the generic level 7 competencies and was not able to achieve the required standards.
2. **Mr Henryk Dworzanski has very little understanding of his own ability or skill level**
Throughout the documentation and at interview, Mr. Dworzanski has made many claims about his skills, and about his reports being valued and used by others. These claims are not substantiated. Any achievements that Mr Dworzanski claims seem to be either trivial or non-existent.

At interview Mr Dworzanski expressed a view that he should be in a more senior position with staff to supervise and to allow him to share his knowledge. This view is clearly unrealistic. Mr Dworzanski seems unable to make a connection between demonstrated performance and skill level. His claim to possess skills comes almost entirely from his qualifications dated over 30 years ago.

3. The Department has given Mr Henryk Dworzanski fair opportunity to address his performance issues

The Department has attempted to seek opportunities for Mr Dworzanski to address his performance issues, including investigating placements in other sections of the department, closer supervision and working with an outside consultant for skills transfer.

When issues have been raised by Mr Dworzanski as being detrimental to his work performance, they have been addressed. His final assessment by the Panel was totally separate from his branch where he claimed the manager's behaviour negatively affected his performance.

4. Mr Henryk Dworzanski's many comments and statements cannot, in the main, be substantiated

Mr Dworzanski was given the opportunity to provide both written comment and verbal comment at interview. His claims are generally not substantiated and in many cases appear to be inappropriate. He has taken the approach of criticizing most of the people and the aspects of his assessment in an apparent attempt to obfuscate the real issue of his inability to perform at the required level. Some of his comments border on the nonsensical. Many other comments are either inappropriate, clearly untrue or based on hearsay, extremely derogatory and in one case, possibly racist.

5. The Department has complied with the PSS Performance Management Standard

While the minimum standards have been met, the process for performance review did have an issue in that documentation was placed on Mr Dworzanski's personal file without his knowledge. This was however addressed when it came to light and other processes were implemented to ensure there was no disadvantage as a result."

32 The Director General then considered a number of options in respect of Mr Dworzanski.

33 Mr Dworzanski was receiving the attraction/retention benefit which was paid for particular positions of high importance in the organisation which were critical and which were difficult to fill. The allowance was not personal to the particular efforts of the individual but was to ensure that the positions remained filled. The attraction and retention benefit was removed following consideration of Mr Dworzanski's comments in that regard.

34 In an endeavour to find alternative employment options for Mr Dworzanski the respondent arranged for him to be assessed by Chandler McLeod for the purpose of examining Mr Dworzanski's "cognitive abilities, potential, interests, behaviour style dimensions and management style" (Exhibit R 10). The Review and Recommendation sections of the report dated 8 February 2008 includes the following comments:

"Mr Dworzanski's results across the measures of ability administered are not particularly strong and raise reservations regarding his ability to meet the problem solving language-based and technical demands of a professional engineering role."

"Mr Dworzanski's level of literacy was assessed and while his result is not strong, he has emphasised accuracy, indicating that he is capable of understanding basic written information, although he will require additional time."

"With respect to higher-level verbal reasoning skills, Mr Dworzanski is likely to struggle to convey information in an articulate and fluent manner, particularly to individuals who do not possess the same technical qualifications as he will tend to rely on familiar phrasing and terminology."

"Mr Dworzanski appeared to have difficulty on the assessment of numerical reasoning, although given that there is a language component to this assessment, it cannot be determined whether his slow reading speed impacted his ability to achieve success."

"When assessing candidates for professional engineering roles, a Verbal Critical Thinking assessment is typically administered to verify the individual's capacity to evaluate complex or intricate written material, however given Mr Dworzanski's poor performance on the assessments of verbal reasoning and literacy, he was not asked to complete this measure."

"Based on Mr Dworzanski's temperament findings, concerns exist regarding his ability to achieve success in a professional level role where he would be required to manage pressure, be self-managing in his work approach and capable of setting his own direction, and act decisively when faced with urgent requests or issues."

"With respect to his ability results, they consistently fall well below the standard expected of individuals having attained engineering qualifications and highlight significant concerns regarding his ability to manage the problem solving, communication and technical demands of the role."

35 In around February 2006, the respondent sought to place Mr Dworzanski in another work area. This was in the Geological Survey Division in Petroleum Geology, under the management of Mr Jeff Haworth, where he participated in the Canning Basin Tight Gas Project. This work was not performed to a satisfactory standard. Ms Fuller gave evidence that Mr Haworth indicated to her that there were significant issues and problems with Mr Dworzanski's performance, and that it was substandard (See Transcript pages 16-17 and Exhibit R 11). On 17 November 2008 there was a meeting between Mr Dworzanski, Mr Tinapple, Ms Carla Frayne as a support person for Mr Dworzanski, Ms Fuller and, for some of the meeting, Mr Haworth. Ms Fuller made a file note of this meeting (Exhibit R 13). Mr Haworth reported that Mr Dworzanski

had been in the Geological Survey Division for approximately eight months, had produced an initial report, to which Mr Haworth had provided feedback and suggested amendments, the second draft of the report is said to have needed significant work done to complete it. Mr Haworth reported that the structure of the report was poor, the content lacked substance and in comparison with another employee at a lower level, Mr Dworzanski's work was slow. "In (Mr Haworth's) opinion the work did not meet the standard expected of a L7 officer" (Exhibit R 13). Ms Fuller's file note also recorded "HD (Henryk Dworzanski) provided comments that he considered the work to be good, reports were inconsistent across the industry and that it was quite complex".

- 36 Ms Fuller informed the meeting that the next stage was to provide the Director General with a range of options to conclude the process. She said that this was likely to include an option of dismissal of the grounds that Mr Dworzanski was unable to fulfil the requirements of his position as a Production Engineer level 7. Mr Dworzanski stated that he would like to access some assistance with applying for other positions and possibly apply for leave without pay if he gained a temporary contract position. Ms Fuller offered him assistance in reviewing his curriculum vitae and identifying positions for which he could apply, and Ms Fuller provided Mr Dworzanski with information on the process as it was from there. Ms Fuller says there were no further options in the Department for Mr Dworzanski.
- 37 In the latter part of Mr Dworzanski's employment, the respondent had concerns that Mr Dworzanski was raising what Ms Fuller describes as "fairly ambiguous information about his health" (Transcript page 16). Accordingly the respondent organised a medical assessment for Mr Dworzanski and he fully cooperated in that process, attending an appointment on 4 August 2008. The report of Dr Joel Silbert, Consultant Occupational Physician, of 17 December 2008, indicated there was no medical reason why he could not undertake his duties at work, however the report once again raised issues which Mr Dworzanski previously raised about his working relationships with his previous manager (Exhibit R 12).
- 38 Following the meeting on 17 November 2008, Ms Fuller wrote to Mr Dworzanski on 18 November 2008 setting out the history of the situation from the respondent's perspective and noting in conclusion that:

"I confirm our discussion at yesterday's meeting that the performance assessment process has now been concluded and your performance has been assessed as substandard. In accordance with the *Public Sector Management Act, 1994* Section (sic) 79 (3), I also confirm that a report is now being prepared for the Director General. One of the options for consideration will be the termination of your employment in the Public Sector. A copy of the above section of the Act is provided for your information. You will be given an opportunity to comment on any proposed outcome."

(Exhibit R 15)

- 39 Ms Fuller then prepared a report to the Director General, Anne Nolan (Exhibit R 14), in which the performance assessment process undertaken in respect of Mr Dworzanski was outlined and included recommendations for options following the conclusion that the performance was substandard. Those options included withholding an increment, reducing the level of classification or termination of employment. The recommended option was termination of employment and the Director General supported this outcome.
- 40 By letter dated 28 November 2008 the Director General wrote to Mr Dworzanski, referring to the outcome of the performance assessment, that his performance was found to be substandard, and advising that she had made a provisional decision to terminate his employment under s 79(3)(c) of the *Public Sector Management Act 1994*. Mr Dworzanski was given the opportunity to provide a written submission within ten working days if he thought this should not occur.
- 41 On 16 December 2008 Mr Dworzanski provided to the Director General a letter dated 15 December 2008 in the following terms:

"Thank you for giving me the opportunity to respond to your letter dated 28 November 2008 and related to my performance assessment.

I have seriously considered (sic) outcome of my performance assessment and definitely termination of my employment should not occur for the following reasons:

- As an Oil and Gas Production Engineer with Petroleum Engineering qualification (sic) (BS and MS) and over 35 years engineering experience in the Oil and Gas Industry I have significantly contributed to the Department of Industry and Resources.

I have conducted extensive study related to the Barrow Island Enhanced Oil Recovery, Barrow Sub-basin and Canning Basin unconventional gas development for WA market. My study should have significant impact for the creation of further projects, field developments and regulatory approvals process.

Together with (sic) external consultant I have conducted a number of audits related to oil, gas, LPG and LNG custody transfer as per Auditor General Office requirements.

Every month I have also generated a 35 page production report for all WA fields. My production report is frequently used for oil and gas fields' performance review, forecasting, planning and fields development.

- I have attended a number of DoIR coaching workshops related to Performance and Accountability Framework (PAF) and I am totally convinced that my performance assessments were never conducted according to basic DoIR PAF Work and Development Plan. I have raised and described this issue in writing on a numerous occasions.
- Report about assessment processes conducted by Ms Kath White should not be taken seriously. The report focuses strongly on negatives about myself and contains untrue statements. Some individuals that have been interviewed by her intentionally fooled her. This was unknowingly reported in her report and should never have been part of her report. I have raised my serious concerns about this matter. Competency, qualifications and work behaviours of some branch members and my assessors are also serious issues.

Some of the projects that I have created have been blocked together with my access to the computer applications. Also expensive DOIR computer application (sic) have been deleted. A lack of understanding of engineering concepts by some of my previous assessors was clearly evident.

- Based on the above report sanctions against me have been imposed and my salary has been reduced by 30%.
- My health has seriously deteriorated during this process and I have made the choice to do everything I can to stop my health from deteriorating further. (OSH medical report attached for your information). I have also informed Ms Carol Fuller in writing that recently I have been diagnosed with cancer and I am recovering from (sic) very painful surgical operation. Ms Fuller asked me for another doctor's certificate to speed up my retirement process due to the ill health. I strongly believe that I am still employable and another stressful situation is not a part of my therapy.
- I am approaching my retirement age and I have received advice to postpone my retirement due to the current word (sic) financial crisis. My strong perception is that my negative assessments are not related to my performance and more sanctions against me should definitely not be imposed.

I am comparing my performance and amount of work with other members of Petroleum Resources Branch employed on the same level, and based on my comparison I am totally convinced that my performance should never be assessed as substandard.

I strongly believe that internal solution (sic) would be the best options especially during current DoIR restructure process. I am ready for confidential discussion for further clarification, suggestion or recommendations."

(Exhibit R 18)

- 42 By letter dated 17 December 2008 the Director General thanked Mr Dworzanski for his response to her letter, noting the matters he had raised but saying that those matters had already been dealt with as part of the assessment process. The letter advised that the Director General had decided to terminate his employment under s 79(3)(c) of the *Public Sector Management Act 1994* with effect from 31 December 2008.

Issues and Conclusions

- 43 During the hearing, Mr Dworzanski represented himself in this matter. Although as a lay person, he may not have experience or expertise in conducting his own case, he did not make the best of the opportunities which were available to him. His own case consisted largely of him adopting the statement attached to his Notice of Appeal to Public Service Appeal Board in the following terms:

"I strongly believe that I was unfairly dismissed based on harsh performance assessments and sanctions against (sic) should not be imposed for the following reasons:

- As a Petroleum Engineer I have significantly contributed to the Department of Industry and Resources (working in the office and in the oil and gas fields) (sic)
- My reports have been frequently used as a reference for other projects and approval processes.
- Basically negative comments were never expressed about my projects progress reports. However when reports were on preliminary stage, harsh and very controversial comments were always created.
- Some of my assessors are not possessing formal engineering qualifications and it was not possible for me to agree with their engineering comments.
- Report of Ms Kath White about my performance assessments processes contain untrue statements and should not be taken seriously. Based on this report 30% of my salary was reduced.
- My performance assessments were never conducted according to approved DoIR Performance Accountability Framework (sic)

After more than 30 years engineering and 6 years DoIR experience I strongly believe that my performance was absolutely not substandard, specially comparing my performance and amount of work with the other employees on the same level.

Definitely my employment termination should not occur and my pre retirement financial commitments urgently forcing me for (sic) seeking reinstatement to my job."

- 44 The Chairman endeavoured to encourage Mr Dworzanski to elaborate on his position, however, he gave limited responses, preferring to rely on his statement. He did not at all address the issue raised in his last ground of whether the performance assessments were conducted according to the respondent's own procedure.
- 45 Mr Dworzanski complains that the respondent has treated him unfairly in its termination of employment on account of substandard performance. We have had the benefit of observing Mr Dworzanski, Ms Fuller and Mr Tinapple as they gave their evidence and of examining the documents which have been submitted into evidence. Mr Dworzanski's evidence did not seriously challenge either Ms Fuller's or Mr Tinapple's evidence, and in particular in the case of Mr Tinapple, Mr Dworzanski described him as being honest and a man he respected. There was nothing in the way in which Mr Tinapple gave his evidence which would indicate to the contrary. We find that each of the witnesses gave their evidence openly and honestly however Mr Tinapple's and Ms Fuller's opinions differed from that of Mr Dworzanski.

- 46 We conclude that the respondent has undertaken a reasonable process and made several efforts to provide Mr Dworzanski with an opportunity to demonstrate a satisfactory standard of performance following a number of reports from Mr Dworzanski's manager that his performance was substandard and creating problems within the division. It is true that Mr Tinapple is a busy person however we are satisfied that he entered into an assessment process regarding Mr Dworzanski's performance in good faith, gave him the opportunity to select the project he wished to undertake, and set up, in consultation with Ms Fuller, appropriate benchmarks and timeframes. We find that Mr Tinapple has the technical capacity to assess the competency and the standard of work of a person performing the role of Production Engineer at level 7. Consideration was given to bringing outside expertise into the process however, there were good reasons for that not occurring, and we find that it did not make the process inadequate or flawed.
- 47 It is to be noted that a level 7 position is a responsible and senior position. The requirements of the position are clearly stated in the Job Description Form. The position is one which requires skilled analysis and proper reporting, as well as high level written skills. It is clear from the evidence including an objective assessment of the report prepared by Mr Dworzanski for the Barrow Island EOR Project that his report was inadequate for a person occupying a position at level 7. He was provided with an opportunity to respond to the respondent's views as a consequence of that project and he did so. Where his response again raised matters not relevant to that particular project, but were associated with ongoing complaints by Mr Dworzanski about the conduct of his manager, Mr Malek, and others, those allegations were investigated by Ms White on behalf of the respondent.
- 48 In any event during the period when Mr Dworzanski was undertaking the project, he reported directly to Mr Tinapple. It became apparent only during the course of his evidence that although he was no longer reporting to Mr Malek, Mr Dworzanski, for some unknown reason, continued to participate in meetings conducted by Mr Malek. This was something that Mr Tinapple was not aware of. In any event we find that Mr Dworzanski's performance in regard to the Barrow Island EOR Project was not assessed by reference to any input from Mr Malek, and there is no evidence that Mr Malek had any influence in that regard.
- 49 Further, subsequent to the report by Ms White, Mr Dworzanski had an opportunity to lodge a formal grievance and did not do so.
- 50 Notwithstanding the process it had undertaken to that point, the respondent did not rely upon the Barrow Island EOR Project work performed by Mr Dworzanski and the unsatisfactory performance report resulting from that to determine whether his employment ought to be terminated. Rather the respondent searched for opportunities to find alternative work for Mr Dworzanski and placed him in another area, in the Geological Survey Division, undertaking work under the supervision of Mr Haworth. Again, this removed Mr Dworzanski from Mr Malek's line of authority and any issue arising between Mr Dworzanski and Mr Malek played no part in his performance or in any assessment of that performance. Accordingly he was not able to demonstrate that any complaints he might have in regard to Mr Malek are relevant to the assessment of his standard of performance.
- 51 Mr Haworth's assessment of Mr Dworzanski's performance was that it was also inadequate. The respondent had no other options available to continue Mr Dworzanski's employment.
- 52 As to the specific grounds of appeal raised in the Notice of Appeal, it may be that Mr Dworzanski did significantly contribute to the work of the Department. However, firstly, he brought no evidence of it. Secondly, the evidence is clear that his performance was substandard. The same may be true of the second ground that his reports have frequently been used as a reference, but this is not to the point. The point is whether, overall, his performance was of the standard required of a Production Engineer at level 7.
- 53 The third ground is about negative comments not being expressed about progress reports, but, harsh and controversial comments being made when preliminary reports were presented. This appears to relate to the fact that during the early stages of the Barrow Island EOR Project, Mr Tinapple was encouraging and gave extensions in time, that it was not until later that conclusions were drawn as to the project being unsatisfactorily performed. We accept Mr Tinapple's evidence that it was difficult to draw any conclusions during the early stages of the project, except to the extent that progress was slow and difficult. We do not accept that the criticism of Mr Dworzanski's work was harsh or unfair and agree with Mr Tinapple's assessment of it.
- 54 As to the fourth ground, that some of the assessors were not engineers, there is no real evidence that the engineering assessment, which was Mr Tinapple's responsibility, was not within his expertise. On the contrary, Mr Dworzanski acknowledged that Mr Tinapple understands the detailed issues as well as having high level expertise. The process may have been enhanced by additional engineering expertise, but it was far from inadequate. Although Mr Tinapple was the only member of the assessment panel with engineering expertise, his was the opinion on that matter which counted. The role of the other members of the panel was, in essence, to assist and advise Mr Tinapple of the appropriate procedures for such an assessment.
- 55 There was no real challenge by Mr Dworzanski to Ms White's report in either his evidence or submissions. Although he claims that some of the statements in the report are untrue, he has not demonstrated this.
- 56 As noted earlier in these Reasons, Mr Dworzanski did not address his last ground of appeal, which was that the respondent did not conduct its assessment of Mr Dworzanski according to its own Performance Accountability Framework.
- 57 In those circumstances, it must be said that the respondent has made reasonable, perhaps more than reasonable, endeavours to assist Mr Dworzanski's work, provide him with opportunities to demonstrate adequate performance, with the appropriate support provided to him, and still further opportunities including undertaking an assessment of his skills and expertise by an external testing agency for the purpose of examining other employment options. In those circumstances there is nothing unfair in the respondent's decision to bring the employment to an end. We find that Mr Dworzanski's performance was substandard in regard to the position of Production Engineer level 7 which he occupied.

- 58 Mr Dworzanski does not rely upon any issues of poor health as being an explanation for substandard performance, although it does seem that there was some issue associated with his health which may have had an impact. However it is very difficult to assess that suggestion and to come to any conclusion particularly given that a medical assessment of Mr Dworzanski, undertaken at the respondent's instigation, indicated that there was no impediment to him performing his responsibilities.
- 59 In all of the circumstances we find that Mr Dworzanski has failed to demonstrate that the respondent's decision to terminate his employment on account of substandard performance has been harsh or unfair in any way. Accordingly an order shall issue for the dismissal of the appeal.

2009 WAIRC 00377

**APPEAL AGAINST THE DECISION MADE ON 31 DECEMBER 2008 RELATING TO TERMINATION OF
EMPLOYMENT**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
HENRYK DWORZANSKI

PARTIES**APPELLANT**

-v-

ANNE NOLAN
DIRECTOR GENERAL
DEPARTMENT OF INDUSTRY AND RESOURCES

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER P E SCOTT - CHAIRMAN
MS L MCKAY - BOARD MEMBER
MR P MAHLER - BOARD MEMBER

DATE

TUESDAY, 16 JUNE 2009

FILE NO

PSAB 1 OF 2009

CITATION NO.

2009 WAIRC 00377

Result Appeal dismissed**Representation****Applicant** Mr H Dworzanski**Respondent** Mr D Matthews (of counsel)

Order

Having heard the appellant on his own behalf and Mr D Matthews (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2008 WAIRC 01620

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MICHAEL CHRISTIAN NICHOLAS

PARTIES**APPELLANT**

-v-

DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR C FLOATE - BOARD MEMBER
MS E MCQUEEN - BOARD MEMBER

DATE

MONDAY, 17 NOVEMBER 2008

FILE NO

PSAB 15 OF 2008

CITATION NO.

2008 WAIRC 01620

Result	Order and Direction issued
Representation	
Appellant	Mr K Trainer as agent
Respondent	Mr P Wishart

Order and Direction

HAVING heard Mr K Trainer as agent on behalf of the appellant and Mr P Wishart on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby –

- (1) ORDERS that the time for filing the notice of appeal be and is hereby extended to 15 September 2008.
- (2) DIRECTS that evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements will only be adduced by leave of the Public Service Appeal Board. Copies of documents referred to in witness statements shall be annexed to the statement.
- (3) DIRECTS that the appellant file and serve upon the respondent any signed witness statements upon which he intends to rely no later than 21 days prior to the date of hearing.
- (4) DIRECTS that the respondent file and serve upon the appellant any signed witness statements upon which it intends to rely no later than 7 days prior to the date of hearing.
- (5) DIRECTS that the appellant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.
- (6) DIRECTS that the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

2008 WAIRC 01645

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MICHAEL CHRISTIAN NICHOLAS	APPELLANT
	-v-	
	DEPARTMENT OF EDUCATION AND TRAINING	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER - CHAIRMAN MR C FLOATE - BOARD MEMBER MS E MCQUEEN - BOARD MEMBER	
HEARD	MONDAY, 17 NOVEMBER 2008	
DELIVERED	TUESDAY, 25 NOVEMBER 2008	
FILE NO.	PSAB 15 OF 2008	
CITATION NO.	2008 WAIRC 01645	

Catchwords	Industrial law – Termination of employment – Appeal against decision of respondent to terminate appellant’s employment – Application referred outside of 21 day time limit – Principles applied – Appeal Board satisfied that extension of time to institute proceedings be granted – <i>Industrial Relations Act 1979 (WA) s 27(1)(n), s 29(1)(b)(i), s 29(3), s 80(1)(e), s 80(I), s 80(J), s 80(L), s 80(L)(1), Industrial Relations Commission Regulations 2005 (WA) reg 107(2).</i>
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Result	Decision issued
Representation	
Appellant	Mr K Trainer as agent
Respondent	Mr P Wishart

Reasons for Decision

1. This is an appeal by the appellant pursuant to s 80(1)(e) of the Industrial Relations Act 1979 (“the Act”) against a decision of the respondent to dismiss him. The decision of the respondent said to have given effect to the appellant’s dismissal, was contained in a letter dated 18 August 2008. The respondent denies it dismissed the appellant and says that his employment came to an end by reason of a repudiation of the contract of employment.
2. Whilst on the evidence referred to below, receipt of the letter of 18 August 2008 was contentious the notice of appeal was not filed until 15 September 2008, outside of the 21 day time limit for commencing such appeals, as prescribed by s 80J of the Act and reg 107(2) of the Industrial Relations Commission Regulations 2005.
3. As the appeal is out of time, the matter was listed for hearing as to whether the period within which to lodge the appeal should be extended.

The Appeal

4. The notice of appeal as filed on 15 September 2008 particularises the grounds of appeal in Schedule A as follows:

“I seek an extension of time on this application for reasons including that due to my current medical situation I am no longer residing at the address outlined in the correspondence and therefore did not receive the correspondence until 10 September 2008.

Upon receiving the correspondence I immediately began to act in relation to putting together this application.

By letter dated 18 August 2008 my employer informed me that it considered that I had repudiated my contract of employment with it and went on to say that “ accordingly (I am) no longer an employee of the Department of Education and Training”.

I deny that I had at any time repudiated my contract of employment with my employer. I have been absent from work due to illness since 5 March and since 16 May 2008 have been on what the Department calls ‘no pay status’.

I have at all times been, and remain, ready and willing and able to work for the Department subject being fit to do so. At no time have I indicated to the Department that I no longer wish to be employed by the Department.

The Department apparently had a medical report from Dr Joel Silbert to the effect that I was no unfit to return to work but the report came with the justification that the opinion of a consultant psychiatrist should be sought. This was not done. I maintain that the only reason I was absent from work was due to illness and that my employer knew this.

I have not defied any order from my employer to return to work, even though, due to my illness, I would have had difficulty in complying with such an order. In any event my employer has not ordered me back to work.

I received no opportunity to comment on the Department’s decision to dismiss me. Had I been given an opportunity to comment I would have done so and believe I would have had reasonable and persuasive submissions to make. I have been denied procedural fairness in relation to the decision to dismiss me.

The Department was aware I was unwell. Even though it had a medical report that I was fit to work this was not the report of a consultant psychiatrist, which the Department was advised to obtain. I was on ‘no pay’ status which I had to accept but acceptance of this status did not indicate an intention to no longer be bound by my employment contract. No action on my part indicated this so comprehensively as to amount to a repudiation. Further the Department accepted my repudiation without giving me an opportunity to comment. In all of the circumstances my dismissal was unfair.”

5. In short, the appellant complains that at all material times he remained an employee of the respondent and was absent by reason of a bona fide psychiatric illness.
6. The respondent alleges that the appellant’s absence from the workplace was unauthorised. Ultimately, the failure by the appellant to perform the duties as required constituted a repudiation of his contract of employment with the respondent.

Extension of Time

7. The extension of time proceeding was heard on 17 November 2008. After hearing submissions of the parties and the evidence adduced on behalf of the appellant, the Appeal Board announced its unanimous decision that the time for lodging the appeal would be extended to 15 September 2008 with reasons for decision to follow. Directions were also made for the future hearing of the appeal. These are our reasons for so concluding.
8. By s 80J of the Act and reg 107(2) of the Regulations, an appeal of the present kind is to be commenced within 21 days of the decision appealed against. Taking the date of 18 August 2008 for present purposes as the material notification of termination of the appellant’s employment, and allowing for delivery of the letter in the ordinary course of the post, that being by 19 August 2008, the notice of appeal is some three working days out of time.
9. By s 80 L of the Act the provisions of Part II Division 2 of the Act apply to the Appeal Board’s jurisdiction, in particular, for present purposes, s 27. By s 27(1)(n) of the Act, a power exists to extend any prescribed time, which reg 107(2) of the Regulations plainly is. By the terms of s 27(1)(n) of the Act, the Commission, and by necessary modification (s 80 L(1) of the Act) the Appeal Board plainly has the power to extend the time for lodging an appeal under s 80I: *Re Coldham v Ors*; *Ex parte BLF* 64 ALR 215; *Arpad Security Agency Pty Ltd v FMWU* (1989) 69 WAIG 1287; *Maureen Dehnel v Dr Neil Fong Director General Department Health and Ors* (2006) 86 WAIG 3310.

Relevant Principles

10. The jurisdiction and power to grant an extension of time for the institution of an appeal is a discretionary decision. In extensions of time applications generally, courts and tribunals are to consider the justice of the particular case in terms of the relative prejudice to the parties. The onus is on the appellant to establish that the discretion should be exercised in his or her favour. Generally, some consideration of the merits of the appeal is to be undertaken.
11. Whilst the representatives of the appellant and respondent made some reference to relevant principles for extensions of time in unfair dismissal proceedings before the Commission pursuant to s 29(3) of the Act, as considered in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683, it is important to observe that that case turned substantially upon the particular statutory framework prescribed under s 29 of the Act and in particular s 29(3), which provides that “*The Commission may except a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so*”.
12. Whilst the principles in *Malik* may be of some assistance in the present context, a more apposite approach in our view, given the range of different decisions from which persons may commence appeal proceedings under s 80I of the Act, and where the exercise of the statutory power to extend any prescribed time by s 27(1)(n) of the Act is under consideration, is that applicable to extensions of time to appeal and institute proceedings generally.
13. In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, the Full Court of the Supreme Court of Western Australia considered general principles applicable to extensions of time for the institution appeals against primary decisions. In that case, Kennedy J at 198, considered that four relevant factors to take into account include the length of the delay, reasons for the delay, whether the appellant has an arguable case and any prejudice to the respondent.
14. In *Chan v The Nurses Board of Western Australia* [2007] WASCCA 123, the Court of Appeal (WA) considered and applied the principles discussed in *Esther Investments*. In particular, in relation to consideration of the relevant principles, Buss JA observed at pars 12-14 as follows:

“Application for an extension of time: principles

[12] In *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, Kennedy J said, at 198:

In Palata Investments Ltd v Burt & Sinfield Ltd [1985] 1 WLR 942 at 946; [1985] 2 All ER 517 at 520, the Court of Appeal accepted that, in relation to an application for an extension of time for appealing, there are four major factors to be considered in the exercise of the discretion which is conferred upon the court. They are, first, the length of the delay, secondly, the reasons for the delay, thirdly, whether there is an arguable case and, fourthly, the extent of any prejudice to the respondent. There may in a particular case be additional factors, but I accept that the foregoing are the major factors in the present case.

[13] Where the failure to appeal within time is attributable to the act or default of the applicant's solicitor (and not the applicant), that is a material consideration in the exercise of the Court's discretion. See *Esther Investments per Kennedy J at 199 and per Rowland J at 204*.

[14] In *Gallo v Dawson* (1990) 64 ALJR 458, McHugh J examined the applicable principles in relation to an application to extend time to appeal to the High Court. The relevant provision in the rules of the High Court empowered the Court to extend time upon such terms “as the justice of the case may require”. His Honour said, at 459:

The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or Justice to do justice between the parties: see *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 92; *Jess v Scott* (1986) 12 FCR 187 at 194–195. When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see *Burns v Grigg* [1967] VR 871 at 872; *Hughes* (at 263–264); *Mitchelson v Mitchelson* (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has ‘a vested right to retain the judgment’ unless the application is granted: *Vilenius v Heinegar* (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice. As the Judicial Committee of the Privy Council pointed out in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12 ; [1964] 3 All ER 933 at 935:

The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion.

Also see *Jackamarra v Krakouer* (1998) 195 CLR 516. “

15. We now consider the above mentioned four factors for the purposes of whether the Appeal Board should exercise the discretion in favour of the appellant and accept the appeal out of time.

Length of Delay

16. As noted above, leaving aside for the moment the respondent's contention that there was no dismissal from employment, the letter from the respondent to the appellant dated 18 August 2008, tendered as exhibit A2, was the instigating event leading to the commencement of this appeal by the appellant. As also noted above, assuming that the letter was delivered to the appellant in the ordinary course of the post, and omitting any consideration for present purposes, of the contention surrounding the receipt by the appellant of the letter, it would be deemed to have been received by the appellant on or about 19 August 2008.
17. On this basis, the time for filing the appeal would be 21 days from 19 August that being 9 September 2008. The appeal was not in fact filed until 15 September 2008 being some six calendar days or three working days, being days upon which the Registry is open for business, out of time. Therefore, the length of the delay in the present case is relatively short.

Reasons for Delay

18. On the evidence led by the appellant, and not contradicted by the respondent, the appellant says that due to his declining mental state from the time at which he last attended for work in March 2008, until August 2008, he was unable to adequately manage his day to day affairs. The appellant's testimony was to the effect that his condition reached the point where he was unable to attend to basic day to day functions such as paying bills, to the extent that utilities were cut off at his residence; he was suffering almost complete withdrawal from social interaction with friends and family; he felt consistently tired and fatigued despite sleeping in some cases up to 14 hours per day and was on his evidence, generally unable to function normally. The appellant's evidence was that he completely failed to respond to any mail received by him to the extent that upon his evidence, and others who gave evidence on his behalf, the appellant's letter box was overflowing with unopened mail and other articles.
19. The appellant said in his evidence that during this period he had been attending his general practitioner and had been taking prescribed anti-depressants but they had not overcome his symptoms.
20. The appellant testified that he did not see exhibit A2, the letter of 18 August 2008 from the respondent, until it was brought to his attention by his mother who also gave evidence. Mrs Nicholas testified that she noticed a progressive decline in her son's state of mental health prior to August 2008. She also gave evidence that she noticed the mail box at the appellant's residence overflowing with mail and other articles, and that the garden and the premises generally were in an unkempt state. Her evidence was that she collected mail from the appellant's residence, which included exhibit A2. When Mrs Nicholas saw the content of exhibit A2, she was concerned by it and the impact it may have on her son, given his mental state. She held the letter for some 10 to 14 days, to consider what she should do. Mrs Nicholas said she ultimately informed the appellant about it and showed him its content in approximately early September 2008. None of this evidence was challenged by the respondent.
21. Another witness called on behalf of the appellant Ms Allen, who was at material times the appellant's partner, generally confirmed the appellant's evidence and that given by Mrs Nicholas as to the decline in the health of the appellant. Ms Allen is also a registered psychologist.
22. The appellant also gave evidence that he did not see an earlier letter dated 7 May 2008 from the respondent to him, enclosing a copy of a medical report from a Dr Silbert dated 27 February 2008, until the time he first saw exhibit A2, in about early September 2008.
23. The medical report from Dr Silbert, which arose seemingly as a result of a referral of the appellant by the respondent for a medical assessment, suggested that the appellant at that time had capacity for work. It is also noted however, that the appellant presented with the "development of a psychological and/or psychiatric state arising over the past 1.5 years". It was further recommended in the medical opinion that the appellant be "forthwith" referred to a consultant psychiatrist "to establish a clear and unequivocal diagnosis".
24. It is reasonably clear from the medical report, that Dr Silbert's opinion and prognosis as to the appellant's condition at that point, in February 2008, was qualified by his recommendation that there be an immediate assessment by a consultant psychiatrist. It was common ground that no such assessment took place.
25. Additionally it is the appellants' uncontradicted evidence that from about March 2008, his mental state progressively became worse as has been outlined above.
26. Importantly also, was the appellant's evidence that as soon as he had exhibit A2 brought to his attention, he took action to challenge his purported dismissal by initially commencing proceedings pursuant to s 29(1)(b)(i) of the Act, alleging he had been harshly, oppressively and unfairly dismissed by the respondent. That application, U116 of 2008, was filed in the Registry of the Commission on 12 September 2008. The appellant subsequently commenced the present appeal and concurrently discontinued application U116 of 2008 on 15 September 2008.
27. In view of the unchallenged evidence of the appellant as to these issues, we consider that the appellant has established an adequate reason for the delay in commencing the appeal.

Arguable Case

28. For the purposes of considering an extension of time to appeal, any assessment of the merits of the proceedings is to be made on a broad brush basis. As was said by Brennan CJ and McHugh J in *Jackamara v Krakour* (1998) 195 CLR 516 at par 9:
- "Unless motions to extend time for appeals are to turn into full rehearsals for those appeals, appellate courts can only assess 'the merits' in a fairly rough and ready way".*
29. As we have already observed above, the only testimony lead in these proceedings was by and on behalf of the appellant, which has been outlined above. Whilst it seems from exhibit A1, that Dr Silbert considered that as at

- February 2008, whilst suffering a psychological and/or psychiatric condition, the appellant had some capacity for work, he clearly strongly was of the view that a further psychiatric assessment should be undertaken. This was not done at that time by either the respondent or the appellant. The appellant's evidence was however, that over recent months, of his own initiative, he has been attending a consultant psychiatrist, a psychologist and his general practitioner for further treatment.
30. We have also referred to the appellant's unchallenged evidence that after about March 2008, his condition deteriorated substantially, such that he was unable to undertake basic functions in the course of day to day living. Additionally, is the appellant's evidence that at all material times, he considered that he remained on unpaid sick leave or "no pay" status as set out in exhibit A2.
31. There was no evidence that the appellant was in contact with the respondent in the period between March and August 2008, despite his obligations as an employee of the respondent. Also however, there was no evidence that the respondent, apart from exhibit A1 being the letter of 7 May 2008, had any contact with the appellant over this same period either. In particular, there was no evidence to explain the gap in time between Dr Silbert's medical report dated 27 February 2008, and when a copy of it was sent to the appellant under cover of the letter of 7 May 2008.
32. The respondent's submission was that as set out in exhibit A2, the appellant repudiated his contract of employment with the respondent by his absence without any ongoing contact and it no longer regarded the appellant as its employee. It is not entirely clear from the letter as to when it was that the respondent asserted that the contract between it and the appellant was repudiated, but it is open to draw the inference that it was at least from the date of the letter, that being 18 August 2008, and this has been reasonably assumed for the purposes, as set out earlier, as the period of delay by the appellant in commencing the appeal.
33. The doctrine of repudiation involves a circumstance where a party to a contract evinces an unwillingness or inability to render substantial performance of the contract or a breach of a term of a contract occurs: *Koompaahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 241 ALR 88 per Gleeson CJ, Gummow, Heyden, Crennan JJ at pars 44-49. Repudiation by one party gives the party not in breach, known as the innocent party, the option to affirm the contract or to accept the repudiation and regard the contract as at an end. This step, by an innocent party, known as the election, is required for employment contracts as with other species of contracts: *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410. Whether the respondent's letter of 18 August 2008 constitutes an acceptance of the appellant's alleged repudiation is arguable but if so, it may well also constitute a dismissal at law.
34. An alternative basis on which the respondent seemed to suggest the employment of the appellant came to an end was, following an exchange with the Bench, frustration of the contract on the grounds of illness. This is a difficult area of the law and ultimately turns on the facts of each individual case: *Simmons Ltd v Hay* [1964] NSW 416; *Finch v Sayers* [1976] 2 NSWLR 540.
35. On balance, and on the footing that only a "rough and ready" assessment is to be made of the merits at this stage of the matter, we are not persuaded that the appellants' case is unarguable. There clearly are issues that arise for determination.

Prejudice

36. In all cases where an extension of time to institute proceedings is granted, the opposing party will always suffer the prejudice of having to meet the proceedings. Apart from this, the respondent did not advert to any other particular prejudice it would suffer as a consequence of the grant of the extension of time to appeal in this case.

Conclusion

37. The time within which to lodge the appeal is extended to 15 September 2008 and the Appeal Board ordered accordingly.

2009 WAIRC 00392

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MICHAEL CHRISTIAN NICHOLAS	APPELLANT
	-v-	
	DEPARTMENT OF EDUCATION AND TRAINING	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER – CHAIRMAN MR C FLOATE – BOARD MEMBER MS E MCQUEEN – BOARD MEMBER	
DATE	FRIDAY, 19 JUNE 2009	
FILE NO/S	PSAB 15 OF 2008	
CITATION NO.	2009 WAIRC 00392	

Result Application discontinued by leave
Representation
Applicant Mr K Trainer as agent
Respondent Ms R Hartley of counsel

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Public Service Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the appeal be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2009 WAIRC 00425

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 MR BARRIE YORK;
 MR VALENTIN FERNANDEZ;
 MR KERRY DUNLOP;
 MR CHRISTOPHER FORSYTH;
 MS JACQUELINE FRANCES WALLACE

APPELLANTS

-v-

MR BERNARD UNDERWOOD
 MANAGER, WORKFORCE AND ORGANISATION DEVELOPMENT
 WORKCOVER WA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
 COMMISSIONER P E SCOTT
DATE THURSDAY, 2 JULY 2009
FILE NO PSA 70 OF 2008, PSA 71 OF 2008, PSA 72 OF 2008, PSA 73 OF 2008, PSA 74 OF 2008
CITATION NO. 2009 WAIRC 00425

Result Name of Respondent Amended

Order

WHEREAS these are appeals pursuant to Section 80E of the Industrial Relations Act 1979; and

WHEREAS on the 9th day of February 2009 the appellants filed an amended Notice of appeal seeking to amend the name of the respondent to “WorkCover Western Australia Authority”; and

WHEREAS by correspondence the parties agreed that the name of the respondent be amended to “WorkCover Western Australia Authority”;

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

THAT the name of the respondent in the appeal be amended to “WorkCover Western Australia Authority”.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

2009 WAIRC 00426

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR BARRIE YORK; MR VALENTIN FERNANDEZ; MR KERRY DUNLOP; MR CHRISTOPHER FORSYTH; MS JACQUELINE FRANCES WALLACE	APPELLANTS
	-v- WORKCOVER WESTERN AUSTRALIA AUTHORITY	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR COMMISSIONER P E SCOTT	
DATE	THURSDAY, 2 JULY 2009	
FILE NO	PSA 70 OF 2008, PSA 71 OF 2008, PSA 72 OF 2008, PSA 73 OF 2008, PSA 74 OF 2008	
CITATION NO.	2009 WAIRC 00426	
Result	Direction issued	

Direction

WHEREAS these are appeals to the Public Service Arbitrator (the Arbitrator) pursuant to s 80E(2)(a) of *the Industrial Relations Act, 1979* (the Act), by which the appellants challenge the level of classification of the positions occupied by them; and

WHEREAS on Friday 1 May 2009 and Wednesday 1 July 2009 the arbitrator convened conferences for the purpose on conciliating between the parties; and

WHEREAS the Arbitrator is of the opinion it is now appropriate to set the matters down for hearing and determination; and

WHEREAS the circumstances of these matters include that the appellants now intend to prepare a significant amount of further material for the purposes of the hearing; and

WHEREAS the Arbitrator is of the opinion that the timeframes set down in the Reclassification Appeals – Practice Direction of the Western Australian Industrial Relations Commission require modification to meet the particular circumstances.

NOW THEREFORE the Arbitrator hereby directs that where the procedure set down in the Reclassification Appeals – Practice Direction provides at:

1. Point 1 that at least seven (7) clear working days before the hearing of the appeal the appellant is to provide the Arbitrator with a written statement of the facts upon which the appellant relies to support the appeal and any witness statements, and serve a copy of the statement on the respondent or its representative, that the period of seven days be amended to be twenty-one (21) days.
2. Point 2 that at least three (3) clear working days before the hearing, the respondent is to provide the Arbitrator with a written statement of the basis upon which it relies to resist or otherwise question the appeal and any witness statements, and serve a copy on the appellant or the appellant's representative, that such period of three days be amended to seven (7) days.

(Sgd.) P E SCOTT,
Commissioner,
Public Service Arbitrator.

[L.S.]

SCHOOL TEACHERS—Matters dealt with—

2009 WAIRC 00413

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER JOHN AYLING

APPLICANT

-v-

DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT**CORAM**

SENIOR COMMISSIONER J H SMITH

HEARDTUESDAY, 3 MARCH 2009, WEDNESDAY, 4 MARCH 2009, THURSDAY, 5 MARCH 2009,
FRIDAY, 6 MARCH 2009**DELIVERED**

FRIDAY, 26 JUNE 2009

FILE NO.

APPL 98 OF 2008

CITATION NO.

2009 WAIRC 00413

CatchWords

Appeal against a finding of breach of discipline and against penalty - use of unreasonable force against a student by a teacher - whether nature of appeal stricto sensu or hearing de novo - *Industrial Relations Act 1979* (WA) s 29(b)(1); *Interpretation Act 1984* (WA) s 56; *Public Sector Management Act 1994* (WA) s 78(2), s 81, s 81(1), s 85, s 86, s 86(3), s 86(3)(a), s 86(3)(b), s 86(4), s 86(8), s 86(8)(a), s 86(9), s 86(9)(a), s 86(9)(b); *School Education Act 1999* (WA) s 64, s 64(1)(e), *School Education Regulations 2000* (WA) reg 38, reg 39, reg 39(1).

Result

Appeal upheld in part. Order made.

Representation**Applicant**

Mr S A Millman (of counsel)

Respondent

Ms R M Hartley (of counsel)

Reasons for Decision

- 1 Peter John Ayling (the applicant) filed an appeal against the decision of the Director General, Department of Education and Training (the respondent) that he had committed a breach of discipline. The applicant also appeals against the penalty imposed upon him. At all material times the applicant is employed by the respondent as a Deputy Principal and was appointed to a position at Manjimup Senior High School. The applicant's appeal is made under s 78(2) of the *Public Sector Management Act 1994* (the PSMA). Pursuant to s 78(2) the decision is referred to the Commission as if that decision were an industrial matter mentioned in s 29(b)(1) [sic] of the *Industrial Relations Act 1979* (the IR Act).

The Incident

- 2 On 4 April 2007, the applicant informed two students AS and KR that they were suspended following an incident where KR had removed the leg from a school desk. KR and AS attempted to leave the school and the applicant tried to stop them by standing in front of the two students and holding his arms out. During the incident the applicant physically restrained AS. The applicant was charged with a breach of discipline as a result of the action to restrain AS.
- 3 All documents quoted from in these reasons have been edited to delete the names of the two students and members of their families. Initials have been added to distinguish their identity.

The Charges

- 4 Pursuant to s 80 of the PSMA the applicant was served with a notice on 19 July 2007 that it was suspected that he may have acted in a manner which constituted a breach of discipline. It was alleged that "on 4 April 2007 at Manjimup Senior High School, you used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law." In the notice the suspected breach of discipline was clarified by the statement that "it is claimed that as AS left the administration block you attempted to stop her by holding the top of her arm causing a struggle to ensue." In the notice pursuant to s 81(1) of the PSMA the applicant was provided an opportunity to provide a written explanation in relation to the matter.
- 5 On 3 August 2007, the applicant responded to the notice of suspected breach of discipline through his solicitors (Exhibit 1, document 3). In that letter the applicant's solicitors stated as follows:

Our client denies the allegation.

Our client has been an employee of the Department of Education and Training since 1974, including seventeen years experience working in Central Office. Since 2003, our client has been employed as a deputy principal.

To the extent that our client made contact with the student, AS, in the circumstances where AS had attacked our client, our client's actions were not only reasonable and justified, but also fell within the scope of Regulation 39 of the School Education Regulations. The contact made with the student was the necessary minimal contact required in order to restrain the student.

We submit that this matter need be taken no further

- 6 In a letter dated 7 August 2007 (Exhibit 1, document 4), the applicant was informed by the Director General, that she had carefully considered his response but regretted to advise that a formal investigation would be initiated. The applicant was informed in that letter as follows:

In accordance with section 81(2)(a) of the Public Sector Management Act 1994 (WA) ("Act"), Mr Ceri Skamp, Senior Investigator, Department of Education and Training, Standards and Integrity Directorate, has been directed to investigate the suspected breach of discipline.

An investigation is intended to be an objective search for the truth. The investigator will establish the facts relating to the suspected breach of discipline by conducting interviews with, and obtaining relevant documentation from you and other witnesses. The investigator will prepare a report for my consideration to assist me in forming an opinion as to whether or not you have committed a breach of discipline.

The investigation will be conducted in a fair, proper and objective manner. You will be provided with an opportunity to respond to any allegations made during the investigation and appropriate records of the investigation will be kept. Mr Skamp will contact you shortly to discuss in further detail the steps to be taken in the investigation and of any interviews or meetings that you will be requested to attend. Please note that you are entitled to have present during any interviews or meetings a representative capable of providing advice and/or support to you. The representative is not, however, entitled to take an active part in the interview or meeting unless the investigator considers it appropriate.

- 7 The applicant was also informed in that letter that the investigation would lead to a finding being made. The consequences of each finding that could be made were also set out.
- 8 On 11 September 2007, the investigator, Mr Ceri Skamp, completed his investigation report (Exhibit 1, document 24). In the report he concluded that the applicant had used unreasonable force against AS and amended the particulars of the unreasonable force as "AS left the administration block you attempted to stop her by grabbing her on the wrist causing a struggle to ensue. You then grabbed AS's right arm and forced it around behind her back and pushed her up against a wall." Mr Skamp recommended that the applicant be reprimanded and be fined one day's pay
- 9 On 18 September 2007, a copy of Mr Skamp's investigation report was sent to the applicant's solicitor. On 26 September 2007, the applicant's solicitors sent a letter to Mr Skamp:

We confirm that in accordance with the Public Sector Management Act, my client objects to the finding.

Can you please confirm that the Department will now appoint an inquirer to conduct an inquiry.

(Exhibit 1, document 6)

- 10 At that point in time the respondent had not indicated that a formal finding had been made. In fact the decision was not made until 10 January 2008, when the applicant was sent a letter notifying him that a finding had been made that he had committed a minor breach of discipline (Exhibit 1, document 8). Notwithstanding the objection the applicant was sent a letter by the respondent which stated as follows:

In a letter to you dated 7 August 2007 from Ms Sharyn O'Neil [sic], Director General, you were advised that she had authorised an independent investigation into a suspected breach of discipline by you. The investigator has now concluded the investigation and submitted his report to me. You have been provided with a copy of the investigators [sic] report and I have received correspondence from your Legal Practitioner at Slater and Gordon advising that you object to the finding.

...

I have carefully considered the investigator's report, including your response to the allegation. In light of the findings in the investigation report the allegation has been amended to state the following:

On 4 April 2007 at Manjimup Senior High School, you used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law.

By way of further clarification it is claimed that as AS left the administration block you attempted to stop her by grabbing her on the wrist causing a struggle to ensue. You then grabbed AS's right arm and forced it around behind her back and pushed her up against a wall.

Pursuant to section 83(1)(a) of the Public Sector Management Act 1994 (WA) ("Act"), I find on the basis of the evidence contained in the investigator's report that a minor breach of discipline has been committed by you as a result of your conduct breaching the above.

Proposed action:

I proposed to take the following action under section 83(1)(a) of the Act:

1. a reprimand; and

2. *impose on you a fine equal to the amount of remuneration received by you in respect of the last day during which you were at work as an employee before the day on which this finding was made.*

- 11 On 16 January 2008, the applicant through his solicitors informed the respondent that in accordance with the provisions of the PSMA the applicant objected to the finding and asked for confirmation that the respondent would now appoint an inquirer to conduct an inquiry (Exhibit 1, document 9). Pursuant to s 85 of the PSMA the finding that the applicant had committed a minor breach of discipline was cancelled by operation of that section. The respondent formally notified the applicant by letter dated 24 January 2008 that the finding of a minor breach of discipline was cancelled (Exhibit 1, document 10). The applicant was also informed that he had been formally charged with committing a breach of discipline. The particulars of the breach of discipline were the same as found by Mr Skamp in his investigation report. The applicant was also informed that pursuant to s 86(1)(c) of the PSMA he was required to state in writing within seven calendar days from receipt of the letter whether he admitted or denied the truth of the charge and what penalties could be imposed if he admitted the charge and what could occur if he denied the charge. At the conclusion of the letter the respondent stated, "*Should you have any queries regarding the above matter, please do not hesitate to contact Mr Ceri Skamp, Senior Investigator, Standards and Integrity Directorate on 9270 3004.*"
- 12 On 14 February 2008, the applicant through his solicitors advised that he denied the charge (Exhibit 1, document 11).
- 13 The applicant's solicitors were then sent a letter from Mr Skamp on 18 February 2008 attaching a letter to the applicant in which the applicant was informed that an inquiry would be held (Exhibit 1, document 12).
- 14 On 13 May 2008, the respondent's Acting Director of Standards and Integrity, Liam Smyth, on behalf of the respondent appointed Mr James Zaknich, a Senior Investigator with Gold Security Group (International) Pty Ltd, to conduct a disciplinary inquiry in accordance with s 86(4) of the PSMA (Exhibit 1, document 13). In the letter to Mr Zaknich, Mr Zaknich was informed that should he require any assistance with procedural aspects of the inquiry to contact Mr Ceri Skamp.
- 15 On 21 May 2008, Mr Zaknich wrote to the applicant's solicitors and advised that he had been appointed to conduct the disciplinary inquiry into the allegations against the applicant and he asked whether the applicant was prepared to be interviewed by him (Mr Zaknich) regarding the matter (Exhibit 1, document 14). On 30 May 2008, the applicant's solicitors wrote to Mr Zaknich and stated that:

My client is keen to participate in the Public Sector Management Act process.

Accordingly, please provide a list of all the questions that you wish to put to my client so that I may take his instructions and provide a response in writing.

(Exhibit 1, document 15)

- 16 On 9 June 2008, Mr Zaknich provided to the applicant's solicitors a letter containing the following questions:

On the 4th April 2007 at the Manjimup Senior High School:

- 1) *Did you grab AS by the wrist?*
- 2) *Did you restrain AS by twisting her arm behind her back?*
- 3) *If so, which arm was it?*
- 4) *After twisting her arm behind her back, did you push her against a wall?*
- 5) *What was the reason for using such restraint?*

(Exhibit 1, document 16)

- 17 On 1 July 2008, the applicant's solicitors wrote to Mr Zaknich and advised:

Please find attached my client's response to each of your questions.

I refer to my correspondence dated 3 August 2007 addressed to the Executive Director of Professional Standards and Conduct.

I confirm that at that time I advised that:

To the extent that our client made contact with the student, AS, in the circumstances where AS had attacked our client, our client's actions were not only reasonable and justified, but also fell within the scope of Regulation 39 of the School Education Regulations. The contact made with the student was the necessary minimal contact required in order to restrain the student.

Based on the enclosed responses, and in light of the material already before the DET, it is my view that any finding by you that my client has committed a breach of discipline would have the effect of rendering Regulation 39 useless.

This case is an obvious example of the reason why that regulation has been enacted by the legislature.

(Exhibit 1, document 17)

- 18 In the attachment to that letter the following answers were given on behalf of the applicant:

- 1) *Did you grab AS by the wrist?*

I took hold of AS's right wrist.

- 2) *Did you restrain AS by twisting her arm behind her back?*

I held her right wrist behind her back so that she faced away from me.

3) *If so, which arm was it?*

Right

4) *After twisting her arm behind her back, did you push her against a wall?*

No.

5) *What was the reason for using such restraint?*

Immediately before taking hold of AS's right wrist, AS had attacked me by kicking at my left leg and slapping at my left arm with both her hands.

- 19 After interviewing witnesses and examining documents Mr Zaknich completed his investigation and provided a report dated 28 July 2008 to the respondent. In that report he made a finding:

... on the Balance of Probabilities, that on the 4th April 2007 at Manjimup Senior High School, Peter John AYLING used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law: such behaviour being an Act of Misconduct within the provisions of Section 80(c) of the PSMA and therefore a Breach of Discipline contrary to Section 80 of that Act.

(Exhibit 1, document 25)

- 20 In the report Mr Zaknich made the following recommendation:

Peter John AYLING being a Deputy Principal at the School had substantial authority over the student AS and was significantly physically superior to her.

He used his position and superior strength to restrain her in circumstances that were not authorised, justified or excused by law.

The student AS had not been accused of any wrong doing.

The actions of AYLING were excessive in the circumstances.

I recommend that the penalty should be a Reduction of monetary remuneration as per Section 86(3)(b)(iv) of the PSMA.

- 21 At the time the finding was made in the report, a copy of the report was not provided to the applicant. However, on 17 September 2008, the applicant through his solicitors was sent a letter by the respondent which stated that Mr Zaknich had found that the applicant had committed a serious breach of discipline as charged and that pursuant to s 86(9)(a) of the PSMA she was required to accept those findings (Exhibit 1, document 18). In the letter the Director General set out the penalty recommended by Mr Zaknich but she stated that it was her view that the recommended penalty did not adequately reflect the seriousness of the breach of discipline and she went on to state:

Therefore, I am proposing to take the following actions:

- *Your monetary remuneration is to be temporarily reduced under the School Education Act Employees (Teachers and Administrators) General Agreement 2006 from your current pay level of 5.1A (\$97 703 per annum) to Level 4.1 of the administrator's pay scale (\$87 718.00 per annum) for a period of six months. This action is taken in accordance with section 86(3)(b)(iv) of the Act; and*
- *Reprimand. This action is to be taken in accordance with section 86(3)(b)(i) of the Act.*

The breach of discipline goes to the heart of your employment contract and you have severely violated the confidence and trust the Department places in you as a Deputy Principal.

In coming to this determination I have also considered the duty of care responsibilities and the special position of trust that exists between teachers and students. The Department recognises that the community has an expectation that Department employees will behave in an exemplary fashion due to their direct association with children. Further, there is an expectation that Department employees are to act as role models and uphold the values and behaviour consistent with those held by the school and general community.

I deem your actions to have been totally inappropriate and inconsistent with community expectations of what constitutes an acceptable professional relationship between a teacher and student.

However, prior to imposing the above actions against you, I am providing you with an opportunity to furnish a written submission as to why I should not take the proposed course of action.

- 22 The applicant chose not to respond to that notice but to file the appeal in the Commission on 1 October 2008. The respondent determined that the penalty that she proposed would be implemented. In a letter dated 28 October 2008 she stated:

I further advise your monetary remuneration is to be temporarily reduced under the School Education Act Employees (Teachers and Administrators) General Agreement 2006 from your current pay level of 5.1A (\$97 703 per annum) to Level 4.1 of the administrator's pay scale (\$87 718.00 per annum) for a period of six months. This action is taken in accordance with the provision of section 86(3)(b)(iv) of the Act.

In determining this penalty, I have taken into account your previous good record as a Deputy Principal. In reprimanding you, I remind you that as a teacher, through your contact with students, you are in a special position of trust and have obligations to protect students' interests and to accept the constraints inherent in the teacher-student relationship. Paramount is the requirement to avoid unnecessary and injurious physical contact with students and to respect the uniqueness and dignity of students. To avoid any further allegations of misconduct, I am directing you to avoid any unnecessary physical contact with students.

(Exhibit 1, document 20)

- 23 The decision by the respondent in respect of the penalty was not administratively implemented as at the time the letter was sent the appeal was before the Commission.

The Applicant's Evidence

- 24 The applicant is the Deputy Principal of the Manjimup Senior High School. He has held this position since 2004. He was first employed by the Department in 1976 as a Secondary English School Teacher after he completed a BA in English and a Diploma of Education from the Secondary Teachers College. In 1985, he moved into administration and worked in a number of positions including working as the Senior Consultant (HR Policy Review) from 1996 to 1998 and the Manager (Industrial Relations) of the Department from 1999 to 2002. In 2003, he returned to teaching duties and was posted to the Eastern Goldfields Senior High School as a Deputy Principal.
- 25 The applicant as Deputy Principal at the Manjimup Senior High School was a member of the administration team which is comprised of the Principal and two Deputies. When he first commenced at the school he was primarily responsible for lower school students in years 8, 9 and 10. In 2007, he swapped duties with the other Deputy Principal and became responsible for upper secondary students and the other Deputy took over the responsibility for lower secondary students. Being responsible for students as a Deputy Principal requires the monitoring of the academic progress of students and dealing with behaviour management, pastoral care and other administrative duties. The applicant was also responsible for the master timetable. In 2004 to 2006, the other Deputy Principal of the Manjimup Senior High School was David Brady. In 2007, that position was held by Anne Marie Mony de Kerloy. Manjimup Senior High School has a student services team which is comprised of pastoral care co-ordinators who are responsible for particular groups of students in each year. The team is also comprised of a school psychologist, a school nurse who is a community health nurse employed by the Health Department, a school chaplain and an Aboriginal and Islander education officer who has particular responsibilities for supporting Aboriginal students in the school. The team formally meets at least once a week but in practice members of the team liaise on a daily basis in relation to particular students. The student services committee consider pastoral care issues and they are also informed about behavioural management issues relating to particular students.
- 26 In 2007, AS was a female student in year 12. The applicant was aware of issues involving AS prior to 2007 as he had read minutes of student services meetings which raised a number of pastoral care issues in respect of AS. In particular, concern had been raised about AS's academic progress. She was often absent from school with friends rather than attending classes and the staff were concerned whether she would succeed in the range of subjects that she had selected to study. In 2007, consideration was being given to AS being enrolled in aquaculture studies by arrangement with the local TAFE centre. The aquaculture course is a non-academic course for students who are having difficulties completing upper secondary studies. As the timetabler for the school, the applicant was consulted about whether changes could be accommodated to AS's courses to try and improve her chances of being able to complete enough subjects to graduate from high school.
- 27 Prior to the incident in question, the applicant says that there was nothing particularly exceptional about her behaviour in terms of requiring any formal disciplinary action but he was aware that there were concerns about her emotional state as members of the student services team had discussed her on several occasions and a recommendation had been made that follow up be carried out by the school psychologist to ensure there was not anything so serious as to require intervention.
- 28 KR was also a year 12 student in 2007. KR was reluctant to be at school and was misbehaving in class. This resulted in ongoing weekly counselling involving the school psychologist. The applicant produced minutes of upper school student services meetings held in the first six months of 2007 which the applicant says shows that KR had showed inappropriate emotional responses to situations. For example, on 28 February 2007, it was reported in the minutes of the upper school student services meeting that KR had been frustrated by another student and rather than taking the matter out on the student he had punched the blackboard in the classroom and broke his hand. (Exhibit 1, document 31)
- 29 On 4 April 2007, at the beginning of the day at about 8:45 am which was the beginning of the first period of the school day, the head of the learning area of maths, Bill Chapman, reported to the applicant a desk in a maths classroom had been damaged. The applicant inspected the desk with Mr Chapman. The legs of the desk were made of tubular steel approximately three feet in length. The inspection revealed that the leg had been broken off from the welding of the frame and the desk leg in question was missing. Mr Chapman also reported to the applicant that the student sitting at the desk at the end of the last period on the previous day was KR and that he (Mr Chapman) suspected that KR may be responsible for the damage. Mr Chapman also informed the applicant that the student sitting next to KR was AS. The applicant was aware that AS was a very close friend of KR.
- 30 The applicant made a decision to speak to AS first to see whether she could throw any light on anything she had seen before he spoke to KR. The applicant removed AS from her classroom and took her to his office and asked her if she could tell him anything about the damage which had occurred to the desk. Her only response was to say that she knew nothing about it, that she had been doing a test in maths and did not see anything. The applicant left his office and spoke again to Mr Chapman. Mr Chapman showed the applicant a copy of AS's test paper which indicated she had not been directing any attention to the

test whilst in class. The applicant then spoke again to AS and reported his discussion with Mr Chapman and asked her again if she could tell him anything about the damage to the desk. AS put her head down and refused to answer any questions. The applicant then asked her to wait next door in a room which is adjacent to the Deputies' offices.

- 31 The applicant collected KR from his class. He left AS in the room next to his office and made certain that KR saw that she was sitting there but did not allow him to have an opportunity to speak to her. The applicant said the reason why he did this was to indicate to KR that he (the applicant) may have more information than what he actually had, because KR would not necessarily know what AS may have said. That strategy seemed to work as the first thing KR said was, *"Is this about the desk?"* The applicant simply said to him, *"What can you tell me about it?"* KR readily told the applicant that he had removed the leg from the desk and smuggled it out of the classroom. He went on to explain that the leg had been weakened sometime previously when he had thrown the desk across the classroom at another student. This was not an incident that the applicant was aware of as it apparently had occurred when the teacher was out of the room. KR explained to the applicant that the other student had upset him and he had become angry. The applicant testified that he was not surprised when KR reported this behaviour. He was aware of the incident when KR punched the blackboard and he knew KR had been counselled for sometime about controlling his violent impulses.
- 32 KR went on to explain to the applicant that having discovered that the welding had been weakened on the desk he decided to complete the job by working away at the frame to sever the welding so he could take the whole leg away. The applicant asked KR whether removing the leg of the desk when they are supposed to be doing a maths test may have been related to him being unhappy about a decision that he could not leave maths and study Russian. KR had earlier made a request of the applicant that he stop studying maths and study Russian. The applicant had refused the request as Russian was not a language that was available through the school or through distance education. When the applicant put to KR that he may have been unhappy about this decision KR's response was to chuckle and simply say that he was bored. KR told him that AS thought removing the leg of the desk was a great joke and she had laughed her head off. The applicant asked KR where the leg of the desk was and KR said that it had been confiscated after school by a music teacher. KR went with the applicant to the music building in the school where the applicant spoke to the music teacher who confirmed that he had seen KR and AS playing with the desk leg after school the previous day and he had removed the leg from them.
- 33 On the way back to the office KR said to the applicant, *"Does this mean that I'm expelled?"* The applicant says he simply responded to KR, *"Well, you're certainly not going to be very welcome here, not if you are going to behave like this as a year 12 student."* He then told KR that he intended to suspend him (KR) for one day and that he could only be suspended for one day because that was the last day of term. The applicant explained that he was of the view KR's conduct was a reasonably serious offence of wilful damage to school property and that he was authorised to suspend a student for a period of time from school but no longer than the period of time prior to a school vacation.
- 34 When the applicant returned to his office with KR he asked KR to wait in a room next to his office and asked AS to come in. The applicant put all of the information he had gleaned from KR to AS and asked her for a response. However, AS continued to refuse to respond in any way at all. The applicant informed her that he was satisfied that she was a party to the matter and that she was also going to be suspended from school for one day. The applicant asked both KR and AS to wait in the room next to his office while he made arrangements to contact their parents to collect them from the school. The applicant was unable to contact AS's mother because the number he had was not in use. He spoke again to AS to ask her the contact number for her mother but she would not provide that information. The applicant contacted KR's father in Bridgetown. He was not prepared to collect KR because he was working but he eventually agreed that KR's aunt could come and collect him. The applicant was then informed by another member of staff that AS's mother had entered into a de facto relationship with KR's father. He then contacted KR's father again and asked whether KR's aunt could collect both the students.
- 35 The applicant said that his main concern at that point was to address the Department's duty of care of students. He said that if a student is suspended they are always required to make certain that arrangements were made for the student to be safely collected from school.
- 36 Whilst the applicant was making these telephone calls he noticed both students running past his doorway from the room next door. The applicant followed them as they disappeared out through a doorway on to a verandah outside the front office and into the school rather than away from the school. The applicant called out to them to stop. They paused. He stepped between the two of them and then got in front of them, turned and faced them and held his arms out. The applicant is a very tall person. AS was quite short and of small build and KR was not much taller than AS. With the applicant's physical stature he was able to hold his arms straight out in a way that was effectively blocking the way of both students. AS said to the applicant that she wanted to get her school bag from her classroom. The applicant told her that he had already made arrangements for her bag to be collected and brought to the front office, so there was no need for her to go into the school and that she should turn around and go back into the office and wait for KR's aunt to come and collect them. KR then said, *"We're suspended from school. So we don't have to do anything you tell us,"* and AS said, *"Yeah, that's right. We don't have to do anything that you say."* The applicant said, *"No. Don't be silly. Your aunt is coming to collect KR,"* and the applicant then said to AS, *"Someone is coming to get you. Just wait quietly in the office and they will come and get you."* At that point in time AS said to the applicant, *"We're not staying here"* and she took a step forward towards the applicant whilst the applicant still had his arms held out on either side of him. The applicant displayed the position of his arms whilst giving evidence which is not reflected in the transcript. The applicant said when giving evidence that he had the feeling that AS was trying to race past him so he stepped sideways so that his arm was up against the wall to block her path. At that point AS was behaving similar to what she had been in the office. She put her head down and it was a case of her being very determined to do what she wanted to do. The applicant said he was doing what he would normally do in a situation like that and that was to try to talk calmly to them, to use some physical presence in terms of his arms to block the way. He was standing in front of them but not too close to them. When they both started to say, *"We don't have to do anything you have to say,"* his thoughts were at that point that they were being silly and were acting immaturely and that he should talk to them calmly and persuade them not to do anything silly. The

applicant testified that he had every reason to believe that by talking calmly to the students and exercising some physical presence in terms of eye contact, the tone of voice and using physical space by blocking their path would help in persuading them. He said that you always had to be aware that a lot really depends on a certain extent of bluff with teenagers or teenage students.

- 37 When AS tried to move quickly past him, the applicant said he moved sideways and put his arm adjacent to the wall so there was a physical barrier of an arm in front of her. When asked in cross-examination did he give consideration to allowing her to race through the gap instead of him closing it, he said, "*No. The thought in my mind was that I was concerned about what would happen to her if she did.*" He explained that when a student is suspended he had a very clear understanding that they should be kept at school until collected by a responsible adult as suspending a student from school does not absolve the school from their special duty of care towards the students. In particular he was concerned that AS might try to make her own way home to Bridgetown and that "included hitchhiking". He was very mindful of the fact that AS was an emotionally intense girl and fairly immature and he was concerned for her safety as she was a young female student racing out of the school in an emotionally distraught state.
- 38 When the applicant put his arm onto the wall as a physical barrier AS at that point started slapping at his arm with both of her hands and kicking his leg. His response was to step back and as she continued forward with her momentum he grabbed her jumper or windcheater up by her right shoulder and turned her around so that she was facing away from him. He then held her right arm with his right hand. He testified that his intention at that point was to get her into a position where she was not able to continue hitting and kicking out at him. KR was standing to his right. KR said, "*You can't do that,*" and took a step forward. As he did so the applicant transferred his hold of AS's arm to his left hand so that he was holding her wrist and her arm with his left hand which was then effectively being held behind her back and he put his right arm up with his hand open in a stop sign towards KR. The applicant said to KR, "*Stop right there.*" KR paused at that point. The applicant gave evidence that he thought things were getting "dicey" at that point in time because his strong impression of KR was that he was "squaring up" and adopting a position as if he was getting ready to punch. He thought he had to watch KR as KR was the danger. He felt he had AS restrained to the point where she was not going to be doing anything but she was in no danger. KR hesitated and the applicant continued what he had been doing in terms of talking to both of them, trying to keep things reasonable calm and reassured. He continued to hold up his hand towards KR in an open palm gesture saying, "*Just stay there,*" and he said to AS, "*Go back to the office.*" She was facing towards the door and she started moving forward towards the door. AS then started pushing off the door and used the frame to stop herself from moving with her feet and her other arm. KR was continuing to move along and there was a lot of noise and swearing from both the students. The applicant said he was hoping someone was going to come along as he needed some help. By this stage AS had got herself braced to the side of the door so that there was no way she was going through the door. The applicant was holding her with his left hand and KR was over to his right. When asked in cross-examination why did he not release AS at that stage and concern himself with KR if he was concerned that he was in danger from KR and not AS, the applicant said that he would then have the possibility of having to deal with both of them on both sides of him and that he was hoping that someone else would come along. The verandah was empty but there are normally people moving around, students coming up to the office and teachers going to the staff room or to the office. At this stage both students were swearing quite strongly at him and AS was throwing herself around left, right, forward and back and KR was watching her as much as him (the applicant). The applicant said whilst KR was preoccupied with AS he was not likely to follow through with what his initial body language had indicated.
- 39 At the point when AS had braced herself against the door, the applicant heard a voice behind him. It was one of the school clerical officers, Dayle Riley, who came from an adjoining door which leads into part of the front office where the clerical staff work. She called out, "*Are you alright, John?*" and the applicant replied, "*No, I'm not. I need some assistance here straight away.*" Ms Riley went back inside. As that occurred AS appeared to relax, stopped struggling and held her hand up and said, "*Alright, I give up.*" The applicant said to AS, "*Are you going to go inside?*" and AS said, "*Yes.*" He then told AS to go inside and she led the way through the door. When she went through the door the applicant continued to hold her arm and to watch KR. He followed them. As they got through the door another senior member of staff, John Carr, came out of his office, walked across the reception area and accompanied them back into the room from where AS and KR had run out. When cross-examined, the applicant said he thought it was Ms Riley's intervention that prompted the change in AS.
- 40 When AS and KR were returned to the detention room the applicant asked them to sit down. AS sat down and kicked a desk over onto the floor in front of her. Consequently, the applicant asked Mr Carr to keep an eye on the two of them while he removed all of the desks in the room. He left two chairs for AS and KR to sit on. He locked the door to the other Deputy's office and the main door of the room and did not return until KR's aunt arrived to collect them. When he returned to the room he found the room was empty and saw a high window open. Another member of the staff informed the applicant that both students had been seen climbing out of the window and leaving the school. The applicant said that the window is approximately seven-and-a-half feet above the floor. Underneath the window is a cupboard which is about three foot high. KR's aunt later telephoned the school and said that she had found them in the main street of town, they were okay and she was taking them home to Bridgetown.
- 41 In cross-examination, it was put to the applicant that when AS attempted to push past him why did he not simply step back and let them go rather than take physical action to restrain AS. The applicant said that if he had not chased the two students and simply let them run away as they were not actually running out of the door of the front office, he could have simply done nothing and that would have lessened the chances of these proceedings coming about. But he then said that that was not the way he has done his job, that he has always been commended in the past for performing his job to the best of his ability and putting the safety of staff and students uppermost.
- 42 The applicant reported the incident to the Principal of the school, Kerry Mather. He spoke to her that afternoon and told her that there had been an incident and he had been made aware that the mother of AS intended to complain and take the matter up with the police and lay a complaint of criminal assault. The following morning Ms Mather came to him and said she was

going to prepare an incident report to send to the District Office. The applicant told her what occurred and she prepared an incident report. Later Ms Mather showed him a copy of the incident report and told him it was a draft. She asked him to read through it and confirm whether it was correct. When he read through it he told her that "by and large" it was correct but there did not appear to be any mention of AS having hit him. He asked for a Post-it note to be attached to the report which reflected that. The incident report stated as follows:

Description

It is alleged that Deputy Principal Mr John (Peter) Ayling held the arm of Year 12 student AS. This has resulted in a complaint being made by AS at Bridgetown Police Station.

The following information has been provided verbally by Mr John Ayling on 5/4/07 and Kerry Mather, Principal has taken the notes written below.

Mr Ayling was called to a Mathematics class by Mr William Chapman. Mr Chapman has indicated that a desk was vandalised and a leg was missing from the desk. In following up this incident, Mr Ayling found that Year 11 student, KR was responsible and that Year 12 student AS watched as the vandalism took place. Mr Ayling removed AS from class and interviewed her. After stating that she had not seen the vandalism occur she refused to answer any further questions directed to her from Mr Ayling. AS was placed into the adjoining room to Mr Ayling's office while he interviewed KR who admitted to being responsible for the damage to the desk. Both students were placed into the adjoining room while Mr Ayling proceeded to phone parents. While this was happening the students left the room and ran out of the administration block. Mr Ayling headed them off and asked them to return to the room. AS pushed past Mr Ayling and Mr Ayling attempted to stop AS from leaving. He took hold of her arm and a struggle ensued. The receptionist, Mrs Dayle Riley put her head out of the administration door and Mr Ayling asked for assistance. Mr John Carr went to his assistance. Both students were guided back to the waiting room next to Mr Ayling's office. Mr Ayling locked the door at the [sic] of the room which lead [sic] to the other Deputy Principal's office because this lead [sic] to an exit door. Mr Ayling indicated that his intention was to suspend both students for a day. Mr Ayling returned to continued [sic] the phone calls to parents, and was interrupted by the desks being kicked in the room. Other items were also being thrown. Mr Ayling removed all of the furniture from the room and locked the second door. KR's father was contacted by Mr Ayling but was unable to come to the school to collect his son because he was working his taxi service in Bridgetown. KR's father also informed his partner Mrs MS that she was required to collect AS from the school. When Mr Ayling returned to the room it was empty, the students had climbed out of the window and disappeared. Ms SR, KR's natural mother's sister came to the school to collect both students and was informed they were missing. She found them a short time later outside Southern Chicken and notified the school. She drove them home to Bridgetown

Action

Ms MS and her daughter made a complaint to Bridgetown Police regarding the way Mr Ayling man-handled AS at 2.30pm, 4/4/07. Ms MS contacted the District Office then left a message for the Principal to contact her. Ms Kerry Mather, Principal spoke to her about her complaint at 12.30pm, 5/4/07. Bridgetown Police contacted the school at 2.15pm 5/4/07 indicating that a complaint had been made.

Outcome

Ms Kerry Mather discussed the issue with the District Director, Mrs Janine Milton and this was followed by completion of a critical incident notification.

(Exhibit 1, document 28)

- 43 The Post-it note that was attached to the incident report states, "When Mr Ayling resisted AS's attempts to get past she began hitting him." At the time the incident report was made the applicant did not see the handwritten notes made by Ms Mather. During these proceedings he contended that Ms Mather's handwritten notes quite clearly indicated that he was responding to the actions by AS. The handwritten notes that Ms Mather made from which she prepared the incident report state as follows:

Bill Chapman

Damage to desk

KR & AS — interview by John

AS sat and stared, refused to talk.

Wouldn't give phone no.

Interviewed KR – got some explaining about the desk

Early in term threw chair across room loosened. KR admitted he broke the desk leg – removed it. Leg removed from class ????

Wilful damage to property –

AS interviewed again refused to give info

Sat in room next door

Phoned parents – AR

– Trying to ring MS

While phoning – student attempted to leave room. When John appeared they began running. John got in front of them. Held hand out in front

John asked them to go back into room

AS tried to bulldoze in front of him

Started pushing through his arm

John took hold of arm

KR began

Dayle put head out of door – John asked for assistance

AS stopped fighting and returned to room. KR followed

Wait quietly – locked Annmarie's door

Started kicking desks – John removed them.

Locked outside door while he made phone calls.

SR – sister of KR's natural mother

AR phoned her to collect KR.

John – rang back AR - to ok AS to be picked. SR was not informed she had to pick up AS.

Students got out window and ran off.

SR came – told ↑ and later found downtown

...

(Exhibit 1, document 29)

- 44 When cross-examined the applicant conceded that Ms Mather had asked him to provide a written account but he had declined to do so. He, however, said that he observed her taking handwritten notes. The applicant also said in cross-examination that he assumed when the note was made on the Post-it note that it would be added to the incident report. Ms Mather's handwritten notes were made available to him through the investigation report. The applicant contended when giving evidence that when it gets to the key point of what happened, the notes appear to be incomplete. The applicant testified that he quite clearly discussed with Ms Mather AS's physical movements and he demonstrated to her the physical movement of both AS's arms moving up and down as a way of illustrating the way in which she was trying to bulldoze through his arms. When it was put to the applicant that Ms Mather says that at no time during the course of his explanation to her did he mention that AS had begun hitting him the applicant disagreed with that and said he had demonstrated that to her when she was making the handwritten notes. The applicant also said when cross-examined that "*when someone puts their head down and starts slapping away at you with both their hands and kicking your legs and they are trying to force through, the term 'bulldozing' is one that he would normally use to describe that sort of situation, particularly if you are on the receiving end of it.*" (Transcript p 79)
- 45 The applicant also testified that he told Mr Carr about AS and kicking and hitting him. The applicant talked to Mr Carr on two occasions about the incident. He said however when he gave evidence that he tried not to talk terribly much about it and he did not discuss all the aspects of the incident from beginning to end with Mr Carr or anyone else because he did not think it was appropriate for him to be discussing it with him (Mr Carr) in detail. He said his only recollection of what he might have told Mr Carr was talking about the incident on the verandah in terms of AS trying to bulldoze through his arm, his grabbing hold of her arm and his concern about KR shaping up to punch him. The applicant said that he was mindful from the first day of the incident that he wanted to exercise his right to remain silent and he had been advised to retain his right of silence by his solicitors.
- 46 As to his relationship with Ms Mather, the applicant testified that prior to this incident he had every reason to believe that he had effective relationship with Ms Mather. They had been working together since 2004. However, he found at times she appeared overly concerned with the reputation of the school to the extent of being reluctant to acknowledge any problems with the students. When he arrived at the school he noticed there were signs of a significant drug problem which could have been developing at Manjimup Senior High school. He raised these concerns with Ms Mather but she was not prepared to acknowledge there could be any basis for it. When he was served with notice of suspected discipline, he thought initially that Ms Mather was supportive of him because she made the comment that she was shocked and surprised that the department was taking this action. She told him that she was pursuing the matter with the district and central office to try to get the matter dealt with as quickly as possible because she believed it had all been dealt with three months before by the police investigating the matter and finding there was no case to answer. Ms Mather had told him that detectives had dealt with the complaint and they were satisfied that there was no case to answer and would be taking no further action. As far as he understood that was the end of the matter until he received a letter from the department some three months later. However, when the applicant subsequently read in the initial investigation report and the inquirer's report that she had made further allegations which he did not believe were a correct reporting of matters he subsequently felt let down by a lack of support.
- 47 In relation to the suspension process of students, the applicant conceded when cross-examined that formally a suspension has to be signed off by the Principal. He said, however, that if the Principal is not available the Deputy's role is to deputise and when the Principal does become available the formal signing off of any documents in relation to a suspension has to be done by the Principal. At the time when he made the decision to suspend both the students Ms Mather was unavailable. He explained that the penalty for unlawful damage to school property would generally result in more than a one-day suspension

but the maximum he could impose on KR was one day's suspension because it was the last day of school term. In relation to AS, he said that her conduct in refusing to respond to questions and to simply say she was doing a test and knew nothing about the removal of the chair leg, certainly when her denial had been completely contradicted by the music teacher, would be serious and would warrant a one-day suspension.

- 48 When the applicant was asked why did he not provide a detailed exposition of the facts to the investigator or the inquirer as he has given in these proceedings, the applicant said there was a couple of reasons for not doing so. First of all he had sought legal advice on the matter and his legal advice was that he continually faced the threat of criminal action being taken against him and that he should not rush into responding to questions without consulting his lawyers first. In addition, he had every reason to believe that as the department had agreed to implement the recommendations made by Peter Browne in his report titled "Executive Summary Complaint's Management Review March 2006", (Exhibit 1, document 23) he had confidence that he would be exonerated as the idea that he was innocent until proven guilty would be applied.
- 49 When the applicant was interviewed by Mr Skamp he had already provided information to Mr Skamp through his solicitors and he did not propose to make a statement on the matter. When Mr Skamp was at the school on 21 August 2007, Ms Mather came to him and said that Mr Skamp had invited him (the applicant) to meet. The applicant agreed to go meet with Mr Skamp and he asked Ms Mather to attend as a witness. At the meeting he asked Mr Skamp whether he (Mr Skamp) had received a copy of a letter from his solicitors saying they were acting on his behalf and that in light of that advice from his solicitors he did not have anything further to add. Mr Skamp asked if he was prepared to have that recorded electronically for the purpose of completeness of the investigation. The applicant agreed and Mr Skamp formally put that question to him and the applicant formally replied. The recorded interview took approximately three minutes. After that the tape recorder was turned off Mr Skamp turned to the applicant and said he wished to make some off-the-record remarks to him. Mr Skamp informed the applicant that he wanted to formally caution him (the applicant) to never to touch a student again, that he (Mr Skamp) was a former police detective and was satisfied on the evidence that he already had that there was enough to charge him (the applicant) with criminal assault. Mr Skamp then told the applicant that he had more than enough evidence to find him guilty and was confident he was going to be able to complete this investigation very soon. The applicant told Mr Skamp if that was his considered opinion then to bring it on. Mr Skamp said in reply that he understood that he (the applicant) had some experience with industrial relations and it may be his (the applicant's) intention to take the matter before the Industrial Commission and if that was the case he (Mr Skamp) was ready for it. The applicant testified that he formed the impression that Mr Skamp was simply going to go through a series of comments and provocative statements in an attempt to get him (the applicant) to respond in a way contrary to his advice about remaining silent. Mr Skamp told the applicant that he had evidence that he had used excessive force against the female student but he did not believe that there were any grounds that he (the applicant) should not be allowed to continue to work in a school. Mr Skamp then told the applicant that there is no concern of him being unsafe around students but he had not heard any mitigating circumstances. He asked the applicant again, "*Is there anything you can say?*" Again the applicant did not make any response and Mr Skamp told the applicant that he was going to bring this investigation to a conclusion fairly soon.

The Respondent's evidence

- 50 In these proceedings Mr Ceri Skamp, Ms Kerry Mather, Mr James Zaknich and Mr Paul O'Connor gave oral evidence on behalf of the respondent
- 51 Kerry Mather who substantively holds the position of the Principal of Manjimup Senior High School gave evidence on behalf of the respondent. She held that position in 2007 and continues to do so but her role at the time of giving evidence was Principal Consultant at the Warren Blackwood District Education Office.
- 52 Ms Mather said that either late morning or early afternoon on 4 April 2007 the applicant came to her and informed that there had been an incident involving AS and KR and he gave her a brief summary of what had happened. Early in the afternoon of 4 April 2007 the Bridgetown police telephoned her and said that a complaint had been made against the applicant by AS's mother. Ms Mather later received a telephone call from AS's mother who had informed Ms Mather she had gone to the police about the matter. On 5 April 2007, Ms Mather took steps to complete a critical incident report as it was something that had to be done fairly urgently and she did not have time to do it on 4 April 2007. She discussed it with the applicant and asked him if he could write down his version of events. He chose not to do so but told her he would give the information verbally. While he spoke she made handwritten notes. She typed the report from the notes straight away and sent it off to the Department. On 6 April 2007, Ms Mather showed the applicant a copy of the critical incident report. She said when giving evidence that she thought he requested to look at it but she was not completely sure about that. After she showed it to him, he asked her to amend just one entry by asking her to write down the words that "when Mr Ayling resisted AS's attempts to get past she began hitting him". Ms Mather said she wrote those words on a Post-it note and stuck it on the document because it could not be entered into the system as the incident report had already been submitted on line and once the document had been sent it could not be changed.
- 53 When cross-examined, Ms Mather was not able to recall whether she spoke to the applicant on more than one occasion on 4 April 2007, in particular she was unable to recall whether she had spoken to the applicant after the police had contacted her. She said it was a very busy day. On 4 April 2007 she had a student services meeting between 9:00 am and 10:15 am and then she had a construction issue regarding the farm dam which she had to try to resolve which resulted in numerous phone calls to engineers, builders and contractors. She then had a panel meeting in the afternoon.
- 54 When asked in cross examination about the handwritten notes line by line, Ms Mather stated in relation to each line that she had recorded what the applicant had said to her. When the line "KR began" was put to her, she said, "*I think that was KR began to walk away*" but she was not sure. When it was put to her that that was not consistent with the applicant's evidence given in these proceedings, Ms Mather said she could not confirm or deny whether that was the case, she did not know, she had not completed the sentence. She also agreed that there was no mention of KR in her typewritten notes. When it was put to

Ms Mather that what was in her typewritten notes was a relatively sanitised version of what was in her handwritten notes in respect of the entries which recorded that AS tried to "bulldoze in front of him and started pushing through his arms" and the typewritten notes which simply stated "AS pushed past Mr Ayling and Mr Ayling attempted to stop AS from leaving", Ms Mather reluctantly agreed and then said that she thought she had omitted the word "bulldoze". It was also put to her that she had also omitted any reference to physical contact between AS and the applicant and Ms Mather said that she thought it was inferred from the word "pushed" as pushed meant touched. When asked about the information contained in the Post-it note Ms Mather said that she did not know why the applicant asked her to attach the Post-it note. It was then put to her whether she had any reason to doubt that he was telling the truth when he asked to include the Post-it note and she said, "No." She also said she was concerned that not all of the information was there and that it subsequently came out when one of the witnesses gave some further information that he (the applicant) had held AS's arm which she discussed with the applicant later. With the exception of the word "bulldoze" which Ms Mather says was omitted from the typewritten notes Ms Mather says she wrote down exactly what the applicant told her.

- 55 When Ms Mather was asked about whether she provided any documentation to the police during their investigation she said they took a statement from her and she provided them with one behaviour management report for AS and two behaviour management reports for KR. Ms Mather said that she could not produce the behaviour management reports in these proceedings as they were either archived or the police had them. When asked about the content of the behaviour management reports she said that all she recalled was that they were fairly mild. When asked about what her recollection was of KR as a student, Ms Mather said he was very different; he was quite withdrawn and often did not perform in class. She also said he often sat quiet and isolated in class but every now and again he would have a behavioural issue which was fairly mild but they were more concerned about his emotional health than any other issues. When the student services report was put to her about KR which indicated that he had punched the blackboard and injured his hand, Ms Mather said that she was aware of that incident as she was at that meeting. When it was put to her that that was a violent thing to do, she said, "Yes, but it was not a student or a teacher, so that was good news." When asked why she said that, she said, "Well, it does not put anyone else at risk," but then she said she could not remember the incident and it did not come to mind, but she would say that it was a manifestation of an emotional issue. She then agreed that you could classify the act of punching a blackboard and injuring a hand as violent but qualified her response by saying that if you do not know the history of the student you may draw incorrect conclusions. She also said that the only report she had received that KR had thrown a desk at another student was a report from the applicant about that.
- 56 In relation to AS, Ms Mather said that AS was a reasonably talented student who was not performing and they were concerned that she was not on track to graduate consequently most of their concern was about her graduation status. Ms Mather also said that AS was a very quiet student, who did not focus at all in terms of her behaviour, who came from a fairly assertive background and that her mother was very assertive.
- 57 In relation to the process of suspension of students, Ms Mather gave evidence that it is only the Principal who can sign off on a suspension of a student. She said, however, that Deputy Principals will make a decision but generally it was always discussed with the Principal prior to any action being taken. She also said there was a lot of paperwork that is generated when a student is to be suspended or has been suspended from school. There is a letter that goes to parents and there is a discussion with the parents. In relation to the incident on 4 April 2007 there was no paperwork generated at all. It was clear from her evidence that she did not proceed with the suspension of either KR or AS.
- 58 When Ms Mather was advised the disciplinary action was being taken by the Department in relation to the incident on 4 April 2007, Ms Mather said that she was somewhat puzzled because she did not understand the process of the various investigations. When she telephoned Standards and Integrity Branch of the Department they clarified the issue and told her that the police investigation was a criminal investigation and this was a completely separate investigation. She also testified that when the applicant was informed he was going to be investigated she would have indicated to him that she would have supported him just like she would support any staff member in that situation. When cross-examined, Ms Mather said that she was not aware the reason why the police had not proceeded with their investigation other than they said that there was no criminal charge.
- 59 In relation to the applicant's working relationship with Ms Mather, Ms Mather said that they had a reasonably effective working relationship although there were times when she had to give negative feedback to the applicant about some issues. She said this had caused a rift in their relationship. The rift arose because it had been reported to her by staff that the applicant had lied to them on occasions and on other occasions staff reported when they had discussions with the applicant the conversation would go round and round in circles and there was never an outcome and they would leave his office very confused. This caused her workload to increase as staff complained about the issue to her. Her advice was always to the staff members to try to resolve the issue with the applicant, but many of them felt they could not do so. When cross-examined Ms Mather was asked to specify the number of complaints that she had received about the applicant. She said that from 2004 to 2008 she had received a total of 20 complaints from parents, teachers and students.
- 60 In relation to the drug problem at the school Ms Mather said this was not new news. She said like most senior high schools they had always had a drug problem. They had developed a policy to always contact police that gave very clear guidelines as to what they would do with students who had found to be in possession of drugs or who were under suspicion of any drug use.
- 61 Ms Mather participated in a record of interview with Ceri Skamp. The interview was recorded and later transcribed.
- (a) In that interview it is apparent from what was said in the record of interview when asked to recount what had been said to her by the applicant, Ms Mather read from her typewritten notes. When asked by Mr Skamp was there any variance in the personal notes she had written and the typed document, Ms Mather said, "I would have clarified certain things, I would imagine as I was typing it up. These are fairly well as you can see they are pretty rushed notes." She was asked in the record of the interview whether the applicant sat with her while she typed up the notes and she said, "No." She was then asked whether she showed the applicant her draft and whether he was happy with

that and she said, "Yes." When asked whether it was his version of events she said, "I clarified it with him and he made another comment which I referred to when I was talking." That was the comment that was made on the Post-it note. She also stated that she did not add the Post-it note to the document (incident report) because she had sent the document off. When asked whether they had been added to an amended copy of the document (incident report) she said, "No. I simply just didn't think it was important enough to amend." When asked what her understanding of AS's suspension on the day in question of the alleged assault, she said that all suspension documents come through her because she has to sign them. The applicant told her he wanted to suspend her (AS) because she had withheld information and that he felt she was a bit of an accomplice in the whole matter. When asked if that was sufficient grounds to suspend someone she said, "No, I wanted some more information on that." When this occurred, the applicant said that he wanted to suspend AS but she said, "No, it required further information, further investigation."

- (b) When Ms Mather was asked what was her understanding of the inappropriate use of force, she said, "When I questioned Mr Ayling how he, what contact he made with AS, he demonstrated to me what he said he did." Mr Skamp then asked Ms Mather to demonstrate on him. Mr Skamp stood up and she said, "So I said to him, how did you use force and he said, I grabbed hold of her arm." Mr Skamp then said, "You're using your right arm now." Ms Mather said, "Yep. Well I can't remember if it was the right arm or left." Then it was put to her by Mr Skamp that she could not remember if it was right or left. Ms Mather said, "No, I can't. I didn't get that specific. All I wanted to know was how he touched her and he said he grabbed hold of her arm." Mr Skamp then said, "OK and what you are doing is grabbing me on my upper forearm, I suppose near my elbow." Then Mr Skamp asked how light or heavy was his touch, Ms Mather said, "He didn't demonstrate it on me, he just said, look I grabbed her arm." Ms Mather was asked what was the location of the touching and Ms Mather said, "Well, my understanding was it was to restrain her from moving." Then when she was asked what was the purpose of the restraining she said, "So she wouldn't leave the school." She then said, "He indicated that he was blocking her way of getting out of the school and she was trying to go past him." Ms Mather was then asked, "Is it appropriate that a teacher can prevent a student from leaving the school?" Ms Mather said, "It depends on the situation." She then said, "What I tend to council [sic] people is that if a person is so heated and wishes to go then generally its [sic] best if they just go and we inform their parents straight away." Ms Mather was then asked if it was appropriate or inappropriate to use force to prevent someone from leaving and Ms Mather said, "I would always say it's inappropriate. Yeah unless they're putting themselves into danger and there's a safety issue." Ms Mather was then asked, "And did Mr Ayling provide you with any evidence in relation to that?" Ms Mather said, "No."
- (c) Ms Mather was also asked about the statement made by the applicant that AS had intended to push past him and she was asked whether he had said anything more than that. Ms Mather said in response to the interview, "No, he simply just said that she tried to push past him." Ms Mather then confirmed that the applicant had declined to write a report, that it was a very busy time, she needed to get the critical incident report in and to expedite matters she said, "Sit down. Let's go and we will write it out now." With respect with the Post-it note she was asked again what was her view on that and she said she did not read anything into it. She also said that she wrote down exactly what the applicant had said to her. When it was put to her by Mr Skamp whether she had any particular view that once the applicant had proof read her notes he specifically stated he was hit by AS, however in the initial conversation he failed to mention that, Ms Mather said, "Well he may have mentioned that in this, and I've written it down. Mr Ayling heeded [sic] them off and asked them to return to the room, AS pushed past Mr Ayling and Mr Ayling attempted to stop AS from leaving. In my notes here, he's actually said AS tried to bulldozed [sic] in front of him starting to push through his arm. John took hold of arm, KR began ... I missed that sentence there. Dayle put her head out the door, John asked for assistance, AS stopped fighting and returned to the room." Ms Mather participated in that record of interview on 21 August 2007.

- 62 On 30 May 2008, she was interviewed by the inquirer James Zaknich. In that statement, Ms Mather again recounted what the applicant had told her when she sat with him and made notes of what he said on 5 April 2007. It was apparent, however, when that document is read that in recounting what was said by the applicant, Ms Mather, referred to her typewritten notes rather than her handwritten notes. In her statement she says in relation to the copy of the Incident Report:

Some time later, I think it was the following day, I presented John with a copy of the Incident Report.

He read it and said that it was correct.

After he had read the report he said he wanted to add a comment to the effect that when he resisted AS's attempt to get past him, she began hitting him.

I wrote the additional information on a "stick-it" poster which is now attached to the report.

At no time did John tell me that he had twisted AS's arm behind her back.

On the 12/9/07 I was at a meeting with John AYLING on a completely different matter.

During the course of our discussion John said that he felt unsupported by me because I had not provided documentation to his lawyers as he had requested. This documentation related to the interview with Ceri SCAMP [sic] and Mike EVANS regarding his alleged assault on AS.

I said that I felt let down by him, because he had not given me the correct information about how he had restrained AS.

John insisted that he had always acknowledged that he had held AS's arm behind her back.

I replied that at our meeting regarding the incident with AS that he had demonstrated to me as well as telling me that he had only held her arm below the elbow and that he had made no mention of holding her arm behind her back.

He said "yes" and then made it clear that he did not wish to discuss the matter any further and changed the subject.

(Exhibit 1, document 25)

63 Mr Ceri Skamp was employed by the respondent as a Principal Investigator at the Standards and Integrity Directorate for about a year and a half as an acting Principal Investigator. Prior to being employed in that position he was a police officer for 10 years in the Western Australian Police Force, five of that as a uniformed constable and five years as a detective. At the time of giving evidence Mr Skamp had returned to the Western Australian Police Force and was employed as a Detective Senior Constable at the Child Abuse Squad.

64 Mr Skamp testified that he followed the guidelines made under the *Public Sector Management Act* that have to be followed. When he commenced the investigation he first obtained some information from Ms Mather. He then caused the letter to be sent to the applicant, signed by the Director General alleging a breach of discipline and a second letter to the applicant advising the matter was going to be investigated. He then conducted the investigation by speaking to relevant witnesses. At the conclusion of his investigation he wrote a report which was discussed and adopted by the Director General. After that point in time he did not have a great deal of involvement in the matter as the matter proceeded to an inquiry and Mr Zaknich carried out the inquiry.

65 On 13 September 2007, Mr Ceri Skamp submitted his investigation report. In his report Mr Skamp stated:

1 **BACKGROUND**

1.1 *On 5 April 2007 Kerry Mather, (Ms Mather) Principal at Manjimup Senior High School advised the Standards and Integrity Directorate (SID) of an alleged incident involving Peter John Ayling (Mr Ayling), Deputy Principal at Manjimup Senior High School and AS, a year 11 female student at Manjimup Senior High School.*

1.2 *The matter was later reported to the Bridgetown Police by AS's mother MS on Police Incident Management System (IMS) number 040407 1220 8411. A complaint was taken for common assault and deprivation of liberty.*

The matter was investigated by Detective Senior Constable Trevor Douglas (Det S/C Douglas) of the Child Protection Squad (CPS). As a result of inquiries Det S/C Douglas stated in his report that "as a result of inquiries I cannot identify any criminal offences in relation to the incident. The level of force used by Ayling and the detention of the students in a locked room was not excessive in the circumstances and within the parameters of Section 39 of the School Education Act 2000" [sic].

1.3 *On or about the 23rd July 2007 the respondent received an allegation letter signed by the Director General on 19 July 2007 stating:*

On 4 April 2007 at Manjimup Senior High School, you used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law.

By way of further clarification it is claimed that as AS left the administration block you attempted to stop her by holding the top of her arm causing a struggle to ensue.

1.4 *As a result of further investigations the "further clarification" needs to be particularised in a more concise manner. The amended allegation is:*

On 4 April 2007 at Manjimup Senior High School, you used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law.

By way of further clarification it is claimed that as AS left the administration block you attempted to stop her by grabbing her on the wrist causing a struggle to ensue. You then grabbed AS's right arm and forced it around behind her back and pushed her up against a wall.

2 **INVESTIGATION**

2.1 *On 14 August 2007 a letter signed by the Director General on 7 August 2007 notifying Mr Ayling of the commencement of an investigation was received by Mr Ayling.*

2.2 *The following persons were interviewed:*

- AS - Age 16 (complainant)
- KR - Age 17 (student and witness)
- Dayle Patricia Riley - School officer at Manjimup Senior High School
- William Chapman - Teacher at Manjimup Senior High School
- Kerry Leanne Mather - Principal at Manjimup Senior High School
- John Andrew Carr - Teacher at Manjimup Senior High School
- Peter John Ayling - Deputy Principal & respondent in this matter.

2.3 *The following files and documents were examined:*

- *Incident report by Ms Mather with photo copy of yellow "post-it" note attached. DO07/294787*

- *Handwritten notes by Ms Mather in relation to interview with Mr Ayling. DO07/317261*
- *Police statement of AS. DO07/294600.*
- *Map endorsed by KR DO07/294591.*
- *Map drawn by AS. DO07/317298*
- *Notes made by AS on day of incident. DO07/294576.*
- *Report from Doctor Hoar re: injuries to AS. DO07/311447*
- *Seven photographs of reception area.*

2.4 *At 2.55 pm on Monday 20 August 2007 witness William Charles Chapman (Mr Chapman), teacher at Manjimup Senior High School was interviewed by Ceri Skamp (Skamp), Senior Investigator, Standards & Integrity Directorate (SID) and Michael Evans (Evans), Senior Investigator, SID in the Principal's office at Manjimup Senior High School. The interview was electronically recorded.*

Mr Chapman stated in his interview, inter alia:

- *KR (KR) and AS used to be students in his class.*
- *KR was the victim of a prank which caused KR to get angry during class.*
- *Later it was noticed that a seat which KR used to sit in during class had a metal leg missing.*
- *Mr Chapman did not witness KR damage the desk.*
- *Mr Ayling interviewed AS and KR approximately one day after the damage was uncovered.*
- *Another staff member had seen KR waving the leg of a chair around.*
- *Mr Ayling heard the conversation and stated he would look into the matter.*
- *Mr Ayling has no knowledge of any alleged assault incident between Mr Ayling and AS.*

2.5 *At 4.34 pm on Monday 20 August 2007 witness KR, ex-student at Manjimup Senior High School was interviewed by investigators Skamp and Evans in the presence of his landlord ... Bridgetown. The interview was electronically recorded.*

KR stated in his interview, inter alia:

- *On a Wednesday in April 2007 just before first period (at about 9.00 am) Mr Ayling attended at the science room and removed KR from class to discuss an alleged incident that KR had damaged a desk. (Note: the damage to the desk occurred approximately one week before). AS was a witness to the damage of the chair.*
- *KR was taken to Mr Ayling's office and was advised that he had been expelled as he had broken a desk.*
- *KR was placed in the "detention room" next to Mr Ayling's office. AS was already inside the detention room.*
- *KR was advised that AS had also been expelled and they both decided to leave the school by walking out of "Door A" (as marked on the map endorsed by KR).*
- *Mr Ayling came out through the door and asked AS to stop. AS continued to walk away.*
- *Before KR & AS got a few steps away from the door Mr Ayling caught up with them and grabbed AS by the left wrist and told AS that she was to return.*
- *AS tried to pull away from his grip but Mr Ayling held onto her for about 10 seconds.*
- *KR was about one metre from AS when this occurred.*
- *AS & KR both refused the request to return as they both believed that they had been expelled and Mr Ayling had no authority over them.*
- *AS and KR were both swearing at this time and although no specific phrases can be recalled words like "fuck" and "shit" were used. KR called Mr Ayling "a dick".*
- *Mr Ayling appeared to become more frustrated and twisted AS's left arm up behind her back in a police style restraint and pushed her towards a window next to "door A" which rattled with the impact.*
- *AS was facing the window and was resisted for a short time until she became compliant.*

- *Mr Ayling walked AS through the office by holding her onto her collar.*
- *Mr Ayling placed both of them into the detention room and locked both of them inside (after clearing the room out).*
- *No damage was caused inside the detention room.*
- *KR and AS escaped by climbing through the window.*

2.6 *At 5.30 pm on Monday 20 August 2007 AS, complainant and ex-student at Manjimup Senior High School was interviewed by investigators Skamp and Evans in the presence of her mother MS... Bridgetown. The interview was electronically recorded.*

AS stated in her interview, inter alia:

- *At about 9.00 or 10.00 o'clock in the morning Mr Ayling attended at AS's classroom and asked her to come to his office.*
- *Mr Ayling asked AS about an incident where a desk was damaged by KR. AS refused to answer any questions about the incident as she did not want to get KR into trouble.*
- *AS formed the belief that she was under suspension for failing to answer questions and Mr Ayling said "something about being expelled".*
- *AS was placed in the detention room with KR.*
- *AS and KR walked out of a door into the main school area.*
- *Mr Ayling came out of the office and said words to the effect that they were not allowed to leave and to return to the detention room.*
- *AS "stood her ground" and said words to the effect that she was leaving as she believed that she had been expelled.*
- *Mr Ayling grabbed one of AS's arms and swung her around so she was facing him. Mr Ayling was blocking AS's path.*
- *AS tried to move around him but Mr Ayling would not let her.*
- *At some point Mr Ayling grabbed one of her arms and pushed it behind her back in a restraint type hold.*
- *AS was pushed in the direction of the door.*
- *AS is unsure if she was pushed up against a wall or not.*
- *When AS got to the door she swung from one side of the door frame to the other side. Mr Ayling pushed her arm up a bit more and there was pain in her shoulder.*
- *After a while AS put her hand up and said words like "I give up" and stopped struggling.*
- *AS was taken through the office and put in the detention room.*
- *KR kicked the desks inside the detention room and Mr Ayling came in and removed the furniture.*
- *Both of the doors in the detention room were locked.*
- *AS & KR climbed through the window.*
- *AS later saw Dr Hoar on the same day and he stated that there was soft tissue damage in the area by her shoulder.*

2.7 *At 8.30 am on Tuesday 21 August 2007 witness Dayle Patricia Riley (Ms Riley), school officer at Manjimup Senior High School was interviewed by investigators Skamp and Evans in the Principal's office at Manjimup Senior High School. The interview was electronically recorded.*

Ms Riley stated in her interview, inter alia:

- *Ms Riley was at work at her computer in the reception area of Manjimup Senior High School and she faces the "detention room".*
- *Ms Riley heard a noise (like raised voices) and went to a door which opens up into the main area of the school.*
- *Ms Riley opened the door and put her head out of the door and looked to her left hand side.*
- *Ms Riley saw Mr Ayling restraining AS.*
- *Mr Ayling had AS pushed up against a brick wall and was bending AS's left arm behind her back.*

- *AS was quite still at the time.*
- *Ms Riley does not recall any words being said.*
- *Ms Riley does not recall seeing any other person present.*
- *Ms Riley looked at them for 3 or 4 seconds from about 2 or 3 metres away.*
- *Ms Riley shut the door and asked John Carr for assistance.*

2.8 *At 9.40 am on Tuesday 21 August 2007 witness Ms Mather, Principal at Manjimup Senior High School was interviewed by investigators Skamp and Evans in her office at Manjimup Senior High School. The interview was electronically recorded.*

Ms Mather stated in her interview, inter alia:

- *Ms Mather was made aware of an alleged incident between Mr Ayling and AS from an unknown source (probably Mr Ayling).*
- *Mr Ayling was requested to provide his account on 5 April 2007 and stated that he would rather provide it verbally to Ms Mather than to provide a written account.*
- *Ms Mather made handwritten notes of the conversation.*
- *Ms Mather used these notes to type up a formal incident report (which was later submitted to concerned parties).*
- *These notes were later shown to Mr Ayling and 'adopted' by him as a true record.*
- *Mr Ayling read the draft report and requested that the following line "When Mr Ayling resisted AS's attempt to get past she began hitting him" be included. This comment was written on a post it note and was not added into the document as it had already been sent.*

2.9 *At 10.30 am on Tuesday 21 August 2007 Mr Ayling, the respondent was interviewed by investigators Skamp and Evans in the Principal's office at Manjimup Senior High School, in the presence of Ms Mather. The interview was electronically recorded.*

Mr Ayling stated in his interview, inter alia:

- *Mr Ayling does not wish to speak to investigators in relation to this matter as a result of legal advice.*

2.10 *At 11.01 am on Tuesday 21 August 2007 witness John Carr (Mr Carr), teacher at Manjimup Senior High School was interviewed by investigators Skamp and Evans in the Principal's office at Manjimup Senior High School. The interview was electronically recorded.*

Mr Carr stated in his interview, inter alia:

- *Mr Carr was sitting in his desk in his office which is near the reception area.*
- *Mr Carr heard some raised voices coming from the main school area.*
- *Dayle Riley called Mr Carr's name out.*
- *Mr Carr put his head around his door and saw Mr Ayling inside the reception area holding one of the students by the upper arm.*
- *Mr Carr believed that Mr Ayling was holding a male student.*
- *Both of the students were agitated and were raising their voices.*
- *Mr Ayling was calm and was asking the students to come into his office.*
- *Mr Carr did not see any incident outside of the reception area*

3 ANALYSIS

3.1 *AS presents as an intelligent and articulate young female and investigators had no reason to doubt the veracity of the account provided to SID. AS's evidence is compelling as she has made two written accounts and one verbal account of the incident and aside from minor discrepancies all corroborate each other. Particular weight can be placed on the written accounts as they are contemporaneous and clearly articulated.*

3.2 *The report by Doctor Hoar corroborates the complaint by AS and shows that there was evidence "tenderness of the right supraspinatus muscle and tenderness of the posterior shoulder joint. A diagnosis of minor soft tissue injury was made." Considerable weight can be placed on the evidence of a qualified medical practitioner who can give evidence in relation to an injury to which the complaint relates.*

3.3 *KR presents as an intelligent and articulate young male and investigators had no reason to doubt the veracity of the account provided to SID. KR's account corroborates AS's complaint in full. The weight of KR's evidence may be diminished because of his relationship to AS and his dislike of the respondent. KR provided a statement to police but SID have not been provided with a copy of this statement and cannot comment if it corroborates the verbal account provided to SID.*

- 3.4 *The evidence of Ms Riley is particularly compelling as she witnesses the incident at exactly the time when AS was pushed up against the wall with Mr Ayling holding an arm behind her back. Ms Riley had an unobstructed view of the incident from a short distance and is clear in her evidence. Ms Riley is an independent witness who has no interest in the outcome of the investigation. It may be noted that Ms Riley was not spoken to by Police as she was on annual leave at the time.*
- 3.5 *Ms Mather stated that she typed the incident report from handwritten notes taken during a conversation with Mr Ayling. When these were later read out loud to Mr Ayling (possibly one day after the incident) Mr Ayling requested the words: "When Mr Ayling resisted AS's attempt to get past she began hitting him" be included in the report. These words were handed to Ms Mather on a post it note. Self defence against unprovoked assault is defined in section 248 of the "Criminal Code" states that "when a person is unlawfully assaulted, and has not provoked the assault, it is lawful of him to use such force to the assailant as is reasonably necessary to make an effectual defence against the assault". It would be mere conjecture on the part of the investigator to presume that Mr Ayling had time to ponder his actions on the day of the incident and has attempted to provide a defence at law for his alleged assault upon AS.*
- 3.6 *Mr Ayling has failed to provide any account of his actions to the Department once requested by the Director General. No inference is drawn by the respondent exercising his right to remain silent.*
- 3.7 *The evidence of Mr Chapman has no bearing on this matter as he only provides corroboration into evidence about why Mr Ayling was [sic] removed AS and KR from his classroom to discuss damage to a chair.*
- 3.8 *The evidence of Mr Carr has little bearing on this matter as he does not witness the alleged incident and can only provide evidence in relation to what occurred after the incident in the reception area.*
- 3.9 *The department can draw no inference that Police have elected not to prefer criminal charges in relation to this matter as the burden of proof required by the Police to establish a prima-facie case is considerably higher than "reasonable suspicion" required by the Department. However, it may be noted that at the time the decision was made not to proceed the Police were not in possession of the evidence provided by Ms Riley or Doctor Hoar. A review of the evidence is currently being undertaken by the Child Protection Squad.*

4 FINDINGS

- 4.1 *In disciplinary and administrative investigations, allegations must be proved "on the balance of probabilities". It must be more probable than not that the allegations are made out.*
- 4.2 *Balance of probabilities may be defined as: "The weighing up and comparison of the balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability" Reifek v McElroy (1965) s 112 CLR 517.*
- 4.3 *Having regard to the burden of proof required for the allegation to be established I submit that on the balance of probabilities there is sufficient evidence to conclude that Mr Ayling used unreasonable force against AS as described in the amended allegation.*

RECOMMENDATIONS

- 5.1 *Having regard to all the evidence obtained during this investigation I submit that on the balance of probabilities the allegation against Mr Ayling is proven.*

(Exhibit 1, document 24)

- 66 Attached to Mr Skamp's report was a copy of the incident report prepared by Ms Mather and Ms Mather's handwritten notes. Also attached was a copy of the statement AS made to the police on 5 April 2007 together with handwritten notes AS made about the incident on 4 April 2007. Also attached was a copy of two plans of the area, photographs and a brief medical report written by Dr Michael Hoar who examined AS on 4 April 2007. In Dr Hoar's report he stated:

This is to certify that AS attended my clinic on the fourth of April 2007, following an alleged assault. She described her right arm having been twisted behind her back.

On examination, there was tenderness of the right supraspinatus muscle and tenderness of the posterior shoulder joint. Her shoulder retained a full range of movement. There were no other injuries.

The diagnosis of minor soft tissue injury was made, and she was prescribed ibuprofen.

- 67 In a statement to the police AS stated:

7. *Sometime around 9.10am to 9.15am Mr Ailing [sic] came into the class room and asked me to come to the office with him.*
8. *Mr Ailing [sic] is the Deputy Principal at the Senior High School.*
9. *I followed Mr Ailing [sic] to his office in the Administration block, which is across the court yard from my class room.*

10. *We went into his office. Mr Ailing [sic] sat on a chair behind his desk and I sat in front of his desk on a chair, facing him.*
11. *Mr Ailing [sic] asked me about something that happened the previous day. The kid sitting next to me broke the leg off a desk in the math's [sic] class. It was KR. The leg was already loose.*
12. *Mr Ailing [sic] asked me what I could tell him about what happened in maths, when the leg broke off. I told him I was doing my test.*
13. *I didn't answer anything else that he asked me.*
14. *I felt I didn't do anything wrong, so I thought I wasn't going to answer him. I just sat there looking down, I pretty much well ignored his questions.*
15. *Mr Ailing [sic] said I was going to be suspended.*
16. *As far as I can tell, I haven't been in trouble. I have spoken to Mr Ailing [sic] in the past about subject selection – but there have been no discipline issues this year.*
17. *In the third term last year, I got some detention for wagging – I'm not sure who gave me the detention though.*
18. *When I wouldn't say anything, or tell him my home number – or tell him my home phone number, he wanted to call my mum. He said I was expelled or going to be expelled – something about expelling.*
19. *Mr Ailing [sic] then put me in the detention room. He told me to sit in the detention room. I walked into the room myself - the detention room is just next door to Mr Ailing's [sic] office.*
20. *The room was open, it has two doors, one leading into the hallway and another leading into an office. There was no one in the detention room when I went in.*
21. *I have gone into the room and sat down. I read for a while - a short story book called Short Stories.*
22. *I was in there for 10 to 15 minutes max. After sitting in the room for about 5 minutes, I then got up and went outside of the room to look at last years school photos. Mr Ailing [sic] directed me back into the room, and I went back to reading.*
23. *Mr Ailing [sic] then brought [sic] in KR into the room. KR sat down. I asked what punishment and he said he was being expelled.*
24. *Then we decided that, seeing we were going to be expelled, we were going to leave.*
25. *I said I had been expelled - and I finished my story. I then said, "Well I'm going to get my bag and leave."*
26. *I'm not quite sure what KR said, something along the lines of "Yeah, me too."*
27. *We then walked out of the detention room and out of the admin block. We started walking across the court yard to get my bag.*
28. *Mr Ailing [sic] came up from behind me and grabbed hold of my left arm up the top, across the middle top section of my arm. He would have used - I'm not sure which arm he used.*
29. *He pulled me back towards the office and I pulled my arm away from him - he had come around in front of me.*
30. *I broke away, he wasn't holding on very tight.*
31. *I am not sure of what words he said.*
32. *I continued to try and move around him, so I could get back to the photography room.*
33. *He then grabbed my right arm in the upper part of my arm above the elbow, and I tried to pulled [sic] away, but he was holding on too tight.*
34. *He was standing in front of me.*
35. *He pushed my right arm around behind my back and then tried to push me back to his office. I was trying as much as I could to not go back to the office, to get out of his grip.*
36. *I was pulling away I don't remember trying to hit him, at one point I tried to push off of him.*
37. *KR was standing to the right of me.*
38. *He didn't try and do anything. One of the office ladies, Dale [sic] her name is - she poked her head outside the door.*
39. *I'm not sure if said anything, not that I can remember. Mr Ailing [sic] called out to the lady for her assistance, "Can I get some assistance." - the lady went back into the office.*
40. *Whilst trying to push away to stop going into the office, I pushed off a wall and then I gave up - and held up my left hand and said, "I give".*

41. *He didn't let go until he pushed me with my arm behind me, the whole way, back to the detention room. He was holding my arm behind me, it hurt - it hurt my shoulder.*
42. *I can't see any bruising on my arm, but it hurts.*
43. *Mr Ailing [sic] then pushed me into the detention room, KR came in as well.*
44. *I can't recall any words.*
45. *Mr Ailing [sic] held me until he locked the door leading to the other office - then he let me go and told me and KR to sit down.*
46. *We sat down on chairs.*
47. *I then kicked over a desk. I did this because I was very angry that he had hurt me and been mean /forceful - I felt he didn't have the right to do that.*
48. *Mr Ailing [sic] then took out all the desks out of the room.*
49. *He then locked the hallway door as he was leaving.*
50. *He locked both the doors. It made me feel angry that the [sic] locked the doors. I wanted to leave at that stage. Both doors were key locked. There was no phone in the room either, just a desk, some books and two chairs, I can't recall what the door locks were like, I just remember that he used keys to lock the doors.*
51. *The detention room had windows in it. There were two see through mirror windows, one into Mr Ailing's [sic] room which is mostly obscured by things on the window. The other mirrored window leads into the office - the office was mostly vacant.*
52. *Whilst we were in the room, I just sat there; KR was kicking, punching the air.*
53. *We were left in the room for about 20 minutes, then I looked into Mr Ailing's [sic] office and saw that he was on the phone.*
54. *The other windows, three of them, were locked except for one window.*
55. *I then opened one of the windows and climbed out - it was on the ground floor. KR came too. I got my bag from the photography room and then we left school.*
56. *We went and sat on a bench outside Southern Chicken.*
57. *KR's aunt came and picked us up, it was 11.10-11.11am.*
58. *We went around to a phone booth - KR's aunt rang the school and KR and I then spoke with the office lady, and we told her we were with KR's aunt and we were going back home.*
59. *KR's aunt then drove us home to Bridgetown; I went back to my mum's place.*
60. *When I got home, I told my mum what happened.*
61. *I believe that teachers can hand out punishments, like detention and blue slips - for being bad - they shouldn't forcefully [sic] restrain people and lock them in rooms.*
62. *I am not so sore now, I felt weird before - after it happened, painful until I got home.*
63. *I have been to the doctors in Bridgetown. I saw Dr Hoar, it was after I went to the Police Station.*

(Exhibit 1, document 24)

- 68 In AS's handwritten notes which she made on 4 April 2007 AS stated as follows:

Mr Ailing [sic] then comes out & grabs my arm & trys [sic] to pull me back to the office, I pull away & the next few moments were spent me looking for a way to get past him. I told him he has no right to grab me. He then grabbed my arm & after a struggle he twisted it behind my back, I then continued to try get away from him. He started to try push me back into the office & I swung around side to side, stopping him from getting me in. He pushed my arm up further which hurt me lots. My only thoughts were to get away & called for assistance from an office lady who had poked her head out a door. I said I give in & lifted my spare hand as a sign of surrender & he then took me back into the office, not loosening his grip at all until he had closed & locked one of the detention room doors. He let go & I sat down. He left & then came back, I was rather angry & insulted at this point & kicked down a desk to show this & to keep myself from crying. He took out all the desks & locked the door.

(Exhibit 1, document 24)

- 69 Mr Skamp gave evidence that he had a short conversation with the applicant after the applicant informed him that he had obtained legal advice and did not wish to discuss the incident. Mr Skamp testified he told the applicant that he was an ex-police officer and he had some experience in this area. He advised the applicant that he believed that there was probably sufficient evidence that he could have been charged criminally and should anything occur like that in the future it was probably not appropriate that he did so. He also told the applicant not to have physical contact with a student.
- 70 When cross-examined, Mr Skamp was asked about the police investigation. Mr Skamp was handed a copy of an email which summarised the result of the police investigation in which it was stated that the level of force used by the applicant and the

detention of students in a locked room was not excessive in the circumstances and within the parameters of s 39 of the *School Education Act 2000* [sic]. Mr Skamp said it was highly likely he had a copy of the email prior to commencing the investigation. He agreed that in light of the opinion expressed in the email it was open for him not to proceed further with the investigation, however he decided, in any event, to conduct an investigation.

- 71 In relation to the amended allegation contained in Mr Skamp's report that the applicant pushed AS up against a wall, Mr Skamp was asked whether he notified the further particulars to the applicant. Mr Skamp said that a decision was made that this allegation was a minor change in relation to the charge and so a fresh allegation letter was not sent out to the applicant. In making this decision he also had regard to the fact that the applicant had already indicated that he did not wish to talk to the investigators. Consequently, the amended allegation was simply referred to in the investigation report. In relation to the amendment, Mr Skamp was asked to explain where in the investigation report it was alleged that AS was pushed up against the wall. In response Mr Skamp referred to paragraph 40 of the statement AS gave to the police in which AS said, "*While trying to push away to stop going into the office, I pushed off a wall and then I gave up.*" Mr Skamp said AS's statement was corroborated also by the independent witness (Ms Riley) who described AS being against the wall and as a result he formed a reasonable suspicion that AS's arm was pushed up against the wall and he concluded that the applicant had pushed AS up against the wall.
- 72 In relation to Dr Hoar's report, Mr Skamp conceded that he did not speak to Dr Hoar but he had regard to the information contained in the report that Dr Hoar found tenderness in AS's right supraspinatus muscle, as a medical opinion of corroboration of some type of injury.
- 73 Mr Skamp was also asked in cross-examination whether he had a discussion with Ms Mather about whether there were any behavioural management reports and whether AS and KR were subject to any disciplinary matters. In response Mr Skamp said that he did have a conversation with Ms Mather about that but he did not make a record of the conversation as it would probably have been a general conversation when he was obtaining some general background information. When it was put to Mr Skamp that it was relevant to consider the character of the complainant and her accomplice, Mr Skamp said that the reality is the character of the complainant has no relevance whatsoever on the actions of people. He said that he deals with complainants all the time who he finds particularly objectionable but his opinion is of no consequence. He then went on to say that he did not consider the character of AS or KR but simply weighed the actions on the day.
- 74 Mr Skamp conceded when cross examined that he did not recount in his investigation report or consider the opinions of Mr John Carr who, when interviewed, stated that he thought from what he saw that the applicant handled the situation really well. Mr Skamp said he did not consider Mr Carr's opinion to be relevant as Mr Carr was not present at the scene but if he had viewed the entire incident he (Mr Skamp) might have considered Mr Carr's views but even then Mr Carr's view would only be opinion evidence.
- 75 Mr Skamp was also asked whether he considered the provisions to s 64 of the *School Education Act 1999*. Mr Skamp said, yes he did, but he was of the opinion that the applicant's conduct fell outside the scope of reg 39 of the *School Education Regulations 2000*.
- 76 James Zaknich was appointed by the respondent to carry out an investigation into the alleged breach of discipline in relation to the incident on 4 April 2007. He is employed by Gold Security Group (International) Pty Ltd as a senior investigator. He has held that position for over seven years. Mr Zaknich holds a Bachelor of Commerce with a major in law and management and a post graduate diploma in business law. He has also completed criminal law and evidence units at law school. He has previously been employed as a police officer having spent time in the Fraud Squad in Scotland Yard and the City of London police. He is a Churchill Fellow and has lectured at the detective training school. He has also lectured part-time at Curtin University in corporate law. Since he has been engaged as a senior investigator with Gold Security Group (International) Pty Ltd he has carried out investigation work for both private and government agencies. Prior to investigating this matter, Mr Zaknich had conducted a number of investigations and inquiries under the disciplinary provisions of the PSMA.
- 77 When conducting his inquiry Mr Zaknich read Mr Skamp's report and statements collected by Mr Skamp and caused to be transcribed the records of interview. He also re-interviewed all of the witnesses with the exception of KR whom he was unable to locate. He testified that although he had Mr Skamp's report, he formed his own independent opinion and came to the conclusion that the applicant had committed a breach of discipline. In his report (Exhibit 1, document 25) Mr Zaknich points out that the main thrust of the inquiry revolved around a very short period of time where the allegation is that the applicant grabbed AS by the wrist, twisted her arm behind her back and pushed her against a wall. In relation to the charge that the applicant used unreasonable force against AS in circumstances not authorised, justified or excused by law, Mr Zaknich particularised the unreasonable force as the alleged action by the applicant to grab AS on the wrist causing a struggle to ensue and then to grab her right arm and force it around her back and push her against a wall.
- 78 When conducting the inquiry Mr Zaknich interviewed AS, Ms Dayle Riley who is a school officer at the Manjimup Senior High School, Ms Mather, John Carr who is the Manager of Information Systems at the school and Mr William Chapman, the Head of Department of Mathematics. In relation to the documents he examined, Mr Zaknich had regard to the records of interview of the witnesses interviewed by Mr Skamp. These records of interview were conducted with AS, Ms Riley, Ms Mather, Mr Carr, Mr Chapman, the applicant and KR. Mr Zaknich also reviewed the statement of AS taken by Manjimup Police, the contemporaneous notes of the incident made by AS, the medical certificate from Dr Hoar and a letter from the applicant's solicitors dated 1 July 2008.
- 79 In relation to AS, Mr Zaknich in his report summarised her evidence which included the statement that he took, the record of interview with Mr Skamp, the statement taken by the Manjimup Police, her contemporaneous notes and the medical certificate provided by Dr Hoar as follows:

(1) AS (Appendices 1-5)

AS stated that before she was placed in the detention room she was informed by AYLING that she had been expelled. A short time later KR was placed in the detention room by AYLING and he told AS that he too had been expelled. They then formed the opinion that as they were expelled from school there was no obligation for them to remain in the detention room.

The [sic] both left the detention room via the Administration Office and as they entered the covered veranda AYLING caught up with them and grabbed AS on the right upper arm.

She pulled away from him and after she pulled away from him she ended up facing him.

She then tried to get around him and told him that he had no right to grab her. She said AYLING then grabbed her on the lower part of her right arm and twisted it behind her back.

She struggled to get away but was pushed against the wall.

She continued struggling and he pushed her arm higher up her back. Because it was hurting her, she stopped struggling and said something like "I give up" and put her left hand in the air.

AYLING continued to hold onto her until she was placed back into the detention room.

AS subsequently attended at the surgery of Dr Michael HOAR at Bridgetown where he made a diagnosis of minor soft tissue injury to the shoulder joint.

Later that day at home AS made notes of the incident.

- 80 Mr Zaknich also summarised the statement taken by him of Ms Riley and the record of interview Ms Riley participated in when interviewed by Mr Skamp. In his report Mr Zaknich summarised Ms Riley's recollection of events from those records as follows:

(2) Dayle Patricia RILEY (Appendices 6-7)

RILEY states that on the 4th April 2007, she was sitting at her desk in the Administration Area when she heard a disturbance which from recollection consisted of raised voices and scuffling.

She left her desk and opened the door to the verandah.

She saw AYLING restraining AS by holding her arm behind her back. She says that it was her left arm.

RILEY further stated that AS was facing the brick wall and was being held against the wall.

She stated that she was about 3 metres from the incident and had a clear view of both AYLING and AS.

She also said that AS was not struggling, that AYLING appeared to be acting in a calm and controlled manner and that AS appeared to be firmly restrained against the wall.

- 81 Mr Zaknich also took a statement from Mr Carr and he summarised Mr Carr's evidence given in that statement and in the record of interview taken by Mr Skamp in his report as follows:

(4) John Andrew Bice CARR (Appendices 10-11)

CARR stated that on the 4th April 2007 he was sitting at his desk at the rear of the Administration Building when his name was called by Dayle RILEY saying something to the effect that AYLING might need some help.

He said that he saw AYLING enter the room with two students and was holding one of the students on the upper arm.

He stated that the students were resisting, in that they were not walking.

He did not witness any physical threat towards AYLING by the students but that they were "in his face".

He did not see AYLING acting aggressively towards the students.

He goes on to say that several days later AYLING spoke to him about the incident, saying words to the effect that he had the girls [sic] arm behind her back as he was feeling physically threatened by KR and needed to be able to see him and be in a position to defend himself.

AYLING went on to say that he needed to restrain AS because he felt that the girl would leave the school grounds if he let her go.

AYLING also said that by resisting [sic] AS in that way she would not hurt herself unless she physically struggled.

Mr Zaknich added a note under:

Again it should be noted that AYLING did not accuse AS of hitting him at this time.

- 82 Mr Zaknich also made a brief summary of KR's recollection of events as told to Mr Skamp in a record of interview. In his report Mr Zaknich reported this summary as follows:

(5) KR (Appendix 12)

He stated that after he and AS left the detention room and went out on to the verandah, AYLING caught up with them and grabbed AS's wrist and told her to come back.

He said that both he and AS told him that they wouldn't, because he technically had no authority over them considering that they had been expelled by him.

He stated that AS continued to struggle and that AYLING seemed to get more frustrated and twisted AS's arm around the back of her head, and push her against the window next to the door.

AYLING then took them back to the detention room.

- 83 Mr Zaknich also had regard to what the applicant said in his record of interview with Mr Skamp and the response given in writing to the questions posed by him (Mr Zaknich) through his solicitor. After collating the evidence Mr Zaknich analysed the evidence and reached his findings as follows:

ANALYSIS OF THE EVIDENCE

There are three (3) issues which need to be determined:

Issue (1): Did AYLING physically handle AS in the manner described?

Issue (2): If so was the action authorised, justified or excused by law?

Issue (3): If AYLING did handle AS in the manner described, and his action was not authorised, justified or excused by law, does it amount to misconduct as per Section 80(c) of the PSMA.

Analysis of the evidence relating to issue (1)

AS's evidence is credible, having made contemporaneous notes of the incident immediately upon arriving home from school on the day of the incident.

Her account of the occurrence was consistent in her interviews with the Police; the investigators from Standards and Integrity and the interview with the Investigator.

Further her account was corroborated by Dayle Patricia RILEY who stated that she witnessed AYLING restraining AS by holding her arm behind her back and against the wall.

RILEY also stated that AS appeared to be firmly restrained against the wall.

It should be noted that RILEY's evidence is that AYLING had hold of AS's left arm which differs from AS's evidence who states that it was her right arm.

AS's evidence is further corroborated by KR, to the extent that AYLING grabbed her by the arm and twisted it behind her back. KR also states that AS was forced up against the glass adjacent to the door to the administration office. (Refer to Photograph attached to Appendix 6).

The glass referred to by KR abuts the area of wall described by AS and RILEY as the place where she was being held against. It is possible that in the ensuing struggle AS was also pushed against the glass.

In any event the evidence is clear that she was restrained against the brick wall as described by her and the witness RILEY.

AS's account is further corroborated by AYLING, who gives several versions of the event.

In a comment to a fellow teacher, John Andrew Bice CARR, AYLING admitted that he had AS's arm behind her back but does not suggest that AS had attacked him in any way.

Further in a statement to the Investigator through his Solicitor AYLING also admitted that he:

"Held AS's right wrist behind her back, so that she faced away from him".

On the day of the incident, AS attended the surgery of Dr. Michael HOAR who examined her right shoulder.

She was diagnosed with minor soft tissue injury.

The evidence that AYLING grabbed AS by the wrist and subsequently twisted that arm behind her back then restrained her against a wall is unequivocal, provable on the balance of probability.

Analysis of the evidence relating to Issue (2)

AYLING's defence, provided in a letter to the Investigator through his Solicitors a letter dated 1st July 2008, was that his actions were reasonable and justified and fell within the scope of Regulation 39 of the Schools Education Regulations.

There is no evidence that supports the proposition that AYLING acted in accordance with the provisions of Regulation 39 (now repealed) of the Schools Education Regulations which states inter alia:

A member of the teaching staff at a Government School may take such physical action as is appropriate to prevent or restrain a student at the school from acting in a manner which places at risk the safety of –

(a) that student or any other person; or

(b) any property (whether or not vested in the Minister).

At the time of the incident, AS had left the detention room together with KR when she was grabbed on the wrist by AYLING.

At that time she was not acting in a manner that placed anybody or anything at risk. There is not a scintilla of evidence to suggest otherwise.

AYLING's first account of the incident was to the Principal Kerry MATHER.

He told MATHER that after AS and KR had left the detention room he "headed them off" and asked them to return to the room.

He also stated that AS pushed past him and that he attempted to stop her. He said that he took hold of her arm and a struggle ensued.

The import of AYLING's statement is that he instigated the incident by taking hold of AS. It was within his ability to desist from holding her and thereby preventing an escalation of the situation.

It is pertinent to note that he made no mention of any physical action by AS, neither did he mention that he had twisted AS's arm behind her back.

After MATHER prepared a report of the incident described by AYLING she presented him with a copy of the report which he said was correct, but then stated that he wished to add a comment to the effect that when he resisted AS's attempt to get past him she began hitting him.

Even if this was the case, and there is a subsequent statement by AYLING which refutes this, it was only after his attempt to resist her attempt to get past him that she allegedly hit him. It does not explain why he took hold of her arm in the first place when she was not placing anyone or anything at risk.

It is noteworthy that at this subsequent meeting with MATHER, AYLING again made no mention of the fact that he had twisted AS's arm behind her back.

AYLING's next version of events occurred when he made an unsolicited comment to a fellow teacher John CARR.

He told CARR that he had held AS's arm behind her back as he was feeling physically threatened by KR and needed to see him and be in a better position to defend himself.

He went on to say that he needed to restrain AS because he felt that she would leave the school grounds if he let her go.

He also said that by restraining AS in that way, she would not hurt herself unless she physically struggled.

He was aware that if she struggled she would hurt herself, and it is clear from his statement to CARR that it was his intention to restrain her in a manner that would cause pain to her if she struggled.

These comments made to CARR clearly indicate that AS was not a threat to him, that she did not physically attack him either by hitting him or by any other means.

This statement by AYLING establishes the fact the reason he restrained AS was to prevent her from leaving the school premises, and for no other reason, particularly not to prevent her from physically attacking him.

AYLING's final version of events is contained in a letter from his solicitor where he states;

"Immediately before taking hold of AS's right wrist, AS had attacked me by kicking at my left leg and slapping at my left arm with both her hands"

This statement is at odds with the two statements he gave to the Principal and particularly the unsolicited comment he made to John CARR.

AYLING's final comment has the ring of "recent invention".

AYLING's actions in this matter are not supported by Regulation 39. His comments to CARR completely refutes this defence.

There is no credible evidence that the actions attributed to AS by him ever occurred.

AYLING's four (4) different versions of the events render his evidence not credible and should not be accepted.

It was in AYLING's power to walk away from the incident without placing anyone or anything at risk.

Further it should be noted that AYLING is physically bigger than AS, who is of small build. (Refer to statements of AS and MATHER).

AYLING's behaviour also contravened the provisions of the 'Behaviour Management in Schools Policy (now repealed but in force at the time of the incident) which states at Paragraph 4.2.7:

"As a last resort, students can be physically restrained in response to spontaneous potentially harmful behaviour that places at risk the physical safety of the student, other students, school staff and any other person or threaten damage to property."

There is no credible evidence that there was any such risk.

In this instance AYLING was the instigator of a set of circumstances which resulted in minor injury to the complainant AS, a female student who is physically much smaller than him.

There is no evidence that AS breached any school procedures.

The evidence clearly indicates that the force used by AYLING on AS was used solely for the purpose of preventing her from leaving the school premises. It was excessive to the extent that she was restrained by being held against a brick wall such action not being authorised, justified or excused by Regulation 39 (repealed) as claimed by him through his solicitor. Further his behaviour was contrary to Paragraph 4.2.7 of the Behaviour Management in Schools Policy. (Now repealed, but in force at the time).

Analysis of the evidence relating to Issue (3)

In the case of: "Civil Service Association of Western Australia Inc v Director General of Department for Community Development (2002) WASCA 241 (3 September 2002) it states inter alia:

"Nothing in the Act (PSMA) indicates that parliament intended the word "misconduct" to have any special meaning in s80. It is to be given its ordinary meaning which is simply conduct which is improper or immoral by the standards of ordinary people"

AYLING used his superior physical strength to subdue a much smaller female student for the purpose of preventing her from leaving the school grounds and in the process caused soft tissue damage to the shoulder of that student, in circumstances where there was no risk to the safety of any person or property.

Such behaviour is clearly improper by any objective analysis and the criteria of the Supreme Court.

FINDING:

I find, on the Balance of Probabilities, that on the 4th April 2007 at Manjimup Senior High School, Peter John AYLING used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law: such behaviour being an Act of Misconduct within the provisions of Section 80(c) of the PSMA and therefore a Breach of Discipline contrary to Section 80 of that Act.

RECOMMENDATION

Peter John AYLING being a Deputy Principal at the School had substantial authority over the student AS and was significantly physically superior to her.

He used his position and superior strength to restrain her in circumstances that were not authorised, justified or excused by law.

The student AS had not been accused of any wrong doing.

The actions of AYLING were excessive in the circumstances.

I recommend that the penalty should be a Reduction of monetary remuneration as per Section 86(3)(b)(iv) of the PSMA.

- 84 When cross-examined Mr Zaknich informed the Commission that he had not been provided with a copy of the applicant's written response to Mr Skamp which was contained in a letter from his solicitors dated 3 August 2007 (Exhibit 1, document 3). He also stated that when he prepared his report he was only provided with a copy of Ms Mather's written Incident Report but was not provided with a copy of her handwritten notes even though she had referred to them.
- 85 Mr Zaknich was asked when cross-examined why he made the finding at page 11 of his report that the applicant's final version of events contained in his letter from his solicitor, is at odds with the two statements he gave to Ms Mather and particularly the unsolicited comment he made to Mr Carr and that the final comment (made through his solicitor) has the ring of "recent invention" when Ms Mather's evidence was that the Post-it note was attached to the incident report the day after the incident. Mr Zaknich when re-examined said the first time that the word "kicking" was used was in the solicitor's letter and there had been no mention of that before and this explanation had come a substantial time after that explanation was given. He was then asked whether he put weight on the fact that the Post-it note was added one or two days later and Mr Zaknich said:
- I considered it that the ... I mean I always will accept that people can forget but even with that post it note it was still after he had attempted to already grab hold of her arm so it was after an event. It was a ... even with the post it note it was that when he attempted to stop her and in his evidence to Ms Mather was that he grabbed her by the arm, that was his original statement and then it was after that that she started struggling or hitting ... that's what I, as I read the post it note, to mean. So, he didn't ... the second comment as I read to Ms Mather was that she started striking at him after he grabbed her.*
(Transcript p 140)
- 86 Paul O'Connor is the respondent's Executive Director of Professional Standards and Conduct. Mr O'Connor is a barrister and solicitor who after working for six years in private practice in Canberra was in charge of the ACT Customs Legal Unit dealing with administrative law issues.
- 87 He has lectured part-time in administrative law at Canberra University and was the Regional Director of Customs in Western Australia for eight years. He joined the Department of Education and Training on 28 April 2008. He has responsibility for the Standards and Integrity Directorate which coordinates and manages discipline management and resolution.
- 88 In respect of this matter Mr O'Connor became involved in the latter stages of the inquiry process by reviewing Mr Zaknich's report. He oversaw the preparation of brief and material to the Director General for her consideration of the proposed penalty

to be imposed upon the applicant. Mr O'Connor pointed out that whilst the Director General is bound by an inquirer's finding as to whether or not there has been a serious breach of misconduct, the Director General has a discretion whether to affirm the recommendation for penalty or apply a different sanction or penalty.

- 89 Mr O'Connor testified that when he reviewed the file including the investigation report from Mr Skamp, the investigation report from Mr Zaknich and other documentation it was clear that there had been some difference of opinion throughout the Department as to the desirability of accepting Mr Zaknich's recommendation in respect of penalty. Prior to the Director General considering the matter a briefing note was prepared by the then Acting Director of Standards and Integrity Mr Greg Lee on 3 September 2008 and directed to him (Mr O'Connor) for his consideration. In that memorandum Mr Lee stated:

This breach of discipline can be considered to be at the higher end of the scale in relation to inappropriate use of force against a female student. Mr Zaknich's report also makes some very negative comments about the truthfulness of Mr Ayling in relation to the incident and states that "Mr Ayling's four different versions of the events render his evidence not credible and should not be accepted".

Ms Kerry Mather, Principal, Manjimup SHS has provided the view that she considers it would be unsuitable for Mr Ayling to return to Manjimup SHS as there is a consensus that there is a loss of confidence in his ability to fulfil his duties as Deputy Principal.

There is strong evidence to suggest that Mr Ayling's actions during the incident and his attempt to subsequently offer varying explanations during this process indicate a course of conduct which is at odds with his role as Deputy Principal.

Mr Ayling is currently a substantive Level 4 Deputy Principal at Manjimup SHS, but is paid at level 5.1A pursuant to the School Education Act Employees (Teachers and Administrators) General Agreement 2006. This entitles Mr Ayling to an annual salary of \$96,703.00.

It is also my understanding Mr Ayling's wife is employed at Manjimup SHS and the Department has recently contributed approximately \$20,000 to the Ayling's [sic] under the provisions of the Award as they recently purchased a house in the locality.

Labour Relations have been consulted and provided a report (attached) in relation to an appropriate penalty. Labour Relations are of the view:

- *Mr Ayling's classification should be temporarily reduced to 4.1 of the administrator's pay scale (\$87,718 per annum) for a period of six months, before reverting to his substantive position (this would in effect result in a reduction of \$4492.50);*
- *Mr Ayling should be reprimanded; and*
- *Consideration should be given to transferring Mr Ayling to another post.*

I do not concur with the recommendation of Labour Relations in regard to the transferring of Mr Ayling and am of the view that reprimanding and reducing Mr Ayling's remuneration as outlined above is more than appropriate in the circumstances. To also transfer Mr Ayling could be viewed as being overly harsh in the circumstances given he has no previous adverse disciplinary findings recorded against him and has been employed by the Department for over 20 years.

(Exhibit B)

- 90 Mr O'Connor discussed the matter with the Director of Schools, Mr Jeff Macnish, and the Director of Human Resources, Mr Kim Ward, and he made a written note on the briefing note on 4 September 2008 to the Director General as follows:

The relationship between the Principal and Ayling has broken down, hence her request that he be transferred. Ayling has lodged two workers [sic] compensation claims alleging stress due to the Principal's poor management – both declined. I have discussed the transfer option with Kim Ward (HR) he agrees it would be harsh. I have also discussed the matter with Director Schools (MacNish [sic]) he is aware that a management plan will be needed & difficult.

- 91 Mr O'Connor then affixed a date stamp to his comment which is 4 September 2008 and sent his briefing note to the Director General who accepted Mr O'Connor's recommendation.

- 92 As to why the penalty of a temporary reduction of pay and a reprimand was imposed, Mr O'Connor said it was assessed that the use of physical force was at the higher end of the scale but he did not regard a transfer as an appropriate penalty. He said that those in the Department who had recommended a transfer had paid insufficient regard to the consequential impact on the applicant namely that he would need to relocate his household from the area and they also looked to his years of service with the Department by way of mitigation.

- 93 When asked in cross-examination what weight did he attach to Mr Zaknich's comments in respect to the truthfulness or otherwise of the applicant, Mr O'Connor said that Mr Zaknich's comments were relevant and they formed a part of the decision making process in arriving at the appropriate penalty. Mr O'Connor was then asked if a finding were made that the applicant was telling the truth and that his version of events were preferred would the Department still be seeking to impose a penalty. In response Mr O'Connor said that if there was a finding that the applicant's physical restraint came within the provisions of the *School Education Regulations* then that would have been authorised contact and he should not have been subject to a finding of a breach of discipline and there would be no need for any penalty to be imposed. Mr O'Connor was also asked if the issue about the applicant's truthfulness was removed but the physical contact occurred in breach of the provisions of the legislation

what penalty would he say should be imposed. In response Mr O'Connor said in those circumstances he would still view the conduct as serious physical contact which did not seem warranted but that a penalty that would not be unreasonable would be more in line with what Mr Skamp had proposed because there would not be concerns about the applicant's truthfulness.

The Applicant's Submissions

- 94 The applicant seeks an order under s 78(2) of the PSMA to set aside a decision made in the exercise of a power under s 86(3)(b), s 86(8)(a) and s 86(9)(b)(ii) of the PSMA. The grounds on which the application is made are that:
- (1) The respondent failed to afford the applicant procedural fairness;
 - (2) The respondent failed to comply with the requirements of the PSMA;
 - (3) The respondent imposed a penalty that in all the circumstances was harsh and oppressive without proper regard to the circumstances of the applicant, and the relevant mitigating factors.
- 95 The details of the applicant's claim were set out in the attached statement of claim. In the statement of claim the applicant states as follows:
1. The Applicant is a deputy principal employed by the Respondent.
 - ...
 3. The Applicant has been the subject of a purported notice of suspected breach of discipline issued by the Director General of the Department of Education and Training. The notice placed the Applicant in a position where statutory powers were liable to be exercised in relation to him, giving rise to the prospect that his employment may be terminated. Accordingly, the Director General was under a duty to afford the Applicant a fair hearing and was obliged, as a matter of procedural fairness, to give proper notice to the Applicant as to the matters which were the subject of the relevant allegations.
 - ...
 6. Purportedly in accordance with Section 86(4) the respondent then appointed an inquirer to conduct an inquiry. The person directed to conduct the inquiry was an employee of the Respondent, Mr Jim Zaknich ("the Inquirer").
 7. The Inquirer's function under the PSMA included a power to make a finding, binding upon the Respondent, to the effect that the Applicant had committed a breach of discipline. Accordingly, the Inquirer was under a duty to afford the Applicant a fair hearing.
 8. In breach of the duty to afford procedural fairness, the Inquirer failed to disclose relevant material and information to the Applicant in such a manner so that the Applicant could properly respond.
 9. The Inquirer failed to conduct a proper inquiry and merely reviewed the material that had been before the investigator.
 10. The Inquirer failed to have regard to relevant considerations and material.
 11. The Inquirer relied upon irrelevant material.
 12. The Inquirer came to unreasonable conclusions on the basis of the material before him.
 13. The Respondent failed to have any, or any proper regard to the particular circumstances of the Applicant.
 14. The Respondent failed to have any, or any proper regard to the Applicant's submissions in mitigation and in relation to penalty.
- 96 The applicant seeks orders that the finding made under s 86(8)(a) of the PSMA that the applicant committed a breach of discipline be set aside and that the penalty imposed on him pursuant to s 86(3)(b) also be set aside.
- 97 When opening the applicant's case the applicant's counsel informed the Commission that pursuant to the principles discussed by Kenner C in *Johnston v Mance, Acting Director General Department of Education* (2002) 83 WAIG 1553 the hearing of this matter should proceed as a hearing de novo. The applicant contends that pursuant to s 78(2) of the PSMA the Commission is not restricted to a consideration of the reasonableness of the employer's conduct but the Commission may review the employer's decision de novo as the circumstances warrant and substitute its own decision for the employer's decision. If the merits of the application warrant the Commission may quash the decision of the employer in its entirety (see *Webb v The Director General, Department of Education* [2004] WAIRC 10441; (2004) 84 WAIG 132). The applicant says that if this approach is applied the witness statements and records of interview of the persons who were not called to give evidence in these proceedings and were not available for cross-examination should be given less weight by the Commission than the evidence given by the applicant who is in the best position to give the description of the circumstances of the incident as those who were also present. The applicant says that the failure by the respondent to call AS and KR should give rise to an adverse inference about the substance of the evidence that they were going to give. The applicant also makes the same submission in relation to Dr Hoar's report. The applicant says that the Commission should draw an inference that Dr Hoar has simply summarised what was reported to him by AS. In any event the applicant says that the Commission should be careful about the weight the Commission attaches to the opinion expressed by Dr Hoar in the medical report. Further, the applicant says that natural justice and procedural fairness required that the investigator and the inquirer under the PSMA turn their mind to the issue of weight as the general practitioner's report can only have as much weight as can be attributed to it by the veracity with which the patient had reported her symptoms. The respondent has elected to not call AS or KR or its employee, Ms Riley, who witnessed the event. Nor has the respondent called Dr Hoar to whom AS reported the alleged symptoms. It is conceded, however, that the applicant could have called Dr Hoar to give evidence.

- 98 In relation to the handwritten notes prepared by Ms Mather and the typewritten incident report the applicant contends that it was clear that the incident report is not a transcription of the handwritten notes. It is contended that the handwritten notes refer to physical contact by AS on the applicant prior to any physical contact by the applicant on AS. The incident report fails to record this. It is also pointed out that it is clear from the evidence that Ms Mather did not write down word for word what the applicant said to her. The applicant's counsel speculated that the handwritten notes probably reflect 90% of what was said by the applicant and the incident report is less accurate than the handwritten notes.
- 99 The applicant also says that to the extent there are any inconsistencies between the evidence of the applicant and Ms Mather the Commission should have regard to the fact that the relationship between the applicant and Ms Mather has broken down. Consequently, the Commission can infer that there is no interest on Ms Mather's part to support or endorse what the applicant is saying. It is also said that Ms Mather, when giving her evidence relied heavily on her handwritten notes rather than recalling things from her memory. In addition, she conceded that those notes are not as good as they could be.
- 100 The applicant also seeks the Commission make a finding that the finding of fact made by both Mr Skamp and Mr Zaknich that the hold the applicant had on AS at the time that Mr Carr saw them was different to the hold that the applicant had on AS prior to Mr Carr seeing them was incorrect. The applicant says that based on the applicant's evidence that he maintained the same hold until after Mr Carr had arrived on the scene and that he did not change or release the hold until AS was back through the door, the opposite inference can be drawn.
- 101 In relation to the character of KR, the applicant says the Commission should draw an inference that KR was a "strange" person. The Commission heard evidence by Mr Zaknich that he (KR) was the sort of person who did not want to be found. There is also evidence that there were concerns about his emotional state, actions of violence and anger and the existence of behavioural management reports. In relation to the character of AS, the applicant says the evidence establishes she was assertive and the sort of student who would kick a desk over in a fit of passion.
- 102 The applicant also seeks the Commission draw an inference that not all the relevant material was considered by the investigator and the inquirer. Firstly, the police report is absent from both reports. Secondly, Ms Mather's handwritten notes are absent from Mr Zaknich's report. The applicant also contends the interview transcripts are absent from Mr Skamp's report. However, it is conceded that they had been recorded but not transcribed by Mr Skamp.
- 103 The applicant was not aware that interviews had been conducted with the witnesses until after he received a copy of Mr Skamp's investigation report which said he had committed a minor breach of discipline. Mr Skamp had at least one discussion with the applicant which was not recorded and he may have had a couple of discussions with Ms Mather. In addition, the applicant makes a submission that Mr Zaknich may have also had discussions with both Mr Skamp and Ms Mather that were not referred to in his report (no evidence of this).
- 104 The applicant challenges the finding that he used unreasonable force against AS, a student, in circumstances not authorised, justified or excused by law. He also challenges the decision to impose a penalty on him for the breach of discipline.
- 105 The applicant points out that s 64(1)(e) of the *School Education Act 1999* states one of the functions of a teacher in a government school is to "supervise students and to maintain proper order and discipline on their part". Part 3 Division 4 of the *School Education Regulations 2000* provides for supervision of students, protection of persons and property. Regulation 39(1) of the *School Education Regulations* at the time that the incident in question occurred provided:
- A member of the teaching staff at a government school may take such physical action as is appropriate to prevent or restrain a student at the school from acting in a manner which places at risk the safety of:*
- (a) *that student or an other person; or*
- (b) *any property (whether or not vested in the Minister).*
- 106 Regulation 39 was repealed on 24 August 2007 and was replaced with reg 38.
- 107 Counsel on behalf of the applicant points out the question in these proceedings is whether the applicant used reasonable force against AS.
- 108 In relation to credibility, it is submitted that the applicant gave his evidence in an open and forthright manner and no adverse inference can be drawn about the applicant's credibility from the way in which he has given his evidence in these proceedings. The applicant is an experienced educator with over 30 years' experience who exercises sound and professional judgment. It is contended that when regard is had to the response provided by the applicant's solicitor to the investigator in early 2007 and the response provided to the inquirer by the applicant's solicitor in mid-2008 and the applicant's evidence given in the witness box under cross-examination the Commission should make a finding that the applicant has been consistent throughout in relation to what he says occurred on the day in question. It is also contended that when the applicant's evidence is considered the only finding open to the Commission is that the applicant used reasonable force in accordance with the provisions of the *School Education Act* and the *School Education Regulations*.
- 109 In relation to the circumstances of the incident in question and the disciplinary policy which applies to suspension of students the applicant says that pursuant to the Behavioural Management in Schools Policy (Exhibit 1, document 26) a student who is suspended prior to the end of the school day must not be permitted to leave the school grounds until an arrangement to get the student home is agreed to by the Principal and the student's parent or a person responsible. It is contended that this language together with the statement in the policy that as a last resort a student can be physically restrained in response to spontaneous behaviour such as the act of running at a teacher, as such conduct places at risk the physical safety of a staff member. Consequently, the submission is made that the actions by AS of kicking and slapping the applicant constituted a risk to the applicant's safety. The applicant says that this submission has to be considered in light of all of the circumstances that it was not only just AS that was kicking and slapping the applicant but KR was also a threat standing close by and was known to have a propensity for violent acts and who by "shaping" up to the applicant caused the applicant to be concerned for his safety.

110 In relation to the investigation carried out by Mr Skamp, the applicant says that Mr Skamp fell into error in respect of the following:

- (a) Mr Skamp failed to interview Dr Hoar and he should have taken into account when considering Dr Hoar's report that AS escaped through a window which was seven feet high. In addition Mr Skamp accepted the report from Dr Hoar without properly analysing the contents of the report.
- (b) Mr Skamp failed to properly consider the provisions of the *School Education Act* and *School Education Regulations* and did not turn his mind effectively to the requirements of reg 39. He also failed to have regard to the character and history of behaviour of AS and KR, when considering what physical actions were appropriate under reg 39 to prevent or restrain a student from placing themselves or others at risk. AS was emotionally unbalanced and not the sort of person that the applicant could feel comfortable "with letting her escape out to the big wide world". The applicant was exercising his duty of care to restrain AS and whilst doing so KR was coming at the applicant as well. KR was the sort of student who has thrown a desk at another student and broken a leg off a desk and punched a blackboard. Mr Skamp accepted unconditionally the evidence of the complainant and KR. He described AS as intelligent and articulate without looking at her academic records.
- (c) Mr Skamp failed to attach sufficient weight to the evidence of Mr Carr, a very senior and experienced employee of the respondent, who came to the view that the applicant handled the situation appropriately.
- (d) Mr Skamp mistakenly formed the view that the restraint which the applicant had on the complainant was different to that witnessed by Mr Carr.
- (e) Mr Skamp attached undue weight to the statement given by Ms Mather despite her not being a witness to the event and not being in a position to record the applicant's description of events in an unrushed way. He also failed to have regard to the fact that her handwritten notes were obviously incomplete and that she edited her handwritten notes when she typed the incident report.
- (f) Mr Skamp failed to have any proper consideration to the police report which exonerated the applicant. Mr Skamp also failed to have a proper appreciation of the potential inaccuracies contained in Ms Mather's notes and failed to discount Ms Mather's evidence on the basis that she was not present at the time the alleged breach occurred.
- (g) Mr Skamp failed to provide further and better particulars to the applicant of the allegation that the applicant had pushed AS against the wall before concluding the investigation and his report. Mr Skamp not only denied the applicant the opportunity to comment on the further and better particulars prior to the completion of the report but he did not provide the applicant with a written list of questions. He incorrectly assumed that the applicant did not want to participate in the investigation process.
- (h) Mr Skamp failed to have regard to or properly consider the correspondence from the applicant's solicitors to the respondent denying the allegation and providing an explanation (Exhibit 1, document 3). This correspondence is not in the list of documents examined by Mr Skamp at paragraph 2.3 of his report, and his view in relation to the applicant's participation in the investigation process at paragraph 3.6 of his report is clearly mistaken.
- (i) Mr Skamp failed to have regard to the recommendations contained in the Browne review. In particular, Mr Skamp failed to have regard to the recommendations in the report that:
 - (a) persons under investigation should not be treated as guilty until proven innocent; and
 - (b) the veracity of the allegations should be tested.

It is contended that Mr Skamp superficially analysed the material that was before him, failed to test the complaint by AS and failed to consider the character of AS. His findings that the applicant was not prepared to participate in a process or had not responded to the Director General shows that Mr Skamp took the attitude that the applicant was guilty until proven innocent.
- (j) Mr Skamp failed to have regard to the statement in the executive summary in the Browne report that the terms of reg 39 of the *School Education Regulations* were not clear. It is contended that the lack of clarity in reg 39 ought to have been a consideration that Mr Skamp took into account when making a report finding whether the applicant's conduct was authorised by law.

111 It is conceded, however, on behalf of the applicant that once the finding of a minor breach of discipline was cancelled all the issues raised in relation to the investigation report fall away but it is said that these errors are relevant as they were repeated by Mr Zaknich.

112 In relation to Mr Zaknich's report, the applicant says that Mr Zaknich failed to conduct an independent inquiry and made numerous procedural and substantive errors in the manner in which he conducted his inquiry. These are said to be as follows:

- (a) Mr Zaknich mistakenly believed that he was conducting an inquiry into a serious breach of discipline. The applicant however concedes this error was a relatively minor procedural error. The finding made by Mr Zaknich that the applicant had committed a serious breach of discipline was not open under the legislative scheme. Under s 86(8) of the PSMA the only findings that can be made at the conclusion of a disciplinary inquiry, is that a breach of discipline was committed or no breach of discipline was committed.

- (b) As the investigator found that there was minor breach of discipline not a serious breach of discipline, it was not open to the inquirer to make a finding of a serious breach of discipline. The applicant says there was no significant difference between the material upon which the investigator made his finding and the inquirer made his finding. Consequently, the question is asked how the inquirer could characterise the conduct of the applicant as a serious breach of discipline.
- (c) The inquirer misdirected himself as to the test of what he has been asked to do. If the inquirer was turning his mind to whether there was a serious breach of discipline he should have applied a high standard of proof as discussed in the decision of *Briginshaw v Briginshaw* (1938) 60 CLR 336.
- (d) The applicant says the inquirer failed to consider or to adequately or properly consider the police report and he failed to review or consider the contents of the handwritten notes made by Ms Mather.
- (e) Although Mr Zaknich considered the correspondence from the applicant's solicitors dated 1 July 2008 (Exhibit 1, document 17), there is no evidence that he considered the letter from the applicant's solicitors dated 3 August 2007 (Exhibit 1, document 3). It is contended that Mr Zaknich's condemnation of the applicant falls on the allegation that the applicant's version of events as described in the 1 July 2008 letter was recent invention. It is argued that if Mr Zaknich had regard to the 3 August 2007 letter where the applicant's solicitors stated that AS attacked the applicant was conduct which was not only reasonable and justified but fell within the scope of reg 39, he could not have reached that conclusion. In the letter dated 3 August 2007, the respondent was informed that the applicant contended that AS attacked the applicant. If Mr Zaknich had regard to this letter and to the handwritten notes, the most Mr Zaknich could say was that the allegation that AS attacked the applicant arose by the latest two days after the applicant's first discussion with Ms Mather. If the Commission accepts that Mr Zaknich misdirected himself on the question of recent invention, then the balance of his report falls away because the credibility of the applicant is contingent upon the recent invention thesis and the reasonableness of the force used, is based on the assumption that there was no attack by AS prior to physical contact by the applicant. Mr Zaknich was not clear on this point in his oral evidence. Mr Zaknich testified that he thought the struggle to which the applicant referred to in the Post-it note was after physical contact had been made by the applicant on AS. This assumption is not correct.
- (f) Mr Zaknich has made highly prejudicial adverse findings against the applicant's credibility despite never speaking to the applicant. This is also an issue which goes to a penalty. It is plain from the evidence given by Mr O'Connor that the truthfulness or otherwise of the applicant was taken into account by the respondent in determining the nature of the penalty that was to be imposed. It is clear that the applicant's written answer to the questions put to him by Mr Zaknich is entirely consistent with what the applicant purported to occur at all times. Consequently, there is no basis on which Mr Zaknich can make adverse findings or draw adverse conclusions about the applicant's credibility. When making findings of credibility Mr Zaknich relied heavily on second-hand accounts of what other people reported the applicant as having said.
- (g) It is not just important that justice is done; but also that justice is seen to be done. The applicant is concerned that Mr Zaknich spoke to Mr Skamp about the way in which the inquiry was conducted. The applicant cannot be satisfied that substantive matters were not discussed between Mr Skamp and Mr Zaknich as Mr Skamp was Mr Zaknich's case manager. The Commission in these circumstances would have a reasonable apprehension that such discussion undermines the independence of the inquiry.

113 In relation to the contention that the applicant was prepared at all time to participate in the investigation in the inquiry, it was submitted on behalf of the applicant that all he did was decline to participate in an interview with Mr Skamp and with Mr Zaknich. He invited Mr Zaknich for the list of questions to him through his solicitors and provided straightforward answers to those questions. It is said that if Mr Zaknich felt he needed any further information it was always open to him to ask further questions. The applicant also says that he was entitled to remain silent (see *Police Service Board v Morris and Martin* (1985) 156 CLR 397).

114 As to procedural flaws that the applicant contends were made by the respondent, these are as follows:

- (a) The respondent failed to provide the applicant with a copy of Mr Zaknich's report prior to providing the applicant with the letter dated 17 September 2008 in which the respondent informed the applicant that a finding had been made by Mr Zaknich that the applicant had committed a breach of discipline and the respondent intended to impose upon the applicant a penalty for breaches of discipline (Exhibit 1, document 18).
- (b) The respondent erred in making a decision to investigate the matter after the police had reached the view that the applicant had not committed a criminal offence. The applicant says that this is a breach of procedural fairness.

115 The applicant also says that prior to making a finding that the applicant had committed a breach of discipline the respondent failed to provide a copy of Mr Zaknich's report. The applicant was denied an opportunity to review witness statements and the transcripts of the witness interviews or to respond to all of the material that was before both Mr Skamp and Mr Zaknich. In addition, the respondent failed to provide a copy of Mr Zaknich's report prior to imposing a penalty. The applicant says that the respondent failed to provide any proper explanation to the applicant for its significantly increased penalty beyond what it had proposed at first instance after Mr Skamp's investigation.

- 116 No submissions were made on behalf of the applicant in respect of the proposed penalty because on 1 October 2008 these proceedings were commenced. The applicant does not complain about the failure of the respondent to afford the applicant an opportunity to provide submissions on penalty as the applicant did not take the opportunity to make submissions because he had filed an application in the Commission.
- 117 The applicant submits that the Commission has the power to cure the defects in the decisions by substituting its own findings in place of the findings of the inquirer, the investigator and the respondent. Because the process has taken more than two years after the original conduct complained of occurred, it would be oppressive if the Commission quashes the decisions and refers the matter back to the respondent to commence a fresh inquiry. Further, if the Commission finds that the finding of the breach of discipline should stand, the applicant says that the penalty should be quashed and no penalty be substituted. The basis of this submission is that the applicant contends that pursuant to s 86(3)(b) of the PSMA it is discretionary whether a penalty should be imposed. In the event that submission is rejected the applicant says that as there is no significant or substantial difference in the material considered by Mr Skamp and Mr Zaknich, the penalty recommended by Mr Skamp should be imposed.

The Respondent's Submissions

- 118 The respondent says the nature of the hearing before the Commission in this matter does not warrant a hearing de novo. In written submissions filed by the respondent dated 20 March 2009, the respondent makes the following submissions:
1. The Applicant has sought to rely upon the decision of Kenner C in *Johnston v Mance, Acting Director General of Department of Education* (2002) 83 WAIG 1553 in asserting that the hearing of this matter ought to be treated as a hearing de novo.
 2. It is not the case that a matter that comes before the Commission by way of an appeal under section 78(2) of the *Public Sector Management Act 1994* ('the PSM Act') is automatically to be regarded as warranting a hearing de novo.
 3. As set out by Kenner C at paragraph 26 of his Reasons for Decision in *Johnston v Mance*:

"...depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": *Ormsby*."
 4. The excerpt from the decision in *Ex Parte Hill, Director of WA Prisons Department v Ormsby* No 1987 of 1985 quoted by Kenner C in *Johnston v Mance* includes the following statement by the Chief Justice at 11 of that case:

"Grounds of appeal are to be given and the manner in which the Tribunal goes about its task will be controlled by those grounds ... If the grounds are such that in the judgement of the Tribunal justice cannot be done without hearing the proceedings all over again then it has power to do so. If, on the other hand, the grounds can be adequately dealt with by the Tribunal on such record of the proceedings below as comes up to it, supplemented or not by evidence, then the Tribunal can deal with the appeal on a more restricted basis."
 5. Similarly, the Full Bench concluded in *Milentis v Minister for Education* (1987) 67 WAIG 1124 that the nature of an appeal to the former Government School Teachers Tribunal pursuant to the repealed s 78(1)(b) of the PSM Act was such that it should essentially be heard de novo, however this would depend on the grounds of appeal in each particular case.
 6. Turning to the grounds of the application in this particular case, as set out in the Notice of application filed on 1 October 2008:
 - (1) The Respondent failed to afford the Applicant procedural fairness
 - (2) The Respondent failed to comply with the requirements of the PSMA
 - (3) The Respondent imposed a penalty that in all the circumstances was harsh and oppressive without proper regard to the circumstances of the Applicant, and the relevant mitigating factors
 7. On the basis of the above grounds, as supplemented by the Statement of Claim attached to the Application, the Respondent was on notice that the Applicant intended to challenge the process that led to the finding that the Applicant committed the act of misconduct in question. More specifically, the Respondent was aware that the Applicant challenged the conduct and outcome of both the disciplinary investigation and inquiry. For that reason, the Respondent called the investigator, Mr Ceri Skamp, and the inquirer, Mr Jim Zaknich, to give evidence such that their methods and conclusions could be tested before the Commission.
 8. Working from the Notice of Application, the Respondent was also prepared for a hearing which challenged the appropriateness of the penalty imposed upon the Applicant at the conclusion of the disciplinary process. Mr Paul O'Connor, Executive Director Professional Standards and Conduct with the Department, was called to give evidence on this issue and was thereby open to cross examination by the Applicant's representative on the decision making process that led to the imposition of a penalty comprising a reprimand and temporary reduction in monetary remuneration.
 9. Nowhere in the grounds of appeal is it evident that the Applicant sought to have the version of the events of 4 April 2007 involving the Applicant and a student at Manjimup Senior High School that was before the

Respondent at the conclusion of the disciplinary process set aside so that what unfolded on the day in question could be heard afresh. Therefore, the Respondent seeks to rely upon the numerous records of those involved (including handwritten notes, incident report and statements given to the police, the investigator and the inquirer) as the evidence which formed the basis of the finding that the Applicant committed the breach of discipline as alleged. That evidence was also used in reaching a decision as to the appropriate penalty to be imposed upon the Applicant.

10. As set out in the case law on this issue, it is open to the Commission to deal with this matter on the more restricted basis suggested by the Respondent given the grounds of the application, as supplemented by any additional evidence either party may seek to adduce. The Respondent does not object to the evidence led by the Applicant at the hearing of this matter as to what he asserts occurred on 4 April 2007 being considered by the Commission in reaching a conclusion on the appropriate disposition of this application.

119 The respondent says that if the Commission finds that a number of procedural defects occurred in the disciplinary process which led to a finding that the applicant committed a breach of discipline, it is possible for the Commission to cure those defects in a hearing de novo. If the Commission concludes the hearing in this matter was not de novo then the appropriate test for the Commission to apply is whether the decision made by the respondent that the applicant committed the breach of discipline was a reasonable decision on the material before the respondent and whether the penalty imposed was reasonable in the circumstances found by the respondent.

120 In relation to the obligation or requirement that someone in the applicant's position co-operate with or involve himself in the investigation inquiry process it is not in dispute that the applicant is entitled to exercise his right of silence in relation to the police investigation. The respondent concedes that the applicant had the authority to suspend students from school but says that as the Deputy Principal he had a duty to make a proper report about that. He did not do that in this matter. The respondent says there is an obligation upon someone in the applicant's position to provide information for the preparation of a critical incident report. In support of the respondent's submission the respondent's counsel referred to the decision of *Lips v Supercheap Auto Pty Ltd* (2004) 84 WAIG 2660 at [30]-[32] and [40]. However, the applicant elected to answer questions through his representatives and provided written material during Mr Skamp's investigation and in Mr Zaknich's inquiry. The respondent says the applicant could have done himself a "favour" by giving a full account as he did to the Commission and says that if that information had been provided to Mr Skamp and Mr Zaknich and the applicant's version of events was to be believed it may have been that the matter need not have gone any further.

121 The respondent contends that the applicant was given every reasonable opportunity to explain the events and did not take up this opportunity until he gave evidence in these proceedings. While the respondent says that if the applicant had taken up that opportunity to provide a proper explanation, these proceedings may not have been necessary, the respondent also says that having heard the applicant's evidence as to what he says occurred on 4 April 2007 it is open for the Commission to find that the applicant committed the breach of discipline in question on his own admission because the applicant says he came into physical contact in with AS by grabbing her right shoulder, turning her and then holding her right arm up behind her back in what he describes as a mild form of restraint. The respondent makes the submission that the applicant's justification for this contact has varied in different versions of events stated by the applicant to Ms Mather, Mr Carr, Mr Zaknich and the Commission. One explanation given by the applicant was that he was in some way protecting AS from the danger or risks that could await her should she leave the school premises as the applicant believed she was intending to do. The second explanation given by the applicant is that the physical contact occurred as he was defending himself from AS, whom he says was slapping and kicking him. The third explanation is that he used the restraint of AS to send a message to KR who the applicant described as being "the danger". The respondent contends that if any or all of these purported explanations are accepted they do not justify or excuse the physical contact by the applicant upon AS. The only defensible option available to the applicant was simply to back away and let AS go on her way should that be what she chose to do. The respondent says there was no need for the use of force whatsoever. This was because AS was not acting in a manner that placed at risk her own safety, the safety of the applicant, the safety of any other person or the safety of any property within the meaning of reg 39 of the *School Education Regulations*.

122 In relation to the suspension of students, although the Behavioural Management in Schools Policy (Exhibit 1, document 26) provides that a student who is suspended from school prior to the end of the school day must not be permitted to leave the school grounds until an arrangement is made to get the student home, the respondent says that the terms of the policy do not give a teacher the right to physically restrain a student. The respondent says a physical restraint of a student is only allowed in the specific set of circumstances which are provided in reg 39. Although paragraph 4.2.7 of the Behavioural Management in Schools Policy enables physical restraint of a student, this provision closely reflects the wording of reg 39 and it is only physical restraint as a last resort which is authorised. As to the suggestion that troublesome children somehow warrant more forceful discipline as a justification for the use of force, the respondent says that is obviously not the case as the use of unreasonable force can never be sanctioned. Consequently, the respondent says that even if it is accepted that AS was kicking and slapping the applicant prior to the applicant taking any action to restrain AS, such action by AS did not constitute a risk or a physical safety to the applicant. In any event the respondent says that the assertion by the applicant that AS was kicking and slapping him is not something that can be accepted as there is no reference in the handwritten notes to hitting or kicking. There is only a reference to "bulldozing". It is said that a distinction can be drawn between bulldozing and slapping, kicking or hitting. The respondent says that Ms Mather was quite clear in her evidence that slapping, kicking, hitting was not put to her by the applicant in the initial conversation when she made the handwritten notes but was added as a detail in the Post-it note and attached to the incident report. The respondent says the applicant ought to have provided this information at the time he gave that initial explanation, if in fact it had actually occurred.

- 123 In relation to the conversations that the applicant had with Mr Carr, the applicant has given evidence that he did not want to discuss the incident in full detail with Mr Carr. The respondent says this evidence should not be accepted as the applicant told Mr Carr, "*Your recollection is not right*", but he did not discuss the hitting and kicking by AS with Mr Carr.
- 124 The respondent says that Mr Zaknich's evidence establishes that his inquiry constituted an objective search for the truth. The finding of a breach of discipline should not be disturbed as it was based on sound reasoning and reached at the conclusion of a thorough and independent investigation. The strong and unwavering evidence of Mr Zaknich was to the effect that he did not simply adopt the findings of Mr Skamp, but rather conducted his own fresh, independent inquiry which included re-interviewing all of the witnesses he could locate. The only witness he was unable to locate and re-interview was KR.
- 125 In relation to the evidence that Mr Zaknich did not have regard to Ms Mather's handwritten notes, the respondent points out that the applicant has not "taken ownership" of the handwritten notes and has sought to distance himself from the content or the lack of content of them. In addition, the applicant had the opportunity to review the version of events contained in the incident report and he agreed the content to be correct with the exception of the addition of the matters in the Post-it note. Consequently, the respondent says that the version of events in the incident report should be relied upon in these proceedings. In addition, when the incident report is examined it is clear that there is simply a reference to the applicant heading AS and KR off and there is no suggestion of physical contact.
- 126 In relation to the Browne report (Exhibit 1, document 23), the respondent says that the Browne report has little relevance to this particular disciplinary process.
- 127 In relation to Ms Mather, there is no suggestion that she in anyway fudged the version of events or sought to do anything but her level best to record the events as put to her by the applicant and complete the incident report.
- 128 In relation to penalty, the respondent says that the penalty imposed by the respondent was not unreasonable and that if the decision in relation to the breach of discipline is upheld then the penalty of a reprimand and a temporary reduction in monetary penalty for a period of six months should stand.

Conclusion

(a) Nature of hearing

- 129 In an appeal *stricto sensu*, the body hearing the appeal only considers whether the decision appealed was correct when given. The law and facts which existed at the time the decision was made are considered and fresh evidence is not taken into account unless there is power to do (See the discussion in *Bradshaw v Medical Board of Western Australia* (1990) 3 WAR 322 (FC)). In a hearing *de novo* the body hearing the appeal hears the matter anew. In Marantelli SE *The Australian Legal Dictionary* (Melbourne: Hargreen Publishing, 1980), the learned author observed that in a hearing *de novo* the body:

must determine the legal position of the parties as at the date of the re-hearing and not as at the date of the original hearing. It must therefore apply itself to the circumstances as they exist when the appeal is heard. This means that the court may consider fresh evidence and any changes in the law which have taken place since the case was heard at first instance (Civil Procedure, "Appeals Stricto Sensu and Appeals by Way of Rehearing").

- 130 In *Johnston v Mance* Kenner C at [25]-[27] held:

- 25 *Whilst s 78(2) does not refer to an "appeal" to the Commission, it seems plain enough from the language in the section as a whole, that it is concerned with challenges to a decision taken by the employer in relation to which the employee is "aggrieved". Reference to "aggrieved" is made in s 78(1)(b) dealing with appeals to the Public Service Appeal Board, and also in ss 78(2)(b), (3) and (4) dealing with referrals to the Commission. In my opinion, given the nature of the proceeding contemplated by s 78 of the PSMA, a matter referred to the Commission pursuant to s 78(2) by an aggrieved employee from one of the nominated decisions, is to be dealt with in the same manner as a matter referred under s 78(1) of the PSMA. That is, I do not consider that such a proceeding ought to be regarded as an "appeal" in the strict sense, as that issue was discussed by the Full Bench in *Milentis*. Nor is it the case in my opinion, that the Commission is limited to determining only the reasonableness of the employer's decision.*
- 26 *In other words, depending upon the nature of the challenge to the decision under review, such a proceeding may involve the Commission re-hearing the matter afresh or it may only be necessary to consider the decision taken by the employer "on such record of the proceedings below as comes up to it, supplemented or not by evidence": Ormsby. It would seem to be the case therefore, that consistent with the reasoning of the Full Bench in *Milentis*, the decision of the employer is not to be totally disregarded in the Commission hearing and determining the matter.*
- 27 *Furthermore, it also seems to me that if the referral to the Commission pursuant to s 78(2) of the PSMA involves an allegation of harsh, oppressive or unfair dismissal, then, consistent with the referral of such a matter to the Commission pursuant to s 44 of the Act, s 23A should apply to such matters in terms of the relief to be granted. Such a matter, although referred to the Commission under s 78(2) of the PSMA, would nonetheless constitute "a claim of harsh, oppressive or unfair dismissal" for the purposes of s 23A of the Act and any relief to be granted. In my opinion, it would be incongruous if this were not to be the case, as claimants commencing proceedings under ss 29(1)(b)(i) and 44 would be entitled and limited to the remedies under s 23A if successful, whereas those under s 78(2) of the PSMA would not be so limited, for example, as to matters of compensation for loss and injury. Given the scheme of the Act in relation to such matters, I do not think parliament could have intended such an outcome.*

Different considerations may apply of course in cases where it is alleged that a dismissal was unlawful, for example, on the grounds of a failure by the employer to comply with a mandatory statutory requirement.

131 The grounds of appeal and the statement of claim seek only to review the decision made by the inquirer and the penalty imposed on the applicant on grounds of procedure or failing to take into account relevant considerations or taking into account irrelevant considerations. None of the grounds directly raise the issue that when all relevant facts and circumstances are considered the applicant did not commit a breach of discipline. In ground 12 of the Statement of Claim, the applicant specifically contends that the inquirer came to unreasonable conclusions on the basis of the material before him. The submissions made on behalf of the applicant have been substantially directed as to whether the investigator, the inquirer and the respondent erred in law and in fact which is the basis of an appeal *stricto sensu*. If this matter was truly heard *de novo* then any errors made by the decision makers would be irrelevant and it would not be necessary for the applicant to prove any error as the Commission would exercise its discretion without regard to any procedural error.

132 With respect I am not sure that the approach adopted by Kenner C is correct insofar as he concludes that matters referred to the Commission pursuant to s 78(2) of the PSMA, are not restricted to consideration of the reasonableness of the employer's conduct, but may review the employer's decision *de novo*. The reason why I question this approach is that the nature of proceedings referred under s 78(2) requires a review of decisions made following the consideration of the conduct of an employee by an employing authority in respect of events that have past and require a consideration of circumstances that existed when that conduct occurred. Notwithstanding my reservations about the analysis of Kenner C in respect of the nature of a hearing of a matter referred under s 78(2) of the PSMA, it is not necessary for me to conclusively express an opinion in respect of this matter as notwithstanding the statement made by the applicant's counsel at the outset of the hearing that the Commission should hear this matter *de novo*, the way in which the appeal has been in part conducted on behalf of the applicant has been to treat the appeal as an appeal *stricto sensu*, supplemented by oral evidence from the applicant. No objection has been made on behalf of the respondent that the Commission should not have regard to the evidence given by the applicant in these proceedings. Consequently, I intend to consider his oral evidence given in these proceedings together with the documentary evidential material collected by the respondent and oral evidence given by the respondent's witnesses.

(b) The decisions to investigate and to charge the applicant with a breach of discipline

133 A contention is put forward on behalf of the applicant that the respondent breached a rule of procedural fairness in making the decision to investigate the incident pursuant to s 81 of the PSMA as a suspected breach of discipline after the police had concluded the applicant had not committed a criminal offence. With respect this contention is flawed. Firstly, this is not an issue that goes to procedural fairness. Secondly, the police investigation was concerned to identify a criminal offence or offences. There is no rule of law which would operate as a bar to subsequent disciplinary proceedings where criminal charges are not proceeded with in respect of the same conduct (see *Civil Service Association of Western Australia Inc v Director General of Department for Community Development* (2002) 82 WAIG 2845). In an email Detective Senior Constable Trevor Douglas (Exhibit A) discloses that after interviewing AS, KR, Mr Carr and Ms Mather, he (Detective Senior Constable Douglas) had regard to s 64(1)(e) of the *School Education Act* which provides that one of the functions of a teacher in a government school is to supervise students and to maintain proper order and discipline on their part; and reg 39 of the *School Education Regulations*. Detective Senior Constable Douglas stated in the email that there is no instruction in the *School Education Act* itself that explains how s 64(1)(e) is to be executed. Detective Senior Constable Douglas did not consider nor was it open for him to consider whether the applicant had committed a breach of discipline under the PSMA.

(c) The Investigation

134 The investigation conducted by Mr Skamp resulted in a finding that the applicant had committed a minor breach of discipline. This finding was cancelled by operation of s 85 of the PSMA. However, it is conceded on behalf of the applicant any errors of fact or procedure are only relevant if repeated by the inquirer. Consequently, it is only necessary to consider any errors if repeated.

(d) The inquiry

135 Whilst it is clear that the respondent breached the rules of procedural fairness in failing to provide the applicant a copy of Mr Zaknich's inquiry report prior to imposing a penalty for the breach of discipline, I do not agree that prior to making a finding that the applicant had committed a breach of discipline the respondent should have provided a copy of Mr Zaknich's report. Pursuant to s 86(9) of the PSMA the respondent was required to accept Mr Zaknich's finding that the applicant had committed a breach of discipline. Once Mr Zaknich finalized his report and had made his finding, that finding had to be accepted and can not be disturbed unless an appeal pursuant to s 78(2) of the PSMA is successful. However, one of the grounds of appeal is that the applicant was denied procedural fairness because the inquirer failed to disclose relevant material and information to the applicant in such a manner that the applicant could properly respond. Although the applicant's solicitors sought only to participate in the inquiry by answering a list of questions put by Mr Zaknich (Exhibit 1, documents 15, 16 and 17), it does not have to be established that the applicant and/or his solicitors would have taken up the opportunity to make submissions on the material before Mr Zaknich or made the best use of the witness statements, transcripts of witness interviews and other documents considered by Mr Zaknich (see the discussion in *Health Services Union of Western Australia (Union of Workers) v Director General of Health* (2008) 88 WAIG 543 at [114]-[122], [188]-[189] and [196]. Applied in *The Department of Education and Training v Weygers* (2009) 89 WAIG 267 at [103]). The obligation to provide procedural fairness is as I stated in *Weygers* at [175]:

that except where issues of confidentiality arise information that is credible, relevant and significant to the decision should be disclosed (Kioa v West (1985) 159 CLR 550, Brennan J at 629). What is credible, relevant and significant is not concerned with whether the information will ultimately be

accepted by the decision maker as credible or the weight to be given to such information (see Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88).

- 136 Although I am satisfied that the inquirer breached the rules of procedural fairness in failing to provide to the applicant and/or his solicitors an opportunity to review this material, as the applicant's case has been put forward on the basis that it would be oppressive to quash the decisions and refer the matter back to commence a fresh inquiry, I intend to deal with the facts of this matter as I am satisfied that I have all relevant material before the Commission on which to make a decision whether the applicant committed a breach of discipline.
- 137 Another procedural issue raised by the applicant is that the inquiry conducted by Mr Zaknich was "tainted" because Mr Zaknich had at least one discussion with Mr Skamp. I do not agree that in this matter it is open to make a finding that the discussion between Mr Zaknich and Mr Skamp undermined the independence of the inquiry. Mr Zaknich testified that in his view the witness evidence considered by Mr Skamp was insufficient for him (Mr Zaknich) to make a finding. Mr Zaknich also gave uncontradicted evidence that the one occasion he spoke to Mr Skamp was when he sought permission to return to Manjimup (Transcript p 128). In addition although Mr Zaknich read Mr Skamp's report, statements and documents considered by Mr Skamp and transcripts of interview conducted by Mr Skamp it cannot be said that he did not conduct an independent inquiry or consider the matter afresh.
- 138 I do not agree that Mr Zaknich erred in law in making a finding that the applicant had committed a serious breach of discipline. Whilst at law pursuant to s 86(8) of the PSMA an inquirer is authorised only to make a finding that a breach of discipline was committed or that no breach of discipline was committed. In fact he made no such finding. His finding was that the applicant committed a breach of discipline (Exhibit 1, document 25, page 13). The respondent was bound by this finding. However, the respondent informed the applicant in a letter dated 17 September 2008 (Exhibit 1, document 18) that Mr Zaknich made a finding that he (the applicant) had committed a serious breach of discipline. This statement is not correct as this was not the finding that was made. However, in my opinion, it is open in any inquiry conducted under s 86 of the PSMA to characterise the facts and circumstances of a breach of discipline as conduct within a scale ranging from minor to very serious, as such a finding would be relevant to the imposition of a penalty under s 86(3) of the PSMA. Whether the conduct of the applicant in committing the breach of discipline (if sustained), can be characterised as serious turns on not only the findings of fact in respect of the incident but also on Mr Zaknich's adverse findings of the credibility of the applicant's versions of events.
- 139 In relation to the submission that little weight should be given to Dr Hoar's report, given that the applicant does not dispute the fact that he restrained the applicant by grabbing her right arm, turning her and held her by her right wrist so that her hand was restrained behind her back whilst she struggled, it is difficult to see how this submission assists the applicant. Dr Hoar's report states that AS described: *her right arm having been twisted behind her back*. He then states that on examination he found tenderness of the "right supraspinatus muscle and tenderness of the posterior shoulder joint". Clearly he described a minor injury consistent not only with what was described to him by AS but also the events as stated by the applicant in these proceedings. In my opinion the submission that the Commission could draw an inference that AS hurt herself by climbing out of the window based on the applicant's evidence of the height of the window without any other evidence, is in my view speculative.
- 140 Mr Zaknich's findings must be examined together with the statements and records of interview considered by him but also:
- (a) the notes made by Ms Mather (Exhibit 1, document 29);
 - (b) the letter from the applicant's solicitor to Mr Skamp dated 3 August 2007 (Exhibit 1, document 3); and
 - (c) the oral evidence given by Mr Zaknich.
- 141 One of the critical findings made by Mr Zaknich is that the applicant instigated the incident by taking hold of AS (Exhibit 1, document 25, page 10). Part of this finding is the finding that the applicant made no mention of any physical action by AS in his first account to Ms Mather. The accounts given by Ms Mather when considered in their totality do not, however, support this conclusion. Although Ms Mather's statement to Mr Zaknich supports this finding, the accounts of what the applicant told her are not unequivocally consistent with this conclusion. In her statement given to Mr Zaknich dated 30 May 2008, Ms Mather says:
- During the time I spent with John AYLING I did not ask questions. I took notes of what he said.*
- During the course of his explanation to me, at no time did he mention that AS had begun hitting him.*
- Resulting from that conversation and the notes I took, I prepared an Incident Report on the 5th April which I forwarded to District Office and Central Office.*
- Some time later, I think it was the following day, I presented John with a copy of the Incident Report.*
- He read it and said that it was correct.*
- After he had read the report he said he wanted to add a comment to the effect that when he resisted AS's attempt to get past him, she began hitting him.*
- I wrote the additional information on a "stick-it" poster which is now attached to the report.*
- At no time did John tell me that he had twisted AS's arm behind her back.*

(Exhibit 1, document 25, pp 73-74)

- 142 In the record of interview with Mr Skamp taken sometime before September 2007, Ms Mather after reading from the incident report was asked about whether there was any variance in her personal notes and the incident report. In reply she said:

I would have clarified certain things, I would imagine as I was typing it up. These are fairly well as you can see they are pretty rushed notes.

(Exhibit 1, document 25, p 80)

143 Unfortunately Ms Mather does not say what she clarified and how she did that. However she does say the notes were rushed. Later in the interview she is asked about "AS has attended [sic] to push past him" and Ms Mather said, "*He just simply said that she tried to push past him*" (Exhibit 1, document 25, pp 87-88). It was then put to her that what the applicant is effectively saying in the Post-it note is, "*I actually got assaulted by her, which puts a completely different spiel on the whole thing*" (Exhibit 1, document 25, p 88). Ms Mather is then asked:

Do you have a particular view on, I guess once Mr Ayling has proof read your notes he's specifically stated that he was hit by AS, however in the initial conversation he failed to mention that?

(Exhibit 1, document 25, p 89)

144 Ms Mather importantly says in reply:

Well he may have mentioned that in this, and I've written it down. Mr Ayling heeded [sic] them off and asked them to return to the room, AS pushed past Mr Ayling and Mr Ayling attempted to stop AS from leaving. In my notes here, he's actually said AS tried to bulldoze [sic] in front of him starting to push through his arm. John took hold of my arm, KR began...I missed that sentence there. Dayle put her head out the door, John asked for assistance, AS stopped fighting and returned to the room.

(Exhibit 1, document 25, p 89)

145 There is then a discussion about when AS stops fighting.

146 In Ms Mather's notes she states:

students attempted to leave room. When John appeared they began running. John got in front of them. Held hand out in front.

John asked them to go back into room. AS tried to bulldoze in front of him. Started pushing through his arm.

John took hold of arm.

KR began

147 Although mention was made of the handwritten notes in the interview Ms Mather participated in with Mr Skamp, Mr Zaknich did not review a copy of the notes or consider the contents of the notes which were discussed by Ms Mather in her interview with Mr Skamp. In my opinion in light of the statements contained in the notes and the discussion of the content of those notes as set out above, the finding that the import of the applicant's statement to Ms Mather was that he instigated the incident by taking hold of AS cannot stand as it is equally open to find that what the applicant was saying to Ms Mather was that after he put his hand out, AS initiated physical contact with him (the applicant). As to Ms Mather's evidence in these proceedings I did not find her evidence helpful as it is clear to me that her recollection of what the applicant told her was poor and in some respects incorrect. In particular she said that she wrote down exactly what the applicant told her. Yet that is not correct. Her handwritten notes are not a complete record and contain incomplete sentences such as "*KR began*".

148 In Mr Zaknich's report (Exhibit 1, document 25, page 10) he also stated that even if the statement in the Post-it note is correct that when he resisted AS's attempt to get past him she began hitting him, there is a subsequent statement by the applicant which refutes this. Although it is not entirely clear what statement Mr Zaknich is referring to, he appears to be referring to the discussion of the events the applicant had with Mr Carr and recanted to Mr Skamp and Mr Zaknich by Mr Carr. When interviewed by Mr Zaknich on 30 May 2008, Mr Carr stated:

Several days after the incident John spoke to me about what happened on the veranda with AS.

He told me that he had the girl's arm behind her back, as he was feeling physically threatened by KR and needed to be able to see him and be in a position to defend himself. At the same time he needed to restrain AS because he felt that the girl would leave the school grounds if he let her go.

He also felt that by restraining AS in this way, she would not hurt herself unless she physically struggled.

These were not the exact words John Spoke. They are words to that effect.

(Exhibit 1, document 25, p 94)

149 When interviewed by Mr Skamp (Exhibit 1, document 25, p 102) Mr Carr in mid 2007 said after the incident:

I went to see him afterwards and I just said that was a bit hairy and, oh hold on, no, he came to see me and thank you for my support and basically he did that and at that stage, you know, basically I just was saying well you know was a good thing that that's over. I mean it was an unpleasant situation with students.

KS Did he tell you what happened?

JC He indicated to me that basically that my recollection was not accurate.

KS So what do you mean by that?

JC *He said he was holding, he was actually, he said that he was holding the girl and that he was feeling extremely threatened by the boy. Now I take his word for it, but I can't say that he was, the kids were definitely agitated, but I definitely didn't see physical threatening behaviour by the boy or the girl. They were resisting.*

KS *Verbally you mean? Verballing resisting?*

JC *Yeah*

KS *Yeah*

JC *Yeah I mean, you know it's already seen, maybe my eye sights [sic] not perfect anymore but this, yeah all I can say is yes they were verbally resisting and John was trying to keep them as calm as he could.*

150 Importantly Mr Carr was later asked by Mr Skamp:

When you spoke with Mr Ayling afterwards, did he discuss with you in any detail the lead up prior to what you saw?

JC *Only that he felt threatened and that because he was feeling that the boy was physically threatening him and that he had to turn away from the girl that he did have hold of the girl, but yeah I really you know, I don't know anything about the situation that lead up to it. I haven't discussed yeah, I haven't discussed with John. Yeah I don't know about what actually lead [sic] to them being at the door there.*

(Exhibit 1, document 25, p 103)

151 When regard is had to these extracts from the interviews it is clear that Mr Carr did not discuss the incident in its entirety with the applicant. In particular it is open to infer from the statements made by Mr Carr that what was discussed was what occurred from the time the applicant restrained AS.

152 Mr Zaknich also makes the finding that the applicant's final version of events (contained in a letter from his solicitor dated 1 July 2008) in which he states, "*Immediately before taking hold of AS's right wrist, AS had attacked me by kicking at my left leg and slapping at my left arm with both her hands*" is at odds with the statements he made to Ms Mather and Mr Carr. For the reasons set out above, this finding is not based on unequivocal facts and in my view cannot be sustained (Exhibit 1, document 25, p 146).

153 Consequently the finding that the version of events stated in the letter dated 1 July 2008 has the ring of "recent invention" can also not be sustained.

154 It may, however, have been open to Mr Zaknich to reject the applicant's version of events as recounted to Ms Mather and Mr Carr on the basis that he preferred the accounts given by AS and KR. Mr Zaknich did not embark upon such an analysis. He did, however, make a finding that AS's evidence is credible and consistent and her account was corroborated by Ms Riley and KR (Exhibit 1, document 25, page 8). This finding was however confined to the finding of fact that "*the applicant grabbed AS by the wrist and subsequently twisted that arm behind her back then restrained her against a wall*" (Exhibit 1, document 25, page 9). It is not in dispute in these proceedings that the applicant grabbed AS by the wrist and subsequently twisted that arm behind her back and restrained her while she struggled. It is in dispute whether he restrained AS against a wall. However, whether that occurred or not during the incident is in my view not material as the fundamental issue is whether the actions of the applicant were authorised by reg 39 goes to why the applicant took action to restrain AS. For the same reason it is also immaterial whether the applicant had the same hold of AS when Mr Carr came onto the scene prior to Mr Carr seeing them.

155 Although Mr Zaknich made a finding that KR's version of events corroborated the versions given by AS, there is one matter in which their statements are so inconsistent it could not be attributed to differences in perception of events. AS was asked by Mr Skamp whether during the incident she swore at the applicant and she said, "*No*." (Exhibit 1, document 25, p 33) KR however when asked whether there was any swearing, readily stated he and AS swore at the applicant (Exhibit 1, document 25, p 116). Further, it is clear from what he said that they both persistently swore at the applicant throughout the incident.

156 The applicant contends that if it is accepted that AS instigated the physical contact by kicking the applicant's leg and slapping at this left arm with both her hands, that when regard is had to the evidence given by the applicant in these proceedings the Commission should find that the applicant's actions were authorised by the provision of the *School Education Act* and the repealed reg 39 of the *School Education Regulations*. Pursuant to s 64(1)(e) of the *School Education Act* it is a function of a teacher to "supervise students and to maintain proper order and discipline on their part". When the incident in question occurred reg 39(1) prescribed that a teacher could physically restrain a student in circumstances where the student acts in a manner which places at risk the safety of the student or any other person or any property. Clause 4.2.7 of the Behaviour Management in Schools Policy (effective 1 July 2001) provided at the time the incident occurred that:

As a last resort, students can be physically restrained in response to spontaneous, potentially harmful behaviour that places at risk the physical safety of the student, other students, school staff, any other person or to threatens damage to property.

Following a situation in which a student has been physically restrained the parents must be informed and the incident recorded.

(Exhibit 1, document 26)

157 Whilst the terms of the policy cannot confine the scope of reg 39(1) it does contemplate that action can be taken to restrain a student in response to potentially harmful behaviour. Such behaviour must however constitute a risk to the safety of the student or another person or property. It is clear from the express terms of reg 39(1) that when considering whether an act placed at risk the safety of a student, any other person or any property, the test is objective and not subjective. It is not whether the applicant believed his safety or the safety of AS was at risk but whether a reasonable person in all the circumstances would consider whether there was a risk to the safety of the applicant, AS or KR. The applicant has given evidence that he was concerned for the safety of AS if she was to leave school and that is why he ran in front of AS and KR, placed his arm adjacent to the wall to stop her from running past him. Whilst this is not an issue considered by the investigator or the inquirer, I do not accept that by attempting to run past the applicant AS's safety was placed at risk. An act which is a risk to a person's safety is an act which creates a situation of potential danger to the health and safety to the person's safety. The concept of "risk" conveys the possibility of danger rather than actual danger (see *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 at 1177). AS and KR were at that point in time not running out of the school into the street. They were running from the front office inside the main school grounds to a classroom where AS had left her bag. Consequently it can be inferred that they were not intending immediately to leave the school. Further, although the applicant stated that he did not want AS to race out of the school in an emotionally distraught state there is no evidence that she was emotionally distraught prior to the applicant restraining her. As to KR there is no evidence that KR was threatening to punch the applicant before the applicant restrained AS.

158 I also do not accept that when AS began kicking the applicant in the leg and slapping him with her arms prior to him taking hold of her by the arm that the applicant's safety was placed at risk. It is not in dispute that AS, at the time of the incident, was 17 years old and a very small person and the applicant is a very tall mature adult. Although a submission has been made on his behalf that the applicant was defending himself, the applicant did not give evidence that he felt threatened by AS. His evidence was that after he restrained AS he felt threatened by KR as KR began to "shape up to him". Whilst it could be said at that point the applicant's safety was under threat, the threat did not arise until after the applicant had taken physical action to restrain AS. Whilst it was a finding made by the Browne review that the interpretation of the "physical action" aspect of reg 39 is not clear, no submission has been made in these proceedings as to why such a finding was made. The fact that the applicant took physical action against AS is not in dispute. Perhaps in other matters whether a teacher had taken action there may have been a debate about whether "physical action" had occurred.

159 For these reasons I do not agree that the decision that the applicant committed a breach of discipline should be quashed as the actions of the applicant were not authorised by reg 39(1) of the *School Education Regulations*. I have come to this conclusion based solely on the evidence given by the applicant in these proceedings and without regard to the written statements of evidence and transcripts of evidence given by AS, KR, Ms Riley and Mr Carr. However even if I was to have regard to those documents I would make the same finding.

(e) Penalty

160 As set out above the findings made by Mr Zaknich that the applicant's explanations were not credible cannot stand. The applicant had a right to remain silent (see *Police Service Board v Morris and Martin*). He chose not to do so. Unfortunately he did not provide a proper account of the incident at anytime prior to giving evidence in these proceedings. It is clear from the evidence given by Ms Mather that when making her handwritten notes she was rushed. Those notes are not complete and the written incident report does not accurately reflect all that was in the notes. The initial letter sent by the applicant's solicitor (Exhibit 1, document 3) simply makes a bare statement that AS attacked the applicant and that the applicant made minimal contact required in order to restrain the student. Although it is contended that the applicant's actions were reasonable and justified no information was provided as to the facts on which such a conclusion could have been drawn. In addition, although the written answers provided to Mr Zaknich by the applicant's solicitors dated 1 July 2008 (Exhibit 1, document 25, appendix 16) state the reasons for using restraint, this explanation was inadequate as reg 39 only authorised physical action to prevent or restrain a student from acting in a manner which places at risk the safety of that student, another person or property. The explanation given by the applicant through his solicitors did not address this fundamental issue.

161 The fact that the applicant provided an inadequate explanation in relation to the incident following his waiver to the right to remain silent cannot be considered when assessing what is an appropriate penalty for the breach of discipline. The applicant's responses were made on advice from his solicitors and he can not be personally criticized or required to account for that advice.

162 It is clearly apparent from the evidence given by Mr O'Connor that the respondent regarded the applicant's actions as a serious breach of discipline because of the findings made by Mr Zaknich that the applicant had not provided a truthful account of his actions. It was conceded by Mr O'Connor that if findings about the applicant's truthfulness fell away that an appropriate penalty for the breach of discipline in line with the recommendation made by Mr Skamp would be appropriate.

163 It is argued however on behalf of the applicant that no penalty should be imposed as where a breach of discipline is found to be proven s 86(3)(b) of the PSMA the imposition of a penalty is discretionary. Section 86(3) provides:

- (3) *Subject to section 89, if a respondent admits a charge under subsection (2) and the employing authority finds the charge to be proved, the employing authority —*
 - (a) *shall, if the charge is a charge of committing a breach of discipline consisting of disobedience to, or disregard of, a lawful order referred to in section 94(4), dismiss the respondent; or*

- (b) may —
- (i) reprimand the respondent;
 - (ii) transfer the respondent to another public sector body with the consent of the employing authority of that public sector body or, if the respondent is an employee other than a chief executive officer or chief employee, transfer him or her to another office, post or position in the public sector body in which he or she is currently employed;
 - (iii) impose on the respondent a fine not exceeding an amount equal to the amount of remuneration received by the respondent in respect of the period of 5 days during which he or she was at work as an employee immediately before the day on which the finding of a breach of discipline was made;
 - (iv) reduce the monetary remuneration of the respondent;
 - (v) reduce the level of classification of the respondent; or
 - (vi) dismiss the respondent,
- or, except when the respondent is dismissed under subparagraph (vi), take action under any 2 or more of the subparagraphs of this paragraph.

164 Section 56 of the *Interpretation Act 1984* provides:

- (1) Where in a written law the word **may** is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.
- (2) Where in a written law the word **shall** is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

165 It can be inferred by the use of the word "shall" in s 86(3)(a) when contrasted against the word "may" in s 86(3)(b) that if an employee is found to have breached a lawful order the employing authority is obligated to dismiss the employee. However, does the word "may" in s 86(3)(b) simply create the authority to impose one or more of a number of penalties whereby the discretion conferred is only to exercise a choice between one or more of the penalties having considered all of the relevant facts and circumstances of the breach of discipline?

166 The nature of the penalties set out in s 86(3)(b)(ii), (iii), (iv) and (v) are created by statute and not by common law. At common law an employer is not able to suspend a contractual right (see the discussion in Sappideen, O'Grady and Warburton, *Macken's Law of Employment* (6th ed, 2008) at [6.05]).

167 In this matter, whilst there is a power at common law to dismiss for a repudiatory breach of contract by an employee and an employer may in an appropriate case reprimand an employee, a reprimand does not constitute the alteration of contractual rights and duties. However the remainder of the penalties created by s 86(3)(b) are creatures of statute. Does that mean that by vesting power in an employing authority to impose statutory penalties is the power required to be exercised?

168 In *Re Dunsborough Districts Country Club Inc* (1982) WAR 321, Olney J at 329 considered the predecessor to s 56 of the *Interpretation Act* and observed:

This provision must be read subject to the limitation contained in s 3 of the same statute, which makes the intention and object of the Act being construed paramount. These provisions are a restatement of the common law and are no assistance in discerning the intention and object of the relevant statute. That the word "may" when associated with the grant of a power can in some contexts be construed as mandatory is well established by authority (see Julius v Bishop of Oxford (1880) 5 App Cas 214; Finance Facilities Pty Ltd v FC of T (1971) 45 ALJR 615, per Owen J at 619; Re M (1924) 26 WALR 115). In the words of Lord Cairns in Julius v Bishop of Oxford (at 225): "... where a power is deposited with a public officer for the purposes of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised." But it is for the person who asserts that "may" has been used in a mandatory sense to show as a matter of construction of the Act taken as a whole that the word was intended to have such a meaning (Ex parte Gleeson [1907] VLR 368, per Cussen J at 373; Ward v Williams (1955) 92 CLR 496 at 505).

169 Section 86(3)(b) of the PSMA must be read together with s 86(8)(a) and s 86(9)(b)(ii) and (iii) of the PSMA. Section 86(8)(a) and s 86(9)(b)(ii) and (iii) provide:

- (8) If a directed person finds at the conclusion of a disciplinary inquiry that —
 - (a) a breach of discipline was committed by the respondent, the directed person shall submit that finding to the employing authority and recommend to the employing authority that it act in relation to the respondent under subsection (3) as if the respondent had admitted the charge under subsection (2); or

...

(9) *On receiving a finding and recommendation under subsection (8), the employing authority shall —*

...

(b) *in the case of a recommendation made under —*

...

(ii) *subsection (8)(a) in relation to a charge other than a charge referred to in subparagraph (i), accept that recommendation and act accordingly in relation to the respondent, or decline to accept that recommendation and take such other action in relation to the respondent as could have been recommended under that subsection; or*

(iii) *subsection (8)(b), accept that recommendation and act accordingly in relation to the respondent.*

170 Whilst s 86(3)(b) provides a list of penalties which could be said to be a list from which an employing authority may impose in its discretion, s 86(9)(b)(ii) and (iii) provides a precondition that an employing authority "shall" accept a recommendation made by the inquirer under s 86(3) (in respect of penalty) or decline to accept the recommendation and take other action under s 86(3).

171 When regard is had to use of the word "shall" in s 86(9) it can be inferred that the grant of power in s 86(3) is mandatory. However it is not necessary to conclusively decide this point as in my opinion the facts and circumstances of the breach of discipline can not be said to be a technical breach, trivial or so minor so as not to warrant the imposition of a penalty. The applicant restrained AS in an "arm lock" which caused AS to struggle during which she sustained a minor injury to her shoulder in circumstances where the applicant was not authorised to take steps to restrain her. Consequently, I am of the opinion that the penalty of a reprimand and a fine of one day's pay recommended by the investigator Mr Skamp should be imposed. I am of this view for two reasons. Firstly, whilst I recognise that the task of a teacher to maintain discipline in a school is difficult, the right to restrain a student is not without limit and the action taken by the applicant on the day in question was improper and warrants more than the imposition of a reprimand. Secondly, in light of the concession on behalf of the respondent by Mr O'Connor that if the findings about the truthfulness of the applicant about the incident fall away then the recommendation made by Mr Skamp would be an appropriate disposition, I am of the opinion that a fine of one day's pay should also be imposed.

172 For the reasons set out above I will make an order that insofar as the appeal is against the decision made by the respondent:

- (1) Pursuant to s 86(8)(a) and s 86(9)(a) that the applicant committed a breach of discipline, that part of the appeal is dismissed;
- (2) Pursuant to s 86(3)(b)(i) that the applicant be reprimanded, that part of the appeal is dismissed; and
- (3) Pursuant to s 86(3)(b)(iv) to reduce the applicant's monetary remuneration, that part of the appeal is upheld and the decision is varied by imposing on the applicant a fine equal to the amount of remuneration received by the applicant in respect of the last day during which he was at work as an employee before the day on which the finding of a breach of discipline was made by the inquirer.

2009 WAIRC 00422

ALLEGED BREACH OF THE RESPONDENTS DUTY TO AFFORD PROCEDURAL FAIRNESS.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER JOHN AYLING

APPLICANT

-v-

DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM

SENIOR COMMISSIONER J H SMITH

DATE

WEDNESDAY, 1 JULY 2009

FILE NO/S

APPL 98 OF 2008

CITATION NO.

2009 WAIRC 00422

Result

Appeal upheld in part. Order issued.

Representation

Applicant

Mr S A Millman (of counsel)

Respondent

Ms R M Hartley (of counsel)

Order

HAVING heard Mr S. A. Millman (of counsel) on behalf of the applicant and Ms R. M. Hartley (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 insofar as the appeal is —

- (1) against the finding that the applicant committed a breach of discipline, that part of the appeal is dismissed;
- (2) against the finding that the applicant be reprimanded, that part of the appeal is dismissed; and
- (3) against the decision to reduce the applicant's monetary remuneration, that part of the appeal is upheld and the decision is varied by imposing on the applicant a fine equal to the amount of remuneration received by the applicant in respect of the last day during which he was at work as an employee before the day on which the finding of a breach of discipline was made by the inquirer.

[L.S.]

(Sgd.) J H SMITH,
Senior Commissioner.

NOTICES—Union Matters—

2009 WAIRC 00433

NOTICE

FBM 1 of 2009

NOTICE is given of an application by the “Community Employers WA” to the Full Bench of the Western Australian Industrial Relations Commission for registration of an organisation pursuant to Section 54 the *Industrial Relations Act 1979*.

The rules of the proposed new organisation relating to the qualification of persons for membership including any rule by which that area of the State within which the organisation operates, or intends to operate is limited, are as follows:

“6 MEMBERSHIP

- 6.1 The Association shall consist of such organisations which are employers within the not for profit community and welfare sector in Western Australia who shall be approved for membership by the Board.
- 6.2 Each application for membership of the Association shall be made in writing in the form provided by the Association, or in such form as may from time to time be approved by the Board.
- 6.3 Upon receipt by the Board of a duly completed Application for Membership form, together with such fees and subscriptions as may be payable, the Board will place that application before the next meeting of the Board and the Board will at that meeting consider whether the application should be accepted or rejected in accordance with these Rules. The applicant shall be deemed to be a member of the Association on the date that the Board approves the application. The decision of the Board shall be conveyed in writing to the applicant.
- 6.4 Each member of the Association shall on application for membership and annually at the time of payment of annual membership fees and subscriptions advise the Board of the name and address of the person authorised to be its representative at all meetings of the Association and who may vote and nominate and stand for office on behalf of such member.”

The matter has been listed before the Full Bench at 10:30 am on Monday 31 August 2009 in the President’s Court (Floor 17). A copy of the rules of the proposed new organisation may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who objects to the registration of the organisation and who satisfies the Full Bench that he/she has sufficient interest in the matter, may appear and be heard in objection to the application. Notice of the objection (Form 13) should be filed in accordance with the *Industrial Relations Commission Regulations 2005*.

S. HUTCHINSON

DEPUTY REGISTRAR

23 June 2009

2009 WAIRC 00434

NOTICE

FBM 2 of 2009

Notice is given of an application by The State School Teachers’ Union of W.A. (Incorporated) to the Full Bench of the Western Australian Industrial Relations Commission for the alteration to Rule 4 – Membership.

Existing Rule 4 – Membership**4 - MEMBERSHIP**

The State School Teachers' Union of W.A. (Incorporated) shall consist of an unlimited number of persons employed or usually employed in the following categories:-

- (a) **FULL MEMBERS:**
- (i) Teachers employed by the Department of Education and Training or by any institution providing technical and further education in Western Australia and teachers employed in pre-school centres in Western Australia provided that such teachers hold or are enrolled for the purpose of obtaining a teaching academic qualification.
 - (ii) Any person employed by any of the employers or in any of the places referred to in sub-rule (a)(i) of this rule who is employed as an education officer, guidance officer, counsellor or demonstrator.
 - (iii) Teachers employed in a temporary capacity by a technical and further education institution.
 - (iv) Teachers employed by and in a Community College in Western Australia.
 - (v) School teachers who are employed on a part-time (fractional) basis in the supervision and/or coordination of student teachers during their periods of practice teaching in schools provided that they are eligible for membership of the Union within one of the preceding paragraphs of this subrule.
 - (vi) Any person elected to an office in the State School Teachers' Union of Western Australia.
 - (vii) Any employee of the SSTUWA (Inc) provided that such persons are not eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A., Clerical and Administrative Branch.
 - (viii) Persons who are qualified to be and desire to be employed in any of the categories of persons specified in the preceding subrules of this rule.
- Notwithstanding, subparagraph (viii) above any person who is not registered with the relevant employer as available for work, has not worked as a teacher for at least two years or who no longer has a contract of employment with the relevant employer shall not be eligible for membership under sub-rule 4(a).
- (b) **HONORARY LIFE MEMBERS:** Any teacher or any employee of the Union who has rendered long and meritorious service to the Union may, upon retirement, be appointed as an Honorary Life Member. For the purpose of such an appointment it shall be necessary that nominations be received and approved by the Executive and published in the W.A. Teachers' Journal or The Western Teacher at least three months prior to the opening of State Council.
- (c) **HONORARY MEMBERS:** Exchange teachers who are members of a teachers' organisation in the State or country from which they have come may be appointed by the Executive as Honorary Members of this Union.
- (d) **SPECIAL CATEGORY MEMBERSHIP:** Persons who are not trained teachers but who because of their special expertise are placed in charge of a class in any area of the educational service may become Special Category Members.
- (e) **RETIRED TEACHER MEMBERS:** Teachers retired from the Department of Education and Training because of age or invalidism may be admitted as Retired Teacher Members at the discretion of the Executive.
- (f) **ASSOCIATE MEMBERS:** The following persons are eligible:-
- (i) Retired employees of the Union.
 - (ii) Former members, including all categories who are not eligible for any other form of membership.

Proposed alterations to Rule 4- Membership

Proposed alterations are shown as ~~strike through~~ for deletions and underlining for additions.

4 - MEMBERSHIP

The State School Teachers' Union of W.A. (Incorporated) shall consist of an unlimited number of persons employed or usually employed in the following categories:-

- (a) **FULL MEMBERS:**
- (i) Teachers employed by the Department of Education and Training or by any institution providing technical and further education in Western Australia and teachers employed in pre-school centres in Western Australia provided that such teachers hold or are enrolled for the purpose of obtaining a teaching academic qualification.
 - (ii) Any person employed by any of the employers or in any of the places referred to in sub-rule (a)(i) of this rule who is employed as an education officer, guidance officer, counsellor or demonstrator.
 - (iii) Teachers employed in a temporary capacity by a technical and further education institution.
 - (iv) Teachers employed by and in a Community College in Western Australia.
 - (v) School teachers who are employed on a part-time (fractional) basis in the supervision and/or coordination of student teachers during their periods of practice teaching in schools provided that they are eligible for membership of the Union within one of the preceding paragraphs of this subrule.
 - (vi) Any person elected to an office in the State School Teachers' Union of Western Australia.
 - (vii) Any employee of the SSTUWA (Inc) provided that such persons are not eligible for membership of the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A., Clerical and Administrative Branch.
 - ~~(viii) Persons who are qualified to be and desire to be employed in any of the categories of persons specified in the preceding subrules of this rule.~~

~~Notwithstanding subparagraph (viii) above any person who is not registered with the relevant employer as available for work, has not worked as a teacher for at least two years or who no longer has a contract of employment with the relevant employer shall not be eligible for membership under sub rule 4(a).~~

- (viii) Persons who are qualified to be and desire to be employed in any of the categories of persons specified in subrules (i)-(iv) of this rule. Notwithstanding the above, any person who is not registered with the relevant employer as available for work, and has not worked as a teacher for at least two years and who no longer has a contract of employment with the relevant employer shall not be eligible for membership under this subrule.
- (b) **HONORARY LIFE MEMBERS:** Any teacher or any employee of the Union who has rendered long and meritorious service to the Union may, upon retirement, be appointed as an Honorary Life Member. For the purpose of such an appointment it shall be necessary that nominations be received and approved by the Executive and published in the W.A. Teachers' Journal or The Western Teacher at least three months prior to the opening of State Council.
- (c) **HONORARY MEMBERS:** Exchange teachers who are members of a teachers' organisation in the State or country from which they have come may be appointed by the Executive as Honorary Members of this Union.
- (d) **SPECIAL CATEGORY MEMBERSHIP:** Persons who are not trained teachers but who because of their special expertise are placed in charge of a class in any area of the educational service may become Special Category Members.
- (e) **RETIRED TEACHER MEMBERS:** Teachers retired from the Department of Education and Training because of age or invalidism may be admitted as Retired Teacher Members at the discretion of the Executive.
- (f) **ASSOCIATE MEMBERS:** The following persons are eligible:-
- (i) Retired employees of the Union.
 - (ii) Former members, including all categories who are not eligible for any other form of membership.

The matter has been listed before the Full Bench at 10:30 am on Tuesday 1 September 2009 in the President's Court (Floor 17). A copy of the Rules of the organisation and the proposed rule alterations may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005*.

S. HUTCHINSON

DEPUTY REGISTRAR

2 July 2009

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2009 WAIRC 00380

**REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS
IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

RAY DALEY

APPLICANT

-v-

MODERN INDUSTRIES HOLDINGS PTY LTD

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE MONDAY, 15 JUNE 2009
FILE NO OSHT 8 OF 2009
CITATION NO. 2009 WAIRC 00380

Result Application discontinued

Representation

Applicant Mr J Nicholas (of counsel)

Respondent Mr S. Currie

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS on 14 May 2009 the Tribunal convened a conference for the purpose of conciliation between the parties;

AND WHEREAS at the conclusion of the conference matters remained unresolved between the parties;
 AND WHEREAS the matter was listed for preliminary hearing on 27 May 2009;
 AND WHEREAS the respondent raised jurisdictional issues in relation to the application;
 AND WHEREAS on 9 June 2009 the applicant filed a Notice of Discontinuance in respect of the application;
 NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order –
 THAT this application be, and is hereby discontinued

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.**2009 WAIRC 00423****REFERRAL OF DISPUTE RE ENTITLEMENT TO PAY AND OTHER BENEFITS**

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

GRANT VEAL AND OTHERS

APPLICANT

-v-

HITACHI PLANT TECHNOLOGIES LTD AND OTHERS

RESPONDENT**CORAM**

COMMISSIONER S M MAYMAN

DATE

WEDNESDAY, 1 JULY 2009

FILE NO/S

OSHT 3, 12, 15, 17, 22 - 25 OF 2009

CITATION NO.

2009 WAIRC 00423

Result	Directions issued
Representation	
Applicant	Mr S Milman (of counsel)
Respondent	Mr J Blackburn (of counsel)

Directions

WHEREAS OSHT 3, 12, 15 and 17 of 2009 were listed for jurisdictional hearing together with a number of applications before the Occupational Safety and Health Tribunal ("the Tribunal") on 30 June 2009;

AND WHEREAS at the hearing counsel for the applicants in OSHT 3, 12, 15 and 17 of 2009 advised the Tribunal that new applications were being filed that same day in the office of the registry;

AND WHEREAS counsel for the applicants in OSHT 3, 12, 15 and 17 of 2009 advised the Tribunal that the applicants' names would be replicated in the new applications;

AND WHEREAS the Tribunal was advised that existing applications OSHT 3, 12, 15 and 17 of 2009 would be discontinued;

AND WHEREAS the Tribunal was advised by all parties they consented to an adjournment to facilitate the administrative matters in relation to the new applications being dealt with;

AND WHEREAS the Tribunal understood the jurisdictional issues would also apply to the new applications;

AND WHEREAS the Tribunal was advised by all parties they consented to the 7 day period for the notification of the jurisdictional hearing for the new applications being waived;

AND WHEREAS the Tribunal was advised by all parties they consented to the new applications being listed with the remaining applications to allow the jurisdictional issues to be heard together, namely OSHT 2, 4, 5, 6, 18, 22, 23, 24 and 25 of 2009;

NOW THEREFORE the Tribunal pursuant to the powers of the *Occupational Safety and Health Act 1984* hereby directs –

1. THAT in lieu of endorsement on the reverse of the notice of referrals as to service, counsel for the applicants in OHST 22, 23, 24 and 25 of 2009 serve upon the respondents copies of the applications filed in the registry on 30 June 2009;
2. THAT OSHT 3, 12, 15 and 17 of 2009 be discontinued;
3. THAT the 7 day period for the notification of the time and place of hearing be waived for OSHT 22, 23, 24 and 25 of 2009; and
4. THAT OSHT 22, 23 24 and 25 of 2009 be joined to the proceedings listed for 30 June 2009 for the purposes of hearing the jurisdictional issues.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2009 WAIRC 00333

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES

SHANE LOWRY AND ANOTHER AND OTHERS

APPLICANT

-v-

HITACHI PLANT TECHNOLOGIES LTD AND OTHERS

RESPONDENT**CORAM** COMMISSIONER S M MAYMAN**DATE** TUESDAY, 2 JUNE 2009**FILE NO/S** OSH 2-6, 8, 12, 15, 17 AND 18 OF 2009**CITATION NO.** 2009 WAIRC 00333**Result** Directions issued**Representation****Applicant** Mr T Kucera and Mr J Nicholas (both of counsel) and

Mr T Hayes and Ms M Ireland (both as agents)

Respondent Mr J Blackburn and Ms L Gibbs (both of counsel)

Mr S. Currie

Directions

WHEREAS this matter was listed for a preliminary hearing before the Occupational Safety and Health Tribunal ("the Tribunal") on Wednesday 27 May 2009;

AND WHEREAS at the hearing the respondents raised the issue of jurisdiction with respect to some of the applications;

AND WHEREAS having considered it necessary to give directions for the expeditious and just hearing of the jurisdictional issue;

NOW THEREFORE the Tribunal pursuant to the powers of the *Industrial Relations Act 1979* hereby directs –

1. THAT the question of whether the Tribunal has jurisdiction to hear and determine the applicants' claims be heard as a preliminary issue;
2. THAT Mr Blackburn (of counsel) specify by close of business on 2 June 2009 those applications for which jurisdiction is raised;
3. THAT the respondents file and serve upon the applicants a broad outline of the jurisdictional issue(s) by close of business on 29 May 2009;
4. THAT the respondents give notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys-General of the Commonwealth and of the States as to the matter arising under the Constitution or involving its interpretation by close of business on 29 May 2009;
5. THAT the respondents file and serve upon the applicants their outline of submissions and any list of authorities upon which they intend to rely by no later than 10 June 2009;
6. THAT the applicants file and serve upon the respondents their outline of submissions and any list of authorities upon which they intend to rely by no later than 24 June 2009;
7. THAT the jurisdictional matters be listed for hearing on 29 June 2009; and
8. THAT the parties have liberty to apply with short notice.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.