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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—General Matters—

2009 WAIRC 00488

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

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

The figure that will apply from 1 July 2009 has been calculated by the Registrar as being $122,900.00. The amount is a matter for the Commission to determine so that figure must be seen as a guide, until such time as the Commission may determine a different amount.

INDUSTRIAL APPEAL COURT—Appeal against decision of Full Bench—

[2009] WASCA 119

JURISDICTION	**:**	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	**:**	SALDANHA -v- FUJITSU AUSTRALIA LTD [2009] WASCA 119
CORAM	**:**	WHEELER JA
		PULLIN JA
		LE MIERE J
HEARD	**:**	3 JUNE 2009
DELIVERED	**:**	3 JUNE 2009
FILE NO/S	**:**	IAC 1 of 2009
BETWEEN	**:**	MARINA SALDANHA
		Appellant
		AND
		FUJITSU AUSTRALIA LTD
		Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	**:**	RITTER AP BEECH CC KENNER C
Citation	**:**	SALDANHA v FUJITSU AUSTRALIA PTY LTD [2008] WAIRC 01732
File No	**:**	FBM 5 of 2008

Catchwords:

Industrial Appeal Court - No power to extend time in which to appeal

Legislation:

Industrial Relations Act 1979 (WA)

Result:

Appeal struck out as incompetent

Category: A

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Ms F A Stanton

Solicitors:

Appellant	:	In person
Respondent	:	McCallum Donovan Sweeney

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

Matkevich v New South Wales Technical & Further Education Commission (1995) 36 NSWLR 718

Patterson and James v Public Service Board of NSW (1984) 1 NSWLR 237

Re Carmody; Ex parte Glennan [2000] HCA 37; (2000) 173 ALR 145

Solomon v Psychologists Board of Western Australia [2001] WASCA 226

Woods v Bate (1989) 7 NSWLR 560

1 **WHEELER JA**: This matter comes before the Industrial Appeal Court based on the following events:

- 10 March 2008: Ms Saldanha filed a notice of application, pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) (the IR Act) for alleged unpaid benefits pursuant to a contract of employment with the respondent.
- 26 August 2008: Commissioner Wood, having consulted the parties, requested the President to refer a question of law (concerning the commission's jurisdiction) to the Full Bench. The President referred the matter on the same day.
- 17 December 2008: the Full Bench delivered reasons answering the questions of law referred.
- 23 December 2008: an order that the questions be answered as indicated was sealed and deposited in the office of the Registrar (s 36 IR Act).
- 12 January 2009 to 17 February 2009: between these dates, Commissioner Wood notified the parties that, following the answers given to the two questions of law, he was considering issuing an order dismissing the application for want of jurisdiction, and the parties made submissions to him about that matter.
- 17 February 2009: Commissioner Wood dismissed Ms Saldanha's application for want of jurisdiction.
- 5 March 2009: Ms Saldanha filed a notice of appeal from the decision of the Full Bench answering the questions of law referred.

Extension of time sought

2 By s 90(2) of the IR Act, it is provided that an appeal from a decision of the Full Bench to the Industrial Appeal Court "shall be instituted within 21 days from the date of the decision against which the appeal is brought". Having regard to s 61(1)(b), (e) and (h) of the *Interpretation Act 1984* (WA), it appears to me that the last day on which the notice of appeal could have been filed was 19 January 2009 (that is, 21 days from 23 December excluding that day, the Christmas and New Year public holidays and the weekend preceding the 19th).

3 Ms Saldanha applies for an extension of time within which to appeal on the basis that she understood that she could only lodge an appeal after the dismissal of her application by the Industrial Relations Commission for want of jurisdiction. That is, she mistakenly believed that she could not appeal until after 17 February 2009. Her affidavit in support of extension of time also deposes that she sought information from the Western Australian Industrial Relations Commission registry about appealing the decision of Commissioner Wood dismissing her application, and was given certain advice. It is not necessary to consider whether the material to which she deposes is an adequate explanation for the delay, unless the court has power to extend time.

4 There is a preliminary issue in this case, therefore, as to whether the appeal is competent.

Whether power to extend time

5 It has often been noted that the right of appeal is a creature of statute. The rights that an appellant has are therefore those conferred by the statute. Further, the Industrial Appeal Court is itself a statutory court having a limited jurisdiction. There is in the IR Act no express power to extend the time within which an appellant may appeal to the Industrial Appeal Court. The relatively simple question which arises therefore is whether any power to extend time may be implied from the IR Act. In my view, it cannot.

6 An analogous case is that of ***Patterson and James v Public Service Board of NSW*** (1984) 1 NSWLR 237, a decision of the Court of Appeal of New South Wales. In that case, the *Government & Related Employees Appeal Tribunal Act 1980* (NSW) (the GREAT Act) provided that an appeal on a question of law from the tribunal to the Court of Appeal "shall be made within 21 days after the tribunal's decision". A significant difference between the legislation in that case, and in this, is that in the GREAT Act the section conferring the right of appeal went on to add that an appeal "shall be made in accordance with the rules of the Supreme Court", and those rules did provide for the possibility of an extension of time, although they also provided, inconsistently with the GREAT Act, that an appeal must be instituted within 28 days (subject to any extension of time). In the present case, there is not even a reference in the Act to the *Supreme Court* or *Court of Appeal Rules* (which do, of course, provide for extensions of time).

7 Applying the principles referred to above, that is, that an appeal is a creature of statute, the Court of Appeal was unanimously of the view that no jurisdiction existed to extend the time within which to bring an appeal. That decision has been followed in New South Wales in ***Woods v Bate*** (1989) 7 NSWLR 560 and ***Matkevich v New South Wales Technical & Further Education Commission*** (1995) 36 NSWLR 718, has been referred to, apparently with approval, by Kirby J in ***Re Carmody; Ex parte Glennan*** [2000] HCA 37; (2000) 173 ALR 145 at [20] and followed in Western Australia by White J in ***Solomon v Psychologists Board of Western Australia*** [2001] WASCA 226.

8 In ***Patterson***, Moffitt P considered the subject matter of the Act to be of significance. It dealt broadly with aspects of Public Service organisation, including questions of circumstances in which an officer of the Public Service might be dismissed. His Honour considered (at 240) that policy considerations suggested that there was legislative policy of ensuring certainty in relation to decisions of that kind, once the time limit for appeal had passed. In my view, similar policy considerations may be discerned in the IR Act. The "Objects" section, s 6, places emphasis on negotiation and agreement as a means of settling disputes. Section 90, which invests the court with jurisdiction to hear appeals from the Full Bench, confers jurisdiction only in the very limited circumstances of excess of jurisdiction in that the matter was not an industrial matter; error of law in erroneously construing any Act, regulation, award, industrial agreement or order; and want of procedural fairness. Taken together, these provisions indicate a legislative policy that negotiation rather than litigation is preferable, and that resort to the Industrial Appeal Court is to be permitted only in strictly limited circumstances. It would be consistent this court, after which this court would not have power to extend time. The reasons in ***Patterson***, which, in my view, this court should apply, lead to a conclusion that the appeal is incompetent.

9 Further, there is in s 113, which confers regulation making power on the court, no indication that the court may make regulations providing for the extension of time for the doing of any act. Finally, in ***McCorry v Como Investments Pty Ltd*** (1989) 69 WAIG 1000, a question arose as to whether an appeal pursuant to s 90, alleged to have been made out of time, was competent. The case turned on the question of what was to be regarded as the "date of the decision" in that case, and the appeal was held to have been brought within time. However, no member of the Industrial Appeal Court questioned the assumption made in that case, that an appeal not instituted within 21 days would be incompetent.

10 Ms Saldanha, in her submissions, has referred to reg 26 of the *Industrial Relations (Western Australian) Industrial Appeal Court Regulations 1980*, which permits the court to waive procedural requirements in certain circumstances. However, in the view that I take of s 90 of the IR Act, the requirement to institute the appeal within time is not a procedural requirement, but a precondition to the competence of the appeal. Ms Saldanha also referred in her written submissions to reg 2A, which deals with the time in which appeals may be instituted, pursuant to s 96K of the Act, against a decision of an Industrial Magistrates Court. This, however, as Ms Saldanha accepts, is not a decision of an Industrial Magistrates Court and neither s 96K nor the regulation in question is applicable. Similarly, the *Crown Suits Act 1947* (WA) and the *Limitation Act 1935* (WA), to which Ms Saldanha also refers, are irrelevant, since the time limit in the present instance is provided by the IR Act itself.

Conclusion

11 I would therefore strike out this appeal as incompetent.

12 **PULLIN JA**: I agree with Wheeler JA.

13 **LE MIERE J**: I agree with Wheeler JA.

2009 WAIRC 00561

AGAINST THE DECISION OF THE FULL BENCH IN MATTER NO FBM 5 OF 2008 GIVEN ON 23 DECEMBER 2008

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	MARINA SALDANHA
	APPELLANT
	-v-
	FUJITSU AUSTRALIA LTD
	RESPONDENT
CORAM	WHEELER J
	PULLIN J
	LE MIERE J
DATE HEARD	WEDNESDAY, 3 JUNE 2009
DATE DELIVERED	WEDNESDAY, 12 AUGUST 2009
FILE NO	IAC 1 OF 2009
CITATION NO.	2009 WAIRC 00561

Result	Appeal struck out as incompetent
Representation	
Appellant	Ms M Saldanha (In person)
Respondent	Ms FA Stanton (of Counsel), by leave, on behalf of the Respondent

Order

Having heard Ms M Saldanha on her own behalf and Ms FA Stanton (of Counsel), by leave, on behalf of the Respondent THE COURT HEREBY ORDERS THAT:-

The appeal is struck out as incompetent.

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

COMMISSION IN COURT SESSION—Appeals against decisions of Boards of Reference—

2009 WAIRC 00470

APPEAL AGAINST THE DECISION IN MATTER NO BOR 2/2008 GIVEN ON 4/6/2009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH SKILL
	APPELLANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	TUESDAY, 21 JULY 2009
FILE NO/S	APPL 47 OF 2009
CITATION NO.	2009 WAIRC 00470

Result	Orders issued

Order

HAVING HEARD by correspondence from Mr L Edmonds on behalf of the appellant and from Mr S Kemp on behalf of the respondent;

AND WHEREAS the parties have agreed to the following orders being made for the hearing of the appeal;

NOW THEREFORE the Commission in Court Session makes the following orders by consent:

1. THAT the appeal be listed for hearing on Tuesday, 11 August 2009;
2. THAT on or before 4.00pm on Friday, 31 July 2009 the appellant file and serve on the respondent
   (a) Three copies of an appeal book prepared and bound in an approved form containing-
      (i) a copy of the application or reference instituting proceedings before the Board of Reference;
      (ii) a copy of that part or those parts of the transcript containing the matters relevant to the appeal that were before the Board of Reference;
      (iii) a copy of the decision that is the subject of the appeal and the Board of Reference's reasons for the decision; and
      (iv) a copy of all relevant exhibits tendered during those proceedings; and
   (b) An outline of submissions; and
3. THAT on or before 4.00pm on Friday, 7 August 2009 the respondent file and serve on the appellant an outline of submissions.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On behalf of the Commission In Court Session.

2009 WAIRC 00523

AGAINST THE DECISION IN MATTER NO BOR 2/2008 GIVEN ON 4/06/2009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH SKILL
	APPELLANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S WOOD
DATE	WEDNESDAY, 5 AUGUST 2009
FILE NO/S	APPL 47 OF 2009
CITATION NO.	2009 WAIRC 00523

Result Order varied

Order

WHEREAS an order was made in this matter on 21 July 2009;

AND WHEREAS the parties have agreed to the following amended orders being made for the hearing of the appeal;

AND HAVING HEARD by correspondence from Mr L Edmonds, of counsel on behalf of the appellant and from Ms J Alilovic, of counsel on behalf of the respondent;

NOW THEREFORE the Commission in Court Session makes the following orders by consent:

1. THAT the order dated 21 July 2009 is hereby revoked;
2. THAT the appeal be listed for hearing on Thursday, 3 September 2009;
3. THAT on or before 4.00pm on Friday, 21 August 2009 the appellant file and serve on the respondent
   (a) Three copies of an appeal book prepared and bound in an approved form containing-
      (i) a copy of the application or reference instituting proceedings before the Board of Reference;

(ii) a copy of that part or those parts of the transcript containing the matters relevant to the appeal that were before the Board of Reference;

(iii) a copy of the decision that is the subject of the appeal and the Board of Reference's reasons for the decision; and

(iv) a copy of all relevant exhibits tendered during those proceedings; and

(b) An outline of submissions; and

4. THAT on or before 4.00pm on Friday, 28 August 2009 the respondent file and serve on the appellant an outline of submissions.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On behalf of the Commission In Court Session.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2009 WAIRC 00510

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, DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION AND DIRECTOR GENERAL, DEPARTMENT FOR COMMUNITIES
	APPLICANTS
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 JULY 2009
FILE NO/S	P 13 OF 2009
CITATION NO.	2009 WAIRC 00510

Result Award varied

Order

HAVING heard Ms S Thomas on behalf of the Civil Service Association of Western Australia Incorporated and Mr D Hughes and with him Mr E Rea on behalf of the Department for Child Protection and Department for Communities, 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 23rd day of July 2009.

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

SCHEDULE

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

2. - ARRANGEMENT

10. Casual Employment
11. Salaries
12. Purchased Leave - 44/52 Salary Arrangement
13. Purchased Leave - Deferred Salary Arrangement
14. Salary Packaging Arrangement
15. Annual Increments
16. Hours
17. Higher Duties Allowance
18. Annual Leave
19. Public Holidays
20. Long Service Leave
21. Sick Leave
22. Carers Leave
23. Short Leave
24. Parental Leave
25. Leave Without Pay
26. Study Assistance
27. Bereavement leave
28. Cultural/Ceremonial Leave
29. Blood/Plasma Donors Leave
30. Emergency Service Leave
31. Leave to Attend Union Business
32. Trade Union Training Leave
33. Union Facilities For Union Representatives
34. Defence Force Reserves Leave
35. Witness and Jury Service
36. District Allowance
37. Motor Vehicle Allowance
38. Relieving Allowance
39. Transfer Allowance
40. Travelling Allowance
41. Preservation of Rights
42. Keeping of and Access to Employment Records
43. Notification of Change
44. Deduction of Union Subscriptions
45. Right of Entry and Inspection by Authorised Representatives
46. Copies of Award
47. Establishment of Consultative Mechanisms
48. Access to Information and Resources
49. Dispute Settlement Procedure
50. Expired General Agreement Salaries
51. Named Parties to the Award

Schedule A - Salaries

Schedule B - District Allowance

Schedule C - Motor Vehicle Allowance

Schedule D - Travelling Allowance

Schedule E - Travel Concessions for Annual Leave

Schedule F - Expired General Agreement Salaries

2. Clause 3. – Scope: Delete this clause and insert the following in lieu thereof:

3. - SCOPE

This Award shall apply to all Employees employed by the Director General, Department for Child Protection and/or the Director General, Department for Communities in the capacity of a Family Resource Worker, Welfare Assistant or Parent Helper.

3. Clause 5. – Definitions: Delete this clause and insert the following clause after Clause 4 - Area

5. - TERM OF AWARD

This Award shall operate from 15 August 1991 and shall remain in force for a period of 3 months.

4. Clause 6. – Hours: Delete this clause and insert the following in lieu thereof:

6. - DEFINITIONS

(1) "Casual Employee" means an Employee engaged by the hour for a period not exceeding one four week cycle in any period of engagement, or any Employee employed as a casual on an hourly rate of pay by agreement between the Union and Employer.

(2) "De Facto Partner" means a relationship (other than a legal marriage) between two persons who live together in a 'marriage-like' relationship and includes same sex Partners.

(3) "Director General" means the Director General, Department for Child Protection and/or the Director General, Department for Communities.

(4) "Employee" means Family Resource Worker, Welfare Assistant or Parent Helper.

(5) "Employer" means the Director General, Department for Child Protection and/or the Director General, Department for Communities.

(6) "Fixed Term Employee" means an Employee who is employed on a contract of service of specified duration.

(7) "Partner" means either Spouse or De Facto Partner.

(8) "Part-Time Employment" means regular and continuing employment for a maximum of sixty hours per four week cycle.

(9) "Spouse" means a person who is lawfully married to that person.

(10) "Union" means The Civil Service Association of Western Australia Incorporated (the Union).

5. Clause 8. – Contract of Service: Delete this clause and insert the following in lieu thereof:

8. - CONTRACT OF SERVICE

(1) (a) Every Employee appointed to the employ of an Employer shall be on probation for a period not exceeding six months, unless otherwise determined by the Employer.

However, Employees appointed from the Public Sector who have at least six months' continuous satisfactory service immediately prior to their permanent appointment will not be required to serve a probationary period.

(b) At any time during the period of probation the Employer may annul the appointment and terminate the services of the Employee by the giving of one week's notice by either party or payment in lieu thereof, by either party.

(c) As soon as possible following the expiry of the period of probation the Employer shall:

(i) confirm the appointment; or

(ii) extend the period of probation for up to six months;

(iii) allow the probationary employment to lapse.

(d) Where the Employer extends the period of probationary employment the contract of employment may be terminated as set out in paragraph (b) of this subclause.

(e) The Employer may summarily dismiss an Employee deemed guilty of gross misconduct or neglect of duty and the Employee shall not be entitled to any notice or payment in lieu of notice.

(2) (a) No Employee shall leave the employ of an Employer until the expiration of one month's written notice of the Employee's intention to do so, without the approval of the Employer. An Employee who fails to give the required notice shall forfeit a sum of $500.00. Such monies may be withheld from monies due on termination.

(b) One month's written notice shall be given by the Employer to an Employee whose services are no longer required. Provided that the Employer may pay the Employee one month's salary in lieu of the said notice.

(c) Notwithstanding any of the other provisions contained in this clause a lesser period of notice may be negotiated between the Employer and the Employee.

(d) The Employer may summarily dismiss an Employee deemed guilty of gross misconduct or neglect of duty and the Employee shall not be entitled to any notice or payment in lieu of notice.

(e) An Employee, having attained the age of 55 years shall be entitled to retire from the employ of the Employer.

(3) (a) A part-time Employee shall be entitled to the same salary, leave and other conditions prescribed in this Award for full-time Employees, with payment for paid leave being in the proportion to which the Employee's weekly hours bear to the weekly hours of an Employee engaged full time in that class of work.

(b) The provisions of subclause (2) of this clause shall also apply in respect to part-time Employees.

(4) (a) Notwithstanding the other provisions contained in this clause an Employer may employ Employees for a fixed term.

(b) Employees appointed for a fixed term shall be advised in writing of the terms of the appointment and such advice shall specify the dates of commencement and termination of employment.

(c) The provisions of paragraphs (a), (b), (c) and (d) of subclause (2) of this clause shall also apply in respect to fixed term Employees.

6. Clause 9. – Casual Employees: Delete this clause and insert the following in lieu thereof:

9. - PART-TIME EMPLOYMENT

(1) (a) Each permanent part-time arrangement shall be confirmed in writing and should include the following specifications:

(i) the agreed period of the arrangement; and

(ii) the hours to be worked daily and weekly by the Employee, including starting and finishing times, which shall hereinafter be referred to as "ordinary working hours".

(b) The Employer shall give an Employee one (1) month's notice of any proposed variation to that Employee's ordinary working hours, provided that the Employer shall not vary the Employee's total weekly hours of duty without the Employee's prior written consent, a copy of which shall be forwarded to the Union.

(c) Notwithstanding paragraph (b) of this subclause whenever agreement in writing is reached for a temporary variation to an Employee's ordinary working hours:

(i) Hours worked in excess of ordinary working hours on any day is not to be regarded as overtime but an extension of the contract hours for that day and should be paid at the normal rate of pay.

(ii) Additional days worked, up to a total of five days per week, are also regarded as an extension of the contract and should be paid at the normal rate of pay.

(2) (a) An Employee who is employed on a part-time basis shall be paid a proportion of the appropriate full-time salary as contained in Schedule A. - Salaries of this Award, calculated in accordance with the following formula:

$$\frac{\text{Hours Worked Per Fortnight}}{76} \times \frac{\text{Full-time Fortnightly Salary}}{1}$$

(b) Part-time Employees shall be entitled to annual increments in accordance with Clause 15. - Annual Increments of this Award, subject to meeting the usual performance criteria.

(3) Employees are entitled to the holidays prescribed in Clause 19. - Public Holidays of this Award, without variation of the Employee's fortnightly salary provided the holidays occur on a day which is normally worked.

(4) (a) An Employee shall be granted leave in accordance with Clause 18. - Annual Leave of this Award. Payment to an Employee proceeding on annual leave shall be calculated having regard for any variations to the Employee's ordinary working hours during the accrual period. Payment in such instances shall be calculated as follows:

(i) Where accrued annual leave only is being taken, the ordinary hours worked by the Employee over the accrual period shall be averaged to achieve the average hours worked per fortnight. This average is then applied to the following formula to achieve an average fortnightly rate of pay:

$$\frac{\text{Average Fortnightly Hours Worked}}{76} \times \frac{\text{Appropriate Fortnightly Salary}}{1}$$

(ii) Subject to sub-paragraph (a) (iv) of this subclause, annual leave taken entirely in advance shall be paid according to the salary the Employee would have received had the Employee not proceeded on leave.

(iii) Subject to subparagraph (a) (iv) of this subclause, annual leave which combines both accrued and leave taken in advance, shall be calculated as follows:

(aa) the accrued portion of leave shall be paid at the rate achieved by averaging the hours worked during the accrual period; and

(bb) the portion of leave which is being taken in advance shall be paid according to the salary the Employee would have received had the Employee not proceeded on leave.

(iv) Payment for annual leave taken in advance pursuant to subparagraphs (a) (ii) and (iii) of this subclause, shall be subject to financial reconciliation either at the end of the calendar year or when the Employee ceases employment to take account of any variations in the hours worked by the Employee subsequent to the Employee proceeding on annual leave. This may require further payment by the Employer to the Employee, or repayment by the Employee to the Employer. In all instances the reconciliation should be based on the appropriate fortnightly salary at the time the leave was taken.

(v) An Employee taking annual leave in advance shall be advised of the requirements of this section prior to the Employee proceeding on such leave.

(b) Part-time Employees are entitled to travel concessions pursuant to subclause (8) of Clause 18. - Annual Leave of this Award, on a pro rata basis according to the usual number of hours worked per week.

(c) Travelling time shall be calculated on a pro rata basis according to the number of hours normally worked.

(5) Credits provided in Clause 21. - Sick Leave of this Award shall be pro rated according to the number of hours worked each fortnight. Payment made for sick leave granted in respect of part-time service shall be calculated in accordance with the formula set out in paragraph (4) (a) of this clause.

(6) An Employee shall proceed on long service leave for 13 weeks after seven years part-time service. Payment made for long service leave granted to an Employee in respect of such part-time service shall be adjusted according to the hours worked by the Employee during that part-time service, subject to the following:

(a) If an Employee consistently worked on a part-time basis for a regular number of hours during the whole of the Employee's qualifying service, the Employees shall continue to be paid the salary determined on that basis during the long service leave.

(b) If an Employee has worked a varying number of weekly hours during the period of qualifying service, the payment for long service leave granted in respect of part-time service should be calculated on a salary which bears to the full-time salary of the position occupied by the Employee when taking leave the same proportion that the hours worked bears to average weekly 38 hours.

(7) Subject to Clause 32. - Trade Union Training Leave and Clause 34. - Defence Force Reserves Leave of this Award, part-time Employees shall receive the same entitlement as full-time Employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(8) Subject to Clause 26. - Study Assistance of this Award, part-time Employees are entitled to study leave on the same basis as full-time Employees.

7. Clause 10. – Part-Time Employment: Delete this clause and insert the following in lieu thereof:

10. – CASUAL EMPLOYMENT

(1) A Casual Employee shall be paid for each hour worked at the appropriate salary rate contained in Schedule A - Salaries of this Award, in accordance with the following formula:

$$\frac{\text{Full-time Fortnightly Salary}}{76}$$

With the addition of twenty percent in lieu of annual leave, sick leave, long service leave and payment for public holidays.

(2) Conditions of Employment

(a) Conditions of employment, leave and allowances provided under the provisions of this Award shall not apply to a Casual Employee with the exception of bereavement and unpaid carer's leave. However, where expenses are directly and necessarily incurred by a Casual Employee in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with the provisions of this Award.

(b) Nothing in this clause shall confer "permanent" or "fixed term contract" Employee status to a Casual Employee.

(c) The employment of a Casual Employee may be terminated at any time by the Casual Employee or the Employer giving to the other, one hour's prior notice. In the event of an Employer or Casual Employee failing to give the required notice, one hour's salary shall be paid or forfeited.

(d) A Casual Employee shall be informed that their employment is casual and that they have no entitlement to paid leave, with the exception of bereavement leave before they are engaged.

(3) Caring Responsibilities

(a) Subject to the evidentiary and notice requirements in Clause 22. – Carers Leave of this Award, a Casual Employee shall be entitled to not be available to attend work or to leave work if they need to care for members of their immediate family or household who are sick and require care and support, or who require care due to an unexpected emergency, or the birth of a child.

(b) The Employer and the Casual Employee shall agree on the period for which the Casual Employee will be entitled to not be available to attend work. In the absence of agreement, the Employee is entitled to not be available to attend work for up to 48 hours (ie two days) per occasion. The Casual Employee is not entitled to any payment for the period of non-attendance.

(c) An Employer must not fail to re-engage a Casual Employee because the Casual Employee accessed the entitlements provided for in this subclause. The rights of an Employer to engage or not engage a Casual Employee are otherwise not affected.

8. Clause 11. – Salaries: Delete subclause (2) and insert the following in lieu thereof:

(2) Payment of Salaries

(a) Salaries shall be paid fortnightly but, where the usual payday falls on a public holiday, payment shall be made on the previous working day.

(b) Dividing the annual salary by 313 and multiplying the result by 12 shall compute a fortnight's salary.

(c) The hourly rate shall be computed as one seventy-sixth of the fortnight's salary.

(d) Salaries shall be paid by direct funds transfer to the credit of an account nominated by the Employee at a bank, building society or credit union approved by the Under Treasurer or an Accountable Employee.

(e) Provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement between the Employer and the Union, payment by cheque may be made.

9. Clause 12. – Annual Increments: Delete this clause and insert the following in lieu thereof:

12. - PURCHASED LEAVE - 44/52 SALARY ARRANGEMENT

(1) The Employer and an Employee may agree to enter into an arrangement whereby the Employee can purchase up to eight (8) weeks additional leave.

(2) The Employer will assess each application for a 44/52 salary arrangement on its merits and give consideration to the personal circumstances of the Employee seeking the arrangement.

(3) Where an Employee is applying for purchased leave of between five (5) and eight (8) weeks the Employer will give priority access to those Employees with carer responsibilities.

(4) Access to this entitlement will be subject to the Employee having satisfied the agency's accrued leave management policy.

(5) The Employee can agree to take a reduced salary spread over the 52 weeks of the year and receive the following amounts of purchased leave:

Number of Weeks' Salary Spread Over 52 Weeks	**Number of Weeks' Purchased Leave**
44 weeks	8 weeks
45 weeks	7 weeks
46 weeks	6 weeks
47 weeks	5 weeks
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

(6) The purchased leave will not be able to be accrued. The Employee is to be entitled to pay in lieu of the purchased leave not taken. In the event that the Employee is unable to take such purchased leave, his/her salary will be adjusted on the last pay period in January to take account of the fact that time worked during the year was not included in the salary.

(7) Where an Employee who is in receipt of an allowance provided for in Clause 17. - Higher Duties Allowance of this Award proceeds on any period of purchased leave the Employee shall not be entitled to receive payment of the allowance for any period of purchased leave.

(8) In the event that a part-time Employee's ordinary working hours are varied during the year, the salary paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the Employee's ordinary working hours during the previous year.

10. Clause 13. – Salary Packaging Arrangement: Delete this clause and insert the following in lieu thereof:

13. – PURCHASED LEAVE - DEFERRED SALARY ARRANGEMENT

(1) With the written agreement of the Employer, an Employee may elect to receive, over a four-year period, 80% of the salary they would otherwise be entitled to receive in accordance with this Award.

(2) The Employer will assess each application for deferred salary on its merits and give consideration to the personal circumstances of the Employee seeking the leave.

(3) On completion of the fourth year, an Employee will be entitled to 12 months leave and will receive an amount equal to 80% of the salary they were otherwise entitled to in the fourth year of deferment.

(4) Where an Employee completes four (4) years of deferred salary service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.

(5) An Employee may withdraw from this arrangement prior to completing a four-year period by written notice. The Employee will receive a lump sum payment of salary forgone to that time but will not be entitled to equivalent absence from duty.

(6) The Employer will ensure that superannuation arrangements and taxation effects are fully explained to the Employee by the relevant Employer. The Employer will put any necessary arrangements into place.

Variation of the Arrangements

(7) As an alternative to subclause (5) of this clause, and only by mutual agreement of the Employer and the Employee, the provisions of the deferred arrangement may be varied subject to the following:

(a) the term of the arrangement will not extend beyond that contemplated by this clause,

(b) the variation will not result in any consequential monetary or related gain or loss to either the Employer or the Employee, and

(c) the percentage of salary to apply during the 12 months leave as specified in subclause 3 of this clause will be calculated as 80% of the average ordinary prescribed hours worked over the previous four years.

11. Clause 14. – Purchased Leave – 44/52 Salary Arrangement: Delete this clause and insert the following in lieu thereof:

14. - SALARY PACKAGING ARRANGEMENT

(1) An Employee may, by agreement with the Employer, enter into a salary packaging arrangement in accordance with this clause and Australian Taxation Office requirements.

(2) Salary packaging is an arrangement whereby the entitlements and benefits under this Award, contributing toward the Total Employment Cost (TEC) (as defined in subclause (3) of this clause) of an Employee, can be reduced by and substituted with another or other benefits.

(3) The TEC for salary packaging purposes is calculated by adding the following entitlements and benefits:

(a) the base salary;

(b) other cash allowances;

(c) non cash benefits;

(d) any Fringe Benefit Tax liabilities currently paid; and

(e) any variable components.

(4) Where an Employee enters into a salary packaging arrangement the Employee will be required to enter into a separate written agreement with the Employer setting out the terms and conditions of the salary packaging arrangement.

(5) Notwithstanding any salary packaging arrangement, the salary rate as specified in this Award, is the basis for calculating salary related entitlements specified in this Award.

(6) Compulsory Employer Superannuation Guarantee contributions are to be calculated in accordance with applicable federal and state legislation. Compulsory Employer contributions made to superannuation schemes established under the *State Superannuation Act 2001* are calculated on the gross (pre packaged) salary amount regardless of whether an Employee participates in a salary packaging arrangement with their Employer.

(7) A salary packaging arrangement cannot increase the costs to the Employer of employing an individual.

(8) A salary packaging arrangement is to provide that the amount of any taxes, penalties or other costs for which the Employer or Employee is or may become liable for and are related to the salary packaging arrangement, shall be borne in full by the Employee.

(9) In the event of any increase in taxes, penalties or costs relating to a salary packaging arrangement, the Employee may vary or cancel that salary packaging arrangement.

12. Clause 15. – Purchased Leave – Deferred Salary Arrangement: Delete this clause and insert the following in lieu thereof:

15. - ANNUAL INCREMENTS

(1) Employees shall proceed to the maximum of their salary range by annual increments subject to a satisfactory report on the Employee's level of performance and conduct.

(2) The following procedure will apply prior to the payment of an increment:

(a) Their manager will produce a report on the Employee's performance and conduct no later than 12 months since the Employee's last incremental advance.

(b) Where the report is satisfactory, the increment will be paid.

(c) Where the report is unsatisfactory:

(i) The Employee will be shown the report and required to initial it.

(ii) The Employee will be provided with an opportunity to comment in writing.

(iii) The Employee's comments will be considered immediately by the Employer and a decision made as to whether to approve the payment of the increment or withhold payment for a specific period.

(iv) Where the increment is withheld, the Employer before the expiry of the specified period will complete a further report and provisions paragraph (b) and (c) of this subclause will apply.

(3) The non-payment of an increment will not change the normal anniversary date of any further increment payments.

(4) For the purposes of this clause "continuous service", except where an increment is payable according to age, shall not include:

(a) any period exceeding 14 calendar days during which an Employee is absent on leave without pay. In the case of leave without pay which exceeds 14 calendar days the entire period of such leave without pay is excised in full;

(b) any period which exceeds six months in one continuous period during which an Employee is absent on workers' compensation. Provided that only that portion of such continuous absence which exceeds six months shall not count as "continuous service";

(c) any period which exceeds three months in one continuous period during which an Employee is absent on sick leave without pay. Provided that only that portion of such continuous absence which exceeds three months shall not count as "continuous service".

13. Clause 16. – Annual Leave: Delete this clause and insert the following in lieu thereof:

16. - HOURS

(1) The ordinary working hours for Employees shall not exceed 60 hours per 4 week cycle to be worked Monday to Sunday inclusive.

(2) Where agreement is reached between the Employee and the supervisor more than the maximum of 60 hours in a four week cycle may be worked in which event payment shall be at the ordinary hourly rate for all hours worked unless by agreement in writing between the supervisor and the Employee the hours in excess of 60 in a four week cycle are credited as time off in lieu at ordinary rates in the next monthly period.

14. Clause 17. – Public Holidays: Delete this clause and insert the following in lieu thereof:

17. - HIGHER DUTIES ALLOWANCE

(1) Subject to subclause (2) of this clause an Employee who is directed by the Employer to act in an office which is classified higher than the Employee's own substantive office and who performs the full duties and accepts the full responsibility of the higher office for a continuous period of five (5) consecutive working days or more, shall, subject to the provisions of this clause, be paid an allowance equal to the difference between the Employee's own salary and the salary the Employee would receive if the Employee was permanently appointed to the office in which the Employee is so directed to act.

(2) (a) An Employee who is directed to act in a higher classified office but who is not required to carry out the full duties of the position and/or accept the full responsibilities, shall be paid such proportion of the allowance provided for in subclause (1) of this clause as the duties and responsibilities performed bear to the full duties and responsibilities of the higher office. Provided that the Employee shall be informed, prior to the commencement of acting in the higher classified office, of the duties to be carried out, the responsibilities to be accepted and the allowance to be paid.

(b) The allowance paid may be adjusted during the period of higher duties.

(3) Where the full duties of a higher office are temporarily performed by two (2) or more Employees they shall each be paid an allowance as determined by the Employer.

(4) Where an Employee is directed to act in an office which has an incremental range of salaries such Employee shall be entitled to receive an increase in higher duties allowance equivalent to the annual increment the Employee would have received had the Employee been permanently appointed to such office: provided that acting service with allowances for acting in offices for the same classification or higher than the office during the 18 months preceding the commencement of so acting shall aggregate as qualifying service towards such an increase in the allowance.

(5) Where an Employee who has qualified for payment of higher duties allowance under this clause is required to act in another office or other offices classified higher than the Employee's own for periods less than five (5) working days without any break in acting service, such Employee shall be paid higher duties allowance for such periods: provided that payment shall be made at the highest rate the Employee has been paid during the term of continuous acting or at the rate applicable to the office in which the Employee is currently acting – whichever is the lesser.

(6) Where Employees in receipt of a higher duties allowance proceed on:

(a) a period of annual leave in excess of the normal, such Employees shall only receive payment of such allowance for the period of normal annual leave; and

(b) a period of any other approved leave of absence of more than four (4) weeks, such Employees shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

(7) For the purpose of this clause "normal annual leave" shall mean the annual period of recreation leave as prescribed in Clause 18 - Annual Leave of this Award.

15. Clause 18. – Long Service Leave: Delete this clause and insert the following in lieu thereof:

18. - ANNUAL LEAVE

(1) (a) Each Employee is entitled to four weeks leave for each year of service. Annual leave shall be calculated on a calendar year basis commencing on January 1 in each year.

(b) An Employee may take annual leave during the calendar year in which it accrues, but the time during which the leave may be taken is subject to the approval of the Employer.

(c) An Employee who is first appointed after January 1 is entitled to pro rata annual leave for that year in accordance with the formula contained in subclause (2) of this clause.

(2) Entitlement

(a) An Employee employed after the first day of January in any year is entitled to pro rata annual leave for that year calculated on a daily basis. At the end of each calendar day of the year the Employee will accrue 0.416 hours of paid annual leave provided the maximum accrual will not exceed 152 hours for each completed calendar year of service.

(b) Where Employers have systems in place which record and report pro rata accrual of annual leave entitlements in a manner other than prescribed by this clause, that method of accrual may continue provided the system provides the same accrual over a full year. Employers must ensure that upon the cessation of employment, all pro rata annual leave entitlements accrued are equivalent to the pro rata annual leave entitlement provided by paragraph 18 (2) (a).

(3) Annual leave shall be taken in one period unless otherwise approved by the Employer.

(4) On written application, an Employee shall be paid salary in advance when proceeding on annual leave.

(5) (a) When the convenience of the Employer is served, the Employer may approve the deferment of the commencing date for taking annual leave, but such approval shall only remain in force for a period of one year.

(b) The Employer may renew the approval referred to in paragraph (a) of this subclause for a further period of a year or further periods of a year but so that an Employee does not at any time accumulate more than three years entitlement.

(c) When the convenience of the Employer is served, the Employer may approve the deferment of the commencement date for taking leave so that an Employee accumulates more than three years entitlement, subject to any condition which the Employer may determine.

(d) When an Employee who has received approval to defer the commencement date for taking annual leave under paragraph (a), (b) or (c) of this subclause next proceeds on annual leave, the annual leave first accrued shall be the first leave taken.

(e) To assist Employees in balancing their work and family responsibilities, an Employee may elect, with the consent of the Employer, to accrue and carry forward a maximum of two years annual leave from the date of the entitlement.

(6) An Employee who, during an accrual period was subject to variations in ordinary working hours during the accrual period are less than the Employee's ordinary working hours at the time of commencement of annual leave, may elect to take a lesser period of annual leave calculated by converting the average ordinary working hours during the accrual period to the equivalent ordinary hours at the time of commencement of annual leave.

(7) (a) An Employee whose headquarters are located north of the 26 ° south latitude shall receive an additional five working days' leave on the completion of each 12 months' continuous service in the region.

(b) An Employee who proceeds on annual leave before having completed the necessary year of continuous service may be given approval for the additional five working days' leave provided the leave is taken at the Employer's convenience and provided the Employee returns to that region to complete the necessary service.

(c) Where an Employee has served continuously for at least a year north of the 26 ° south latitude, and leaves the region because of promotion or transfer, a pro rata annual leave credit to be cleared at the Employer's convenience shall be approved on the following basis:

Completed months of continuous service in the region after the initial year's service	1	2	3	4	5	6	7	8	9	10	11
Pro rata additional annual leave (working days)	Nil	Nil	1	1	2	2	2	3	3	4	4

(d) Where payment in lieu of pro rata annual leave is made on the death, resignation or retirement of an Employee in the region, in addition to the payment calculated on a four week basis, payment may be made for the pro rata entitlement contained in paragraph (c) of this subclause.

(8) (a) (i) Employees and their dependants proceeding on annual leave to either Perth or Geraldton from headquarters situated in areas 3, 4, 5 and 6, as defined in Clause 36. - District Allowance of this Award, shall be entitled to the concessions contained in Schedule E. - Travel Concessions for Annual Leave, provided that the Employee has at least 12 months service in these areas.

(ii) An Employee who has less than 12 months service in the abovementioned areas and who is required to proceed on annual leave to suit departmental convenience shall be entitled to the concessions. The concession may also be given to an Employee who proceeds on annual leave before completing the 12 months service provided that the Employee returns to the area to complete the 12 months service at the expiration of the period of leave.

(iii) The mode of travel is to be at the discretion of the Employer.

(iv) Travel concessions not utilised within 12 months of becoming due will lapse.

(b) Where Employees are entitled to a travel concession under subclause (8) of this clause and the Employees' headquarters are situated in District Allowance Areas 3, 4, 5 or 6, a travel concession covering the cost of airfares or motor vehicle allowance up to a maximum amount equivalent to the value of a return fully flexible and refundable airfare to Perth will be provided for each Employee and each of their dependants when proceeding on annual leave to a location other than Perth or Geraldton.

(c) Employees, other than those designated in paragraph (8) (a) of this clause, whose headquarters are situated two hundred and forty kilometres or more from Perth General Post Office and who travel to Perth for their annual leave may be granted by the Employer reasonable travelling time to enable them to complete the return journey.

(9) An Employee who has been permitted to proceed on annual recreation leave and who ceases duty before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion calculated at the rate of salary as at the date the leave was taken, but no refund is required in the event of the death of an Employee.

(10) When computing the annual leave due under this clause, no deduction shall be made from such leave in respect of the period an Employee is on annual leave, observing a public holiday prescribed by this Award, absence through sickness with or without pay. This provision applies except for that portion of an absence that exceeds three months, absence on workers' compensation except for that portion of an absence that exceeds six months, or any period exceeding two weeks during which the Employee is absent on leave without pay.

(11) Notwithstanding the foregoing, but subject to paragraph (5) (e) of this clause, the Employer may direct an Employee to take accrued annual leave and determine the date on which such leave shall commence. Should the Employee not comply with the direction, disciplinary action may be taken against the Employee.

(12) (a) Subject to paragraphs (c) and (g) of this subclause a loading equivalent to 17½% of normal salary is payable to Employees proceeding on annual leave, including accumulated annual leave.

(b) Annual leave commencing in any year and extending without a break into the following year attracts the loading calculated on the salary applicable on the day the leave commenced. The maximum loading payable shall be that applicable on the day the leave is commenced.

(c) The loading payable on approved accumulated annual leave shall be at the rate applicable at the date the leave is commenced. Under these circumstances an Employee can receive up to the maximum loading for the approved accumulated annual leave in addition to the loading for the current year's entitlement.

(d) A pro rata loading is payable on periods of approved annual leave less than four weeks.

(e) The loading is calculated on the rate of salary the Employee receives at the commencement of leave and, where applicable, the salary shall include the following allowances:

(i) District Allowance;

(ii) Personal Allowance;

(iii) Child Allowance paid to Employees whose headquarters are located North of the 26 degrees South latitude.

(f) Part-time Employees shall be paid a pro rata loading at the salary rate applicable.

(g) An Employee who has been permitted to proceed on annual leave and who ceases duty before completing the required continuous service to accrue the leave must refund the value of the unearned pro rata portion. Provided that no refund shall be necessary in the event of the death of an Employee.

(13) Lump Sum Payments

(a) On application to the Employer, a lump sum payment for the money equivalent of any -

(i) accrued annual leave as prescribed by subclause (2) and (4) of this clause shall be made to Employee who resigns, retires, is retired or is dismissed unless the misconduct for which the Employee has been dismissed occurred prior to the completion of the qualifying period , or in respect of an Employee who dies;

(ii) pro rata annual leave shall be made to an Employee who resigns, who retires, is retired or in respect of an Employee who dies, but not an Employee who is dismissed; and

(b) In the case of a deceased Employee, payment shall be made to the estate of the Employee unless the Employee is survived by a legal dependant, approved by the Employer, in which case payment shall be made to the legal dependant.

(c) Where payment in lieu of accrued or pro rata annual leave is made on the death, dismissal, resignation or retirement of an Employee, a loading calculated in accordance with the terms of this clause is to be paid. Provided that no loading shall be payable in respect of pro rata annual leave paid on resignation or where an Employee is dismissed for misconduct.

16. Clause 19. – Sick Leave: Delete this clause and insert the following in lieu thereof:

19. - PUBLIC HOLIDAYS

(1) The following days shall be allowed as holidays with pay:

(a) New Year’s Day, Australia Day, Good Friday, Easter Monday, Christmas Day, Boxing Day, Anzac Day, Sovereign’s Birthday, Foundation Day, Labour Day, provided that the Employer may approve another day to be taken as a holiday in lieu of any of the above mentioned days.

(2) When any of the days mentioned in subclause (1) of this clause falls on a Saturday or on a Sunday, the holiday shall be observed on the next succeeding Monday.

(a) When Boxing Day falls on a Sunday or Monday, the holiday shall be observed on the next succeeding Tuesday.

(b) In each case the substituted day shall be a holiday without deduction of pay and the day for which it is substituted shall not be a holiday.

(3) This clause does not apply to Casual Employees.

17. Clause 20. – Parental Leave: Delete this title and clause and insert the following in lieu thereof:

20. - LONG SERVICE LEAVE

(1) Subject to subclause (4) of this clause an Employee who has completed seven years continuous service shall be entitled to 13 weeks long service leave on full pay.

(2) For each subsequent period of seven years continuous service an Employee shall be entitled to an additional 13 weeks long service leave with pay.

(3) Employees may by agreement with their Employer, clear any accrued entitlement to long service leave in minimum periods of one (1) day.

(4) For the purposes of determining an Employee's long service leave entitlement under the provisions of subclauses (1), and (2) of this clause the expression "continuous service" includes any period during which the Employee is absent with pay but does not include:

(a) any period exceeding two weeks during which the Employee is absent on leave without pay or parental leave without pay, unless the Employer determines otherwise;

(b) any period during which the Employee is taking long service leave entitlement or any portion thereof except in the case of subclause (13) – Cash Out of Accrued Long Service Leave Entitlement, of this clause when the period excised will equate to a full entitlement of 13 weeks;

(c) Any service by an Employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when that prior service had actually entitled the Employee to the long service leave provided under this clause;

(d) Any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave;

(e) Any service of a Cadet whilst undertaking full-time studies.

(5) Any public holiday prescribed in Clause 19. - Public Holidays of this Award, which occurs during the period an Employee is on long service leave shall be treated as part of the long service leave and extra days in lieu thereof shall not be granted.

(6) (a) Long service leave shall be taken within three years of it becoming due, at the convenience of the Employer. Provided that the Employer may approve the deferment of long service leave in exceptional circumstances. Provided further that such exceptional circumstances shall include retirement within five years of the date of entitlement.

(b) Approval to defer the taking of long service leave may be withdrawn or varied at any time by the Employer giving the Employee notice in writing of the withdrawal or variation.

(7) On application to the Employer a lump sum payment for the money equivalent of any:

(a) Long service leave entitlement for continuous service as provided in subclause (1) and subclause (2) of this clause shall be made to an Employee who resigns, retires, is retired or is dismissed or in respect of an Employee who dies;

(b) Pro rata long service leave based on continuous service of a lesser period than that provided in subclause (1) and subclause (2) of this clause for a long service leave entitlement shall be made -

(i) to an Employee who retires at or over the age of 55 years or who is retired on the grounds of ill health, if the Employee has completed not less than 12 months continuous service before the date of retirement;

(ii) to an Employee who, not having resigned, is retired by the Employer for any other cause, if the Employee has completed not less than three years continuous service before the date of retirement; or

(iii) in respect of an Employee who dies, if the Employee has completed not less than 12 months continuous service before the date of death.

(c) in the case of a deceased Employee, payment shall be made to the estate of the Employee unless the Employee is survived by a legal dependant approved by the Employer, in which case payment shall be made to the legal dependant.

(8) The calculation of the amount due for long service leave accrued and for pro rata long service leave shall be made at the rate of salary of an Employee at the date of retirement or resignation or death, whichever applies.

(9) An Employee prior to commencing long service leave may request approval for the substitution of another date for commencement of long service leave and the Employer may approve such substitution.

(10) (a) Notwithstanding the provisions contained in this subclause where an Employee was, immediately prior to being employed in the public authority, employed in the service of the public service in Western Australia or any other state body in Western Australia that Employee shall be entitled to long service leave determined in the manner contained in this subclause. Provided that the period immediately prior to being employed in the public authority and the date the Employee ceased the previous employment described in this subclause does not exceed one week or a further period as determined by the Employer.

(b) (i) The pro rata portion of long service leave to which the Employee would have been entitled to up to the date of appointment shall be calculated in accordance with the provisions that applied to the previous employment referred to. However in calculating that period of pro rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the Employee may become entitled to under this clause;

(ii) the balance of long service leave entitlement of the Employee shall be calculated in accordance with the provisions contained in this clause.

(c) Nothing in this clause confers on any Employee previously employed by those bodies specified in paragraph (10) (a) of this clause any entitlement to a complete period of long service leave that accrued in the Employee's favour prior to the date on which the Employee commenced employment in the public authority.

(11) An Employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may make application to take pro rata long service leave before the date of retirement.

(12) (a) A full time Employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full and part time basis may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full time service.

(b) A full time Employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on a part time basis may elect to take a lesser period of long service leave calculated by converting the part time service to equivalent full time service.

(c) Subject to the Employer's convenience, an Employer may approve an Employee's application to take a complete entitlement of long service leave on full pay or half pay for double the period accrued.

(d) Employees may by agreement with their Employer, access any portion of an accrued entitlement to long service leave on double pay for half the period accrued. In these circumstances the leave actually taken is 50 percent of the accrued entitlement accessed.

(e) Where Employees proceed on long service leave on double pay in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (4) of this clause.

(13) Cash Out of Accrued Long Service Leave Entitlement

(a) Employees may by agreement with their Employer, cash out any portion of an accrued entitlement to long service leave, provided the Employee proceeds on a minimum of ten (10) days annual leave in that calendar year.

(b) Where Employees cash out any portion of an accrued entitlement to long service leave in accordance with this subclause, the entitlement accessed is excised for the purpose of continuous service in accordance with subclause (4) of this clause.

18. Clause 21. – Leave Without Pay: Delete this clause and insert the following in lieu thereof:

21. - SICK LEAVE

(1) For the purposes of this clause "service" shall not include:

(a) any period exceeding 14 calendar days in a continuous period during which an Employee is absent on leave without pay. In the case of leave without pay which exceeds 14 calendar days, the entire period of such leave without pay is excised in full;

(b) any period which exceeds six months in one continuous period during which an Employee is absent on workers compensation. Provided that only that portion of such continuous absence which exceeds six months shall not count as "service";

(c) any period which exceeds three months in one continuous period during which an Employee is absent on sick leave without pay. Provided that only that portion of such continuous absence which exceeds three months shall not count as "service".

(2) In the case of personal illness or injury of an Employee the Employer shall grant the Employee leave of absence in accordance with the provisions contained in this clause.

(3) (a) The basis for determining the entitlement to leave of absence on the grounds of illness which an Employee may be granted shall be ascertained by crediting the Employee concerned with the following sick leave credits, which shall be cumulative:

	Leave On full pay (Hours)	Leave On half pay (Hours)
On date of appointment	38	15.2
On completion of six months continuous service	38	22.8
On completion of 12 months continuous service and on completion of each further period of 12 months continuous service	76	38

(b) A part-time Employee shall be entitled to sick leave credits, pro rata according to the number of hours worked each fortnight, calculated in the following manner:

$$\frac{\text{Hours Worked Per Fortnight}}{76} \times \frac{\text{Accrued Hours of Sick leave for a Full-time Employee}}{1}$$

(c) Payment for sick leave shall be calculated in accordance with the formula prescribed in paragraph (b), of this subclause.

(4) (a) An application for sick leave exceeding two consecutive working days shall be supported by evidence to satisfy a reasonable person.

(b) The amount of sick leave granted without the production of evidence to satisfy reasonable person required in paragraph (a) of this subclause shall not exceed, in the aggregate, 5 working days in any one-credit year.

(5) Where an application for leave is supported by the certificate of a registered medical practitioner, a further certificate from a registered medical practitioner nominated by the Employer may be required and if that certificate does not confirm or substantially confirm the certificate of the medical practitioner, the Employee making the application for sick leave shall pay the fee due to the nominated medical practitioner in respect of the certificate.

(6) Where the Employer has occasion to doubt the cause of illness or the reason for the absence the Employer may arrange for a registered medical practitioner to visit and examine the Employee or may direct the Employee to attend the registered medical practitioner for examination. If the report of the medical practitioner does not confirm that the Employee is ill or if the Employee is not available for examination at the time of the visit of the medical practitioner or if the Employee fails, without reasonable cause to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the Employee.

(7) Where an Employee is ill during the period of annual leave for a period of at least seven consecutive calendar days; or long service leave for a period of at least 14 consecutive calendar days and produces at the time or as soon as possible thereafter medical evidence satisfactory to the Employer that the Employee is or was as a result of the illness confined to the Employee's place of residence or a hospital, the Employer may grant sick leave for the period during which the Employee was so confined and reinstate annual or long service leave equivalent to the period of confinement.

(8) Where an Employee is absent on account of illness and that Employee's entitlement to sick leave on full pay is exhausted, the Employee may elect to convert any part of the entitlement to sick leave on half pay to sick leave on full pay, but so that the Employee's sick leave entitlement on half pay is reduced by two hours for each hour of sick leave on full pay that the Employee receives by the conversion.

(9) An Employee who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.

(10) No sick leave shall be granted with pay if the illness or injury has been caused by the misconduct of the Employee or in any case of absence from duty without sufficient cause.

(11) An Employee, who has resigned, is subsequently reappointed such Employee shall for the purposes of this clause be regarded as a new appointee as from the date of reappointment.

(12) Where an Employee who has been retired on medical grounds resumes duty, sick leave credits at the date of retirement shall be reinstated.

(13) (a) If the Employer has reason to believe that an Employee is in such a state of health as to render him/her a danger to fellow Employees or the public, the Employer may require the Employee to obtain and furnish a report as to the Employee's condition from a registered medical practitioner or may require the Employee to submit him/her for examination by a medical practitioner nominated by the Employer. The fee for any such examination shall be paid by the Employer.

(b) Upon receipt of the medical report, the Employer may direct the Employee to be absent from duty for a specified period or, if already on leave of absence, direct the Employee to continue on leave for a specified period. Such leave shall be regarded as sick leave.

(14) (a) Upon report by a registered medical practitioner that, by reason of contact with a person suffering from an infectious disease and through the operation of restrictions imposed by Commonwealth or State law in respect of that disease, an Employee is unable to attend for duty, the Employee concerned may be granted sick leave or, at the option of the Employee, the whole or any portion of the leave may be deducted from accrued annual leave or long service leave;

(b) Leave granted under paragraph (a) of this subclause shall not be granted for any period beyond the earliest date at which it would be practicable for the Employee to resume duty, having regard to the restrictions imposed by law.

(15) Where an Employee suffers a disability within the meaning of Section 5 of the Workers' Compensation and Assistance Act 1981 which necessitates that the Employee be absent from duty, sick leave with pay shall be granted to the extent of sick leave credits held by the Employee. In accordance section 80 (2) of the *Workers' Compensation and Assistance Act 1981* where the claim for Workers' Compensation is decided in favour of the Employee sick leave credits are to be reinstated and the period of absence granted as sick leave without pay.

(16) (a) An Employee who produces a certificate from the Department of Veterans' Affairs stating that the Employee suffers from war caused illness, may be granted special sick leave credits of 15 working days per annum on full pay in respect of that war caused illness. These credits shall accumulate up to a maximum credit of 45 working days, and shall be recorded separately to the Employee's normal sick leave credits.

(b) Every application for sick leave for war caused illness shall be supported by a certificate from a registered medical practitioner as to the nature of the illness.

(17) Where an Employee was, immediately prior to being employed was employed in the service of the Public Service of Western Australia or any other State body of Western Australia and the period between the date when the Employee ceased previous employment and the date of commencing employment in the public authority does not exceed one week or such other period as approved by the Employer, the Employer may credit that Employee additional sick leave credits up to those held at the date the Employee ceased previous employment.

19. Clause 22. – Study Leave: Delete this clause and insert the following in lieu thereof:

22. - CARERS LEAVE

(1) An Employee is entitled to use, each year, up to five (5) days of the Employee's sick leave entitlement per year to be the primary care giver of a member of the Employee's family or household who is ill or injured and in need of immediate care and attention.

(2) Employees shall, wherever practical, give the Employer notice of the intention to take carers leave and the estimated length of absence. If it is not practicable to give prior notice of absence Employees shall notify the Employer as soon as possible on the first day of absence.

(3) Employees shall provide, where required by the Employer, evidence to establish the requirement to take carers leave. An application for carers leave exceeding two (2) consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

(4) The definition of family shall be a person who is related to the Employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of, the Employee.

(5) Carers leave may be taken on an hourly basis or part thereof

20. Clause 24. – Carers Leave: Delete this clause and insert the following in lieu thereof:

24. – PARENTAL LEAVE

(1) Definitions

"Employee" includes full time, part time, permanent and fixed term contract Employees.

"Partner" means a person who is a Spouse or De Facto Partner.

"Primary Care Giver" is the Employee who will assume the principal role for the care and attention of a child/children. The Employer may require confirmation of primary care giver status.

"Public sector" means an employing authority as defined in Section 5 of the *Public Sector Management Act 1994.*

"Replacement Employee" is an Employee specifically engaged to replace an Employee proceeding on parental leave.

(2) Entitlement to Parental and Partner Leave

(a) An Employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

(i) birth of a child to the Employee or the Employee's Partner; or

(ii) adoption of a child who is not the child or the stepchild of the Employee or the Employee's Partner; is under the age of five (5); and has not lived continuously with the Employee for six (6) months or longer.

(b) An Employee identified as the primary care giver of a child and who has completed twelve months continuous service in the Western Australian public sector shall be entitled to the following amounts of paid parental leave which will form part of the 52 week entitlement provided in paragraph (a) of this subclause:

(i) eight (8) weeks paid parental leave until 30 June 2006;

(ii) ten (10) weeks paid parental leave from 1 July 2006;

(iii) twelve (12) weeks paid parental leave from 1 July 2007; and

(iv) fourteen (14) weeks paid parental leave from 1 July 2008.

(c) An Employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the Employee would otherwise be entitled.

(d) A pregnant Employee can commence the period of paid parental leave any time up to six (6) weeks before the expected date of birth and no later than four (4) weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four (4) weeks after the birth or placement of the child.

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in paragraphs (2)(b) and (2)(c) above.

(f) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between Partners assuming the role of primary care giver.

(g) Parental leave may only be taken concurrently by an Employee and his or her Partner as provided for in subclause (3) or under special circumstances with the approval of the Employer.

(h) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(i) An Employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(j) An Employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

(3) Partner Leave

(a) An Employee who is not a primary care giver shall be entitled to a period of unpaid Partner leave of up to one (1) week at the time of the birth of a child/children to his or her Partner. In the case of adoption of a child this period shall be increased to up to three (3) weeks unpaid leave.

(b) The Employee may request to extend the period of unpaid Partner leave up to a maximum of eight weeks.

(4) Birth of a child

(a) An Employee shall provide the Employer with a medical certificate from a registered medical practitioner naming the Employee, or the Employee's Partner confirming the pregnancy and the estimated date of birth.

(b) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.

(5) Adoption of a child

(a) An Employee seeking to adopt a child shall be entitled to two (2) days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The Employee may take any paid leave entitlement in lieu of this leave.

(b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

(6) Other leave entitlements

(a) An Employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(b) Subject to all other leave entitlements being exhausted an Employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two (2) years.

(c) The Employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the Employer's business. Such grounds might include:

(i) cost;

(ii) lack of adequate replacement staff;

(iii) loss of efficiency; and

(iv) the impact on customer service.

(d) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both Partners work for the Employer the total combined period of leave without pay following parental leave will not exceed two (2) years.

(e) An Employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in paragraph (a) and (f) of this subclause.

(f) Should the birth or adoption result in other than the arrival of a living child, the Employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(g) Where a pregnant Employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the Employee may take any paid sick leave to which the Employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

(7) Notice and Variation

(a) An Employee shall give not less than four (4) weeks notice in writing to the Employer of the date the Employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(b) An Employee seeking to adopt a child shall not be in breach of paragraph (7)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An Employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four (4) weeks written notice is provided.

(8) Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant Employee make it inadvisable for the Employee to continue in her present duties, the duties shall be modified or the Employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

(9) Communication during Parental Leave

(a) Where an Employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the Employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the Employee held before commencing parental leave; and

(ii) provide an opportunity for the Employee to discuss any significant effect the change will have on the status or responsibility level of the position the Employee held before commencing parental leave.

(b) The Employee shall take reasonable steps to inform the Employer about any significant matter that will affect the Employee's decision regarding the duration of parental leave to be taken, whether the Employee intends to return to work and whether the Employee intends to return to work on a part-time basis.

(c) The Employee shall also notify the Employer of changes of address or other contact details which might affect the Employer's capacity to comply with paragraph (a) of this subclause.

(10) Replacement Employee

Prior to engaging a replacement Employee the Employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the Employee on parental leave.

(11) Return to Work

(a) An Employee shall confirm the intention to return to work by notice in writing to the Employer not less than four (4) weeks prior to the expiration of parental leave.

(b) An Employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the Employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the Employee was transferred to a safe job the Employee is entitled to return to the position occupied immediately prior to transfer.

(c) An Employee may return on a part time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 9. – Part-Time Employment of this Award.

(d) Employees who return to work on a part time basis have access to the right of reversion provisions of Clause 9. – Part-Time Employment of this Award.

(12) Effect of Parental Leave on the Contract of Employment

(a) An Employee employed for a fixed term contract shall have the same entitlement to parental leave, however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes of this Award. During paid parental leave at half pay all entitlements will accrue as if the Employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of Employees but shall not be taken into account in calculating the period of service for any purpose of this Award.

(d) An Employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with subclause (2) of Clause 8. – Contract of Service of this Award.

(e) An Employer shall not terminate the employment of an Employee on the grounds of the Employee's application for parental leave or absence on parental leave but otherwise the rights of the Employer in respect of termination of employment are not affected.

21. Clause 25. – Bereavement Leave: Delete this clause and insert the following in lieu thereof:

25. - LEAVE WITHOUT PAY

(1) Subject to the provisions of subclauses (2) and (3) of this clause, the Employer may grant an Employee leave without pay for any period and is responsible for that Employee on their return.

(2) Subject to the provisions of subclause (3) of this clause every application for leave without pay will be considered on its merits and may be granted provided that the following conditions are met:

(a) The work of the department is not inconvenienced; and

(b) All other leave credits of the Employee are exhausted.

(3) An Employee shall, upon request be entitled to two days unpaid personal (caring) leave.

(4) An Employee on a fixed term contract may not be granted leave without pay for any period beyond that Employee's approved period of engagement.

(5) Any period that exceeds two weeks during which an Employee is on leave of absence without pay shall not, for any purpose, be regarded as part of the period of service of that Employee.

22. Clause 26. – Cultural/Ceremonial Leave: Delete this clause and insert the following in lieu thereof:

26. – STUDY ASSISTANCE

(1) (a) To ensure the maintenance of a trained public sector an Employer may provide an Employee with paid study leave and/or financial assistance for study purposes in accordance with the provisions of this clause.

(b) Employees are not eligible for study assistance if they have previously received study assistance for an approved course from their Employer. Further study assistance towards additional qualifications may, however, be granted in special cases, at the discretion of the Employer.

(2) Study Leave

(a) An Employee may be granted time off with pay for study purposes at the discretion of the Employer.

(b) In every case the approval of time off to attend lectures and tutorials will be subject to:

(i) agency convenience;

(ii) Employees undertaking an acceptable formal study load in their own time;

(iii) Employees making satisfactory progress with their studies;

(iv) the course being an approved course as defined by subclause (5) of this clause;

(v) the course being of value to the agency; and

(vi) the Employer's discretion when the course is only relevant to the Employee's career in the service and being of value to the State.

(c) Part-time Employees are entitled to study leave on the same basis as full time Employees, with their entitlement calculated on a pro rata basis. Employees working shift work or on fixed term contracts have the same access to study leave as all other Employees.

(d) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.

(e) Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed in paragraph 26 (2) (d).

(f) Where an Employee is undertaking approved study via distance education and/or is not required to attend formal classes, an Employer may allow the Employee to access study leave up to the maximum annual amount allowed in paragraph 26 (2) (d).

(g) Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

(h) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the Employee's own time, except in special cases such as where the Employee is in the final year of study and requires less time to complete the course, or the Employee is undertaking the recommended part-time year or stage and this does not entail five hours formal study.

(i) In cases where Employees are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.

(j) In agencies which are operating on flexi-time, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.

(k) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the Employee's normal place of work.

(l) An Employee shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the Employer may decide otherwise.

(m) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.

(n) An Employee performing service with the Australian Defence Force is not entitled to study leave for any period of service with the Australian Defence Force that they receive defence force reserves leave as provided for by Clause 34. – Defence Force Reserves Leave of this Award.

(o) A service agreement or bond will not be required.

(3) Financial Assistance

(a) An Employer may reimburse an Employee for the full or any part of any reasonable cost of enrolment fees, Higher Education Contribution Surcharge, compulsory text books, compulsory computer software and other necessary study materials for studies commenced during their employment.

(b) Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of enrolment and costs incurred, and the remaining half shall be reimbursed following production of written evidence of successful completion of the subject for which reimbursement has been claimed.

(c) The Employer and Employee may agree to alternative reimbursement arrangements.

(4) Cadets and Trainees

(a) Agencies are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a university or college of advanced education. Employees who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(b) This assistance does not include the cost of textbooks or Guild and Society fees.

(c) An Employee who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

(5) Approved Courses for Study Purposes

(a) For the purposes of subclauses (2) and (3) of this clause, the following are approved courses:

(i) Degree or associate diploma courses at a university within the Australia;

(ii) Degree or diploma courses at an authorised non-university institution;

(iii) Diploma courses provided by registered training organisations, including TAFE;

(iv) Two-year full time certificate courses provided by registered training organisations, including TAFE;

(v) Courses recognised by the National Authority for the Accreditation of translators and Interpreters (NAATI) in a language relevant to the needs of the public sector; and

(vi) Secondary courses leading to the Tertiary Entrance Examination or courses preparing students for the mature age entrance conducted by the Tertiary Institutions Service Centre.

(b) For the purposes of paragraph 26 (5) (a):

(i) The term ‘university’ includes recognised Australian universities and recognised overseas universities as defined by the *Higher Education Act 2004* (WA);

(ii) An authorised non-university institution is a non-university institution that is authorised under the *Higher Education Act 2004* (WA) to provide a higher education course; and

(iii) A registered training organisation is an organisation that is registered with the Training Accreditation Council or equivalent registering authority and complies with the nationally agreed standards set out in the Australian Quality Training Framework (AQTF).

(c) An Employee who has completed a diploma through TAFE is eligible for study assistance to undertake a degree course at a university within Australia or an authorised non-university institution.

(d) An Employee who has completed a two year full time certificate through TAFE is eligible for study assistance to undertake a diploma course specified in subparagraph 26 (5) (a) (iii) or a degree or diploma course specified in subparagraphs 26 (5) (a) (i) or (ii).

(6) Full Time Study

(a) Subject to the provisions of paragraph 26 (6) (b), the Employer may grant an Employee full time study leave with pay to undertake:

(i) post graduate degree studies at Australian or overseas tertiary education institutions; or

(ii) study tours involving observations and/or investigations; or

(iii) a combination of postgraduate studies and study tour.

(b) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:

(i) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclauses (2) and (5) of this clause and Clause 25 - Leave Without Pay.

(ii) It must be a highly specialised course with direct relevance to the Employee’s profession.

(iii) It must be highly relevant to the agency’s corporate strategies and goals.

(iv) The expertise or specialisation offered by the course of study should not already be available through other Employees employed within the agency.

(v) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an Employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.

(vi) A fixed term contract Employee may not be granted study leave with pay for any period beyond that Employee's approved period of engagement.

(c) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.

(d) Where an outside award is granted and the studies to be undertaken are considered highly desirable by an Employer, financial assistance to the extent of the difference between the Employee's normal salary and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the Employer.

(e) The Employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.

(f) Where recipients are in receipt of a living allowance, this amount should be deducted from the Employee's salary for that period.

(g) Where the Employer approves full time study leave with pay the actual salary contribution forms part of the agency's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.

(h) Where study leave with pay is approved and the Employer also supports the payment of transit costs and/or an accommodation allowance, the Employer will gain approval for the transit and accommodation costs as required.

(i) Where Employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the Employer together with some local transit and accommodation expenses providing it meets the requirements of paragraph 26 (6) (b). Each case is to be considered on its merits.

(j) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for Employees under the award.

23. Clause 27. – Blood/Plasma Donors Leave: Delete this clause and insert the following in lieu thereof:

27. - BEREAVEMENT LEAVE

(1) Employees including casuals shall on the death of:

the Spouse or de-facto Partner of the Employee;

the child, step-child or grandchild of the Employee;

the parent, step-parent or grandparent of the Employee;

the brother, sister, step brother or step sister; or

any other person who, immediately before that person's death, lived with the Employee as a member of the Employee's household;

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an Employee the Employer may exercise a discretion to grant bereavement leave to an Employee in respect of some other person with whom the Employee has a special relationship.

(2) The two (2) days need not be consecutive.

(3) Bereavement leave is not to be taken during any other period of leave.

(4) Payment of such leave may be subject to the Employee providing evidence of the death or relationship to the deceased, satisfactory to the Employer.

(5) An Employee requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the Employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the Employee is eligible, have immediate access to annual leave and/or accrued long service leave in weekly multiples and/or leave without pay provided all accrued leave is exhausted.

Travelling time for Regional Employees

(6) Subject to prior approval from the Employer, an Employee entitled to bereavement leave and who, as a result of such bereavement, travels to a location within Western Australia that is more than 240 km from their workplace will be granted paid time off for the travel period undertaken in the Employee's ordinary working hours up to a maximum of 15.2 hours per bereavement. The Employer will not unreasonably withhold approval.

(7) The Employer may approve additional paid travel time within Western Australia where the Employee can demonstrate to the satisfaction of the Employer that more than two days travel time is warranted.

(8) The provisions of subclause (6) of this clause are not available to Employees whilst on leave without pay or sick leave without pay.

(9) The provisions of subclauses (6) and (7) of this clause apply as follows.

(a) An Employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent Employee for each full year of service and pro rata for any residual portion of employment.

(b) An Employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro rata basis for the period of employment.

(c) A part time Employee shall be entitled to the same entitlement as a full time Employee for the period of employment, but on a pro rata basis according to the number of ordinary hours worked each fortnight.

(d) For Casual Employees, the provisions apply to the extent of their agreed working arrangements.

24. Clause 28. – Emergency Service Leave: Delete this clause and insert the following in lieu thereof:

28. - CULTURAL/CEREMONIAL LEAVE

(1) Cultural/ceremonial leave shall be available to all Employees.

(2) Such leave shall include leave to meet the Employee's customs, traditional law and to participate in cultural and ceremonial activities.

(3) Employees are entitled to time off without loss of pay for cultural /ceremonial purposes, subject to agreement between the Employer and Employee and sufficient leave credits being available.

(4) The Employer will assess each application for ceremonial /cultural leave on its merits and give consideration to the personal circumstances of the Employee seeking the leave.

(5) The Employer may request reasonable evidence of the legitimate need for the Employee to be allowed time off.

(6) Cultural/ceremonial leave may be taken as whole or part days off. Each day or part thereof, shall be deducted from:

(a) the Employee's annual leave entitlements

(b) the Employee's accrued long service leave entitlements, but in full days only.

(c) accrued days off or time in lieu; or

(d) short leave when entitlements under paragraphs (a), (b) and (c) of this subclause have been fully exhausted.

(7) Time off without pay may be granted by arrangement between the Employer and the Employee for cultural/ceremonial purposes.

25. Clause 29. – Leave to Attend Association Business: Delete this clause and insert the following in lieu thereof:

29. - BLOOD/PLASMA DONORS LEAVE

(1) Subject to operational requirements, Employees shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:

(a) prior arrangements with the supervisor has been made and at least two (2) days' notice has been provided; or

(b) the Employee is called upon by the Red Cross Blood Centre.

(2) The notification period shall be waived or reduced where the supervisor is satisfied that operations would not be unduly affected by the Employee's absence.

(3) The Employee shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.

(4) Employees shall be entitled to two (2) hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

26. Clause 30. – Trade Union Training Leave: Delete this clause and insert the following in lieu thereof:

30. - EMERGENCY SERVICE LEAVE

(1) Subject to operational requirements, paid leave of absence shall be granted by the Employer to an Employee who is an active volunteer member of State Emergency Service Units, St John Ambulance Brigade, Volunteer Fire and Rescue Service Brigades, Bush Fire Brigades, Volunteer Marine Rescue Services Groups or FESA Units, in order to allow for attendance at emergencies as declared by the recognised authority.

(2) The Employer shall be advised as soon as possible by the Employee, the emergency service, or other person as to the absence and, where possible, the expected duration of leave.

(3) The Employee must complete a leave of absence form immediately upon return to work.

(4) The application form must be accompanied by a certificate from the emergency organisation certifying that the Employee was required for the specified period.

(5) An Employee, who during the course of an emergency, volunteers their services to an emergency organisation, shall comply with subclauses (2), (3) and (4) of this clause.

27. Clause 31. – Union Facilities for Union Representatives: Delete this clause and insert the following in lieu thereof:

31. - LEAVE TO ATTEND UNION BUSINESS

(1) (a) The Employer shall grant paid leave during ordinary working hours to an Employee:

(i) who is required to give evidence before any Industrial Tribunal;

(ii) who as an Union nominated representative is required to any attend any negotiations and / or proceedings before an Industrial tribunal and / or meetings with ministers of the Crown, their staff or any other representative of Government;

(iii) when prior agreement between the Union and the Employer has been reached for the Employee to attend official Union meetings preliminary to negotiations and / or industrial tribunal proceedings;

(iv) who as an Union-nominated representative is required to attend joint Union/management consultative committees or working parties.

(b) The granting of leave pursuant to paragraph (a) of this subclause shall only be approved,

(i) where an application for leave has been submitted by an Employee a reasonable time in advance;

(ii) for the minimum period necessary to enable the Union business to be conducted or evidence to be given;

(iii) for those Employees whose attendance is essential;

(iv) when the operation of the organisation is not being unduly affected and the convenience of the Employer impaired.

(2) (a) A leave of absence provided under this clause will be granted at the ordinary rate of pay.

(b) The Employer shall not be liable for any expenses associated with an Employee attending to Union business.

(c) Leave of absence provided under this clause shall include any necessary travelling time in normal working hours.

(3) (a) Nothing in this clause shall diminish the existing arrangements relating to the granting of paid leave for Union business.

(b) The provisions of this clause shall not apply to special arrangements made between the parties which provide for unpaid leave for Employees to conduct Union business.

(4) The provisions of this clause shall not apply when an Employee is absent from work without the approval of the Employer.

28. Clause 32. – Defence Force Reserves Leave: Delete this clause and insert the following in lieu thereof:

32. - TRADE UNION TRAINING LEAVE

(1) Subject to departmental convenience and the provisions of this clause:

(a) The Employer shall grant paid leave of absence to Employees who are nominated by the Union to attend short courses relevant to the public sector or the role of Union workplace representative, conducted by the Union.

(b) The Employer shall grant paid leave of absence to attend similar courses or seminars as from time to time approved by agreement between the Employer and the Union.

(2) An Employee shall be granted up to a maximum of five (5) days paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five (5) days and up to ten (10) days may be granted in any one calendar year provided that the total leave being granted in that year and in the subsequent year does not exceed ten (10) days.

(3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.

(b) Where a Public Holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.

(c) Subject to paragraph (a) of this subclause, shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.

(d) Part-time Employees shall receive the same entitlement as full time Employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(4) (a) Any application by an Employee shall be submitted to the Employer for approval at least four weeks before the commencement of the course unless the Employer agrees otherwise.

(b) All applications for leave shall be accompanied by a statement from the Union indicating that the Employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the authority, which is conducting the course.

(5) A qualifying period of twelve months service shall be served before an Employee is eligible to attend courses or seminars of more than a half-day duration. The Employer may, where special circumstances exist, approve an application to attend a course or seminar where an Employee has less than twelve months service.

(6) (a) The Employer shall not be liable for any expenses associated with an Employee's attendance at trade union training courses.

(b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

29. Clause 33. – Witness and Jury Service: Delete this clause and insert the following in lieu thereof:

33. - UNION FACILITIES FOR UNION REPRESENTATIVES

(1) The Employer recognises the rights of the Union to organise and represent its members. Union representatives in the agency have a legitimate role and function in assisting the Union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, agency and Union electorate.

(2) The Employer recognises that, under the Union's rules, Union representatives are members of an Electorate Delegates Committee representing members within a Union electorate. A Union electorate may cover more than one agency.

(3) The Employer will recognise Union representatives in the agency and will allow them to carry out their role and functions.

(4) The Union will advise the Employer in writing of the names of the Union representatives in the agency.

(5) The Employer shall recognise the authorisation of each Union representative in the agency and shall provide them with the following:

(a) Paid time off from normal duties to perform their functions as a Union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the electorate delegates committee and to attend Union business in accordance with Clause 31. - Leave to Attend Union Business of this Award.

(b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal agency protocols.

(c) A noticeboard for the display of Union materials including broadcast email facilities.

(d) Paid access to periods of leave for the purpose of attending union training courses in accordance with Clause 32 - Trade Union Training Leave of this Award. Country representatives will be provided with appropriate travel time.

(e) Notification of the commencement of new Employees, and as part of their induction, time to discuss the benefits of union membership with them.

(f) Access to awards, agreements, policies and procedures.

(g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.

(6) The Employer recognises that it is paramount that Union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a Union representative.

30. Clause 34. – District Allowance: Delete this clause and insert the following in lieu thereof:

34. - DEFENCE FORCE RESERVES LEAVE

(1) The Employer must grant leave of absence for the purpose of Defence service to an Employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.

(2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.

(3) Application for leave of absence for Defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the Employee shall provide a certificate of attendance to the Employer.

(4) Paid Leave

(a) An Employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.

(b) Part-time Employees shall receive the same paid leave entitlement as full-time Employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(c) On written application, an Employee shall be paid salary in advance when proceeding on such leave.

(d) Casual Employees are not entitled to paid leave for the purpose of Defence service.

(e) An Employee is entitled to a period of leave, not exceeding 16 calendar days, in any period of twelve months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the Employee and the Defence Force payments to which the Employee is entitled if such payments do not exceed normal salary. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to excluded and no account is to be taken of the value of any board or lodging provided for the Employee.

(5) Unpaid Leave

(a) Any leave for the purpose of Defence service that exceeds the paid entitlement prescribed in subclause (4) if this clause shall be unpaid.

(b) Casual Employees are entitled to unpaid leave for the purpose of Defence service.

(6) Use of Other Leave

(a) An Employee may elect to use annual or long service leave credits for some or all of their absence on Defence service, in which case they will be treated in all respects as if on normal paid leave.

(b) An Employer cannot compel an Employee to use annual leave or long service leave for the purpose of Defence service.

31. Clause 35. – Motor Vehicle Allowance: Delete this clause and insert the following in lieu thereof:

35. - WITNESS AND JURY SERVICE

Witness

(1) An Employee subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify the manager/supervisor who shall notify the Employer.

(2) Where an Employee is subpoenaed or called as a witness to give evidence in an official capacity that Employee shall be granted by the Employer leave of absence with pay, but only for such period as is required to enable the Employee to carry out duties related to being a witness. If the Employee is on any form of paid leave, the leave involved in being a witness will be reinstated, subject to the satisfaction of the Employer. The Employee is not entitled to retain any witness fee but shall pay all fees received into Consolidated Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the Employer.

(3) An Employee subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses as soon as practicable after the default, notify the Employer.

(4) An Employee subpoenaed or called, as a witness on behalf of the Crown, not in an official capacity shall be granted leave with full pay entitlements. If the Employee is on any form of paid leave, this leave shall not be reinstated as such witness service is deemed to be part of the Employee's civic duty. The Employee is not entitled to retain any witness fees but shall pay all fees received into Consolidated Fund.

(5) An Employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses (2) and (4) of this clause shall be granted leave of absence without pay except when the Employee makes an application to clear accrued leave in accordance with Award provisions.

Jury

(6) An Employee required to serve on a jury shall as soon as practicable after being summoned to serve, notify the supervisor/manager who shall notify the Employer.

(7) An Employee required to serve on a jury shall be granted by the Employer leave of absence on full pay, but only for such period as is required to enable the Employee to carry out duties as a juror.

(8) An Employee granted leave of absence on full pay as prescribed in subclause (6) of this clause is not entitled to retain any juror's fees but shall pay all fees received into Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the Employer.

32. Clause 36. – Travelling Allowance: Delete this clause and insert the following in lieu thereof:

36. - DISTRICT ALLOWANCE

(1) For the purposes of this clause the following terms shall have the following meaning:

"dependant" in relation to an Employee means:

(a) a Partner; or

(b) where there is no Partner , a child or any other relative resident within the State who rely on the Employee for their main support; who does not receive a district or location allowance of any kind.

"partial dependant" in relation to an Employee means:

(i) a Partner; or

(ii) where there is no Partner, a child or any other relative resident within the State who rely on the Employee for their main support; who receives a district or location allowance of any kind less than that applicable to an Employee without dependants under any award, agreement or other provision regulating the employment of the partial dependant.

(2) An Employee who is employed on a part-time basis shall be entitled to district allowance on a pro rata basis. The allowance shall be determined by calculating the hours worked by the Employee as a proportion of the full-time hours prescribed by this award. That proportion of the appropriate allowance shall be payable to the Employee.

(3) (a) For the purposes of this clause, the boundaries of the various districts shall be as described hereunder and as delineated on the plan at Part 1 of Schedule B. - District Allowance of this Award.

(b) For the purposes of this clause, a district shall mean:

(i) The area within a line commencing on the coast; thence east along latitude 28 ° to a point north of Tallering Peak, thence due south to Tallering Peak; thence southeast to Mt Gibson and Burracoppin; thence to a point southeast at the junction of latitude 32 ° and longitude 119 °; thence south along longitude 119 ° to coast.

(ii) That area within a line commencing on the south coast at longitude 119 ° then east along the coast to longitude 123 °; then north along longitude 123 ° to a point on latitude 30 °; thence west along latitude 30 ° to the boundary of No 1 District.

(iii) The area within a line commencing on the coast at latitude 26 °; then along latitude 26 ° to longitude 123 °; thence south along longitude 123 ° to the boundary of No 2 District.

(iv) The area within a line commencing on the coast at latitude 24 °; thence east to the South Australian Border; thence south to the coast; thence along the coast to longitude 123 ° thence north to the intersection of latitude 26 °; thence west along latitude 26 ° to the coast.

(v) That area of the State situated between the latitude 24 ° and a line running east from Carnot Bay to the Northern Territory.

(vi) That area of the State north of a line running east from Carnot Bay to the Northern Territory Border.

(4) An Employee shall be paid a district allowance at the standard rate prescribed in Column II of Schedule B - District Allowance, to this Award, for the district in which the Employee's headquarters is located. Provided that where the Employee's headquarters is situated in a town or place specified in Column III of Schedule B. - District Allowance, the Employee shall be paid a district allowance at the rate appropriate to that town or place as prescribed in Column IV of Schedule B - District Allowance of this Award.

(5) An Employee who has a dependant shall be paid double the district allowance prescribed by subclause (4) of this clause for the district, town or place in which the Employee's headquarters is located.

(6) Where an Employee has a partial dependant the total district allowance payable to the Employee shall be the district allowance prescribed by subclause (4) of this clause plus an allowance equivalent to the difference between the rate of district or location allowance the partial dependant receives and the rate of district or location allowance the partial dependant would receive if he or she was employed in a full-time capacity under the Award, Agreement or other provision regulating the employment of the partial dependant.

(7) When an Employee is on approved annual recreational leave, the Employee shall for the period of such leave, be paid the district allowance to which he or she would ordinarily be entitled.

(8) When an Employee is on long service leave or other approved leave with pay (other than annual recreational leave), the Employee shall only be paid district allowance for the period of such leave if the Employee, dependant/s or partial dependant/s remain in the district in which the Employee's headquarters are situated.

(9) When an Employee leaves his or her district on duty, payment of any district allowance to which the Employee would ordinarily be entitled shall cease after the expiration of two weeks unless the Employee's dependant/s or partial dependant/s remain in the district or as otherwise approved by the Employer.

(10) Except as provided in subclause (9) of this clause, a district allowance shall be paid to any Employee ordinarily entitled thereto in addition to reimbursement of any travelling, transfer or relieving expenses.

(11) Where an Employee whose headquarters is located in a district in respect of which no allowance is prescribed in Schedule B - District Allowance of this Award, is required to travel or temporarily reside for any period in excess of one month in any district or districts in respect of which such allowance is so payable, then notwithstanding the Employee's entitlement to any such allowance provided by Clause 40. - Travelling Allowance of this Award, the Employee shall be paid for the whole of such a period a district allowance at the appropriate rate prescribed by subclauses (3), (4) or (5) of this clause, for the district in which the Employee spends the greater period of time.

(12) When an Employee is provided with free board and lodging by the Employer the allowance shall be reduced to two-thirds of the allowance the Employee would ordinarily be entitled to under this clause.

(13) District Allowance is payable to Casual Employees on an hourly rate basis in accordance with the following formula:

$$\frac{\text{Appropriate Annual District Allowance Rate}}{1} \times \frac{12}{313} \times \frac{1}{76}$$

(14) The rates expressed in Schedule B – District Allowance of this Award shall be adjusted every twelve (12) months, effective from the first pay period to commence on or after the first day of July in each year, in accordance with the official Consumer Price Index (CPI) for Perth, as published for the preceding twelve (12) months at the end of March quarter by the Australian Bureau of Statistics.

33. Clause 37. – Higher Duties Allowance: Delete this clause and insert the following in lieu thereof:

37. - MOTOR VEHICLE ALLOWANCE

(1) For the purposes of this clause the following expressions shall have the following meaning:

"a year" means 12 months commencing on the first day of July and ending on the thirtieth day of June next following.

"metropolitan area" means that area within a radius of 50 kilometres from the Perth Railway Station.

"southwest land division" means the southwest land division as defined by schedule 6 Section 1 of the *Land Administration Act, 1997* excluding the area contained within the metropolitan area.

"rest of the state" means that area south of 23.5 degrees south latitude, excluding the metropolitan area and the southwest land division.

"term of employment" means a requirement made known to the Employee at the time of applying for the position by way of publication in the advertisement for the position, written advice to the Employee contained in the offer for the position or oral communication at interview by interviewing Employee and such requirement is accepted by the Employee either in writing or orally.

"qualifying service" shall include all service in positions where there is a requirement as a term of employment to supply and maintain a motor vehicle for use on official business but shall exclude all absences which effect entitlements as provided by this Award.

(2) (a) An Employee who is required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment shall be reimbursed in accordance with the appropriate rates set out in Part I of Schedule C. - Motor Vehicle Allowance of this Award, for journeys travelled on official business and approved by the Employer or an authorised Employee.

(b) An Employee who is reimbursed under the provisions of paragraph (a) of this subclause will also be subject to the following conditions -

(i) for the purposes of paragraph (a) of this subclause an Employee shall be reimbursed with the appropriate rates set out in Part 1 of Schedule C. - Motor Vehicle Allowance for the distance travelled from the Employee's residence to the place of duty and for the return distance travelled from place of duty to residence except on a day where the Employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day;

(ii) where an Employee in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part 1 of Schedule C. - Motor Vehicle Allowance;

(iii) where an Employee does not travel in excess of 4,000 kilometres in a year an allowance calculated by multiplying the appropriate rate per kilometre by the difference between the actual distance travelled and 4,000 kilometres shall be paid to the Employee provided that where the Employee has less than 12 months qualifying service in the year then the 4,000 kilometre distance will be reduced on a pro rata basis and the allowance calculated accordingly;

(iv) where a part-time Employee is eligible for a payment of an allowance under sub-paragraph (b) (iii) of this subclause such allowance shall be calculated on the proportion of total hours worked in that year by the Employee to the annual standard hours had the Employee been employed on a full-time basis for the year;

(v) an Employee who is required to supply and maintain a motor vehicle for use on official business is excused from this obligation in the event of his vehicle being stolen, consumed by fire, or suffering a major and unforeseen mechanical breakdown or accident, in which case all entitlement to reimbursement ceases while the Employee is unable to provide the motor vehicle or a replacement;

(vi) the Employer may elect to waive the requirement that an Employee supply and maintain a motor vehicle for use on official business, but three months' written notice of the intention so to do shall be given to the Employee concerned.

(3) (a) Subject to subclause (2) of this clause, an Employee who is not normally required to supply and maintain a motor vehicle as a term of employment and who is required to relieve an Employee required to supply and maintain a motor vehicle as a term of employment shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part I of Schedule C. - Motor Vehicle Allowance of this Award, for all journeys travelled on official business and approved by the Employer where the Employee is required to use the vehicle on official business whilst carrying out the relief duty.

(b) For the purposes of paragraph (a) of this subclause an Employee shall be reimbursed all expenses incurred in accordance with the appropriate rates set out in Part I of Schedule C. - Motor Vehicle Allowance of this Award, for the distance travelled from the Employee's residence to place of duty and the return distance travelled from the place of duty to residence except on a day where the Employee travels direct from residence to headquarters and return and is not required to use the vehicle on official business during the day.

(c) Where an Employee in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part I of Schedule C. - Motor Vehicle Allowance of this Award.

(d) For the purpose of this subclause the allowance prescribed in sub-paragraphs (2) (b) (iii), (iv) and (vi) of this clause shall not apply.

(4) (a) An Employee who is not required to supply and maintain a motor vehicle for use when travelling on official business as a term of employment, but when requested by the Employer voluntarily consents to use the vehicle shall for journeys travelled on official business approved by the Employer be reimbursed all expenses incurred in accordance with the appropriate rates set out in Parts II and III of Schedule C. - Motor Vehicle Allowance of this Award.

(b) For the purpose of paragraph (a) of this subclause an Employee shall not be entitled to reimbursement for any expenses incurred in respect to the distance between the Employee's residence and headquarters and the return distance from headquarters to residence.

(c) Where an Employee in the course of a journey travels through two or more separate areas, reimbursement shall be made at the appropriate rate applicable to each of the areas traversed as set out in Part II of Schedule C. - Motor Vehicle Allowance of this Award, if applicable.

(5) In case where Employees are required to tow departmental caravans on official business, the additional rate shall be 7.5 cents per kilometre. When the Employer's trailers are towed on official business the additional rate shall be 4.5 cents per kilometre

34. Clause 38. – Preservation of Rights: Delete this clause and insert the following in lieu thereof:

38. - RELIEVING ALLOWANCE

(1) An Employee who is required to take up away from headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the Employee's usual place of residence shall be reimbursed reasonable expenses on the following basis: -

(a) Where the Employee: -

(i) is supplied with accommodation and meals free of charge, or

(ii) is accommodated at a government institution, hostel or similar establishment and supplied with meals,

reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule D. - Travelling Allowance of this Award.

(b) Where Employees are fully responsible for their own accommodation, meals and incidental expenses and hotel or motel accommodation is utilised: -

(i) For the first forty-two (42) days after arrival at the new locality reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule D. - Travelling Allowance of this Award.

(ii) For periods in excess of forty-two (42) days after arrival in the new locality reimbursement shall be in accordance with the rates prescribed in Column B, Items (4) to (8) of Schedule D. - Travelling Allowance of this Award for Employees with dependants or Column C, Item (4) to (8) of Schedule D. - Travelling Allowance of this Award for Employees without dependants. Provided that the period of reimbursement under this subclause shall not exceed forty-nine (49) days without the approval of the Employer.

(c) Where Employees are fully responsible for their own accommodation, meals and incidental expenses and other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule D. - Travelling Allowance of this Award.

(2) Reimbursement of expenses shall not be suspended should an Employee become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with the provisions of Clause 21. – Sick Leave of this Award and the Employee continues to incur accommodation, meal and incidental expenses.

(3) When an Employee who is required to relieve or perform special duties in accordance with the preamble of this clause is authorised by the Employer to travel to the new locality in the Employee's own motor vehicle, reimbursement for the return journey shall be as follows: -

(a) Where the Employee will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by subclause (2) of Clause 37. - Motor Vehicle Allowance of this Award.

(b) Where the Employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties reimbursement shall be on the basis of one half (1/2) of the appropriate rate prescribed by subclause (4) of Clause 37. - Motor Vehicle Allowance of this Award. Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.

(4) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the Employer.

(5) The provisions of Clause 40. - Travelling Allowance shall not operate concurrently with the provisions of this clause to permit an Employee to be paid allowances in respect of both travelling and relieving expenses for the same period. Provided that where an Employee is required to travel on official business which involves an overnight stay away from the Employee's temporary headquarters, the Employer may extend the periods specified in paragraph (b) of subclause (1) of this clause by the time spent in travelling.

(6) An Employee who is directed to relieve another Employee or to perform special duty away from the Employee's usual headquarters and is not required to reside temporarily away from his or her usual place of residence shall, if the Employee is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the Employee travelling by public transport to and from the place of temporary duty.

35. Clause 39. – Keeping of and Access to Employment Records: Delete this clause and insert the following in lieu thereof:

39. - TRANSFER ALLOWANCE

(1) Subject to subclauses (2) and (5) of this clause an Employee who is transferred to a new locality in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the Employee has no control, shall be paid at the rates prescribed in Column A, Item (4), (5) or (6) of Schedule D. - Travelling Allowance for a period of 14 days after arrival at new headquarters within Western Australia or Column A, Items (7) and (8) of Schedule D. - Travelling Allowance for a period of 21 days after arrival at a new headquarters in another State of Australia. Provided that if an Employee is required to travel on official business during the said periods, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of Clause 40. - Travelling Allowance of this Award to permit an Employee to be paid allowances in respect of both travelling and transfer expenses for the same period.

(2) Prior to the payment of an allowance specified in subclause (1) of this clause, the Employer shall:

(a) Require the Employee to certify that permanent accommodation has not been arranged or is not available from the date of transfer. In the event that permanent accommodation is to be immediately available, no allowance is payable; and

(b) Require the Employee to advise the Employer that should permanent accommodation be arranged or become available within the prescribed allowance periods, the Employee shall refund the pro rata amount of the allowance for that period the occupancy in permanent accommodation takes place prior to the completion of the prescribed allowance periods.

Provided also that should an occupancy date which falls within the specified allowance periods be notified to the Employer prior to the Employee's transfer, the payment of a pro rata amount of the allowance should be made in lieu of the full amount.

(3) If an Employee is unable to obtain reasonable accommodation for the transfer of his or her home within the prescribed period referred to in subclause (1) of this clause and Employer is satisfied that the Employee has taken all possible steps to secure reasonable accommodation, such Employee shall, after the expiration of the prescribed period to be paid in accordance with the rates prescribed by Column B, Items (4), (5), (6), (7) or (8) of Schedule D. - Travelling Allowance as the case may require, until such time as the Employee has secured reasonable accommodation. Provided that the period of reimbursement under this subclause shall not exceed 77 days without the approval of the Employer.

(4) When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an Employee on transfer, an appropriate rate of reimbursement shall be determined by the Employer.

(5) An Employee who is transferred to government owned accommodation shall not be entitled to reimbursement under this clause. Provided that where entry into government owned accommodation is delayed through circumstances beyond the Employee's control an Employee may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the Employee and dependants less a deduction for normal living expenses prescribed in Column A, Items (15) and (16) of Schedule D. - Travelling Allowance of this Award.

36. Clause 40. – Notification of Change: Delete this clause and insert the following in lieu thereof:

40. - TRAVELLING ALLOWANCE

(1) An Employee who travels on official business shall be reimbursed reasonable expenses on the following basis:

(2) When a trip necessitates an overnight stay away from headquarters and the Employee:

(a) is supplied with accommodation and meals free of charge; or

(b) attends a course, conference, etc., where the fee paid includes accommodation and meals; or

(c) travels by rail and is provided with a sleeping berth and meals; or

(d) is accommodated at a Government institution, hostel or similar establishment and supplied with meals;

reimbursement shall be in accordance with the rates prescribed in Column A, Item 1, 2, or 3 of Schedule D. - Travelling Allowance of this Award.

(3) When a trip necessitates an overnight stay away from the Employee's headquarters and the Employee is fully responsible for the provision of accommodation, meals and incidental expenses:

(a) Where hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items 4 to 8 of Schedule D. - Travelling Allowance of this Award;

(b) where other than hotel or motel accommodation is utilised reimbursement shall be in accordance with rates prescribed in Column A, Items 9, 10 or 11 of Schedule D. - Travelling Allowance of this Award.

(4) When a trip necessitates an overnight stay away from headquarters and accommodation only is provided at no charge to the Employee, reimbursement shall be made in accordance with the rates prescribed in Column A, items 1, 2 or 3 and items 12, 13 or 14 of Schedule D. - Travelling Allowance of this Award, subject to the Employees' certification that each meal claimed was actually purchased.

(5) To calculate reimbursement under subclauses (1) and (2) of this clause, for a part of a day, the following formula shall apply -

(a) If departure from headquarters is:

before 8.00am - 100% of the daily rate.

8.00am or later but prior to 1.00pm - 90% of the daily rate.

1.00pm or later but prior to 6.00pm - 75% of the daily rate.

6.00pm or later - 50% of the daily rate.

(b) If arrival back at headquarters is:

8.00am or later but prior to 1.00pm - 10% of the daily rate.

1.00pm or later but prior to 6.00pm - 25% of the daily rate.

6.00pm or later but prior to 11.00pm - 50% of the daily rate.

11.00pm or later - 100% of the daily rate.

(6) When an Employee travels to a place outside a radius of 50 kilometres measured from the Employee's headquarters, and the trip does not involve an overnight stay away from headquarters, reimbursement for all meals claimed shall be at the rates set out in Column A, Items 12 or 13 of Schedule D. - Travelling Allowance of this Award, subject to the Employee's certification that each meal claimed was actually purchased. Provided that when an Employee departs from headquarters before 8.00am and does not arrive back at headquarters until after 11.00pm on the same day reimbursement shall be at the appropriate rate prescribed in Column A, Items 4 to 8 of Schedule D. - Travelling Allowance of this Award.

(7) When it can be shown to the satisfaction of the Employer by the production of receipts that reimbursement in accordance with Schedule D. - Travelling Allowance of this Award, does not cover an Employee's reasonable expenses for a whole trip the Employee shall be reimbursed the excess expenditure.

(8) In addition to the rates contained in Schedule D. - Travelling Allowance of this Award, an Employee shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.

(9) If, on account of lack of suitable transport facilities, an Employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the Employee shall be reimbursed the actual cost of such accommodation.

(10) Reimbursement of expenses shall not be suspended should an Employee become ill whilst travelling, provided leave for the period of such illness is approved in accordance with the provisions of this Award, and the Employee continues to incur accommodation, meal and incidental expenses.

(11) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying Employee unless the Employer has endorsed the account.

(12) An Employee who is relieving at or temporarily transferred to any place within a radius of 50 kilometres measured from headquarters shall not be reimbursed the cost of midday meals purchased, but an Employee travelling on duty within that area which requires absence from headquarters over the usual midday meal period shall be paid the rate prescribed by Item 17, of Schedule D. - Travelling Allowance of this Award, for each meal necessarily purchased, provided that:

(a) such travelling is not a normal feature in the performance of the Employee's duties; and

(b) such travelling is not within the suburb in which the Employee resides; and

(c) total reimbursement under this subclause for any day period shall not exceed the amount prescribed by Item 18 of Schedule D. - Travelling Allowance of this Award.

37. Clause 41. – Deduction of Union Subscriptions: Delete this clause and insert the following in lieu thereof:

41. - PRESERVATION OF RIGHTS

Notwithstanding the provisions of this Award, an Employee engaged at the time of operation of this Award, shall not suffer any reduction in their conditions of employment.

38. Clause 42. – Right of Entry and Inspection by Authorised Representatives: Delete this clause and insert the following in lieu thereof:

42. - KEEPING OF AND ACCESS TO EMPLOYMENT RECORDS

(1) Employers must ensure that the keeping of employment records and access to employment records of Employees is in accordance with *Industrial Relations Act 1979 Part 11 Division 2F Keeping of and Access to Employment Records* .

(2) If the Employer maintains a personal or other file on an Employee subject to the Employer’s convenience, the Employee shall be entitled to examine all material maintained on that file.

39. Clause 43. – Copies of Award: Delete this clause and insert the following in lieu thereof:

43. - NOTIFICATION OF CHANGE

(1) (a) Where the Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on Employees, the Employer shall notify the Employees who may be affected by the proposed changes and the Union.

(b) For the purpose of this clause "significant effects" include termination of employment; major changes in the composition, operation or size of the Employer's workforce or in the skills required; elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of Employees to other work or locations and restructuring of jobs.

Provided that where this Award or any other Award or Agreement makes provision for alteration of any of the matters referred to in this clause an alteration shall be deemed not to have significant effect.

(2) (a) The Employer shall discuss with the Employees affected and the Union, inter alia, the introduction of the changes referred to in subclause (1) of this clause, the effects the changes are likely to have on Employees, measures to avert or mitigate the adverse effects of such changes on Employees and shall give prompt consideration to matters raised by the Employees and/or the Union in relation to the changes.

(b) The discussion shall commence as early as practicable after a firm decision has been made by the Employer to make the changes referred to in subclause (1) of this clause, unless by prior arrangement, the Union is represented on the body formulating recommendations for change to be considered by the Employer.

(c) For the purposes for such discussion, the Employer shall provide to the Employees concerned and the Union all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on Employees and other matters likely to affect Employees.

40. Clause 44. – Term of Award: Delete this clause and insert the following in lieu thereof:

44. - DEDUCTION OF UNION SUBSCRIPTIONS

(1) The Employer shall deduct normal subscriptions as equal amounts each pay period in which the Employee claims.

(2) Payroll Deduction Authority Forms shall be completed by Employees. Where the Employer requires a standard procreation form, that form shall be used.

(3) Where required by the Employer or the Union, the Union's General Secretary or person acting in his/her stead, shall countersign all forms and forward them to the Employer's paymaster.

(4) (a) The Employer shall commence deduction of subscriptions from the first full pay period following receipt of a completed Payroll Deduction Authority form and continue deducting throughout the Employee's period of employment, except as provided in subclause (5) of this clause or until the Authority is cancelled in writing by the Employee.

(b) Where the Payroll Deduction Authority form authorises the Employer to deduct subscriptions in accordance with the rules of the Union, the Union shall notify the Employer in writing of the level of subscription to be deducted. The Employer shall implement any change to Union subscriptions no later than one month after being notified by the Union except where the Union nominates a later date.

(5) (a) The collection of any nomination fee, arrears, levies or fines are not the responsibility of the Employer.

(b) Where a deduction is not made from an Employee in any pay period, either inadvertently or as a result of an Employee not being entitled to salary sufficient to cover the subscription, it shall be the Employee's responsibility to settle the outstanding amount with the Union.

(6) The Employer shall not make any deduction of subscriptions from an Employee's termination pay on termination of service, other than normal deductions for the preceding pay period.

(7) The Employer shall forward contributions deducted, together with supporting documentation, to the Union at such intervals as are agreed between the Employer and the Union.

41. Clause 45. – Establishment of Consultative Mechanisms: Delete this clause and insert the following in lieu thereof:

45. - RIGHT OF ENTRY AND INSPECTION BY AUTHORISED REPRSENTATIVES

(1) The parties shall act consistently with the terms of the *Division 2 G - Right of Entry and Inspection by Authorised Representatives - of the Industrial Relations Act 1979.*

(2) An authorised representative shall on notification to the Employer have the right to enter any premises where relevant Employees covered by this Award work during working hours, including meal breaks, for the purpose of holding discussions at the premises with relevant Employees covered by this Award who wish to participate in those discussions, the legitimate business of the Union or for the purpose of investigating complaints concerning the application of this Award, but shall in no way unduly interfere with the work of Employees, or impinge on clients rights of privacy.

42. Clause 46. – Transfer Allowance: Delete this clause and insert the following in lieu thereof:

46. - COPIES OF AWARD

Every Employee shall be entitled to have access to a copy of this Award. Sufficient copies shall be made be made available by the Employer for this purpose and shall be located in each of the Employer's premises.

43. Clause 47. – Relieving Allowance: Delete this clause and insert the following in lieu thereof:

47. - ESTABLISHMENT OF CONSULTATIVE MECHANISMS

The parties to this Award are required to establish a consultative mechanism/s and procedures appropriate to their size, structure and needs, for consultation and negotiation on matters affecting the efficiency and productivity of the Public Sector.

44. Clause 48. – Dispute Settlement Procedure: Delete this clause and insert the following in lieu thereof:

48. - ACCESS TO INFORMATION AND RESOURCES

(1) The parties recognise that information technology resources have major implications for industrial and human resource functions within the workplace.

(2) The Employer recognises the need to provide appropriate information to all Employees, so it is accessible in the workplace in either electronic or hard copy format.

(3) Where the Employer utilises information technology as the means of communicating to Employees, the Employer must ensure that where Employees do not have access to technology, then alternative methods of providing this information will be used.

(4) The information includes, but is not limited to policies and practice guidelines, human resource manuals, awards and agreements, internal agency news bulletins and updates and job opportunities.

45. Clause 49. – Expired General Agreement Salaries: Delete this clause and insert the following in lieu thereof:

49. - DISPUTE SETTLEMENT PROCEDURE

(1) Any questions, difficulties or disputes arising under this Award of Employees bound by the Award shall be dealt with in accordance with this clause.

(2) The Employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days.

(3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's superior and an attempt made to find a satisfactory solution, within a further three (3) working days.

(4) If the dispute is still not resolved, it maybe referred by the Employee/s or Union representative to the Employer or his/her nominee.

(5) Where the dispute cannot be resolved within five (5) working days of the Union representatives' referral of the dispute to the Employer or his/her nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.

(6) The period for resolving a dispute may be extended by agreement between the parties.

(7) At all stages of the procedure an Union representative may accompany the Employee.

46. Clause 50. – Named Parties to the Award: Delete this clause and insert the following in lieu thereof:

50. - EXPIRED GENERAL AGREEMENT SALARIES

(1) No-Disadvantage Test

(a) Expired General Agreement salary rates as amended from time to time are incorporated in the Award at Schedule F – Expired General Agreement Salaries of this Award. These rates are not to be subject to arbitrated safety net adjustments and unless otherwise specified are only for the purpose of the no-disadvantage test as defined at s. 97VS of the *Industrial Relations Act 1979*.

(b) Notwithstanding the above, if the salary rates within this Award at Schedule A – Salaries of this Award are higher than those expressed at Schedule F – Expired General Agreement Salaries of this Award, the former rates shall be utilised for the purposes of the no disadvantage test under the *Industrial Relations Act 1979*.

(2) Salary Based Allowances

All salary based allowances specified within this Award will be calculated on the salary rate as specified at Schedule F. – Expired General Agreement Salaries of this Award or the applicable Award salary rate as specified at Schedule A – Salaries of this Award which ever is the higher.

47. Clause 51. – Named Parties to the Award: Insert this clause after Clause 50:

51. - NAMED PARTIES TO THE AWARD

The named parties to this Award shall be the Director General of the Department for Child Protection, the Director General, Department for Communities and The Civil Service Association of WA Inc.

48. Wherever the word "employee" appears throughout this Award replace with "Employee".

2009 WAIRC 00508

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL, DISABILITY SERVICES COMMISSION, THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANTS
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 JULY 2009
FILE NO/S	P 12 OF 2009
CITATION NO.	2009 WAIRC 00508

Result Award varied

Order

HAVING heard Ms L Wiese on behalf of the Director General, Disability Services Commission and Ms K Worlock on behalf of The Civil Service Association of Western Australia Incorporated 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, No. PSAA 20 of 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 23rd day of July 2009.

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

SCHEDULE

1. Clause 2. – Arrangement:

A. Delete "29. Study Leave" and insert the following in lieu thereof:

29. Study Assistance

B. Delete "55. Dispute Settlement Procedures" and "56. Expired General Agreement Salaries" and insert the following in lieu thereof:

55. Access to Information and Resources

56. Dispute Settlement Procedures

57. Expired General Agreement Salaries

2. Clause 6. – Definitions: Immediately following the definition beginning "Employer" and before the definition beginning "Metropolitan Area" insert a new definition as per the following:

"Fixed term employee" means an employee who is employed on a full time or part-time basis on a contract of service of specified duration.

3. Clause 17. – Hours: Delete subclause 2(f) and 2(g) of this clause and insert the following in lieu thereof:

(f) Employees on day study leave will be recorded as 7 hours and 36 minutes worked.

(g) Employees on block study leave will be recorded as a 38 hour week worked.

4. Clause 18. – Shift Work:

A. Delete subclauses (2)(a)and (b) of this clause and insert the following in lieu thereof:

(2) Shift Work Allowance

(a) (i) An employee required to work a weekday afternoon or night shift, will in addition to the ordinary rate of salary, be paid an allowance in accordance with the following formula for each shift so worked.

$$\frac{\text{Annual Salary}}{1} \times \frac{12}{313} \times \frac{1}{10} \times \frac{15}{100}$$

(ii) Notwithstanding the above, the minimum amount payable per shift to an employee required to work afternoon or night shift will be the allowance payable to an employee with an annual salary of Level 1.7 using the formula at subclause 18(2)(a)(i).

(iii) For the purposes of subclause 18(2)(a), "annual salary" is the current ordinary rate of salary payable for the position as prescribed in Schedule A. – Salaries.

(b) Work performed during ordinary rostered hours on the following days shall be paid for at the following rates, in lieu of the allowance prescribed in subclause 18(2)(a):

(i) Saturdays – time and one-half;

(ii) Sundays – time and three quarters; and

(iii) Public holidays – double time and one half

Provided that in lieu of the provisions of subclause 18(2)(b)(iii) and subject to agreement between the employer and the employee, work performed during ordinary rostered hours on a public holiday shall be paid for at the rate of time and one-half and the employee may, in addition be allowed a day's leave with pay to be added to annual leave to be taken at some other time within a period of one year.

B. Immediately following subclause (2)(b) of this clause insert a new subclause as per the following:

(c) Weekend Penalty Rates for Casual Employees

(i) Notwithstanding the provisions of subclause 10 (2) – Casual Employment, casual employees are entitled to weekend shift penalties. Work performed during ordinary rostered hours on the following days shall be paid for at the following rates:

(aa) Saturdays and public holidays – time and one-half (casuals are already paid a loading in lieu of public holidays); and

(bb) Sundays – time and three quarters

(ii) These rates are paid in addition to but not compounded on the casual loading provided for in subclause 10 (2) – Casual Employment.

C. Renumber subclauses (c), (d), (e), (f) and (g) of this clause as (d), (e), (f), (g) and (h) respectively.

5. Clause 22. – Annual Leave:

A. Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) Pro Rata Annual Leave

(a) Entitlement

(i) An employee employed after the first day of January in any year is entitled to pro rata annual leave for that year calculated on a daily basis. At the end of each calendar day of the year the employee will accrue 0.416 hours of paid annual leave provided the maximum accrual will not exceed 152 hours for each completed calendar year of service.

(ii) Where employers have systems in place which record and report pro rata accrual of annual leave entitlements in a manner other than prescribed by this clause, that method of accrual may continue provided the system provides the same accrual over a full year. Employers must ensure that upon the cessation of employment, all pro rata annual leave entitlements accrued are equivalent to the pro rata annual leave entitlement provided by subclause 22(3)(a)(i).

B. Delete subclauses (10)(a)(iv) and (10)(a)(v) of this clause and insert the following in lieu thereof:

(iv) Travel concessions not utilised within twelve months of becoming due will lapse.

(v) Part-time employees are entitled to travel concessions on a pro-rata basis according to the usual number of hours worked per week.

Travelling time shall be calculated on a pro-rata basis according to the number of hours worked.

	Approved Mode of Travel	**Travel Concession**	**Travelling Time**
(aa)	Air	Air fare for the Employee, and dependant partner and dependant children	One day each way
(bb)	Road	Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the return air fare for the employee, dependant partner and dependant children, travelling in the motor vehicle.	North of 20° South Latitude - two and one half days each way. Remainder - two days each way.
(cc)	Air and Road	Full motor vehicle allowance rates for car trip, but reimbursement not to exceed the cost of the return air fare for the employee. Air fares for the dependant partner and dependent children.	North of 20° South Latitude - two and one half days each way. Remainder - two days each way.

(vi) Where employees are entitled to a travel concession under subclause 22(10) and the employees' headquarters are situated in District Allowance Areas 3, 4, 5 or 6, a travel concession covering the cost of airfares or motor vehicle allowance up to a maximum amount equivalent to the value of a return fully flexible and refundable airfare to Perth will be provided for each employee and each of their dependants when proceeding on annual leave to a location other than Perth or Geraldton.

6. Clause 29. - Study Leave: Delete the clause title and the entire clause and insert the following in lieu thereof:

CLAUSE 29. – STUDY ASSISTANCE

(1) (a) To ensure the maintenance of a trained public sector an employer may provide an employee with paid study leave and/or financial assistance for study purposes in accordance with the provisions of this clause.

(b) Employees are not eligible for study assistance if they have previously received study assistance for an approved course from their employer. Further study assistance towards additional qualifications may, however, be granted in special cases, at the discretion of the employer.

(2) Study Leave

(a) An employee may be granted time off with pay for study purposes at the discretion of the employer.

(b) In every case the approval of time off to attend lectures and tutorials will be subject to:

(i) agency convenience;

(ii) employees undertaking an acceptable formal study load in their own time;

(iii) employees making satisfactory progress with their studies;

(iv) the course being an approved course as defined by subclause 29(5);

(v) the course being of value to the agency; and

(vi) the employer's discretion when the course is only relevant to the employee's career in the service and being of value to the State.

(c) Part-time employees are entitled to study leave on the same basis as full time employees, with their entitlement calculated on a pro rata basis. Employees working shift work or on fixed term contracts have the same access to study leave as all other employees.

(d) Time off with pay may be granted up to a maximum of five hours per week including travelling time, where subjects of approved courses are available during normal working hours, or where approved study by correspondence is undertaken.

(e) Employees who are obliged to attend educational institutions for compulsory block sessions may be granted time off with pay, including travelling time, up to the maximum annual amount allowed in subclause 29(2)(d).

(f) Where an employee is undertaking approved study via distance education and/or is not required to attend formal classes, an employer may allow the employee to access study leave up to the maximum annual amount allowed in subclause 29(2)(d).

(g) Employees shall be granted sufficient time off with pay to travel to and sit for the examinations of any approved course of study.

(h) An acceptable part-time study load should be regarded as not less than five hours per week of formal tuition with at least half of the total formal study commitment being undertaken in the employee's own time, except in special cases such as where the employee is in the final year of study and requires less time to complete the course, or the employee is undertaking the recommended part-time year or stage and this does not entail five hours formal study.

(i) In cases where employees are studying subjects which require fortnightly classes the weekly study load should be calculated by averaging over two weeks the total fortnightly commitment.

(j) In agencies which are operating on flexi-time, time spent attending or travelling to or from formal classes for approved courses between 8.15 am and 4.30 pm, less the usual lunch break, and for which "time off" would usually be granted, is to be counted as credit time for the purpose of calculating total hours worked per week.

(k) Travelling time returning home after lectures or tutorials is to be calculated as the excess time taken to travel home from such classes, compared with the time usually taken to travel home from the employee's normal place of work.

(l) An employee shall not be granted more than 5 hours time off with pay per week except in exceptional circumstances where the employer may decide otherwise.

(m) Time off with pay for those who have failed a unit or units may be considered for one repeat year only.

(n) An employee performing service with the Australian Defence Force is not entitled to study leave for any period of service with the Australian Defence Force that they receive defence force reserves leave as provided for by clause 38 – Defence Force Reserves Leave.

(o) A service agreement or bond will not be required.

(3) Financial Assistance

(a) An employer may reimburse an employee for the full or any part of any reasonable cost of enrolment fees, Higher Education Contribution Surcharge, compulsory text books, compulsory computer software and other necessary study materials for studies commenced during their employment.

(b) Half of the value of the agreed costs shall be reimbursed immediately following production of written evidence of enrolment and costs incurred, and the remaining half shall be reimbursed following production of written evidence of successful completion of the subject for which reimbursement has been claimed.

(c) The employer and employee may agree to alternative reimbursement arrangements.

(4) Cadets and Trainees

(a) Agencies are to meet the payment of higher education administrative charges for cadets and trainees who, as a condition of their employment, are required to undertake studies at a university or college of advanced education. Employees who of their own volition attend such institutions to gain higher qualifications will be responsible for the payment of fees.

(b) This assistance does not include the cost of textbooks or Guild and Society fees.

(c) An employee who is required to repeat a full academic year of the course will be responsible for payment of the higher education fees for that particular year.

(5) Approved Courses for Study Purposes

(a) For the purposes of subclauses 29(2) and (3), the following are approved courses:

(i) Degree or associate diploma courses at a university within Australia;

(ii) Degree or diploma courses at an authorised non-university institution;

(iii) Diploma courses provided by registered training organisations, including TAFE;

(iv) Two-year full time certificate courses provided by registered training organisations, including TAFE;

(v) Courses recognised by the National Authority for the Accreditation of Translators and Interpreters (NAATI) in a language relevant to the needs of the public sector; and

(vi) Secondary courses leading to the Tertiary Entrance Examination or courses preparing students for the mature age entrance conducted by the Tertiary Institutions Service Centre.

(b) For the purposes of subclause 29(5)(a):

(i) The term 'university' includes recognised Australian universities and recognised overseas universities as defined by the *Higher Education Act 2004* (WA);

(ii) An authorised non-university institution is a non-university institution that is authorised under the *Higher Education Act 2004* (WA) to provide a higher education course; and

(iii) A registered training organisation is an organisation that is registered with the Training Accreditation Council or equivalent registering authority and complies with the nationally agreed standards set out in the Australian Quality Training Framework (AQTF).

(c) An employee who has completed a diploma through TAFE is eligible for study assistance to undertake a degree course at a university within Australia or an authorised non-university institution.

(d) An employee who has completed a two year full time certificate through TAFE is eligible for study assistance to undertake a diploma course specified in subclause 29(5)(a)(iii) or a degree or diploma course specified in subclauses 29(5)(a)(i) or (ii).

(6) Full Time Study

(a) Subject to the provisions of subclause 29(6)(b), the employer may grant an employee full time study leave with pay to undertake:

(i) post graduate degree studies at Australian or overseas tertiary education institutions; or

(ii) study tours involving observations and/or investigations; or

(iii) a combination of postgraduate studies and study tour.

(b) Applications for full time study leave with pay are to be considered on their merits and may be granted provided that the following conditions are met:

(i) The course or a similar course is not available locally. Where the course of study is available locally, applications are to be considered in accordance with the provisions of subclauses 29(2) and (5) and clause 28 - Leave without Pay.

(ii) It must be a highly specialised course with direct relevance to the employee's profession.

(iii) It must be highly relevant to the agency's corporate strategies and goals.

(iv) The expertise or specialisation offered by the course of study should not already be available through other employees employed within the agency.

(v) If the applicant was previously granted study leave, studies must have been successfully completed at that time. Where an employee is still under a bond, this does not preclude approval being granted to take further study leave if all the necessary criteria are met.

(vi) A fixed term contract employee may not be granted study leave with pay for any period beyond that employee's approved period of engagement.

(c) Full time study leave with pay may be approved for more than 12 months subject to a yearly review of satisfactory performance.

(d) Where an outside award is granted and the studies to be undertaken are considered highly desirable by an employer, financial assistance to the extent of the difference between the employee's normal salary and the value of the award may be considered. Where no outside award is granted and where a request meets all the necessary criteria then part or full payment of salary may be approved at the discretion of the employer.

(e) The employer supports recipients of coveted awards and fellowships by providing study leave with pay. Recipients normally receive as part of the award or fellowship; return airfares, payment of fees, allowance for books, accommodation or a contribution towards accommodation.

(f) Where recipients are in receipt of a living allowance, this amount should be deducted from the employee's salary for that period.

(g) Where the employer approves full time study leave with pay the actual salary contribution forms part of the agency's approved average staffing level funding allocation. Employers should bear this in mind if considering temporary relief.

(h) Where study leave with pay is approved and the employer also supports the payment of transit costs and/or an accommodation allowance, the employer will gain approval for the transit and accommodation costs as required.

(i) Where employees travelling overseas at their own expense wish to participate in a study tour or convention whilst on tour, study leave with pay may be approved by the employer together with some local transit and accommodation expenses providing it meets the requirements of subclause 29(6)(b). Each case is to be considered on its merits.

(j) The period of full time study leave with pay is accepted as qualifying service for leave entitlements and other privileges and conditions of service prescribed for employees under the award.

7. Clause 31. – Bereavement Leave:

A. Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Employees including casuals shall on the death of:

the spouse or de-facto partner of the employee;

a child, step-child or grandchild of the employee;

a parent, step-parent or grandparent of the employee;

a sibling of the employee; or

any other person who, immediately before that person's death, lived with the employee as a member of the employee's family;

be eligible for up to two (2) days paid bereavement leave, provided that at the request of an employee the employer may exercise a discretion to grant bereavement leave to an employee in respect of some other person with whom the officer has a special relationship.

B. Immediately following subclause (5) of this clause insert a new subclause as per the following:

(6) Travelling time for Regional Employees

(a) Subject to prior approval from the employer, an employee entitled to bereavement leave and who, as a result of such bereavement, travels to a location within Western Australia that is more than 240 km from their workplace will be granted paid time off for the travel period undertaken in the employee's ordinary working hours up to a maximum of 15.2 hours per bereavement. The employer will not unreasonably withhold approval.

(b) The employer may approve additional paid travel time within Western Australia where the employee can demonstrate to the satisfaction of the employer that more than two days travel time is warranted.

(c) The provisions of subclause 31(6) are not available to employees whilst on leave without pay or sick leave without pay.

(d) The provisions of subclauses 31(6)(a) and (b) apply as follows.

(i) An employee employed on a fixed term contract for a period of greater than 12 months, shall be credited with the same entitlement as a permanent employee for each full year of service and pro rata for any residual portion of employment.

(ii) An employee employed on a fixed term contract for a period less than 12 months shall be credited with the same entitlement on a pro rata basis for the period of employment.

(iii) A part time employee shall be entitled to the same entitlement as a full time employee for the period of employment, but on a pro rata basis according to the number of ordinary hours worked each fortnight.

(iv) For casual employees, the provisions apply to the extent of their agreed working arrangements.

8. Clause 40. – District Allowance:

A. Immediately following subclause (4) of this clause insert a new subclause as per the following:

(5) Casual Employees

District Allowance is payable to casual employees on an hourly rate basis in accordance with the following formula:

$$\frac{\text{Appropriate Annual District Allowance Rate}}{1} \times \frac{12}{313} \times \frac{1}{76}$$

B. Renumber subclause (5) of this clause as subclause (6).

9. Clause 46. – Removal Allowance: Delete the entire clause and insert the following in lieu thereof:

(1) When an employee is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be reimbursed:

(a) The actual reasonable cost of conveyance of the employee and dependants.

(b) The actual cost (including insurance) of the conveyance of an employee's household furniture effects and appliances up to a maximum volume of 45 cubic metres provided that a larger volume may be approved by the employer in special cases.

(c) An allowance of $532.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,188.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $181.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

(2) An employee who is transferred solely at their own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the employer prior to removal.

(3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the employee's motor vehicle. If authorised by the employer to travel to a new locality in the employee's own motor vehicle, reimbursement shall be as follows:

(a) Where the employee will be required to maintain a motor vehicle for use on official business at the new headquarters, reimbursement for the distance necessarily travelled shall be on the basis of the appropriate rate prescribed by subclause 42(2) - Motor Vehicle Allowance.

(b) Where the employee will not be required to maintain a motor vehicle for use on official business at the new headquarters reimbursement for the distance necessarily travelled shall be on the basis of one half (½) of the appropriate rate prescribed by subclause clause 42(3) - Motor Vehicle Allowance.

(c) Where an employee or their dependants have more than one vehicle, and all the vehicles are to be relocated to the new residence, the cost of transporting or driving up to two vehicles shall be deemed to be part of the removal costs.

(d) Where only one vehicle is to be relocated to the new residence, the employee may choose to transport a trailer, boat or caravan in lieu of the second vehicle. The employee may be required to show evidence of ownership of the trailer, boat or caravan to be transported.

(e) If the employee tows the caravan, trailer or boat to the new residence, the additional rate per kilometre is to be 3.5 cents per kilometre for a caravan or boat and 2.0 cents per kilometre for a trailer.

(4) The employee shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the employer, who may authorise the acceptance of the more suitable: Provided that payment for a volume amount beyond 45 cubic metres shall not occur without the prior written approval of the employer.

(5) The employer may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an employee, with prior approval of the employer, disposes of their household furniture effects and appliances instead of removing them to the new headquarters: Provided that such payments shall not exceed the sum which would have been paid if the employee's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.

(6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $989.00 per annum. Actual cost is deemed to include the premium for adequate

insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the employer.

(7) Receipts must be produced for all sums claimed.

(8) New appointees to the public service shall be entitled to receive the benefits of this clause if they are required by the employer to participate in any training course prior to being posted to their respective positions in the service. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.

(9) An employer may agree to provide removal assistance greater than specified in this award and if in that event that the employee to whom the benefit is granted elects to leave the position, on a permanent basis, within twelve months, the employer may require the employee to repay the additional removal assistance on a pro rata basis. Repayment can be deducted from any monies due to the employee.

(10) For the purposes of subclause 46(9), "elects to leave the position," means the employee freely chooses to leave the position in the ordinary course of promotion, transfer or resignation and this necessitates the employer obtaining a replacement employee.

10. Clause 55. – Dispute Settlement Procedure: Delete the clause title and the entire clause and insert the following in lieu thereof:

55. - ACCESS TO INFORMATION AND RESOURCES

(1) The parties recognise that information technology resources have major implications for industrial and human resource functions within the workplace.

(2) The employer recognises the need to provide appropriate information to all employees, so it is accessible in the workplace in either electronic or hard copy format.

(3) Where the employer utilises information technology as the means of communicating to employees, the employer must ensure that where employees do not have access to technology, then alternative methods of providing this information will be used.

(4) The information includes, but is not limited to policies and practice guidelines, human resource manuals, awards and agreements, internal agency news bulletins and updates and job opportunities.

11. Clause 56 – Expired General Agreement Salaries: Delete the clause title and the entire clause and insert the following in lieu thereof:

56. – DISPUTE SETTLEMENT PROCEDURE

(1) Any questions, difficulties or disputes arising under this Award of employees bound by the award shall be dealt with in accordance with this clause.

(2) The employee/s and the manager with whom the dispute has arisen shall discuss the matter and attempt to find a satisfactory solution, within three (3) working days.

(3) If the dispute cannot be resolved at this level, the matter shall be referred to and be discussed with the relevant manager's supervisor and an attempt made to find a satisfactory solution, within a further three (3) working days.

(4) If the dispute is still not resolved, it maybe referred by the employee/s or Association representative to the Employer or his/her nominee.

(5) Where the dispute cannot be resolved within five (5) working days of the Association representatives' referral of the dispute to the Employer or his/her nominee, either party may refer the matter to the Western Australian Industrial Relation Commission.

(6) The period for resolving a dispute may be extended by agreement between the parties.

(7) At all stages of the procedure the employee may be accompanied by an Association representative.

12. Immediately following clause 56 insert a new clause as per the following:

57. - EXPIRED GENERAL AGREEMENT SALARIES

(1) No-Disadvantage Test

(a) Expired General Agreement salary rates as amended from time to time are incorporated in the Award at Schedule K. These rates are not to be subject to arbitrated safety net adjustments and unless otherwise specified are only for the purpose of the no-disadvantage test as defined at s.97VS of the Industrial Relations Act 1979.

(b) Notwithstanding the above, if the salary rates within the Award at Schedule A are higher than those expressed at Schedule K, the former rates shall be utilised for the purposes of the no-disadvantage test under the Industrial Relations Act 1979.

(2) Salary Based Allowances

All salary based allowances specified within this Award will be calculated on the applicable salary rate as specified at Schedule K of this Award or the applicable Award salary rate as specified at Schedule A of this Award whichever is the higher.

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 00469

PRISON OFFICERS' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 20 JULY 2009
FILE NO/S	APPL 32 OF 2009
CITATION NO.	2009 WAIRC 00469

Result	Award varied
Representation	
Applicant	Mr P Budd
Respondent	Mr T Clark

Order

HAVING heard Mr P Budd on behalf of the applicant and Mr T Clark on behalf of the respondent and by consent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the Prison Officers' Award (No.12 of 1968) be varied in accordance with the following schedule and that such variation shall have effect from the first pay period on or after the date of this order.

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

SCHEDULE

1. Clause 17 – Transfers: In subclause 17.3 insert new paragraphs (14), (15), (16), (17) and (18) as follows:

(14) For the purposes of this Award and in relation to Senior Officer Transfers only, Senior Officer Positions shall be identified as 'General' and 'Specific' positions.

(15) Senior Officer 'General' Position is one that requires the occupant to have successfully completed the Department's Industry Standard Prison Officer Training Course and the Department's Senior Officer Promotional Process. These officers shall be able to register on the Senior Officer Transfer List.

(16) A Senior Officer 'Specific' Position will be identified for the purposes of this clause as a Senior Officer position that falls within the classification of Vocational Support Officer, Work Camp Officer, Reception, Security or Training, or does not require the Senior Officer 'General' requirements. These officers may be considered for inclusion on the relevant VSO Transfer Lists or where qualified, the appropriate Prison Officer Transfer list, subject to the relevant clauses of this Award.

(17) Where a Senior Officer 'Specific' had previously held a position as a Senior Officer 'General' they shall be entitled to register on the Senior Officer 'General' Transfer list.

(18) Senior Officer 'General' shall be restricted from transferring to a Senior Officer 'Specific' position, unless previously qualified and trained for the nominated position.

NOTICES—Award/Agreement matters—

2009 WAIRC 00583

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 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 inset 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 in a Juvenile Custodial facility and/or detention centre 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 Australian 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,
[L.S.] Registrar.

14 August 2009

2009 WAIRC 00509

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 36 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"SWALSC COLLECTIVE AGREEMENT 2009"

NOTICE is given that an application was made to the Commission, on 24 July 2009, by the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch, 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.

1 Parties

1.1 This is an agreement between South West Aboriginal Land and Sea Council and the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch (ASU) and extends to and binds all employees of South West Aboriginal Land and Sea Council who are eligible to members of the respondent union. …

Definitions

…

1.5 Union – Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch. …

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

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

28 July 2009

2009 WAIRC 00535

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 38 of 2009

APPLICATION FOR A NEW AGREEMENT ENTITLED

"THE ROMAN CATHOLIC ARCHBISHOP OF PERTH NON-TEACHING STAFF ENTERPRISE BARGAINING AGREEMENT, 2009"

NOTICE is given that an application was made to the Commission, on 3 August 2009, by; The Independent Education Union of Western Australia, Union of Employees; The Roman Catholic Archbishop Perth; and The Australian Nursing Federation, Industrial Union of Workers Perth; , 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. - SCOPE

(1) This Agreement shall apply to those employees as defined in Clause 6. – Definitions of this Agreement employed in Western Australia by the employer as perscribed in Appendix A who are members of or are eligible to be members of the Unions party to this agreement.

(2) This Agreement provides for all conditions contained within the following Awards;

(a) Independent Schools Administrative and Technical Officers Award 1933;

(b) Independent Schools (Boarding House) Supervisory Staff Award;

(c) Independent Schools Psychologists and Social Workers Award 1996;

(d) Nurses' (Independent Schools) Award 1962.

(3) The number of employees covered by this Agreement is 925.

6. – DEFINITIONS

This Enterprise Bargaining Agreement covers the following classifications:

(4) Administrative and Technical Officers as defined in Part III, Clause 38. – Classifications of this Agreement;

(5) Boarding House Supervisors as defined in Part IV, Clause 43. – Classifications of this Agreement;

(6) Nurses as defined in Part V, Clause 48. – Wages of this Agreement;

(7) Psychologists and Social Workers in Part VI, Clause 53. – Salaries and Classifications of this Agreement.

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

(Sgd.) J SPURLING,
Registrar.

[L.S.]

7 August 2009

INDUSTRIAL MAGISTRATE—Claims before—

2009 WAIRC 00463

BREACH OF SECTION 190(1) OF THE CHILDREN AND COMMUNITY SERVICES ACT 2004

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	CHRISTOPHER BELL, DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION
	PROSECUTION
	-v-
	RAYDALE HOLDINGS PTY LTD TRADING AS TAMBREY TAVERN AND FUNCTION CENTRE ACN: 106 193 837
	ACCUSED
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	THURSDAY, 30 APRIL 2009, WEDNESDAY, 10 JUNE 2009, WEDNESDAY, 1 JULY 2009
DELIVERED	WEDNESDAY, 1 JULY 2009
CLAIM NO.	CP 1 OF 2009
CITATION NO.	2009 WAIRC 00463

Catchwords	Employment of children under the age of 15 years in a business, trade or occupation carried on for profit; breach of section 190(1) of the *Children and Community Services Act 2004*
Legislation	*Children and Community Services Act 2004;* s.190(1), s.191(4)
	Criminal Procedure Act 2004; s.78, s.153
	Sentencing Act 1995; s.40(2)
Cases Cited	*Department of Consumer and Employment Protection -v- Gold Mountain Enterprise Pty Ltd*
	(2008) 88 WAIG 2023
Result	Plea of guilty by accused - penalties imposed
Representation	
Prosecution	Ms K Scoble (of Counsel)
Accused	Ms M Saraceni instructed by *Deacons*

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by His Honour)

1 The accused has pleaded guilty to two charges. By its plea it agrees that it has contravened section 190(1) of the *Children and Community Services Act 2004*. It contravened that provision by employing two children under the age of 15 years in a business carried on for profit. The maximum penalty faced by the accused for each of the offences is a fine of $120,000.00 by operation of section 40(2) of the *Sentencing Act 1995*. The accused is, because of its corporate status, liable to five times the maximum penalty that is otherwise applicable to an individual.

2 The facts are that two children were employed at a tavern operated by the accused in Karratha. Plans of the premises shown to me indicate that the tavern is part of a very large complex comprising many aspects including sporting facilities. Essentially the place at which these offences occurred was a community centre of which the tavern is a part.

3 At the material times, the two children were in each instance between 14 and 15 years of age. They were approaching their respective 15th birthday. The parties agreed that the child DG worked on five separate occasions. It is clear from what I have been told that his designated working hours were between 6.00 pm to about 10.00 pm. On one occasion he worked to 9.50 pm, on another occasion he worked to 9.25 pm and on another occasion until 10.15 pm, but generally speaking his hours were from 6.00 pm to 10.00 pm.

4 The other child CF worked on many more occasions than DG. His commencement times were usually between 5.00 pm and 6.00 pm. On one occasion he commenced at midday. He usually finished working sometime after 11.00 pm. There are instances when he finished much earlier in the evening. I think it would be fair to say however that he usually worked beyond 11.00 pm. At various times he respectively worked to 11.30 pm, 11.40 pm, 11.45 pm and 11.50 pm. The latest time that he finished was 12.20 am.

5 Each child worked because they wanted to. They did so with the consent of their parents (albeit not in writing in one instance). It seems from the materials handed up to me that the accused employed the children at the suggestion of their parent/s. The children were happy to be employed by the respondent because it provided them with money and social interaction.

6 The problem for the accused however is that the employment of the children in such circumstances was strictly prohibited. The accused could never have employed children within its tavern. Counsel for the accused submitted that the work done by them at the tavern was the same as might be done in a restaurant. Although it is the case that they handled food, dealt with plates, glasses and cutlery and did all of the things that one would also do in a restaurant, the fact remains that they did those things in a tavern environment, albeit that the tavern was orientated to the provision of services to families, such being a requirement of the tavern licence.

7 The problem is that a tavern is a tavern. People not only go to such a place to eat food but also to drink alcohol without food. There are the attendant problems that flow from people drinking alcohol at places such as taverns. Unfortunately it is a fact of life that people become inebriated at such places. Indeed unruly behaviour became so problematic for the accused that its licence was varied to ensure the safety and welfare of people at the tavern. The fact is that taverns carry attendant problems for people who work within them. They are inevitably exposed to risk when working within such an environment.

8 I am not saying in this instance that the children were in each case exposed to a particular danger, but it is the potentiality of risk which is a concern. In this matter I am satisfied that the children worked in the way described, serving food, cleaning up plates, cutlery and glasses and so forth. They were not involved in the service of liquor. However, they would have inevitably been mingling with people who had been drinking alcohol. People drinking at taverns don't have to consume food. Some people just go there to drink, and if one of those persons becomes inebriated then people working within that particular environment are exposed to risk. As a result the children were potentially at risk. A restaurant environment is somewhat different. What is clear here is that this place at which the children worked was not a restaurant. It was never a restaurant; it was a tavern.

9 In my view, the place within which the children worked is of critical importance. It is a very important factor to be considered. The legislation has been enacted to protect children. Children need to be protected not only from being exploited in the sense of being underpaid and so forth, but also need to be protected so that they are not exposed to the potentiality of injury in the workplace. They also need to be protected insofar that a balance must be struck between their schooling and working

obligations. In other words, one of the objectives of the legislation is to ensure that children have a balanced life and that their work does not overbear their schooling and social activities. It is important therefore, to have regard to the times that the children have worked in this instance. The fact is that in certain circumstances where the law permits it, children under the age of 15 can work, but they cannot work beyond 10.00 pm. That is for good reason. They need to have their rest and recreation so that their work does not impact upon their scholastic and social circumstances. Children working beyond 10.00 pm at night is an aggravating factor to be considered.

10 The accused's director was well meaning in his employment of the children. The children were only employed at the behest of their parents. Clearly the accused is remorseful about its conduct. It is important to note that the employment of the children was not of longstanding duration. I accept that the offences occurred by way of ignorance of the law rather than by any wilful defiance of the law. I think that is an important consideration. The employer is no longer involved in the industry and in fact no longer trades. It has pleaded guilty to the charge at an early opportunity. When the accused initially appeared with respect to this matter it did so by its representative as it is permitted by section 153 of the *Criminal Procedure Act 2004*. That person was not a legal practitioner. A plea of not guilty was entered by its representative. Once the accused obtained legal advice concerning the matter there was a change of plea. The court can therefore conclude that the accused has pleaded guilty at an early opportunity. All of those are factors are to be taken into account in mitigation.

11 The court needs to set a penalty which takes into account all of the aggravating factors that I have referred to and the mitigating circumstances of the accused. In this matter, compared to other matters that have come before this Court as presently constituted, there is some distinction to be drawn. In this instance there are only two children involved. In many of the other matters that I have dealt with a greater number of children were involved. That is a factor to be considered. The circumstance by which the children became employed is another relevant factor. This was not a commercial decision by the accused to gain the services of children in order to have them work as a form of cheap labour. Rather this was a situation where the accused has acquiesced to the parents' request that the children be employed. Furthermore, the age of the children involved is of significance. In many other instances where I have dealt with matters of this type the children involved were much younger. From memory some were as young as 11 or 12 years of age. That is not the case here. The children were approaching 15 in each instance.

12 In this matter the court needs to impose a penalty which will act as a deterrent not only to the accused but also others. There is a need not only for a personal deterrent penalty but also a general one. Those within the industry should know from this, that the employment of children in a tavern is prohibited and that any contravention of the law in that regard will have serious consequences.

13 Every case will turn on its own facts. Having regard to the particular circumstances in this case, although there is a concern arising out of the fact that the children were employed in a tavern which potentially put them at risk, I must have regard to the mitigating circumstances. The following penalties are appropriate penalties having regard to the particular circumstances of this case. With respect to the first count relating to DG, the appropriate penalty to be imposed is less than the other count. That must be so having regard to the number of shifts worked which were significantly less. Further, the times worked did not involve late finishes. A fine of $2,000.00 is imposed with respect to that count. In relation to the second count involving CF, where a greater number of shifts were worked and the times worked were to a much later finish a $4,000.00 fine is imposed.

G CICCHINI
Industrial Magistrate

LONG SERVICE LEAVE—Boards of Reference—Special—

2008 WAIRC 01698

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH SKILL
	APPELLANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 8 DECEMBER 2008
FILE NO.	BOR 2 OF 2008
CITATION NO.	2008 WAIRC 01698

Result	Direction issued
Representation	
Appellant	Mr L Edmonds of counsel
Respondent	Ms J Alilovic of counsel

Direction

Having heard Mr L Edmonds of counsel on behalf of the appellant and Ms J Alilovic of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

THAT the appellant file and serve any affidavits for which he intends to rely upon by 19 January 2009.

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

2009 WAIRC 00356

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH SKILL
	APPELLANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 30 JULY 2008, MONDAY, 8 DECEMBER 2008, TUESDAY, 27 JANUARY 2009
DELIVERED	THURSDAY, 4 JUNE 2009
FILE NO.	BOR 2 OF 2008
CITATION NO.	2009 WAIRC 00356

CatchWords	Industrial law – Appeal to Commission from decision of Construction Industry Long Service Leave Payments Board – Accrual of long service leave – Whether employee must be registered to accrue long service leave entitlement – Interpretation of statute - Employee must be registered – Construction Industry Portable Paid Long Service Leave Act 1985 ss 3, 14(3), 21, 22, 23, 24(2), 25, 30, 34, 50.
Result	Appeal dismissed.
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr S Kemp of counsel

Reasons for Decision

1 This is an appeal pursuant to s 50 of the *Construction Industry Portable Paid Long Service Leave Act, 1985* ("the Act"). The appeal concerns a claim made by the appellant under the Act to the Construction Industry Long Service Leave Payments Board ("the Board") for recognition of service while he was employed by Otis Building Technologies ("Otis") from 1995 to 2003. The Board considered Mr Skill's application in or about September 2007 and rejected his claim. In short the Board concluded that there was insufficient material before it to establish to its satisfaction that the appellant was employed in the construction industry over the period from July 1995 to June 2003.

Relevant Statutory Provisions

2 Given the analysis to follow, it may be helpful at this point to set out relevant provisions of the Act arising for consideration both in terms of the submissions made and these reasons for decision.

3 The appellant's appeal is made pursuant to s 50 of the Act which provides as follows:

> ***"50. Appeals***
>
> *All claims arising out of the —*
>
> *(a) refusal of the registration of an employee;*
>
> *(b) requirement that an employer register under this Act;*
>
> *(c) removal of the name of an employer or employee from the employers register or the employees register respectively;*
>
> *(d) assessment of the amount of ordinary pay of an employee under section 34;*
>
> *(e) the entitlement of an employee to long service leave;*

> *(f) the amount of any moneys to be paid in respect of a long service leave entitlement whether pro rata or otherwise,*
>
> *may be made to the Board of Reference constituted under the Industrial Relations Act 1979 in relation to long service leave and the provisions of section 48(8), (9), (10), (11), and (12) of the Industrial Relations Act 1979 apply as though the claim were a claim under that section."*

4 The present appeal is made under s 50(e) in relation to the appellant's entitlement to long service leave under the Act.

5 As is made plain in the short title to the Act, the Act establishes a scheme making provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes. There are a number of definitions set out in s 3 of the Act dealing with the meanings of "employee", "employees register", "employer" and "employers register" and they are set out as follows:

> ***"employee"*** *means a person who is employed under contract of service or apprenticeship in a classification of work referred to in a prescribed award relating to the construction industry that is a prescribed classification;*
>
> ***"employees register"*** *means the register of employees established and maintained under Part IV;*
>
> ***"employer"*** *means a natural person or firm or body corporate, as the case may be, who or which engages persons as employees in the construction industry but does not include a Minister, authority or local government prescribed under subsection (4)(c);*
>
> ***"employers register"*** *means the register of employers established and maintained under Part IV;"*

6 The scheme of entitlement to long service leave and pay is set out in Part III of the Act. In particular, s 21 deals with an entitlement to paid long service leave and pay and is in the following terms:

> ***"21. Entitlement to paid long service leave and pay***
>
> *(1) Notwithstanding any other Act or award but subject to this Act, a person registered as an employee under this Act is entitled to the following long service leave in respect of service in the construction industry —*
>
> *(a) $8\ ^{2}/_{3}$ weeks after completing 10 years of service; and*
>
> *(b) $4\ ^{1}/_{3}$ weeks after completing 5 years of service subsequently to completing the period of service referred to in paragraph (a),*
>
> *and is entitled to be paid ordinary pay for such leave in accordance with this Act.*
>
> *(2) For the purposes of calculating the entitlement of an employee to long service leave under subsection (1) the following provisions apply —*
>
> *(a) 220 days of service as an employee shall be regarded as 1 year of service;*
>
> *(b) no more than 220 days of service shall be credited to an employee in a period of 12 months whether or not he has been employed as an employee during that period;*
>
> *(c) service in the construction industry is not required to be continuous and shall be included whether or not service is with more than one employer;*
>
> *(d) service with the same employer need not be continuous service as an employee but in that event only days of service as an employee shall be included;*
>
> *(e) a period of service in respect of which an employee has received a lump sum payment under section 22(1) shall not be counted as service.*
>
> *(3) In subsection (1) —*
>
> ***"ordinary pay"*** *means the average ordinary pay of the person over the period in which the person completed his or her most recent 220 days of service in the construction industry.*
>
> *[Section 21 amended by No. 30 of 1989 s. 6; No. 36 of 2006 s. 45.]"*

7 Also relevant for present purposes are s 23 dealing with the cessation of continuous service entitlements and s 25 dealing with when payments fall due from the Board. Those provisions are as follows:

> ***"23. Cessation of continuous service entitlement***
>
> *(1) Where a person has been engaged as an employee —*

(a) for any number of days that does not exceed 1 100 days and has not been so engaged within the period of 2 years commencing from the last of such days; or

(b) for any number of days exceeding 1 100 days and has not been so engaged within the period of 4 years commencing from the last of such days,

the Board shall cause the name of that person to be removed from the register of employees and where the name of an employee is so removed the entitlement of that person to long service leave in respect of those days is extinguished.

(2) Nothing in this section prevents an employee from becoming entitled to long service leave under this Act by virtue of any subsequent service as an employee.

25. Payment when due

The amount of money payable in respect of an entitlement under this Act becomes due when the Board is satisfied of that entitlement and shall be payable to the employee only in respect of the leave taken but, the Board may, with the agreement of the person who is entitled to the payment, postpone the payment for such period as is specified in the agreement."

8 A scheme of registration of both employers and employees, as defined in s 3 of the Act, is set out in Part IV. In particular, the most relevant provision of Part IV for present purposes is s 30 which is in the following terms:

"30. Registration of employers and employees

(1) Every natural person, firm or body corporate that is an employer in the construction industry (whether or not he or it carries on any other business) shall register as an employer under this Act.

(2) On and after the appointed day a natural person, firm or body corporate who or which fails to comply with subsection (1) commits an offence.

Penalty: $500.

(3) A natural person, firm or body corporate who or which desires to register as an employer under this Act shall apply in writing to the Board for registration in the form of a form approved by the Board.

(4) A person who desires to register as an employee under this Act shall apply in writing to the Board for registration in the form of a form approved by the Board.

(5) An application under this section by an employer shall contain every name and address under which the employer is engaged in the construction industry.

(6) Where an employer ceases to operate under any name or at any address notified in an application the employer shall notify the Board or cause the Board to be notified of that fact.

(7) A person who fails to comply with subsection (5) or (6) commits an offence.

Penalty: $500.

(8) An application made under subsection (3) or (4) shall contain such information as is required by the form.

(9) The Board may require an applicant to supply such further information as it specifies in relation to an application under this section and may require any information to be verified by statutory declaration.

(10) On receiving an application made under this section the Board may if it is satisfied with the information in the application —

(a) register the applicant as an employer or employee as the case requires; and

(b) issue to the applicant a certificate of registration.

(11) Where the Board is not satisfied with any information given in an application the Board may return the application and refuse to register the applicant.

(12) A registered employer who ceases to employ persons as employees may cancel his registration under this section by giving notice in writing to the Board."

The Evidence

9 Evidence on behalf of the appellant was from himself. On behalf of the respondent the Senior Inspector of the Board was called.

10 Mr Skill testified that he commenced employment with Otis in or about July 1995 and said he was continuously employed by that same company until in or about June 2003.

11 During that period of time, Mr Skill testified that he was employed as a service technician in the fire services section of the business. In terms of his work location, Mr Skill said that whilst Otis had a storage yard and an office in Western Australia, they had no workshop facilities and as a consequence, all of his duties were performed onsite. Those duties included the maintenance and testing of sprinkler systems already installed in buildings. Mr Skill estimated that that type of work engaged him for approximately 25% of his working time. For most of his time, Mr Skill testified that he was required to install new sprinkler systems at new construction projects, as well as the dismantling and reinstallation of sprinkler systems as part of building refurbishments.

12 According to Mr Skill, whilst he was employed by Otis, his payslips recorded a contribution towards his long service leave entitlements and he testified that Otis informed him that this contribution was being made on his behalf. A number of such payslips were annexed to Mr Skill's witness statement.

13 It was Mr Skill's evidence that he took this statement from Otis at face value and undertook no independent enquires in relation to his entitlements before the Board. His evidence was that he only noticed in or about January 2001, because of a reduction in pro rata hours recorded on his payslips that contributions may not have been made to the Board. As a result, Mr Skill contacted his union and instructed them to pursue the matter on his behalf.

14 Mr West is the Senior Inspector of the Board. Mr West outlined in his testimony the functions and procedures of the Board, the applicant's registration, his entitlements accrued while not registered and the relevant circumstances surrounding his claim.

15 Mr West testified that the Act commenced in January 1987 and the Board was created to administer the Act. All employers in the construction industry are required to register with the Board. Once an employer is registered, they are required to lodge Employer Return Forms. These forms were initially required every two months, but since 1994 they have been required to be lodged only every three months. On these returns, employers are required to list the names of all their employees who fall within the construction industry as defined in the Act and the number of days those employees are performing work onsite during that period. Mr West testified that when an employer initially registers with the Board it sends out a blank return and the employer is required to fill in the names of its current employees who fall within the scheme of the Act. This return is then sent back to the Board. If a return is lodged that includes the name of an employee who is not registered under the Act, the Board sends out application forms to be filled in by the relevant employees with the return for the next relevant period.

16 In terms of contributions, Mr West said that when each return is lodged, employers are required to pay contributions to the Board for each employee based on the number of days they have worked on a site. When an employee has sufficient credits of service he or she can request to have their long service leave entitlement paid out by the Board. Also, Mr West testified that if an employee terminates their employment in the construction industry, they are entitled to request a payout of their long service entitlement by way of a lump sum.

17 In terms of the appellant's registration, Mr West testified that he initially registered with the Board when it commenced operating in 1987. At this time all employees were sent out a registration card as evidence of their registration under the Act. It was the Board's practice to initially issue annually new registration cards. In or about 2002, Mr West said that a change of policy took place whereby the Board issued plastic cards which were only reissued when they needed replacing or were lost.

18 In terms of periods of service when the Board commenced operations, Mr West said that newly registered employees were allocated days of service based on the period of continuous employment they had with their current employer at the time of registration. At the time of his initial registration, the appellant had been employed by O'Donnell Griffin since October 1980. At that time the appellant was credited with seven years of long service leave entitlements in recognition of this period of employment.

19 From the records of the Board annexed to Mr West's affidavit, on or about 12 December 1993 the appellant terminated his employment in the construction industry and he received a payout by way of a lump sum of his then accrued long service leave entitlement. This was confirmed in the Board's long service leave register relevant entry annexed as MW1 to Mr West's affidavit.

20 Mr West testified that in circumstances where an employee leaves the construction industry and takes a lump sum payment of their long service leave entitlements, the Board removes the employee from its employee register. According to Mr West, when this situation arises, a letter is sent to the relevant employee, advising them of the lump sum payment confirming that they are no longer in the industry and that they have been de-registered under the Act. Whilst a copy of such a letter to the appellant was not in evidence, copies of similar letters sent to other registered employees by way of examples, were annexed as MW3 and MW4 respectively to Mr West's affidavit.

21 Mr West also gave evidence about the Board's policy concerning accrual of entitlements and registration. He testified that when the Act commenced operation, the Board's policy was that employees who were not registered could not accrue long service leave entitlements, even when a registered employer was making contributions on their behalf. He said that in about 1990, the Board changed its policy and from this time when an employee was detected on an employer's return who was not registered, the Board would send the employer an application for registration to be given to the unregistered employee.

22 In these circumstances, if the employee registered under the Act, they would be entitled to the long service leave credits that they had accrued based on service in the construction industry, prior to their registration. Alternatively, if an employee had

previously been registered under the Act, the Board would send out an application for registration and in the interim period, credit long service leave entitlements for days of service in the industry even though no new registration application had been received.

23 In relation to the appellant, for the year 1994, Mr West testified that three returns were lodged listing the appellant as an employee of Swan Fire Protection Services. A copy of the relevant returns was annexed to Mr West's affidavit as MW5. It was noted that the returns lodged at this time recorded the appellant's former registration number, despite the appellant having being de-registered after having received payment of a lump sum entitlement in or about December 1993.

24 Mr West testified that after this the appellant did not receive any further credits for long service leave for service in the construction industry until 2004. These entitlements are set out in annexure MW5.

25 In 2004, Mr West said that the Board noted that the appellant's name began to appear on returns filed by Chubb Fire Australia. He said that at this time, the Board policy was that if an employee had been previously registered they would be automatically re-registered without needing to complete a new application for registration. In this case, the appellant was re-registered with effect from 21 April 2004. From this time the appellant commenced receiving annual statements of service from the Board each March referring to the number of days of service in the construction industry up to the proceeding 31 December.

26 Mr West referred to statements of service in March 2005 and 2006 sent to the appellant referring to his total days of service as at the proceeding 31 December, copies of which were annexed as MW6 and MW7 to Mr West's affidavit.

27 In terms of the appellant's present claim, Mr West testified that the Board did not receive any queries from the appellant in relation to his days of service record until a letter was received from his union on 26 May 2006. This letter referred to the appellant's employment by Otis from July 1995 to June 2003 as a sprinkler fitter under the Sprinkler Pipe Fitters Award 1975, but he had not received any long service leave credits for that service. The letter from the appellant's union advised that Otis had been purchased by another company, Advanced Building Technologies, subsequently.

28 Mr West said that he made contact with Advanced Building Technologies and was informed that the employment of the appellant with Otis had terminated before they purchased the business and thus had no records in respect of his service. Mr West said he then contacted the parent company to Otis, requesting details in relation to the appellant's employment, duties and a period of service. He was informed that they did not retain any records from the appellant's period of service with Otis.

29 Mr West testified that he also used the Board's record system to check returns filed by Otis for the relevant period concerning the appellant's employment. According to Mr West, none of the relevant returns, a copy of which was annexed as MW8, referred to the appellant as being employed in the construction industry.

30 As a consequence of these enquires, the appellant was advised by the Board by letter dated 5 September 2007 that his claim had been denied.

Consideration

31 The resolution of the present appeal in part turns upon the proper construction of the relevant provisions of the Act. A key question for resolution is whether, to be entitled to long service leave benefits under the Act, an employee engaged in the construction industry, must be registered in order to accrue long service leave entitlements. I will refer to relevant provisions of the Act set out above.

32 By its long title, the Act is to provide for a scheme of long service leave for employees "engaged in the construction industry."

33 By s 3 of the Act, "employee" means a "person…engaged in a classification of work in a prescribed award relating to the construction industry."

34 The definition of "employer" in the Act refers to a person who engages employees *in* the construction industry. The definition does not say that the employer must itself, be in the construction industry.

35 As set out above, a key provision for present purposes is s 21. By s 21(1), a person who is *registered* as an employee under the Act, is *entitled* to long service leave "in respect of service in the construction industry…"

36 The issue that arises for present purposes is whether the "entitlement" and "service" are both linked to the registration of an employee under the Act.

37 The language of s 21(1) suggests that there is a necessary linkage between the entitlement to leave, service and the registration of an employee. An "entitlement" to long service leave under the Act can only arise as a consequence of "service" in the construction industry by an employee employed by an employer. There are also a number of signposts in the Act, as set out in the respondent's submissions, suggesting that registration by an employee is a matter of some significance.

38 To be entitled to the benefit of long service leave or payment of a lump sum under s 22 of the Act, the accrual of an entitlement to long service leave, and consequently a pay out of long service leave in respect of such an accrual of entitlement, can only occur for a registered employee.

39 By s 23, if a person as an employee in the construction industry ceases to be employed for the proscribed periods after a minimum service of 1100 days, then the Board is required to deregister the employee and importantly, the accrued entitlement to the long service leave is extinguished for the days of service accrued. The removal of the name of the employee from the register has the effect in these circumstances, of extinguishing the entitlement.

40 The terms of s 23, as set out above, suggest that the entitlement to long service leave i.e. the accrual of service for long service leave purposes, is subject to a requirement that an employee register as an employee under the Act. By this I mean that the

removal of the name of an employee from the register removes the entitlement. This is supportive of the proposition that on its proper construction, under the Act, to accrue an entitlement in the first instance requires an employee to be registered. This is consistent with the observations of Owen J in *Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd* (unreported Supreme Court of WA Library No 920130 4 March 1992) where his Honour said:

> "To be eligible for benefits under the scheme, employees must be registered (s21). All employers in the construction industry must be registered (s30). To meet the costs of the scheme each employer pays a contribution to the plaintiff based on a percentage of their employees' ordinary pay (as defined in s3) except in the case of apprentices, for whom no contribution is made (s31 and s34(1)). The scheme enables registered employees to carry their long service leave entitlements from employer to employer as the responsibility for payment for long service leave rests with the plaintiff rather than the individual employer."

41 By s 24(2) the Board is required to notify an employer and an employee of an impending entitlement to long service leave. There could be difficulties in notifying an employee if they are not registered.

42 By Part IV of the Act, the registration provisions are set out. By s 30(1), as above, an employer *in* the construction industry is required to register with the Board. By s 30(4) persons who "desire" to register as an employee, are required to apply to the Board to do so. I do not consider that the use of the word "desire" is to be construed as meaning that an employee who seeks to have benefits accrue to him or her has an option to register. It seems to me that the better construction is, having regard to the language of the statute as a whole, that a person who is an employee for the purposes of s 3 of the Act, and who wishes to accrue service and long service leave entitlements, is required to do so.

43 In relation to employers, an employer registered under the Act is required by s 31 to provide a return to the Board and to make payments as required by the Act.

44 Furthermore, by s 34(1), when read with s 30(1), (2) and (3), an "employer" (i.e. one not necessarily registered), is required to make contributions for "employees" (i.e. those employees engaged in work relating to the construction industry). On this analysis, the Act appears to contemplate two classes of employers, those registered as engaged *in* the construction industry as provided in s 30(1) and those not in this category, but who employ employees who are so engaged and who are employers as defined in s 3: *Aust-Amec Pty Ltd t/a Metlab Mapel & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) 62 IR 412 per Ipp J at 418-420.

45 It appears therefore that the Act does not require all employers who have to make contributions under the Act to be registered. It is only those who are engaged in the construction industry as defined in s 3 of the Act who are so required.

46 From the foregoing analysis, for an employee to obtain the benefits of long service leave under the Act, the employee concerned needs to be registered under s 21 for the period of service in respect of which the entitlement to long service leave is claimed.

47 In this case, the appellant was not registered under the Act in respect of the period of service over which he claims a long service leave entitlement for work performed in the construction industry. On the payment out to him in 1993 of a lump sum entitlement under s 22 of the Act, the appellant was considered to have left the construction industry and on the respondent's evidence, his registration then in effect under the Act, was cancelled. Whilst counsel for the appellant suggested in his submissions that the Board has no such power, and the only power of deregistration is under s 23(1) of the Act, I consider that the terms of s 14(3) of the Act conferring powers that are necessary and convenient for the performance of the Board's functions under the Act, are sufficiently broad to enable the Board to have acted as it did with the appellant's then registration.

48 I accept the appellant's evidence that he was employed by Otis which on the appellant's uncontradicted evidence was owned by the Otis Elevator Company, which name appeared on the appellant's pay slips tendered as exhibits A3 to A5. This is supported by the appellant's evidence that he worked with a Mr Stalker at Otis, who was also engaged in sprinkler fitting work, and whose name appears on returns filed with the Board by Otis as set out in annexure MW8 to Mr West's affidavit. Having regard to all of this evidence, and the evidence of the appellant as to his duties, I accept that the appellant was engaged in the construction industry as defined in s 3 of the Act as a sprinkler fitter at the material times.

49 However, given these findings, the importance of employee registration under the Act is brought into focus. Had the appellant been registered with the Board over this period as a person engaged in the construction industry, the absence of the appellant's name on the returns of Otis would have no doubt alerted the Board to a matter requiring investigation.

50 Furthermore however, even if it could be said that on its proper construction, the Act does not require an employee to be registered throughout the entire period of service in respect of which a long service leave claim is made, in the present case, there is simply insufficient evidence to enable a determination to be made of the days of service that would be credited to the appellant in order to confer an entitlement to long service leave under the Act. This is because the evidence discloses that there are no adequate records of the appellant's service for this purpose by way of employer returns made under the Act to enable this calculation to occur.

51 For all of these reasons the appeal must be dismissed.

2009 WAIRC 00357

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEITH SKILL
	APPELLANT
	-v-
	CONSTRUCTION INDUSTRY LONG SERVICE LEAVE PAYMENTS BOARD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 4 JUNE 2009
FILE NO/S	BOR 2 OF 2008
CITATION NO.	2009 WAIRC 00357

Result	Appeal dismissed
Representation	
Applicant	Mr L Edmonds of counsel
Respondent	Mr S Kemp of counsel

Order

Having heard Mr L Edmonds of counsel on behalf of the applicant and Mr S Kemp of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979, hereby orders –

THAT the appeal be and is hereby dismissed.

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

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2009 WAIRC 00303

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
HEARD	FRIDAY, 24 APRIL 2009
DELIVERED	MONDAY, 25 MAY 2009
FILE NO.	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 00303

CatchWords	*Removal of Police Officer – loss of confidence by Commissioner of Police – production of documents prior to hearing appeal – Police Act 1892 (WA) s 33S; Industrial Relations Act 1979 (WA) s 27(1)(o)*
Result	Application dismissed
Representation	
Appellant	Mr G J Laurent, via video-link
Respondent	Ms D P Scaddan, of counsel

Reasons for Decision - Application for an Order for Production of Documents

1 Mr Laurent has appealed to the WAIRC his removal from the WA Police. His appeal was listed for hearing 11 May 2009. On 31 March the WAIRC received a request from Mr Laurent for an order to issue requiring the Commissioner of Police to produce 38 documents to him. The WAIRC gave the Commissioner of Police the opportunity to consider the request and to advise which documents, if any, the Commissioner of Police was prepared to produce without an order being required. The Commissioner of Police replied on 16 April 2009. Except for document 4 which is to be found in the three volumes of documents already provided by the Commissioner of Police for the purposes of the appeal, the Commissioner of Police did not consent to produce any other documents referred to in Mr Laurent's request.

2 The WAIRC listed Mr Laurent's request for hearing, with Mr Laurent participating by video, in order to deal with his request. The time set aside for the hearing was fully taken up in hearing from Mr Laurent and allowed insufficient time for the Commissioner of Police to reply to his submissions. Accordingly, the WAIRC both adjourned the appeal hearing listed for 11 May to a date to be fixed, and also provided an opportunity for the Commissioner of Police to consider Mr Laurent's submissions and to reply in due course in writing. This was done on 7 May 2009. These reasons for decision are the WAIRC's decision regarding Mr Laurent's request for an Order that the Commissioner of Police produce certain documents to him.

3 The WAIRC approaches its decision from this perspective. Mr Laurent's right to appeal his removal is set out in s 33P and following of the *Police Act, 1892* (WA) (the Police Act). Mr Laurent's appeal, and the right of the Commissioner of Police to be heard in reply to it, is comprehensively covered by the Police Act.

4 We also note that the power of the WAIRC to order the production of documents in an appeal under s 33P of the Police Act appears to be specifically preserved by the Police Act; the power of the WAIRC is found in s 27(1)(o) of the *Industrial Relations Act, 1979* (WA) and that subsection is specifically included in an appeal under s 33P by s 33S of the Police Act. It follows that Mr Laurent's appeal, and this request from him for an order for the production of documents, is to be dealt within that context. We note that s 33Q provides for the steps to be followed on an appeal; the WAIRC is to first consider the Commissioner of Police's reason for deciding to take removal action; those reasons are contained in certain documents, all of which the Commissioner of Police is obliged to provide to Mr Laurent. The Commissioner of Police says that these documents have been supplied to Mr Laurent.

5 Secondly, the WAIRC is to consider the case presented by Mr Laurent as to why that decision was harsh oppressive or unfair. Mr Laurent's case is necessarily restricted to the grounds he has set out in his Notice of Appeal. He is also able to respond to any matter that is raised by the Commissioner of Police in the Commissioner's reasons for deciding to remove him. Thirdly, the WAIRC is to consider the case presented by the Commissioner of Police in answer to Mr Laurent's appeal.

6 Therefore, the documents that are relevant to the appeal are those encompassed within the three steps set out above. Section 33R, and in particular s 33R(11), makes it clear that any document other than evidence of:

(a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;

(b) the notice given under section 33L(1);

(c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);

(d) the notice given under section 33L(3)(b); and

(e) a notification of the removal from office

is "new evidence" and Mr Laurent has no right to introduce new evidence into his appeal.

7 Therefore, and as became apparent to him during the course of the hearing, if any of the 38 documents he seeks are not documents which relate to his grounds of appeal, or are not relevant to the appeal from the reasons the Commissioner of Police decided to remove him, they are not relevant to the appeal. If they are not relevant to the appeal then not only should Mr Laurent not be asking for them to be produced, which is a waste of his own, the Commissioner of Police's and the WAIRC's time, but the WAIRC will not have the power to order their production.

8 During the proceedings, it became apparent that a number of the documents sought by Mr Laurent could not possibly be relevant to the appeal. Those documents are: documents 14, 15, 17-21, 24, 25, 27, 29, 31, 34-36; accordingly so far as Mr Laurent's application relates to those documents, the request is refused.

9 We turn our attention to the other documents sought.

10 In relation to the other documents sought, our decision in respect of each document is as follows.

Document 1 – It is agreed that it has already been included in the documents supplied to Mr Laurent and the WAIRC by the Commissioner of Police. No order will issue.

Document 2 – After questioning Mr Laurent during the hearing it became apparent from his answers that the document he is referring to appears to be a document that has already been provided to him by the Commissioner of Police in volume 2 tab 27 (as discussed in the transcript of proceedings 5-15). No order will issue.

Documents 3-6 – The discussion of these documents with Mr Laurent (transcript 15-23) revealed that they do not relate to a ground of Mr Laurent's appeal and neither do they relate to a reason the Commissioner of Police relied upon for Mr Laurent's removal. No orders will issue in relation to these documents.

Document 7 – Mr Laurent describes this document as background pertaining to the Northbridge incident. However, he concedes that the issue is not specifically in his grounds of appeal (transcript 24). Further, as the Commissioner of Police points out in his reply filed on 7 May 2009, document 7 refers to journal notes of a meeting occurring some 8 months prior to the Northbridge incident. We are not persuaded this document can be relevant to Mr Laurent's appeal and no order will issue.

Document 8 – Discussion with Mr Laurent during the hearing indicated that the documents being sought are the photoboard and "audio-recordings" of witnesses to the Northbridge incident. The Commissioner of Police agreed during the proceedings to provide a transcript of witness statements and to check on the status of the photoboard. We record that the Commissioner also indicated a preparedness to make a copy of the "audio-recording" (transcript 26). On the basis of the undertaking given by the Commissioner of Police, no order will issue.

Document 9 – The Commissioner of Police undertook to supply copies of the transcript of witness statements; on that basis, no order will issue.

Document 10 – This is a request for "a copy of the documentations (*sic*), correspondence, emails and other forwarded to Ken Bates director of public Prosecution". As it is worded, the request is impossibly broad because it does not restrict itself to the decision made by Mr Bates reflected in his letter of 5 September 2008 (which is in volume 1, tab 5 attachment 3).

During the hearing, Mr Laurent said that he had had a conversation with Mr Bates and understood there were numerous phone calls by the Commissioner of Police requesting an explanation of why the charge against Mr Laurent was withdrawn. Mr Laurent makes the request because he thinks there is an inference from Mr Bates that senior police were dismayed with the decision. He states that Mr Bates had had a number of options and Mr Laurent alleges that Mr Bates may have been influenced by senior police to withdraw (transcript 30).

We note that Mr Laurent's grounds for appeal do not allege that one of the reasons why his removal is unfair is due to any of the matters Mr Laurent now refers to in connection with Mr Bates. Further, it is the fact that the Director of Public Prosecutions (DPP) moved to discontinue the charge against Mr Laurent on the basis set out in the letter of 5 September 2008 that is part of the reasons why the Commissioner removed Mr Laurent; whether there may have been other options open to the DPP does not alter the fact that the decision was made to discontinue the prosecution. It is also not clear whether there are any documents in existence as sought by Mr Laurent, given his reference during the hearing to telephone calls. We are not satisfied that he has shown that an order should issue.

Document 11 – It is not clear from Mr Laurent's submission how the documents sought relate to a ground of appeal or matter referred to by the Commissioner of Police in his decision to remove Mr Laurent. The response of the Commissioner of Police is, with respect to Mr Laurent, a little more helpful to our understanding. It appears that Mr Laurent is seeking to establish the relevance of these documents by suggesting that they may contain information that would assist in establishing that a person other than himself was the offender in the Northbridge incident. The Commissioner of Police submits that Mr Laurent is engaged in a "fishing expedition".

We are inclined to agree. We do so because Mr Laurent did not make it clear what any such document he is requesting would do to assist him in his appeal, particularly as his appeal does not allege that any conduct or involvement of Detective Sayer is relevant. No order will issue.

Document 12 – In discussion with Mr Laurent, it appears that Mr Laurent has had access to his medical file however he seeks one letter that is not in it. This is said by him to be a letter from Dr Schulman regarding giving Mr Laurent sick leave after he had advised the doctor of being assaulted at work. The letter is dated shortly after 9 May 2007. Although Mr Laurent stated that he did seek the whole file, our reading of the transcript (page 32) indicates that it is this letter which he seeks to have produced to him.

Helpfully, the Commissioner of Police's response to the request for this item provides considerable information (a reference to [33]–[41] of the Commissioner of Police's Submissions in Response to the Appellant's Notice to Produce) that to the best of the Commissioner's knowledge, a letter in the terms of the document sought by Mr Laurent does not actually exist. We also note the Commissioner's advice that Mr Laurent has had full access to his medical file on two occasions. No order will issue.

Document 13 – This is a request for a copy of the reports, recording, documents and recommendation demonstrating corruption of the investigation conducted by the internal affairs regarding the involvement of Sergeant Hutchison and Senior Sergeant Barfoot regarding a stealing offence from the beach car park. Mr Laurent concedes that this issue is not one raised in his appeal. He does submit that it is a matter referred to and relied upon by the Commissioner of Police in the decision to remove him. He says that the production of the document will show police officers write what they feel like just because they are supervisors. Mr Laurent is of the view

that this leads to victimisation and harassment (transcript 33). He believes that the documents will show that the Commissioner of Police does not have a grasp on what actually happens "at core roots of policing" (transcript 33).

The Commissioner of Police responded with the advice that both Sergeant Hutchison and Senior Sergeant Barfoot have been instrumental in preparing written reports regarding Mr Laurent's poor performance as a police officer. The Commissioner of Police points out that Mr Laurent provides no indication how this further information has a legitimate forensic purpose relevant to the issues before the WAIRC or how the documents will materially assist Mr Laurent in establishing that the Commissioner of Police's decision to take removal action was harsh, oppressive or unfair. The Commissioner points out that a copy of Sergeant Hutchison's report was included in the Commissioner of Police's response to Mr Laurent's complaint to the Equal Opportunity Commissioner dated 6 August 2007; Mr Laurent had full access to Sergeant Hutchison's report being an annexure to Mr Laurent's response when he was provided with a copy of the response by the Equal Opportunity Commissioner on or around 6 August 2007; additionally or alternatively Mr Laurent would have received a copy of Sergeant Hutchison's report shortly after 18 December 2007 and was therefore aware of this information at the time of preparing his response to the Commissioner of Police prior to his removal from office and could have brought to the Commissioner of Police's attention any issues he had with the reports or authors at that stage for consideration by the Commissioner.

We agree with the Commissioner of Police that Mr Laurent's assertions do not render the information evidence which is sought for a legitimate forensic purpose. We have not been persuaded by Mr Laurent that a copy of the documents should be made available for the purposes of appeal and no order will issue.

Document 16 – This request can refer both to the Analysis of Response to the Commissioner of Police's Loss of Confidence Process dated 3 November 2008 (volume 1 tab 5) and to the Summary of Investigation dated 20 August 2008 (volume 1 tab 9). Mr Laurent's submission to us is that at the bottom of each page Acting Inspector Edwardes ('Senior Sergeant Edwardes' at the time of the Summary of Investigation) refers to particular investigations or statements. It is these references he requests to be produced to him. The Commissioner of Police replies that other than two references which are to be produced (and which are referred to in these reasons regarding documents 8 and 9), the summary of investigation and all the references have been produced to Mr Laurent in the documents already supplied to him (Commissioner of Police's Submissions in Response [48]).

Our examination of Acting Inspector Edwardes's Analysis of Response does not reveal any attachment to which she refers which has not been supplied. We are not able to identify from Mr Laurent's submission to us what other document he refers to; on that basis no order will issue.

Document 22 – Mr Laurent seeks a copy of the complete roster at Geraldton from June 2006 to April 2008. In the hearing, Mr Laurent stated that this request is to sustain allegations he has made and to show that his pattern of sick leave directly contributed to the fact that he was suffering from injuries at the time and that the pattern was not extreme. He also said it would assist him to "be able to respond to some of these allegations in the documents" (transcript 36). The Commissioner of Police's Submissions in Response point out that the complete roster is irrelevant to the appeal proceedings and Mr Laurent provides no information as to how the provision of the roster is for a legitimate forensic purpose relevant to the issues before the WAIRC or how the documents will materially assist Mr Laurent in establishing the Commissioner's decision to take removal action was harsh, oppressive or unfair. The Commissioner states that to the extent Mr Laurent asserts the roster is relevant to whether he inappropriately took sick leave when he was not sick, his complete leave history is supplied at volume 2 tab 3.

We note that Mr Laurent's grounds of appeal do not contend that the rostering practices contributed to his failure to perform or to his poor conduct. We have noted that the Commissioner of Police's reasons for deciding to remove Mr Laurent (volume 1, tab 1 page 4 at paragraph 2(i)) state that other grounds which were examined in the investigation into Mr Laurent's conduct into the course of his career and which formed the basis for the Commissioner of Police's decision, include that Mr Laurent inappropriately used the sick leave entitlements of WA police officers to avoid working shifts that did not suit him, to attend to activities in his private life and to avoid rotating to areas of work that do not suit him.

Mr Laurent did not provide any detail to us in his submission regarding how the provision of the complete roster would allow him to challenge these assertions. We use one as an example. In the Commissioner's reasons at [257] is the statement that on 28 October 2007, whilst on sick leave, Mr Laurent was observed at home washing his vehicle and tending to his boat with the inference that "he was going to, or had taken, the boat out". Mr Laurent did not make clear to us how the provision of the complete roster would allow Mr Laurent to answer this statement.

Further, the allegation that Mr Laurent inappropriately used the sick leave entitlements of WA Police to avoid working shifts was clearly spelt out to him in the Notice of Intention to Remove dated 3 September 2008. Mr Laurent's response of 6 October 2008 answers the allegation on the basis that he has been entitled to all leave taken and it has been supported with sick leave certificates - it was leave taken as a result of caring for his young family and for injuries as a result as a number of work related injuries. Proving the accuracy of this response does not depend upon the provision of the roster.

In the absence of any argument from Mr Laurent about how the provision of the complete roster would enable him to show that his removal for this reason was harsh, oppressive or unfair, we are not persuaded that an order should issue.

Document 23 – The documents requested are "a copy of all complaints submitted against Police officers at Geraldton Police Station since 2006 to 2008?". In his submission (transcript 36) Mr Laurent refers to an incident where he left his unsecure firearm in the armoury. Mr Laurent believes that the Commissioner of Police is not aware of incidents that surround the issue. He refers to "20-odd incidents I can refer to the fact that procedures weren't followed and…things weren't reported". However, we agree with the Commissioner of Police's response that Mr Laurent provides no indication about how a copy of all such complaints, presuming they exist, have a legitimate forensic purpose to Mr Laurent's appeal. Mr Laurent's own appeal does not suggest that his treatment is harsh or oppressive by reference to complaints having been made about other officers and how they were dealt with. No order will issue.

Document 26 – Mr Laurent requests a copy of the business and action plan prior to the commencement of the refurbishment at the Geraldton Police Station. Mr Laurent submits that it will be relevant to the fact that he suffered injuries and hence to behave in a certain way and seek treatment. It appears to us from Mr Laurent's submission that Mr Laurent is seeking to submit that there was at least another option open to the Commissioner of Police regarding the refurbishment, one that may have involved "more safety conscious proceedings" (transcript 39). That is not an issue that is raised by Mr Laurent's Notice of Appeal or by the Commissioner of Police and no order will issue.

Document 28 – This is a copy of "the action plan after the Appellant informed of injuries sustained" *(sic)*. Mr Laurent states that this is a reference to whether there was an action plan after the Commissioner of Police was informed of his injuries at the Geraldton Police Station. He wishes to know what other actions the WA Police took, and what was documented. The Commissioner of Police replies that to the extent that the Commissioner has in his possession documents matching the description of document 28, he has already provided Mr Laurent with copies in relation to proceedings before the Equal Opportunity Commission. The WAIRC is not persuaded that the document fits within Mr Laurent's grounds of appeal or has the capacity to show that his removal was harsh, oppressive or unfair. No order will issue.

Document 30 – Mr Laurent requests a copy of photographs of the refurbishment obtained by the Commissioner of Police. The Commissioner of Police advises that no photos were taken of the relevant refurbishment by the Commissioner of Police or any of its employees or officers. On that basis, no order will issue.

Document 32 – Mr Laurent requests a copy of all correspondence, emails and documentation addressed to or received from a number of medical practitioners and the Director of Public Prosecutions that involves Mr Laurent. Mr Laurent in the hearing made the observation that the production of such documents will show unfairness in that the Commissioner of Police did not treat his injury as he should have and how he has done for others. The Commissioner of Police's response to this request submits that the request is too broadly termed and is also a "fishing expedition". We are inclined to agree. There is nothing in Mr Laurent's grounds of appeal which relate specifically to the Commissioner of Police failing to deal properly with his illness or injury whilst at Geraldton. It is certainly not clear from Mr Laurent's submission that the documents would assist him in any particular allegation made by the Commissioner of Police. No order will issue.

Document 33 – Mr Laurent seeks a copy of all correspondence including records of telephone calls "manifested between the Commissioner of Police and medical staff". In the hearing it appeared that Mr Laurent is seeking a copy of correspondence and telephone calls between the Commissioner of Police and his medical practitioners for the period that Mr Laurent was at Geraldton.

The submission made by Mr Laurent at (transcript 42) does not relate to any ground of his appeal. It is also not clear how the reasons for the Commissioner's loss of confidence in Mr Laurent would be able to be challenged by a copy of such correspondence. We note the Submissions in Response of the Commissioner of Police, which we consider to be quite correct, that the Commissioner's reasons for removal are not limited to Mr Laurent's conduct whilst at the Geraldton Police Station. We are not persuaded that an order should issue.

Document 37 – This requests a copy of the journal of Acting Senior Sergeant Gillis, Senior Sergeant Kosovich and Commander Gere regarding the refurbishment and "after events". In his submission to us, Mr Laurent states that the reason he seeks the documents is that these officers knew of people suffering from injuries due to the refurbishment, and he queries what they have done about it, and that the course of action which they took would be documented in the journals. Provision of the documents will allow an inference of unfairness because, as we understand Mr Laurent's submission, he says that these officers undermined the investigation in order to remove themselves from liability. We are unable to see how these documents relate to a ground of Mr Laurent's appeal or how they are material to the reasons given by the Commissioner of Police for his removal of Mr Laurent. We are not persuaded that an order should issue.

Document 38 – This requests "a copy of what information was given and requested to the Appellant's medical practitioners". Mr Laurent submits that he has received some documents "through a different forum" but there should have been more documents that were forwarded to which he has not had access. It is apparent that Mr Laurent is referring in part to the Geraldton medical practitioners for the period 2006 to 2008.

We are unable to identify from Mr Laurent's request the documents which he seeks, and the documents he has already received. In those circumstances, we regard Mr Laurent's request as somewhat onerous because it must inevitably duplicate the documents he has already received. More importantly however, we are unable to see how the provision of the information is relevant to one of Mr Laurent's grounds of appeal or how it bears upon the reasons relied on by the Commissioner of Police to remove Mr Laurent.

Conclusion

11 These reasons for decision show that Mr Laurent's application for the production of documents can be viewed in three broad parts. The first part is those documents he himself concedes have no relevance to the appeal. These are detailed in paragraph 8 of these reasons. The second part is those documents where the Commissioner of Police has undertaken to provide copies to Mr Laurent. The Commission accepts the undertaking of the Commissioner of Police in each case and does not consider that an order should issue. The third and final part is those documents that we have dealt with in the paragraphs above. For the reasons that we have given in each case, Mr Laurent has been unable to show that an order should issue in his favour. Accordingly, an order will now issue dismissing Mr Laurent's application for an order that the Commissioner of Police produce certain documents to him.

2009 WAIRC 00305

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
DATE	MONDAY, 25 MAY 2009
FILE NO/S	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 00305

Result Application dismissed

Order

The WAIRC, pursuant to the powers conferred on it under s 33S of the *Police Act, 1892*, hereby orders–

THAT the application for an order for production of documents is dismissed.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

2009 WAIRC 00515

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 4 FEBRUARY 2009, TUESDAY, 24 FEBRUARY 2009, MONDAY, 30 MARCH 2009, FRIDAY, 24 APRIL 2009, MONDAY, 25 MAY 2009, FRIDAY, 17 JULY 2009
DELIVERED	MONDAY, 3 AUGUST 2009
FILE NO.	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 00515

CatchWords	Removal of Police Officer – Loss of confidence by Commissioner of Police – What constitutes a further grounds of appeal – Distinction between submissions and grounds of appeal – Power to amend grounds of appeal –*Police Act 1892 (WA)* s 33P, s 33R, s 33R(3), (4) and (11), s 33S - *Industrial Relations Act 1979 (WA)* s 27(1)(l)
Result	Application granted in part; remainder of application dismissed
Representation	
Appellant	Mr G J Laurent, in person
Respondent	Ms D P Scaddan, of counsel

Reasons for Decision – Application to amend grounds of appeal

1 This is our unanimous decision. Mr Laurent is a former police officer who has appealed to the Western Australian Industrial Relations Commission (the WAIRC) his removal from the Western Australian Police Force (the Police). Since lodging his appeal on 23 December 2008 Mr Laurent has made three applications regarding his appeal. The first two applications were a request from Mr Laurent for an order to issue requiring the Commissioner of Police to produce 38 documents to him and a request from Mr Laurent for an adjournment of the proceedings. Both these applications were refused: 2009 WAIRC 00303 and 2009 WAIRC 00301 respectively. These Reasons for Decision relate to a third application made by him.

2 On 3 June 2009 Mr Laurent sent an email to the WAIRC stating that the document attached to the email is the "Further and Articulate Grounds" he intends to rely upon "at trial". Attached to the email is an 82 page document consisting of 631 numbered paragraphs and dated 2 June 2009. (This document was subsequently revised by Mr Laurent with 85 pages and 636 paragraphs and re-sent to the WAIRC on 18 June 2009 and it is this latter document upon which Mr Laurent relies although it still carries the same date.) We note that on 24 April 2009 Mr Laurent had sent two emails to the WAIRC to which other documents are attached; the status of these documents is not clear. The WAIRC listed Mr Laurent's appeal for mention on 17 July 2009 in order to deal with these issues.

3 Although at the commencement of the hearing, Mr Laurent appeared to indicate that he was applying to substitute the document of 2 June 2009 for the grounds of appeal he lodged on 23 December 2008, he subsequently stated that he wishes to add to his grounds of appeal the matters contained in the document of 2 June 2009. In making his application, Mr Laurent says that when he lodged his appeal on 23 December 2008 he was not medically capable of summing up, or articulating, the matters that he wished to raise. This was because of the stress and anxiety he was suffering which, from his submissions, he attributes to injuries and injustices suffered by him in the course of his employment.

4 The Commissioner of Police submitted that the document of 2 June 2009 is more than mere substitution or the provision of additional grounds: it is a new document which goes far beyond the grounds of appeal, although there are some common elements. Further, the Commissioner of Police says that the document contains matters which go beyond the issues relied upon in the Commissioner of Police's loss of confidence process and thus do not fall within the scope of this appeal. The Commissioner of Police also queried the extent to which the WAIRC is able to amend the grounds of appeal, particularly by an amendment of the magnitude of the document of 2 June 2009. In the view of the Commissioner of Police, the powers made available to the WAIRC under s 27(1)(l) of the *Industrial Relations Act, 1979* (WA) (the IR Act), to the extent that they are available by reason of s 33S of the *Police Act 1892* (WA) (the Police Act), do not allow the supplanting of the grounds of appeal with a whole new document.

5 It may be helpful to summarise what we consider to be Mr Laurent's present grounds of appeal. Mr Laurent's Form 31 Notice of Appeal of 23 December 2008 has attached to it what Mr Laurent has referred to in these proceedings as "a letter". That is

probably an accurate description of its layout. What it should be is a statement by him of the reasons why he considers the decision of the Commissioner of Police to remove him is harsh, oppressive or unfair (which is required by the Form 31 which he completed) and a summary of facts or issues of law relied upon by Mr Laurent, including matters relevant to s 33Q(4) of the Police Act (which is required pursuant to r 90(a)(ii) of the *Industrial Relations Commission Regulations 2005*).

6 Accordingly, even though the document attached to the Notice of Appeal is set out in the form of a letter, it must be read as setting out the reasons why Mr Laurent believes his removal was harsh, oppressive or unfair. Those reasons, extracted from the document are, if we understand them correctly, as follows:

1. That with regards to the Northbridge incident, the Commissioner of Police has mistakenly identified Mr Laurent as the person of interest. (Mr Laurent sets out a statement of facts in relation to the Northbridge incident later in this document.)
2. That the reasons for Mr Laurent's removal are totally unfounded to the extent that the Commissioner of Police has been made fully aware that Mr Laurent's performance was hindered due to injury he sustained whilst carrying out his duties.
3. That since the injury which occurred in 1997, Mr Laurent has received no assistance whatsoever from the Police, was made to feel inadequate by his peers and supervisors, and was constantly harassed because of a pending claim for compensation.
4. That there are certain reports about Mr Laurent's conduct and performance which were never bought to his attention during his time as a police officer.
5. That Mr Laurent feels he has been unfairly dismissed as a result of performance which was caused by injury sustained in carrying out his duties, taking into account pain and suffering, harassment, threats, assaults, discrimination, false statements and reports and vexatious allegations he has had to endure during his tenure as a police officer.
6. That if Mr Laurent's performance as a police officer was "substandard" he would not have moved up to the rank of First Class Constable after four years and to the rank of Senior Constable after eight years of dedicated service. This includes positive accolades from senior police as well as having conducted approximately 250 successful prosecutions.

7 The above are Mr Laurent's current grounds of appeal. It is upon those grounds that Mr Laurent will present his case when his appeal is heard and upon which the Commissioner's answer to that case will be based.

8 We now turn to examine the document of 2 June 2009 which Mr Laurent wishes to add to his grounds of appeal. It is headed "Appellant's Issues, Facts And Contention For Dismissal Of Employment". The first 22 numbered paragraphs consist of questions. It should be apparent to Mr Laurent that a question is not a ground of appeal: it is a question, nothing more and nothing less. It may not even be a question that is relevant to a matter before the WAIRC but it remains a question. Accordingly, paragraphs 1 to 22 cannot comprise "grounds of appeal" and are irrelevant to his application as indeed are all the other questions elsewhere in the document.

9 Although we regard the document as quite unsuitable for Mr Laurent's purpose, primarily because it does not identify the grounds he wishes the WAIRC to add to his grounds of appeal, we will now consider it in more detail.

10 The first paragraph that is not a question is under the heading "Facts". It is numbered paragraph 23 and it consists of three parts. The first part is repeated below as Mr Laurent has presented it to the WAIRC:

> 23. **Medical injuries sustained-work related to Present**
>
> 1. Mental Alignment.
>
> a. Emanating from the Appellant's time working at Midland, Mirrabooka and Geraldton Police Station. This injury is well documented by numerous specialists and others that demonstrate the inability to work effectively due to suffering to post shuttle response, stress, anxiety attacks, heart permutations, depression, blur vision and over suspicious. Appendix number (1 to 20) ######

11 A number of issues arise from this paragraph. It refers to "Mental Alignment" but it is not clear from the document nor from any submission made to us on the day by Mr Laurent what is meant by those words. It says that the injury is well documented by "numerous specialists and others" however there is no documentation attached to the document. If the documentation to which paragraph 23 refers is contained within the three volumes of lever arch files already before us from the Commissioner of Police, its location within those volumes was not identified to us. Finally, the paragraph refers to "Appendix number (1 to 20) ######" but there is no Appendix to the document.

12 Paragraph 23, at best from Mr Laurent's perspective, is simply a statement by him in support of a submission that an injury or injuries meant that he was unable to work effectively. Paragraph 23 is not evidence in support of the submission; it is just a submission.

13 If, to be somewhat generous towards Mr Laurent, the WAIRC was to find that paragraph 23 seeks to add as a "further and additional ground of appeal" that Mr Laurent suffered a work-related injury that demonstrates his inability to perform his work effectively, then it is not necessary. This is because Mr Laurent's current grounds of appeal say:

> "The reasons for my removal from the WA Police given by the Commissioner in writing dated 18 November 28 (sic) are totally unfound (sic), to the extent that the Commissioner was made and has been fully aware that my performance as a Police Officer was hindered due to injury I sustained whilst carrying out my duties as a Police Officer."

14 This is set out earlier in these Reasons as the second ground of Mr Laurent's appeal. Therefore, it is already a ground of Mr Laurent's appeal that his performance as a police officer was hindered due to injury he sustained whilst carrying out his duties. On that basis, paragraph 23 does not add a further or additional ground; the ground is already in the appeal.

15 The same can be stated for the balance of paragraph 23, which comprises points 2 and 3 headed "Back Injury (severe) dated 21th February 2009" and "Rash Injury" respectively. In our view, the most that can be said about paragraph 23 as a whole is that it provides the details of what Mr Laurent meant in his Notice of Appeal when he said that his performance as a police officer was hindered due to injury he sustained whilst carrying out his duties as a police officer. If, for example, the WAIRC or the Commissioner of Police asked to what injuries Mr Laurent was referring in his Notice of Appeal of 23 December 2008, paragraph 23 merely provides the answer.

16 We add that it is most unlikely that the Commissioner of Police would ask the question because Mr Laurent's response to the Notice of Intention to Remove (Volume 1 Attachment 1 of the Commissioner of Police's submissions) states as follows:

> "***Injuries.***
>
> Currently, I am suffering from a number of injuries as a result of WA police's actions.
>
> 1. Back Injury – as a result of wrestling, lifting Mark Batka off the ground and falling on top of him February 2004.
> 2. Heart palpitations as a result of taking extensive medication as a result of WA Police lack of actions and causing to suffer by not reviewing my work place for over a year.
> 3. Rash Injury – as a result of contracting an injury as a result of the refurbishment at the Geraldton police station.
> 4. Rash Injury – WA police's interference in my recovery was causing further injury and not being allowed treatment by a well known doctor (my family doctor).
> 5. Mental Injury (Stress and depression) – torment, harassment and victimisation suffered by senior police.
> 6. Pneumonia as a result being run down and emotionally drained.
> 7. Recurrence of rash as a result of stress and being run down.

17 These statements were commented upon in the analysis of response (Volume 1 tab 5) and thus the injuries Mr Laurent refers in his Notice of Appeal of 23 December 2008 are already known, and have been taken into consideration by, the Commissioner of Police.

18 Finally in relation to paragraph 23, we wish to make the point that the statement in it by Mr Laurent that he suffered a work-related injury that demonstrates his inability to perform his work effectively is not evidence that he did suffer that injury, or that it was work-related, or that it demonstrates his inability to work effectively. It is not evidence and thus it is not a matter that the WAIRC needs to consider under s 33R of the Police Act which provides for new evidence on appeal and which was referred to a number of times by Mr Laurent. For the same reason, none of the 636 paragraphs in the document of 2 June 2009 are evidence.

19 Accordingly, to the extent that paragraph 23 can be said to be a ground of appeal, and it is certainly not worded that way, it is not a "further or additional ground" as Mr Laurent suggested because it is a ground which is already in his appeal.

20 We approach each of the remaining 613 paragraphs on the same basis.

21 Paragraphs 24 to 49 all provide further detail of the allegation by Mr Laurent that he had a work-related injury that demonstrates his inability to perform his work effectively. As such, they are not grounds of appeal. They may well be submissions that Mr Laurent may wish to make in support of his ground of appeal that his "performance was hindered due to injury" but each paragraph is not of itself a ground of appeal. Paragraphs 50 to 54 add further information regarding the injuries Mr Laurent says that he suffered.

22 Paragraph 55 is a submission from Mr Laurent for the WAIRC to bear in mind that he is self represented. The paragraph states, again reproduced exactly as Mr Laurent has presented it:

> 55. I wish for the WAIRC to consider that the Appellant is self represented, with no finance to afford legal support or being fully conversant with the Industrial Judicial matters and suffering injuries that the Respondent used and couple with criminality to terminated the Appellant's employment.

This is not a ground of appeal.

23 Paragraph 56 is a repeat of the grounds of appeal attached to Mr Laurent's Notice of Appeal.

24 Paragraph 57 states that "the Respondent appears to use senior Police to protect himself from litigations, criminality and corruption" and refers to an incident that Mr Laurent relies upon to say that he suffered injury. Paragraph 57 also refers to Mr Laurent's belief that there was a "malicious/lack of medical investigation to prolong injury suffered more with a corrupt investigation as a direct result of poor governance and couple with corruption", it refers to Mr Laurent's attempt "to investigate the Respondent for corruption" and other matters concluding with an allegation that Mr Laurent then "was subjected to malice and poor governance that exacerbated his injuries for more than 5 years to present".

25 This paragraph therefore provides further detail regarding one of the work-related injuries Mr Laurent relies upon that apparently demonstrates his inability to perform his work effectively. It is not a further or additional ground of appeal. To the extent that the balance of paragraph 57 refers to "criminality and corruption", they are issues which are not a matter for this appeal. If Mr Laurent believes he has evidence of criminality or corruption then he may draw it to the attention of the Corruption and Crime Commission which is the body that is set up to deal with such issues.

26 Paragraph 57 states that the Commissioner of Police "appears to use senior Police to protect himself from litigations, criminality and corruption". As with the previous paragraph where Mr Laurent alleges criminal conduct or corruption on the part of the Police, these are issues he may draw to the attention of the Corruption and Crime Commission.

27 Paragraph 58 has the heading "Scarborough Matters". Subparagraphs (a) to (e) are statements made by Mr Laurent alleging that he was sent to Scarborough to be "set up". He makes allegations of what others told him to expect, that he was directed "not to record any staff", that he was advised that junior staff have a history of "getting other police officers termination" and those same junior staff refused to offer evidence regarding an alleged traffic offence when that evidence would have prevented Mr Laurent from having to defend a speeding allegation offence in court.

28 What Mr Laurent believed was the reason for being sent to Scarborough, and what others told him is hearsay and can be of no assistance to Mr Laurent in this appeal. Mr Laurent made no submission to us why it would be of assistance to him and reading the Commissioner's reasons for deciding to take removal action (Volume 1 tab 1) does not show that the reasons why the Commissioner of Police lost confidence in Mr Laurent depend upon the reason why Mr Laurent was sent to Scarborough. Similarly, a direction to Mr Laurent "not to record staff", if indeed it was given, does not provide a ground for showing why the removal of Mr Laurent was unfair. Similarly, if junior staff did refuse to offer evidence regarding an alleged traffic offence, that is not a ground of appeal.

29 Subparagraph (f) of paragraph 58 refers to Mr Laurent not being conversant with "Custody" due to injury and sick leave. He also states that this was coupled with "not being allowed any office time during his working time in Scarborough Police Station". This may relate to paragraph 181 of the Commissioner of Police's reasons for deciding to take removal action. This refers to a report that Mr Laurent had "failed to: identify elements of offences in narratives or Statements of Material Facts in Briefs and IMS Reports; load information into the Custody system correctly or update information not completed…". To the extent that Mr Laurent relies upon injury and sick leave taken to argue that the Commissioner of Police's reliance on the report that he failed to load information into the Custody system correctly or update information not completed, it is already a ground of Mr Laurent's appeal and paragraph 58(f) is not an additional ground of appeal.

30 To the extent that paragraph 58(f) also alleges that he was not allowed any office time during his working time at Scarborough Police Station and therefore it was difficult to catch up on administrative duties, this is able to be considered as a further or additional ground of appeal.

31 The balance of paragraph 58(f) refers to Custody at Geraldton Police Station. Our reading of the Commissioner of Police's reasons for Mr Laurent's removal, particularly between paragraph 224 (when, chronologically, Mr Laurent was transferred to the Geraldton Police Station) to paragraph 242 does not show that the issue of Custody at Geraldton Police Station is an issue in this appeal and it is not relevant.

32 The next two subparagraphs (numbered 58(g) and (h)) are under the heading "Incident Management System (IMS)". Mr Laurent made no submission to us why these could be additional grounds of appeal and it is not apparent to us why they could be. We do see that IMS was mentioned at paragraphs 235 of the Commissioner of Police's reasons, where it is mentioned that as a result of Mr Laurent's poor performance appraisal it was arranged that he commence a six week secondment to develop his knowledge of IMS, and paragraph 240 where Mr Laurent states that he has not been trained by the Police in IMS. Given that Mr Laurent's statement that he has not been trained in IMS is already before us, it is not clear how subparagraphs 58(g) and (h) take the matter any further to form a basis for Mr Laurent to show that reliance by the Commissioner of Police on IMS issues relating to Mr Laurent was misplaced.

33 Paragraph 58(i) is under the heading "Brief case". The two sentences provide no means of identifying to what this relates and Mr Laurent made no submission to us about it. Paragraph 182 of the Commissioner of Police's reasons for deciding to take removal action notes that Mr Laurent submits poor quality work in Brief preparation, factual information, attention to detail and attention to procedures. It notes that Mr Laurent is unable to meet time frames to complete work even after being given written examples, without direct supervision and he has had every Brief submitted rejected and requires correctional advice and written assistance. If paragraph 58(i) does relate to the Commissioner's paragraph 182, it provides no ground of appeal.

34 Similarly, paragraphs 58(k) and (l) refer to the Commissioner of Police failing to state that Mr Laurent was mocked and humiliated after advising that Mr Laurent suffered as a result of not having an appropriate chair. When both subparagraphs are read together it does not suggest a ground of appeal but rather makes a statement relating to a claim regarding discrimination and the Equal Opportunity Commission (EOC) which is referred to in paragraph 58(l).

35 Paragraph 58(m) is merely a statement by Mr Laurent that he investigated two police officers' "involvement in a fraud". The statement is meaningless in the context of this application. Similarly, the comments in paragraphs 58(n) and (o) that "the Appellant investigated the Appellant for unlawfully using of Police information for his personal use" is meaningless.

36 The final paragraph 58(p) merely states that the allegations used by the Commissioner of Police are misconceived and that it is clear that some allegations are false. This is a statement of such generalised scope as to be meaningless.

37 Paragraphs 59 to 62, referring to both Midland and Mirrabooka Police Stations, raise issues relating to Mr Laurent's allegation that he suffered from anxiety stress and injury. As such these are matters which are already a ground of Mr Laurent's appeal.

38 Paragraphs 63 to 65 refer to matters already canvassed by Mr Laurent in paragraphs 58(a) to (e) and suffer from the same defects.

39 Paragraphs 66 to 68, which relate to "Geraldton" allege poor behaviour and corruption, including "[b]ehaviour such as torturing prisoners in custody". These paragraphs attract the same criticism as earlier ones where Mr Laurent attempts to respond to the matters relied upon by the Commissioner of Police by alleging poor conduct on the part of others. An allegation regarding the torture of prisoners is an extremely serious allegation. It does not, and cannot, form part of this appeal. Mr Laurent may draw the allegation to the attention of the Corruption and Crime Commission.

40 Paragraphs 69 to 75 allege that Mr Laurent was suffering injury which prevented him from responding to the allegations of the Commissioner of Police. In our view, this does not constitute a ground of appeal as such, but is a statement in support of Mr Laurent's application to add further and additional grounds to his appeal.

41 Paragraphs 77 to 78 are said to "provide a description of a number of incidences pertaining to the Commissioner of Police (Respondent) failed to consider prior to losing confidence and terminating the Appellant employment". Paragraph 77 then lists matters under the headings of "False charge and prosecution" and paragraph 78 lists matters under the heading "Lack of transparency".

42 However, and we intend no disrespect to Mr Laurent, many of the sentences are either meaningless or so generalised that their meaning and context is not apparent.

43 Paragraphs 79 to 126 are a series of questions. As such they will be disregarded. We note that paragraph 79 is under the heading "Victimisation", followed by a further heading in bold capitals: ISSUES and is a question whether "the Appellant have impairment within the meaning of section 4 of the *Equal Opportunity Act 1984*". The whole of paragraphs 79 to 126 appear directed to that question which is not a question which arises in this appeal. Paragraph 127 is headed "Initial complaint submitted to the E.O.C." and appears, from a reading of the document to embrace paragraphs 127 to 334. All these paragraphs appear to relate to something other than Mr Laurent's appeal in the WAIRC: they refer to reports submitted to the EOC but which do not form part of the document before the WAIRC (for example paragraph 129; paragraph 246); paragraphs 259 and 261 seem to read as though they were written at a time when Mr Laurent was in employment and paragraphs 286 to 334 similarly read as being part of a submission to another place. Those matters directed to section 4 of the *Equal Opportunity Act 1984* are not relevant to this appeal. To the extent that they relate to matters of illness, it is already a ground of Mr Laurent's appeal that he suffered illness of injury.

44 Paragraphs 335 to 349 appear to be submissions directed to the State Administrative Tribunal regarding a failure to comply with its orders which is irrelevant to this appeal.

45 Subsequent to paragraph 349, the numbering changes. The changed numbering are paragraphs which relate to the Northbridge incident which is already a ground of appeal: that the Northbridge incident is a case of "mistaken identity".

46 Paragraphs 353 to 357 are statements by Mr Laurent which relate to circumstances of his health following the stand down notice and decision to remove him.

47 Paragraph 358 has a number of subparts and is under the heading "Irrelevance of accusations". It commences with a statement by Mr Laurent that "Any allegations made by the Respondent, at a date not in alliance with the above physical and emotion demise, are irrelevant and show the lack of knowledge and insight into the Appellant situation". The following paragraphs appear to be statements relating to Mr Laurent's assessment of his injuries, the taking of sick leave and inability to sit for prolonged periods. As such, these are statements which relate to an existing ground of appeal and do not provide the basis for further or additional grounds.

48 Paragraphs 359 and 360 are statements regarding lack of legal support and avoiding bankruptcy. Paragraph 361 is, again, a submission regarding injuries. Paragraphs 362 to 365 are statements by Mr Laurent that he was a victim of "assaults, threats, torment, reckless behaviour". Mr Laurent's grounds of appeal in his Notice of Appeal already include "harassment, threats, assaults, discrimination, false statements and reports and vexatious allegations". These paragraphs therefore do not provide the basis for further or additional grounds.

49 Paragraphs 366 to 375 are matters to do with Mr Laurent's submission that he suffered work-related injuries. Paragraphs 376 to 391 are questions.

50 Paragraphs 392 to 480 are matters to do with Mr Laurent's allegation that he was injured in the course of his employment. These submissions lead to, from paragraph 481 onwards, a contention that the Commissioner of Police discriminated against and harassed Mr Laurent by failing in his duty of care to provide a safe working environment and a possible breach of some other, but unnamed, legislation. As already pointed out in these reasons, whether the Commissioner of Police was in breach of provisions of the *Equal Opportunity Act 1984*, or other legislation, is not part of this appeal.

51 Paragraphs 486 to 510 are questions and paragraphs 511 to 600 are a repeat of earlier paragraphs. Paragraphs 601 to 636 are either statements on issues already covered, sometimes repeatedly, in the earlier part of the document, or are questions.

52 In summary, while it is appreciated that Mr Laurent has prepared the document himself and, as he has reminded the WAIRC on a number of occasions, that he is not legally trained or qualified, the document of 2 June 2009 consists of a jumble of statements and allegations made by Mr Laurent, questions and submissions or comments relating to or forming part of proceedings in the State Administrative Tribunal or the EOC. The document is not set out in a logical sequence and contains much that is repetitive; for example Mr Laurent's submissions that he sustained work-related medical injuries are repeated on a number of occasions and paragraphs 511 to 600 appear to be a copy-and-paste of paragraphs 392 to 480. Some of the sentences within the paragraphs are incomplete or appear to have words missing.

53 The document submitted by Mr Laurent as further and additional grounds of appeal is a document which should never have been submitted for that purpose because it does not set out the further or additional grounds of appeal he seeks. It is a document containing many statements, many of which are repeated in one form or another, which relate to matters which are already part of Mr Laurent's Notice of Appeal of 23 December 2008. It contains statements of facts, or perhaps what Mr Laurent may believe to be facts, but is not proof of any of those things. It may contain, in some parts, relevant submissions that Mr Laurent may make when his appeal is heard, however submissions are made in support of grounds of appeal; they are not themselves grounds of appeal.

54 At best, given the absence of any submissions from Mr Laurent which address the detail of the document, we have been able to identify only one issue that is able to be seen as a ground of appeal and which is not already covered within a current ground of appeal. That is part of paragraph 58(f) which alleges that Mr Laurent was not allowed any office time during his working time at Scarborough Police Station and therefore it was difficult to catch up on administrative duties.

Power to amend grounds of appeal

55 Section 33S of the Police Act applies provisions of the IR Act to and in relation to an appeal and a determination of an appeal instituted under Part II of the Police Act subject to Part II of the Police Act and any necessary modifications. Section 27(1)(l) provides that the WAIRC has the power to "allow the amendment of any proceedings on such terms as it thinks fit".

56 The words "any proceedings" have been held to include an appeal under the IR Act: *The Attorney General in and for the State of WA v. Cockburn Cement Limited and Others* (1982) 63 WAIG 6. In that matter, a Full Bench of the Commission dealing with an appeal from a decision of a single Commissioner allowed the grounds of appeal to be amended during the proceedings. O'Dea P stated:

> "…I think that once the appeal is instituted, there is ample authority under section 27 to do what is necessary to enable the expeditious hearing and determination of all the relevant issues and for this purpose to allow amendment of the proceedings if amendment is thought to be appropriate."

57 This decision, together with the specific application of s 27(1)(l) to and in relation to an appeal and a determination of an appeal instituted under Part II of the Police Act, leads us to conclude that the power to allow the amendment of any proceedings applies to grounds of appeal. We think there is some strength to the submission of the Commissioner of Police that much will depend upon the amendment sought. An appeal under Part II of the Police Act is conditioned by a time limit of 28 days from the date the police officer is removed from office (s 33P(3)) and there is no express power granted to the WAIRC to extend the 28 day period. Therefore we are not at all sure that the power in s 27(1)(l) would permit the substitution of completely new appeal grounds if to do so will create a new appeal, thereby effectively lodging an appeal out of time. It is one thing to amend the grounds of an existing appeal; it is another to create an entirely new appeal.

58 Therefore, we are satisfied that the WAIRC has the power to amend the grounds of appeal to include that part of paragraph 58(f) which alleges that Mr Laurent was not allowed any office time during his working time at Scarborough Police Station and therefore it was difficult to catch up on administrative duties. Should the WAIRC amend the grounds accordingly?

Conclusion

59 Mr Laurent's application has been made 6 months after he lodged his appeal. That is a significant period of time. He submits that at the time he lodged his appeal he was not medically capable of summing up, or articulating, the matters that he wished to raise. This was because of the stress and anxiety he was suffering which, from his submissions, he attributes to injuries and injustices suffered by him in the course of his employment. He has not produced any medical evidence to support this submission. However, we do not think that his submission should be rejected for that reason.

60 The reasons the Commissioner of Police lost confidence in Mr Laurent, as they are set out in the document at Volume 1 tab 1, are many. The overview of those reasons at pages 4 to 7 of Volume 1 tab 1 does not refer specifically to Mr Laurent's time at the Scarborough Police Station. Reference to the Scarborough Police Station occurs later in the document to a report of 7 February 2006 (contained in Volume 3 tab 2). Our brief reading of that report, and without having had the benefit of submissions about it, shows that it does include comments regarding the time allocated to Mr Laurent to complete certain paperwork. We conclude that although the time Mr Laurent spent at the Scarborough Police Station does not form of itself a significant part of the Commissioner of Police's reasons for losing confidence in Mr Laurent, it is relevant in that it does form part of the whole of the circumstances relied upon by the Commissioner of Police.

61 Mr Laurent's reported difficulties over administrative issues at Scarborough Police Station are already an issue in the appeal. It is unlikely that the Commissioner of Police would suffer significant prejudice if Mr Laurent is permitted to argue that the reason for this being an issue is that he was given inadequate time to do the work.

62 On balance, we think it is appropriate to make the amendment and we would grant the application to the extent we have outlined, but in all other respects dismiss the application. As noted at the commencement of these Reasons, on 24 April 2009 Mr Laurent had sent two emails to the WAIRC to which other documents are attached; the status of these documents is not clear. Mr Laurent has not made any application to the WAIRC in relation to these documents. They were not the subject of any submission from him when this matter was heard. Accordingly, they are not part of these proceedings and they will be returned to him.

Comment

63 During the course of the hearing regarding this matter, Mr Laurent referred to an apparent intention to call evidence during the hearing of the appeal. He referred to an "inspector who I hope will give evidence"; he has stated that he has "many documents"; his Notice of Appeal itself states that the Commissioner of Police has mistakenly identified him as the person of interest and that this mistake "will be evidenced by witness statements to be provided in due course".

64 The WAIRC has already drawn to Mr Laurent's attention the limited nature of an appeal under s 33P of the Police Act. It is not a "trial" as he refers to in his email to the WAIRC of 3 June 2009 which attached the document of 2 June 2009. It is an appeal. It is an appeal which has its procedures set out in the Police Act. Those procedures make it plain that the documents to be considered by the WAIRC in deciding Mr Laurent's appeal are only:

> (a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;

(b) the notice given under section 33L(1);

(c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);

(d) the notice given under section 33L(3)(b); and

(e) a notification of the removal from office.

65 Therefore Mr Laurent is not able to call a witness, produce further documents or produce witness statements to the WAIRC in this appeal. As s 33R(11) (as above) makes clear, these will be "new evidence".

66 Section 33R of the Police Act will permit Mr Laurent to seek leave to tender new evidence but he should not assume that leave will be granted merely because he asks for it: s 33R(3) and (4) set out the requirements to be met before the admission of new evidence can be considered and if he does seek leave, he will need to deal with each of those requirements.

Minute of Proposed Order

67 We would issue an order:

1. That the following ground be added to the Notice of Appeal: "That I was not allowed any office time during my working time at Scarborough Police Station and therefore it was difficult to catch up on administrative duties".

2. That the application to add to the grounds of appeal otherwise be dismissed.

2009 WAIRC 00560

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 12 AUGUST 2009
FILE NO/S	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 00560

Result Application granted in part; remainder of application dismissed

Order

The WAIRC, pursuant to the powers conferred on it under s 33S of the *Police Act, 1892*, hereby orders –

1. THAT the following ground be added to the Notice of Appeal: "That I was not allowed any office time during my working time at Scarborough Police Station and therefore it was difficult to catch up on administrative duties".

2. THAT the application to add to the grounds of appeal otherwise be dismissed.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

2009 WAIRC 00514

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WALL
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
HEARD	WEDNESDAY, 17 JUNE 2009, THURSDAY, 9 JULY 2009
DELIVERED	MONDAY, 3 AUGUST 2009
FILE NO.	APPL 40 OF 2009
CITATION NO.	2009 WAIRC 00514

CatchWords	Removal of police officer – When an appeal is instituted – *Police Act 1892* (WA) s 33P – *Industrial Relations Commission Regulations 2005* r 38, r 90
Result	Declaration and order issued
Representation	
Appellant	Mr P Momber (of counsel)
Respondent	Ms D Scaddan (of counsel)

Reasons for Decision

BEECH CC:

1 Mr Wall was a police officer who was removed by the Commissioner of Police pursuant to s 8 of the *Police Act 1892* (the Police Act). Mr Wall, both personally and through the actions of a solicitor of the Western Australian Police Union of Workers (the WAPU), has sought to appeal his removal. These proceedings arise from the filing on 4 June 2009 of a Notice of Appeal against a decision of the Commissioner of Police to take removal action, and an application "for filing out of time". A police officer's right to appeal his or her removal is contained in s 33P of the Police Act which is as follows:

> **33P. Appeal right**
>
> (1) A member who has been removed from office by or as a result of removal action taken in accordance with section 33L may appeal to the WAIRC on the ground that the decision of the Commissioner of Police to take removal action relating to the member was harsh, oppressive or unfair.
>
> (2) The appellant shall institute an appeal by a notice to the Commissioner of Police stating —
>
> (a) the reasons for the decision the subject of the appeal being harsh, oppressive or unfair; and
>
> (b) the nature of the relief sought.
>
> (3) The appeal shall not be instituted later than 28 days after the day on which the member was removed from office and shall not be instituted if the member has resigned under section 33O(1).

2 Section 33P was inserted into the Police Act by the *Police Amendment Act 2003* (Act No. 7 of 2003) (the Police Amendment Act). That Police Amendment Act also amended s 113 of the *Industrial Relations Act 1979* (the IR Act) to extend the power given to the Chief Commissioner, after consultation with the members of the Commission, to make regulations regulating the practice and procedure to be followed in relation to appeals under s 33P.

3 The *Industrial Regulations Commission Regulations 2005* (the Regulations), relevantly, provide in r 90 the manner by which an appeal may be instituted. It provides as follows:

> **90. Instituting an appeal against removal action**
>
> A police officer may institute an appeal against removal action —
>
> (a) by completing and filing in the office of the Registrar 3 copies of —
>
> (i) a notice of appeal in the form of Form 32;
>
> (ii) a summary of facts or issues of law relied upon by the appellant,
>
> including any matters relevant to the *Police Act 1892* section 33Q(4); and

(iii) the nature of the relief sought;

(b) by serving a stamped copy of those documents on the Commissioner of Police within 28 days after the day on which the removal action took place; and

(c) by having a declaration of service completed, and filing the declaration.

4 It is to be noted by s 33P(3) that the appeal shall not be instituted later than 28 days after the day on which Mr Wall was removed from office. I find that Mr Wall was removed from office by the service upon the WAPU's solicitor on Monday, 4 May 2009 of a notice indicating that the Minister for Police had authorised Mr Wall's removal from the Western Australian Police. It is common ground that Mr Wall's appeal would need to be instituted no later than 2 June 2009 in order to be within the 28 day period. (The 28th day is 1 June 2009 but since that day was a Western Australian public service holiday, the Registry was only open the following business day, being 2 June 2009 - see r 4(3)).

5 For reasons which are not necessary to detail here and which go to whether or not the WAPU would be representing Mr Wall and thus have the responsibility for lodging the appeal documents, on the evening of Monday, 1 June 2009 Mr Wall accessed the Commission's website and lodged via that website a claim of unfair dismissal using Form 2 of the Commission's forms. He completed the Particulars of Claim accompanying the Form and attached to it a schedule which sets out why Mr Wall believes he had been unfairly dismissed.

6 The record from the Commission's registry indicates that the claim submitted by Mr Wall was received by the registry on 2 June 2009 (Annexure PW-1 to Exhibit 1). On 2 June 2009 Mr Wall attended the Commission's registry and was provided by registry staff with a copy of the Form which had been lodged by him.

7 Later that afternoon, at approximately 3:55pm, the registry staff informed Mr Wall that the Form he had used was not the correct Form and that he needed to lodge a Form 31 with the Commission. Given that the registry closes at 5:00pm, and that 2 June 2009 was the last day by which the appeal could be lodged within time, Mr Wall made considerable effort to provide the correct form. The record indicates that a completed Form 31 was sent by him by email to the registry at 5:21pm on 2 June 2009.

8 I pause in the chronology of events to note that by r 4 of the Regulations, all documents required to be filed or lodged under the Police Act or the Regulations must be filed or lodged as the case requires in the office of the Registrar. Regulation 4(2) is as follows:

4. Lodging documents

(2) Subject to this regulation and regulation 5, documents required to be filed or lodged under the Act or these regulations must, unless in a particular case the Commission otherwise expressly approves, be lodged not earlier than 8.00 a.m. and not later than 5.00 p.m. on any day on which the office of the Registrar is open for business.

9 Regulation 5(1) provides that subject to the requirements of the Commission's website and r 5, a party may lodge a form electronically by completing it on the Commission's website. Regulation 6(3) is relevant and states as follows:

6. Office of the Registrar opening hours

(3) An electronic or other document sent to the office of the Registrar by fax transmission or email that is not received when the office of the Registrar is open to the public for the transaction of business is taken to have been received at 8.00 a.m. on the next day the office of the Registrar is open to the public for the transaction of business.

10 It will be seen therefore that the Form 31 lodged by Mr Wall by email at 5:21pm on 2 June 2009 was lodged at a time when the Commission's registry was not open for business; accordingly, it is taken to have been received at 8:00am on the next day the registry was open for business, that being 3 June 2009. Accordingly, the Form 31 was not lodged within the 28 day period required by s 33P(3).

11 Before dealing with the issue of whether or not the WAIRC has the power to extend the 28 day period prescribed in s 33P(3), it is helpful to deal with the issue of whether or not the earlier document lodged by Mr Wall on 2 June 2009 (the Form 2 claim of unfair dismissal) can be held to have instituted the appeal under s 33P because if it did institute the appeal, it will not be necessary to consider whether or not the WAIRC has the power to extend the 28 day period. Mr Wall's position on this issue is relatively straightforward. He submits that the Form 2 did indeed institute an appeal under s 33P. Mr Wall concedes that he did not use the correct Form, but submits that this is curable and would not of itself invalidate the appeal: Mr Wall points to r 38 of the Regulations which states:

38. Non-compliance with regulations

Non-compliance with any of these regulations does not render void any proceedings before the Commission or the Registrar, but the proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and on such terms as the Commission or the Registrar, as the case may be, thinks fit to remedy any defect caused by the failure to comply.

12 Mr Wall states that what is required by s 33P to institute an appeal is "a notice to the Commissioner of Police" stating the reasons for the decision being harsh, oppressive or unfair and the nature of the relief sought. In Mr Wall's submission, that is all that is required and it is done by lodging the notice with the Commission within the 28 day period. In particular, there is no requirement in s 33P on Mr Wall to both lodge and serve the Commissioner of Police with a copy of that notice within the 28 day period.

13 This last submission is relevant because r 90 of the Regulations states that the institution of the appeal is by not only completing and filing three copies of the notice of appeal in the office of the Registrar, but also by complying with r 90(b) by

serving a stamped copy of those documents on the Commissioner of Police within 28 days and with r 90(c) by having a declaration of service completed and filed.

14 This is a point examined by the Commissioner of Police in his submissions. The Commissioner of Police submits that the amendment made to s 113 of the IR Act by the Police Amendment Act may not be valid given that the amendment to the Police Act in s 33S which imports sections of the IR Act for the purposes of appeals did not import s 113. Therefore, the regulations made pursuant to s 113 applicable to appeals under the Police Act, including r 90, may also not be valid. In the alternative, the Commissioner of Police submits that to the extent that the Regulations require a prospective appellant to institute an appeal by doing anything other than complying with s 33P, the Regulations are inconsistent with s 33P and cannot prevail over s 33P. In the submission of the Commissioner of Police, the ordinary interpretation of s 33P(2) dictates that some form of service is to occur. Thus, an appeal is to be instituted by a notice to the Commissioner of Police which is served on him not later than 28 days after the day on which the police officer was removed from office. In relation to the Form 2 lodged by Mr Wall, this was not served upon the Commissioner of Police at all and therefore could not institute an appeal under s 33P.

Consideration whether an appeal was instituted within time

15 I consider that the submission of the Commissioner of Police is correct to the extent that where the Regulations may require more to be done to institute an appeal than is required to be done by the Police Act, the Police Act's requirements are all that is required. I do not agree with the submission, however, that an appeal may be instituted by a former police officer without lodging the notice to the Commissioner of Police with the WAIRC. This is because s 33P(1) states that the appeal is to the WAIRC; it is therefore necessary for a former police officer to invoke the jurisdiction of the WAIRC to hear and determine the appeal. When s 33P(1) and (2) are read together, an appeal is instituted by the former police officer completing a notice to the Commissioner of Police containing the information required in s 33P(2)(a) and (b) and lodging that notice with the WAIRC. By s 33P(3) this must be done no later than 28 days after the day on which the former police officer was removed from office.

16 I turn to examine the Form 2 lodged by Mr Wall on 2 June 2009. Regulation 5(1) permits the lodging of a form electronically by completing the form on the Commission's website, which is precisely what Mr Wall did with the Form 2. By r 4(1) the Form was required to be "lodged in the office of the Registrar". It is lodged at the stage at which it comes into the possession of the registry or staff of the registry (*Swan Television & Radio Broadcasters Ltd trading as STW Channel 9 Perth v. Satie* [1999] WASCA 79 at [33]; (1999) 79 WAIG 1863 at 1866). The Form 2 came into the possession of the registry on 2 June 2009. Accordingly, Form 2 was lodged within time. It is a notice directed to the Commissioner of Police (Annexure PW-1 to Exhibit 1). Section 33P(2) requires that the notice state the reasons for the decision the subject of the appeal being harsh, oppressive or unfair; this notice does so in the schedule which is attached to the Particulars of Claim. The notice is also required to state the nature of the relief sought; this notice does so in clause 21 of the Particulars of Claim which indicates that Mr Wall is seeking reinstatement. In my view, Form 2 lodged by Mr Wall on 2 June 2009 satisfies the requirements of s 33P. Therefore, Mr Wall instituted an appeal under s 33P within time.

17 That does not end the difficulties in relation to Mr Wall's appeal because the notice lodged by him did not comply with r 90 of the Regulations. In particular r 90 was not complied with because:

a. Regulation 90(a)(i) requires the notice of appeal to be in the form of Form 32; as Mr Wall points out, there is no Form 32 and the reference should be to Form 31 and thus, r 90(a)(i) could not be strictly complied with in any event. Nevertheless the point is made that the incorrect form was used.

b. Regulation 90(a)(ii) requires a summary of facts or issues of law relied upon by Mr Wall including any matters relevant to the Police Act s 33Q(4) to be included.

c. Regulation 90(b) requires the document stamped by the Commission to be served on the Commissioner of Police within 28 days after the day on which the removal action took place and r 90(c) requires a declaration of service to be completed and filed.

18 The Commissioner of Police submitted that parts of r 90 that are inconsistent with the requirements of s 33P should be regarded as void. It is not entirely clear how the Commission may regard a regulation or parts of it as void. The Commission is not a superior court of record and has no inherent jurisdiction; it has no power to declare void its own regulations: *Australian Glass Manufacturing Company Pty Ltd and Others v. Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch* (1992) 72 WAIG 1499. Accordingly, the regulation is to be regarded as valid by the Commission.

19 The better position in my view is that the non-compliance with r 90 is able to be dealt with under r 38 which is set out earlier in these reasons. Regulation 38 is not found within Part 9 of the Regulations. The Commissioner of Police also submitted that Part 9 of the Regulations forms a "code" and queried whether other regulations not within Part 9 can apply to an appeal under s 33P of the Police Act. However, if that submission was correct it would mean that regulations contained in Part 2 of the Regulations to do with lodging of documents, including lodging them electronically, the registry opening hours, the procedure to be followed by the Registrar and so on would equally not apply to an appeal under s 33P of the Police Act. That cannot have been intended to be the case. Accordingly, I do not accept that submission and find that r 38, r 37, and the Regulations generally, are applicable to appeals under s 33P of the Police Act.

20 For the above reasons, I have concluded that Mr Wall instituted an appeal under s 33P of the Police Act within time when he lodged the Form 2 with the office of the Registrar and it was received on that day. Having regard to the power under r 38 of the Regulations for the Commission to "amend or otherwise deal with" proceedings before the Registrar, I would order the Registrar to file the Form 2 lodged by Mr Wall and received by the office of the Registrar on 2 June 2009 as though it was an appeal made on Form 31 of the Regulations and return a filed copy of it to him. I would then require Mr Wall to forthwith serve the Commissioner of Police with a copy of the appeal and to file a completed Declaration of Service accordingly. This will then overcome the non-compliance with r 90. It also follows that the notice of appeal in Form 31 subsequently lodged by Mr Wall but received by the office of the Registrar on 3 June 2009, and the still further notice of appeal in Form 31 lodged on

Mr Wall's behalf by the WAPU on 4 June 2009 were lodged out of time and fall away as mere waste paper.

21 It also follows that I do not need to consider the issue of whether or not the WAIRC has the power under s 27(1)(n) of the IR Act, which is imported by s 33S of the Police Act to and in relation to an appeal under s 33P, to extend the 28 day period prescribed in s 33P(3).

KENNER C:

22 The appellant brings these proceedings challenging his removal from the police service by the Commissioner of Police, the respondent to this appeal, pursuant to s 8 of the Police Act 1892 ("the Police Act").

23 A preliminary issue arises as to whether the appellant's appeal was filed within the time prescribed by s 33P of the Police Act, and if it was not, whether that time can be extended by the operation of s 27(1)(n) of the Industrial Relations Act 1979 ("the IR Act") applied to appeals of the present kind by the operation of s 33S of the Police Act.

Brief Factual Background

24 There is much common ground in relation to the preliminary issue. The removal notice removing the appellant from the police service was effective 4 May 2009. By s 33P(3) of the Police Act, an appeal against removal action taken by the respondent "shall not be instituted later than 28 days after the day on which the member was removed from office." For present purposes, the appeal was to be filed by 2 June 2009.

25 The appellant appears to have purported to institute the present appeal on three occasions. On the affidavit evidence before the Commission, the appellant's first attempt at lodging an appeal took place, it seems, in the early hours of 2 June 2009 when he completed a Form 2 Notice of application directed to the respondent. In it the appellant alleged that he had been unfairly dismissed on or about 4 May 2009 for the reasons set out in a Schedule annexed to the Notice of application. The records of the Registry of the Commission note that the Form 2 Notice of application was electronically received on 2 June 2009.

26 Next, following it seems notification by an officer by the Registry, the appellant then lodged electronically a Form 31 Notice of appeal against a decision of the Commissioner of Police to take removal action, recorded as having been electronically received at 5:21 pm 2 June 2009. As the office of the Registry was then closed for business, by reason of Reg 6 of the Industrial Relations Commission Regulations 2005 ("the Regulations"), the Form 31 was deemed to be received in the Registry at 8 am on 3 June 2009.

27 Thirdly, a further Form 31, with quite extensive particulars, was lodged by the appellant's solicitor on 4 June 2009 by the filing of it in the Registry.

Consideration

28 For the following reasons in my opinion, the second and third purported Notices of appeal are invalid as they are outside of the 28 day time limit prescribed by s 33P (3) of the Police Act. In my opinion, for the reasons that follow, this time limit cannot be extended by the operation of s 27(1)(n) of the IR Act as incorporated by s 33S of the Police Act. Section 27(1)(n) of the IR Act empowers the Commission, in relation to a matter before it, to "except as otherwise provided…" "extend any prescribed time or any time fixed by an order of the Commission."

29 It is of considerable significance that the language of s 33P (3) of the Police Act is in terms that "The appeal **shall not be instituted** later than 28 days after the day on which the member was removed from office…" The legislature has deliberately chosen to use prohibitive language governing the time limit for the institution of an appeal under s 33P of the Police Act, which is in marked contrast to that dealing with appeals under the IR Act. For example s 49(3) dealing with appeals to the Full Bench of the Commission and s 90(2) dealing with appeals to the Industrial Appeal Court are in terms that "an appeal under this section shall be instituted within 21 days of the date of the decision against which the appeal is brought…"

30 Whilst Reg 90 of the Regulations deals with requirements regarding the instituting of an appeal against removal action by the Commissioner of Police, any conflict between Reg 90 and s 33P of the Police Act must be resolved in favour of the latter: *Webster v McIntosh* (1980) 32 ALR 603; *Billings v Reed* [1945] 1 KB 11; *Jackson v Hall* [1980] AC 854.

31 As was noted by Fielding C in *EJ Richardson v Cecil Bros Pty Ltd* (1994) 74 WAIG 107 "there is a difference between a time limit which conditions the exercise of jurisdiction and the time limit which governs its exercise (see: *General Motors Holden Ltd v Di Fazio* (1979) 141 CLR 659". This proposition was considered and endorsed by the Industrial Appeal Court in *Aurion Gold v Bilos* (2004) 84 WAIG 3759. In *Aurion Gold* the Industrial Appeal Court affirmed the approach taken in *EJ Richardson* to the effect that the former s 29(2) of the IR Act which provided that a referral of an application under s 29(1)(b)(i) alleging unfair dismissal " cannot be made more than 28 days after the day on which the employee's employment terminated" was an essential condition to the exercise of the right to commence the proceeding and was not a time limit governing its exercise: *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265.

32 In my opinion, the plain language of s 33P(3) of the Police Act is in similar terms and compels the conclusion that the 28 day time limit for the institution of an appeal against removal action by the respondent cannot be extended, despite the incorporation of s 27(1)(n) of the IR Act. That is, as with the former s 29(2) of the IR Act, the 28 day time limit prescribed by s 33P(3) of the Police Act - is an essential condition to the exercise of the right to appeal and is not one that merely applies to it.

33 That being so, both the second and third purported Notices of appeal must be regarded as invalid.

34 It then falls for consideration as to what is the status of the Form 2 Notice of application lodged electronically by the appellant within the 28 day time limit prescribed by s 33P(3) on 2 June 2009.

35 Despite contentions of the respondent to the contrary, in my opinion on its proper construction, s 33P of the Police Act deals with the institution of an appeal as of right to the Commission, on the ground that the decision of the respondent, in taking

removal action, is harsh, oppressive or unfair. The institution of an appeal under this statutory provision is effected by a notice directed to the respondent and lodged with the Registry of the Commission no later than 28 days after the officer's removal.

36 It is the case in these proceedings that the requirements of Reg 90 of the Regulations were not met by the appellant. In my opinion, however, that is not fatal. Whilst the appellant did not use the correct form to institute the appeal, by Reg 38 a failure to comply with the Regulations, which in my opinion include Reg 90, does not render void any proceedings before the Commission. Furthermore, the Commission has a general power of waiver of the procedural requirements of the Regulations in Reg 37.

37 In this case, the Form 2 Notice of application is directed to the respondent and sets out the reasons for the decision the subject of the appeal being harsh, oppressive or unfair and the nature of the relief sought. This is sufficient in my opinion, in this case, to constitute the institution of an appeal which appeal was commenced within the 28 day time limit prescribed by s 33P(3) of the Police Act. Thus the appeal is competent. I agree with the declaration and orders as proposed.

MAYMAN C:

38 I have had the advantage of reading in draft form the reasons of Beech CC and Kenner C. I agree with the reasons of Beech CC and have nothing further to add.

2009 WAIRC 00536

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER WALL
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 11 AUGUST 2009
FILE NO.	APPL 40 OF 2009
CITATION NO.	2009 WAIRC 00536

Result Declaration and Order issued

Declaration and Order

HAVING HEARD Mr P Momber, of counsel on behalf of the appellant and Ms D Scaddan, of counsel on behalf of the respondent, the WAIRC hereby:

1. DECLARES that on 2 June 2009 Mr Peter Wall instituted an appeal under s 33P of the *Police Act 1892* within the time prescribed under that Act.

2. ORDERS pursuant to Regulation 38 of the Industrial Relations Commission Regulations 2005:

   (a) THAT the Registrar file the Form 2 lodged by Mr Peter Wall and received by the Office of the Registrar on 2 June 2009 as though it was an appeal made on Form 31 of the Regulations and return a filed copy of it to Mr Wall.

   (b) THAT upon Mr Wall receiving a filed copy from the Registrar he shall forthwith serve the Commissioner of Police with a copy of the appeal and file a completed Declaration of Service accordingly.

3. ORDERS that the application by Mr Wall for leave to file an appeal out of time otherwise be dismissed.

(Sgd.) A R BEECH,
Chief Commissioner,

[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 00558

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISS TONI AVIS
	APPLICANT
	-v-
	DR. MICHAEL WILDIE
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 11 AUGUST 2009
FILE NO	U 106 OF 2008
CITATION NO.	2009 WAIRC 00558

Result	Application discontinued
Representation	
Applicant	Ms T Avis (on her own behalf)
Respondent	Mr M Wildie (on behalf of the respondent)

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 June 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 31 July 2009 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

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

2009 WAIRC 00449

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JOHN BINKS
	APPLICANT
	-v-
	DAVID AND SANDRA KENT
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	TUESDAY, 9 JUNE 2009
DELIVERED	FRIDAY, 10 JULY 2009
FILE NO.	U 71 OF 2009
CITATION NO.	2009 WAIRC 00449

CatchWords	Termination - Unfair Dismissal - Retirement - Notice - Industrial Relations Act 1979, s23 and 29(1)(b)(i)
Result	Applicant dismissed unfairly; Notice awarded
Representation	
Applicant	Mr C Binks
Respondent	Mr D Kent

Reasons for Decision

1 Mr Binks worked as a window manufacturer for David and Sandra Kent. They operated a business named Kent Aluminium Windows which manufactures aluminium windows. Mr Binks worked there from 25 August 2003 until 13 March 2009 when he says that he was dismissed unfairly by Mr David Kent. In his application Mr Binks states:

> "I feel I was unfairly dismissed because I was told by my employers, one week before retirement age, that my final day at work would be my 65th birthday. When I questioned my employers as to the reason for this, he stated "because you're retiring". I had not given my employers any formal written or verbal notice of an intention to retire in the month or so leading up to this meeting, I had decided that I would continue working in light of the current economic climate and the impact of that on my personal financial situation. During this month I attempted on numerous occasions to communicate this to my employers, but they continually postponed meeting with me."

2 Mr Binks, in his application sought reinstatement, however, at hearing he did not pursue this and instead said that because of what transpired he did not feel comfortable seeking reinstatement.

3 Mr and Mrs Kent state in their Notice of Answer and Counterproposal that:

> "Mr Binks has stated that he never gave us a written or verbal notice of his intentions to retire. Mr Binks had stated to us on many occasions over the past year that he was going to retire when he turned 65. (sic) as he has stated to several members of our staff who are all willing to state this or appear in a court of law to verify.
>
> Mr Binks has marked yes for seeking reinstatement to his job. On the Friday prior to Mr Binks retiring 13-3-09. (sic) we told him that we also are retiring as of that day & our son Bradley Kent will be taking over as the manager. Mr Binks said that if this was the case he would not work under Bradley. In fact because of this he took the last week off as a holiday."

4 This then is a simple matter and concerns a question as to whether Mr Binks retired or was dismissed. Mr Binks was born on 20 March 1944 and hence his 65th birthday would have fallen on 20 March 2009. Mr Binks tendered a written statement at hearing [Exhibit A2] and in that he states:

> "23rd May 2009
>
> To Whom It May Concern:
>
> I feel Kent Aluminium unfairly dismissed me as an employee. This is because my employers told me, one week before retirement age, that my final day at work would be my 65th birthday. When I questioned my employer as to the reason for this, he stated, "Because you're retiring." I had not given my employers any formal written or verbal notice of an intention to retire. In the month or so leading up to this meeting, I had decided that I would continue working in light of the current economic climate and the impact of that on my personal financial situation. During this month I attempted on numerous occasions to communicate this to my employers, but they continually postponed meeting with me.
>
> On the 14/3/09, David Kent, owner of Kent Aluminium, rang me at 3.20pm to tell me I had four choices concerning my employment. The first choice was to work for a final five days, after which my employment would be terminated, the second to obtain a five day sick leave certificate from my GP if I refused to work for these five days, the third choice was to take this week out of my accumulated 3 weeks holiday pay and the fourth was to stay at home for this final week without pay or compensation of any kind.
>
> During this phone conversation, I felt very intimidated by what David was saying to me. I believed I had no choice when presented with these suggestions and felt the only thing I could do was take the week off out of my annual holiday pay.
>
> I believe that this situation may have been easily handled in a professional manner if David Kent had only accepted to have a meeting with me concerning my interests in continuing my employment. As such, I regret that issue has come to this, but I believe that I have been wrongfully made redundant and would like to examine this matter. It is my opinion that I should have been given more that one week's notice, and that David Kent should not have assumed I wished to retire. Even if he had continued to insist on my termination, I think I should have been given four weeks notice, plus one week for being over 45.
>
> Because of this situation, I do not feel comfortable requesting my employment to be reinstated. I feel I should be compensated with salary I would have received if I had been given the fair notice period. I believe that an agreement can be met that is acceptable to both myself and Kent Aluminium."

5 Mr Binks says that leading up to 13 March 2009 Mr Kent had asked him what were his intentions concerning work and Mr Binks replied that he wanted to stay working. He says that he asked to meet with Mr Kent on several occasions and, "the

meetings weren't forthcoming". Then at 11.55am on 13 March 2009 Mr Kent called Mr Binks to his house and told Mr Binks that he (Mr Binks) was retiring and to finish up work on 20 March 2009. On Saturday, 14 March 2009 at 3.20pm Mr Kent telephoned Mr Binks and Mr Binks says that he was given four options. He could work the last week, he could obtain a medical certificate, he could stay at home and not be paid or he could take annual leave. He says he felt intimidated and decided to take the last option. He received his final pay the following Wednesday [Exhibit A1].

6 Mr Binks says that his performance whilst employed by Mr Kent was 110%. Mr Binks says that if they had been able to meet then they could have sorted something out. He does not know why they could not meet. He says that he approached Mr Kent one day in the compound and told him that he wanted to stay and asked Mr Kent if Mr Kent wanted him to stay. Mr Kent did not give him an answer, but Mr Binks felt that Mr Kent wanted him to stay.

7 Mr Binks says that he was paid $836 gross per week and that his employment was covered by the Metal Trades (General) Award. Since his employment ended with Mr Kent, Mr Binks has been working part-time in a funeral parlour. He says he started there on 30 March 2009 and he works on average perhaps about eight hours a week. He is paid $18 an hour. He has not looked for full-time work and is happy working part-time.

8 Under cross-examination Mr Binks was asked why he did not put his request to have a meeting in writing. He says that after five and a half years of employment he did not consider it necessary. Mr Binks says that he had said he was going to retire but he had never said when he would retire. He denies that he said he was going to retire at 65 years of age. Mr Binks was asked as follows:

> "**MR KENT:** Okay. Now, you are seeking reinstatement to your job. You've put yes. You indicated to Sandra and myself that if we were to retire, which we told you on 13 March we were as of that date retiring, and Bradley our son was taking over as … as the manager, that there'd be no circumstance would you work under those conditions?---That is correct, but in the meantime I still hadn't told you or Sandy officially that I was going to retire."

9 Mr Binks says that Mr Brad Kent took over running the business on 16 March 2009. Mr Binks was asked by the Commission as follows:

> "Okay. But if I'm to understand you clearly, you wouldn't have been working there after the 20th with Brad in charge?---No, I probably would not've been, but I would've … what I would've done, I would've given the appropriate notice.
>
> All right. And so is this case about notice?---Yes, it is.
>
> All right. And you think you should have got paid, what, five weeks' notice?---I should've … I … I feel I should've been given the … the proper notice.
>
> And the proper notice is, you think, what?---My … my assessment on the proper notice … I think it was four weeks plus one for being over 45."

10 Mr David Kent gave evidence that throughout the year leading up to Mr Binks' 65th birthday he indicated quite a few times that he wanted to retire when he was 65. Mr Kent says that Mr Binks asked if he could stay on part-time and then would change his mind again and say he wanted to retire. Mr Kent says that he was "up in the air" as to what Mr Binks actually wanted to do. About one month before Mr Binks retired Mr and Mrs Kent went on a holiday to Tasmania. During that time Mr Binks did not come in one day because he was concerned that he was being made to do too much lifting. This got the other employees offside. During that holiday Mr and Mrs Kent decided to semi-retire. He says that he telephoned Wageline to find out what he needed to pay Mr Binks. They planned to tell Mr Binks one week before his retirement that he was retiring; that they accepted his retirement, and that they planned a party for him. Mr Brad Kent was to take over the running of the business. Three weeks prior to Mr Binks' retirement Mr Brad Kent said that they would need to find someone to replace Mr Binks. They advertised in the paper and employed someone. Mr Binks asked Mr Brad Kent why he was interviewing people and was told the reason.

11 Under cross-examination Mr David Kent says that there was a definite date for Mr Binks' retirement; it was 20 March 2009. Mr Binks asked Mr Kent why they never had, "this meeting". Mr Kent replied, "We just didn't have the time. I was very sick at the time, if you remember, and we had to work out what we were doing and whether we were retiring ourselves or not. And when Sandra and I decided that's what we were going to do, that's when we called you in." Mr Kent says that Mr Binks could have brought it up. Mr Kent later says, "You told us that you would not work under Brad, so we took it that you were going to retire when you're 65." Mr Kent says that he always thought 65 was the retiring age. He admits that Mr Binks did ask to see him but did not say specifically what it was about. He just mentioned he wanted to talk about what was going to happen.

12 Mr Kent says that Mr Binks told him on 13 March 2009 that he did not want to retire but Mr Kent told him that they had already employed someone else. Mr Kent took it that Mr Binks was leaving anyway because he would not work for Mr Brad Kent. Mr Binks had also upset the other employees by taking the day off when Mr and Mrs Kent were in Tasmania.

13 Evidence was given by Mr Brad Kent, Mr Darren Rupe and Mr Gareth Whetnall for the respondent all to the effect that Mr Binks had said that he was retiring at age 65.

14 I consider that it is plain, when the evidence of Mr Binks and Mr David Kent is viewed as a whole, that Mr Binks did suggest that he was going to retire. However, he was also considering options. For example, Mr Kent says that he talked about continuing on a part-time basis and then Mr Binks changed his mind. In fact, on Mr Kent's evidence alone it is clear that Mr Binks had not made up his mind and was considering options and wanted to talk to Mr Kent about the situation.

15 What is also clear is that at the same time Mr and Mrs Kent were considering retirement or at least semi-retirement. On holiday in Tasmania they made up their minds that they would semi-retire and that Mr Brad Kent would take over the business.

It is clear from Mr Binks' evidence that he would not work for Mr Brad Kent. This was a factor in the thinking of Mr and Mrs Kent. Mr David Kent also thought the normal retiring age was 65. Mr Brad Kent was to take over about the same time as Mr Binks turned 65. In that sense Mr Binks' employment with Kent Aluminium Windows was not going to last much longer as he would have chosen not to work for Mr Brad Kent.

16 It is clear also from the evidence that on 13 March 2009, Mr David Kent, told Mr Binks that Mr Binks was retiring at age 65. Mr Binks replied that he did not want to retire. It was Mr David Kent who brought the employment relationship to an end. It is not the case that Mr Binks retired. He had suggested that he was going to retire, but this plan was not certain, and before it was made certain he was dismissed. The only reason for his dismissal at that time was that Mr Binks had expressed a desire to retire, Mr Brad Kent was taking over and Mr Binks would not work for him. In those circumstances, the dismissal at that time, without proper discussion with or consideration of Mr Binks, was unfair.

17 Mr Binks' termination should have been on notice. The notice required given his age and length of service should have been five weeks. Given all the circumstances this is the loss he suffered as his employment would not have continued in any event. It is clear also from Mr Binks' evidence that this is the amount he seeks. Therefore I find that Mr Binks was dismissed unfairly on 13 March 2009. The employment was to end in Mr Kent's mind on 20 March 2009. I therefore take the period of notice to commence from that time. Mr Binks took annual leave, for which he was paid, in the week commencing 16 March 2009. I do not count that period as being any part of the notice period. I find that reinstatement is impracticable. Mr Binks does not seek this because Mr Brad Kent is now running the business and because of what happened. I find that Mr Binks' loss is the lack of payment of any notice period, which should have been five weeks.

18 Therefore the compensation to be paid by the respondent to Mr Binks is the sum of five by the weekly wage of $836 gross per week. This equates to $4180 gross less any taxation payable to the Commissioner for Taxation. This amount should be paid to Mr Binks within seven days from the date of the order.

2009 WAIRC 00464

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JOHN BINKS
	APPLICANT
	-v-
	DAVID AND SANDRA KENT
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 17 JULY 2009
FILE NO/S	U 71 OF 2009
CITATION NO.	2009 WAIRC 00464

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr C Binks
Respondent	Mr D Kent

Order

HAVING heard Mr C Binks on his own behalf and Mr D Kent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

DECLARES that the applicant, Mr C Binks, was unfairly dismissed by the respondent on 13 March 2009;

DECLARES that reinstatement is impracticable;

ORDERS that the said respondent do hereby pay, as and by way of compensation, the amount of $4180 gross, less any taxation payable to the Commissioner for Taxation, to Christopher Binks, within seven days from the date of this order.

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

2009 WAIRC 00442

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID BOLTON
	APPLICANT
	-v-
	STEVEN ERCEG, SOLE OPERATOR OF A AND C TRUCK ELECTRICS
	(ABN 18267277280)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	FRIDAY, 1 MAY 2009, MONDAY, 18 MAY 2009
DELIVERED	THURSDAY, 9 JULY 2009
FILE NO.	B 37 OF 2009
CITATION NO.	2009 WAIRC 00442

Catchwords	Industrial Law – Contractual benefits claim – Meaning of industrial matter – Aspects of claim commercial in nature – Unpaid annual leave – Issue of jurisdiction – Consideration of Minimum Conditions of Employment Act 1993 (WA) – Industrial Relations Act 1979 s 7, s 27, s 29(1)(b)(ii).
Result	Application upheld in part
Representation	
Applicant	In person
Respondent	No appearance

Reasons for Decision

1 The present application is pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that on the termination of his employment he was denied various contractual benefits. The applicant claims $2,170 in wages and overtime payments, $1,984 holiday paid accrued but unpaid and $5,689.69 for what are described as parts and fuel purchases for the respondent's business.

2 The respondent did not file a notice of answer and counter-proposal indicating whether it objected to or consented to any part of the applicant's claim. Moreover, at the hearing of the application, the respondent failed to appear. Given that the Commission was satisfied that the respondent had been duly notified of the hearing and no advice had been received in my Chambers or through the Registry as to why the matter should not be heard and determined, in the respondent's absence, the Commission proceeded pursuant to s 27(1) of the Act to hear and determine the matter.

Factual Background

3 The factual background is relatively simple and is as follows. The applicant commenced employment as an auto electrician on 12 August 2008 and the employment came to an end on or about 29 January 2009. The applicant testified that he was working on a part time basis up to 32 hours per week and was paid at the rate of $31 per hour plus overtime as required. Payment for overtime was agreed to be paid at the rate of time and one-half for two hours and double time thereafter. The applicant was provided with four weeks annual leave on a pro rata basis according to the hours worked per week.

4 Additionally, the applicant testified that it was part of his arrangement with the respondent, that to assist in the operation of the business, the applicant would use his account at a motor parts supplier to supply parts to the respondent. The applicant was reimbursed by the respondent in the month following the receipt by the applicant of the account from the parts supplier. It seems from the applicant's testimony that this arrangement operated satisfactorily for a while. Thereafter the applicant was not being reimbursed for parts that he purchased on behalf of the respondent's business.

5 According to the evidence and materials adduced by way of bank statements (exhibit A3), parts supplier invoices (exhibit A4) and a written record of parts supplied to the respondent (exhibit A5), the applicant said that the respondent owed him some $5,689.69 for these parts and also fuel supplied at his own expense. The applicant referred in his evidence, to what was said to be a written acknowledgement by the respondent of monies owing in the sum of $7,407.69 from which monies would be deducted representing payments already made to the applicant in respect to these matters.

6 In relation to the applicant's wages claim, the applicant tendered as exhibit A1 two payslips from the respondent's payroll services provider for the pay periods ending 23 and 30 January 2009 in the amounts of $1,108.25 gross and $1,061.75 gross respectively. According to the applicant's testimony, and having regard to the bank statements tendered in evidence, the applicant, from the procedure up until that time, had expected the wage payments to be credited to his bank account by direct bank transfer on the day immediately preceding the pay period concerned. The applicant testified that both wage payments had not been received by him from the respondent and the bank statements bear this out.

7 Additionally, the applicant testified that during his period of employment of approximately five months he took no annual leave nor did he receive any annual leave payment pro rata on the termination of his employment. In relation to the annual leave claim however, the applicant did not refer to any agreement with the respondent to provide annual leave separate to or in

addition to that prescribed by the Minimum Conditions of Employment Act 1993 ("the MCE Act"). Additionally, the applicant testified that there was no reference during the course of discussions with the respondent about his employment conditions to any award of this Commission.

Consideration

8 In relation to the applicant's wages claim, I accept the applicant's testimony without hesitation that wages due and owing as set out in the payroll advices for the weeks ending 23 and 30 January 2009, as contained in exhibit A1, are outstanding and were entitlements due to the applicant but denied to him. Accordingly I am satisfied from the evidence before the Commission that the applicant is entitled to the sum of $2,170 gross in respect of unpaid wages.

9 In relation to the applicant's claim for unpaid annual leave there is an issue of jurisdiction which arises in this case. Given that the applicant was unable to establish in his evidence any agreement between him and the respondent to provide annual leave payments independent of the terms of the MCE Act, then such a claim is not recoverable as a contractual benefit but rather it is an enforcement of the MCE Act which must be pursued elsewhere: *Oates v Sanders Executive* (1998) 79 WAIG 1192; *Brown v the University of Western Australia* (2004) 84 WAIG 189.

10 Furthermore, there is also a jurisdictional issue which arises in relation to the applicant's claim for reimbursement of expenses for the purchase of parts on behalf of the respondent. For a claim of the present kind to constitute an industrial matter pursuant to s7 of the Act, the industrial matter must have an industrial and not a commercial character: *Hotcopper v Saab* (2002) 82 WAIG 2020. In this case I am not satisfied that the arrangement for the supply by the applicant to the respondent of parts, very honourable though it was by the applicant, can be regarded as a claim of an industrial character. Rather, in my opinion, the arrangement between the applicant and the respondent in this regard was of a commercial character. The decision in *Hotcopper*, unless and until it is overruled, precludes the applicant's claim from being dealt with by the Commission. That matter may need to be pursued in the civil courts by way of a claim for a debt due under a simple common law contract.

11 Accordingly, an order will be made in respect of the applicant's claim for unpaid wages but otherwise the application must be dismissed.

2009 WAIRC 00458

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID BOLTON
	APPLICANT
	-v-
	STEVEN ERCEG, SOLE OPERATOR OF A AND C TRUCK ELECTRICS
	(ABN 18267277280)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 15 JULY 2009
FILE NO/S	B 37 OF 2009
CITATION NO.	2009 WAIRC 00458

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard from the applicant in person and there being no appearance by the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 herby orders -

1. THAT the respondent pay to the applicant the sum of $2,170.00 gross as unpaid wages within 21 days of the date of this order.
2. THAT otherwise the application be and is hereby dismissed.

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

2009 WAIRC 00410

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRANT CARTLEDGE
	APPLICANT
	-v-
	BRITONE ALUMINIUM & GLAZING SERVICES
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 25 JUNE 2009
FILE NO/S	U 80 OF 2009
CITATION NO.	2009 WAIRC 00410

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 5th day of June 2009 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 16th day of June 2009 the applicant advised the Commission that the matter had settled;

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

THAT this application be, and is hereby dismissed.

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

2009 WAIRC 00473

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA DE HAAN
	APPLICANT
	-v-
	CASH CONVERTORS MIDLAND
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 23 JULY 2009
FILE NO/S	U 138 OF 2008
CITATION NO.	2009 WAIRC 00473

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr J Piner

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.

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

2009 WAIRC 00467

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AJIE DHARMA
	APPLICANT
	-v-
	WATSON TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 JULY 2009
FILE NO	B 102 OF 2009
CITATION NO.	2009 WAIRC 00467

Result	Application discontinued
Representation	
Applicant	Mr A Dharma
Respondent	Mr S Waight

Order

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

AND WHEREAS on 26 June 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 9 July 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 discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2009 WAIRC 00471

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE FERRIER
	APPLICANT
	-v-
	DRUG ARM WA INC
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	WEDNESDAY, 22 JULY 2009
FILE NO/S	U 86 OF 2009
CITATION NO.	2009 WAIRC 00471

Result	Application discontinued
Representation	
Applicant	Ms J Ferrier (by teleconference)
Respondent	Ms J Siddins (on behalf of the respondent)

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 17 June 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 8 July 2009 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

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

2009 WAIRC 00516

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER FRASER
	APPLICANT
	-v-
	G. L AND D. M TALBOT T/AS SOUND BUSINESS EQUIPMENT AND STATIONERY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 3 AUGUST 2009
FILE NO	U 117 OF 2009
CITATION NO.	2009 WAIRC 00516

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 21 July 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 discontinued.

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

2009 WAIRC 00455

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN PATRICK GALEA
	APPLICANT
	-v-
	SHIRE OF RAVENSTHORPE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	THURSDAY, 19 MARCH 2009
WRITTEN SUBMISSIONS	FRIDAY 3 APRIL 2008, FRIDAY 24 APRIL 2009, THURSDAY 30 APRIL 2009
DELIVERED	WEDNESDAY, 15 JULY 2009
FILE NO.	U 175 OF 2008
CITATION NO.	2009 WAIRC 00455

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 - Order issued - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 29(2) and (3) Termination of employment - Harsh, oppressive and unfair dismissal - Whether Commission has Jurisdiction - Trading activities of respondent considered - Commission not satisfied respondent is a constitutional corporation - Claim within Commission's jurisdiction - Declaration issued - *Industrial Relations Act 1979* (WA) s 29(1)(b)(i); *Workplace Relations Act 1996* (Cth) s 4, s 6 and s 16; *Commonwealth of Australia Constitution Act 1900* s 51(xx) and s 109; *Local Government Act 1995* s 1.3(3), s 2.5 and s 3.1(1)
Result	Extension of time granted; Declaration Issued
Representation	
Applicant	Mr J Hodgkinson (of Counsel)
Respondent	Mr S White (as Agent)

Reasons for Decision

1 On 5 December 2008 John Patrick Galea ("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 he was harshly, oppressively or unfairly dismissed on 4 November 2008 by the Shire of Ravensthorpe ("the Shire"/"the respondent").

EXTENSION OF TIME

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 5 December 2008 and the applicant was terminated on 4 November 2008 it is three 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.

7 The applicant's application confirms that he commenced employment with the respondent on 1 May 2008 and he was a leading hand in the respondent's maintenance section when he was terminated. It was not in dispute and I find that on 4 November 2008 the applicant was terminated in a summary fashion and it was not until 19 November 2008 that the respondent gave him a payment in lieu of notice.

8 The applicant now resides in the eastern states and at the hearing his representative stated that the applicant was not giving evidence at the hearing because he was not capable of doing so given his poor state of health arising out of the way the respondent treated him both during his employment with the respondent and given the nature of his termination.

Applicant's submissions

9 The applicant submits that the merits of his substantive application are strong on the basis that he was summarily dismissed by the applicant's supervisor Mr Ian Dickinson without cause or reason. The applicant also maintains that Mr Dickinson victimised, intimidated and bullied him during his employment with the respondent and he claims that Mr Dickinson told numerous people, who told the applicant, that he was going to "get" the applicant, Mr Dickinson persistently told the applicant that he is "a useless bastard who does not know what he is doing", Mr Dickinson dumped work orders in front of the applicant and said "you better do this today" in a tone that was threatening and intimidating to him and Mr Dickinson used body language in the presence of the applicant in a way that was inappropriately dominant and aggressive. The applicant maintains that as a consequence of Mr Dickinson's bullying he became depressed and anxious and was unable to sleep properly and as a result was prescribed anti-depressant medication.

10 The applicant made a number of additional submissions in support of his claim that it would be unfair of the Commission not to accept this application. The applicant argues that the respondent was aware that he was contesting his termination soon after he was terminated as within eight days of the applicant being terminated he attempted to negotiate a settlement with the respondent prior to the limitation period ending however these negotiations were unsuccessful. Specifically, the applicant's representative wrote to the respondent on 12 November 2008 making an offer to settle the applicant's termination. In response the respondent wrote to the applicant on 20 November 2008 informing him that it would respond to his offer after it had conferred with its industrial advisors and this response was received on 9 December 2008 after the limitation period ended and only subsequent to a further letter being sent by the applicant's representative on 3 December 2008 seeking an urgent response to his offer.

11 The applicant argues that there is very little prejudice, if any, to the respondent if the extension of time within which to file this application is granted as this application was lodged only three days out of the required timeframe and the respondent had been aware for some time that the applicant was contesting his termination.

12 The applicant's representative maintains the delay in filing this application was not caused by inaction on the part of the applicant. The applicant's representative claims that the applicant was not aware that there was a timeframe for lodging this application and that it was representative error which led to this application being lodged outside of the required timeframe.

13 The applicant relies on the following additional information contained in correspondence attached to this application in support of the applicant's good work history and his poor relationship with Mr Dickinson:

- a reference dated 11 November 2008 given by Ms Rowena Ritchie, Manager Corporate and Community Services, Shire of Ravensthorpe citing the applicant's good work record;
- a statement made on 6 November 2008 by three of the respondent's employees with respect to comments allegedly made by Mr Dickinson who was in charge of the respondent's building maintenance section and who was the person who terminated the applicant, claiming that Mr Dickinson called the applicant "a liar, a snake in the grass, useless and numerous colourful names were used to describe what he thought of him";
- a letter from the respondent's Chief Executive Officer ("CEO") Mr Paul Richards dated 18 July 2008 with respect to the granting of a pay increase to the applicant as a result of his good performance; and
- a statement by the applicant's medical practitioner dated 5 November 2008 which reads as follows (formal parties omitted):

> "To whom it may concern
>
> **Re: John Galea DOB: 26 Mar 1962**
>
> **P.O. Box 382**
>
> **Ravensthorpe 6346**
>
> **0427 07 80 22**
>
> I know (sic) John since September 2008.
>
> He was exposed to an ongoing bulling (sic) situation at work and was fired on the spot in front of his colleagues.
>
> This caused gradually (sic) worsening of his emotional and mental wellbeing. He suffers from stress symptoms like insomnia and anxiety."

Respondent's evidence

14 Mr Dickinson is employed by the respondent as its Works Supervisor. Mr Dickinson gave evidence that after returning from a period of leave he was in his office on the morning of 4 November 2008 and the applicant came in and removed some time sheets from his desk without speaking to him. Mr Dickinson gave evidence that he stepped around his desk and asked the applicant to return the time sheets to him and in response the applicant "flew into a tirade of abuse that lasted between 10 and 12 minutes with threats of physical violence" (T9). When Mr Dickinson told the applicant that he was terminated and asked him to leave the applicant refused to go and Mr Dickinson stated that it was only after he contacted police for assistance that the applicant left. Another employee, Mr Dave Forsythe, was present during this incident and Mr Dickinson stated that after the applicant left both he and Mr Forsythe went to the respondent's administration office to speak to the CEO about the incident but when they could not locate him they reported the incident to Ms Ritchie.

15 Under cross-examination Mr Dickinson reiterated that the applicant abused him for between 10 to 12 minutes and he stated that he had never been treated like this before by an employee. Mr Dickinson then stated that he believed the applicant was upset and angry for reasons apart from work. Mr Dickinson stated that he got on well with the applicant until 7 September 2008. Mr Dickinson then declined to give any details about the issues which caused difficulties between himself and the applicant after that date however he stated that the issues did not involve him and the applicant but other people and Mr Dickinson stated that the applicant did not like his views about what he was saying and doing in relation to those people.

Respondent's submissions

16 The respondent submits that it had sufficient reason to terminate the applicant and the respondent relies on the evidence given by Mr Dickinson. The respondent claims that on the morning of 4 November 2008 the applicant launched into a tirade of abuse towards Mr Dickinson in front of another employee and the applicant threatened to physically harm Mr Dickinson and behaved as if he was going to assault him. The applicant initially refused to leave the respondent's premises and only did so when Mr Dickinson contacted police for assistance. The respondent also submits that the applicant was not summarily terminated as he was given a payment in lieu of notice subsequent to his termination.

17 The respondent argues that the Commission should have regard to the fact that the applicant's representative was aware that there was a set timeframe for filing this application.

18 The respondent accepts that the applicant contested his termination soon after it occurred and concedes that its response to correspondence from the applicant soon after he was terminated was delayed due to internal issues occurring within the respondent's operations and because the respondent's representative was on leave. The respondent also concedes that given the short timeframe of this application being filed late there is no additional prejudice to the respondent.

Findings and conclusions

19 The issue of whether or not there is any merit to the applicant's claim that he was unfairly dismissed is difficult to determine as the applicant did not appear in these proceedings to give evidence due to his poor state of health and the only person to give direct evidence about the events of 4 November 2008, which resulted in the applicant being terminated, was the applicant's supervisor Mr Dickinson. Even though Mr Dickinson gave evidence that the applicant abused him for approximately 10 minutes during what he described as an unprovoked tirade against him, the incident between Mr Dickinson and the applicant took place after some months of difficulties between them which it appears resulted in the applicant requiring medical treatment, which is ongoing. In the circumstances, and given that there appears to have been issues between the applicant and Mr Dickinson of an unspecified nature since 7 September 2008, I am not in a position to definitively determine whether or not there is any merit to the applicant's claim that he was unfairly dismissed on 4 November 2008. As a result I give the issue of merit little if any consideration in this instance.

20 It was not in dispute and I find that the applicant took reasonable and timely steps to engage a representative to act on his behalf to settle his dispute with the respondent concerning his termination and I accept that the applicant relied on his representative to lodge his claim for unfair dismissal however, in this instance, the applicant's representative failed to fulfil his professional obligations to the applicant to lodge this application within the required timeframe. In the circumstances I find that the applicant has an acceptable reason for the delay in lodging this application on the basis of representative error as the applicant's representative conceded at the hearing that it was his fault, and not that of the applicant, for this application being lodged three days outside of the required timeframe. I am satisfied therefore that representative error provides an acceptable explanation for the delay in lodging this application and I find that the applicant should not be disadvantaged due to this error (see *Clark v Ringwood Private Hospital* [1997] 74 IR 413).

21 I also accept that the delay in lodging this application resulted from a less than prompt response by the respondent to a letter written to the respondent by the applicant's representative on 12 November 2008, which was followed up by further correspondence on 3 December 2008, in order to negotiate a settlement with respect to the applicant's termination. I find that this correspondence gave a clear indication to the respondent that the applicant intended to contest his termination and the respondent was put on notice in this correspondence that an application of this nature would be filed if the parties did not reach agreement. I therefore find 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 and no disadvantage was highlighted by the respondent in meeting this application because of the delay and I accept that there was no additional prejudice to the respondent given the delay in lodging this application.

22 When balancing the above findings and taking into account all of the relevant factors to consider in an application of this nature and when taking into account the issue of fairness to both parties I find that it would be unfair not to accept this application. In reaching this view I take into account that there was an acceptable reason for the delay in lodging this application and I have found that the respondent will not be prejudiced any more than usual in allowing this application given that the applicant advised the respondent within eight days of his termination that he was contesting his termination. 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.

23 An order will issue to that effect.

JURISDICTION

24 The respondent maintains that it is a constitutional corporation for the purposes of the *Workplace Relations Act 1996* ("WR Act") and the applicant's claim is therefore outside of the Commission's jurisdiction. In contrast the applicant argues that the respondent is not a constitutional corporation and the Commission therefore has jurisdiction to deal with this application.

Respondent's evidence

25 In support of its claim that the Commission does not have jurisdiction to deal with this application the respondent relies on the evidence of Mr Pascoe Durtanovich which it maintains demonstrates that the respondent is a trading corporation, given the significance and scope of its trading activities (see Witness Statement, Exhibit R3, and amended Witness Statement and supporting documentation lodged in the Commission on 3 April 2009).

26 Mr Durtanovich is employed as the Acting CEO at the Shire and he has held this position since 14 November 2008. Mr Durtanovich has had 42 years of experience working in Local Government in Western Australia, 30 of them as a CEO. Mr Durtanovich maintains that his position as the Acting CEO of the Shire provides him with a good understanding of the Shire's operations and functions.

27 Mr Durtanovich stated that the Shire is located 536 kilometres from Perth, covers 12,872 square kilometres and has approximately 2,300 residents. Mr Durtanovich maintains that the Shire operates several trading activities in addition to its statutory functions. Mr Durtanovich confirmed that the information contained in his initial witness statement dated 4 March 2009 about the Shire's trading activities was taken from the Shire's financial analysis reports for the financial years 1 July 2006 to 30 June 2007 and 1 July 2007 to 30 June 2008.

28 Mr Durtanovich stated that of the total operating revenue of the Shire of $10,538,817.00 during the 2007/2008 financial year, $2,584,212.95 or 24.52 percent was assessed by him as being trading activity. Mr Durtanovich stated that the income the Shire received from its trading activities is reasonably consistent from year to year even though the Shire's total operating revenue increases or decreases as business needs change.

29 At the hearing Mr Durtanovich provided an amended Appendix A to attach to his witness statement and a further amended Appendix A was provided to the applicant and the Commission following the hearing on 3 April 2009, in response to issues that arose at the hearing. The final document, headed Appendix A, is as follows:

Shire of Ravensthorpe Operating Accounts

		2006-2007	2007-2008
Ref#	**Name**	**Trading Income**	**Trading Income**
1	Sale of Council Publications	$546.00	$111.27
2	FESA - Bush Fires	$35,700.00	$38,000.00
3	FESA - Administration Charge	$4,000.00	$4,000.00
4	Fire Map Sales	$30.00	$474.55
5	Grant - Emergency Services Collocation		$1,600,000.00
6	Rent - Martin St, Ravensthorpe		$5,352.00
7	FESA - State Emergency Service	$11,200.00	$11,600.00
~~8~~	~~Crime Prevention Grant~~		
9	Business Refuse Charges	$17,708.24	$22,045.81
10	Business Tip Charges	$11,113.32	$11,017.40
11	Building Sites Tip Charges	$15,008.53	$20,782.56
12	Mine Site Refuse Charges	$188,320.45	$116,671.09
13	Sale of Refuse Bins	$2,070.00	$534.73
14	Cemetery Charges	$499.54	$930.00
15	HalI Hire Charges	$3,617.01	$5,172.17
16	Swimming Pool Admission Charges	$7,934.91	$7,931.05
17	Ravensthorpe Entertainment Centre Charges	$9,065.00	$6,876.73
18	Ravensthorpe Sports Pavilion Hire Charges	$4,700.00	$1,952.50
19	Gym Memberships	$6,321.35	$6,734.06
20	Camping Fees	$7,822.00	$5,306.00
21	Landing Fees and Charges	$39,300.00	$32,715.00
22	Ravensthorpe Nickel Operation Contribution	$185,680.62	$194,621.06
23	Gate Registrations		$270.00
24	Hopetoun Caravan Park lease	$10,000.00	$21,200.00
25	Other Minor Revenue		$500.00
26	Tectonic Resources Lease	$6,545.00	$6,750.00
27	Standpipe Administration Charge	$864.50	$1,759.00
28	Airport Farmland Lease	$25,000.00	$25,750.00
~~29~~	~~Power Connection Morris Camp~~		
30	Private Works Revenue	$27,193.30	$80,618.91
31	Staff Housing Rent - Works		$9,525.73
32	Westpac Banking Corporation In-Store Commission	$55,814.83	$51,925.92
33	Department for Planning & Infrastructure Commission	$33,230.16	$37,965.37
34	Safe Custody Charges	$1,008.02	$854.87
35	Westpac Training		$592.20
36	Rate Search Fees	$15,454.55	
37	Profit on Sale of Asset	$1,119.63	
38	Reimbursement Fire Fighting Expenses	$28,720.30	
39	Rent - Medical House	$872.72	

		2006-2007	2007-2008
Ref#	**Name**	**Trading Income**	**Trading Income**
40	Medical Practice Review	$9,090.91	
41	Tip Entry Fees	$435.54	
~~42~~	~~Sewerage Fees~~		
43	Hopetoun Recreational Facilities	$34,583.00	
44	Landcorp Street Tree Project	$87,385.18	
45	Subdivision Admin & Supervision	$40,449.99	
46	Western Power - Lease of Depot	$12,000.00	
47	Ravensthorpe Sewerage Charge	$42,032.47	$48,181.89
48	Ravensthorpe Sewerage in Lieu	$6,588.97	$8,919.35
49	Munglinup Sewerage Charge	$1,849.87	$1,942.60
~~50~~	~~Reimbursement Fire Fighting Expenses~~		
51	Ravensthorpe Sewerage Extensions	$70,072.20	$122,979.34
52	Hopetoun Effluent Cartage	$375,000.00	
53	Waste Effluent Dump Charge		$71,649.79
		$1,435,948.11	**$2,584,212.95**
		$6,118,024.00	**$10,538,817.00**
		23.47%	24.52%

30 Mr Durtanovich stated that the 24.52 percent of the Shire's income generated from trading activities in the financial year 2007/2008 was significant both with respect to the monetary value of these activities and their importance to the Shire given that it is a small Local Government.

31 Mr Durtanovich detailed the income received by the Shire in the 2007/2008 financial year which he maintains constitutes trading income.

32 Mr Durtanovich stated that the sale of council publications and fire maps by the Shire generates trading income (see Items 1 and 4). Mr Durtanovich gave evidence that publications sold by the Shire include council minutes and agendas and he stated that the costs charged to the public for these publications cover the cost of printing the publications. He also stated that the majority of these publications are available on the respondent's website and can be downloaded by the public.

33 Mr Durtanovich claims that a payment of $53,600 to the Shire from the Fire and Emergency Services Authority of Western Australia ("FESA") should be considered as trading income as this funding enabled the Shire to undertake a State Government responsibility that would not be carried out by the Shire if this payment was not made (see Items 2, 3 and 7). Attached to Mr Durtanovich's amended witness statement is the grant acquittal form for this payment identifying the expenses incurred by the respondent relevant to the income received (see Appendix B). Mr Durtanovich gave evidence that the payment listed at Item 2 came from the Emergency Services Levy allocated to the Shire on a needs basis for fire control and he stated that the income is used for purchasing items including fire units and protective clothing for brigade members. Mr Durtanovich gave evidence that the payment listed at Item 3 also came from the Emergency Services Levy and he stated that the income was used to purchase items including office equipment, vehicles and protective clothing for the Shire's State Emergency Service. Mr Durtanovich maintains that the commission paid to the Shire for collecting the Emergency Services Levy constitutes a trading activity.

34 Mr Durtanovich stated that the Shire received a grant of $1,600,000 to facilitate the construction and fit out of a new building in Hopetoun for the housing of fire and emergency services. Mr Durtanovich testified that a building company was used to undertake much of the work and was chosen through a tender process. Mr Durtanovich stated that the Shire was reimbursed out of the grant for administration costs associated with this project (see Item 5).

35 Mr Durtanovich gave evidence that the Shire owns property leased to external bodies and income was received for this leasing arrangement in the amount of $5,352. Mr Durtanovich stated that the majority of these premises were rented to Shire employees at non-commercial rates and he stated that the Shire pays for the upkeep on these properties (see Item 6).

36 Mr Durtanovich gave evidence that the respondent has not included income from domestic refuse collection as a trading activity but he maintains that commercial refuse collection, tip charges for business and building and mine site refuse collection, which are optional services provided by the Shire, should be considered as trading activity. Mr Durtanovich stated that charges levied on business for picking up and disposing of waste, as well as for the use of bins on building sites generated income of $170,516.86 in the 2007/2008 financial year (see Items 9, 10, 11 and 12).

37 Mr Durtanovich gave evidence that in the 2007/2008 financial year the sale of additional refuse bins required by residents and businesses, which were not sold for a profit, generated income of $534.73. Cemetery fees on burials performed by Shire employees, which he maintained were charged at commercial rates, provided $930 in revenue and $14,001.14 in income was received for the hire of halls, the Ravensthorpe Entertainment Centre and for hiring the sports pavilion out to the public. Mr Durtanovich stated that all of these facilities are owned, operated and maintained by the Shire (see Items 13, 14, 15, 17 and 18).

38 Mr Durtanovich stated that the Shire charges entry to the Ravensthorpe swimming pool, which is owned and maintained by the Shire and for gym memberships for residents to use a gymnasium which is operated by the Shire. These facilities generated income of $14,665.11 (see Items 16 and 19).

39 Mr Durtanovich gave evidence that members of the public were charged fees to use camping facilities provided by the Shire and gate registration charges, which was a nominal fee collected for the right of landowners to put gates across public thoroughfares, amounted to $5,306 and $270 respectively in the 2007/2008 financial year (see Items 20 and 23).

40 Mr Durtanovich maintains that the running of the Ravensthorpe airport is a commercial enterprise and he gave evidence that the Shire owns and operates this airport. Mr Durtanovich stated that BHP Billiton's Ravensthorpe Nickel operation contributes to the operating cost of the facility and he stated that landing fees were charged to users of the airport. In total this amounted to income of $227,336.06 in the 2007/2008 financial year (see Items 21 and 22). Mr Durtanovich stated that some of the equipment used at the airport was paid for out of grant funding and capital works costs relevant to the airport were paid for by BHP Billiton ("BHP"). Appendix C attached to Mr Durtanovich's amended witness statement contains the expenditure involved in operating the airport.

41 Mr Durtanovich gave evidence that the Hopetoun Caravan Park is on shire vested land and a commercial operator of this park pays $21,200 to the Shire for the lease of the land (see Item 24). Commercial leases for the use of land as farmland at the airport and for a campsite for the use of Tectonic Resources' employees also generated income to the Shire of $32,500 (see Items 26 and 28).

42 No information was provided by the respondent about the breakdown of the $500 claimed as **'**Other Minor Revenue' at Item 25.

43 Mr Durtanovich gave evidence that the Shire received $1,759 for the sale of Standpipe water and he stated that these facilities are maintained by the Shire (see Item 27).

44 Mr Durtanovich gave evidence that the Shire received $80,618.91 in income for undertaking private works during the 2007/2008 financial year, which consisted of carting waste water for BHP and for constructing a gravel pit using the Shire's plant and equipment (see Item 30).

45 Mr Durtanovich stated that the Shire's works employees paid $9,525.73 to rent Shire owned houses in the 2007/2008 financial year and he confirmed that these rents were not levied at a commercial rental rate (see Item 31). Under cross-examination Mr Durtanovich estimated that the rent that employees paid was 50 to 60 percent less than market rates.

46 Mr Durtanovich gave evidence that the Shire received $89,891.29 in commissions during the 2007/2008 financial year for running a bank agency on behalf of Westpac Banking Corporation ("Westpac") and for operating an agency for vehicle licensing on behalf of the Department for Planning and Infrastructure ("DPI"). Under these agency arrangements a safe custody service was also provided for Westpac items and $854.87 in income was generated in the 2007/2008 financial year for this service and the Shire was reimbursed $592.20 by Westpac for training staff to work in the bank agency (see Items 32, 33, 34 and 35).

47 Mr Durtanovich stated that residents who choose to connect to the sewerage system provided by the Shire are charged an annual rate for this service and the total revenue for providing these services was $59,043.84 in the 2007/2008 financial year (see Items 47, 48 and 49).

48 Mr Durtanovich gave evidence that $122,979.34 was paid to the Shire by the Department of Industry and Resources to upgrade the sewerage treatment plant (see Item 51 and details at Appendix D of his amended witness statement).

49 Mr Durtanovich stated that $71,649.79 was paid to the Shire by the Water Corporation for the cost of disposing of effluent at the Shire's licensed facility at Ravensthorpe and this was part of a contract which the Shire had with the Water Corporation to cart effluent from Hopetoun to Ravensthorpe (Item 53).

50 The applicant did not give any evidence about the respondent's trading activities.

Submissions

Respondent

51 The respondent submits that a corporation is to be regarded as a trading corporation if a substantial proportion of its activities are trading activities and argues that it is well established that it does not matter that the same corporation is engaged at the same time in activities which are not trading activities. The respondent relies on the following decisions in support of this claim: *Eric Bell v Shire of Dalwallinu* (2008) 88 WAIG 1867 ("*Bell*"), *Jacqueline Ann Bysterveld v Shire of Cue* (2007) 87 WAIG 2462 ("*Bysterveld*") and *Aboriginal Legal Service of Western Australia Incorporated v Mark James Lawrence* (2007) 87 WAIG 856 ("*Lawrence* [FB]").

52 The respondent maintains that the following summary from *Lawrence* (FB) is relevant to the Commission's determination of this application:

> *"3.1 Whether the respondent is a trading corporation involves questions of fact, to be determined upon the evidence before the Commission.*
>
> *3.2 The primary focus is on what the respondent does. This determines what its activities are.*
>
> *3.3 The respondent is a trading corporation if its (sic) substantially engages in trading activity. This necessitates a close analysis of what the appellant (sic) does, and whether this in whole or part constitutes trading. If all of its activities are trading, it is a trading corporation. If a portion of its activities are trading then it is necessary to consider whether that portion is a substantial or significant portion of its overall activities. If so it is a trading corporation.*
>
> *3.4 It is immaterial if a corporation has a non-profit, benevolent or charitable object; if its trading activities are nevertheless substantial then it will be a trading corporation.*"

(Respondent's submissions dated 4 March 2009)

53 The respondent argues that the authorities of *Bell* and *Bysterveld* are relevant as they deal with the test of establishing a constitutional corporation in Western Australian Local Government post the "WorkChoices" amendments to the WR Act.

54 The respondent submits that the decision of *Lawrence* (FB) provides guidance in distinguishing whether funds supplied by Government constitute trading as it is argued in *Lawrence* (FB) at 890 of one source of Government funding as follows:

> "*… the gratuitous provision of a public welfare service, where the money to engage in the service is supplied by government funding, is not trading. In our opinion, and with respect, so broad a proposition is not supported by the decisions of the High Court or the other authorities cited above which discuss the meaning of "trade" or "trading". In a situation where there is in effect, a tripartite arrangement involving the government it is necessary to look at the basis on which the money is received to provide services to ascertain if any or all of this constitutes trading. … There is no reason in principle why a tripartite arrangement may not constitute trading. The fact that government funds are used for a public welfare service, does not necessarily have the effect that the means by which the funds were received, or the arrangement overall, is not trading.*"

55 The respondent maintains that the total operating revenue of the respondent during the 2007/08 financial year was $10,538,817.00 and claims that of this $2,584,212.95 should be assessed as trading activity, 24.52 percent of the respondent's revenue, which is a significant percentage of the respondent's total revenue (these figures have been amended subsequent to the hearing). The respondent argues that this claim is consistent with the decision in *Bell* where the Shire of Dalwallinu had trading activities of 20.88 percent of its total revenue which was sufficient for it to be found to be a trading corporation.

56 The respondent relies on Mr Durtanovich's confirmation that the total income received from trading activities is reasonably consistent from year to year although fluctuations can occur as business needs change and the respondent submits that the evidence presented both at hearing and in supplementary documentation submitted after the hearing demonstrates that it has the character of a constitutional corporation.

57 The respondent maintains that it is unlikely that an organisation is not a trading organisation when it operates the range of income generating activities detailed in Appendix A and the respondent argues that a substantial proportion of its current activities are trading in nature with about a fifth of the respondent's activities being derived from trading activities. The respondent also argues that the percentage and financial value of the respondent's trading activities is in line with other decisions where Local Governments have been determined to be constitutional corporations.

58 The respondent argues that even though some trading activities arise as a result of the statutory obligations of a Local Government (see Items 1 to 5, 7 and 36 - Sale of Council Publications, FESA – Bush Fires, FESA – Administration Charge, Fire Map Sales, Grant – Emergency Services Collocation, FESA – State Emergency Service and Rate Search Fees) trading activities can arise out of statutory obligations.

59 The respondent disagrees with the applicant's contention that profit being derived from an activity is relevant to the nature of that activity and even though some businesses are profitable at a point in time and some not, this does not alter the nature of the trading activity. The respondent also relies on Mr Durtanovich's evidence that many of the respondent's trading activities run at a profit. The respondent argues that bank transactions carried out by the respondent constitute trading activity in the same way as a bank undertaking this role even if it is performed by an organisation acting on their behalf and the nature of the activity is unchanged whether the operations are undertaken by an employee of the respondent or an employee of a contracted organisation. The agency arrangements conducted by the respondent for banking and vehicle licenses are transactions made by members of the public for which the respondent receives a commission for its services and as the payment for this product or service is between the organisation on whose behalf the Shire is acting and its customers the respondent receives trading income for facilitating these services. The respondent offers a similar agency service for FESA by providing fire and emergency services and the respondent maintains that the payment made by FESA to the respondent for administration services performed by the respondent along with the reimbursement of expenses incurred constitutes trading activity. The respondent argues that rent charged for houses owned by the respondent should be included as trading activity and that the discounting of rent for the respondent's employees is a separate employment matter and even though the rent received is reduced this does not alter that the payments are in return for the provision of housing. The respondent acknowledges that domestic refuse collection may not be considered trading income but argues that as commercial enterprises have the choice of buying these services then the charges arising from mine sites, building sites and businesses should be considered as trading activities. The respondent submits that the Ravensthorpe airport is a commercial enterprise that generated trading income through its use by the Ravensthorpe Nickel operation, along with landing fees. The respondent maintains that the lease for the Hopetoun Caravan Park is a commercial arrangement based on market rates and is therefore a trading activity. The respondent also submits that Mr Durtanovich gave evidence that the private works carried out by the respondent on behalf of external organisations are charged at market rates.

60 In conclusion the respondent claims that it is open to the Commission to find that it lacks jurisdiction to hear this matter.

Applicant

61 The applicant argues that the Commission has jurisdiction to hear his claim. The applicant rejects the respondent's claim that it is a constitutional corporation in accordance with s 4 of the WR Act and for the purposes of s 16 of the WR Act, which precludes the Commission from dealing with this application if an employer is a trading corporation in accordance with ss 4 and 6 of the WR Act. The applicant submits that whilst the respondent is engaged in some trading activities, those activities are not sufficient to characterise the respondent as a trading corporation and the applicant argues that the character of the trading activities undertaken by the respondent are insufficient to impose the character of a trading corporation on the respondent and as such the Commission has jurisdiction to hear and determine this matter.

62 The applicant submits that whether a corporation is a trading corporation is a question of fact and degree and relies on *R v Judges of the Federal Court of Australia and Another; Ex parte The Western Australian National Football League (Inc) and Another* (1979) 143 CLR 190; (1979) 23 ALR 439 ("*Adamson*") which was applied by the Full Bench in *Crown Scientific Pty Ltd v Leslie Bruce Clarke* (2007) 87 WAIG 598 and in *Lawrence* (FB) at paragraphs 207, 235 and 322(b).

63 The applicant relies on *Adamson* where the majority stated at 452 (ALR):

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

64 The applicant submits that whether or not a particular activity of the respondent may be considered a trading activity as opposed to a statutory function or non-trading activity is determined by whether that activity has the character of trading. The applicant argues that trading has been defined variously as "traffic by way of sale or exchange" (by Bowen CJ in *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* [1978] 36 FLR 134), not limited to buying at a profit but extending to business activities carried out with a view to earning revenue (Mason J in *Adamson*) and the most important indication is whether a corporation is "engaged in the buying or selling or change of goods or services or valuable intangibles" (*Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]* [2008] 89 WAIG 243 ["*Lawrence* (IAC)"]).

65 The applicant argues that the characterisation of a corporation as a trading corporation should be determined by primarily focusing on the activities of the corporation (see *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) FCA 1268 at paragraph 146).

66 The applicant argues that when determining whether or not trading by the respondent is substantial and not merely peripheral *Bysterveld* provides some guidance at 2475:

> "… Whilst the percentage values are relevant to the question whether it can be said that the trading activities of the Respondent are significant, it is not of assistance to simply analyse these activities only on the basis of comparative dollars of trading activities to the total operating revenue received from rates and grants and other items that are not trading activities…"

67 The applicant argues that the trading activity of the respondent is quite insignificant in relation to the overall consideration of the respondent's activities which, as a Local Government, exercises extensive legislative and executive functions in the area of Local Government (see *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [op cit] at paragraph 75).

68 The applicant argues that despite the respondent claiming that its trading activities for the financial year 2007/08 represents 24.52 percent (as amended following the hearing) of their total operating revenue, the trading figures for the previous two financial years show trading activities to be considerably less and the applicant maintains therefore that the percentage of trading activity the respondent claims it undertook in the 2007/08 financial year is not indicative on its own that the respondent is a trading corporation.

69 The applicant submits that where the respondent acts merely as a conduit for the channelling of funds gratuitously provided by the State or Federal government, which are then spent by way of engaging a third party to deliver the good or service, this is not trading. The applicant maintains that the following activities are of that character and should be discounted as trading income from Appendix A of Mr Durtanovich's amended Witness Statement:

(a) Items 2, 3 and 7 - Mr Durtanovich provided in Appendix B a breakdown of the manner in which the sums of $38,268 and $13,221 are spent by the Shire. The applicant submits that expenditure items 1, 5, 6, 7 and 8 in Appendix B relate to expenditure where the respondent has not traded but has merely acted as a conduit for funds to pay for items which FESA could have bought and these items are distinguishable from expenditure items 2, 3 and 4 where the respondent is using its own capital items in exchange for a payment. The applicant maintains that no evidence has been provided in relation to Item 3 of Appendix A and if this submission is accepted $32,184 would be deducted from the trading income figure for the 2007/2008 financial year.

(b) Item 5 – the applicant submits that no further details have been provided by Mr Durtanovich in relation to this item. The applicant maintains that Mr Durtanovich states that the Shire "facilitated" the construction of a new building however, it has been admitted that the works were not carried out by the Shire and it is not clear what the Shire did, if anything, which would constitute trading. The applicant submits that this item ought not be considered a trading activity and if this submission is accepted, $1,600,000 should be deducted from the trading income figure. Furthermore, this grant of $1,600,000 was an anomaly and inconsistent with the usual trading activity revenue from previous financial years.

70 The applicant argues that as BHP has ceased its operations in Ravensthorpe, the actual trading income for the respondent for the 2008/2009 financial year, which is the period when the applicant was terminated, is likely to be substantially less than the trading income in the 2007/2008 financial year. The applicant submits that if one wholly discounts the categories referred to in the applicant's submissions and applies an overall discount of 50 percent to the other trading activities of the respondent (given the population of Ravensthorpe/Hopetoun is expected to decline by 50 percent), the percentage of trading activities against non-trading activities may be calculated as $2,584,212.95 less $32,184.00, $1,600,000, $116,671.69 (sic), $227,336.06 and

$80,618.91 which equals $527,402.29. $527,402.29 divided by two is $263,701.14. The applicant maintains that $263,701.14 represents 3.2 percent of trading income and is insubstantial in quantitative and qualitative terms when compared with non-trading activities engaged in by the Shire.

71 The applicant argues that without the airport, private works and refuse charges the respondent's trading activities cannot be characterised as substantial and rather, they may be characterised as minimal and incidental to its other non-trading activities.

(a) Item 12 – the applicant maintains that BHP are unlikely to have any mining refuse and will be unlikely to pay any refuse charges in the 2008/2009 financial year and the applicant argues that if this submission is accepted the sum of $116,671.69 (sic) would be deducted from the trading income.

(b) Items 21 and 22 – the applicant maintains that BHP will no longer need to use the Shire's airport facilities or pay any contribution to the running of the airport as its Ravensthorpe employees have been redeployed or made redundant and the applicant argues that if this submission is accepted, the sum of $227,336.06 would be deducted from the Shire's trading income for the 2008/2009 financial year.

(c) Item 30 – the applicant maintains that BHP are unlikely to undertake private works and the revenue for private works is unlikely to be achieved in the 2008/2009 financial year and the applicant argues that if this submission is accepted, the sum of $80,618.91 would be deducted from the Shire's trading income.

72 In summary the applicant submits that as the respondent is not a trading corporation the Commission has jurisdiction to hear the applicant's claim for unfair dismissal.

Findings and conclusions

Credibility

73 I have no reason to doubt the veracity of the evidence given by Mr Durtanovich, however, I do not accept Mr Durtanovich's characterisation of some of the income received by the respondent as being from trading activities. With this qualification, I accept the evidence given by Mr Durtanovich.

74 There is no dispute between the parties and I find that in the financial years 2006/2007 and 2007/2008 the respondent received the income specified in Appendix A, which was attached to Mr Durtanovich's witness statement (as amended on 3 April 2009) (see paragraph 29). As the applicant was employed for two months during the 2007/2008 financial year and for a little over four months of the 2008/2009 financial year, I will base my findings on the income the respondent received in the 2007/2008 financial year, as the income the respondent received in this financial year was the only complete financial record available as at the date of the hearing.

75 Section 6 of the WR Act defines "employer" as "a constitutional corporation, so far as it employs, or usually employs, an individual" (see also s 14(a) of the *Fair Work Act 2009*). Section 4 of the WR Act defines a "constitutional corporation" as a corporation to which s 51(xx) of the Commonwealth Constitution applies and s 51(xx) of the Commonwealth Constitution defines a corporation among others as "trading or financial corporations formed within the limits of the Commonwealth". If the respondent is a trading corporation by virtue of ss 4, 6 and 16 of the WR Act the jurisdiction of the Commission to deal with the applicant's claim is excluded by s 16(1) of the WR Act and s 109 of the Commonwealth Constitution (see *Crown Scientific Pty Ltd v Leslie Bruce Clarke* [op cit]).

76 Section 16 of the WR Act reads as follows:

"**16 Act excludes some State and Territory laws**

(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:

(a) a State or Territory industrial law;

(b) a law that applies to employment generally and deals with leave other than long service leave;

(c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);

(d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines ***applies to employment generally***.

State and Territory laws that are not excluded

(2) However, subsection (1) does not apply to a law of a State or Territory so far as:

(a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or

(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or

(c) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3).

(3) The non-excluded matters are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it."

77 The issue to be determined when deciding if a corporation is a trading corporation is the character of the activities carried out by a corporation at the relevant time within the context of the purpose of the organisation and whether or not the corporation engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation for the purposes of the WR Act.

78 In *Lawrence* (IAC), Steytler, P and Pullin, J decided that the Aboriginal Legal Service of Western Australia (Inc) ("the ALS") was not a constitutional corporation and found that the tender and contract arrangements the ALS had with the Federal Government did not fundamentally alter the ALS's character as a public service provider rather than as a trading corporation under s 51(xx) of the Commonwealth Constitution.

79 The principles to apply when determining whether a corporation is a trading corporation are set out by Steytler, P at 254 in this decision and are as follows:

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

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

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

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

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

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 - 306); ***E*** (343). Consequently, the

fact that the trading activities are conducted is (sic) the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

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

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

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

80 Steytler, P stated the following at 255 when applying these principles to the ALS's operations:

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

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

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

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

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

None of these factors, taken individually, necessarily has the consequence that the appellant is not a trading corporation. A trading corporation can contract with government to provide a charitable or welfare function in fulfilment of government policy. Ordinarily, the provision of large scale legal and allied services, for reward, is trading and the fact that it is not done for profit is not determinative of its character, as I have said. However, when all of the factors to which I have referred are taken together, it cannot be said that what is done by the appellant has a commercial character. Rather, its activities, including its entry into the contract, seem to me to be removed from ordinary concepts of trade or trading, whether for reward or otherwise, in much the same way as those of a government-run legal aid agency. As I have stressed, its services are provided, in all but the most exceptional cases, free of charge: ***St George County Council*** (569). They are provided for altruistic purposes, not shared by ordinary commercial enterprises (***Ku-ring-gai*** (160) (Deane J)), under a constitution which requires the appellant to act only in furtherance of the altruistic objects. The appellant engages

> in a major public welfare activity pursuant to an agreement with the Commonwealth under which it will be re-imbursed for most of its costs: ***E*** (343) (Wilcox J); ***Fowler***. Although its services have been 'purchased' by the Commonwealth under the contract, its activities continue to lack a 'commercial aspect': ***Hardeman*** [26]; ***J S McMillan*** (355) (Emmett J); ***Ku-ring-gai*** (142) (Bowen CJ), (167) (Deane J). It follows from what I have said that the appellant is not a 'trading corporation' for the purposes of s 51(xx) of the Constitution and the notice of contention succeeds. The Commission has jurisdiction to determine the issue before it."

81 Neither party gave evidence about the respondent's corporate status. However, I note that s 2.5 of the *Local Government Act 1995* ("the LG Act") provides that each Local Government body in Western Australia is a body corporate and has the legal capacity of a natural person. I therefore find that the respondent is an incorporated body.

82 Section 1.3(3) of the LG Act creates a duty on the respondent to focus on the environment, social advancement and economic prosperity of community members residing within the Shire. Section 1.3(3) reads as follows:

> "(3) In carrying out its functions a local government is to use its best endeavours to meet the needs of current and future generations through an integration of environmental protection, social advancement and economic prosperity."

There is also an obligation on the respondent under the LG Act to provide appropriate governance for its residents. Section 3.1(1) of the LG Act reads as follows:

> "(1) The general function of a local government is to provide for the good government of persons in its district."

Mr Durtanovich also confirmed that the respondent's role was to carry out its statutory functions in addition to conducting a range of what he described as 'trading activities'. On this basis I find that the respondent's main role is to provide a range of infrastructure and other services to the residents of the Shire for their benefit.

83 I also find that the services provided by the respondent are funded from income received by the respondent from rates and service charges as well as from other sources, in the main from grants.

84 It was not in dispute and I find that the applicant was an employee of the respondent and he was terminated on 4 November 2008 (see paragraph 7).

85 I make the following findings about the activities which the respondent maintains were trading activities in the 2007/2008 financial year.

Items 1 and 4 – Sale of Council Publications and Fire Maps

86 The charges for these publications, most of which are available free on the respondent's website, were levied on a cost recovery basis.

Items 2, 3 and 7 – Income from FESA

87 The income paid to the respondent under Item 3, FESA - Administration Charge, is a commission paid to the respondent for collecting the statutory Emergency Services Levy imposed on the respondent's ratepayers. The respondent also received income of $49,600 from FESA for the purchase of capital goods and equipment and maintenance costs of this equipment to assist in the running of the respondent's fire and emergency services for the benefit of community members (Items 2 and 7).

Item 5 – Emergency Services Collocation Grant

88 The respondent was reimbursed administration costs associated with coordinating this project which was funded by a government grant to build and fit out premises for housing fire and emergency services in Hopetoun. Despite the Commission requesting details about the quantum the respondent received from the grant in return for administering this project no information was provided by the respondent.

Item 6 - Rent

89 Income paid to the respondent in return for renting houses owned by the respondent was in the main from employees who paid rent at a subsidised rate.

Items 9, 10, 11 and 12 – Collection of business refuse and business tip charges, building site tip charges and mine site refuse collection

90 These are optional services provided by the respondent to businesses operating within the Shire and all of these services were provided in return for the payment of fees. It was unclear if these services were provided on a cost recovery basis or if a profit was made from the provision of these services.

Item 13 – Sale of refuse bins

91 The income from this activity is from the sale of bins to residents on a cost recovery basis.

Item 14 – Cemetery charges

92 Income arising from this activity is paid to the respondent in return for the provision of burial services to residents and the respondent claimed that these charges are based on commercial rates. It is unclear if the respondent made a profit from the provision of this service.

Items 15, 17 and 18 – Income received from the hire of halls, the Ravensthorpe Entertainment Centre and the Sports Pavilion

93 The respondent received income from the hire of these buildings, which are owned and operated by the respondent. Again, it is unclear if the respondent made a profit from conducting these activities.

Items 16 and 19 – Swimming pool admission charges and gymnasium memberships

94 The respondent received income from the use of these facilities in the form of admission charges and the payment of gym membership however there was no evidence if this income covered the cost of operating these facilities or if the respondent made a profit from these activities.

Items 20 and 23 –Camping fees and gate registrations

95 Income was generated from the provision of camping facilities by the respondent however it is unclear if the fees covered the cost of maintaining these facilities. Although the respondent was paid fees in return for farmers/landowners putting gates across a public thoroughfare there was no evidence of any service or good being provided in return for this charge.

Items 21 and 22 – Landing fees and charges and Ravensthorpe Nickel Operation contribution

96 Landing fees were paid to the respondent in return for the use of the airstrip at the Ravensthorpe Airport and BHP gave the respondent a contribution which covered some of the operating costs of running the airport.

Items 24 and 25 – Hopetoun Caravan Park Lease and other minor revenue

97 The respondent received income from a commercial operator to lease the Hopetoun Caravan Park however it is unclear if this lease arrangement generated a profit for the respondent. No breakdown was provided for the $500 claimed as trading income at Item 25.

Items 26 and 28 – Lease of land owned by the respondent

98 These amounts were paid to the respondent in return for the lease of land for a campsite and for the use of land near the airport.

Item 27 – Standpipe Administration charge

99 Fees were paid to the respondent in return for the use of standpipe water however it is unclear if the fees charged covered the cost of operating the standpipes.

Item 30 – Private works

100 Income was received by the respondent in return for carting waste water for BHP and for the construction of a gravel pit for private use. Mr Durtanovich confirmed that when these private works were undertaken a fee was charged over and above the cost of providing the service and the respondent made a profit from the provision of these services.

Item 31 – Staff housing rent

101 Income was paid to the respondent by its works employees at lower than commercial rates in return for the provision of housing and it is unclear if the rent received covered the costs incurred by the respondent in providing and maintaining the houses rented by these employees.

Item 32 – Westpac Banking Commission, Item 33 – Department for Planning and Infrastructure Commissions, Item 34 – Safe Custody Charges and Item 35 – Westpac Training

102 Commissions were paid to the respondent in return for the respondent providing banking and licensing services on behalf of Westpac and DPI and a fee was paid to the respondent in return for the provision of a safe custody service. The amount claimed for Westpac training, which is reimbursement of costs incurred with respect to training employees to undertake services on behalf of Westpac, was associated with the respondent's employees providing a service for Westpac.

Items 47, 48 and 49 – Ravensthorpe and Munglinup Sewerage charges

103 This income was generated from the provision of sewerage services to residents who chose to connect to the Shire's sewerage system however no details were provided about whether this service was provided on a profit making basis.

Item 51 – Ravensthorpe Sewerage Extensions

104 This payment was made to the respondent by the Department of Industry and Resources in return for extending the Shire's sewerage services as the respondent has a license to operate the Ravensthorpe sewerage system and it is clear that some of the work involved in this project was undertaken by contractors. Even though no breakdown of the amount paid to contractors or information about the respondent's contractual arrangements with the contractors or the Department of Industry and Resources was provided by the respondent it appears on the evidence and documentation that this activity was conducted on a commercial basis.

Item 53 Waste effluent dump charge

105 The Water Corporation paid the respondent to dispose of effluent at its licensed facility and it appears that the respondent conducted this activity on a commercial basis.

Does the respondent engage in substantial trading activities?

106 The income the respondent received from the following activities, as a percentage of the respondent's total income for the 2007/2008 financial year, is as follows:

Ref#	Name	2007-2008 Income	Percentage of total income for 2007/2008
1	Sale of Council Publications	$111.27	0.001
2	FESA - Bush Fires	$38,000.00	0.360
3	FESA - Administration Charge	$4,000.00	0.038
4	Fire Map Sales	$474.55	0.004
5	Grant - Emergency Services Collocation	$1,600,000.00	15.182
6	Rent - Martin St, Ravensthorpe	$5,352.00	0.051
7	FESA - State Emergency Service	$11,600.00	0.110
~~8~~	~~Crime Prevention Grant~~		
9	Business Refuse Charges	$22,045.81	0.209
10	Business Tip Charges	$11,017.40	0.104
11	Building Sites Tip Charges	$20,782.56	0.197
12	Mine Site Refuse Charges	$116,671.09	1.107
13	Sale of Refuse Bins	$534.73	0.005
14	Cemetery Charges	$930.00	0.008
15	HalI Hire Charges	$5,172.17	0.049
16	Swimming Pool Admission Charges	$7,931.05	0.075
17	Ravensthorpe Entertainment Centre Charges	$6,876.73	0.065
18	Ravensthorpe Sports Pavilion Hire Charges	$1,952.50	0.018
19	Gym Memberships	$6,734.06	0.064
20	Camping Fees	$5,306.00	0.050
21	Landing Fees and Charges	$32,715.00	0.310
22	Ravensthorpe Nickel Operation Contribution	$194,621.06	1.847
23	Gate Registrations	$270.00	0.002
24	Hopetoun Caravan Park lease	$21,200.00	0.201
25	Other Minor Revenue	$500.00	0.005
26	Tectonic Resources Lease	$6,750.00	0.064
27	Standpipe Administration Charge	$1,759.00	0.017
28	Airport Farmland Lease	$25,750.00	0.244
~~29~~	~~Power Connection Morris Camp~~		
30	Private Works Revenue	$80,618.91	0.765
31	Staff Housing Rent - Works	$9,525.73	0.090
32	Westpac Banking Corporation In-Store Commission	$51,925.92	0.493
33	Department for Planning & Infrastructure Commission	$37,965.37	0.360
34	Safe Custody Charges	$854.87	0.008
35	Westpac Training	$592.20	0.006
36	Rate Search Fees		
37	Profit on Sale of Asset		
38	Reimbursement Fire Fighting Expenses		
39	Rent –Medical House		
40	Medical Practice Review		
41	Tip Entry Fees		
~~42~~	~~Sewerage Fees~~		
43	Hopetoun Recreational Facilities		
44	Landcorp Street Tree Project		
45	Subdivision Admin & Supervision		
46	Western Power – Lease of Depot		
47	Ravensthorpe Sewerage Charge	$48,181.89	0.457
48	Ravensthorpe Sewerage in Lieu	$8,919.35	0.085
49	Munglinup Sewerage Charge	$1,942.60	0.018
~~50~~	~~Reimbursement Fire Fighting Expenses~~		
51	Ravensthorpe Sewerage Extensions	$122,979.34	1.167
52	Hopetoun Effluent Cartage		
53	Waste Effluent Dump Charge	$71,649.79	0.680
	Respondent's total income for 2007/2008	**$10,538,817.00**	

107 When taking into account the principles outlined by Steytler, P in paragraph 79 and after reviewing the nature of the funds received by the respondent which it claims constitutes income from trading activities and when taking into account the activities of the respondent as a whole and the purpose and role of the respondent I find that the respondent was not a trading corporation at the relevant time for the purposes of this application.

108 I find that when considered collectively the nature of most of the activities undertaken by the respondent which generated income in the 2007/2008 financial year which it claims were trading activities were conducted in the main for the public benefit of residents in the Shire and did not have the requisite commercial character one would normally associate with the activities of a trading corporation. I also find that most of these activities were inconsequential and incidental to the primary activities and functions of the respondent.

109 I find that the income the respondent received with respect to Items 2, 5, 7, 22, 23 and 25 in the 2007/2008 financial year lacks the essential character of trading and can therefore not be regarded as being income from trading. I do not accept that income from gate registrations, Item 23, is a trading activity as no service or good was provided in return for the payment of these monies and I am unable to determine if the income the respondent received from Item 25 was as a result of trading as no details were provided about how this income was generated. I find that the monies the respondent received to purchase equipment to provide fire and emergency services as and when required for community members does not constitute trading as this income was given to the respondent by way of a grant to buy equipment to provide services on a needs basis to community members and fees were not charged by the respondent in return for the provision of these services (Items 2 and 7). I do not consider that the amount claimed by the respondent at Item 5 to be income as a result of a trading activity as the money from this grant was mainly used to fund contractors to construct a community facility. Even though the respondent was paid a portion of this grant in order to facilitate the construction of this building, as no details were provided about the amount it received from this grant for this purpose, I am unable to determine the quantum which can be considered to be income from trading. I find that the funds paid to the respondent at Item 22 do not represent income from trading activities as details were not provided by the respondent about how this contribution made by BHP's Ravensthorpe Nickel Operations towards the cost of operating the airport was used and whether or not this contribution was paid in return for the provision of goods and/or services by the respondent.

110 I find that with the exception of Items 30, 51 and 53 (2.61 percent of the respondent's total income for the 2007/2008 financial year) the other activities the respondent claimed were trading activities were not activities which could be regarded as trading activities. There was no evidence that any of the following activities generated a profit for the respondent nor was there evidence that they were conducted on a commercial basis as one would normally expect of the activities of a trading corporation. I am also of the view that many of these activities were incidental and peripheral to the respondent's main function and I find that many of these activities were to provide services for the benefit of the local community as one would expect of the activities of a Local Government entity given its charter under the LG Act.

- Items 1, 4 and 13

  I find that the income from these activities was minor, and these activities were peripheral to the main functions of the respondent and were services provided by the respondent to support the local community. It is the case that publications sold by the respondent were not generated on a commercial basis and refuse bins were also sold at cost.

- Items 3

  Whilst the respondent received income for collecting the Emergency Service Levy I find that this activity was provided by the respondent as a community service and I am also of the view that this activity was incidental and peripheral to the respondent's main activities.

- Items 6 and 31

  It is clear that the rent received for the provision of housing to employees was at a subsidised rate and there was no evidence that the respondent made a profit from this activity. It was also plain that lower than commercial rents were charged to employees to enable them to reside and work in the Shire.

- Items 9, 10, 11 and 12

  I accept that income the respondent received in exchange for the provision of these services was for activities which were over and above the services which the Shire normally provides, however there was no evidence that these services were undertaken on a profit making or commercial basis.

- Items 14, 15, 16, 17, 18, 19 and 20

  Given the nature of these activities in the context of the respondent's activities as a whole I find that these activities were incidental and peripheral to the main activities carried on by the respondent and in the main were provided as services to the local community. Additionally, there was no evidence that the income the respondent received in return for the provision of these services was on a cost recovery or profit making basis.

- Item 21

  The income paid to the respondent from landing fees represents a significant amount of income in return for the provision of a service however it constitutes only a small proportion of the costs of operating this facility. It also appears that the operation of the airport was not conducted on a commercial basis as some of the costs for establishing and operating the airport were met by grant funding and contributions from BHP (see appendix attached to Mr Durtanovich's amended witness statement).

- Item 24

  Although the income from leasing land to the operator of the Hopetoun Caravan Park is not insignificant I find that this is a minor and peripheral activity of the Shire.

- Items 26 and 28

  I find that whilst the income from these activities was not insubstantial it results from activities which are incidental and peripheral to the respondent's main activities.

- Item 27

  I find that the income the respondent received from the standpipe administration charge is minor and results from an activity which is incidental and peripheral to the respondent's main activities. It is also unclear if this activity operated on a commercial basis.

- Items 32, 33, 34 and 35

  I find that the income the respondent received in return for operating banking and DPI services, whilst not insignificant, is operated as a public benefit and it can be inferred that this is not a major activity of the respondent given that these services would be attended to by the respondent's employees on an intermittent basis. Income for providing safe custody is also minor and I find that this activity is incidental and peripheral to the respondent's main activities.

- Items 47, 48 and 49

  I find that the respondent received income in return for connecting residents to the sewerage system, which was paid by an annual fee charged to residents, however it is unclear if this activity was operated on a commercial basis.

111 I find that the following income arises from trading activities which have a commercial character.

- Item 30

  The income the respondent received in return for undertaking private works conducted by the respondent is substantial and I find that this income was as a result of a trading activity as the respondent made a profit from these activities.

- Items 51 and 53

  I accept that the income paid to the respondent for the upgrade of the sewerage treatment plant and for cartage of effluent is income from trading as the respondent received income on a commercial basis in return for the provision of these activities.

112 It is also the case that the respondent is not a financial corporation as there was no evidence that the respondent engaged in any financial activities.

113 For the reasons set out above I will make a declaration that during the period the applicant was employed by the respondent, the respondent was not a trading corporation. The substantive matter will be listed for hearing on a date to be fixed.

2009 WAIRC 00462

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN PATRICK GALEA
	APPLICANT
	-v-
	SHIRE OF RAVENSTHORPE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 17 JULY 2009
FILE NO/S	U 175 OF 2008
CITATION NO.	2009 WAIRC 00462

Result	Extension of time granted; Declaration issued
Representation	
Applicant	Mr J Hodgkinson (of Counsel)
Respondent	Mr S White (as Agent)

Order

HAVING heard Mr J Hodgkinson of counsel on behalf of the applicant and Mr S White as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS THAT application U 175 of 2009 be and is hereby accepted out of time.

2. DECLARES THAT during the time the applicant was employed by the respondent, the respondent was not a trading corporation.

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

2009 WAIRC 00443

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRYSTI GUEST
	APPLICANT
	-v-
	KIMBERLEY LAND COUNCIL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	THURSDAY, 22 JANUARY 2009, FRIDAY, 30 JANUARY 2009, MONDAY, 16 FEBRUARY 2009, FRIDAY, 27 FEBRUARY 2009, MONDAY, 30 MARCH 2009, WEDNESDAY, 17 JUNE 2009
DELIVERED	WEDNESDAY, 8 JULY 2009
FILE NO.	U 161 OF 2008
CITATION NO.	2009 WAIRC 00443

CatchWords	Industrial Law (WA) - Termination of employment - Harsh, oppressive and unfair dismissal - Jurisdiction - Trading Corporation - Application to reopen hearing of jurisdiction - *Industrial Relations Act 1979* s.27(1)(m)
Result	Application to reopen hearing of jurisdiction granted
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr D Schapper (of counsel) and Mr D Jones

Reasons for Decision

Introduction

1 A jurisdictional challenge by the respondent to this application for unfair dismissal was heard by the Commission on 16 February 2009 and 27 February 2009. The Reasons for Decision were issued on 30 March 2009 and I found that I have jurisdiction to hear the substantive application. That finding was not reduced to an order or declaration; neither party requested that this be done. The substantive hearing was listed for 15 June 2009 to 18 June 2009 in Broome. The respondent by letter dated 9 April 2009 and 8 May 2009 sought an adjournment of the hearing to pursue an appeal of the Commission's finding. The applicant consented to the adjournment. The matter was adjourned pending outcome of the appeal.

2 Arising from the appeal, by letter dated 16 June 2009 the respondent sought to reopen the hearing of the issue of jurisdiction, and if this application should fail then the respondent requested that the Commission reduce the earlier finding to a declaration or order. The reason for the latter request is that the appeal at that time could not proceed as the finding had not been perfected by way of order or declaration (see *The Construction, Mining & Energy Workers' Union of Australia, Western Australian Branch v The United Furniture Trades Industrial Union of Workers, WA*, [1990] 70 WAIG 3913). The applicant opposed the application to reopen the jurisdictional hearing. The matter came on for conference on 17 June 2009 and the parties decided to proceed by way of written submissions to deal with the application to reopen. Should the application to reopen be dismissed then both parties seek that the original finding be reduced to order or declaration.

3 It is common ground that the Commission has power to reopen the hearing of jurisdiction. Counsel for Ms Guest at paragraph 2 of his submissions stated:

> "Until final orders in a matter have been perfected by the Commission, the Commission is not *functus officio*. As stated by the Full Bench in *CFMEU v BHPB* (2004) WAIRC 12462:
>
> > *The Commission is not functus officio in this matter; the Commission has issued its Reasons for Decision and the Minute of a Proposed Order. We therefore consider that we do have the power pursuant to s27(1)(e) to reconvene for the purposes set out in s27(1)(m) of the Industrial Relations Act 1979 and reopen the hearing if the circumstances warrant that course of action."*

Submissions

4 Hereinafter I will refer to the Kimberley Land Council (the KLC) as the applicant in this matter (the respondent in the substantive application). The applicant seeks the following:

> "1. To adduce further evidence as to the nature and extent of the services it provided and payments received therefore; and
>
> 2. To adduce evidence as to the nature and extent of the services it acquired and payments made therefore; and
>
> 3. To make submissions in relation to:
>
> 3.1 The nature of the findings that the Commission must make in order to properly ground a finding of jurisdiction; and
>
> 3.2 The degree of satisfaction that must be achieved before findings may be made about these matters."

5 The applicant says that from the Reasons for Decision and hearing there is a "great deal of uncertainty" as to the services provided by the KLC for the receipt of $3.9/4.8 million. The extent of monies received by way of grant as opposed to payment for services is "precisely ascertainable". The applicant attributes the confusion to the cross-examination by counsel for Ms Guest and to the use of video-link. The applicant submits that it is highly unsatisfactory to determine jurisdictional questions "in such an unclear and confused state" when the facts are precisely ascertainable. It is not correct that the Commission is not an investigative authority in that section 23(1) of the Act provides that the Commission may "enquire into" an industrial matter. The applicant also seeks to lead evidence as to the services purchased as well as those rendered.

6 The applicant seeks also to make further submissions to the effect that the Commission has applied the wrong test and not reached a relevant conclusion of fact on which to base the finding of jurisdiction. The applicant submits:

> "If leave is given, the respondent intends to submit that it is not enough to find that the Kimberley Land Council (KLC) has failed to prove that it is a trading corporation. Rather, what is required is that the Commission must be actually persuaded by the evidence to the positive conclusion that the KLC is not a trading corporation. And that this latter conclusion could not possibly be reached on the evidence so far adduced."

7 The applicant submits that, "it would be proper and desirable in the interests of the administration of justice" to deal with these matters now rather than on appeal, and may shorten the proceedings.

8 Hereinafter I will refer to Ms Guest as the respondent in this matter (the applicant in the substantive matter) The respondent quotes a series of relevant cases and then states:

> "The common law principles relevant to an application to re-open a case can be summarised as follows:
>
> - The power to re-open is discretionary;
> - In accordance with the public interest in maintaining the finality of litigation, a party is to be bound by its conduct of its case except in exceptional circumstances. The principle of finality of litigation is to ensure a degree of regularity and certainty necessary for the fair and predictable conduct of litigation. Courts should not encourage carelessness by parties or legal representatives and thereby put this fundamental principle at risk;
> - The jurisdiction is not to be exercised for the purpose of generally re-agitating arguments already considered by the Court, including because the party seeking a rehearing failed to present the argument in all its aspects or as well as it might have been put. Further, if there was a deliberate decision not to call the evidence sought to be led, this will generally lead to a decisive argument against the application to reopen;
> - The jurisdiction to reopen will be enlivened if the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. Further the fresh evidence must be so material that the interests of justice require it to be led, that the evidence, if believed, would most probably affect the result and that the evidence could not by reasonable diligence have been discovered before.
> - Any pleaded or asserted personal stress of the cross-appellants would be relevant in a reopening application."

9 The respondent in answer to the applicant's submissions states:

> "The applicant's submissions do not separate the facts upon which they assert the Commission should base a finding to reopen from its legal arguments as to the reasons the Commission's discretion should be exercised. However, the facts asserted appear to be as follows:
>
> - On the evidence provided by the applicant to the Commission, there is uncertainty as to what services the applicant provided.
> - On the evidence provided by the applicant to the Commission, there is uncertainty what income was received by way of grant as opposed to income received by way of payment for services.
> - The question of what income was received by the applicant by way of payment for services or by way of grant is a fact which is 'precisely ascertainable'.
> - This confusion was caused by the respondent's confusing and unclear cross-examination of the applicant's witnesses.
> - The confusion in the evidence was compounded by the fact the applicant's witnesses gave evidence by video link.

- No evidence was given as to what services the applicant purchased and this bears upon the characterisation of a trading corporation.
- The Commission applied the wrong test in assessing its decision as to jurisdiction."

10 The respondent submitted that the applicant's submissions make no attempt to apply the established common law principles to the facts upon which it bases its application to reopen. They merely seek to re-agitate arguments considered by the Commission. Mr Powrie made a deliberate decision not to tender the evidence which the applicant now seeks to adduce. The KLC was given leave to re-open at first instance. There is not one fact submitted by the applicant which "justifies a deviation from the public interest in maintaining the finality of litigation". A further delay to the substantive hearing will prejudice Ms Guest who has always and continues to seek reinstatement.

11 The applicant in reply submitted that the chief factor said by the respondent to militate against a reopening is the requirement for finality of litigation. The litigation will not be final as the applicant has appealed and will, if need be, pursue the appeal. A reopening may shorten the litigation. The issue is one of jurisdiction which the Commission is required to enquire into and determine before exercising any of its powers. The applicant states:

> "Further the commission has misapprehended the law in that it has found that it has jurisdiction without making a finding the respondent was not a trading corporation. Such a finding was a necessary finding in order to ground jurisdiction. It was not enough to find that the respondent had failed to demonstrate that it was trading (sic) corporation.
>
> These misapprehensions cannot be attributed solely to neglect or default of the respondent. On the contrary, it was the applicant who, wrongly, submitted and persuaded the Commission that the respondent bore the onus of demonstrating that it was not a trading corporation.
>
> Further, it is true that the respondent's advisers did not, in bringing the appeal, advert to the absence of a formal order and the consequences of that for the appeal. However, the applicant's advisers also erred in not adverting to the point. Had that error not been made by them the delay that has been occasioned would have been avoided."

Considerations

12 The Commission has a broad discretion in considering whether to reopen a hearing. This discretion must be exercised with care. In *Metwally v University of Wollongong* (1985) 60 ALR 68, the High Court held:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

13 The principles to be considered when deciding whether to reopen a hearing were enunciated by Wolff CJ in *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 88. He stated:

> "There is a dearth of authority as to the circumstances in which the court should reopen the evidence after the trial has concluded. I consider that a court should be cautious in doing so and should admit fresh evidence of this nature only when it is so material that the interests of justice require it, and the evidence if believed would most probably affect the result, and further that the evidence could not by reasonable diligence have been discovered before."

14 The need for careful consideration is particularly so where, as in this instance, Reasons for Decision have been issued (see *Smith v New South Wales Bar Association* [1992-1993] 176 CLR 256 at 266 and 267, and *Mickelberg v The Queen* [1988-1989] 167 CLR 259 at 301). The ultimate emphasis being whether the admission of the evidence would most likely affect the result and the interests of justice require it.

15 The applicant seeks not only to adduce new evidence but also to make further submissions. In *McKay and Anor v Hudson and Ors* [2001] WASCA 387 at paragraphs 28-31 Olsson AUJ stated:

> "28 It is trite to say that it is only in an exceptional case that the court will permit a party against whom an adverse decision has been given to raise a new line of argument which – deliberately or by inadvertence – the party did not pursue, when there was an opportunity of doing so (***University of Wollongong v Metwally (No 2)*** (1985) 59 ALJR 481 at 483).
>
> 29 In the instant case, the appellants themselves raised the point and elected to abide by counsel's advice not to pursue the point.
>
> 30 With all due respect, it is difficult to follow the logic of that advice. On the appellants' present contention, if the proposed evidence is significant in the respect now sought to be propounded, it was always so significant, regardless of the fine finish issue. There would have been no inconsistency in advancing it. The omission of the appellants to seek to re-open was a deliberate tactical decision and, generally speaking, they should be held to it – notwithstanding what fell from Clarke JA in ***Urban Transport Authority of NSW v Nweiser*** (1992) 28 NSWLR 471 at 478. It is most undesirable that parties be permitted to re-open their evidentiary case in circumstances such as that now under consideration, unless the exclusion of the new evidence is patently likely to lead to an injustice because of the apparently persuasive and important nature of the material sought to be adduced. I consider that the application should not succeed for that reason.
>
> 31 Quite apart from that consideration, if the appellants wish to now adduce fresh evidence, they must, in any event, satisfy three preconditions:
>
> (1) that it could not, by reasonable diligence, have been obtained at the trial;
>
> (2) that, had it been adduced at that time, an opposite result would have been likely; and

(3) that the proposed new evidence is credible (***Greater Wollongong City Council v Cowan*** (1955) 93 CLR 435)."

16 It is important in deciding this application to restate briefly what the original hearing of jurisdiction concerned. It concerned the establishment of a jurisdictional fact; namely whether the KLC is a trading corporation. In brief, the respondent (in this matter) says that the KLC is not a trading corporation in that it is a public benevolent organisation whose main purpose, by statutory recognition, is the promotion and protection of native title in the Kimberleys. The KLC's activities are not commercial in nature. The applicant (in this matter) says that the KLC is a trading corporation as certain of its activities are commercial in nature and these activities make up a substantial portion of their annual income. The dispute centred on the Native Title Representative Body (NTRB) work of the KLC and its non-NTRB work. Both parties relied on the decision of the Industrial Appeal Court (IAC) in the *Aboriginal Legal Service of Western Australia (Inc) v Lawrence* [No 2] [2008] WASCA 254 (the ALS case). The KLC maintained at all times that the overall test is the current activities test. As the organisation earned $4.816 million per year through the provision of services (specifically Work Program Clearances (WPCs)), which represented on average 29.8% of their overall yearly income, a significant portion of the KLC's income is derived from trading activities. Counsel for Ms Guest argued that the predominant activities of the KLC are in fulfilment of its statutory obligations as a NTRB, namely the facilitation and assistance of native title claims and future act negotiations and agreements, and are not trading activities. The bases for much of the detailed evidence upon which both parties relied were the Annual Reports of the KLC.

17 There can be no doubt in respect of points 1.1 and 1.2 of the applicant's submissions that the evidence they now seek to adduce is all evidence that the KLC was reasonably able to bring forward to the hearing at first instance. Mr Schapper at paragraph 13 of the applicant's submissions refers to the 2008 Annual Report which is already in evidence as Exhibit R2 and about which much was said. Mr Powrie as detailed in the earlier Reasons for Decision at paragraph 55 stated that much of the detail of the non-NTRB income could be collated but would take some time and that he did not consider it to be relevant. This would seem to be the same evidence that the applicant now seeks to adduce (see paragraph 1.2 of the applicant's submission). Mr Schapper later in his submission refers to the $3.9/4.8 million about which much was said at the earlier hearing.

18 Mr Jones for the KLC sought on 27 February 2009, some 11 days after the first day of hearing and after the evidence for the respondent was closed (Transcript page 61), leave to "re-open the evidence of Mr Powrie" (Transcript page 65). This was opposed by counsel for Ms Guest. In any event leave was given and a further email was tendered in evidence for the KLC.

19 The question as to what comprised the $4.816 million in income upon which the respondent case relied was most certainly relevant. It was not adequate to simply assert the amount and ascribe it to WPCs, mainly for mining companies. The detail of the Annual Report upon which this figure was based was challenged via cross-examination. I found that the Annual Report most probably included all income and expenses of the KLC, and it was not likely that this income included $4.816 million for WPCs. It is not now for the applicant to assert "uncertainty" and "lack of clarity" around what this figure represented by way of activities and state that this was due "in large measure" to the "confused and unclear" cross-examination. If that was the case then that was rectifiable at hearing by proper objections and re-examination. It is not also for the applicant to now ascribe error due to the video-link when it was they who sought the use of this link at the directions hearing on 30 January 2009. The applicant then made no complaint about the quality of the link or its impact on the fairness of the hearing. No complaint was expressed then or now about the unfairness or prejudice derived from the conduct of the hearing.

20 In coming to the decision expressed in the Reasons for Decision issued on 30 March 2009 I considered whether it would be appropriate to allow the respondent to lead further evidence as to the extent of services it says it provides commercially. In those reasons at paragraphs 60 and 61 I stated:

> "In saying this I am mindful that the matter before me is a question of jurisdiction; does the Commission have power to hear the merits of the unfair dismissal claim. An option would be for the respondent to be given a further opportunity to present the information which Mr Powrie says is available, but will take time to extract, about the payments of mining companies for WPCs. The applicant has claimed, and still claims reinstatement, even though she has shifted to Melbourne for personal reasons. Towards that end counsel for the applicant has pressed for the Commission to deal with this matter expeditiously. In my view it would indeed be harder for an applicant to sustain an argument about the practicability of reinstatement if the elapse of time between dismissal and substantive hearing was considerable. This says nothing about the merits of the applicant's claim. I am mindful also that the Commission is not for the purposes of this matter an investigative authority. Both parties are represented at hearing and the hearing was adjourned to a second day to complete the matter. The respondent chose to call further evidence after hearing the complete evidence of Mr Hunter and Mr De Silva. They had the opportunity to seek leave to introduce further evidence on the second day of hearing or make an application for an adjournment if they had wanted to do so. They chose only to seek leave to introduce an email. The parties are responsible for their own cases.
>
> I conclude that I cannot, on the evidence before me, find that the respondent has earned $3.9 million (let alone $4.86 million) a year in activities which could be classed as trading activities. In that sense the respondent has failed to discharge the onus upon them. In light of this, and in conjunction with the comments I have made as to the purpose, structure and broader activities of the KLC, I therefore find that the Commission has jurisdiction to hear and determine the applicant's claim."

21 Whilst not stated explicitly, it would seem from the applicant's submissions that their complaints relate mostly to these two paragraphs.

22 The applicant complains essentially that the course of action I chose was wrong in that as this matter concerns a question of the Commission's powers, I should have called for further evidence to ascertain precisely whether the KLC is or is not a trading corporation. They maintain it is not sufficient and wrong in law to say that the KLC failed to prove it is a trading corporation.

Counsel for Ms Guest wrongly persuaded the Commission that the KLC bore the onus to prove this. The Commission must also make a positive finding that the KLC is not a trading corporation. The Commission is required to "enquire into" the matter and precisely determine the question.

23 These submissions raise an issue as to the role of the Commission in matters to do with determining jurisdiction. In *The Queen against The Judges of the Federal Court of Australia and Another; Ex parte The Western Australian National Football League (Incorporated) and Another* (1979-1980) 143 CLR 190 at 202 Barwick CJ stated:

> "Where constitutional competence to create the jurisdiction depends on the actual existence of some specific fact or situation the court or tribunal, though it may form a view as to whether the fact or situation exists, is not competent to decide that in truth either does exist: only this Court may conclusively determine the actual existence of the fact or situation which grounds the constitutional power."

24 Perhaps then the role to be undertaken by the Commission is best described in the decision of the High Court in *The Owners of the Ship "Shin Kobe Maru" and Empire Shipping Company Inc* (1994) 181 CLR 404 at 426. The Court stated unanimously:

> "*Standard of proof and jurisdictional facts*
>
> ...
>
> Where jurisdiction depends on particular facts or a particular state of affairs, a challenge to jurisdiction can only be resisted by establishing the facts on which it depends. And, of course, they must be established on the balance of probabilities in the light of all the evidence advanced in the proceedings held to determine whether there is jurisdiction."

25 It is not for the Commission to run the case for a party to the proceedings. This is in part what I alluded to, albeit briefly, in using the term "investigative authority". It was perhaps not the best expression, but s23(1) of the Act does not allow the Commission to conduct itself in a way which could lead to claims of partiality. The Commission may seek clarification or direct that material be put, but each party makes their own decisions as to how best to present their case. For the Commission to do otherwise might lead to complaints of unfairness or bias. The Commission must make findings of fact, and based on the evidence provided and on the balance of probabilities determine whether there is jurisdiction. In this case determine whether the KLC is or is not a trading corporation. My earlier Reasons may not have been expressed clearly enough, however, I am not persuaded that somehow I erred through lack of findings, certainty or precision at first hearing such that the matter should be reopened. Nevertheless, at paragraph 10 of the applicant's submissions in reply the applicant suggests that the Commission applied the wrong test in that I stated that the KLC bore the onus of establishing that, and I think it should read "was a trading corporation", rather than "was not".

26 Counsel for Ms Guest, at first instance, stated in closing submissions that:

> "… there are two propositions that you would need to accept in order to accept the applicant … the respondent's case. And can I say this: the law is clear on this point. The respondent bears the onus of proof in demonstrating … Lawrence v the ALS, I find is probably the best authority to refer to on this point. The respondent bears the onus of proof in demonstrating. It has raised this jurisdictional question. It has raised this point. It bears the onus of proof in demonstrating that it is a constitutional corporation in order to relieve you, sir, of your jurisdiction. They need to demonstrate two things. In order for you to accept their submissions, you need to … you need to accept … and for them to succeed … you need to accept that the non-NTRB work is significant, that that is work that is not connected with its … the discharge of its functions under the Native Title Act. You need to accept that that work is significant and you need to accept the second proposition that as well as being significant that work is commercial."

27 Counsel stated also (Transcript page 113) that the respondent bears the onus and referred to, "the lack of significant evidence led by the respondent to discharge its obligations". Mr Jones for the KLC was silent on this point.

28 In *Aboriginal Legal Service of Western Australia Incorporated and Mark James Lawrence* (2007) 87 WAIG 856 at 869 (ALS) the Full Bench considered the question of onus as it may relate to a jurisdictional challenge based on the respondent claiming they are a constitutional corporation. They stated:

> "**12. Onus of Proof**
>
> 121 There was some discussion at the hearing of the appeal as to whether any party had the onus of proof in the jurisdictional question which had to be determined by the Commission.
>
> 122 The appellant asserted it was a trading corporation and therefore the Commission did not have jurisdiction, but this does not necessarily mean the appellant has an onus to establish that fact. Some consideration of an analogous question was provided by Barwick CJ in *R v Judges of the Federal Court of Australia and Another; ex parte The Western Australian National Football League (Inc) and Another (Adamson)* (1979) 143 CLR 190 at 202-204 and in *R v Heagney and Another; ex parte ACT Employers Federation and Others* (1976) 137 CLR 86 at 89.
>
> 123 It was conceded by the appellant that if a party to an application before the Commission which was a corporation, made a bare assertion that it was a trading corporation, the Commission would not then have before it sufficient evidence to decide the jurisdictional question. The appellant's counsel therefore submitted that there was at least an evidential onus upon such a party to place before the Commission sufficient evidence to allow it to determine, as a question of fact, the issue of whether that party was a trading corporation. The position of the Commission in a situation where there was before it some, but in the opinion of the Commission insufficient, evidence to allow it to determine the jurisdictional question was also discussed with counsel.
>
> 124 The Minister submitted that in such a situation the Commission had the power to and should seek additional evidence and direct the parties to provide it. In support of this, counsel for the Minister, after the hearing and as

invited by the Full Bench, cited the decision of the Industrial Appeal Court in *Commissioner of Police v Civil Service Association of WA Incorporated* [2002] WASCA 19.

125 Although this issue may become relevant in another application before the Commission, or an appeal before the Full Bench, it is not necessary to further consider in the present appeal."

29 In short, the matter was not determined by the Full Bench in the ALS case and did not arise at first instance or before the IAC. I need now to address the question of onus. I have found little to assist me on this issue, however, in *Attorney-General for the State of Queensland and Riordan and Others* (1997) 192 CLR 1 the High Court considered an issue concerning the establishment of a jurisdictional fact, namely whether an industrial dispute existed. Toohey, J stated at paragraph 24:

"In *Re State Public Services Federation* I discussed the role that onus has to play when the existence of an industrial dispute is asserted. Onus may not be the happiest of terms to use in relation to proceedings before the Commission since the Commission "is not bound by any rules of evidence" and "may inform itself on any matter in such manner as it considers just" (the Act, s 110(2)(b)). Nevertheless, I adhere to what I said in that case [88]:

"It is for the applicant who has invoked the jurisdiction of the Commission to make good the proposition that jurisdiction exists. But, in doing so, the applicant will be assisted by the evidentiary weight to be attached to the service of a log of claims and a failure to accede to the demands contained in the log."

Whether or not one uses the term onus, the statutory functions of the Commission are to prevent and settle industrial disputes (the Act, s 89). "Industrial dispute" is defined by s 4(1) in wide terms which include "a situation that is likely to give rise to an industrial dispute". Nevertheless as Windeyer J observed in Ex parte Professional Engineers' Association [89]:

"It is not possible by fictions to transgress the boundaries of the Constitution. A dispute may be a paper dispute. It must still be a real dispute, really extending beyond the boundaries of any one State."

It follows that, however the "standard of proof" is expressed, there must be material before the Commission from which it can legitimately conclude that an industrial dispute (as defined) exists.

Reference to a "paper dispute" tends to cloud the issue. A demand and a log of claims have evidentiary value."

30 I take this as a clear expression that the "onus" rested with Ms Guest at first instance to establish that the Commission in fact had jurisdiction. Clearly, in a matter such as the jurisdictional challenge it would be very difficult to come to a proper finding if the employer chose to simply assert the fact without being prepared to then lead sufficient evidence. In my view it is open for the Commission to direct that such evidence be put by the employer. This may be particularly so in cases where, as often occurs in this jurisdiction, the parties are unrepresented. In these circumstances, the issue of direction by the Commission is one of degree but could not extend to the Commission organising the case for one party. Clearly also the Commission has a role to raise the question of jurisdiction where the Commission considers it might be an issue, even when parties have not raised the issue or have conceded the issue (see *The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Roman Catholic Bishop of Bunbury Chancery Office and Others* 87 WAIG 1147 at 14 and 15). Nevertheless, this does not alter the question of the onus of proof.

31 Further, in *Springdale Comfort Pty Ltd and Building Trades Association of Unions of Western Australia (Association of Workers) and Others* (1987) 67 WAIG 466 at 467 this question was not argued, however, the Full Bench stated:

"As to the onus of establishing that the Commission has jurisdiction, it was conceded in these proceedings that that onus rests with the party making application before the Commission and I would think that that is a matter beyond doubt. In accordance with that outline of the principles involved I turn to consider the alleged errors."

32 In *Gregory John Clarke v Stirling Skills Training Inc Trading as Jobwest* (2002) 82 WAIG 621 at 622 the then Senior Commissioner stated:

"Firstly, it is Mr Clarke who is claiming that this Commission has the jurisdiction to deal with the claim that he has lodged in it. Therefore, it is Mr Clarke who bears the onus of proving that the Commission has the jurisdiction to deal with the claim. It is not for the respondent to the application to prove that the Commission does not have jurisdiction. Rather, once the respondent has indicated a challenge to jurisdiction, and given the grounds for that challenge, the onus lies upon Mr Clarke to prove that the Commission does have jurisdiction."

33 I accept that I have applied the wrong test. Whether my error in applying the wrong test as expressed in paragraph 61 of my Reasons would lead to a different result I do not know. However, it clearly had an impact on my decision and hence justice requires and the administration of justice is best served by reopening the hearing. Therefore I will issue an order to reopen the hearing and my Associate will contact the parties shortly to list a directions hearing. At that directions hearing I will also ask the parties to address me on the requirements for issuing orders pursuant to s7 and 8 of the *Judiciary Act 1903* (*Commonwealth)* (see the Full Bench decision in the ALS case [paragraphs 10 and 11] and the decision of Gray, J in *Danielsen v Onesteel Manufacturing Pty Ltd and Another* 224 FLR 319 at 326-328).

34 I have two further points to cover. At paragraph 60 of my earlier Reasons I expressed doubt as to whether, should the substantive hearing be delayed, the applicant would be capable of achieving reinstatement. These comments were said in the context of considering whether to require the KLC to produce further evidence and hence delay the substantive hearing. I do not wish those brief Reasons to be taken as if I had any concluded thoughts on that issue. The applicant has always sought and continues to seek reinstatement. That is the primary remedy in matters pursuant to s29(1)(b)(i) of the Act and that remedy of course remains open.

35 Finally, the applicant in this matter in their submissions stated at paragraph 4 as follows:

> "At first instance it was more or less assumed, rightly, that if the $3.9/4.8 million was payment for services rendered then the KLC should be regarded as a trading corporation and hence beyond the jurisdiction of the Commission." (my emphasis)

Needless to say the factors expressed by the majority of the IAC in the ALS case at paragraph 68 need to be balanced, in particular the purpose and activity of the organisation, the nature of the trading activities and whether they are substantial or sufficient to justify the description of "trading corporation".

2009 WAIRC 00448

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KRYSTI GUEST
	APPLICANT
	-v-
	KIMBERLEY LAND COUNCIL
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 9 JULY 2009
FILE NO/S	U 161 OF 2008
CITATION NO.	2009 WAIRC 00448

Result	Application to reopen hearing of jurisdiction granted
Representation	
Applicant	Mr S Millman (of Counsel)
Respondent	Mr D Schapper (of Counsel) and Mr D Jones

Order

WHEREAS the Commission issued Reasons for Decision on 30 March 2009 and determined that the Commission has jurisdiction to hear the claim by Krysti Guest for harsh, oppressive or unfair dismissal; and

WHEREAS counsel for the Kimberley Land Council, by letter dated 16 June 2009, applied to the Commission to reopen the hearing of jurisdiction; and

WHEREAS the parties made written submissions as to whether the hearing of jurisdiction should be reopened; and

WHEREAS I delivered my Reasons for Decision on 8 July 2009 and determined that the hearing of jurisdiction should be reopened.

NOW THEREFORE pursuant to my powers under s27(1)(m) of the *Industrial Relations Act 1979* I hereby order that:

The hearing of jurisdiction be reopened.

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

2009 WAIRC 00472

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DELCIA KAYE HUBBLE
	APPLICANT
	-v-
	MICHELLE & ALEXANDER MCALEESE, EXPRESS YOURSELF PRINTING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 23 JULY 2009
FILE NO/S	U 99 OF 2008
CITATION NO.	2009 WAIRC 00472

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr G Lilleyman as agent

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.

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

2009 WAIRC 00424

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN MILTON LATTA
	APPLICANT
	-v-
	PAUL HINES - LEONARD'S POULTRY ALBANY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
HEARD	TUESDAY, 26 MAY 2009
DELIVERED	WEDNESDAY, 1 JULY 2009
FILE NO.	U 55 OF 2009
CITATION NO.	2009 WAIRC 00424

CatchWords	Dismissal - gross misconduct - breach of safety - three warnings - unpaid entitlements - long service leave - annual leave - salary - summary dismissal unwarranted - dismissal unfair - *Industrial Relations Act 1979* s.26, s.29(1)(b)(i); *Long Service Leave Act 1958* s.8(2) and (3)
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr I M Latta
Respondent	Mr P Hines

Reasons for Decision

Introduction

1 This is an application pursuant to s.29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act"). Mr Ian Milton Latta worked at Lenard's Poultry, Albany, as a Chicken Boner from September 2001 to 24 February 2009. He was dismissed summarily on 24 February 2009, without notice. In his application Mr Latta states the grounds for unfairness as follows:

> "Only given 3 warnings in the 5 minutes prior to be dismissed. Dismissal came after complaint re: unpaid superannuation and change to work conditions.
>
> I feel I was unfairly dismissed because I had worked for seven & a half years without complaint & I believe Mr Hines changed my work conditions in the hope I would quit & therefore not have to pay severance pay."

2 His letter of termination states:

> "Notice of Dismissal
>
> This letter is to document the events of this morning and to detail the reasons for your summary dismissal.
>
> Your actions in throwing product and scraps around the shop in particular into the walkways, even after repeated warnings, was a danger to the safety of the staff within the store and therefore is regarded as gross misconduct.
>
> When you commenced work on Tuesday, 24 Feb 09 there was no regard for the product as you damaged 21 chickens beyond use. You then commenced to throw scraps and product around the shop creating a serious safety hazard for all staff. I asked you not to throw any thing onto the floor, which you chose to ignore. You then proceeded to continue

throwing scraps into the walkway, at that stage you were warned not to do it again as it creates a serious safety hazard to staff. You again chose to ignore my instructions and threw more skin into the walkway and on the floor, again you were warned at which your response was 'What are you going to do if I do it again' (or words to that effect). Again you threw scraps onto the floor in the walkway at which time you were given a final warning.

You then immediately threw more product onto the floor at which time I told you to leave the premises as your employment had been terminated for endangering the safety of staff, which amounts to gross misconduct. I have a witness statement to verify these events."

3 Lenard's Poultry is a retail store which sells chicken products. Mr Latta worked in the back of the store boning chickens. He worked on a bench next to the cooler room. In front of the bench were two large bins into which skin, carcasses, bones and other chicken waste were put as part of the boning process. He would take boxes of chicken from the cooler room, dismember the chicken and the finished products were returned to the cooler room in trays. Ms Spaanderman worked directly behind him at a bench and prepared chicken products for sale. There was a walkway separating their benches which led to the cooler room. Along from Mr Latta on the same bench, approximately 7 to 10 metres away, worked Mr Hines. Mr Hines is the owner of the business, in partnership with his wife.

Evidence

4 It is common ground that Mr Hines and Mr Latta agreed at one time that Mr Latta would be required to bone 26 boxes of chickens each day, approximately eight chickens per box, following which he was free to leave the premises for the day. Mr Latta had a business as an occasional driving instructor. Mr Hines says that he allowed Mr Latta to conduct some of his business (eg taking bookings and lessons) whilst at work at Lenard's Poultry. It is common ground also that for most of Mr Latta's employment Mr Hines and he enjoyed a good relationship. Just prior to Mr Latta's dismissal the two men had a confrontation and arising from that incident Mr Hines changed unilaterally Mr Latta's conditions of employment. Mr Latta was told that he would no longer be able to leave the premises before 3.00 pm each day. The incident arose because Mr Latta, over a period of time, challenged Mr Hines about the non-payment of his superannuation contributions. This issue soured their relationship. Mr Hines then on 23 February 2009 challenged Mr Latta by accusing Mr Latta of giving him the finger behind his back. Mr Hines was concerned that Mr Latta had been bad mouthing him to other staff. There were no other concerns about the performance of Mr Latta at work at anytime or leading up to the dismissal.

5 On 24 February 2009 Mr Latta arrived at work as usual about 7.00 am. Mr Hines says that Mr Latta then, "intentionally and continually created safety hazards for other staff in that he intentionally and continually threw scraps onto the floor in the walkway". He says, "he (ie Mr Latta) refused or neglected to obey my reasonable request to stop throwing scraps onto the floor". Mr Hines tendered a statement [Exhibit R1] which he says is a note he made that morning of the incident and which he typed up that night. The statement reads as follows:

"This morning Ian Latta was terminated from his employment for intentionally and continuously creating a safety hazard in the store.

When he arrived and started work he began to damage products and throw scraps and chicken carcusses (sic) on the floor in the walkway to the coolroom (sic). He was immediately asked to stop as this was creating a safety hazard to all the staff in the store. I picked up the items and continued to set up the store for the start of trade. Over the next few minutes he threw a lot more scraps on the floor and up to five meters (sic) from his work area (there was Maryland bones under the sink and skin on the yet to be used carcus (sic) tubs in the middle of the preparation area).

I picked up these scraps as well and warned him not to do it as it was creating a serious safety hazard for all the staff. He chose to ignore my instructions and continued to throw more skin and scraps on to the floor in the walkway. I again warned him not to do it as it created a serious safety hazard for all staff. To this his response was 'What are you going to do if I do it again', or words to that effect. Again he continued to throw food scraps on the floor into the walkway, I again picked up these scraps and gave him a final warning for creating a safety hazard for all staff.

He then immediately threw scraps on to the floor at which time I told him to leave the premises as his employment had been terminated for endangering the safety of staff, which amounts to gross misconduct.

He was then escorted from the premises at approximately 0730. Kellie Spaanderman was present through the entire event and has written a witness statement as to the details."

6 Mr Latta gave evidence that he was usually paid weekly, on Thursdays, on a cash in hand basis. In his application, which he verified under oath, he says he was paid approximately $650 gross per week. Since his dismissal he says that, "I've started a small business of my own as a driving school, which has provided very minimum income". He was a driving instructor whilst employed by Mr Hines and did an hour lesson each day, five days a week, on average. He charges $60 an hour for a lesson. Compared to the number of lessons a week he undertook whilst employed by the respondent, he now some weeks takes one or two more a week, some weeks six to eight more, or some weeks there might be no lessons at all. He says there is little profit in the business. He did not look for other employment.

7 Mr Latta says that reinstatement is not practicable. He says Mr Hines and he have been arguing over unpaid superannuation since August 2007. They have argued also over the lack of safety equipment. His job was to bone chickens. He did not sell product in the shop. He would take four boxes of chickens at one time, eight chickens in a box, balance the boxes on the bins next to his work bench and bone the chickens. His agreement with Mr Hines was that he was required to bone 26 boxes of chickens and then he could cease work for the day. Mr Latta tendered a photograph of his workspace and stated, "The situation of these boxes sitting on top of the crates on top of these bins and obscuring half the top of each bin is a large piece of my evidence, I suppose, as to why … why the stuff goes on to the floor and goes towards me proving that its not deliberate". Mr Latta complained about a lack of safety and hygiene in the shop and tendered photographs to support his claims. He says that he complained endlessly to Mr Hines about the lack of safety and hygiene in the shop and Mr Hines did nothing about it.

8 Mr Latta says that the whole problem started with Mr Hines not paying him his superannuation. He tendered a record of the employer's superannuation payments to his superannuation fund. He was also not paid wages for 23 and 24 February 2009, was dismissed summarily without payment of notice and was not paid his annual or long service leave.

9 Mr Latta described the events of 23 and 24 February 2009 as follows:

> "---Well, it actually began on the 23rd, Commissioner, where on the morning of the 23rd, I arrived at work. Mr Hines was there and he said to me … I can't … don't recall the exact comments, but basically it was about one of the other staff members said to Mr Hines that I gave him the finger when he walked out of the shop the afternoon before, which would've been the 22nd, I guess. So on the morning of the 23rd, he said, "Oh, so … so you give me the finger behind me back," and I said, "Well, if I was going to give you the finger, it wouldn't be behind your back," and I gave him one right there, and said, "There you go." I said, "It doesn't bother me behind your back or it's in front of your face, it's what you deserve for stealing my superannuation and everyone else's." And he said, "We'll see about that." Then shortly after … nothing happened, I started work. Shortly after that, he said, "By the way, you won't be knocking off early any more. You'll be … you'll be working here the whole day," which is a change of my conditions. I said, "Oh, that's fine. In that case, I'll … I won't be cutting five or six boxes an hour. I'll be only cutting 2.6's," is … which is the standard and I've since confirmed that once again, as I have a couple of times over the years, with the manager of Lenard's WA, Mr Jason Mitchell. I rang him just a couple of days ago to confirm this and he said, "Yes, the standard is 2.6 and that's all you have to cut at a basic wage. Your standard wage is 2.6." So I said to Mr Hines I would only cut at that rate and he said, "No, you won't." He said, "You'll cut at the normal rate." So I said, "Fine, if that's the case," I said, "I can't put up with this. I feel quite sick. This is making me feel sick," so I left and I went home; knocked off for the day sick. On the morning of the 24th, I turned up for work. He had a very bad attitude towards me, pushing past me in the work area. We began discussing the situation … I don't recall exactly what was … what was said, just sort of snapping at each other. I said to him … I said, "You do realise that you've caused all this by not paying my superannuation and ripping … by ripping us all off. You're the cause of this," and he said, "Yes, I know." And this is what Mr Hines said. So he admitted that this is the cause of the whole situation. Then I began to bone chickens; got the chickens out of the coolroom, set up for the day, started boning chickens. At this stage, whereas Mr Hines is going in and out, I'm going about my business and then he picked up the phone and went out the front of the shop, away where I couldn't hear and made a phone call; come back in, moving around the shop, went back out, I believe, as best I can remember, went out and made another phone call. I think the first phone call wasn't answered because he was standing out the front of the shop. He made a second phone call. After that phone call, he come back in, walked straight up to me and said, "That's it. You're being dangerous. You're chucking chicken scraps on the floor. You're endangering the workplace," to which I just shook my head and carried on doing my job. He walked into the coolroom. He come out of the coolroom and said, "This is your second warning. You're still endangering the staff," as best as I can remember, "You're still endangering the staff by putting the chicken scraps on the floor as you're … you're creating a dangerous situation for the workers. That's your second warning. He went over to the work preparation bench, over near the sink, where the broken tiles are. He went over there and he come back. He says, "Oh, have you just chucked carcasses on the floor," or I think it was carcasses on the floor or scraps at that stage, I can't remember. He said, "That's your third warning. You're terminated for being … creating an unsafe work environment," to which I left. So I said, "Fine," and I left."
>
> (Transcript pages 16 and 17)

10 Mr Latta says the events on 24 February 2009 all happened between 7.00 am and 7.30 am. The skin , bones and carcasses are supposed to go in the bins but normally many pieces do not, due to the rate at which he works and the set up of the work area. He says of Mr Hines, "after seven-and-a-half years of watching these … and being completely happy at the productivity rate that I've been working at, he's been completely happy for all this product to be all over the floor all day, every day until the morning of the 24th and all of a sudden he decided within five minutes to give me three warnings, and this was a safety issue, where he'd never given me a warning for it being a safety issue before in seven-and-a-half years".

11 Mr Latta says that Ms Spaanderman could not have seen what happened on 24 February 2009 and could not know whether he had put chicken scraps on the floor deliberately. Mr Latta says that he confirmed in a conversation with Mr Jason Mitchell, who is in charge of Lenard's in Western Australia, that on the morning of 24 February 2009 Mr Hines rang Mr Mitchell for advice on how to sack Mr Latta. He says that he has never received a warning in seven-and-a-half years from his employer for any reason.

12 Mr Latta went through a number of concerns he had over safety and hygiene matters in the shop, which he says he raised with Mr Hines, and nothing happened. Under cross-examination Mr Latta denied throwing intentionally the chicken scraps and skin onto the floor. He denied asking Mr Hines what he was going to do about throwing chicken scraps on the floor. He says that he said, "What the fuck do you want me to do about it?" Mr Latta says that he did not continue to put scraps on the floor, but scraps continued to go on the floor as is normal in the boning process. He says that because of the situation he probably had less regard for where the scraps went than he usually would. Mr Latta says that it is acceptable to intentionally throw chicken and skin in the walkway. Mr Hines picked up some of the scraps that were on the floor. Mr Hines warned Mr Latta each time and stated that it was a safety hazard. Mr Latta was then asked:

> "Mr Latta, when I gave you your final warning, did you look at me and just throw stuff on the floor?---Mm. I may have looked at him, Commissioner, and thrown … thrown stuff, as he puts it. Whether it went on the floor or the bin, I don't know. I find that to be irrelevant.
>
> Mr Latta, the day … the day before on the 23rd when I asked if you had been bad mouthing me in the shop, did you say yes or no?---I don't recall, but I said … you asked … that's not what you asked me. You asked me had I been bad

mouthing you behind your back and I said, as I recall, "I don't think so. If I would, I'd do it to your face," and that's exactly what I said and then I gave you the finger in front of you. As I recall, what you said is, "I'll do what I fucking want"?---That may well be true."

(Transcript page 29)

13 Mr Latta says that it was common practice for other staff to throw chicken skin in the walkway. He says 10% of the waste on the benches would be chicken scraps, that is, after the make up of the product.

14 Mr Hines relies on the statement he says he put in writing on 24 February 2009. Mr Hines says he asked Mr Latta, on 23 February 2008, when Mr Latta said he was leaving the premises, to provide a medical certificate. Mr Latta replied that he could not recall but that Mr Hines had never previously asked for a medical certificate. Mr Hines says that Mr Latta came to work on 24 February 2009 with the intention of, "making me terminate his …his employment". Mr Hines went on to say:

"The day before when he'd gone home sick, he phoned me in the afternoon and said, "I'm not happy with … you … you know I'm not going to do … go with these work conditions. Are you going to sack me?" I said, "No, I'm not going to sack you. I've got no reason to sack you."

……

---He said, "Are you going to sack me?" I said, "No, I'm … I've got no reason to sack you," and he said you … I said, "You can quit if you want to," and he said, "No, I'm not quitting. You're going to sack me. Sack me if you want." I said, "No, I don't want to sack you." He said that he could come into work at any time he wanted on … on the next day. I said, "No, you'll work … your place of employment is from 7.00 in … 7.00 in the morning till 3.00 in the afternoon at this workplace. You will be here at 7 o'clock." That phone call happened mid-afternoon on the 23rd."

(Transcript page 36)

15 These were not matters which were put to Mr Latta despite instructions from the Commission. Mr Hines says that occasionally very small scraps of chicken would have been on the floor, but not the skin off half a chicken thrown into the walkway. He says he stated, "Listen, if you don't stop bad mouthing me behind my back, I'm going to change your work conditions". He says that Mr Latta replied, "I'll do what I fucking want".

16 Mr Hines was asked what happened for him to issue Mr Latta with the first warning. His evidence is:

"---As I … in the morning, Commissioner, there is three people on duty in the store; the chicken boner and two people who are putting the window display in, putting the actual food in the actual display counter. As I walked into the back of the shop from putting a display tray in the cabinet … I believe that's what I was doing … as I walked back into the shop, a piece of chicken skin came flying across the room. I said, "Don't throw skin on the floor." That was exactly where it started, Commissioner, at which stage he intentionally in front of me threw more skin on the floor. I left to make a phone call, came back. There was chicken skin, as I explained, three metres away on carcass bins, which I explained had to physically be thrown there. It couldn't have been dropped. It couldn't have been flicked. It had to be physically thrown there for that … something that weighs that much, it probably weighs 50 or 56 grams … for something that size to go that far, it had to be intentionally thrown there. There was what's called a Maryland bone, which is a bone from a thigh and drumstick five to six metres away underneath the sink at the other side of the room. Mr Latta says that they get kicked there during the day. No-one had been there. There'd been no-one there during the day. And there was carcasses and large amounts of chicken skin and fat on the floor in the actual work way that we need to walk into up to 50 and 60 times in putting the window in … the window display in."

(Transcript pages 39 and 40)

17 Ms Spaanderman says that on the morning of 24 February 2009 Mr Hines asked Mr Latta to stop throwing fat and carcasses on the floor. Mr Hines gave Mr Latta three warnings and after that he asked Mr Latta to leave the premises and told him he was dismissed. In evidence in chief she was asked whether Mr Latta said something to Mr Hines after he received his third warning and Ms Spaanderman says that Mr Latta asked, "If you give me my three warnings, what will you do? Ms Spaanderman says that employees are not permitted to put scraps on the floor; they are asked to pick them up and discard them properly. This is so that they are not a safety hazard for other employees. She says that the scraps are picked up, "straightaway, immediately". Any chicken scraps that are left on benches are put into the bins and the benches are cleaned. There is hardly any chicken in the scraps on the bench before the bench is cleaned.

18 Under cross-examination Ms Spaanderman's evidence is that three times a day Mr Latta would intentionally flick wing tips at her. Mr Hines does not like Mr Latta doing that. He has never given Mr Latta a warning for doing it. When the benches are cleaned the big scraps go in the bins, the small scraps go on the floor. She says that Mr Latta would on average throw scraps at other staff five times a day. He does that whether Mr Hines is there or not. Ms Spaanderman was asked about the amount of chicken scraps that are typically on the floor. She stated, "I'd say with carcasses, they're often picked up straightaway, but there is, you know, one or two that'll miss the bin when it gets full and otherwise with scraps, there'd maybe be one or two handfuls". These scraps are next to the bins and not in the middle of the walkway. She says it is common for carcasses to be on the floor around the bins. There was then the following exchange:

"Yes. Would you say under the circumstances that it is common for the other bin to have the skin, wing tips, Maryland bones and other things around … around the bin on the floor on a daily basis throughout the whole day?---Yes.

Would you say that my bins are exactly in the walkway between my bench, your bench and the coolroom?---They are right in front of you next to your bench.

Right. And they're right on the edge of the walkway. You walk beside them?---Yes."

(Transcript page 45)

19 Ms Spaanderman says that not long after Mr Latta started work on 24 February 2009 he heard him says "Whoops!" and she turned around from her bench and saw that he had thrown chicken fat from the front of the chicken (about a 3 inch by 4 inch piece) on the floor. She considered that he had done this intentionally and the piece of fat was in the middle of the walkway. At that time she thought Mr Hines was going to dismiss Mr Latta. She says Mr Hines gave Mr Latta a warning and said, "Please do not … please stop that. That is a safety hazard to my staff". This same event happened three times whereby Mr Latta said, "Whoops!" followed by fat being thrown in the middle of the floor and Mr Hines giving him a warning and telling him not to do it as it was a safety hazard. Mr Latta did it a fourth time and Mr Hines dismissed him.

20 Later Ms Spaanderman says that she saw the chicken fat "falling" on the floor, that is she saw it as it was about to fall on the floor. She was then asked by Mr Latta, "Oh, seen it falling. Okay. Did you think that I'd missed the bucket …presumed that I'd missed the bucket?" She replied, "Yes".

21 Under re-examination Ms Spaanderman says that the bins were empty with maybe only one carcass in them as it was a "new day". The skin and bone tub was also empty. After the third warning Ms Spaanderman says that he heard Mr Latta say, "What are ….what will you do about it?"

Considerations

22 In *Gonzalo Portilla and BHP Billiton Iron Ore Pty Ltd* (2005) 85 WAIG 3441 at 3453 the Hon President stated:

> "128 It is worth recalling, for the purposes of this matter, considering the seriousness of the various acts of misconduct that summary dismissal is a common law remedy available because:-
>
> > "…. a contract of service is but an example of contract in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."
>
> (See *North v Television Corp Ltd* (1976) 11 ALR 599 at 600 where the judges quote what was said in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287 and 289).
>
> 129 Then there is the well known dictum of the High Court in *Blyth Chemicals Limited v Bushnell* [1933] 49 CLR 66 at 81, where it was said:-
>
> > "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal……But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."
>
> 130 The lawful exercise of the power to summarily dismiss depends upon, first, determining whether there has been a breach by the employee of the express or implied terms of the contract or a demonstrated intention not to be bound by those terms, and secondly, an assessment of whether the breach is sufficiently serious to allow summary termination of the contract (see *Bruce v AWB Ltd* (2000) 100 IR 129 at paragraph 15; and Macken, O'Grady, Sappideen and Warburton, *"The Law of Employment"* (5th edition) pages 196 to 199).
>
> 131 No rule of law defines the degree of misconduct which would justify summary dismissal without notice. This is a matter which turns on the facts and circumstances of each case. However, whilst it is only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily, as Kirby J said in *Concut Pty Ltd v Worrell* (op cit), but Gillard J in *Rankin v Marine Power International Pty Ltd* [2001] 107 IR 117 at 142, suggested that the authorities, in particular *Blyth Chemicals Limited v Bushnell* (op cit), do not support the proposition that summary dismissal is available only in exceptional circumstances. His Honour said:-
>
> > "The authorities do establish that the employee's breach of contract of employment must be of a serious nature, involving a repudiation of the essential obligations under the contract or actual conduct which is repugnant to the relationship of employer-employee, before an employer may terminate the contract summarily. Isolated conduct usually would not suffice. Each case must be considered in the light of its particular circumstances, but nevertheless, the seriousness of the act of termination and the effect of

> summary dismissal are factors which place a heavy burden on the employer to justify dismissal without notice. The circumstances do not have to be exceptional, but nevertheless, must establish that the breach was of a serious nature.""

23 In my view it is clear from the evidence of Mr Latta and Mr Hines that the dismissal on 24 February 2009 must be seen in the context of the dispute the two men had the previous day. Mr Latta and Mr Hines had a good work relationship for the great majority of the employment. That relationship, on the evidence of Ms Spaanderman started to deteriorate in late 2008. The source of tension was the unpaid superannuation, which Mr Hines explains as being due to difficulties in the business. Mr Latta does not accept this view. In any event it came to a head on 23 February 2009 when Mr Hines challenged Mr Latta and accused him of giving him the finger behind his back. Mr Latta reacted angrily which led Mr Hines to change unilaterally Mr Latta's contract of employment. Mr Latta's employment is covered by an award of this Commission. I will return to that issue. However, the two men agreed that once Mr Latta had boned 26 boxes of chickens in a day then he could leave work for the day. This agreement had been in place for sometime.

24 Mr Latta would have been entitled to leave the employment relationship on 23 February 2009 and treat that relationship at an end due to the substantive change to his contract. He previously had finished work at about noon and was then going to be required to work until 3.00 pm each day. This change to the contract was significant and could have grounded a claim for unfair dismissal at that time. It is not clear from the evidence whether Mr Latta had been insulting Mr Hines amongst the other staff, but it appears possible. Mr Hines should have issued Mr Latta with a warning then to desist from such behaviour. However, Mr Hines should also have attended to the unpaid superannuation sooner and the situation of conflict would then most likely not have developed.

25 Nevertheless Mr Latta took the rest of the day off sick on 23 February 2009. Mr Hines says that he demanded a medical certificate from Mr Latta for the day, on that day. There is no evidence that he followed up that request on 24 February 2009. I consider it probable that the sense of conflict remained at the commencement of work on 24 February 2009. It is common ground that shortly after Mr Latta commenced work, perhaps no more than 10 minutes after he started, he received his first warning and then in quick succession he received two more and was dismissed summarily. Both men accuse the other of having preconceived the dismissal.

26 The first question is was a summary dismissal justified in all the circumstances? Mr Hines in his letter of dismissal dated 24 February 2009 stated:

> "Your actions in throwing product and scraps around the shop in particular into the walkways, even after repeated warnings, was a danger to the safety of the staff within the store and therefore is regarded as gross misconduct."

He goes on to say that Mr Latta damaged 21 chickens beyond use, and threw scraps and product around the shop.

27 Mr Hines bases the dismissal, in the statement he drafted that day [Exhibit R1], on Mr Latta having, "intentionally and continuously created a safety hazard in the store". Mr Hines refers to chicken carcasses, skin, bones and scraps as being thrown deliberately on the floor, in the walkway and up to five metres from Mr Latta's workbench. Mr Hines refers to having given Mr Latta a final warning and that his actions endangered the safety of other staff. Mr Hines in his statement does refer briefly to "damage product" and to "food".

28 Mr Latta was only at work for about 30 minutes on 24 February 2009. Needless to say there is a difference between throwing scraps on the floor, whether deliberate or not, and destroying 21 chickens beyond use in a short space of time. Mr Latta is said to process approximately 208 chickens a day (ie 26 boxes and 8 chickens a box). He is said to work typically about 5 hours (ie 7.00 am until noon). So in one tenth of his normal workday he is said to have destroyed deliberately about one tenth of his output. This would amount to him destroying every chicken he processed to the point where it could not be used. If this had been the case one would expect that, as the owner of the business, the point might have been highlighted in the warnings given, the contemporaneous note and in Mr Hines' evidence. None of this was the case. Instead the issue that was highlighted at all times was the suggested safety hazard caused by chicken scraps having been thrown in the walkway.

29 Ms Spaanderman's evidence does not support an accusation that Mr Latta destroyed any product. Her evidence is simply that on each occasion Mr Latta threw a piece of chicken skin into the walkway. The chicken skin was from the front of the chicken and the pieces were about 7 centimetres by 12 centimetres in size. Therefore the accusation that Mr Latta destroyed product cannot be sustained.

30 The next most important issue is whether Mr Latta's actions were deliberate. Mr Latta conceded, towards the end of the hearing, that given the circumstances he was less careful than usual in his boning. Ms Spaanderman's evidence is that she heard Mr Latta say, "Whoops!" each time prior to the warning being issued. This is what drew her to look around and she saw the skin hit the floor. This suggests that Mr Latta's actions were deliberate, perhaps, even a wind-up for Mr Hines. However, I am not confident about this aspect of Ms Spaanderman's evidence. More importantly, the other undisputed evidence is that Mr Hines warned Mr Latta three times and picked up at least some of the scraps. In those circumstances one could expect that Mr Latta might be more careful after the first warning. Mr Latta chose not to be and I assume this was due to his antagonism towards Mr Hines. I find that Mr Latta did deliberately throw chicken scraps on the floor on 24 February 2009. This disregard by Mr Latta of Mr Hines' instructions cannot be supported.

31 There is an issue as to what was actually thrown on the floor, and where it was thrown. Mr Latta says that it is normal for skin, fat, bones or carcasses to fall to the floor in the boning process. He works at a fast pace and he has boxes of chickens balanced over the scraps bins. He says also that scraps from the work of other staff are on the floor, and put there intentionally, along with soapy water when benches are cleared. Mr Hines relies on his statement. He says there were chicken scraps and carcasses thrown into the walkway, Maryland bones under the sink, skin on the yet to be used carcass tubs in the middle of the

preparation area, and scraps up to five metres away from Mr Latta's work area. Ms Spaanderman in evidence in chief says that Mr Hines told Mr Latta to stop putting chicken fat and carcasses on the floor. Under cross-examination Ms Spaanderman refers only to seeing a large piece of chicken fat in the walkway on three occasions. It is hard to reconcile the three versions of events and Ms Spaanderman's evidence does change somewhat. My assessment of her evidence is that she had come to the hearing to tell the Commission about Mr Latta having received three warnings for his deliberate and disruptive behaviour. However, I consider that she answered questions in cross-examination and questions from the Commission directly and to the best of her ability. I would rely on this evidence by Ms Spaanderman over that of the two protagonists in the incident on 24 February 2009. I find that chicken fat/skin was thrown deliberately into the walkway by Mr Latta and that there were other chicken scraps, including carcasses, on the floor near Mr Latta's work area. Ms Spaanderman's evidence when viewed as a whole would support this conclusion.

32 The next issue is whether it was normal for chicken scraps to be on the floor and indeed in the walkway. It is on this issue especially that Ms Spaanderman's evidence can be seen to be inconsistent. In evidence in chief she says that staff were not permitted to put scraps on the floor as it is a safety hazard. If scraps went on the floor then they were picked up immediately. Under cross-examination she admitted that carcasses tend to be picked up but about two handfuls of scraps would be on the floor each day. When cleaning benches the larger scraps get put in the bins and the smaller scraps get scraped onto the floor. She says that Mr Latta would intentionally flick chicken wings at her about three times a day and that he would throw chicken scraps at other staff about five times a day. This happened whether Mr Hines was there or not and Mr Latta was never warned. It was common to have carcasses and scraps on the floor around the bins. The bins were next to the walkway to the cooler room.

33 The photograph [Exhibit A1.1] shows Mr Latta at his workstation between the bench and it can be presumed the walkway (the floor and bins are not visible in the photograph). Mr Latta has his back to the cooler room and is quite close to it. Hence there cannot be much distance between the bench and the walkway. The boxes of chickens are in front of the bench and it is Mr Latta's unchallenged evidence that they are balanced on the bins. Mr Latta's unchallenged evidence is also that he worked at speed when boning. He boned over 200 chickens in about five hours which was well above the usual rate of boning. It is probable then that chicken scraps and carcasses do fall on the floor and indeed into the walkway during the normal boning process. Against this backdrop and the evidence of Ms Spaanderman it is hard to see how Mr Latta's deliberate actions of throwing chicken fat/skin into the walkway could amount to gross misconduct and a repudiation of his contract. This was the first time that Mr Hines warned Mr Latta about putting scraps on the floor. The difference perhaps is that on this occasion Mr Latta did so deliberately. However, Mr Latta had regularly thrown scraps at other staff in the presence of Mr Hines without Mr Hines expressing concern.

34 The fact that Mr Latta failed to obey a direction and did so on three occasions has to be viewed in the context of the dispute between Mr Hines and him the previous day, the unilateral change to his contract and the fact that he had never been warned before for similar behaviour even though he daily threw scraps at fellow workers and onto the floor. Mr Latta also gave unchallenged evidence that Mr Hines made a telephone call to Mr Mitchelll to ask about dismissing Mr Latta. Mr Latta knows this because he spoke with Mr Mitchell. It is Mr Latta's evidence that Mr Hines spoke with Mr Mitchell prior to Mr Hines giving Mr Latta the first warning, but after they had continued their disagreement shortly after Mr Latta commenced work on 24 February 2009. Mr Hines says he told Mr Latta not to throw skin on the floor and then left temporarily to make a telephone call. It seems probable then that Mr Hines had had enough of Mr Latta being difficult and decided to dismiss him. The subsequent warnings for breach of safety were then a device to execute this earlier decision. I find that the summary dismissal was not warranted.

35 The test to be applied is that expressed by the Industrial Appeal Court in *Undercliffe Nursing Home –v- Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386. In that decision Brinsden J stated:

> "Accepting then that the Commission may enquire into the termination of a contract of employment, the question then arises to what principles it should apply and having regard to the circumstances in which the termination took place. The jurisdiction has been variously stated: in *re* Loty and Holloway *v.* Australian Workers' Union (1971) A.R. 95 at 99 Sheldon J. said that even though in the dismissal be it summary or on notice, the employer has not exceeded his common law and/or award rights, the Court was entitled to enquire as to whether the employee had received "less than a fair deal". He also approved what had been said in an earlier case whether there had been "a fair go all round". In a later case Metropolitan Meat Industry Board *v* Australian Meat Industry Employees' Union (New South Wales Branch) (1973) A.R. 231 at 233 Watson J. thought that even if there are grounds for terminating the contract of employment it was still open to the tribunal to examine the severity or otherwise of the step of dismissal. In the majority judgement in Western Suburbs District Ambulance Committee *v.* Tipping at 277 their Honours stated the question as being "whether the employer's action was harsh or unjust or that the employer has abused his right to dismiss his employee". In that case they considered the union had made out its case in connection with an employee whose services had been terminated pursuant to the award without any reason being given, the employee having been of impeccable conduct and service over a long period of years. Finally in North West Council *v.* Dunn 129 C.L.R. 247 at 263 Walsh J. specifically approved a test stated by McKeon J. in the case immediately last cited as being the question to ask:
>
> > Has there been or has there not been oppression, injustice, or unfair dealing on the part of the employer towards the employee?
>
> As His Honour points out the question to be investigated is not a question as to the respective legal rights of the employer and the employee but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right."

36 It is plainly apparent in my view that Mr Latta did not receive a fair go. The dispute started with him complaining justifiably about the non-payment of superannuation, which was not rectified or addressed as it should have been. The dispute moved on to a unilateral change of his contract of employment. Then on 24 February 2009, without any history of problems or warnings for his work, Mr Latta was dismissed for gross misconduct on the pretext of having repeatedly breach safety standards. It is true that Mr Latta failed to follow the directions of his employer, but these were standards that did not exist in the workplace, and had not been pursued before. I find that Mr Latta was dismissed unfairly on 24 February 2009.

37 There is no doubt in my mind that the relationship between Mr Latta and Mr Hines has broken down to the point where reinstatement is not practicable. The issue of mitigation is, however, much less clear. Mr Latta simply did not look for other employment. He had been in full time employment for sometime but chose not to look for further full time employment. He chose instead to pursue his existing business as a driving instructor. His evidence is that that business has increased only slightly. Whilst the respondent bears the onus as to proving whether the applicant has failed to mitigate his loss; it is the case that both parties came to hearing unprepared to deal with that point. It was open for Mr Latta to seek to increase his existing business but in all the circumstances I cannot find that Mr Latta has sought to mitigate his loss. He did not seek full time employment at all even in the face of limited bookings for driving lessons.

38 The question is what was the loss suffered by Mr Latta? There must be a direct link between the loss suffered and the summary dismissal. Clearly he suffered an immediate loss of income. His income was approximately $650 gross per week. He suffered the loss of a notice payment which should have been five weeks pay given Mr Latta's age and length of service. Whilst Mr Latta has failed to mitigate his loss, I consider that Mr Latta's loss should include a period of time in which work could have been sought. Given the current economic conditions that period of time would most probably be longer than normal. I would order an additional seven weeks pay to cover this period of time. Therefore the total period of loss post termination is 12 weeks.

39 Mr Latta was not paid any accrued annual leave or long service leave due to the nature of his dismissal. Mr Hines says that he received advice that he did not have to pay these amounts given Mr Latta was dismissed for gross misconduct. Mr Latta says also that he was not paid for some days leading up to his dismissal. Given my findings that a summary dismissal was not warranted and was in fact unfair, Mr Latta should have been paid for any unused accrued annual leave and for his pro rata long service leave. He was not, as a direct result of his dismissal and so his loss includes these amounts.

40 Mr Latta's claim states:

> "Under this Award, I believe I am entitled to:
>
> - Pro rata long service leave for (7.5 yrs) being 6.5 weeks being $4,232.80;
> - 6 weeks annual leave being $4,590.96;
> - 1 weeks pay for 16 February 09 to 20 February 09 being $651.20;
> - 5 weeks notice period being $3,256.00.
> - Total being $12,730.96"

41 Mr Hines' letter of 27 February 2009 [Exhibit A1.5] details Mr Latta's final pay as follows:

"**Wages**

38 hours x 16.74	$636.12
Minus tax:	$79.00
Net	$557.12
Holiday Pay	
77 week x 2.923 hours = 225.071 hrs x 16.74 =	$3767.68
Plus leave loading @17.5%	$659.34
Minus tax	$1620.00
Net	$2807.02"

42 These amounts were not clarified at hearing and I accept this was a mistake on my part. In the context of this dismissal, the amounts claimed for annual leave and long service leave are not to be seen as denied contractual benefits, but as loss incurred due to the nature of the dismissal. In short I am able to award compensation for these two claims of pro rata long service leave and unused accrued annual leave. I cannot deal with the claim for unpaid salary.

43 The long service leave is easily calculated and relies on the period of continuous service. Mr Latta says he commenced employment with the respondent in September 2001 and ceased employment on 24 February 2009. This is a period of approximately seven years and five months. The *Long Service Leave Act 1958* provides in section 8(2) and (3) for:

> "(2) An employee who has completed at least 10 years of such continuous employment, as is referred to in subsection (1), is entitled to an amount of long service leave as follows —
>
> (a) in respect of 10 years so completed, $8\ ^{2}/_{3}$ weeks;
>
> (b) in respect of each 5 years' continuous employment so completed after such 10 years, $4\ ^{1}/_{3}$ weeks; and
>
> (c) on the termination of the employee's employment —
>
> (i) by his death;

(ii) in any circumstances otherwise than by his employer for serious misconduct,

in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a proportionate amount on the basis of 8 $^{2}/_{3}$ weeks for 10 years of such continuous employment.

(3) Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —

(a) by his death; or

(b) for any reason other than serious misconduct,

the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 $^{2}/_{3}$ weeks for 10 years of such continuous employment."

44 To be precise about the calculation I need a start date for Mr Latta's employment. I need also an exact pay figure. The final pay letter suggests that the weekly pay was $636.12 gross, rather than approximately $650 gross as indicated in Mr Latta's application. I need the exact weekly salary also to calculate the 12 weeks loss payment.

45 Finally the question of the extent of unused annual leave was not addressed in evidence at hearing due to the directions given by the Commission. That was my mistake. The final pay letter tendered by the applicant contained a figure of 225.071 hours and suggests a payment has been made even though both parties say annual leave was not paid. This matter needs to be addressed.

46 There was conflict between the parties as to which award applied to Mr Latta's employment. Mr Hines maintained that the Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 applied. Mr Latta says that the Food Industry (Food Manufacturing or Processing) Award or the Meat Industry (State) Award 2003 applied. I do not need to resolve this conflict to finalise this application. However, I would suggest that the appropriate award covering this employment is the Meat Industry (State) Award 2003.

47 To finalise the matter I will call the matter on for a directions hearing by telephone to see whether the parties can provide or agree on the final figures. If this is not possible then a further short hearing in Albany will be required to finalise the matter and complete the order.

2009 WAIRC 00444

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN MILTON LATTA
	APPLICANT
	-v-
	PAUL HINES - LEONARD'S POULTRY ALBANY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	THURSDAY, 9 JULY 2009
FILE NO.	U 55 OF 2009
CITATION NO.	2009 WAIRC 00444

Catchwords	Dismissal - gross misconduct - breach of safety - three warnings - unpaid entitlements -long service leave - annual leave - salary - summary dismissal unwarranted - dismissal unfair -Industrial Relations Act 1979 (WA) s 26, s.29(1)(b)(i); Long Service Leave Act 1958 s.8(2) and (3)
Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr I Latta
Respondent	Mr P Hines

Supplementary Reasons for Decision

1 Subsequent to my Reasons for Decision issued on 1 July 2009 this matter came on for directions hearing on 8 July 2009 in an attempt to resolve the remaining issues of fact to enable the final calculations and order to issue. At that time the parties agreed that the weekly wage paid to Mr Latta was $636.12 gross per week, the commencement date for employment was 6 August 2001, there is no outstanding unpaid, accrued annual leave and the service for long service leave calculations was continuous but 10 weeks and 4 days should be deducted from Mr Latta's total length of service with Lenard's Poultry Albany.

2 This then means that the total loss suffered by Mr Latta due to his summary dismissal on 24 February 2009 should include notice of five weeks by $636.12 per week equals $3,180.60. The period of time to find new employment being seven weeks by $636.12 per week equals $4,452.84. Pro-rata long service leave for the period of service being 6 August 2001 to

24 February 2009, that is a period of 7 years 28 weeks and 4 days, minus the agreed 10 weeks 4 days, leaves a total period of service of 7 years 18 weeks, ie 7.35 years. Therefore in accordance with section 8(3) of the *Long Service Leave Act 1958* the calculation for pro-rata long service leave should be 7.35 divided by 10 years multiplied by 8.67 weeks (being the entitlement for 10 years of service). This gives a total of 6.37 weeks by $636.12 equals $4,052.08.

3 The total loss then is $3,180.60 plus $4,452.84 plus $4,052.08 equals $11,685.52 gross. The compensation then to be awarded to Mr Latta is the sum of $11,685.52 gross less any taxation payable to the Commissioner for Taxation. The respondent is to pay this sum within seven days of the date of order. The final order will reflect the correct spelling for Lenard's, rather than Leonard's.

2009 WAIRC 00450

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN MILTON LATTA
	APPLICANT
	-v-
	PAUL HINES - LENARD'S POULTRY ALBANY
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 10 JULY 2009
FILE NO/S	U 55 OF 2009
CITATION NO.	2009 WAIRC 00450

Result	Applicant dismissed unfairly; compensation awarded
Representation	
Applicant	Mr I Latta
Respondent	Mr P Hines

Order

HAVING heard Mr I Latta on his own behalf and Mr P Hines on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby:

DECLARES that the applicant, Mr Ian Latta, was unfairly dismissed by the respondent on 24 February 2009;

DECLARES that reinstatement is impracticable;

ORDERS that the said respondent do hereby pay, as and by way of compensation, the amount of $11,685.52 gross, less any taxation payable to the Commissioner for Taxation, to Ian Latta, within seven days from the date of this order.

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

2006 WAIRC 05528

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JAMES LAWRENCE
	APPLICANT
	-v-
	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA INC.
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 OCTOBER 2006
FILE NO/S	U 477 OF 2006
CITATION NO.	2006 WAIRC 05528

Result	Direction issued
Representation	
Applicant	Mr T Borgeest of counsel
Respondent	Ms M Ivanovski of counsel

Direction

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and Ms M Ivanovksi of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT each party shall give an informal mutual discovery by serving its list of documents by no later than 17 October 2006.
2. THAT inspection of documents shall be completed by no later than 24 October 2006.
3. THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely by no later than 21 days prior to the date of hearing.
4. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by no later than 14 days prior to the date of the hearing.
5. THAT the parties file and serve upon one another any signed witness statements in reply no later than 7 days prior to the date of the hearing.
6. THAT the parties have liberty to apply on short notice.

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

2006 WAIRC 05672

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JAMES LAWRENCE
	APPLICANT
	-v-
	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 30 OCTOBER 2006
FILE NO.	U 477 OF 2006
CITATION NO.	2006 WAIRC 05672

Result	Direction Issued
Representation	
Applicant	Mr T Borgeest of counsel
Respondent	Mr D Parker of counsel

Direction

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and Mr D Parker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the direction of 3 October 2006 be and is hereby revoked.
2. THAT the issue as to whether the respondent is a constitution or corporation for the purposes of s 51(xx) of the Commonwealth Constitution be heard and determined as a preliminary issue.
3. THAT the parties file and serve upon one another affidavits upon which they intend to rely by 10 November 2006.
4. THAT the respondent file and serve an outline of submissions and any list of authorities upon which it intends to rely by 13 November 2006.
5. THAT the applicant file and serve an outline of submissions and any list of authorities upon which he intends to rely by 15 November 2006.

6. THAT the respondent give notice pursuant to s 78B of the Judiciary Act 1903 to the Attorneys-General of the Commonwealth and of the States as to the matter arising under the Constitution or involving its interpretation by 1 November 2006.

7. THAT the dates of hearing presently listed for 14-16 November 2006 be and are hereby vacated.

8. THAT the parties have liberty to apply on short notice.

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

2006 WAIRC 05849

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JAMES LAWRENCE
	APPLICANT
	-v-
	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	TUESDAY 3 OCTOBER 2006, FRIDAY, 27 OCTOBER 2006, FRIDAY, 17 NOVEMBER 2006,
DELIVERED	19 DECEMBER 2006
FILE NO.	U 477 OF 2006
CITATION NO.	2006 WAIRC 05849

CatchWords	Industrial law - termination of employment - Harsh, oppressive and unfair dismissal - Whether Commission has jurisdiction - Trading corporation - Principles applied - Commission not satisfied respondent is a constitutional corporation - Claim within Commission's jurisdiction - Application to be re-listed - *Industrial Relations Act*, 1979 (WA) s 29 (1)(b)(i), s 23A, *Commonwealth Constitution* s 51(xx), s 109, *Workplace Relartions Act*, 1996 (Cth) s 4, s 5, s 6, *Judiciary Act* 1903 (Cth) s 78B.
Result	Application to be re-listed
Representation	
Applicant	Mr Borgeest of counsel instructed by Slater and Gordon
Respondent	Mr Caspersz of counsel instructed by Blake Dawson Waldron

Reasons for Decision

1 The substantive claim in this matter is one by the applicant that on or about 21 July 2006 his employment as a solicitor by the respondent was terminated harshly, oppressively and unfairly. The applicant now brings the present claim pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") seeking orders under s 23A of the Act that he be reinstated in his employment. The respondent objects to and opposes the applicant's claim. Following the filing of the notice of answer and counterproposal in the matter, the respondent's new solicitors on the record Messrs Blake, Dawson and Waldron advised that the respondent intended to raise as a preliminary issue, that it is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and s 4 of the Workplace Relations Act 1996 (Cth) ("the WRA"). The respondent requested that the Commission hear this matter as a preliminary issue.

2 Accordingly, the original dates listed to hear the application were vacated, and directions were made to hear the respondent's preliminary objection to jurisdiction, including the serving of notices pursuant to s 78B of the Judiciary Act 1903 (Cth) on the Attorneys-General of the Commonwealth and of the States. Those notices were duly served by the respondent's solicitors and none of the Attorneys-General has sought leave to intervene.

Contentions of Parties

3 Both counsel for the applicant Mr Borgeest and for the respondent Mr Caspersz made detailed and helpful submissions on the relevant law in relation to whether a corporation is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and the application of those principles to the facts of the case. I will return to those matters later in these reasons.

4 As to the activities of the respondent, counsel for the respondent submitted that there are a number of features of the respondent's activities that should characterise it as a trading corporation. The respondent provides general legal services to members of the Indigenous community by solicitors employed for that purpose. Importantly for the purposes of the respondent's arguments, it took part and was successful in a competitive tender process initiated by the Commonwealth

Government for the funding of the provision of legal services to Indigenous persons. As a result of the successful tender, detailed contractual arrangements were entered into between the respondent and the Commonwealth, which counsel for the respondent described as a "commercial" contract with commercial provisions. Some of these features include for example, the provision of invoices by the respondent to the Commonwealth for the payment of monies due under the contract, in the form of monthly fees. Reference was also made to various features of the contractual arrangement imposing certain performance requirements on the respondent.

5 Other matters referred to by counsel for the respondent include the fact that the respondent is registered as a business for GST purposes. The respondent is required to keep appropriate professional indemnity insurances and the maintenance of a trust account, in respect of its work performed by its legal practitioners. Also, counsel submitted that as the contract may be terminated by the Commonwealth for breach, this adds to the "commerciality" of the arrangements. Reference was also made by the respondent to the fact that under the financial arrangements with the Commonwealth, there is some means testing as to access to its services by members of the Indigenous community and in some circumstances, a contribution to legal costs may be required by an individual client.

6 For the applicant, counsel submitted that in reality, the activities undertaken by the respondent accords with the description of Wilcox J in *E v Australian Red Cross Society and Others* (1991) 99 ALR 601 that being the "gratuitous provision of a public welfare service, substantially at government expense". Counsel for the applicant submitted that the nature of the funding arrangement between the Commonwealth and the respondent, albeit in contractual terms, cannot alter the essential nature of the activities undertaken by the respondent which do not involve any activities in trade.

7 It was the applicant's contention that in reality the tender process leading to the agreement between the Commonwealth and the respondent for the provision of legal services to Indigenous persons, was a part of the general Legal Aid Services program undertaken by the Commonwealth Attorney-General's Department and is simply a manifestation of one of many funding arrangements for the provision of like services throughout Australia. In essence, the applicant submitted that the current financial arrangements between the Commonwealth and the respondent is not greatly different to previous arrangements whereby the respondent's activities were funded through the Aboriginal and Torres Strait Islander Commission ("ATSIC"). The new arrangements enable a greater level of targeting and control in the provision of such services, and more stringent and detailed reporting and evaluation requirements.

The Evidence

8 There is little dispute on the facts in his matter. On behalf of the respondent, who had the carriage of the preliminary issue, affidavit evidence was led through Mr Dennis Eggington the Chief Executive Officer of the respondent and also from Mr Andrew Grist the respondent's in-house accountant. For the applicant, evidence was adduced by way of an affidavit of the applicant with its various annexures. Neither Mr Grist nor the applicant were cross-examined on their affidavit evidence.

9 Mr Eggington has been the Chief Executive Officer of the respondent for some 11 years and prior to this was a member of the respondent's board for about six years. The respondent is an association incorporated under the Associations Incorporations Act 1895-1969 and a copy of the relevant certificate of incorporation dated 7 January 1975 was annexure DGE2 to Mr Eggington's affidavit. He described the main activity of the respondent as the provision of civil and criminal legal services to Indigenous persons in Western Australia. The organisation however does do other things consistent with the promotion of the rights of Indigenous people within the Australian legal system.

10 In terms of employees, Mr Eggington testified that there are some 30 legal practitioners employed by the respondent throughout 18 locations in the State. As required by law, trust accounts are kept by the respondent and it possesses professional indemnity insurance. The employee's terms and conditions of employment are covered by various industrial instruments under the WRA.

11 As well as legal practitioners, the respondent provides court officers who are not legal practitioners but who provide assistance to Indigenous clients on more minor matters and also assist with local knowledge and language.

12 In terms of funding arrangements, Mr Eggington testified that prior to 2005, the respondent received virtually all of its funding from ATSIC and in the period 2003 to 2005, from its successor body ATSIS. With the abolition of ATSIC, that situation changed and in 2004-2005 an open tender process for funding by the Commonwealth was commenced, for the provision of legal services to Indigenous people throughout Australia. The respondent competed in the first open tender process and was successful. It entered into a written contract for the provision of such services with the Commonwealth in April 2005. A copy of the tender document was annexure DGE3 to Mr Eggington's affidavit and a copy of the resulting contract between the Commonwealth and the respondent was annexure ACG3 to the affidavit of Mr Grist. Mr Eggington said that the respondent received little funding from the State and is not funded generally by charges to Indigenous clients. Mr Eggington was involved in the tender process and testified that the major change from his point of view is that formerly the respondent decided what it was going to do within its overall charter and obtained funding for that work. Now, the Commonwealth requires work to be done and the respondent tenders for it accordingly.

13 In terms of the tender process, Mr Eggington was taken to p 48 of his affidavit in annexure DGE3 being the tender document. This section of the tender document is headed "Funds Available for Purchase of Services" and sets out the total funding allocations for the States of Victoria and Western Australia. The total funding allocation available for Western Australia for the three year contract period from 2005-06 to 2007-08 is $23,439,891.00. Mr Eggington confirmed that the respondent did not tender on the basis of any lower figures for the provision of its services. In fact it seems that ultimately, the funding made available was higher than the initial allocation.

14 As a part of the tender process, Mr Eggington attended a briefing session and said that he was aware of two other groups who also attended the session including Legal Aid and a private law firm he thought. Mr Eggington had no knowledge of any other tenderers for the provision of legal services in Western Australia. Otherwise there is no evidence before the

Commission as to any competition the respondent may have had for the funding. It may well be the case in any event that few organisations, other than the respondent in Western Australia, could provide the level and depth of services to the Indigenous community required by the Commonwealth, particularly in remote locations. It is to be noted in this regard, that from annexure MJL4 to the applicant's affidavit, it seems that the organisations that have entered into such arrangements with the Commonwealth are Aboriginal and Torres Strait Islander legal Services organisations, similar to the respondent.

15 Mr Grist has been employed as the respondent's accountant for about eight years. He confirmed in his affidavit that the respondent is a registered business name and is registered for the purposes of goods and services tax. Relevant documents in relation to these matters were annexed to his affidavit. He referred in his evidence to the requirement under the contract, for the respondent to submit a tax invoice to the Attorney-General's Department monthly in arrears and a copy of such an invoice was annexure ACG4 to his affidavit. Also annexed to Mr Grist's affidavit, was a copy of the respondent's 2006 Annual Report containing a summary of the 2006 Consolidated Annual Reports. From those documents, Mr Grist said that the income for the year to date as at 30 June 2006 from the Commonwealth was $7,264,521.00 and $956,197.00. Those payments were received by the respondent in accordance with the terms of its contract with the Commonwealth. The Commonwealth pays the 10% goods and services tax. Other amounts noted in Mr Grist's evidence included interest receipts of some $67,103.00 and costs covered and retained, relating to costs and fees charged to clients in accordance with the respondent's contract with the Commonwealth, being in the sum of $205,933.00. Mr Grist also referred to other sundry income of $84,193.00 which was inclusive of wage subsidies, refunds on car lease agreements and other various amounts. The respondent also possesses on a freehold basis, property valued at $352,632.00. There is no other activity undertaken by the respondent from which it derives any income.

16 In his affidavit, the applicant referred to a search he had undertaken of the Australian Taxation Office website, reporting on the incorporation and taxation status of persons and entities with Australian Business Numbers. Annexed as MJL3 to his affidavit, was a copy of a document entitled "Current Details for 61 532 930 441" being the Australian Business Number for the respondent. On the document produced in his evidence, the respondent's tax concession status is as a Public Benevolent Institution, and is endorsed for various tax concessions including a GST concession, an FBT exemption and an income tax exemption. The respondent is also endorsed as a deductible gift recipient on that same document.

17 In terms of the funding arrangements for the respondent, the applicant said that whilst he had not seen any tender or contractual arrangements for the respondent's funding by the Commonwealth, he did undertake a website search for the Commonwealth Attorney-General's Department and annexed to his affidavit various documents including a media release dated 12 November 2004, in relation to the request for tenders (MJL4); a document entitled "purchase of Legal Aid services for Indigenous Australians" in relation to the tender the respondent responded to (MJL5); a table entitled "Attorney-General's Department List of Contracts Financial Year 2005-2006" at pages 1, 2 and 17 (MJL6); a document entitled "Policy Framework For Targeting Assistance Provided By Aboriginal and Torres Strait Islander Legal Services July 2005" (MJL7) and finally a document entitled "Policy Directions For The Delivery Of Legal Aid Services to Indigenous Australians May 2006" (MJL8) which appears to be in the same terms as the document dated March 2005 by the same name which is Schedule II to the contract document at annexure ACG3 to Mr Grist's affidavit.

18 I find accordingly.

Consideration

Trading Corporation

19 In the event that the respondent is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution and ss 5 and 6 of WRA, then by the operation of s 109 of the Constitution, for reasons that I have expressed recently, the application must be dismissed: *Sewell v Glenn Brown – CTI Logistics* (2006) 86 WAIG 3278 per Kenner C at pars 15-19.

20 Whether a corporation is a trading corporation for these purposes is a question of fact and degree. There are a number of guiding principles which have fallen from several judgments of the High Court to which reference should be made in order to determine whether in any particular case, a corporation can be so characterised. If trading activities form a significant or substantial part of a corporation's activities, and trading is not precluded by the organic rules of the corporation, then the conclusion that the corporation is a trading corporation is one that is open: *R; ex parte The Western Australian National Football League* (1979) 143 CLR 190 per Barwick CJ at 208; per Mason J at 233. It has been said that "It is the acts of buying and selling that are at the very heart of trade: as Lush J said in *Higgins v Beauchamp* [1914] 3 KB 1192 at 1195, "a trading business is one which depends on the buying and selling of goods". The word "trade" was said by the Lordships in *Commissioners of Taxation v Kirk* [1900] AC 588 at 592, to mean primarily "traffic by way of sale or exchange or commercial dealing". The *Shorter Oxford English Dictionary* gives, as meanings of 'trading', the 'carrying on of trade; buying and selling; commerce, trade, traffic': *E v Australian Red Cross* (1991) 99 ALR 601 per Wilcox J at 632.

21 The attainment of profit is not necessary to the conclusion that a corporation is a trading or financial corporation, and the motive or object of a corporation does not necessarily condition the conclusion as to whether it is a trading corporation: *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 per Stephen J at 569-570. Furthermore, trading activities do not cease to be trading because they are entered into in the course of carrying out some other primary undertaking, which is not characterised as trade, as long as the carrying on of that undertaking requires or involves the engaging in trading activities: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 per Mason, Murphy and Deane JJ at 303-304. In the case of a corporation which has yet to commence any activity, then the "purpose test" taken from the constitution of a corporation can be used: *Fencott v Muller* (1983) 152 CLR 570 at 602. (See also the discussion of these principles generally in *Quickenden v O'Connor* (2001) 184 ALR 260.)

Is the Respondent a Trading Corporation?

22 There is little contest in the present matter as to the relevant facts. I have set out the essential outline above. The issue to be resolved is how the activities of the respondent, which is the focus of the inquiry, are to be characterised. Inherent in the respondent's submissions is that the activities of the respondent at the material time, which is the time at which the applicant was dismissed, embraces not just what the respondent does, but how it goes about it, ie the method of financing those activities. The respondent's contention being that the "commerciality" of the arrangement between the Commonwealth and the respondent in terms of the funding of the provision of legal services for Indigenous persons in this State is part and parcel of the trading activities undertaken. That is, it is the provision of legal services to Indigenous persons in this State, in return for which the Commonwealth pays the respondent, is trading. On the other hand counsel for the applicant submitted that in relation to the activity of the respondent, that being the "gratuitous provision of welfare services" the means by which those services are funded, is a matter of form and is peripheral to the essential inquiry to be undertaken by the Commission.

23 Both counsel placed some emphasis on the judgement of Wilcox J in *Australian Red Cross*. In this case, there was an action brought against the Australian Red Cross Society and other parties, alleging that the respondents had breached the Trade Practices Act 1974 (Cth) and were negligent in giving the plaintiff contaminated blood which was infected with HIV. An issue arose as to whether the Red Cross was a trading corporation for the purposes of the Trade Practices Act 1974 (Cth). Having considered the evidence and summarising the relevant authorities (at 340-343) Wilcox J concluded at 343 as follows:

"*It is convenient to deal immediately with a submission made on behalf of the applicant that, in applying these principles to the first and second respondents account should be taken of their blood supply activity. The applicant accepts that neither respondent makes any charge for any blood which it supplies. Neither "trades" in blood, in the usual sense of that term. But, say counsel, the reality is that the blood transfusion activities of the respondents constitutes substantial business by which they supply valuable commodities, blood and blood products, in return for large payments. In the year 1984-1985, the Society (including its Divisions) received from governments a total of $44, 965,328.00 in respect of its blood transfusion services. Of this, the NSW Division directly received more than $10m. (The exact figure is not ascertainable from the Division's annual report). These were, of course, substantial sums. There were earned only because the respondents are prepared to carry on blood transfusion services at a scale, in terms of labour and resources, greater than that of many organisations which are undoubtedly "trading corporations". But I do not think that it is appropriate to describe the gratuitous provision of a public welfare service, substantially at government expense, as the conduct of a "trade". It is pertinent to recall the words of Stephen J in St George County Council: "It is the acts of buying and selling that are at the very heart of trade", and also to remember the distinction he made in respect of the distribution of electricity free of charge. In relation to the supply of blood, it seems to me that the first and second respondents do not engage in trading activities. They engage in a major public welfare activity pursuant to agreements with the Commonwealth and the various State governments under which they will be reimbursed most of their costs."*

24 Wilcox J went on to find, that the Red Cross raised considerable funds from other activities such as opportunity shops, street stalls and so on to the tune of about $2m over 1984-1985. He concluded therefore that based upon this activity, which he described as "a major contributor to the Division's income the scale of the Division's trading activities amply meets any of the tests enunciated in *Adamson*.": at 343. Wilcox J therefore concluded that based upon this activity, the Red Cross was a trading corporation.

25 It is clear from this case that consistent with the authorities to which I have referred that it was not the essential, primary or dominant activity of the Red Cross which led His Honour to the conclusion that it was a trading corporation. It was the ancillary activities, ie the sale of goods through retail shops and the sale of other items and services that constituted trading.

26 The question in this case must focus on the activities of the respondent at the time of the applicant's dismissal. Did the respondent at that time engage in significant or substantial trading activities such that it can be described as a trading corporation? As opposed to the facts in *Red Cross*, the respondent does not engage on the evidence, in any other activities such as running shops or providing services for fees, apart from its core activity of providing legal services to the Indigenous community. The question therefore is whether the provision of those particular services, including the manner by which they are provided, constitutes trading for the purposes of s 51(xx) of the Commonwealth Constitution.

27 The respondent's argument, as outlined above, is that it is the essentially "commercial" arrangements entered into with the Commonwealth, by way of the tender for the provision of Indigenous legal services, and the "commercial" nature of the resulting contract, in terms of the provision of its services to the Commonwealth that should characterise the activities of the respondent as trading. The respondent submitted that the process of replying to the invitation for tenders, it being an open competitive tender, places the respondent in no different position to any other legal services provider tendering for work.

28 As noted the applicant contends that the respondent's focus on the tender process and the contract documents are to place form over substance in terms of the actual activities of the respondent. It submitted that as in *Red Cross*, the respondent essentially engages in "the gratuitous provision of a public welfare service, substantially at government expense". It is said that the only change that has occurred in recent times, is to the method of funding the respondent, which has gone from the provision of grant funding on an annual basis from ATSIC, to funding on a three yearly basis from the Commonwealth, in accordance with detailed program requirements, as a result of an open tender process. The applicant's submission was that the activities of the respondent, that is the provision of legal services to the Indigenous community, is no different.

29 The question is whether the activities of the respondent, which must be the focus of the inquiry, in providing legal services to the Indigenous community constitute activity of a commercial or trading character which involves for example, "buying and selling" being at the very heart of trade: *St George County Council* per Stephen J at 569-570. In this case it is common

ground that except in a very small minority of cases, where there may be some contribution made by clients to costs, the respondent provides its legal aid services to the Indigenous community free of charge. It does not sell its services as a commercial law firm would do. That is, on one view, the respondent does not sell anything to its clients rather, the Commonwealth, as the respondent would have it, "purchases" the provision of legal services to the Indigenous community via organisations such as the respondent. There is in effect a tripartite arrangement between the Commonwealth, the respondent and the clients of the respondent, on whose behalf the services are delivered. It could equally be said however, that the system of annual grants previously in place, through ATSIC, also involve, at least indirectly, the Commonwealth "purchasing" the provision of such services albeit in a different form. That is the Commonwealth was funding an organisation to provide a service that it did not provide directly itself.

30 There are many examples of such arrangements where governments fund various programs for particular groups in the community and it delivers those programmes through third parties. Depending on the particular arrangements entered into, some of those activities may be regarded as trading and some not. For example, the provision of job search and placement activities by the private sector to government as part of its well known employment network for fee or reward, set by the provider, and part of the firm's services to clients generally, would arguably be a trading activity. The government is in effect contracting out a service that it would otherwise have to provide itself. Whilst the end user in this example, that is the employer or prospective employee may not have to pay for the service, which is in effect being subsidised by the government, that may not alter the fact that the provider of the service acts on a commercial basis in providing it.

31 In my opinion, an issue arises in this matter as to whether the way in which the provision of the respondent's services to the Indigenous community are financed, and any surrounding conditions or form of that financing, can fundamentally dictate the characterisation of the respondent's activities. This is so in my view, because it cannot be said that the respondent "sells" its legal services to members of the Indigenous community, and certainly, they do not buy them. There is no doubt that from the objects of the respondent set out in its constitution the respondent is established to promote the welfare of members of the Aboriginal community in their dealings with the justice system administered by laws of the Commonwealth and the State. That has an overall welfare or charitable type of flavour to it in my opinion. The respondent is also registered, as noted above, as a Public Benevolent Institution for taxation purposes. That does not mean however, that the respondent cannot be a trading corporation as long as its trading activities are not prohibited by its constitution and the trading activities are a significant or substantial component of its overall activities.

32 Whilst the process for the funding of the respondent by the Commonwealth involves a tender, it is clear on the evidence that the respondent does not bid for the contract on the basis of a competitive price tender. The Commonwealth sets the amount of funding available over the term of the contract. The total sum payable is divided into three funding years and payments are made in equal monthly instalments. This is clear from clause 2.7 on page 21 on the tender document as annexure DGE3 to Mr Eggington's affidavit. It is not also insignificant to note that the monies available are described as "funding". There are other aspects of the documentary evidence before the Commission that are to be noted as follows. In the Policy Directions document annexed to the contract document in ACG3 to Mr Grist's affidavit, is reference to the Legal Aid Services programme at 1.4 in the following terms:

> ***"Legal Aid Services Program***
>
> *1.4 Under the grant arrangements to be gradually phased out from 1 July 2005, the Department has provided grant funding of some $42.9m annually to a national network of 25 Aboriginal and Torres Strait Islander Legal Services (ATSILS). This network has delivered legal aid services at some 94 separate service sites across Australia, and in 2002-03 provided legal representation to 69,292 Indigenous people in 113,698 case and duty matters. Grant funding to ATSILS has been provided on an annual basis and has been subject to a range of specified terms and conditions, including compliance with the terms of a Legal Services Policy Framework.*
>
> *1.5 The former Aboriginal and Torres Strait Islander Commission (ATSIC), ATSIS and the Department have pursued a series of reforms to Indigenous legal aid services since 1996. The primary objective of these reforms has been to improve both the quality and efficiency of service delivery, to the ultimate benefit of Indigenous clients. Among other reforms, changes have been made to the targeting of legal aid services, to the service standards to be met by legal service providers, and to arrangements for data collection, monitoring and evaluation.*
>
> *1.6 In line with broader Government policy, an important feature of the reform process has been a commitment to contestability and competitive tendering for legal aid services. The prime objective here is to better prioritise and target available resources, to ensure that services are responsive to established policy priorities and community needs, and to provide the best possible quality of service to individual clients. Related objectives are to strengthen the accountability of service providers for the quality of services delivered and outcomes achieved, and to provide greater continuity and funding certainty to service providers than annual grant funding arrangements have allowed.*
>
> *1.7 From 1 July 2005 the program of grant funding to ATSILS will gradually be replaced by a program under which legal aid service providers are selected by means of a competitive tender and engaged by the Department under contract for a three-year funding period. The Exposure Draft of a Request for Tender was released in March 2004, providing information about the tendering and contracting process and inviting comments and feedback from interested parties."*

33 Additionally in the tender documents at cl 2.2 appears the following as to the description of the services:

> ***"2.2 Objective of the Services***
>
> *Aboriginal and Torres Strait Islander people experience much high rates of adverse contact with the justice system than other Australians and are incarcerated at significantly higher rates than non-Indigenous people. They are*

also one of the most profoundly disadvantaged groups in Australian society, falling well below relevant national benchmarks on virtually every measure of well-being and socioeconomic status.

As part of a broader strategy designed to address both the causes and the effects of Indigenous disadvantage, the Australian Government funds a number of inter-related programs in the broad field of Law and Justice. These include a program of Legal Aid Services for Indigenous Australians (the subject of this tender), and a range of complementary programs in the areas of Law and Justice Advocacy, Prevention, Diversion and Rehabilitation and Family Violence Prevention Legal Services. Details of these programs may be found in the ATSIC/ATSIS Annual Report.

The primary objective of the Legal Aid Services program is to improve the access of Indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens."

34 The Policy Framework document as annexure MJL 7 to the applicant's affidavit in its introduction at par 1 provides:

"1. POLICY INTRODUCTION

1.1 Commitment to a strong, community based, high quality, accountable Legal Service is an effective response to the Government's policy for Indigenous Australians.

1.2 Aboriginal and Torres Strait Islander Legal Services (ATSILS) play a leading role in promoting and protecting the legal rights and interests of Indigenous Australians, in promoting access to justice, and in resolving many disputes. ATSILS deliver extensive legal assistance to Indigenous Australians and undertake important welfare roles related to these legal activities.

1.3 The Attorney General's Department will revise this policy framework from time to time.

1.4 The Attorney General's Department (AGD) requires ATSILS to adopt the Policy Framework as part of the 2005-2006 Program Specific Conditions for Legal Aid Service Program Funding Agreements (PFA). This Policy Framework is deliberately designed to encourage discretionary application of its guiding principles. Therefore there is no need for individual ATSILS to vary the guidelines to suit particular circumstances.

1.5 If an ATSILS believes that some aspects of the guidelines are unworkable in their circumstances, they may apply for a variation to the policy framework. Such a variation must be negotiated through AGD and it will become a Program Specific Condition of agreement within the Letter of Offer.

1.6 Decisions based on the Policy Framework should result in the most effective use of limited resources and provide a basis for assessment of realistic funding levels."

35 The Policy Framework also goes on to set out the purpose of the PFA funds and the targeted use to which the funding is to be directed. It is clear from these provisions that the Commonwealth intends that the PFA funding be very specifically targeted consistent with its overall programme objectives, as set out above, and be the subject of tight controls.

36 The media announcement of the Commonwealth Attorney-General for the tendering process that led to the respondent's funding included the following:

"The tendering process is intended to ensure that Indigenous Australians have access to high quality, professional and culturally appropriate legal services. The Government has committed $120 million over three years for the provision of these services. The selected providers are expected to start delivering services on 1 July 2005.

'This will provide both increased certainty for service providers and a sharpened ability to distribute resources to those in most need of legal aid services. The Government is committed to seeing better outcomes delivered to Indigenous Australians and ensuring value for money,' he said."

37 From the documentary evidence before the Commission, it is clear that the provision of monies by the Commonwealth to the respondent is a part of the Commonwealth's overall program of Legal Aid Services for Indigenous Australians. It is related to a number of other programs, which are set out at clause 2.2 of the tender documents and they include Law and Justice Advocacy, Prevention, Diversion and Rehabilitation and Family Violence Prevention Legal Services. Additionally, from the tender documents, the Commonwealth's primary objective in the Legal Aid Services program is stated to "improve the access of Indigenous Australians to high-quality and culturally appropriate legal aid services, so that they can fully exercise their legal rights as Australian citizens." That this is a social welfare objective is in my opinion, undeniable.

38 Whilst it is certainly the case that the contract arrangements are detailed, it is clear from the tender documents and the contract itself that the Commonwealth, wishes to ensure a substantial degree of control over and attach conditions to the allocation of funding for the provision of legal services to the Indigenous community, in terms of quality, efficiency and accountability for the funding it is providing. The services are to be targeted in ways perhaps different to arrangements of the past. This is also accompanied by substantial record keeping and reporting requirements that the respondent is required to meet. These are some of the stated objectives in changing the funding from an annual grant based arrangement administered by the former ATSIC. I do not consider the detail of the funding and service arrangements as being inconsistent with activities undertaken by an organisation that is not a trading corporation. Indeed it would be surprising, given the large sums of money involved, if there were not detailed conditions attached to any such funding.

39 As to the terms of the funding contract itself, I do not consider many of the provisions of the contract relied on by the respondent as conclusive of a commercial contract only. Provisions as to GST, insurance, both professional indemnity and public liability, are of themselves unexceptional. The engagement of legal practitioners requires the respondent by law, to have in place mechanisms imposed by the Legal Practice Act 2003. Also the fact that the arrangement may be terminated

for breach is again not decisive. Mr Eggington, in his testimony, referred to the prior grant funding arrangements also being able to be terminated for a breach of conditions.

40 The fact that there is some limited means testing of clients is in my opinion consistent with the Commonwealth's objective of greater targeting of the services and usage of the funding available being put to the best use. Many government assistance programs are means tested; for example, family support. Whilst the provision of invoices may suggest some commerciality, in substance they appear to me to be the administrative mechanism by which the monthly allocation of funding is dispersed to the respondent in accordance with the agreement. The respondent does not, in reality, "charge" fees to the Commonwealth for the services it provides.

41 As stated by the applicant, there are some features of the arrangement that would appear to be at odds with the purely commercial delivering of a service. For example, the Policy Directions document annexed to the contract provides in section 11, for the respondent to have both an internal and external review mechanism so that a client can effectively "appeal" a decision of the respondent as to various matters there set out. This is more consistent with general administrative law principles and would be unusual to see in a commercial contract.

42 The funding for the respondent over the three year contract is in my view, clearly directed towards a social welfare objective in improving the access to and participation in legal services for Indigenous people who are involved in the civil and criminal justice system. There is no "on selling" of those services to Indigenous clients of the respondent. This is not a case where a legal services provider is contracting to a client to provide legal services to it on commercial terms the price of which the provider sets. In this case the Commonwealth has a pool of funding available which it has allocated to the provision of legal services to the Indigenous community as a part of its general legal aid programme for such activities. Detailed provision is made for how that funding is to be targeted consistent with the Commonwealth's programme objectives set out in the evidence before the Commission. This funding allocation is part of the Commonwealth's wider Legal Aid Services programme for the Indigenous community. In effect, in my opinion, the respondent bids for the available funding from the government. Presumably also, and by inference from the evidence, the provision of the services and the engagement of the staff of the respondent is entirely dependant on the continuation of this funding source.

43 What appears from these materials is that the funding arrangements for the provision of legal services to the Indigenous community seems to be a further refinement of existing funding arrangements. The Commonwealth describes the process in parts of the documents as a further "reform" of pre-existing funding arrangements. In my opinion the financial arrangement between the Commonwealth and the respondent is a variation of a funding model by which the Commonwealth clearly wishes to see improvements in the targeting of service delivery and greater accountability by the provider of these services. It does not fundamentally alter the character of the activities of the respondent itself. As opposed to for example, a private job agency that may participate in the provision of job search services, the respondent does not seek to provide on commercial terms which it sets, a service to the Commonwealth that it otherwise or also provides on commercial terms to others.

44 In my opinion, the characterisation of the respondent's activities as put by the applicant is to be preferred. I do not regard the provision of legal services by the respondent to the Indigenous community, in the terms of the activities of the respondent, as being a commercial business, trading or mercantile activity in the sense used in the authorities.

45 Accordingly the matter will be re-listed for hearing on the applicant's substantive claims.

2007 WAIRC 00491

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JAMES LAWRENCE
	APPLICANT
	-v-
	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 31 MAY 2007
FILE NO.	U 477 OF 2006
CITATION NO.	2007 WAIRC 00491

Result	Direction
Representation	
Applicant	Mr T Borgeest of counsel
Respondent	Mr D Parker of counsel

Direction

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and Mr D Parker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely by no later than 6 August 2007. Copies of any document(s) referred to by the witness are to be annexed to the witness statement.
2. THAT the respondent file and serve upon the applicant any signed witness statements upon which it intends to rely by no later than 13 August 2007. Copies of any document(s) referred to by the witness are to be annexed to the witness statement.
3. THAT the parties file and serve upon one another any signed witness statements in reply no later than 20 August 2007. Copies of any document(s) referred to by the witness are to be annexed to the witness statement.
4. THAT the parties have liberty to apply on short notice.

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

2007 WAIRC 00532

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JAMES LAWRENCE
	APPLICANT
	-v-
	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY 20 JUNE 2007
FILE NO/S	U 477 OF 2006
CITATION NO.	2007 WAIRC 00532

Result	Order
Representation	
Applicant	Mr T Borgeest of counsel instructed by Slater & Gordon
Respondent	Mr D Parker of counsel instructed by Blake Dawson Waldron

Order

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and Mr D Parker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, and by consent hereby orders –

1. THAT the directions of 31 May 2007 be and are hereby revoked.
2. THAT the dates of hearing presently listed for 27-31 August 2007 be and are hereby vacated.

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

2009 WAIRC 00474

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK JAMES LAWRENCE
	APPLICANT
	-v-
	ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA, INC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 23 JULY 2009
FILE NO/S	U 477 OF 2006
CITATION NO.	2009 WAIRC 00474

Result	Application discontinued by leave
Representation	
Applicant	In person
Respondent	Mr D Parker of counsel

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 are hereby discontinued by leave.

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

2009 WAIRC 00534

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER MASSANG
	APPLICANT
	-v-
	LEONARDO COPPENS (L P & S L BRICKPAVING & LANDSCAPING)
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 11 AUGUST 2009
FILE NO/S	B 52 OF 2009
CITATION NO.	2009 WAIRC 00534

Result	Application dismissed

Order

HAVING heard the applicant on his own behalf and Mr M Llewellyn on behalf of the respondent, the Commission, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the application be, and is hereby dismissed.

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

2009 WAIRC 00468

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROSEMARY AVALON MCSHANE
	APPLICANT
	-v-
	TUAN MANH NGUYEN & NGHI BOI PHUNG T/A JOES LUNCH BAR. TATE ST LUNCH BAR.
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 JULY 2009
FILE NO	U 92 OF 2009
CITATION NO.	2009 WAIRC 00468

Result	Application discontinued
Representation	
Applicant	Ms R A McShane
Respondent	Mr T M Nguyen

Order

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

AND WHEREAS on 8 June 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 8 July 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 discontinued.

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

2009 WAIRC 00556

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELA ORR
	APPLICANT
	-v-
	LINDA PLECAS - PLECAS NOMINEES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	TUESDAY, 11 AUGUST 2009
FILE NO	U 103 OF 2009
CITATION NO.	2009 WAIRC 00556

Result	Application discontinued
Representation	
Applicant	Ms A Orr
Respondent	Ms L Plecas

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 23 July 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 3 August 2009 that she wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued

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

2009 WAIRC 00524

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAX STAM
	APPLICANT
	-v-
	GREAT SOUTHERN GRAMMAR
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	5 AUGUST 2009
FILE NO	U 113 OF 2008
CITATION NO.	2009 WAIRC 00524

Result Application discontinued

Order

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

WHEREAS the applicant advised the Commission on 27 July 2009 that he wanted to discontinue the application; and

WHEREAS the parties have waived their rights to speak to the Minutes of Proposed Order pursuant to s.35(4) of the Industrial Relations Act 1979;

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

THAT the application be and is hereby discontinued.

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

2009 WAIRC 00459

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TANIA LEE SUTRISNO
	APPLICANT
	-v-
	DUMBLEYUNG DISTRICT CLUB INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 16 JULY 2009
FILE NO/S	B 157 OF 2008
CITATION NO.	2009 WAIRC 00459

Result Discontinued

Order

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

WHEREAS on 19 December 2008 the Commission advised the parties that a conference had been set down on 9 January 2009 for the purpose of conciliating between the parties; and

WHEREAS as the respondent claimed in its Notice of answer and counter-proposal lodged in the Commission on 22 December 2008 that the Commission lacked jurisdiction to deal with this matter the parties were advised on 23 December 2008 that the conference would deal with programming issues in relation to the issue of jurisdiction; and

WHEREAS at the conference on 9 January 2009 the parties were given directions in relation to filing and serving written submissions with respect to the issue of jurisdiction and on 12 January 2009 the Commission confirmed the directions in writing; and

WHEREAS on 2 February 2009 the respondent filed in the Commission its submissions with respect to the issue of jurisdiction; and

WHEREAS on 25 February 2009 the applicant filed her response to the respondent's submissions; and

WHEREAS as the applicant conceded in her response to the respondent's submissions that the Commission lacked jurisdiction to deal with this matter and as she stated that she would be lodging an application in another jurisdiction, on 25 February 2009 the Commission wrote to the applicant asking if she was seeking leave to discontinue this application; and

WHEREAS on 5 March 2009 the applicant advised the Commission that she would be discontinuing her application and the applicant was asked to lodge a Notice of Discontinuance form; and

WHEREAS as a Notice of discontinuance form was not lodged, on 3 April 2009 the Commission wrote to the applicant requesting advise as to when the Notice of Discontinuance would lodged; and

WHEREAS as there was no response to this request and as a Notice of Discontinuance form was not lodged in the Commission, on 16 June 2009 the Commission wrote to the applicant to advise that if she did not contact the Commission or lodge the Notice of Discontinuance form by the close of business on 30 June 2009 the matter would be listed for a show cause hearing as to why the matter should not be dismissed; and

WHEREAS on 26 June 2009 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 6 July 2009 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 00465

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE ANITA WILSON
	APPLICANT
	-v-
	RIVERTON ROSSMOYNE BOWLING AND RECREATION CLUB
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	TUESDAY, 14 APRIL 2009, THURSDAY, 9 JULY 2009
DELIVERED	MONDAY, 20 JULY 2009
FILE NO.	U 29 OF 2009
CITATION NO.	2009 WAIRC 00465

Catchwords	Industrial law – Termination of employment – Harsh, oppressive or unfair dismissal – Whether the Commission has jurisdiction – Trading corporation – Principles applied - Applicant's claim beyond jurisdiction of Commission – Industrial Relations Act, 1979 (WA) s 29(1)(b)(i); Workplace Relations Act 1996 (Cth) s 16; Commonwealth Constitution s 51(xx); Fair Work Act 2009 s 26 (Cth).
Result	Application dismissed for want of jurisdiction.
Representation	
Applicant	Mr P MacFarlane as agent
Respondent	Mr G McCorry as agent

Reasons for Decision

1 The present application is made pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act") by which the applicant alleges that on or about 28 January 2009 she was unfairly dismissed from her position as bar manager with the respondent.

2 It is asserted by the applicant in her notice of application that she was unfairly dismissed as a consequence of raising concerns regarding inappropriate behaviour by patrons at the respondent club. The applicant seeks re-instatement.

3 The respondent by its notice of answer and counter-proposal does not descend to any factual allegations concerning the applicant's conduct or performance, rather, asserts that it is a trading corporation and thus as a consequence of the operation of s 16 of the Workplace Relations Act 1996 (Cth) ("the WR Act") the applicant's claim is beyond the jurisdiction of this Commission.

4 The issue of jurisdiction was listed for hearing and determination as a preliminary issue.

Jurisdiction

5 At the conclusion of the hearing, after considering the submissions of the parties and the evidence adduced, the Commission announced its decision dismissing the application for want of jurisdiction with detailed reasons to follow. These are those reasons.

6 The question of whether the respondent is or is not a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution is pivotal. Evidence in relation to this issue was adduced through Mr O'Brien who is the President of the respondent. Mr O'Brien referred to the activities of the respondent club and in particular referred to attachments A and B to the notice of answer and counter proposal, which were tendered as A1 and A2 respectively. Exhibit A1 is a copy of a duplicate certificate of change of name under the Associations Incorporation Act 1895-1969, referring to the respondent as an incorporated body under that legislation.

7 In particular, Mr O'Brien testimony was directed to the trading activities engaged in by the respondent in exhibit A2, which were income and expenditure statements from May 2008 to March 2009, an independent auditor's report to members of the respondent, and profit and loss previous year comparisons for the years May 2007 to April 2008 and May 2006 to April 2007 respectively.

8 In terms of the respondent's trading activities, Mr O'Brien testified that bar takings were the predominant source of income for the respondent. He said that the bar operations at the respondent were like any normal bar facility where beer, wine and soft drinks were sold in addition to other items. The prices were set by the committee at above cost price in order to ensure a commercial return for the respondent. It is to be noted that for the period May 2008 to March 2009 bar takings represented some $160,380 of a total income of some $288,250 for that year. Mr O'Brien also referred to other income as set out in exhibit A2 including a grant of about $9,500 from the City of Canning which apparently is a recurring grant. Other revenue referred to were bingo receipts, VLT receipts, catering receipts and various functions receipts of relatively smaller sums not exceeding on the income and expenditure statements about $7,000. Mr O'Brien also explained to the Commission the other income for the club by way of match committee fees, green fees and alike.

9 According to Mr O'Brien, generally, the respondent anticipates a total income of about $300,000 from these various activities each year. It is to be noted that for the years 2006-2007, and 2007-2008, bar takings were by far and away the greatest contributor to revenue for the respondent.

10 For example according to exhibit A2, for the period May 2008 to March 2009, bar takings represented nearly 59% of the respondent's total revenue. A similar proportion of revenue was represented by bar takings in the previous years contained in exhibit A2.

11 I find accordingly.

Consideration

12 The agent for the applicant argued that because the respondent was a club and was formed for the purposes of and existed for the benefit of its members, it was not a trading corporation. On the other hand, the agent for the respondent argued that the level of trading activity engaged in by the respondent was so significant that it ought to be properly characterised as a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

13 The respondent is plainly a corporation. Whether it is a trading or financial corporation is a matter of fact and agree. Most recently the relevant principles in relation to characterising a corporation as a trading or financial corporation were considered in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No. 2)* (2008) 252 ALR 136. In this decision, the Industrial Appeal Court, on appeal from a decision of the Full Bench of the Commission, considered whether the appellant in those proceedings was a trading corporation for the purposes of s51 (xx) of the Commonwealth Constitution. The leading judgement in the majority was that of Steytler P with whom Pullin J agreed. Steytler P referred to the five frequently cited judgements of the High Court in relation to the tests as to whether a corporation should be classified as a trading incorporation. After considering the relevant High Court judgements, Steytler P summarised the relevant principles at par 68 as follows:

> "The more relevant (for present purposes) principles that might be drawn from these and other cases are as follows:
>
> (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* at CLR 239; *State Superannuation Board* at CLR 303–4; *Tasmanian Dam case* (at CLR 156, 240, 293; *Quickenden* at (49)-(51), (101); *Hardeman* at [18].
>
> (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* at CLR 208, 234, 239; *State Superannuation Board* at CLR 303–4; ALR 14–15; *Hughes v Western Australian Cricket Assn Inc* (1986) 19 FCR 10 at 20 ; 69 ALR 660 at 671 (*Hughes*); *Fencott* at CLR 622; *Tasmanian Dam case* at CLR 156, 240, 293; *Mid Density* at FCR 584; *Hardeman* at [22].
>
> (3) In this context, "trading" is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* at ALR 624, 644; FLR 139, 159–60; *Adamson* at CLR 235; ALR 474; *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 184–5 and 203 ; 40 ALR 609 at 618 and 635; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325 at 330 ; 59 ALR 334 at339,4 IPR 467 at 472; *Quickenden* at (101).
>
> (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* at CLR 539, 563, 569; *Ku-ring-gai* at ALR 625, 645; FLR 140, 167; *Adamson* at CLR 219; *E* at FCR 343, 345; *Pellow* at [28].
>
> (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* at CLR 543; *Ku-ring-gai* at ALR 643; FLR 160; *State Superannuation Board* at CLR 304–6; *E* at FCR 343. Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not

necessarily exclude the categorisation of those activities as "trade": *St George County Council* at CLR 543 per Barwick CJ; *Tasmanian Dam case* at CLR 156; per Mason J.

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

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* at CLR 294–5, 304; *Fencott* at CLR 588–9, 602, 611, 622–4; *Hughes* at FCR 20; *Quickenden* at (101); *E* at FCR 344; *Hardeman* at [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* at CLR 209, 211; *Ku-ring-gai* at ALR 624, 627-8, 643, 648, FLR 139, 142, 160, 167; *Bevanere* at FCR 330; *Hughes* at FCR 19–20; *E* at FCR 343; *Fowler*; *Hardeman* at [26]."

14 The fact that a corporation is a club formed for the purposes of the promotion of a particular sport or activity for the benefit of members, is not fatal to the conclusion that the corporation is a trading corporation for the purpose of s51 (xx) of the Commonwealth Constitution. This issue was the subject of consideration by High Court in one of the judgements considered by Steytler P in *Aboriginal Legal Service.* In *The Judges of the Federal Court of Australia and another; ex parte The Western Australian National Football League (Inc) and another* [1978-1979] 143 CLR 190 *("Adamson").* At issue *Adamson* was whether the Nation Football League and a Western Australian football club were trading corporations. The High Court, after considering previous authority in relation to the characterisation of a corporation as a trading or financial corporation, and the activities of the league and the club respectively, concluded by majority (Barwick CJ, Mason, Jacobs and Murphy JJ; Gibbs, Stephen and Aickin JJ dissenting) that the league and clubs were trading corporations within both s 51(xx) of the Commonwealth Constitution and s 6 of the Trade Practices Act 1974 (Cth) respectively.

15 In considering this issue, Mason J examined the activities of the West Perth Football Club and observed as follows at 236:

> "West Perth derives income from two main sources: First, from the operations from it's football team in the competition run by the WA League; secondly, from various trading activities which it conducts. The first form of income includes the distribution received by it as a member club of the WA League and membership fees for admission to matches in which its teams participate. The second source of income is from bar trading and catering. Its gross income from bar trading was (1976) $116,277(1977) $139,644. Its net profit on trading in those years was (1976) $41,087 (1977) $49,925. A third and minor source of income is revenue from the sale of club ties, objects and souvenirs.
>
> The fact that West Perth is a club and that therefore its sales of liquor and food are largely made to members does not in my view affect its character as a trading corporation. There is no reason why an incorporated club which is heavily involved in trading activities should not be held to be such a corporation, despite the fact that its trading activities are related to its character as a club and that it provides social functions, amenities and services for its members".

16 In my opinion, the same considerations as dealt with in *Adamson* apply in this case. I have no doubt from the evidence before the Commission, that the trading activities engaged in by the respondent are substantial and significant as to warrant its characterisation as a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution. The fact that the club exists for the benefit of its members, and the trading activities are no doubt engaged largely in by its members, does not, as Mason J in *Adamson* outlines, mean that the corporation cannot be a trading corporation. The focus must largely be on the current activities undertaken by the corporation.

17 On this basis, the Commission concluded after having heard the evidence and the submissions that the respondent was a trading corporation. Thus for the purposes of either or both of s 16 of the WR Act and s 26 of the Fair Work Act 2009 (Cth) this Commission's jurisdiction is precluded.

18 Accordingly, an order dismissing the application for want of jurisdiction was made.

2009 WAIRC 00466

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE ANITA WILSON
	APPLICANT
	-v-
	RIVERTON ROSSMOYNE BOWLING AND RECREATION CLUB
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 20 JULY 2009
FILE NO/S	U 29 OF 2009
CITATION NO.	2009 WAIRC 00466

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr P MacFarlane, as agent
Respondent	Mr G McCorry, as agent

Order

HAVING heard Mr P MacFarlane as agent on behalf of the applicant and Mr G McCorry as agent 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 J KENNER,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Diane Kenney	Mr Carlo Calogero, State Manager NDS WA	U 33/2009	Commissioner S J Kenner	Discontinued
Dianne Bennett	Gosnells Armadale Business Development Organisation Inc	U 145/2008	Chief Commissioner A R Beech	Discontinued
Mr Jeremy Stein	Rottnest Express	U 2/2009	Chief Commissioner A R Beech	Discontinued
Peter Michael Taliangis	Swan Districts Football Club (Inc)	U 26/2009	Commissioner S J Kenner	Discontinued
Peter Michael Taliangis	Swan Districts Football Club (Inc)	B 26/2009	Commissioner S J Kenner	Discontinued
Richard Charles Mason	Scotch College	U 142/2008	Commissioner S J Kenner	Discontinued
Simon Estall	Automasters Welshpool	U 76/2009	Commissioner S J Kenner	Discontinued
Simon Estall	Automasters Welshpool	B 76/2009	Commissioner S J Kenner	Discontinued
Tony Matson	Jeff Miller Civil Contractors Federation	U 87/2009	Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2009 WAIRC 00061

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

THE COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S J KENNER

DATE WEDNESDAY, 11 FEBRUARY 2009

FILE NO. PSAC 3 OF 2009

CITATION NO. 2009 WAIRC 00061

Result	Recommendation issued
Representation	
Applicant	Mr S Farrell
Respondent	Mr P Budd

Recommendation

WHEREAS on 10 February 2009 the applicant made application under s 44 of the Industrial Relations Act 1979 ("the Act") for a conference in relation to a dispute between it and the respondent concerning a member of the applicant Ms Stoddart;

AND WHEREAS a compulsory conference was convened by the Public Service Arbitrator (the Arbitrator") on 11 February 2009 during which the parties informed the Arbitrator that the matters in dispute involved the transfer of Ms Stoddart from her substantive position as a Store Supervisor at Casuarina Prison to other duties, as a consequence of allegations made regarding workplace incidents;

AND WHEREAS the Arbitrator was informed that following a period off work the parties, following meetings between themselves, reached an agreement on or about 2 February 2009 that Ms Stoddart return to work in the stores department at Casuarina Prison, subject to working in accordance with a performance management plan;

AND WHEREAS subsequently on 9 February 2009, the applicant and Ms Stoddart were informed by the respondent that following a reconsideration of the circumstances Ms Stoddart would not return to the stores area but alternatively, to an administration position and work in accordance with a performance management plan;

AND WHEREAS the applicant claims that the respondent has denied Ms Stoddart procedural fairness in dealing with the allegations against her and has pre-emptively transferred her from her substantive position which has caused her prejudice and distress, while the respondent maintains that the transfer is in the interests of Ms Stoddart's welfare in all the circumstances;

AND WHEREAS the Arbitrator indicated to the parties that it would make a recommendation in relation to the matters presently in dispute;

NOW THEREFORE the Arbitrator having regard for the public interest and the interests of the parties directly involved and to prevent any further deterioration in industrial relations in respect of the matters in dispute, pursuant to the powers vested in it by the Act hereby recommends –

THAT the respondent return Ms Stoddart to her substantive position in the stores area at the Casuarina Prison and a performance management plan be implemented in the terms as agreed between the parties on 2 February 2009.

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

2009 WAIRC 00454

DISPUTE RE DISCIPLINARY ACTION OF RESPONDENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPELLANT
	-v-
	THE DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS CHILD AND ADOLESCENT COMMUNITY HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	TUESDAY, 14 JULY 2009
FILE NO	PSAC 11 OF 2008
CITATION NO.	2009 WAIRC 00454

Result	Consent Order Issued
Representation	
Applicant	Mr D Ellis
Respondent	Mr P Heslewood

Consent Order

WHEREAS this is an application lodged in the Commission on 29 May 2008 pursuant to section 44 of the Industrial Relations Act 1979; and

WHEREAS the Commission convened conferences on 18 June 2008, 3 October 2008, 16 April 2009 and 30 June 2009; and

WHEREAS at the conference on 30 June 2009 the parties indicated that an agreement in respect of this application had been reached in the following terms:

1. **Sunset clause**

   In respect of the letter from Mr M Morrisey to Mr G Elsdon of 20 February 2008 the parties agree the following words will be added to Mr Elsdon's personal file:

   > "This annotation is to ensure that the letter referred to, which provides a 'First and Final Warning' in relation to Mr Elsdon's conduct, is clearly understood to have no validity after the expiration of a four year period commencing 1 October 2006."

2. **Mr Elsdon's reclassification**

   In keeping with the outcome of agreed processes, the position of Administrative Coordinator, No 005027, level 6, Population Health, occupied substantively by Mr Elsdon, is to be reclassified to level 7, with effect from 1 July 2005.

3. **Transfer of Mr Elsdon to another area**

   Due to restructuring and other events, Mr Elsdon is to be transferred to the Public Health and Ambulatory Care Unit, North Metropolitan Health Service, No 005880 level 7. This transfer is to take effect from the date of the Western Australian Industrial Relation Commission order.

NOW THEREFORE pursuant to the powers under s44(8)(a) of the Act, and by consent, I hereby order that:

1. The abovementioned notation be added to Mr Elsdon's personal file
2. The position of Administrative Coordinator, No 005027, level 6, Population Health, occupied substantively by Mr Elsdon, be reclassified to level 7, with effect from 1 July 2005.
3. Mr Elsdon be transferred to position No 005880, level 7 in Public Health and Ambulatory Care Unit, North Metropolitan Health Service effective from the date of this order.

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

2009 WAIRC 00411

DISPUTE RE ALLEGED MISCONDUCT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) **APPLICANT** **-v-** THE DIRECTOR GENERAL OF HEALTH IN RIGHT OF THE MINISTER FOR HEALTH AS SIR CHARLES GAIRDNER HOSPITAL **RESPONDENT**
CORAM	COMMISSIONER P E SCOTT PUBLIC SERVICE ARBITRATOR
DATE	THURSDAY, 25 JUNE 2009
FILE NO.	PSAC 4 OF 2009
CITATION NO.	2009 WAIRC 00411

Result	Direction issued

Direction

WHEREAS on 17 February 2009 the applicant filed an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) claiming that the investigation process adopted by the respondent into two sets of allegations made against its member, Mr Shane Power, was harsh, unfair and oppressive. The first set of 16 allegations was raised with Mr Power of 22 September 2008, and prior to the resolution of those allegations, on 11 February 2009, the respondent raised a second set of 48 further allegations with Mr Power;

AND WHEREAS on 26 February and 3 March 2009 the Public Service Arbitrator (the Arbitrator) convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the latter conference, it was agreed that:

(1) The respondent would investigate the first set of 16 allegations before considering how to proceed with the second set;

(2) if the initial 16 allegations were resolved in a satisfactory manner, the second set of allegations would be investigated less formally or may not be pursued at all;

(3) Mr Power would cooperate with the investigation to the best of his ability, given that he was being treated by his medical practitioner for stress;

(4) a time would be set for the investigator to meet with Mr Power; and

(5) a further report back conference would be convened as necessary.

AND WHEREAS following correspondence from the applicant to the Arbitrator to the effect that the investigation was not being progressed at a reasonable pace, the Arbitrator convened a further conference on Thursday 25 June 2009;

AND WHEREAS at the conference on the 25 June 2009 the Arbitrator was advised that;

(1) The investigator had met with Mr Power and then concluded his final report in respect of the first set of 16 allegations, that report had been provided to the respondent on the 21 May 2009, and that within the next day or two of the conference, the respondent through the Executive Director, Doctor Amanda Ling, would formally advise Mr Power that nine of the 16 allegations contained within the first set of allegations had been sustained;

(2) The respondent now intended to proceed with the investigation of the second set of 48 allegations;

(3) No decision would be taken as to the appropriate action in respect of Mr Power until the conclusion of the investigation into the second set of allegations;

AND WHEREAS the Arbitrator expressed concern at the time taken for the first set of allegations to be dealt with and in particular that more than five weeks had elapsed from the time the respondent received the investigator's final report into that first set of allegations until the day of the conference and noted that whilst the processes and the levels through which such matters were required to proceed within the public sector formal processes that some greater certainty and a more expeditious process would be helpful;

AND WHEREAS the Arbitrator also expressed concern at the prospect that whilst the respondent might intend to provide Mr Power with formal notice of the outcome of the investigation into the first set of the allegations within the next day or so that it may be appropriate to formally direct the respondent to ensure that this occurred;

AND WHEREAS the Arbitrator sought the parties' responses to the prospect of directions issuing:

(1) to deal with the timing of the formal notification to Mr Power; and

(2) to require the respondent's representative to liaise with the applicant's representative and Mr Power, and with the respondent's officers including the investigator and decision makers for the purpose of advising the Arbitrator within seven days of the conference as to a timeline for the investigation and decision relating to the second set of allegations, with a view to a direction being issued to reflect an appropriate timeline;

AND WHEREAS the parties expressed their views about those matters and those views were considered by the Arbitrator.

AND WHEREAS the Arbitrator is of the opinion that it is appropriate, pursuant to the powers set out in s 44(6)(ba) of *the Act* to issue the following directions for the purposes of preventing the deterioration of industrial relations, encouraging conciliation to resolve the matter and encouraging the parties to exchange or divulge attitudes or information which, in the opinion of the Arbitrator would assist in the resolution of the matter in question.

NOW THEREFORE, the Arbitrator hereby directs:

(1) That no later than 5pm on Friday the 26th day of June 2009 the respondent shall formally advise Mr Shane Power of the outcome of its investigation into the first set of 16 allegations made against him including providing a copy of the findings in respect of those allegations, and shall advise of Mr Power or its intentions arising from its investigations.

(2) In respect of the process of the investigation of the second set of allegations, the respondent shall confer with the applicant and Mr Power, the investigator appointed to investigate those allegations, and with its decision makers for the purpose of preparing a timeline to be applied to the investigation and decision as to the second set of allegations.

(3) The respondent shall advise the Arbitrator and the applicant by no later than midday on Thursday the 2nd day of July 2009 as to the timeline resolved as a result of those consultations with a view to the Arbitrator issuing that timeline in the form of a direction to the parties for the purpose of the investigation being conducted and concluded in accordance with that timeline.

(4) Further the Arbitrator's intention is that should any aspect of the timeline be unable to be complied with then the respondent should report to the Arbitrator as to the reason for non compliance and seek amendment of the direction accordingly.

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

2009 WAIRC 00477

DISPUTE RE TERMINATION OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 24 JULY 2009
FILE NO/S	C 10 OF 2009
CITATION NO.	2009 WAIRC 00477

Result	Application discontinued by leave
Representation	
Applicant	Mr M Aulfrey
Respondent	Ms M Rinaldi

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.

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

2009 WAIRC 00461

DISPUTE RE REPRIMAND AND A REDUCTION OF REMUNERATION OF UNION MEMBER.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	GOVERNING COUNCIL, CENTRAL WEST TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 17 JULY 2009
FILE NO/S	C 44 OF 2008
CITATION NO.	2009 WAIRC 00461

Result	Order issued
Representation	
Applicant	Mr M Amati (by way of written submissions)
Respondent	Ms M Rinaldi (by way of written submissions)

Order

WHEREAS on 23 December 2008 the State School Teachers' Union of W.A. (Incorporated) ("the applicant") applied to the Commission for a conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") in relation to a dispute over the Governing Council, Central West TAFE ("the respondent") imposing both a reprimand and a reduction of remuneration on one of the applicant's members; and

WHEREAS on 19 February 2009 and 9 March 2009 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS at the conference held on 9 March 2009 the parties reached a confidential settlement with respect to this matter; and

WHEREAS at the conference the applicant requested the respondent reimburse it for the cost of transcribing interviews undertaken with respect to the respondent's investigation into the complaint made against the applicant's member and the respondent's representative undertook to obtain instructions with respect to this request; and

FURTHER the parties agreed that if the issue of the payment of the cost of transcribing interviews remained in dispute subsequent to the confidential settlement being reached between the parties this issue would be arbitrated pursuant to s 44(12a) of the Act; and

WHEREAS on 19 March 2009 the respondent advised the Commission that it was not prepared to reimburse the costs incurred by the applicant for transcribing the interviews undertaken as part of the investigation into the complaint made against the applicant's member; and

WHEREAS on 25 March 2009 the parties consented in writing to the dispute about the reimbursement of the cost incurred by the applicant for transcribing the interviews undertaken as part of the investigation being determined by the Commission pursuant to s 44(12a) of the Act; and

WHEREAS the applicant is seeking the issuance of the following order:

> "THAT within 7 days, the respondent pay the sum of $1,178.10 to the applicant; this money being expenses incurred by the applicant in the transcription of the digital compact-disk recording of the witnesses' interviews."; and

WHEREAS on 1 and 22 May 2009 the applicant filed the following submissions in support of its claim that the respondent reimburse the applicant for the costs incurred by it for transcribing the interviews:

- the circumstances of this case are unusual or extreme warranting an order of costs against the respondent and this application for an order for costs is consistent with s 26(1)(a) and (c) of the Act and the objects of the Act, in particular s 6(ca);
- the respondent provided an abridged copy of the report completed as part of the investigation with respect to the complaint against the applicant's member following a written request by the applicant dated 17 October 2008 and it was necessary for the applicant to transcribe the interviews of persons interviewed as part of the investigation to verify the veracity of the conclusions reached by the investigator;
- the applicant and its member required the information contained in the interviews to prepare its case and rebut the accusations made by the respondent during Commission proceedings;
- the interviews contained on the transcript did not support the findings made by the investigator that the applicant's member had done anything wrong;
- the précis of the evidence provided in the investigator's report was misleading given the verbatim evidence contained in the transcription of the interviews;
- the conclusions reached by the investigator are questionable given that the evidence of witnesses involved in the dispute was not transcribed;
- it is a long-standing practice with respect to cases of this nature that written copies of interviews conducted during an investigation into a disciplinary matter be provided by the employer and employees subject to these proceedings should not bear these transcription costs;
- regulation 4(4) of the *Industrial Relations Commission Regulations 2005* ("the Regulations") requires that documents filed or lodged under the Act or the Regulations must be written or typed;
- administrative processes should be reviewable and in cases such as this claim the onus is on the employer to demonstrate its case based on accessible and reviewable evidence;
- an employee is denied natural justice and procedural fairness when witness statements relevant to a disciplinary report are not included in an investigation report; and

WHEREAS on 15 May 2009 the respondent filed the following submissions opposing the applicant's claim that the respondent reimburse the applicant for the costs incurred in transcribing the interviews undertaken as part of its investigation into the complaint made against the applicant's member:

- parties should be responsible for their own costs except in extreme circumstances and the costs involved in the preparation of the applicant's case does not constitute an extreme or exceptional circumstance in this instance;
- discovery of relevant evidence prevents an 'ambush' at hearing and as this matter was not set down for hearing the necessity for the transcription of the interviews to be provided was premature;
- all relevant documents in the respondent's possession were provided to the applicant and a party is not bound to create a document it does not possess;
- the translation of the interviews was a matter for the applicant to decide to undertake;
- the interviews conducted by the investigator were reviewable given the recording of these interviews was provided to the applicant and the respondent's administrative processes were therefore subject to review;

- an investigation report does not always contain "word for word" all of the evidence considered by the investigator nor is it the respondent's custom and practice to produce full transcripts of evidence gathered as part of an investigation conducted by it and all interviews undertaken are not always recorded;
- the Regulations as referred to by the applicant do not apply to transcripts of interviews;
- the applicant has not suffered any prejudice by the non-provision of the transcript of interviews undertaken with respect to the investigation; and

WHEREAS after the above submissions were lodged, as it was unclear to the Commission which disciplinary processes and procedures the respondent utilised in order to investigate the complaint against the applicant's member the parties were asked to attend a conference on 4 June 2009 to provide details about the nature of the investigation and copies of relevant correspondence generated with respect to this investigation; and

WHEREAS at this conference the parties confirmed that the following processes and procedures were adopted by the respondent when dealing with the complaint made against the applicant's member:

1. the complaint was treated as a potential breach of discipline under the respondent's Discipline Policy (Stage 2) and this policy is provided for under Clause 25 of the *Western Australian TAFE Lecturers' Certified Agreement 2005* ("the Agreement");
2. the Discipline Policy provides the following:
   (a) a formal investigation is to take place which is "an objective search for the truth", if the Managing Director believes it is warranted, which occurred in this instance;
   (b) after the Managing Director receives the investigator's report and if he or she is of the opinion that the allegation against an employee is substantiated the Managing Director will, having regard to a number of relevant factors, including input from the employee concerned, decide what if any action is to be taking which may include:
      (i) a written reprimand;
      (ii) the employee's termination; and/or
      (iii) any other lawful action;
   (c) the employee is then notified of the Managing Director's decision and any action to be taken and the reasons for reaching this decision and the employee concerned is to be provided with an opportunity to comment on the decision and the proposed action;
   (d) guidelines for investigators in the Discipline Policy provide that comprehensive notes are to be taken during interviews and "Ideally, interviews should to (sic) be recorded and transcribed." and "Witnesses (sic) statements are to be signed by the witnesses (where possible), after the witnesses (sic) believe they are true and accurate reflections of information provided during the interview.";
   (e) the investigator's report is to contain, where possible, a range of information, including, inter alia copies of transcripts; and

WHEREAS the investigator's report, dated 6 October 2008, contains summaries of evidence given by a number of witnesses and reaches conclusions based on the recorded interviews; and

WHEREAS no signed witness statements were included as attachments to the investigator's report nor was a transcript made of the interviews conducted by the investigator; and

WHEREAS as part of the events leading up to the respondent determining that the applicant's member should be disciplined, the respondent advised the applicant's member on 16 October 2008 that following the receipt of the investigator's report the respondent intended to reprimand him and reduce his salary by one salary grade and the applicants' member was given the opportunity "to provide a written submission concerning the proposed action"; and

WHEREAS the applicant requested access to a copy of the investigator's report on 17 October 2008 and this was provided to the applicant's member on 22 October 2008; and

WHEREAS a response was provided to the respondent by the applicant on behalf of its member on 31 October 2008; and

WHEREAS the dispute between the applicant and the respondent was then referred to the Commission on 23 December 2008; and

WHEREAS arising out of conciliation proceedings a digital copy of the interviews the investigator conducted was provided to the applicant and its member in March 2009; and

WHEREAS as previously indicated, on 9 March 2009 the parties reached a confidential settlement with respect to this matter with the exception of the issue of costs; and

WHEREAS subsequent to the conference held on 4 June 2009 the parties were given the opportunity to make further submissions with respect to the dispute about the cost of transcribing the interviews; and

WHEREAS on 18 and 25 June 2009 the applicant made the following additional submissions:

- the applicant relies on Clause 25 of the Agreement which specifies that an employee who is subject to disciplinary proceedings is to be afforded procedural fairness and natural justice and the applicant maintains that the respondent breached these requirements by suspending its member before giving him a reasonable opportunity to respond to the complaint made against him and by not notifying its member that an investigation was to take place and the consequences of such an investigation;

- the applicant maintains that the reasoning applied by Smith SC in *Civil Service Association of Western Australia Incorporated v Director General, Department of Education and Training* (2008) 89 WAIG 220 is relevant as this decision supports the applicant's claim that an employee against whom complaints have been made should have access to the evidence relied upon, not an abridged summary of evidence, to verify whether the findings made against him or her are appropriate;
- the applicant argues that the evidence referred to above should be accessible and therefore in written form; and

WHEREAS on 18 and 25 June 2009 the respondent made the following additional submissions:

- the respondent conducted its investigation under the requirements of the Discipline Policy which was superseded in part by policies and practices within the Department of Education and Training's Standards and Integrity Directorate;
- the applicant's member was afforded procedural fairness at all times during the disciplinary process;
- it was appropriate for the respondent to rely on the contents of the investigator's report when deciding on the course of action to undertake;
- all elements of the respondent's Discipline Policy were adhered to when dealing with the complaint against the applicant's member and the applicant and its member were provided with a copy of this report prior to any penalty being imposed on the applicant's member as a result the authority contained in *Civil Service Association of Western Australia Incorporated v Director General, Department of Education and Training* (op cit) is not relevant to this case;
- the applicant and its member has not suffered any prejudice due to the lack of provision of the transcript; and

WHEREAS the Commission is of the view that the issue before it is an industrial matter as it relates to a dispute about a "matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein"; and

WHEREAS after considering the submissions of the parties and the events and documentation relevant to this matter I am of the view that the applicant be reimbursed by the respondent for the costs it incurred in transcribing interviews undertaken with respect to the respondent's investigation into the complaint made against the applicant's member; and

WHEREAS I have reached this decision on the basis that it is my view that the applicant's member was denied natural justice and procedural fairness when he was not provided with a written copy of the interviews conducted by the investigator, which formed the basis of the findings made by the investigator, prior to being required to respond to the respondent's decision that he had committed a breach of discipline and that as a result he be subject to a penalty; and

WHEREAS I am also of the view that the applicant and its member should have had the benefit of a transcript of the interviews conducted by the investigator notwithstanding the fact that the respondent had already determined that the applicant's member be subject to sanctions; and

WHEREAS in reaching this conclusion I have taken into account the following:

- even though the applicant transcribed the interviews undertaken by the investigator of its own volition after the applicant's member had been notified that the respondent intended to impose sanctions against the applicant's member and subsequent to the applicant's member being given an opportunity to be heard with respect to the proposed sanctions I accept that the applicant and its member required details of the evidence given by the persons who were interviewed as part of the investigation in order to properly scrutinise and respond to the findings made by the investigator as part of the appeal process against the respondent's decision to impose sanctions against the applicant's member;
- in any event I am of the view that the respondent should have provided a copy of the interviews conducted by the investigator as part of the report provided to the applicant's member on 22 October 2008 as it is my view that the applicant's member was disadvantaged and was not in a position to properly respond to the respondent's view that he had committed a breach of discipline and as a result be subject to sanctions;

  Specifically:

  (i) I find that as a result of the applicant's member not being provided with a copy of the transcript of interviews the applicant and its member were unable to properly analyse and scrutinise the basis upon which the investigator and the respondent concluded that the applicant's member had committed a breach of discipline;

  (ii) in correspondence to the respondent on behalf of its member dated 31 October 2008 in response to the respondent's decision to impose sanctions against the applicant's member, the applicant complained that the investigator's report failed to provide verbatim accounts of the evidence given by witnesses without reference to the questions being asked and claimed that as a result the applicant's member was at a disadvantage and in my view this omission is a relevant and important consideration which would have been cured by the inclusion in the report of the transcripts of interviews undertaken by the investigator;

  (iii) the guidelines given to the investigator in the Discipline Policy refer to the desirability of interviews conducted as part of an investigation being recorded and transcribed which did not occur in this instance;

(iv) there is an onus on the respondent to act fairly towards the applicant's member when making decisions affecting his rights and interests subject only to a contrary statutory intention and in my view the applicant's member was treated unfairly when he was not provided with a copy of the transcript of evidence prior to responding to the respondent's determination that he had committed a breach of discipline and as a result should be subject to sanctions (see *Kioa v West* [1985] HCA 159 CLR 550; and

WHEREAS the Commission is of the view that in the circumstances and given the objects of the Act and equity and fairness it is appropriate that an order issue that the applicant be reimbursed by the respondent for the costs incurred for transcribing the interviews undertaken as part of the respondent's investigation into the complaint made against the applicant's member;

NOW THEREFORE having heard Mr M Amati by way of written submissions on behalf of the applicant and Ms M Rinaldi by way of written submissions on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s 44(12a), hereby orders:

THAT the respondent pay the applicant $1,178.10 as reimbursement of the costs incurred by the applicant for transcribing interviews relevant to the investigation into the complaint made against the applicant's member, within seven (7) days of the date of this order.

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

2008 WAIRC 00410

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 10 JULY 2008
FILE NO.	C 23 OF 2008
CITATION NO.	2008 WAIRC 00410

Result	Recommendation and Direction Issued.
Representation	
Applicant	Ms T Borwick
Respondent	Mr J Welch

Recommendation and Direction

WHEREAS the applicant on 9 July 2008 made an application to the Commission for an urgent compulsory conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act");

AND WHEREAS on 10 July 2008 an urgent compulsory conference was convened by the Commission at which the Commission was informed that industrial action was being engaged in by the respondent and its members, employees of the applicant, in the form of a ban on overtime in prisons throughout the State;

AND WHEREAS the Commission was informed that the parties are in dispute in relation to a range of issues but in particular the shortage of Prison Officers to adequately staff prisons and the claim by the respondent for the payment of overtime at double time rates of pay to act as an incentive to obtain adequate staff coverage;

AND WHEREAS the Commission was informed that the parties have been in negotiations for some months and have been unable to resolve the issues in dispute;

AND WHEREAS at the conference the Commission informed the parties that it would make recommendations in relation to the issues and dispute in an endeavour to assist in the resolution of the matters before the Commission;

NOW THEREFORE the Commission pursuant to the powers conferred by s 44 of the Act hereby:

(1) RECOMMENDS that each of the employees of the applicant members or eligible to be members of the respondent who are engaged in industrial action by way of the imposition of overtime bans concerning matters the subject of these proceedings, cease such industrial action and thereafter work in accordance with their contracts of service and refrain from commencing or taking part in further industrial action in respect of this matter.

(2) RECOMMENDS that the applicant consider and respond by Monday 14 July 2008 to the respondent's request for overtime worked to be regarded as "major emergency duty" for the purposes of clauses 13.1 and 13.4(2) of the Prison Officers Award ("the Award") as an interim measure pending the resolution of the matters in dispute.

(3) DIRECTS that the issue of staffing levels, payment of overtime and related issues be the subject of further conciliation before the Commission on dates to be fixed.

(4) DIRECTS that the applicant inform the Commission and the respondent of efforts being undertaken to increase staffing resources for prisons pursuant to clause 15 – Management of Musters of the Award within seven days.

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

2008 WAIRC 01000

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 AUGUST 2008
FILE NO.	C 23 OF 2008
CITATION NO.	2008 WAIRC 01000

Result	Statement and Direction Issued
Representation	
Applicant	Ms T Borwick
Respondent	Mr J Welch

Statement and Direction

On 9 July 2008 the applicant sought an urgent conference under s 44 of the *Industrial Relations Act 1979* ("the Act"). As a consequence of that application an urgent compulsory conference was convened by the Commission on 10 July 2008.

The application for an urgent compulsory conference concerned industrial action being undertaken by prison officers, members of or eligible to be members of the respondent. Whilst a number of issues were raised in the proceedings before the Commission on 10 July 2008, it was evident that the primary issue in dispute was, and is, the current numbers of employed prison officers falling short of the authorised staffing levels of prisons in the State and means by which those shortages can be remedied.

As a consequence of the compulsory conference on 10 July 2008 the Commission issued a Recommendation and Direction to the effect that the industrial action by way of overtime bans be lifted, the parties further confer, and there be further conciliation before the Commission in relation to the matters in dispute.

Subsequently the overtime bans were lifted in response to the Commission's Recommendation and further compulsory conferences took place on 17, 22 and 31 July 2008. During these compulsory conferences a broad range of issues were canvassed in an endeavour to alleviate staffing pressures caused by the current shortage of prison officers in metropolitan and regional prisons.

As a consequence of the compulsory conference before the Commission on 31 July 2008 the respondent seeks interim orders of the Commission under s 44(6)(ba) of the Act, by way of additional overtime payments on a limited trial basis, in an endeavour to create an incentive for the prison officers to work reasonable overtime shifts.

As a consequence of the conference proceedings on 31 July 2008 the Commission will consider whether such interim orders should be made and if so, the terms of any such orders in order to prevent any further deterioration of industrial relations in respect of the matters in dispute between the parties.

To facilitate the consideration of the respondent's claim for interim orders the Commission, pursuant to the powers conferred on it under the Act, hereby directs:

1. THAT the respondent file and serve the form of interim orders sought by 4pm 1 August 2008.

2. THAT the respondent file and serve written submissions in support of the interim orders sought by 4pm 6 August 2008.

3. THAT the applicant file and serve written submissions in relation to the interim orders sought by the respondent by 4pm 13 August 2008.

4. THAT otherwise the application be adjourned to a date and time fixed by the Commission.

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

2008 WAIRC 01395

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	THURSDAY, 10 JULY 2008, THURSDAY, 17 JULY 2008, TUESDAY, 22 JULY 2008, THURSDAY, 31 JULY 2008, WEDNESDAY, 27 AUGUST 2008, FURTHER WRITTEN SUBMISSIONS 29 AUGUST 2008, 3 SEPTEMBER 2008
DELIVERED	FRIDAY, 12 SEPTEMBER 2008
FILE NO.	C 23 OF 2008
CITATION NO.	2008 WAIRC 01395

Catchwords	Industrial law – Dispute in relation to staffing shortages – Claim for interim order – Relevant principles applied – Interim order to issue – *Industrial Relations Act 1979 ss 44(1), 44 (6)(ba).*
Result	Interim order to issue
Representation	
Applicant	Ms T Borwick
Respondent	Mr J Welch

Reasons for Decision

Background to Application

1. The background to the present application is set out in earlier Recommendations, Directions and Statements of the Commission dated 10 July and 1 August 2008 respectively and I need not repeat it in any detail. In short, the parties to the present proceedings are in dispute in relation to staff shortages in respect of prison officers employed throughout metropolitan and regional prisons in the State. To compensate for the present shortages, prison officers are increasingly filling vacant shifts on overtime. The dispute has involved the imposition of overtime bans by the respondent. Additionally and exacerbating the current dispute, is a prisoner population within metropolitan and regional prisons throughout the State, in excess of the design capacity of the various facilities.

2. As to the latter, it is common ground that the design bed capacity of all prisons throughout the State is 2,641. As at 4 August 2008, the total prison muster was some 3,076 prisoners exceeding the design bed capacity of the prison facilities. Plans are also afoot to accommodate a substantially higher prisoner population still.

Staffing Issues-Brief History

3. This matter of staffing levels has some history. In short as a consequence of an agreement reached in 2006 between the parties as the result of proceedings before the Commission in application C 153 of 2004 agreed approved staffing levels were established for each prison ("the 2006 Agreement"). These proceedings followed a review conducted jointly between the parties of prison officer staffing levels in 2005. According to material provided in submissions by the applicant, it is said that the approved staffing level is some 1,585 prison officers. It is also common ground however, that not all positions from the 2006 Agreement are presently funded. According to the applicant's submissions, from the agreed level, there are presently some 1,440 available prison officers, giving rise to a shortfall of approximately 145 officers.

4. There was some dispute as to these figures. According to the respondent's material in its submissions, as to both approved and available prison officer numbers, account needs to be taken of local staffing agreements to cover the current muster levels, and actual staff numbers having regard to absences on secondments and sickness etc. Using the latter analysis, according to the respondent's material, there is a shortfall of approximately 182 prison officers in total. When this analysis is further refined to include peak muster requirements embedded in future projections by the applicant as to prisoner numbers, based on a projection of some 4,100 in the prisoner population, the shortfall according to the respondent, is even greater at approximately 271 prison officers.

5. Whichever analysis one accepts, it is clear that the prison system in this State is under some strain, in terms of both prison musters significantly exceeding design bed capacity and prison officer staffing levels significantly below those required to fully staff prisons to enable them to operate at an optimum level.

6. It is also common ground from the submissions of the parties, that the issue of staffing shortages in the context of the current dispute has been an ongoing one. Most recently, as far back as early 2007, the respondent raised as an issue with the applicant, its concerns as to staffing shortages and prison muster numbers.

Interim Order

7. Following several compulsory conferences under s 44 of the Industrial Relations Act 1979 ("the Act") and as a means of ameliorating the current pressures being experienced by prison officers, the respondent seeks an interim order of the Commission to introduce a trial of public sector overtime rates, that being time and a half for the first three hours and double time thereafter, for prison officers employed under the Prison Officers' Award ("the Award") and the Department of Corrective Services Enterprise Agreement AG 58 of 2007 ("the Agreement").

8. The interim order sought by the respondent is for the purposes of creating a greater incentive for prison officers to work additional overtime, in particular, that group of prison officers presently working little or none, so as to more evenly spread the overtime load to reduce staffing pressures generally. It is proposed that during the course of the trial, suggested over a three month period, which corresponds to two roster cycles, that the parties also are required to collect data in relation to the number of overtime shifts required, the number of overtime shifts worked, and the number of overtime shifts being performed by individual officers.

9. It is emphasised by the respondent that what is sought is only an interim measure, with the ultimate resolution of the issue being the employment of further prison officers to fully staff, at least as far as practicable, metropolitan and regional prisons.

10. It is also part of the interim order sought, that the additional overtime penalty rates apply from the time of the notification of the dispute to the Commission from on or about 10 July 2008 to the date of the implementation of any trial, if so ordered.

11. The interim order is opposed by the applicant.

Contentions of the Parties

12. The applicant and the respondent made both helpful written and oral submissions in support of their positions concerning the respondent's claim. What follows is a brief outline of the submissions.

13. The respondent referred to the history of disputation between the parties concerning staffing levels in prisons throughout the State, as noted above. It was the submission of the respondent that these staffing shortages are now at a crisis point, such that prison officers are under extreme pressure on a regular basis. The issue is becoming a matter of safety and health for the officers concerned. Whilst the respondent acknowledges recent initiatives undertaken by the applicant to increase recruitment as being welcome, given the timeframes involved in these processes, other urgent action is necessary.

14. In terms of the criterion for the implementation of any enhanced overtime benefits, the respondent has proposed in its negotiations with the applicant, and in these proceedings, "trigger points". It is suggested that in circumstances where staffing levels fall five per cent or more below the approved number and the prison muster is five per cent or more above the design capacity of prisons, then the additional benefits should apply. It is said that any trial should be conducted State wide, and not be targeted to any particular prison(s). According to the respondent, to do so, would encourage a distortion in movement of prison officers between prisons, to those where additional benefits may be available.

15. In terms of the powers of the Commission under the Act, the respondent submits that the Commission has ample power to deal with this matter pursuant to s 44(6)(ba) of the Act. It is also said that there has been deterioration in industrial relations between the parties in relation to this issue.

16. Furthermore, there is no inhibition to the determination of the present claim, under the "No Further Claims" provision of the Agreement in cl 7.0. It is said that cl 7.2, the prohibition on claims, is restricted to matters contained in the Agreement itself. The entitlement to overtime is governed by cl 13 of the Award. Additionally, in response to a proposition put by the applicant, the respondent says that the issue is a pressing matter now and simply cannot be deferred until the next enterprise bargaining negotiations to take place in 2010, on the expiry of the Agreement. Any invocation by the applicant of its Award right to compulsorily roster overtime would, on the respondent's submission, be counterproductive and destroy any residual goodwill remaining between prison officers and management.

17. There were a number of submissions advanced by the applicant in opposition to the respondent's claim for an interim order.

18. It was submitted as an overall proposition, that the respondent's claim in the present circumstances is merely a restatement of a claim advanced by it during the course of the negotiations for the Agreement to improve overtime benefits for prison officers, not agreed to by the applicant. In this regard, it was noted that a number of enhanced benefits were provided to prison officers culminating in the Agreement, including some "front end loading" of salary increases, to acknowledge the high prison musters throughout the State. In view of this, the applicant says that for the respondent to pursue its claim outside of the renewal of the Agreement through the bargaining process in 2010 would be to threaten the integrity of the enterprise bargaining process.

19. Furthermore, if any interim order was made, it is submitted that it should not be on a State wide basis rather, it should be targeted to particular prisons that have low uptakes of overtime or alternatively, different criteria be developed by agreement between the parties.

20. As to the implications of any interim order, the applicant submitted that a significant financial cost would be imposed over a three month trial, as set out in various annexures attached to its written submissions. Moreover, taken on a State wide basis,

current overtime analysis calculations reveal that taking as a benchmark of "reasonable overtime", one overtime shift in a three weekly period, there is presently 46.5 per cent of staff in prisons working less than this threshold. The other 53.5 per cent of staff are exceeding that threshold and in some cases, very significantly so.

21. Additionally, the applicant submitted that a number of other measures are and can be taken to alleviate the present staffing shortages. Mention has already been made of increased activity in relation to recruitment both domestically and overseas, which is continuing. Other initiatives include reviewing existing secondments to ascertain availability to return to substantive positions; streamlining entry level training programs; examining prison routines to deploy staff more effectively; the allocation of existing prison beds to the private Acacia prison later in 2008 and early 2009; reliance upon cl 13 of the Award to compulsorily roster overtime; greater use of ten hour shifts and other initiatives.

22. The applicant's opposition to any adjustment to the overtime rates on a trial basis also extends to any concept of a flat payment regime to apply for overtime shifts, generally on the same basis as identified above in its general submissions. As an alternative however, and in recognition of the need to provide some incentive to those prison officers presently working no or small amounts of overtime to work some or more respectively, thereby increasing the spread of overtime and reducing the burden on other officers, a form of bonus payment could be considered to provide such an incentive.

23. It is suggested that there are a number of advantages of this approach including targeting the particular prison officer groups presently working no or little overtime to encourage them to do more; providing a tangible reward to those prison officers; involving less cost as it will not be "across the board"; and it will avoid the need for the applicant to consider compulsory rostered overtime under cl 13 of the Award, which has not been invoked in the past in other acute circumstances.

24. In connection with this concept, the applicant proposes that there be an agreed number of overtime shifts in any roster period, to achieve a bonus entitlement. In conjunction with such a bonus scheme, the applicant also proposes a joint survey between it and the respondent, to attempt to ascertain reasons why some prison officers are not working any or are working little overtime presently.

25. Whilst the concept of a bonus type of scheme is acknowledged by the respondent, it is submitted that such a scheme would be problematic. First, it is said that often overtime is not worked systematically and there may be substantial time intervals between overtime periods, thus negating the benefits of a bonus based on a "reasonable overtime" according to a set period of shifts. Secondly, it is submitted that it may even act as a disincentive, as prison officers, after working the required overtime shifts to qualify for a bonus, may do no more.

Consideration

26. It is clear from the materials before the Commission, that staff shortages of prison officers throughout prisons in the State has been an ongoing issue, regardless of the cause. It appears common ground that at least to date recruitment initiatives have only just kept pace with the attrition rate of prison officers leaving the prison system. Recent initiatives by the applicant to bolster recruitment overseas and through other measures are to be applauded. However, inevitably, there are time lags in these processes, compounded by a very competitive local labour market.

27. Furthermore, it also appears common ground, that normal prison routines, given the present staff shortages, are only being able to be maintained through prison officers working overtime shifts, in some cases, excessive amounts of overtime, often through the goodwill of the officers concerned. The maintenance of prison routines is of course, extremely important. This is constituted by the four "cornerstones" of prison routine management, custody and containment; care and well being; reparation; rehabilitation and reintegration. As custody and containment is the principal obligation, staff shortages through vacant shifts can mean the other aspects of prison routine may be compromised, potentially impacting on parole release programmes and potentially, in the longer term, recidivism rates.

28. I turn firstly to consider whether cl 7.0 – No Further Claims of the Agreement presents a barrier to the interim relief sought. In my opinion, it does not. It is plain from the ordinary and natural meaning of the language used in cl 7.0 of the Agreement, in particular cl 7.2, that the no further claims provision is a prohibition on the parties to the Agreement pursuing any claims in relation to matters *contained* in the Agreement. Furthermore, by cl 7.3, nothing in cl 7.0 of the Agreement precludes the respondent from bringing an application to vary the Award, in accordance with the Commission's State Wage Fixing Principles.

29. It is beyond doubt that the question of overtime payments is a matter prescribed by the Award in cl 13. Payments for additional hours by way of overtime or otherwise, are not a matter dealt with in the Agreement. Whilst Part 4 of the Agreement deals with allowances of various kinds, none of the allowances there prescribed relate to additional payments for time worked outside of ordinary hours.

30. As a matter of industrial principle, overtime is one of long standing. It is inherently linked to hours of work and particularly "ordinary hours". Overtime, that is hours worked in excess of ordinary hours in relation to which additional payments are payable, has two purposes. The first purpose is to provide a greater reward to employees working additional hours by way of an incentive. The second purpose, also by way of the payment of a higher rate, is to "penalise" employers for requiring employees to work in some circumstances, what may be regarded as unsociable hours. This is the reason for the well known description in industrial parlance of "penalty" rates as being applicable for such additional work. Thus overtime or "penalty" rates have a dual character.

31. In the present context, cl 13 of the Award prescribes arrangements for out of hours work. By cl 13.2 it is provided that all prison officers are required to be available to work "reasonable" out of hours work in addition to their rostered hours of duty. It is clear from the terms of cl 13.2 as a whole, that it is the intention that such out of hours work will be performed as far as possible, by volunteers. It is only in circumstances where it is necessary to maintain prison functions, that by cl 13.2(1), a Superintendent may roster prison officers for out of hours work. All hours so worked, whether by volunteers or on a rostered

basis, are, by cl 13.4(1) to be paid at time and one half of a prison officer's annualised rate of pay. The only exception to this is where there is the declaration of "Major Emergency Duty" for the purposes of cl 13.4(2) of the Award, where the rate of payment is double time.

32. I have already noted above, and it is common ground, that even in prior cases of emergencies in the prison system in this State, the applicant and its predecessor organisations have not sought to invoke the power to forcibly roster prison officers to work overtime pursuant to clause 13.2(1). It is contended by the respondent that for the applicant to now revert to such a rostering system would destroy any goodwill that presently exists among prison officers who are, according to the respondent, making themselves available voluntarily, in order that normal prison routines can be maintained.

33. It must be emphasised that the terms of the Award referred to confer a right on the employer to roster employees for overtime when there are insufficient volunteers to enable a Superintendent to maintain necessary routine prison functions. The applicant does not need the Commission's permission to do so. However, the fact that the applicant has never, according to the material before the Commission, sought to invoke this provision of the Award, even in cases of prior emergencies in prisons, is a matter of some significance. Whilst I would not go so far as to say that the applicant's decision not to invoke this provision in the past now constitutes an estoppel or waiver of an existing legal right, precluding its exercise in current circumstances, or even an established custom, practice and usage which would preclude its exercise now, it is a matter which is not insignificant to take into account.

34. For the purposes of cl 13.2 of the Award, what is "reasonable" overtime will be a matter of fact, depending upon the circumstances of both the employee and the employer: *Metal Trades Employers' Association v Boilermakers' Society of Australia* (1960) 4 FLR 333 per Dunphy J at 334. Additionally, there have been test cases brought in both the Commonwealth and New South Wales jurisdictions in relation to reasonable hours of work and reasonable overtime: *Working Hours Case* (2002) 52 AILR 4-648; *Re State Working Hours Case 2003* (2003) 53 AILR 200-016.

35. In both of these cases, Commonwealth and New South Wales awards were varied to introduce an award provision dealing with the working of reasonable overtime and overtime rates. In accordance with these provisions, whether a request to work overtime is unreasonable or otherwise, falls to be determined having regard to a number of factors including the employee's health and safety; the employee's personal circumstances including family responsibilities; the needs of the workplace or enterprise; the amount of notice given by the employer to the employee to work overtime and any other relevant considerations.

36. Additionally, these principles are now incorporated into s 226 of the *Workplace Relations Act 1996* (Cth) in Part 7 – Australian Fair Pay and Conditions Standards.

37. Given that the question of overtime is a long standing and settled matter of industrial principle, and given that the Award presently provides the current formula for overtime rates for prison officers throughout the State, I am reluctant to interfere with that matter of significant industrial principle, for the purposes of an interim order to implement a trial arrangement. In my view, if there is to be an adjustment to the overtime formula as prescribed by the Award, then that is a matter best progressed by way of an application to vary the Award pursuant to s 40 of the Act, which application, as cl 7.3 of the Agreement contemplates, would need to be considered in light of its merits and the application of the State Wage Fixing Principles. Alternatively, it could be progressed in the next round of negotiations for the renewal of the Agreement.

38. However, in the context of the current dispute, to prevent any further deterioration of industrial relations between the parties, and having regard to all of the material before me as contained in the submissions of the parties, the current arrangements cannot continue. Prisons throughout the State are in some cases, significantly understaffed. Staff shortages are being made up by the working of overtime, in some cases, excessive amounts. This is placing undue pressure on prison officers to maintain normal prison routines as far as possible.

39. In all of the circumstances I consider that an additional incentive to work overtime shifts should be implemented on a trial basis for a period of three months. The Commission in determining this matter is not limited to the specific claim made or to the subject matter of the claim: s 26(2) Act. The incentive will be a flat per shift payment. The payment will be an amount of $129.00 per twelve hour shift. It will be payable on overtime shifts required to be filled by the applicant. For those prison officers who may work eight or 10 hour shifts, a pro rata amount should be paid.

40. The rate has been struck as an average rate used by the applicant for the purposes of its costing of the respondent's claim and is based on the difference between overtime at time and one half for all hours worked and overtime at time and one half for the first three hours and double time thereafter, for the Prison Officer Shift 4-5 years classification, a predominant classification level within the prison system. In my view this represents reasonable additional compensation for an overtime shift. The focus needs to be on those groups of prison officers working the least amount of overtime, based upon the material before the Commission.

41. I do not consider that the trial arrangement should operate on a State wide basis. Rather any trigger points should operate at an individual prison level. This will need to be managed by the parties. There will be granted a liberty to apply in the interim order if this issue or any other causes any difficulties during the course of the trial

42. Whilst the Commission recognises that this interim order will impose additional costs on the applicant for overtime, it is also the case that the substitution cost of employing additional prison officers, including on-costs, to cover vacant shifts, would be very substantial.

43. I do not propose to deal with "trigger points" for the purposes of any trial or the commencement date. That is a matter which I will leave to the parties to discuss amongst themselves. Having said that, I do not consider that the respondent's proposed "trigger points" are necessarily inappropriate. However, I do not have enough before me to determine finally what criteria

should apply. I direct the parties to confer on these matters within seven days of the date of this decision. If the parties are unable to agree on these matters they will be determined by the Commission. Once either agreed or as determined, an interim order will issue.

44. I also wish to emphasise that an interim order can only be an interim measure to assist in the resolution of the dispute, pending further conciliation or arbitration. By its nature, interim relief is not to be regarded as the foundation for a more permanent arrangement and any expectations in that regard will need to be addressed by the parties. The objective must be to increase staffing levels to that agreed as necessary for the optimum operation of the State's prisons.

45. The order will operate for a period of three months from the agreed date of commencement. I am not persuaded that any retrospectivity should apply. The parties will also need to collect and consider data on shifts worked and by what groups, and measure any increase in the rate of take up of the target groups, to determine if the trial is to be regarded as successful and by what measure success is to be determined. Additionally, the applicant's proposal for a joint survey of prison officers in relation to the working of overtime is a worthy one and it should be considered by the parties.

2008 WAIRC 01437

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	THURSDAY, 10 JULY 2008, THURSDAY, 17 JULY 2008, TUESDAY, 22 JULY 2008, THURSDAY, 31 JULY 2008, WEDNESDAY, 27 AUGUST 2008, FRIDAY, 12 SEPTEMBER 2008, THURSDAY, 25 SEPTEMBER 2008
DELIVERED	FRIDAY, 26 SEPTEMBER 2008
FILE NO.	C 23 OF 2008
CITATION NO.	2008 WAIRC 01437

Catchwords	Industrial law – Dispute in relation to staffing shortages – Claim for interim order – Relevant principles applied – Interim order to issue – *Industrial Relations Act 1979 ss 44(1), 44 (6)(ba).*
Result	Interim order issued
Representation	
Applicant	Ms T Borwick and Mr P Giblett
Respondent	Mr J Welch

Further Reasons for Decision

1. In reasons for decision of the Commission of 12 September 2008 it was determined that an interim order would issue implementing on a trial basis for three months, additional payments for overtime shifts for prison officers. It is unnecessary for present purposes to repeat the conclusions reached by the Commission in my earlier reasons.

2. The parties were directed to confer in relation to the relevant "trigger points" for the purposes of the trial and its commencement date. The parties have done so and have helpfully set out the terms of their discussions in a joint document described as "Interim Order 2008 WAIRC01395 Joint Outcomes Version".

3. The parties have reached agreement on all issues save for one. That issue is set out in the "Joint Outcomes" document under the heading of "Nature of the Trial" and relates to the application of the agreed trigger points, they being a prison's actual muster being five percent or greater than the modified design capacity and a staffing shortfall of five percent or greater of the agreed level to staff the relevant actual prison muster.

4. In order to assist the parties in dealing with this issue, the Commission convened a further compulsory conference under s44 of the Industrial Relations Act 1979 ("the Act"). Despite doing so, the parties have been unable to agree and it falls to the Commission to determine the matter.

Contentions

5. The short point to be determined is this. The parties have advanced two competing views as to the application of the agreed trigger points during the course of the trial.

6. From the point of view of the applicant, it considers that the appropriate methodology to apply is that during the course of the three month period, prison officers will only be entitled to the additional overtime payment, during periods where the

particular prison concerned meets the agreed targets. If during the trial period, the prison ceases to meet the particular triggers, then the additional overtime payments cease to be payable.

7. It is accepted that this calculation would be administratively difficult to achieve on a daily or weekly basis, however, it is suggested that a broader approach over a three week or six week cycle could be utilised instead. The principle being however, that the additional payments would not continue beyond a particular point, after the prison ceases to meet the agreed triggers.

8 On the other hand, the respondent proposes that the test for the application of the trigger points be primarily determined immediately prior to the commencement of the trial period. If a prison meets the agreed trigger points at that time, then the prison officers working overtime shifts will be entitled to the additional overtime payments for the duration of the trial period. Furthermore, any prisons that subsequently qualify for entry into the trial, by meeting the agreed trigger points, also would qualify for the additional payments for the remainder of the trial period.

Consideration

9. The resolution of this issue is not without difficulties. It was the intention of the Commission that implementation of the trial will provide an incentive for those prison officers working lesser amounts or no overtime to increase their participation in overtime work. The purpose of the trial is also to enable such arrangements to be in place for a reasonable period of time, to enable a proper comparison to be drawn between the overtime take up rates during the trial period, with comparable historical periods, to evaluate its impact.

10. Additionally it is important in my opinion the implementation not of itself constitute any impediments or create any disincentives to prison officers participating in greater amounts of overtime. Furthermore, it would also seem to be the case, that any method adopted, should be administratively as simple as practicable, for the benefit of those involved in its administration at both prison and head office level, to avoid some of the above consequences.

11. With these considerations in mind, and appreciating the issues raised by both parties, with each having merit, it seems to me that the proposal adopted by the respondent, as "Model One" in the "Joint Outcomes" document, is the least likely to present the kind of difficulties to which I have referred above. Furthermore, I consider that the respondent makes a valid point in its contention that for the enhanced overtime provision to operate for the duration of the trial period would provide a more reliable comparative bench mark when assessing any increased take up rate of overtime shifts in the target group, when compared to prior three month intervals.

12. As the Commission emphasised to the parties in the s 44 compulsory conference, an arrangement being implemented such as the present, cannot be perfect in design and will inevitably create some "swings and roundabouts" in its operation. The intent is to provide a reasonable further incentive for prison officers in the target group to undertake further voluntary overtime, over a reasonable period of time, with as few impediments to achieving a successful outcome as is practicable in the circumstances.

13. As also raised with the parties in the s 44 compulsory conference, the Commission proposes to include the "Joint Outcomes" document, suitably amended, as a schedule to the proposed interim order. Thus not only the parties, but also all prisons staff throughout the State, will be fully aware of the terms of the three month trial, as embodied in the interim order of the Commission.

14. Accordingly, a minute of proposed interim order now issues.

2008 WAIRC 01461

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 1 OCTOBER
FILE NO/S	C 23 OF 2008
CITATION NO.	2008 WAIRC 01461

Result	Interim order issued
Representation	
Applicant	Ms T Borwick and Mr P Giblett
Respondent	Mr J Welch

Interim Order

HAVING heard Ms T Borwick and Mr P Giblett on behalf of the applicant and Mr J Welch on behalf of the respondent the Commission, pursuant to the powers conferred on it under s 44 (6)(ba) of the *Industrial Relations Act 1979* hereby orders –

1. THAT there be a three month trial of the payment of additional overtime incentive payments commencing on 3 October 2008 in the terms as set out in schedule A to this order.

2. THAT the parties have liberty to apply on short notice.

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

SCHEDULE A

C23 of 2008

WA Industrial Relations Commission

Section 44 proceedings

Commissioner Department of Corrective Services

v

Western Australian Prison Officers' Union of Workers

Interim Order 2008 WAIRC 01395

Joint Outcomes Version

1. The parties met on Thursday 18 September 2008, in accordance with the decision and direction of Commissioner Kenner issued Friday 12 September 2008.

2. The following table jointly developed by the parties represents the matters discussed and their status at the conclusion of the meeting. This includes matters determined by the Commission in its decision of 12 September 2008. The matter under the heading "Nature of the Trial" was unable to be agreed and was subsequently determined by the Commission on 26 September 2008.

COMMENCEMENT DATE
The parties have agreed that a commencement date for a trial should be 3rd October 2008 on the basis that it is the first day of a pay period and the start of a new Roster.
TRIGGERS FOR THE TRIAL
The parties agree that the triggers for the trial will comprise two tests: • **The Muster Test** – where the actual muster level is 5% or greater than the modified design capacity; and • **The Staffing Test** – where a shortfall of 5% or greater exists in the agreed staffing level to deal with that actual muster. Then the prison enters the trial.
NATURE OF THE TRIAL
Prisons that qualify for the trigger test immediately prior to the commencement of the trial period will continue to receive the penalty rate for the three-month trial period. Any Prisons that qualify during the three month period being added to the trial for the remainder of the 12 weeks.
PARTICIPANTS IN THE TRIAL
The parties agreed that the trial will apply to ESG if the triggers are met at Bandyup, Hakea or Casuarina. The parties agreed that the trial will apply to the Gatehouse staff if the triggers are met at Hakea or Casuarina. The Department agreed to review the apparent anomaly at Wooroloo.
ADMINISTRATION OF PAYMENT
The incentive payment will be $129 per 12 hour shift. The parties agreed to implement a pro rata payment for hours other than 12 hour shifts at $10.75 per hour.

FURTHER MEETINGS AND DISCUSSIONS

The parties acknowledge that further meetings will occur to consider

Monitoring & Measurement (success factors)

As the trial is for 3 months benchmark data for a corresponding period is to be sourced (July – Sept 08) and the corresponding period in the 07/08 financial year.

Monitoring

A range of items such as:

- Details of number of overtime shifts available to maintain the normal operations of the prison
- Details of the number of shifts not covered
- Details of the number of officers (by rank) involved in covering the shifts.
- Details of the number of officers working double shifts
- Details of the number of shifts required to cover daily sick leave
- Number of hospital shifts
- Level of sick leave utilized.
- Costs of the trial

Success Factors

- A significant increase in the take up of overtime by staff that have worked little or no overtime in the past.
- Any other matters agreed between the parties

DATA to be collected at all prisons not just eligible prisons so as to gauge the effect on prisons not subject to the trial (to ensure they are not negatively affected by the trial).

Other Matters

Joint Department / WAPOU oversight of trial data (PCC).

Determine survey of prison officers as per WAIRC recommendation

For discussion.

Conclusion

3 The parties acknowledged the level of co operation and goodwill which had been exchanged at the meeting to reach common ground on most matters to move forward in the resolution of the dispute.

CONFERENCES—Matters referred—

2009 WAIRC 00525

DISPUTE RE TERMINATION OF EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
HEARD	WEDNESDAY, 10 JUNE 2009 AND THURSDAY, 11 JUNE 2009
DELIVERED	THURSDAY, 6 AUGUST 2009
FILE NO.	CR 7 OF 2009
CITATION NO.	2009 WAIRC 00525

CatchWords	Termination of employment – Harsh, unjust and unfair dismissal – Turns on own facts – Application dismissed – *Industrial Relations Act 1979* (WA) s 44; *Public Transport Act 2003* (WA) s 65
Result	Application dismissed
Representation	
Applicant	Mr D H Schapper (of counsel)
Respondent	Mr D J Matthews (of counsel)

Reasons for Decision

1 On 20 February 2009, The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the Union) made an application for a conference under s 44 of the *Industrial Relations Act 1979* (the Act). In the application, the Union stated that one of its members, Mr Nicholas Burgess was dismissed by the Public Transport Authority (the respondent) on 5 February 2009. The Union claims that the dismissal of Mr Burgess was harsh, unjust and unfair. Following a conference between the parties on 6 May 2009, the matter was referred for hearing and determination under s 44 of the Act. The matters referred for hearing and determination are as follows:

1. The applicant represents its member, Mr Nicholas Burgess, who was dismissed from the employment of the respondent effective date 5 February 2009.
2. The applicant claims its member has been harshly, unjustly and unfairly dismissed from the respondent's employment.
3. The applicant seeks:
   (a) an order for reinstatement of its member, Mr Burgess; and
   (b) an order to compensate for any subsequent loss of earnings (wages) suffered by the applicant's member after the termination date.
4. The respondent denies the claim, opposes the relief sought and says the application should be dismissed.

Background

2 Mr Burgess commenced employment with the respondent as a transit guard in October 2002. He was part of the initial group of transit guards employed by the respondent. He later became a transit officer. Prior to his employment with the respondent he had been employed as a court orderly and as a prison officer.

3 Mr Burgess was dismissed by the respondent following findings made by the Chief Executive Officer of the respondent (CEO) that he (Mr Burgess) had committed breaches of discipline arising out of incidents on 18 and 20 October 2008 which allegedly involved the use of excessive force and/or inappropriate use of force. The charges found to be proven against Mr Burgess were as follows:

Incident 1

On 18 October 2008 at Claremont station, at 2:10 am Mr Burgess acted inappropriately towards an unknown male person when trying to escort him from the station. The specific allegations are that Mr Burgess:

1. Used excessive force and/or inappropriate use of force against the unknown male person as defined in section 7(12) of the Transit Officer Operations Manual.
2. Acted contrary to the Public Transport Authority policies and procedures (as defined in the Transit Officer Operations Manual), training and workplace instructions by:

a. inappropriately pushing/shoving an offender;

b. not removing an offender from PTA property according to stated procedure;

c. failing to call for CCTV coverage of incidents;

d. failing to deal with an offender in a safe manner on stairs.

Incident 2

It is alleged that on 20 October 2008 at Fremantle station, between 2120 hours and 2250 hours Mr Burgess acted inappropriately towards a male person during an incident. The specific allegations are that he used excessive force and/or inappropriate use of force as defined in section 7(12) of the Transit Officers Operations Manual during this incident.

(Exhibit 1(e))

4 Following an investigation, findings were made on 14 January 2009 that Mr Burgess had committed the breaches of discipline and Mr Burgess was given an opportunity to make a submission as to why he should not be dismissed. Mr Burgess made a submission on 15 January 2009. After considering the submission the CEO in a letter dated 4 February 2009 informed Mr Burgess that his employment would be terminated with effect from 5 February 2009 and that an arrangement had been made for him to be paid four weeks' pay in lieu of notice. The reasons given for his termination were excessive and inappropriate use of force in both incidents.

5 No issue has been raised on behalf of the Union in relation to the process initiated by the respondent to investigate the incidents and no procedural issues have been raised in relation to the termination of the employment of Mr Burgess. It is contended on behalf of Mr Burgess that if he did commit acts of misconduct or inappropriate conduct on the occasions in question the dismissal was in all the circumstances harsh, unjust or unreasonable. At the outset of the hearing in opening Mr Schapper on behalf of the Union indicated to the Commission that a challenge would be made to the findings of misconduct or inappropriate conduct. However, at the conclusion of the hearing it was conceded on behalf of Mr Burgess that he could have dealt with the members of the public in each incident better and that he should be reinstated but no order should be made for compensation for loss of earnings between the date of dismissal and the date of his reinstatement.

The Union's Evidence

6 On 17 October 2008, Mr Burgess commenced work on the afternoon shift at 4:00 pm. His shift was due to finish at 3:00 am the following morning. On that occasion he was rostered to work as a member of Delta 1 on the Fremantle line. The role of Delta 1 is to conduct random and roaming patrols on the Fremantle line. Transit officers who work on the Delta 1 shift drive an escort vehicle, conduct random and roaming patrols and they are also required to be available to attend any calls by transit officers on the line. On the night in question, Mr Burgess was accompanied by Transit Officer Martin Wright. Also with Mr Burgess and Transit Officer Wright was a person who was in a training position whose role was simply to observe. Part of the Delta 1 role is to escort the 12:00 pm, 1:00 am and 2:00 am trains from Perth to Fremantle and back. Very late in the shift, Delta 1 was called to the Claremont station because an alarm was not working. The alarm battery had gone flat and an alarm was sounding. They tried to fix the problem. Whilst at the Claremont station the 2:00 am train from Perth arrived at about 2:20 am. Mr Burgess and Transit Officer Wright watched persons alight the train. Nothing initially of interest occurred, however, one person who alighted from the train began to shout profanities and became disorderly. This person is described in these reasons as the passenger. Mr Burgess gave evidence that because the majority of the patrons were moving off or had moved off they allowed a certain amount of leeway until the passenger walked into three people and challenged them to a fight and then punched an advertising sign quite hard. At that point Mr Burgess deemed the passenger's conduct "too much" and intervened.

7 When Mr Burgess gave his evidence about the incident he spoke about what he said occurred whilst the Commission and counsel viewed CCTV footage of the incident in court. What is now described in these reasons is what can be seen in the footage supplemented by oral evidence by Mr Burgess as to what his actions were and what was said by him and the passenger. The CCTV footage of the Claremont incident (Exhibit 4 – CLA201) shows the training officer walking down the platform and positioning himself at the platform close to where the train arrives. The passenger alights from the train and begins to walk around the platform. The passenger was wearing a black hooded jacket with gold markings. Mr Burgess testified that the passenger was cursing and swearing loudly and abusing the transit officers. Whilst this was occurring Mr Burgess was standing near the doorway of the office out of the view of the screen. The CCTV footage shows that four people walk past the passenger. One person appears to be walking alone. The other three are in a group together. As the passenger walks past the group of three he makes contact with one by "shouldering". The group of three do not stop walking but they turn around. As they turn around the passenger appears to be saying something to them and moving his body back and forth. Mr Burgess gave evidence that at that point the passenger was challenging all three to a fight. The passenger then walked forward to a post in the middle of the platform and kicked the post. Mr Burgess testified that whilst the passenger did this he cursed and swore very, very loudly. Mr Burgess also testified that he asked the passenger, "What is wrong? What is going on?" Mr Burgess said the passenger was swearing at him, calling him and other transit officers "white maggots, white dogs, white cunts" and he was saying (to Mr Burgess), "I will kill you all. I will cut you up." His tone was very agitated and loud. The passenger then moved towards a lit sign in the middle of the platform and punched it very hard. As he did that Mr Burgess can be seen on the CCTV footage to walk towards him. Mr Burgess walked quickly up to the passenger. Prior to reaching the passenger Mr Burgess' left arm can be seen to be up high. Mr Burgess testified that when he did that he was telling the passenger to leave the train station. Without pausing to stop Mr Burgess can be seen to push the passenger with an open hand to the chest. At that point the officer in training can be seen standing back towards the edge of the left of the screen. As Mr Burgess pushed the passenger backwards Transit Officer Wright and the officer in training came clearly onto the screen. Transit Officer Wright kept his distance behind and to the side of Mr Burgess. Whilst retaining his distance, Transit Officer

Wright lifted his right hand and motioned to the passenger to leave the train station. Mr Burgess said he pushed the passenger because he was alarmed at the demeanour of the passenger. He also said he saw the force which the passenger hit the advertising board and thought if he allowed him any closer he will strike him (Mr Burgess) in that way. Mr Burgess is then seen to push the passenger with an open hand six to eight times. Mr Burgess testified he told the passenger to leave throughout the incident at least eight to 10 times but the passenger refused point blank and continued his threats such as, "I will kill you! I will smash you! I will kill all of you, you are all white dogs! I will kill you all!" Throughout the CCTV footage, each time the passenger is pushed by Mr Burgess, the passenger steps back quite a distance and then steps forward or leans forward slightly and is then pushed again. After several pushes Mr Burgess pushed the passenger with two hands. Mr Burgess then drew his baton with his right hand. When asked why he did that, he said that the passenger said, "I have a blade and I will cut you up." The passenger then moved his shoulders or his arms towards him (Mr Burgess) as if he was going to punch or make a stabbing movement. The CCTV footage shows that Mr Burgess pushed the passenger again and then strikes him twice with the baton on or near his elbow. Mr Burgess said he did this when the passenger lunged or feigned a lunge for the fourth time. This resulted in moderate compliance. By the time the passenger had been struck twice with the baton he had moved down the platform about 10 metres.

8 Throughout the incident, it is apparent that both Mr Burgess and Transit Officer Wright are telling the passenger to leave as they are pointing their hands towards the stairs in a motion to leave. Although it cannot be seen on the CCTV footage (Exhibit 4 – CLA201), Mr Burgess and Transit Officer Wright follow the passenger to the bottom of the stairs and watch him move up the stairs. Mr Burgess said that at this point in time the passenger was still making threats. They stood at the bottom of the stairs as they thought the passenger might leave. The passenger walked up the stairs and continued to shout threats from the top of the stairs. The passenger can also be seen to punch a panel of clear plastic on the concourse. CCTV footage (Exhibit 4 – CLA102) shows the passenger entering the stair area at 00:18 seconds and remaining there alone until Mr Burgess and Transit Officer Wright begin ascending the stairs to the concourse at 03:58 minutes. The footage of events on the concourse is quite poor. Mr Burgess testified that when he and Transit Officer Wright went to the top of the stairs they told the passenger again to leave. He said the passenger was continually threatening to kill him (Mr Burgess) and stab him and to get a firearm and return to kill him. Mr Burgess also testified that he could not recall what took place on the concourse except that the passenger eventually complied reluctantly with the request to leave the railway station and that he slowly moved along the concourse to the top of the stairs which led down to outside the railway station.

9 CCTV footage (Exhibit 4 – CLA301) shows the initial incident from the bottom of the platform, however very little is seen of the incident. It depicts the passenger leaving the platform after Mr Burgess has drawn his baton. CCTV footage (Exhibit 4 – CLA202) shows more of the incident from the other side of the platform. It also shows Mr Burgess and Transit Officer Wright and the transit officers' office on the platform. The train arrives which obscures what is occurring on the platform. After the train has left the CCTV footage depicts the passenger walking up and down the platform. It also shows Mr Burgess and Transit Officer Wright standing and watching the passenger from the transit officers' office. You can then see the passenger approach the group of three passengers. The passenger moves out of sight behind a sign and a vending machine. The passenger is then seen being pushed by Mr Burgess with both hands on more than one occasion, and then Mr Burgess is seen drawing his baton. The passenger can be seen to be lunging towards or moving his top part of his body towards Mr Burgess as Mr Burgess pushes him. After the passenger is struck twice with the baton the passenger leaves the platform walking up the stairs. As he walks up, he walks backwards up the stairs holding on to the railing with one hand and waving his other arm. Whilst walking up the stairs his movements appear to be consistent with yelling abuse.

10 CCTV footage (Exhibit 4 – CLA202) shows shadowy movements on the top of the concourse. It can be seen that the passenger is walking across the concourse towards the stairs and Mr Burgess and Transit Officer Wright are following him in close proximity. When the passenger gets to the top of the stairs he begins to walk down the stairs and he turns with his back to the bottom of the stairs facing the transit officers. The transit officers step down onto the stairs. At about the third or fourth step Mr Burgess reaches down towards the passenger. As the passenger puts his left hand up, Mr Burgess pushes the passenger with his left hand. The passenger appears to step back as a result of the push. He turns away from Mr Burgess and Transit Officer Wright and begins to walk down the stairs. Mr Burgess and Transit Officer Wright remain at the top of the stairs whilst they watch the passenger walk down the stairs. As the passenger leaves the stairs, he walks over to the fence, bashes the fence and then walks out of view of the CCTV footage. Mr Burgess also pointed in the direction to leave the station. During this part of the incident the passenger continued his tirade of verbal abuse. Mr Burgess and Transit Officer Wright then returned to the office. Mr Burgess says the push was a very soft and guiding push not designed to harm the passenger in any way.

11 When asked in examination-in-chief whether the incident could be handled differently, Mr Burgess said at the time he felt the way he dealt with the incident was a harm minimisation method. He said he honestly thought the way that the passenger struck the sign and his demeanour that if he (Mr Burgess) had to restrain the passenger in any other way he would have been struck. He then went on to explain that he had a relatively inexperienced partner. Transit Officer Wright was a probationary officer with only six months' experience and the on-the-job training officer was not allowed to do anything.

12 When asked what had he been trained to do in such a situation, Mr Burgess said that he was taught to use some form of "transport arm restraint" to take the passenger by the arm and apply pressure in such a way to gain compliance and walk the passenger from the station. Mr Burgess then went on to describe what is known as the "escort hold". Mr Burgess described the manoeuvre by describing how both officers each take an arm of the person, apply pressure to the person's arm and walk the person to the end of the railway property and release them. Both arms of the person are pushed behind their back so that they are restrained. Mr Burgess said that when they are trained to carry out this manoeuvre it is in a training situation and carried out on a person who is willing and compliant. When asked if there is any harm that can come to an officer when the restraint method is put on a person, Mr Burgess said that you have to get very close to the person and even when the restraint is engaged there is still the potential to be headbutted, kicked, tripped or spat on. Both officers applying the hold have to be "spot on" in

their co-ordination otherwise there is potential for harm if only one arm is engaged at one time. Mr Burgess testified that when a person is taken to the edge of the railway property and released, at the time of release the risks of injury are the same as prior to engaging a person in the restraint.

13 When Mr Burgess was asked in examination-in-chief why did he draw the baton, Mr Burgess said, "I drew it because the passenger said, 'I have a blade and I will cut you up'." He says he did so to defend himself in case the person had a knife. Mr Burgess also said he used the baton because the passenger had "shaped up", and he hit the passenger twice on the elbow to defend himself. He testified that he was trained to do that. When asked how strong the blows were, he said that it was difficult to say but they were no stronger than they needed to be to protect himself from a strike. Mr Burgess then said he struck the passenger on the left arm to disable that arm as it was the arm closest to him (Mr Burgess) and it was the one that he felt most likely the person would strike with. Mr Burgess also said the baton strikes were designed to stop the passenger from moving forward and it had that effect as the passenger stopped moving towards him.

14 When giving evidence-in-chief Mr Burgess conceded that the way he dealt with the passenger was not necessarily in keeping with the training standard. However, in his view the training he had received was not relevant to the incident and he did his best to minimise any harm to all parties. When asked why he did not arrest the passenger, he said he did not do so because the passenger was only offending against transit officers and it was part of their job to be more tolerant of that type of behaviour than members of the public. He then went on to say that if a member of the public had been involved in the incident, or if the incident had occurred earlier on in the night when there are more people around, he would have arrested the passenger.

15 When asked about the "push" he gave to the passenger on the stairs he said there was no risk of harm to the passenger. He also said the pushes on the platform did not place the passenger in any real danger as the incident occurred in the middle of the platform and the passenger only moved a metre or so each time he was pushed. It was his view that the passenger was not someone who was going to be easily hurt or pushed over. Also the passenger did not appear to be drunk but hyper and energetic.

16 Mr Burgess said in the last couple of years every six months he received refresher training for five days in the use of the pepper spray, baton training, open hand restraint techniques for the purpose of removing patrons or arresting people. He also said the initial training he received was different to the recent training he had received. When cross-examined Mr Burgess agreed that during refresher training he received training in procedures to be applied in both theory and practice in respect of arrests and the use of a baton. He claimed he had not been required to sit an examination but when he was handed by counsel for the respondent an assessment form completed by him, he agreed that he had completed such a form. He also agreed that as a transit officer he attended regular muster briefings where sometimes the use of force was discussed.

17 It was put to Mr Burgess in cross-examination that when a passenger is behaving badly and the decision is made that the passenger should leave the respondent's property that the first step should be that the transit officer should communicate with the passenger as the mere presence of a transit officer is a powerful tool. Mr Burgess agreed. He also agreed that the first thing you do is ask the person who is creating a disturbance what the problem is and try to take the "heat out" of the situation and ask them to leave. He agreed that an instruction has to be given that the person is to leave or he will be physically removed and that instruction might need to be said several times. Mr Burgess also agreed that he was trained to remove persons from the respondent's property with a minimum of force. He then agreed that you could use an open hand to stop a person invading a transit officer's personal space but not to gain ground or to remove someone from Public Transport Authority property (described as a "check"). It was also put to him that he had been taught that it was not appropriate to push someone because that could escalate the situation and obtain a punch back. Mr Burgess did not agree that he had received such training but he did agree that such a conclusion was a matter of common sense. When it was put to Mr Burgess that he was trained only to remove a person from Public Transport Authority property in two ways and that was by the use of persuasion or by the use of the escort hold, he agreed. He also conceded that even if you are headbutted, kicked, tripped or spat on you are trained only to use the escort hold and it is the safest and best way to remove a person from the property of the respondent. He claimed, however, that he had received no training in the escort hold when the person sought to be restrained is violent. He agreed that he had been trained not to use the baton to ensure compliance or offensively but only to use the baton as a defensive move to protect yourself or property.

18 Mr Burgess also conceded that if he was going to arrest someone then the manoeuvre he should use is similar to an escort hold and that he had been trained not to grab someone by the collar or the shirt. He also agreed that it is appropriate in some situations to call for backup and he agreed that in some situations he had been taught that it was best to make a tactical retreat and call for backup.

19 Transit Officer Wright prepared an incident report (Exhibit A) in respect of the incident at Claremont station. Mr Burgess was asked in cross-examination whether he had input into this report and he said that he did. When asked why there was nothing in that report stating that the passenger had a knife, Mr Burgess said the report was only brief. He, however, agreed it was a key event in the circumstances but he was unable to explain why it was not mentioned. The narrative of the incident in the incident report (Exhibit A) states:

> Delta 1, Transit Officers Burgess and Wright (OJT Morgan), were conducting foot patrols at Claremont Station when they observed a male person detrain from door 4 of the Fremantle bound service. The male was wearing and [sic] black and gold hooded jumper, black pants and black shoes …
>
> The POI immediately began abusing other patrons before approaching a group of 4 males and attempting to engage in a fight. The other males continued walking. Transit Officer Burgess approached making instructions for the POI to leave the Property. The POI refused and stepped towards TO Burgess aggressively and making verbal threats. TO Burgess used one open hand to check the POI away. The POI stepped back then rushed forward at TO Burgess with clenched fists. TO Burgess again checked the POI away with one open hand to the chest. The POI continued this behaviour TO

> Burgess drew his baton in a low defensive stance and instructed the POI to back away. The POI refused and rushed towards the Officers. TO Burgess struck the POI twice to the lower left arm whilst still making clear warnings to back away and leave.
>
> The POI moved up the wooden stairs where he stood on the overpass abusing TOs.
>
> TOs retreated towards the office before returning and approaching the POI on the stairs. The POI again refused to leave when instructed. After further instructions the POI was escorted to the stairs on Gugeri Street where he departed towards the Post Office still yelling abuse.
>
> Details of the POI were not obtained.
>
> TOs returned to the station office.
>
> Shift Commander, Stibi, was advised.
>
> Fremantle Supervisor, Harken, was advised.

20 Mr Burgess conceded that he failed to make a call to the central monitoring control room to ensure that the incident was properly monitored by CCTV.

21 When asked in cross-examination about what communication he had with the passenger before he walked up to the person and pushed him, Mr Burgess said that the initial communication took place from about five metres away. He agreed, however, that when he walked up to the passenger, he did not use his close presence as a calming influence nor did he adopt the "interview stance" with his hands held up in an open way and the palms of his hands facing the passenger. He maintained, however, that the passenger was abusing him and the other transit officers for a good five minutes before he confronted the passenger. Yet he conceded the abuse he heard from the passenger was not uncommon and that he heard such abuse all time on the job.

22 In an explanation given to the respondent on 20 November 2008 in a document titled in part "Extra Information", Mr Burgess said:

> Removal of the offender from authority property was also not strictly in accordance with stated procedure and this was also due to circumstances outlined previously. The offender was extremely volatile, unpredictable, claimed to have a blade and expressed an intent and desire to stab me. Consequently I felt any form of close proximity transport manoeuvre would have been potentially perilous. In combination with circumstances detailed in earlier correspondence and the duress I was under at the time due to the seriousness of the threatening behaviour of which I was the target I felt the chosen method of removal was the safest and most appropriate to minimise potential harm and or injury to all involved parties and bring closure to a stressful incident. I do reiterate that although I felt it the most practical method of removal at the time it was not strictly in line with stated procedure and should a similar incident occur under the same circumstances I would use this experience beneficially to attempt to procure a more suitable outcome.

23 Mr Burgess did not, however, in that memorandum or during the hearing concede that he had used excessive or inappropriate force but simply said that he technically breached policy on these matters. When asked in cross-examination what did he mean when he wrote that his actions were not strictly in accordance with "stated procedures", he said he did not take the passenger in an arm restraint. He agreed that the contact he used was "pushing". He also said the action possibly went beyond what is described as "checking". He also agreed that the large double hand push was not strictly a "check". When asked how far he pushed the passenger prior to drawing his baton, Mr Burgess said about five metres. He said that each time the passenger stepped forward he pushed him back. Mr Burgess, however, maintained that the force that he used in pushing was the minimum amount needed to keep the passenger at a distance. He agreed that the total distance that he moved the passenger was about 10 metres. He also agreed that he had been trained to apply the escort hold in such a situation and that if he had chosen to do so escalation of the incident may not have occurred but he then said that it was more likely to have been more hazardous to him, as an escort hold is not practical to use in every situation. Yet he agreed that pushing and shoving as a matter of common sense can escalate a situation. He did not, however, agree that the passenger remained with his arms unrestrained when he pushed and shoved him. He agreed that he increased the risk of escalation of the incident by his actions but he said the incident did escalate because the passenger was feigning or shaping up to punch him (Mr Burgess). He said he had never seen someone so threatening before.

24 Mr Burgess conceded that the escort hold is all about technique and not about strength. He agreed he did not see the knife produced. However, he then went on to say said that the use of the baton was an appropriate use of force to someone who says they have a knife because you make the person think twice about pulling the knife if he has one. When asked why did he not withdraw, he said because they would have been under greater threat to turn around and walk away. He also said that if they had locked themselves in the office the passenger would take it out on the next person.

25 When it was put to Mr Burgess in cross-examination that he did not really work as a team during the incident at Claremont, Mr Burgess said that Transit Officer Wright was there but someone had to take the lead. Mr Burgess was also asked whether he put his baton away after he had hit the passenger twice and Mr Burgess said he did so after he had moved a sufficient distance away. He also said before he used the baton that he warned the passenger that he was going to use the baton. However, Mr Burgess was unable to recall the words used. When it was put to him whether he said, "Look, if you don't leave the station I'm going to be forced to use the baton on you", Mr Burgess said he did not say that. It was then put to Mr Burgess that in a memorandum (Exhibit 1(d)) he did not mention that he said anything to the passenger about using the baton before he applied the baton. In reply he said that lots of things were said that were not mentioned in the "paperwork". He then conceded it was possible that he did not warn the passenger about the use of the baton, but he then retracted that statement and said he recollected saying to the passenger he would use the baton. When it was put to Mr Burgess that drawing the baton was a "big event" for a transit officer, Mr Burgess said that prior to this incident he had only drawn his baton once in six years and it was a rare event for a transit officer to use a baton.

26 When questioned about his conduct on the concourse, Mr Burgess said it was not safe at that point in time to use the escort hold on the passenger. He explained by saying that the length of the concourse is only five to 10 metres and in his view the passenger was almost off the railway property and they would have had to let him go at the top of the stairs. However, they decided to re-engage him because they thought he was not going to leave. He also said you cannot apply the escort hold towards the stairs or on the stairs as that would be fraught with peril. When asked why did he not call on other delta crews or call the police, Mr Burgess said that other delta crews were at least half an hour away so they would be no use and the police had more important things to do than deal with a disorderly male on a railway property that he should be able to deal with. When asked whether he had made a plan with Transit Officer Wright prior to entering the stairs to the concourse, Mr Burgess said he could not recall what was discussed but they probably discussed what they should do with him if he continued to offend.

27 When asked about his action to push the passenger when the passenger was walking backwards down the stairs Mr Burgess said that he could now see that that was an error of judgment on his part and would not do it again and that it was inappropriate. When asked why did he not mention the push on the stairs in the incident report he said that he did not recall that he had pushed the passenger on the stairs until he watched the CCTV footage of the incident.

28 In relation to the incident that occurred on 20 October 2008 at Fremantle, Mr Burgess was working the evening shift at the Fremantle station. At about 9:00 pm he received a call from revenue staff who were on the train coming into Fremantle and that they were being threatened and harassed. The revenue staff are security contractors employed by Chubb who deal with ticketing offences on trains. Mr Burgess waited with another transit officer, Kelvin Bennett, at the Fremantle station for the train to come in. Mr Burgess in his evidence recounted what had happened whilst counsel and the Commission viewed the CCTV footage (Exhibit 4 – FRE104). The CCTV footage of the incident is very limited. Mr Burgess explained that the incident commenced off screen when he stopped the passenger after he alighted from the train. The person was a very tall, large man wearing a white t-shirt who was agitated and was with a young female who apparently was his girlfriend. Mr Burgess spoke to the passenger and tried to calm him down. The passenger was very upset and agitated. The passenger complained about the revenue staff not being able to speak English and said he wanted to kill them. The passenger gave Mr Burgess his health care card. The passenger wanted to attack the revenue staff who were at that point in time standing directly behind Mr Burgess. In the CCTV footage, part of the incident can be seen in the right hand of the screen which depicts the platform and the train which is stationary. The centre of the screen is taken up by a large fence. The passenger seems to be walking around with Mr Burgess standing in front of him. Mr Burgess motions towards the person with his left hand. The young female in question appears to be trying to calm the passenger. Mr Burgess testified he was trying to write down the passenger's details in his note book and he was intending to let him go without anything escalating. Mr Burgess is then seen more clearly on the CCTV footage to be pointing his index finger on his left hand at the passenger and standing quite close to the passenger. They then both move to the right of the screen and outside the range of the camera. When Mr Burgess and the passenger can be seen again Mr Burgess is seen holding the passenger by his shirt with his left arm looking up at the passenger. The passenger has both of his hands up away from his body. At that particular point in time, Transit Officer Bennett discharged his pepper spray over both Mr Burgess and the passenger. The revenue staff then immediately assisted Transit Officer Bennett to "take the passenger to the ground" and Mr Burgess steps away because he is at that point overcome by pepper spray.

29 When Mr Burgess gave evidence he said the reason why he took the passenger by the shirt was that he was trying to get him to be quiet and to let him go but the passenger was threatening to kill him and he was threatening to kill everyone. When questioned about this incident in cross-examination, Mr Burgess said that the passenger did not initially have a problem with him, his issue was with the revenue staff. He was trying to get at them. When he was asked why he did not ask the revenue staff to leave, he said they were at a safe distance and it was a possibility they would be needed to assist. He was then asked whether he had made a decision to arrest the passenger, Mr Burgess said that he had not decided on a course of action at the point when he was sprayed with pepper spray. However, when he had made a statement about this event in a memorandum dated 27 October 2008 (Exhibit 3(b)) to the respondent, he wrote that when the passenger made the threat that he was going to kill him and attempted to get to the revenue staff, he (Mr Burgess) informed the passenger that he was under arrest for disorderly behaviour, prior to taking the person by the shirt front. When this memorandum was put to Mr Burgess in cross-examination he agreed that he had told the passenger that he was under arrest. He then said he had forgotten the exact words that he used. When questioned further he said he technically did not arrest the passenger because he was sprayed by pepper spray. He agreed when cross-examined that by grabbing the person by the shirt could lead to an escalation of violence. He also agreed that that hold had no place in his training and exposed him to a possible headbutt. When asked why did he grab the passenger by the shirt, he said he thought a possible attack on the revenue staff was imminent.

30 After Mr Burgess' employment was terminated, he took a couple of weeks off to recover because he was stressed about being dismissed. He then actively sought employment and obtained casual employment with MSS Security in late May 2009 and was working 30 hours a week. He is also studying a Bachelor of Arts in Philosophy part-time. He began these studies about five years ago.

31 Jarrad Dekuyer is a senior transit officer. He gave evidence on behalf of the Union. He was also first employed as an inaugural transit guard in September 2002 and became a senior transit officer in November 2007. As a senior transit officer he carries out the duties of a transit officer. He also leads teams for special events, mentors and provides feedback for transit officers and assists in monitoring the performance of transit officers. He also liaises between the supervisor and transit officers to ensure all duties are carried out that are required. Until February 2009, he was the secretary of the Perth sub-branch of the Union. He substantively held that position for two years. He also actively practices martial arts.

32 When giving evidence Senior Transit Officer Dekuyer was asked to view the Claremont CCTV footage CLA201 and CLA202 which he had seen prior to giving evidence. Prior to commenting on the footage in court, it was explained to Senior Transit Officer Dekuyer that the evidence given by Mr Burgess was that prior to Mr Burgess and Transit Officer Wright entering the

screen they were standing off the screen to the left near the office. Senior Transit Officer Dekuyer was then asked to comment on the actions of Mr Burgess. When asked whether it was appropriate to observe a person who becomes disorderly, Senior Transit Officer Dekuyer said:

> The first use of force and the force continuum, his physical presence, I mean the guys are unformed, they are easily visible so my guess would be that standing off and just being there hoping that he will see the uniforms and perhaps calm down. Obviously you'll sort of know fairly quickly whether that's going to work or not. Because once they've seen you, if they continue then you realise that just your presence being there is probably not going to be enough. From there I would escalate the use of force to issuing verbal commands, perhaps to calm down or to leave the station or something of that description.

33 Senior Transit Officer Dekuyer was then informed that evidence had been given that the passenger was issuing abuse and threats to the officers and other patrons. Senior Transit Officer Dekuyer then said:

> [Y]ou do see Nick of course walking towards the offender of which obviously he is able to do. But the offender does walk to him also. And, that offender there has shown a propensity to violence, if he has issued verbal threats then that escalates it. But, the fact that he was prepared to shoulder that other gentleman there and then punch the sign shows that he's, to me, from his body language in my experience shows that he's not going to be a rational person. And, he's baying for a fight. So, Nick walking up to him to give him either a clearer or more firm direction to leave the station and then him walking towards him, I wouldn't let him get that close to me and I would have thought a check away to ... and by a check, Commissioner, I mean an open palm, it's only a single open palm to the chest to keep him at a distance to reduce the risk of ... or to defend himself from any possible headbutt or strike or some description like that which is not uncommon.

34 Senior Transit Officer Dekuyer also said that if a single hand push or check is not sufficient to motivate the passenger to leave it was appropriate to use a double hand check and that a double hand check was warranted by Mr Burgess at the Claremont station as the passenger was not leaving. When it was put to Senior Transit Officer Dekuyer that evidence had been given that Mr Burgess drew his baton when the passenger claimed to have a knife, Senior Transit Officer Dekuyer said that the passenger appeared to throw a punch and Mr Burgess hit the passenger's arm with the baton twice. He then described the actions of the passenger as a "closed hand escalation" about fists or taking a weapon. He said that when there is a threat of a knife, the threat warrants the use of a pepper spray or drawing of a baton if you believe the offender has both the intent and the ability to use a knife. He explained that the words "closed hand" mean they are able to respond in kind by using their baton or pepper spray in self-defence.

35 Senior Transit Officer Dekuyer explained that they are trained to use a baton on the forearm, wrist and triceps. He also said that the double baton strike used by Mr Burgess is the way they are trained to use the baton. Senior Transit Officer Dekuyer explained the training is "strike, strike, its back off, back off". He also said that once Mr Burgess had struck the passenger twice he observed that the passenger moved back and Mr Burgess then appropriately de-escalated the use of force by not applying the baton any further. In his view, the use of force by Mr Burgess was not excessive and within the bounds of training. When cross-examined he also agreed that he had been taught to use a baton not to gain compliance but for self-defence.

36 When asked in examination-in-chief whether Mr Burgess and his partner should have applied an escort hold to the passenger at Claremont, Senior Transit Officer Dekuyer said that if he was the senior officer he would have asked why was that not done. He then said the escort hold is the preferred method of dealing with such an agitated person and it is the method they are trained to use and that is the way they practise. He qualified that statement by saying that that does not mean that other methods are excluded. He said there are advantages and disadvantages to applying an escort hold. When you take the arm of an agitated person you reduce your ability to see what they are doing with their other hand and it is not an easy manoeuvre to undertake. Also an officer and their partner both need to grab an arm each at the same time and you have to have confidence that your partner will move at the same time as you as an escort hold is not effective if the passenger is not grabbed at the same time. He then said the disadvantages of applying an escort hold are that an agitated person may try to headbutt, kick down your legs or scrape your calves, scrape your legs, kick you or kick you with the heal of their boot.

37 Senior Transit Officer Dekuyer expressed an opinion that the advantages of the method of continual "checking away" and the escalation to "double check" is that you will be front on with your offender. He then said another advantage is that the person is moving. He is going in the direction you want him to go and if he escalates the use of force, that is, if he produces a weapon or goes to a closed fist you can deploy your baton or pepper spray. However, if you are holding onto him you cannot deploy your baton from close in, you have to disengage. He could not say whether the check/push method was better than applying an escort hold. He said he does not use the escort hold in all situations. Sometimes it is not effective and he has had to change his approach and defend himself if the subject's other arm is not grabbed the same way and punches start coming around or the person pulls, jerks or drops their weight down. He said it would depend upon the confidence you had in your partner, the confidence the partner has in himself, the size of the person, the aggressiveness of the person and many other factors. Consequently, the method used comes down to an exercise of discretion by the officers concerned.

38 When cross-examined it was put to Senior Transit Officer Dekuyer that there are only two ways to remove a person from the property of the respondent. One is that they voluntarily leave or you apply the escort hold. In response, Senior Transit Officer Dekuyer said that is not the only way, that it is appropriate to "check" someone away and to apply a "check" is to push someone which in doing so is to use a reasonable application of force. He, however, conceded that his views do not accord the training that he has received as a transit officer. He said he had not been taught to push someone to exit a station but he then said there are situations where you can do so. However, he then agreed that pushing someone could lead to an escalation of an incident. He also conceded that an escort hold is less likely to lead to an escalation of violence. When it was put to him that a "check" is to stop a person coming into an officer's personal space or to advance on a transit officer he agreed in part but then

went on to say that is not the only basis in which a "check" can be used and that it is appropriate to use a "check" in the way Mr Burgess did when an offender is baying for a fight. He agreed, however, that they are taught that the best and safest method to deploy is the escort hold. When it was put to Senior Transit Officer Dekuyer that the passenger at Claremont was of medium build and it was a classic situation where an escort hold should have been deployed, Senior Transit Officer Dekuyer agreed and said he would have recommended that they should have used the escort hold but he said that the CCTV footage does not tell the whole story. He said officers need to make decisions on what method they would use based on the information available to them. He also said that it was apparent to him from viewing the CCTV footage that it was the passenger who was more aggressive than Mr Burgess. He also said that Mr Burgess' partner was not assertive and he had not adopted a defensive stance as they were trained to do. He said that if he was a partner to Mr Burgess and saw the first "check" he would have moved around the side of the passenger to restrain the passenger. He explained that you apply the escort hold by approaching a person at a 45 degree angle. He also said that if he wanted to carry out an escort hold and he did not think his partner would participate, he would not go ahead with the manoeuvre. He also would not do so if he thought his personal safety was at risk. He said that you need to be responsible for your safety which is the most important matter as you are at risk of receiving a serious assault. He said to deploy the escort hold and to take someone by the hand to arrest them you need extensive practice of such manoeuvres to carry out the manoeuvre successfully.

39 When re-examined about the Claremont incident, Senior Transit Officer Dekuyer said that any time you place your hands on a threatening offender it can lead to an escalation of violence and that some people perceive such action as it was you who initiated the contact therefore they are entitled to fight back. He said a lot of people are cowards that they wait until they are being carried or you are searching them and then they can do some dirty fighting. He said that once restrained by an escort hold a person can still struggle. It does not remove the risk of injury and it does not remove the risk of escalation.

40 Senior Transit Officer Dekuyer was also asked to view the CCTV footage FRE104 of the Fremantle incident. When he observed Mr Burgess taking the passenger by the shirt, he said as a senior officer he would ask why did he grab him in that manner. He also said that the transit officer who applied the pepper spray did not do so in accordance with training. In his opinion, Mr Burgess' partner's deployment of the pepper spray was a significant departure from protocol as they are trained only to deploy a pepper spray at a distance of at least one metre and not to contaminate persons other than the subject. When asked about Mr Burgess' actions he said that there is a manoeuvre where after taking someone by the shirt you can hook out their leg and use your body weight to push them down, but he had not seen that trained for a significant period of time. He explained that when he and Mr Burgess were transit guards they were trained in this manoeuvre by a different supplier of training but this was a manoeuvre that is not longer taught. He said looking at the footage of the incident Mr Burgess' proximity was too close if he was going to make an arrest and it was a situation that could have been handled differently.

The Respondent's Evidence

41 Kevin Smith is a security trainer employed by the Centre for Excellence in Rail Training. The Centre for Excellence in Rail Training has held the contract to provide training for the past three to four years to train drivers and transit officers employed by the respondent. Mr Smith has personally trained Mr Burgess. He has worked in security industry and as a security trainer for the past 20 years. Over the past five to six years he has spent about 25 per cent of his time working directly in front line security for international acts who come to Western Australia and in crowd control. The remainder of his time has been spent training and supervising security guards and crowd controllers. About six years ago Mr Smith was employed by the respondent as a transit guard manager for approximately eight months.

42 Mr Smith gave evidence that when transit officers are first inducted they have 14 weeks of training. During that time seven days are spent on defensive tactics, using batons and the use of force. He said particular attention is given to the escort hold and the escort positions. These are demonstrated in the first two days together with "take down" and basic self-defence manoeuvres and then on each of the remaining five days the manoeuvres are repeated. Mr Smith, however, conceded that in the refresher course only one hour is spent on the initial training of how to affect an escort hold but said that they come back to the manoeuvre and do it again each day. He said that the technique is "bread and butter" for a transit officer so it is the technique they make sure they spend a lot of time on.

43 Mr Smith said the escort position is designed so both officers end up behind and at a 45 degree angle to the subject. Consequently, they are not really exposed to the kicks, punches, knees, elbows, biting, spitting and eye gouging. Mr Smith explained there are two positions in the escort hold. The first is where a person's arms are held straight and at angle pointing backwards on either side so that when each transit officer takes hold of a person they will be directly behind the passenger. The other escort hold is where at least one arm, if not both arms, are pushed up behind the person's back so they are unable to move. Both of these holds were demonstrated during the hearing. If a person tries to push upwards up whilst in the escort hold they will feel immediate pain. Officers have the option within the escort hold to use what is called pain compliance which results in some pressure being placed across the person's triceps area which is very uncomfortable. Another option is to "take the person to the ground" using two officers, put them in a restraint position and apply handcuffs.

44 Mr Smith said the refresher training which is conducted by the Centre for Excellence in Rail Training ensures that each officer undergoes refresher training on an average every 12 months. Sometimes officers go through training every six months and sometimes the period between refresher training is slightly longer than 12 months. During refresher training the competence of each transit officer is assessed. The participants examine various scenarios, carry out physical training and complete written theory assessments. In five-day training:

(a) One day is spent on "control persons' empty hand". It covers how to block potential attacks. This part of the training highly focuses on the two escort positions and methods of take downs. A "take down" is where officers take a person to the ground so they can be handcuffed during an arrest.

(b) One day is spent on handcuffing procedures and what happens if an escort goes wrong.

(c) One day is spent on baton training which includes a theory component.

(d) Time is also spent discussing the use of a pepper spray.

(e) The last day is spent carrying out scenario based training.

45 In relation to dealing with someone who is exhibiting poor behaviour on railway property where transit officers decide they should leave, Mr Smith said that each transit officer is trained to firstly attempt to remove the person by communicating with that person and then, if necessary, to use one of the escort positions to remove the person from railway property. Officers should where possible come up with a plan before they reach a subject. They should first of all communicate with the passenger and inform them if they are not willing to leave voluntarily what will happen precisely if they do not leave. He said to properly affect an escort manoeuvre it is always necessary for two officers to communicate between themselves that they intend to execute the manoeuvre. They need to place themselves in appropriate positions. The escort positions result in minimising harm to yourself and the subject. If something happens such as the subject trying to break free, the position gives you the ability to be able to safely as possible take the subject to the ground and apply handcuff restraints. Mr Smith said it is important that transit officers continue to communicate with the person at all times, to try to talk the person down and reduce the level of resistance. If they are unable to do so they should know what positions to place themselves in either by verbal communication or hand signal methods, to be able to engage the subject and effectively put an escort hold onto them. They should also tell the subject that they have the lawful authority to remove them with force so the passenger has the option to either leave or they know clearly what will happen if they do not do so. In particular, the subject should be told if they do not leave of their own volition, force will be used to remove them and if they decide to resist further and that escalates the situation charges could potentially be laid, particularly if they decided to assault an officer. Transit officers should always stand about one metre away from a person when they talk to them and off slightly to a 45 degree angle. If there is a one metre gap that allows a reactionary gap so they can still hear the person, so it is not impersonal, but if the person decides to try and engage the transit officer there is still a gap to respond.

46 Mr Smith said the use of the "check" manoeuvre is only to be used to stop a person coming into transit officer's personal space. A "check" is used if somebody is walking aggressively and continuing their movement towards you. A "check" is a barrier between yourself and the subject to make sure the person does not get past. He said pushing is not a tactical option as a push will result in an escalation of violence. He conceded, however, that restraint holds are not perfect. He said if pushing is used the outcome is never going to be very good as the person being pushed is likely to respond in a negative way.

47 In relation to the use of the baton, Mr Smith said that the baton is to be solely used for self-defence. All transit officers are taught they are not to use a baton to "take someone down" or to make an arrest. Mr Smith said that a baton should only be used if transit officers are severely out numbered or if one transit officer is injured or if a person produces a weapon. He also said that they try to control any incident with a minimum amount of force. In his view it was not appropriate for Mr Burgess to draw and use his baton. He said if there was a threat to kill and a threat of a knife being produced it was better to disengage and call the police. He testified he found it hard to believe that you would continue to push a person when the person says they have a knife as you could get stabbed. He also said that Mr Burgess used the wrong technique for holding the baton. Mr Burgess held the baton as a threat and was not the way he had been trained to use the baton. It should have been held in tight whilst he adopted the interview stance.

48 When it was put to Mr Smith in cross-examination that Mr Burgess' escalation of the use of force by using the baton was reasonable given the escalation of the level of aggression by the passenger, Mr Smith said that the fact that the level of aggression increased was caused by Mr Burgess. Mr Smith also explained the "use of force continuum". He said the minimum amount of force is the escort hold and the open hand check. He said that the higher level on the continuum is the use of handcuffs, then ascending to the pepper spray and the highest level is the baton. Mr Smith testified that when looking at the CCTV footage there was "no way" a baton should have been drawn. In particular he said:

> But what I also do have to go on is what our training and what the PTA policy is in regards to the use of a baton. Now, a person doing what you say is shaping up does not mean that a baton can be drawn and then used against a person in this nature. It is not something that we'd endorse, nor is it something that we'd teach. If it was, I could imagine that the Public Transport Authority would be inundated with complaints for assault. (ts 96)

49 He then went on to say:

> The use of the baton would be when the transit officer involved either fears for his own life or his own personal safety and when all other methods of trying to deal with the incident have been exhausted. Now, those methods include communication, negotiation and obviously empty hand control tactics being able to put the person into an escort. If all of those methods failed or did not seem reasonable at the time, then there could be an application where a baton may be used, but given the nature of this incident and the individual involved and his size, the size difference between himself and Mr Burgess, I still cannot see why there was an application of a baton or the use of a baton. (ts 96-97)

50 He did say however that if a knife is produced and there is an attempt to stab a transit officer the baton can definitely be used to defend themselves (ts 70).

51 When asked to comment on what he observed of the incident at Claremont in the CCTV footage CLA201 from a training point of view, Mr Smith said that the approach by Mr Burgess to the passenger appeared to be in a way that Mr Burgess was acting alone and there did not seem to be any plan that had been made for dealing with the passenger. He then said communication did not seem to have been regarded as a good option because as soon as Mr Burgess was within the passenger's close proximity he decided to push the passenger in the chest. He described the initial push as an emotive response by Mr Burgess rather than a tactical response. Mr Smith said that such a push in his view would lead to an increase in the level of aggression.

52 In relation to the events that occurred on top of the concourse at the Claremont station, Mr Smith said that where an agitated person is on top of the stairs and there are no people around transit officers are trained to let the person vent their anger and not intervene unless the focus changes from the transit officers to the public. He also said that given the fact that Mr Burgess and

Transit Officer Wright spent some time at the bottom of the stairs prior to walking up the stairs to confront the passenger they could have formed a plan to go up and effect an escort hold or to call for back up. He also said that if the person had a knife the officers should have called the police. He said he would have expected if the police had been called they would have reacted quite quickly.

53 In relation to the push on the stairs, Mr Smith said that the fact that the passenger was moving backwards when pushed that created a glaring safety problem. The passenger could have lost his footing, rolled down the stairs resulting in an injury.

54 When cross-examined, Mr Smith conceded that when someone is taken into an escort hold there is a risk of injury from a punch, a bite or spitting. He also said some persons may struggle to break free or they pull in their arms in passive resistance. They also sometimes sit on the floor or close their arms. These actions all make the manoeuvre difficult. He also agreed that some people try to scrape their foot along a transit officer's leg, however, he then said they teach the transit officers to carry out the escort hold so that does not happen. He also agreed that headbutts can occur but said if you carry out the manoeuvre properly the risk is reduced but not wholly eliminated. Mr Smith also agreed that prior to taking a person by the escort hold there is to a degree a window of opportunity for injury, as transit officers have to get into the personal space of the person they are attempting to restrain and when they do so they are within striking distance of the person. Mr Smith said that they practise the escort hold with protective gear with a subject who resists. They also practise a number of scenarios including where people are passive or fighting to a degree of safe limits in an attempt to replicate actual situations.

55 When asked if a person is in an escort hold what steps are open to transit officers if the person is violently resisting, Mr Smith said if the person decides to resist and moving them is not safe, transit officers are taught to take a person down to the ground, that is, to put them on their stomach and handcuff them. When asked when someone is asked to leave and is taken into an escort hold and released at the edge of the respondent's property, is there is a risk of injury, Mr Smith said that if a person is released effectively they will be at more than an arm's length and facing away from the transit officers who can retreat quickly. Mr Smith was also asked whether in his experience taking someone in an escort hold will sedate them. In response he said that a lot of people become verbally abusive but in his assessment there was only a 10 to 15 per cent chance that they would be physically aggressive.

56 When asked why he said that Mr Burgess should have approached and spoken to the passenger prior to taking any action, Mr Smith said that Mr Burgess should have initiated some communication and he should have adopted an interview stance. He explained an "interview stance" is when a transit officer stands, holds up their hands with their palms facing the person in a calming way.

57 In relation to the incident at Fremantle Mr Smith said that he viewed the CCTV footage FRE104. He pointed out that Mr Burgess was aggressive by pointing his finger at the passenger. He also said that the training Mr Burgess would have received as a transit officer was that if an offender has a personal bias against any person then that person should be moved away. The person who is acting in a disorderly way, after being warned, should be restrained and escorted or if resistance is increased he should be taken to the ground. Mr Smith said to grab someone by the shirt is not something which is taught to transit officers as such a manoeuvre inflames the situation. When cross-examined Mr Smith also said that the pepper spray should not have been deployed within a distance of one metre.

58 Steven Furmedge is the Manager of Security Services for the respondent. He gave evidence on behalf of the respondent. Mr Furmedge is responsible for security services on buses, trains and ferries including transit officers employed in the rail system and contractors who provide security services. In the hierarchy of the transit officer system below Mr Furmedge are transit officers, senior transit officers, supervisors, shift commanders and operations managers. Mr Furmedge has been employed by the respondent for seven years. Prior to his employment by the respondent he was employed as a police officer for 17 and a half years. He also has 30 years experience in martial arts.

59 Mr Furmedge works closely with the organisations that provide training to transit officers. He attends training courses each month. He is also involved in the drafting of policies in respect of security services. He manages the prosecutions area and has an input into drafting the transit officer's manual. There is an electronic copy of the Transit Officer Operations Manual available to all security services staff. All notices to do with security services are sent out to staff by global email. If there is a specific issue involving security that is dealt with by way of a notice. Each day transit officers have to attend musters and if there is any issue arising in relation to a notice, that is addressed by supervisors at a muster.

60 Mr Furmedge has reviewed the CCTV footage of every "incident" involving a transit officer over the past seven years. He said he has done so to increase "their professionalism". Each month he spends six or seven hours at night on the rail system with transit officers and observes their activities first hand. Mr Furmedge told the Commission that the Corruption and Crime Commission (CCC) has been very critical of the use of the "check" manoeuvre by transit officers. He, like Mr Smith, testified that a "check" is for personal protection and should only be used to stop someone invading your space.

61 Mr Furmedge reviewed the CCTV footage of the Claremont and Fremantle incidents involving Mr Burgess prior to giving evidence in these proceedings. He said in relation to the Claremont incident Mr Burgess should have called the central monitoring control room and notified them of the incident so that the cameras at the railway station could have zoomed in and taken better pictures of the incident when it first occurred. He said, however, it is apparent from the CCTV footage that by the time the passenger entered the stairs that someone in the central monitoring control room was viewing the incident and had zoomed in. Mr Furmedge said that it is important that all incidents are notified to the central monitoring control room as that is where the shift commanders are based and all incidents should be properly filmed particularly where there may be some allegations made against an officer.

62 Mr Furmedge said the second thing that Mr Burgess and the other officer should have done was to formulate a tactical plan of how to put an escort hold on the passenger. Mr Furmedge also described the way in which an escort hold should be affected. His explanation of the hold was not dissimilar to the description given by Mr Smith. Mr Furmedge was also critical of Mr Burgess for failing to try to engage the passenger in a passive way. Although he accepted Mr Burgess had asked the

passenger to leave, Mr Furmedge says the way the passenger was asked to leave did not facilitate him leaving. He said the way to deal with an agitated person is to speak to them in a passive calming way. To approach them as a customer and treat the exercise as a customer service exercise by using words such as, "What's up? What's wrong, sir?" He also said to de-escalate a situation you need to speak to a person close up. Mr Furmedge explained that part of tactical communication is to engage an aggressive person with appropriate tones to facilitate them to leave and get them to calm down. Even if you do not know if such tactics will work it is appropriate to try as the respondent does not want people to be arrested unless it is strictly necessary.

63 Mr Furmedge also gave evidence that Mr Burgess acted contrary to his training as Mr Burgess immediately engaged the passenger by giving the passenger a shove. Mr Furmedge said there was nothing in the pushes that can be described as a "check". He said a "check" should not be a forward movement into the personal space of a person. The transit officer should take a half step back to increase the reactionary gap between him and the offender. He pointed out that Mr Burgess was talking to the passenger from a distance of 10 metres which would mean he would have had to raise his voice to be heard. Doing so, in his view, would be perceived as aggressive. He also said that if you push someone they will push back and that pushing is never an option for a transit officer. He said when Mr Burgess made the decision to remove the passenger he should have taken him into an escort hold.

64 If a transit officer becomes fearful or anxious for their safety then he should at all times remove himself from the situation. Once a person is taken into an escort hold they are taken from behind and it is the safest option. He also said that if the escort hold does not work it is best for the transit officers to call for back up or call the police.

65 In relation to the use of the baton, Mr Furmedge said that the baton should not have been used by Mr Burgess as it is only to be used as a last option as it a concussive force and the last force in the force continuum. He also said that if Mr Burgess thought that the passenger had a knife he should have backed away and called the police. Mr Furmedge said shift commanders have a very good relationship with police. The police will always send their first available unit to Public Transport Authority property if there is an issue arising about a weapon and a threat to transit officers as such complaints always taken seriously by police. In addition, Mr Furmedge testified that Mr Burgess should have contacted the shift commander and advised the passenger was possibly armed.

66 Mr Furmedge also said that the way in which the baton was used by Mr Burgess was contrary to his training. First of all, he held it down near his leg instead of in the ready position. Secondly, he stepped forward when striking the passenger on the second strike. Transit officers are taught never to step forward on a baton strike. They are to back away and only use the baton if someone is coming towards you. In his opinion, Mr Burgess should not have drawn the baton; he should have backed off from the passenger as the person was not coming at him. Mr Furmedge explained that the baton can be drawn in self-defence when a transit officer is in immediate danger of being attacked. He said that the criteria for use of pepper spray is the same, however the baton is at the higher end of the use of force continuum than the pepper spray. The pepper spray can be used to blind and disable a person but it is not concussive. He also said that it is appropriate to hit someone with a baton on muscle mass but not on bone as there is a danger of fracture. He said you are only authorised to draw the baton if you cannot remove yourself from the incident. He said the proper procedure when drawing the baton is to "check" backwards by pushing back with the left hand up and drawing the baton with the right hand.

67 When asked to comment about the fact that Mr Burgess achieved the aim of removing the passenger off the platform, Mr Furmedge said the result of getting the passenger on the concourse did not justify the means. Mr Furmedge explained:

> … it's not about achieving an outcome, it's about the safety for our officers and it's about risk from a … from litigation and it's also about criminal charges. So we make legal considerations. We make safety considerations for every method of training that we do. And we make … that's why we try to reiterate to … to the transit officers, "Stay within these boundaries. It keeps you safe from litigation, criminal charges and also your safety." (ts 105)

68 Mr Furmedge also said that it would have been better if the passenger had been left on the concourse to yell abuse until he got sick of it and left of his own accord. In relation to the push on the stairs, he said that that was a very dangerous action. A foreseeable consequence of such a push if you are dealing with someone who is intoxicated by alcohol or drugs, could have meant that he fell backwards and they could have been dealing with a sudden death.

69 In relation to Senior Transit Officer Dekuyer's evidence, Mr Furmedge said that the evidence given by Senior Transit Officer Dekuyer is contrary to what he was trained to do and what the respondent would expect from Senior Transit Officer Dekuyer and other transit officers. He said that pushing is never an option and there is no discretion to use such a manoeuvre in an incident. He also said that this is made very clear at musters. Mr Furmedge explained:

> … a big thing stemming from our section was a lot of criticisms from the CCC on what is a check and what's actually more of a … a push or a strike or what have you and we went to great lengths to actually sit down with the Union, explain to them what the CCC were saying and … so that we could communicate. We made sure that the trainers were communicating that in training and we'd been getting the supervisors to address it at musters … through the muster notes and also I go out on the system. Nearly every single day I call into a muster or stations and talk to transit officers. I keep a running log of that. I've got an afternoon shift operational manager, who does the same thing. And this specific issue has been addressed numerous times before and post this incident at musters and what I do is I ask the officers themselves, "What's your interpretation?" and I get a unified response that the checking cannot be used for any other purpose other than when someone enters into your personal space. (ts 107)

70 Mr Furmedge explained that the escort hold is applied to protect the officers and to do their job under the *Public Transport Authority Act 2003* (WA) which provides for a right of security officers to eject people from the property of the respondent. He said it is the safest way for a member of the public to be removed and it negates the escalation of an incident. In his view the actions of pushing the passenger by Mr Burgess was not lawful. In his view it was an unreasonable use of force, even

though it did not result incapacitation, as the use of force by Mr Burgess was a greater use of force than the force which would be applied in an escort hold.

71 Mr Furmedge said that the force used by Mr Burgess was unreasonable and more force had been applied than if the escort hold had been applied. When cross-examined about whether the level of force used in an escort hold when compared to the force used by a push, Mr Furmedge said that the only pain that is inflicted in an escort hold is when the person who is taken into the escort hold tries to resist the escort hold. Mr Furmedge explained that he has applied the hold and had the hold applied to him. Mr Furmedge also said that the person who is being held in an escort hold would not be comfortable but if they comply there is no application of force. If they push against the hold, pain can be inflicted but it is the person who inflicts the pain on themselves. It is not caused by the transit officers. He agreed, however, that the transit officers who apply the escort hold are at a risk of injury. There are a number of possibilities of injury, including muscle strain of the forearm or thigh. In his opinion the use of an escort hold is appropriate and requires a lesser use of force than a push. Mr Furmedge explained:

> But with the escort hold, it's different because you've asked for him to remove himself and you've warned him that you're going to physically do something to him, as in escort him. You're placing him into the safe hold and then if he resists, then you have to actually restrain him further, but at the end of the day that force is commensurate with how much force he's applying back to you. The shove has no force being applied back to you, so that is deemed unreasonable. There's no balance there. (ts 115-116)

72 When it was put to Mr Furmedge in cross-examination that the level of aggression by the offender increased because he was shaping up for a fight, Mr Furmedge said that the CCTV footage shows the passenger was moving his chest forward, which looked more like he intended to carry out a "chesting" rather than to use his fists. He conceded that it was clear no pain or incapacity appeared to have been caused to the passenger until the point at which the baton was used. But he then said the pushes may have caused pain.

73 In relation to the Fremantle incident, Mr Furmedge said that if there was a personality slight taken by the passenger against a Chubb officer then the transit officers should have told the Chubb officer to move away from the passenger. Mr Furmedge also said that Mr Burgess' actions on that occasion can be perceived as aggressive as he is seen on the CCTV footage to be pointing at the passenger who was already highly agitated. Mr Furmedge said to grab the person by the shirt near the throat was inappropriate and left him (Mr Burgess) in danger as he had no protection if the passenger decided to throw a punch.

74 When cross-examined Mr Furmedge said that Transit Officer Bennett did not comply with his training and he breached the procedures in relation to the deployment of a pepper spray. Transit Officer Bennett discharged the pepper spray too close to the passenger's face. Mr Furmedge explained that the jet from the pepper spray can harm a person's eye by damaging the retina and can result in a soft tissue injury. He also said that if you discharge a pepper spray too close to your partner your partner can be contaminated by a secondary spray which is what happened on this occasion. Transit Officer Bennett was disciplined in relation to this incident and was counselled and sent back for retraining. He had been employed less than 12 months at the time the incident occurred. Mr Furmedge also said that as the use of the pepper spray by Transit Officer Bennett occurred as part of an arrest the actions of Transit Officer Bennett were currently being considered by the CCC who were carrying out an independent investigation. Transit Officer Bennett had not however been suspended from duty and does not have any history of any prior disciplinary matters.

75 Mr Furmedge said that Mr Burgess' conduct at the Claremont station was so excessive that when the incident is considered alone it only provided reasons for dismissal but when Mr Burgess' conduct at the Fremantle station was also considered there was no alternative but to dismiss. He said that transit officers are law enforcement officers which means they have a greater degree of accountability and the public has to have confidence that they will carry out their role in a reasonable manner.

The Applicant's Submissions

76 Counsel on behalf of the Union remarked on the fact that there is an "air" of unreality in analysing an event in a court room over two days when the event was a 30 second transaction and to do so is to apply a level of scrutiny which is itself approaching unreasonable. Having made that submission, the counsel for the Union does not say that it is inappropriate for the Commission to scrutinise and review the CCTV footage and make a determination whether the force used by Mr Burgess was excessive and/or unreasonable. However, it is pointed out that that whilst the Commission has spent a period of two days considering the actions of Mr Burgess, Mr Burgess did not have the luxury of considering how to deal with the passenger at Claremont over such a long period of time. It is also said that it is unrealistic to expect that someone in the position of a transit officer will get everything right all of the time. Whilst it is conceded that Mr Burgess could have handled the Claremont situation better the Union says it is not correct to say he acted excessively or inappropriately or he used excessive violence or force. The Union says that there was an excess of zeal by those who dealt with Mr Burgess on behalf of the respondent in finding fault with the actions of Mr Burgess as nothing he did was inappropriate.

77 It was also pointed out that while the escort hold minimises the risk of injury to the person and the officers, it is still a substantial exercise of the use of force and a substantial invasion of the person's privacy. Counsel says that the sanitised way that Mr Smith and Mr Furmedge described the escort hold one would think there was no force involved in the execution of the manoeuvre. However, when one looks at the manoeuvre it can be seen that a considerable, substantial or significant level of force is used when the escort hold is applied. Counsel went on to explain that when a person is taken into an escort hold they become wholly incapacitated from any physical movement other than the movement that either of the officers permit the person to make, as the person is grabbed by two officers using both hands and in that process there is an application of considerable force. They are held in such a way that if the person attempts to move in a way in which the officers do not want him or her to move, pain is caused.

78 It is also said that when you compare the "check/push" scenario with what would be done in an escort hold, Mr Furmedge and Mr Smith did not give a detached assessment of the "pros and cons" of each methodology. When the push option is used, a

person who is being pushed can leave the premises voluntarily. This is not an option under the escort hold. From the point that they are taken into an escort hold there is no option to leave voluntarily. If the person chooses not to walk then they will be dragged or carried by the transit officers until they reach the street and then released. Consequently, it is argued that it is wrong to say that the check/push manoeuvre involves excessive force when looked at from that perspective.

79 The Union also contends that if the degree of incapacitation imposed by each of the two methods is examined it can be seen that the escort hold results in the person being wholly physically incapacitated from doing anything and the hold can cause a person pain if they move the wrong way. It is said that it is a "cute" distinction to say that the transit officers do not cause the pain, the person restrained causes the pain to himself. It is said that the check/push manoeuvre engaged in by Mr Burgess at the Claremont station did not deter the person at all and did not inflict injury as his presentation was not consistent with the manoeuvre causing him pain. The Union says that if you look at the level of pain that a check/push manoeuvre can inflict and compare that with an escort hold it can be seen that the check/push manoeuvre involves less force than the escort hold. Therefore you cannot conclude that it involves excessive force. It is also said that pushing someone can engender the same level of violence as an escort hold and cause a person to become enraged. It is pointed out by the respondent that there are risks of injury to the transit officers during an escort hold by spitting, kicking and headbutting. Consequently, it is argued that it does not matter if a push or an escort hold is used to eject the person from Public Transport Authority property because either can escalate the level of aggression as both manoeuvres have a tendency to provoke aggression and ill feeling. Further it is pointed out that once a person is released outside or on the edge of Public Transport Authority property they can still have "a go" at the transit officers.

80 It is also pointed out officers are exposed to the prospect of injury during a very short window of opportunity when they go to grab the person to put them into an escort hold. An aggressive person who is highly agitated can inflict considerable injury during that period of time. Whilst the escort hold is in place there is still a risk of injury as the person can break free and they will have to be put "down to the ground". Alternatively, it is said that it is not possible to say that the escort hold or the check/push method uses more force than the other. They are different and not comparable. Consequently, it is argued to dismiss Mr Burgess for use of excessive force is unjustified.

81 In relation to the use of baton it is argued that it is apparent from the CCTV footage that the passenger became more and more aggressive and looked like he was going to attack. This can be inferred from Mr Burgess' evidence that the passenger was "shaping up" and had made threats that he intended to kill and that he had a knife. Consequently, the use of the baton by Mr Burgess was justified as a defensive means as an attack was imminent. The evidence establishes that the baton may be displayed in a response to a reasonably held belief of imminent attack. It follows, therefore, that a finding can be made by the Commission that the use of the baton by Mr Burgess was for self-defence and was not unreasonable.

82 After the baton was applied the officers retreated to keep their distance and they let the passenger retreat. They gave him some time to leave yet they have been criticised for not leaving him longer. In response it is pointed out that these decisions are made in operational conditions and not with the benefit of hindsight. It is also pointed out that the reason why the transit officers went up onto the concourse is because they perceived their duty was to get the passenger to leave Public Transport Authority property. That is their role under s 65 of the *Public Transport Authority Act 2003.* Consequently, it is not appropriate to criticise their conduct not to leave him when the whole purpose of their job is to deal with persons who behave in the way the passenger was behaving.

83 In relation to the action of Mr Burgess pushing the passenger on the stairs it is pointed out that this action has been portrayed by the respondent as highly dangerous. The Union says that such a proposition is unreasonable, that at its highest the actions of Mr Burgess constituted an encouraging push of a gentle nature. This can be inferred as the person was not falling over, he was not incapacitated or liable to fall and the action by Mr Burgess was nothing more than physical touching to encourage the passenger on his way.

84 A submission is also made that whilst it is conceded that things may have been handled differently and the strong desire on behalf of the respondent to do things by "the book" may be a good thing, Mr Burgess could have been charged with failing to carry out lawful instructions and carry out ejection in the prescribed method. However the respondent did not frame the charges in that way.

85 It is argued that if the breach of discipline in respect of the Claremont incident falls away, the Commission must consider the actions of Mr Burgess in the Fremantle incident. It is apparent from the actions of Mr Burgess at Fremantle that he engaged in inappropriate grabbing of a person by the shirt front. However, it is common ground that conduct complained of in the Fremantle incident alone would not justify termination.

86 It is pointed out that apart from these incidents Mr Burgess has a clean record and had been employed by the respondent for a period of six years. The dismissal has made it difficult for Mr Burgess to obtain work and he has suffered a five-month loss of remuneration. The Union says that the Commission when considering the conduct of Mr Burgess should have regard to the fact that Transit Officer Bennett has simply been counselled and retrained as a result of inappropriate and dangerous use of the pepper spray. It is also said that the Commission should have regard to its recent decision in *Kelly v Public Transport Authority Transperth Train Operations* [2009] WAIRC 00238; (2009) 89 WAIG 669, in which the Commission found that misconduct by Transit Officer Kelly did not warrant termination but a period of suspension without pay. The Union says that when this matter is compared to the facts in *Kelly* it would be appropriate to make an order for reinstatement of Mr Burgess but without an order for compensation for loss of earnings which would in effect result in a period of suspension without pay for approximately five months.

The Respondent's Submissions

87 Whilst Mr Burgess was dismissed because of his conduct in both incidents it is conceded that the actions of Mr Burgess at Fremantle alone would not have been enough for the respondent to justify the dismissal. However, it is said that the actions of

Mr Burgess in the Claremont incident alone are enough to justify dismissal. The respondent points out that Mr Burgess was not summarily dismissed. Consequently the onus is on the Union to show that the decision to dismiss was unfair or harsh and the respondent only needs to show that it acted reasonably in all circumstances.

88 Mr Burgess admits he was wrong not to radio for CCTV to focus on the incident. The respondent says that the incident in Claremont is not a marginal case of the use of excessive force, nor is it a matter of degree or for the use alternative methods of ejecting the passenger from Public Transport Authority property.

89 The respondent points out that Mr Burgess concedes and accepts he did not follow his training and the respondent's policy and procedures and says if he had his time over he probably would have done things differently. The respondent also says it is relevant that Mr Burgess had received refresher training very shortly before these incidents occurred as he attended a refresher training course in September 2008. The respondent says that the evidence given by Mr Smith and Mr Furmedge should be accepted as their evidence was clear and concise and unshaken in cross-examination. On the other hand the respondent says Mr Burgess and Senior Transit Officer Dekuyer attempted to put a gloss on the conduct of Mr Burgess which should be rejected.

90 It is also pointed out that the first real contact with the passenger at the Claremont station was violent and was violence initiated by Mr Burgess. Prior to that physical contact Mr Burgess had spoken to the passenger from about five metres away. He did not go into close contact with the person and adopt the interview stance. The respondent says that even if the interview stance and the customer service strategy seem hopeless it can work. Mr Burgess should have put his hands up in a passive way but he did not do so. When someone is baying for a fight it is utter folly to assume that you do not try to pacify the person by approaching them and talking to them in a controlled and civilised manner. That should be done by the transit officer lifting his hands up in a passive way and ready to protect himself, but not in any way indicating aggression. That is what transit officers are trained to do but Mr Burgess did not do so. Instead he moved at some pace towards the passenger and immediately initiated physical contact. He used force when none may have been necessary and when he applied force he used more than was needed. The respondent says that in doing so Mr Burgess breached the terms of his engagement pursuant to clause 12 of section 7 of the Transit Officer Operational Manual (Exhibit B). Clause 12 provides:

> 12) USE OF FORCE
>
> a) You must not use more force on persons than is reasonably necessary to perform your lawful duties.
>
> b) In any circumstances where the use of force is justified, you should use the minimal amount of force required to establish control, once achieved, lower force options are to be employed at the earliest opportunity.
>
> c) Excessive use of force can be defined as:
>
> i) Any force when none is needed
>
> ii) More force than is needed
>
> iii) Any force or level of force continuing after the necessity for it has ended
>
> iv) Knowingly wrongful use(s) of force
>
> d) Well intentioned mistakes that result in undesired use of force.
>
> e) In all circumstance where use of force options are deployed a use of force form must be completed before ceasing duty.

91 When Mr Burgess immediately applied force ahead of his partner as it is apparent when he first pushes the passenger that his partner was some distance behind him. Consequently, the respondent says as pointed out by Mr Smith it is obvious Mr Burgess has not planned an approach with his partner to take the passenger in an escort hold if communication fails. It is also said that there was sufficient time to plan an approach as the passenger was observed for a period of time before he was approached. It is clear from the CCTV footage that Mr Burgess strides out acting alone. Mr Burgess did not use a check manoeuvre on the passenger as he quite strongly pushed the passenger when the passenger was not at that point physically aggressive. Mr Burgess escalated his pushes by forcefully giving the passenger a two handed push in the direction of the edge of the platform. This, the respondent says, is the second occasion on which Mr Burgess used excessive force, when a lower force option was available. The lower force option was the escort hold. By pushing and shoving, Mr Burgess moved the passenger some 10 metres down the platform. This action can clearly not be described as a "check" to get someone out of your space. You cannot move someone 10 metres by the open hand contact of "checking". It is contended that it is clear from what can been seen on the CCTV footage that during this action Mr Burgess was being physically aggressive and the passenger was not being physically aggressive.

92 The respondent maintains that when Mr Burgess approached the passenger, and if it was necessary to have physical contact, there was a lower force option available and that was to take the passenger into the escort hold if it was necessary to use force. Counsel for the respondent points out it is not in dispute that if force is necessary to remove a person transit officers are trained to apply the escort hold. To apply an escort hold is not to put force into someone like pushing them. If pain is caused to the person being held in an escort hold it is caused by resistance. The respondent does not accept that transit officers have discretion not to use the escort hold. Personal views in relation to its effectiveness or otherwise at the end of the day are irrelevant as the training and instruction they receive is to use the escort hold. In any event the evidence given by Mr Smith and Mr Furmedge adequately explains why the escort hold is the safest and best method to eject a person and is preferable to a push. Mr Furmedge demonstrated that an escort hold involves a lower level of force than a push. It is self-evident that a push has more force and aggression than the escort hold. It is a matter of common sense that a push can "fire a person up". Mr Burgess clearly conceded that to be the case.

93 The respondent says the incident depicted in the Claremont CCTV footage on the platform is a classic example for the application of the escort hold and if the passenger had struggled he could have been "taken down". Instead the pushing and shoving by Mr Burgess led to an escalation of the incident. The respondent says the "shaping up" by the passenger was not truly shaping up in the form of taking the "Queensbury Rules stance", it was more a "lunge in" by the passenger. The situation was not out of control and there was still an opportunity to apply the escort hold but instead Mr Burgess chose to produce the baton. The use of the baton was not necessary. It is only to be used in self-defence or defence of others and as a last resort. If someone is shaping up for a fight that is not sufficient reason to use a baton. The passenger had not thrown a punch. In relation to Mr Burgess' contention that the passenger had a knife, the respondent points out that no knife was produced by the passenger and there is no evidence before the Commission that the passenger attempted to pull a knife out. If Mr Burgess was truly concerned that the passenger had a knife then he should have withdrawn, retreated, observed the passenger and called for backup. If someone says they have a knife, short of producing the knife that does not constitute an imminent danger of attack. The respondent says applying the baton was the third occasion Mr Burgess used excessive force. The action of Mr Burgess to use the baton was a clear example of applying excessive force by applying more force than is needed, contrary to clause 12(c)(ii) of the Transit Officer Operations Manual (Exhibit B). The baton should not have been used. There was a lower level of force option available which was the escort hold. However, if the knife threats are made and taken seriously then no force at all is available. Mr Burgess should have retreated.

94 Counsel for the respondent points out that Mr Burgess made no mention in the incident report that the passenger had made a threat that he had a knife. When Mr Burgess gave evidence he agreed he had read the incident report and had input into the content of the report but he had no explanation why this fact had not been mentioned in that report. It is contended that if there truly was threat of a knife then there was no reasonable explanation for not calling the police.

95 The respondent says Mr Burgess had no real reason for going up the stairs as it was open to wait until the passenger had left. It is not a matter of timing. If the passenger was being a nuisance but not a threat to anyone you should not re-engage someone who you think has a knife. If, however, an officer is of the opinion that the person should be re-engaged then Mr Burgess and his partner should have taken the passenger in an escort hold. But if Mr Burgess truly thought the passenger had a knife the police should have been called. The respondent says Mr Burgess' reasons for not calling the police were very weak.

96 In relation to the push on the stairs, the respondent contends that this was the fourth occasion that Mr Burgess applied excessive force when no force was needed. The push in the circumstances was a totally unnecessary, extremely reckless act. Although Mr Burgess described the push in his evidence as mild or guiding, he conceded when cross-examined that it was a regrettable action. The push was more than regrettable. It was downright dangerous and an obvious example of excessive force.

97 It is clear from the CCTV footage that it looks like he was acting alone at all times. He not only acted contrary to training and instructions but he used excessive force. The respondent says that it has no confidence that Mr Burgess is able to carry out duties of a transit officer appropriately. Transit officers are public officers who have powers of enforcement. The respondent has to hold out the officers to the public as people who exercise discipline, who follow the rules, who do what they are trained to do and who follow instruction. They are not ordinary employees. They are public officers who have extraordinary powers; powers to use a baton, powers to use a pepper spray, powers to arrest, powers to lay hands on people. With these powers come high responsibilities. Clearly the respondent says after the Claremont incident it can have no confidence in Mr Burgess to carry out these duties appropriately.

98 The respondent also contends that the Union could have called Transit Officer Wright to give evidence in support of Mr Burgess' case but has failed to do so and an adverse inference should be drawn against the Union for failing to call Transit Officer Wright.

99 The respondent says that even when the Claremont incident is considered alone without regard to the actions of Mr Burgess in the Fremantle incident, the decision by the respondent to terminate the employment of Mr Burgess as a transit officer was reasonable.

100 In relation to the Fremantle incident the respondent says at all times Mr Burgess showed a lack of control and teamwork. It was a very short incident. It is apparent from the CCTV footage that Mr Burgess used checks appropriately with a bit of pointing, but when he arrested the passenger he grabbed him by the front of the shirt. He approached the passenger in close proximity when the passenger was unrestrained and angry. He did not restrain the passenger in an escort hold. In addition he should have told the Chubb security staff to go and he failed to take any steps to defuse the situation. He showed a lack of control, a lack of regard for teamwork and an inability to apply his training. The respondent also says it is of concern that when giving evidence Mr Burgess forgot he had informed the passenger he had arrested him. Counsel submitted that if he has such memory lapses, this is of concern for a person employed as a transit officer, as transit officers should not forget about such a significant event.

101 The respondent says that the second incident supports the respondent's decision to dismiss. The incident shows he does not know how to discharge the duties of a transit officer. It demonstrates that Mr Burgess acts in a way which displays at law he does not intend to be bound by his contract of employment. In relation to the disciplinary action taken against Transit Officer Bennett, the respondent says that there is insufficient information before the Commission to make an examination as to whether there should be parity imposed by the respondent against Mr Burgess.

Legal Principles and Findings of Fact

102 In this matter the employee in question, Mr Burgess was not summarily dismissed as he was paid four weeks' pay on termination. Pursuant to clause 2.13.1 of the *Public Transport Authority Railway Employees Enterprise Agreement 2006*, the respondent had a right to terminate the employment of Mr Burgess by giving him four weeks' notice or payment in lieu of notice.

103 The question to be determined by the Commission in this matter is whether the legal right of the respondent to dismiss Mr Burgess has been exercised harshly or oppressively against the employee, so as to amount to an abuse of that right (*Ronald David Miles, Norma Shirley Miles and Lee Gavin Miles and Rose & Crown Hiring Service trading as The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386).

104 Misconduct of a serious nature which is inconsistent with the fulfilment of an express or implied term of contract will constitute repudiation of the contract of employment (*North v Television Corp Ltd* (1976) 11 ALR 599 at 608-609). Such misconduct will entitle the employer to elect to terminate the contract of employment (*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 and *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410). The second question to be answered in these proceedings is whether the conduct of Mr Burgess was so serious that it amounted to a repudiation of an express or implied term of his contract.

105 Having heard the evidence, observed the witnesses and watched the CCTV footage of the incidents carefully, I find that whilst Mr Burgess may honestly believe that he acted appropriately when dealing with the passenger at Claremont, I did not find his evidence about his conduct credible. In particular, I do not accept his contention that the means he deployed to remove the passenger from the Claremont station on the night in question were in all the circumstances acceptable, reasonable or that he did not use excessive force. I do not accept that his conduct when viewed objectively was acceptable or appropriate when regard is had to the CCTV footage. It is also clear to me that from time to time he attempted to "tailor" his evidence to fill in gaps in his recollection. His recollection of events where no footage of those events assisted his recollection was extremely poor. For example, he was unable to recollect what was discussed with Transit Officer Wright prior to approaching the passenger on the platform or on the concourse. Also he had forgotten that he pushed the passenger on the stairs and only recalled that action when he viewed the CCTV footage. In addition when giving evidence it is apparent that he "forgot" that he attempted to arrest the passenger during the Fremantle incident. Further, his evidence about whether he gave a warning to the passenger at Claremont that he was going to use the baton was unsatisfactory. He was unable to recollect with any clarity whether he gave a warning and then he attempted to tailor his evidence by saying he recollected saying to the passenger that he would use the baton.

106 I also do not accept the evidence given by Senior Transit Officer Dekuyer that the methods used by Mr Burgess to control the passenger were methods that were acceptable. Nor did I find his evidence in this regard credible. Firstly, I do not accept that the single hand or double hand pushing action depicted in the CCTV footage can be described as "checking". It is a matter of common sense that to forcefully move a person by pushing them cannot be described as a "check" or "checking". Secondly, Senior Transit Officer Dekuyer said when giving evidence that if he was the senior officer on that shift he would have asked why was the escort hold was not applied. He also agreed that the scenario seen of the CCTV footage at Claremont appeared to be a "classic situation" where the escort hold should be used. Thirdly, like Mr Burgess, Senior Transit Officer Dekuyer readily conceded that his "views" do not accord with the training he has received.

107 In relation to Mr Smith and Mr Furmedge, I accept their evidence as relevant and credible with the exception that I did not find Mr Furmedge's evidence helpful that any pain inflicted on a person held in an escort hold is pain inflicted by themselves. Such a matter as a matter of common sense would be open to debate, as it is clear that the taking hold of a person in an escort hold is effected by the application of force. I am satisfied, however, that the evidence establishes that both Mr Smith and Mr Furmedge are well qualified to give opinion evidence as to how disorderly, aggressive and armed persons should be dealt with on the railway network. Mr Smith has considerable experience as a provider of crowd control and security services and training of crowd controllers and security officers, including transit officers. Mr Furmedge not only has a background in law enforcement as a police officer but administrates the provisions of security services for the respondent not only at the level of determining appropriate policies but is involved in the day to day supervision of the provision of those services and the delivery of training to transit officers.

108 I did not find the extensive cross-examination of Mr Furmedge about the application of force used in an escort hold when compared to pushing, helpful. I accept that a transit officer pushing a passenger backwards by applying the palm of one or two hands to the chest of the passenger in the manner depicted on the CCTV footage can never be acceptable. It is plainly an aggressive way of dealing with a passenger. Applying an escort hold is in my view not an aggressive response to aggressive or disorderly conduct by a passenger.

109 I have not drawn any inference against the Union for not calling Transit Officer Wright to give evidence as it was open to either party to call Transit Officer Wright to give evidence in these proceedings.

110 The reasons I have rejected the evidence given by Mr Burgess and Senior Transit Officer Dekuyer about whether the actions of Mr Burgess were appropriate are as follows:

(a) The push/check manoeuvre used by Mr Burgess was at all times contrary to the procedures of the respondent and contrary to the training and instruction given to Mr Burgess;

(b) Whilst much time was spent in the hearing of this matter analysing the actions of Mr Burgess, the CCTV footage in CLA201 clearly shows that Mr Burgess' response to disorderly conduct by the passenger was an aggressive response. What is most telling about the incident is that time record of CLA201 reveals the following:

0.0 tape of footage begins to run;

0.40 train arrives at the platform;

0.56 passengers begin to alight the train;

1.11 the passenger in question appears on the screen and walks up and down;

2.18 the passenger "shoulders" one of the group of three men;

2.31 the passenger kicks a post and appears to be yelling;

2.40 the passenger punches the advertising sign;

2.41 Mr Burgess appears on the screen and walks quickly towards the passenger and motions and points his left arm towards the passenger as a signal to leave;

2.44 Mr Burgess pushes the passenger with his left hand the passenger takes a big step backwards;

2.45 the passenger's body moves forward but his feet do not move forward to any great degree and Mr Burgess pushes him again in the chest;

From the time the passenger is first seen walking up and down the platform to the first push by Mr Burgess was 1 minute and 33 seconds. The time it took between the passenger "shouldering" one of the group of three men and the first push by Mr Burgess was 26 seconds. From the time the passenger kicks the post and being pushed by Mr Burgess is 13 seconds and the time that elapses between the passenger punching the advertising sign and being pushed by Mr Burgess is 4 seconds.

It is clear from the CCTV footage CLA201 that the initial push to the passenger's chest by Mr Burgess was a very strong and forceful push. Not only did he do so but he approached the passenger very quickly. Mr Burgess testified that the passenger had been yelling abuse for five minutes before he (Mr Burgess) approached the passenger. That is not correct. The time record shows that 1 minute 48 seconds elapsed between the time the passenger would have alighted the train and the first push Mr Burgess made to the passenger's chest. It is a matter of common sense that Mr Burgess' approach was not made in any way that could be described as calming or a means to defuse or de-escalate the situation.

111 It is apparent that Mr Burgess was not acting as part of a team with his partner. Transit Officer Wright seems to have left the control of the incident to Mr Burgess. Whilst Transit Officer Wright was a junior officer, Mr Burgess as the senior officer with six years experience should have taken the lead and properly formulated a plan for dealing with the passenger and to defuse his anger.

112 Whilst I accept that the passenger was highly agitated and verbally aggressive, dealing with a passenger who was behaving in that way is not uncommon. It is part of the core duties of a transit officer to deal with such persons and as far as possible to ensure the safety and comfort of passengers and staff of the respondent.

113 I do not accept the proposition that the deployment of an escort hold comes with an unacceptable level of risk of injury to a transit officer. Apprehending an agitated, aggressive person will always carry a risk of injury. Transit officers are required as part of their duties to restrain and eject from the property of the respondent uncooperative passengers. Unfortunately, the duty to do so does carry a risk of injury.

114 It does not follow, however, that a passenger can be ejected by being pushed rather than by applying the escort hold. When cross-examined Mr Burgess conceded that if you push someone that can escalate the situation. Although much was made by counsel for the Union that pushes to the chest were "checks", I do not accept that proposition can be made out. Plainly each push by Mr Burgess was an application of force which had the result of causing the passenger to move backwards.

115 In my opinion not only were the single hand pushes by Mr Burgess inappropriate and excessive use of force but also the two hand pushes were inappropriate and excessive use of force. The two hand pushes were an escalation of force by Mr Burgess. The passenger at that point had not increased his physical resistance. He was simply stepping forward or leaning forward slightly after each push. Further, Mr Burgess conceded when cross-examined that the two hand push went beyond a "check".

116 Mr Burgess' evidence was that it was after he pushed the passenger with both hands the passenger "shaped up" and made the threat that he had a knife. In relation to the drawing of the baton, I accept that the passenger had not only made threats to kill Mr Burgess and the other officer during the entire incident but that after Mr Burgess pushed him with both hands the passenger "shaped up" to punch or at least squared up to "chest" Mr Burgess. I also accept the passenger said he had a blade and would "cut" Mr Burgess up. It is apparent from the CCTV footage in CLA201 and CLA202 that Mr Burgess did not use the baton in self-defence in the sense that he was attacked as he was not attacked by the passenger, nor did the passenger produce a knife. Given the footage of the incident is taken at some distance away it is difficult to ascertain whether an attack was imminent. Even if the use of the baton at that point of time could have been said to have been justified, it is difficult to reach that conclusion when it is clear that it was Mr Burgess who caused the incident to escalate. If he adopted the interview stance and behaved in a passive way when he first approached the passenger, the incident may have not escalated. Even if it had, if he together with Transit Officer Wright had applied the escort hold the drawing of the baton may not have been necessary.

117 Whether Mr Burgess correctly used the baton when it was drawn is an issue the witnesses addressed. Senior Transit Officer Dekuyer gave evidence that Mr Burgess used the correct method. However, Mr Smith said Mr Burgess held the baton as a threat and Mr Furmedge said Mr Burgess did not hold it in the ready position but held it down near his leg and he stepped forward on a baton strike. Mr Furmedge also said that Mr Burgess stepped forward when hitting the passenger on the second strike.

118 Instructions for use of a baton are set out in the clause 7 of section 7 of the Transit Officer Operations Manual issued in July 2008. Clause 7 provides:

7) CARRIAGE AND USE OF BATONS

a) Under the Weapons Act, 1999, batons are a controlled weapon and as such only duly authorised personnel are able to possess and use a baton. To carry and use an approved baton, a Transit Officer must have been authorised as a Security Officer under the PTA Act, 2003. This authorisation may only be enacted by the CEO after the employee has completed the respective Operational Baton course and relevant PTA training.

b) The baton is an impact control weapon that can cause serious injury and less onerous force options must always be considered. When batons are drawn, other than for training purposes, a Use of Force Report must be completed. If the drawn baton is then utilised the Use of Force Report will be referred to the Internal Investigators for their review along with other supporting documentation.

c) Batons are supplied to authorised personnel and may only be used/worn under the following guidelines:

i) For your personal protection where you deem imminent and immediate danger to your safety.

ii) For the protection of any other person whereby the use of force is justified commiserate with the force applied to the victim.

iii) The use of the baton must desist when the threat subsides or the offending party backs away.

iv) A warning must be given of the intention to utilize the baton where possible.

d) **The baton is not for use to affect an arrest, it is purely for protection.**

e) The use of a baton must be justified at all times as its misuse may have an adverse impact on the PTA's image and more significantly may lead to criminal action being taken against the Transit Officer concerned.

(Exhibit B)

119 I understand the point Mr Furmedge makes when he says that when a transit officer uses a baton they should put their hand up, check backwards and draw the baton, which means that the transit officer should step backwards when using the baton as the baton is only to be used for protection. Clearly Mr Burgess did not do that as he stepped forward and in doing so used the baton as a weapon. The fact that the passenger had made a threat that he had a knife and intended to use it may have led Mr Burgess to think that his safety was under danger. However, whether it can be said objectively he was in imminent danger is not clear and is not relevant. Clause 7(c)(i) of the Transit Officer Operations Manual raises a subjective test. The issue is whether Mr Burgess held that belief not whether he reasonably held that belief. I do not find that when Mr Burgess used the baton he used more force than was necessary. I am, however, satisfied that he acted contrary to his training in using the baton as a weapon by holding the baton in a position indicating a threat and by not stepping backwards on the second strike.

120 I agree with the submission that Mr Burgess and Transit Officer Wright should not have followed the passenger up the stairs. It is a matter of common sense that if a threat of a knife in Mr Burgess' judgment warranted the use of a baton and he and the other officers would have been under a greater threat if they retreated that he should not have walked up the stairs and approached the passenger. When the passenger went up the stairs and onto the concourse Mr Burgess should have called the police.

121 In relation to the "push" on the stairs, when giving evidence Mr Burgess conceded that his action was inappropriate. In my opinion that action was a clear example of not only inappropriate force but excessive force. Although Mr Burgess did not push the passenger as hard as he did when the passenger was on the platform, he pushed the passenger when the passenger was close to the top of the stairs and was facing backwards on the stairs. Clearly to push a person in such circumstances was dangerous. It is clearly apparent that the steps are high in the air. It makes no sense to say that a gentle push on the stairs was not highly dangerous when Mr Burgess gave evidence that it would be fraught with peril to apply the escort hold towards the stairs.

122 Mr Burgess' action in the Freemantle incident shows that despite six years of experience and frequent refresher training he has poor skills and shows he exercises poor judgment, which is consistent with the poor judgment exercised when dealing with the passenger at Claremont.

123 As outlined by counsel for the respondent a high standard of conduct is required of transit officers. As law enforcement officers they are expected by the public to exercise their powers diligently and act in a measured way. It is their job to ensure that railway stations and railway property are safe places. A large part of their job is to calm disruptive, abusive and aggressive persons. They should not respond to aggressive behaviour with violence. I observed in *Kelly* at [54]:

> High standards of integrity in the performance of the statutory duties of the office of Transit Officers are required of all Transit Officers. The Public Transport Authority and the public expect that only officers that are trustworthy to carry out their duties properly at all times should remain engaged as Transit Officers. The effectiveness of the service provided by Transit Officers rests heavily upon the public's confidence in the integrity, honesty, conduct and standard of performance by individual Transit Officers. Whilst on duty they should always act and be seen to act appropriately and beyond reproach.

124 Although I have made a finding that the allegation that Mr Burgess used excessive or inappropriate force when he struck the passenger at Claremont station with a baton is not made out, I am of the opinion that the excessive and inappropriate force used by Mr Burgess when he pushed and shoved the passenger with one hand, then with two hands and the later action to push the passenger on the stairs was so serious in all the circumstances that the respondent's decision to dismiss Mr Burgess can not be said to be harsh, oppressive, unfair, unjust or unreasonable. The reason why I have reached this view is as set about above. Mr Burgess did nothing to defuse or de-escalate the situation. He approached the passenger in an aggressive manner and responded to the passenger's verbal threats with aggressive pushing and shoving. His conduct in my view led to escalation of the incident. In addition the final push on the stairs was clearly a dangerous act.

125 I am not satisfied that on the balance of probabilities the Union has proved that the decision to dismiss Mr Burgess was harsh, unjust, unfair or oppressive. In all the circumstances, the actions of Mr Burgess (when considered with the inappropriate use

of force at the Fremantle train station), in my view, constituted misconduct of a serious nature which at law was inconsistent with the fulfilment of the express and implied terms of the contract of employment of Mr Burgess as a transit officer and entitled the respondent to terminate the contract.

126 For the reasons set out above I will make an order that the application be dismissed.

2009 WAIRC 00526

DISPUTE RE TERMINATION OF EMPLOYMENT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	THURSDAY, 6 AUGUST 2009
FILE NO/S	CR 7 OF 2009
CITATION NO.	2009 WAIRC 00526

Result	Application dismissed
Representation	
Applicant	Mr D H Schapper (of counsel)
Respondent	Mr D J Matthews (of counsel)

Order

Having heard Mr D H Schapper of counsel on behalf of the applicant and Mr D J Matthews of counsel on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:—

THAT the application is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

2009 WAIRC 00447

DISPUTE RE RECLASSIFICATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER SECTION 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1972 FOR THE HOSPITALS FORMERLY COMPRISING THE METROPOLITAN HEALTH SERVICES BOARD
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
HEARD	WEDNESDAY, 8 JULY 2009
DELIVERED	THURSDAY, 9 JULY 2009
FILE NO.	PSACR 32 OF 2008
CITATION NO.	2009 WAIRC 00447

CatchWords	Industrial Law (WA) - representation by legal practitioner - question of law raised - not complex issue - *Industrial Relations Act 1979 (WA)* s 31
Result	Applicant denied leave to appear by legal practitioner
Representation	
Applicant	Mr D Ellis (of counsel)
Respondent	Mr J Ross

Reasons for Decision

1 This is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979* (*the Act*).

2 The matter was referred by Memorandum on 2 June 2009 and was set down for hearing on 8 July 2009 by a Notice of Hearing dated 12 June 2009. Prior to its referral for hearing and determination the matter had been the subject of a number of conciliation conferences at which the applicant was represented by Mr Dean Ellis, and Mr John Ross appeared for the respondent. Mr Ellis is an employee of the applicant and a legal practitioner. On 2 July 2009, in anticipation of the hearing, the respondent filed an outline of submission containing a challenge to the Public Service Arbitrator's (the Arbitrator's) jurisdiction and the applicant responded to that submission on 3 July 2009.

3 At the commencement of the hearing on 8 July 2009 the respondent advised that it objected to the applicant being represented by legal practitioner and indicated that there were no complex legal issues arising within the matter including its jurisdiction challenge and that the Arbitrator's jurisdiction is well established. The applicant agreed that there were no complex legal issues arising. However the applicant noted that the respondent advised of its intention to object to the applicant being represented by legal practitioner only at 10:00am that morning.

4 The hearing was adjourned briefly to enable consideration of the matter.

Consideration and Conclusions

5 Section 31 of *the Act* enables a party to be represented by a legal practitioner in a limited range of circumstances. The Commission may exercise discretion to allow a legal practitioner to appear and be heard where "a question of law is raised or argued or is likely in the opinion of the Commission to be raised or argued in proceedings before the Commission…" (s 31(1)(c)(iv) and (4)). The issue of the appearance of a party by way of legal practitioner was considered by the Full Bench of the Commission in *Western Mining Corporation Ltd. v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others* (1990) 70 WAIG 3525. In that matter His Honour the President noted:

> "The right of audience is therefore restricted.
>
> The discretion to permit a legal practitioner to appear (i.e. a certificated legal practitioner) is to be exercised within the parameters of the Act, including those established by the objects of the Act, and, in particular, section 6(c). However, before there is even a question of whether the discretion should be exercised or not, a question of law must clearly be raised or argued, or likely to be raised or argued in proceedings before the Commission. The word "likely" means generally speaking "probable" (see Australian Telecommunications Commission v. Krieg Enterprises Pty Ltd. 27 FLR 400 at 410 per Bray C.J. and Boughey v. R. [1986] HCA 29; 65 ALR 609 at 611). Thus, the prospect of there being raised unnecessary legal form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes, may well not be the sort of consideration which would found the exercise of discretion against a legal practitioner appearing in a matter. The Act after all is meant to provide means for settling disputes and to paraphrase section 6(c), with the maximum of expedition and minimum of legal form and technicality. One would think it would be quite infrequent, for example, for counsel to seek audience at the conciliation stage.
>
> We do not set out a comprehensive set of principles for the exercise of the discretion in the absence of substantial argument. In the end, much will depend upon the matter before the Commission. However, we think it useful to make the comments which we have made."

6 I also note the Reasons for Decision of Beech SC in *Civil Service Association of Western Australia Inc. v Director General, Department of Justice* (2003) 83 WAIG 503 at 504 that;

> "It may be able to be said that most, if not all, proceedings before the Commission may involve some question of law. This is because the Commission is a creature of statute which operates in accordance with that statute and arguments may arise regarding the interpretation of the statute. Further, matters of employment law are frequently central to the issues which are brought to the Commission. The point to be made is that s.31 of the *Industrial Relations Act 1979* does not give a right to parties to be represented by counsel merely because a question of law is raised or argued or likely to be raised or argued. Therefore, the fact that a question of law may be raised of itself may not be sufficient justification for the Commission to exercise its discretion to permit counsel to appear. In other words, merely because a declaration and orders sought "relate or touch upon questions of law" … does not mean that counsel is to be given leave to appear.
>
> Rather the question of law raised or argued, or likely to be raised or argued, should be a question of substance and not merely technicality. I say this because the Act provides means for settling disputes with the maximum expedition and the minimum of legal form and technicality. The prospect of there being raised unnecessarily legal form and technicality, particularly, but not solely, where it inhibits the settling of industrial disputes may well not be the sort of consideration which would justify the exercise of discretion in favour of a legal practitioner appearing in a matter (*Western Mining Corporation v. AWU, op. cit)*."

7 Therefore, according to s 31 and the authorities, two considerations arise being whether there is or is likely, in the opinion of the Commission, to be a question of law raised or argued and whether the Commission should exercise discretion in favour of such representation.

8 The circumstances of this case are that whilst Mr Ellis is an employee of the applicant union, he is a legal practitioner. The respondent has raised an issue of jurisdiction, which is a question of law, and both parties say that the matter is not a complex legal one. The Commission, and the Arbitrator, are required by s 26 of *the Act* to act without regard to technicalities or legal forms. The objects of *the Act* include the promotion of goodwill in industry and the provision of means for preventing and settling industrial disputes with a maximum of expedition and a minimum of legal form and technicality (s 6(a)(c)). In the

circumstances it is not appropriate that the applicant be granted a leave to appear by legal practitioner notwithstanding that an issue of law is to be raised, for the reasons set out by His Honour the President in *Western Mining Corporation Ltd. v The Australian Workers' Union, West Australian Branch, Industrial Union Workers and Others* as the issue is not a complex one.

9 Mr Ellis says that as he is an employee of the applicant, the applicant appears in person in accordance with s 31(1)(a) of *the Act*. While this is true, Mr Ellis is also a legal practitioner. That he is a legal practitioner means that the provisions of *the Act* dealing with representation by legal practitioner continue to apply. The special status of a legal practitioner is recognised by the *Legal Profession Act 2008 (WA)*. The Full Bench of this Commission found that a legal practitioner who sought to renounce his right to carry on practice remained a legal practitioner for the purposes of *the Act* (*John Holland Constructions v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch and another* (1987) 67 WAIG 2233). In *The Civil Service Association of Western Australia (Incorporated) v Neville John Jones and Diane Margaret Robertson* (2003 WAIRC 08378) the Full Bench found that legal practitioners are "a special class who do not appear except by leave of the Commission" and they could not "evade that requirement by purporting to practice as agents." (para 28).

Therefore that Mr Ellis is an employee of the applicant does not override or displace his status as a legal practitioner subject to the requirements of *the Act* as it related to legal practitioners.

10 As I noted during the course of the hearing, the respondent was aware that the applicant was being represented by legal practitioner throughout the process up to and including the date of the hearing and only notified the applicant of its intention to raise the issue at 10:00am on the day of the hearing. As I noted during the course of the hearing this is not conducive to good industrial relations. In circumstances of this case and through no fault of the applicant, the applicant was not in a position to proceed upon the parties being notified that the applicant would not be granted leave to appear by legal practitioner. Accordingly the hearing was adjourned. The applicant indicated that it wished to consider its position and upon advice of the applicant as to how and when it wishes to proceed, the matter will be expeditiously relisted for hearing.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health in Right of the Minister for Health as the Metropolitan Health Services Board	Wood C	PSAC 16/2009	11/06/2009 8/07/2009 13/07/2009	Dispute re proposed termination of employment of union members	Concluded
Liquor Hospitality and Miscellaneous Union, Western Australian Branch	Department of Health	Wood C	C 17/2009	18/05/2009 3/06/2009	Dispute re proposed roster changes for Transport Officers	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Department of Education and Training	Kenner C	C 10/2009	2/06/2009	Dispute re termination of a union member	Discontinued
Minister for Health	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Scott C	C 20/2007	13/08/2007 16/08/2007 6/09/2007 5/10/2007 29/11/2007 6/12/2007 20/12/2007 31/01/2008 5/02/2008 6/02/2008 19/02/2008 25/02/2008 13/03/2008	Dispute re attendance to Code Black incidents by union members	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Department of Agriculture and Food	Kenner C	PSAC 9/2009	N/A	Dispute re formal grievance of union member	Discontinued
The Civil Service Association of Western Australia Incorporated	The Director General of The Department for Child Protection	Wood C	PSAC 15/2009	15/06/2009	Dispute re employment status of a union member	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection	Wood C	PSAC 12/2009	19/05/2009	Dispute re provision of adequate housing for union member	Concluded

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Western Australian Police Union of Workers	Department of Justice	Beech CC	C 230/2004	N/A	Dispute regarding a joint review of canine handlers	Concluded
The Western Australian Prison Officers Union of Workers	The Minister for Justice	Beech CC	C 236/2004	N/A	Dispute regarding reviews of classifications	Concluded
The Western Australian Prison Officers Union of Workers	The Minister for Justice	Beech CC	C 17/2005	10/03/2005	Dispute regarding award amendment	Concluded
The Western Australian Prison Officers Union of Workers	Department of Corrective Services on behalf of the Minister for Corrective Services	Beech CC	C 97/2006	1/12/2006	Dispute regarding employment classifications	Concluded
Western Australian Prison Officers Union of Workers	Department of Corrective Services on behalf of the Minister for Corrective Services	Beech CC	C 3/2007	19/01/2007	Dispute regarding finalisation of review	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2009 WAIRC 00527

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOHAN MARITZ WILLERS;
AUBREY WARREN BIRKELBACH JR;
D'ARCY KEVIN SPIVEY;
FRANIA SHARP;
DAVE MARTYN WHITFORD-HARVEY;
PETER BRASH;
WENDY MARGARET POWLES;
SUSAN LEE WARING;
JACQUELINE FUREY;
JUDITH MARGARET WICKHAM;
CHARLES ALLAN BRYDON;
SHANE MELVILLE

APPLICANTS

-v-

WORKCOVER, WESTERN AUSTRALIAN AUTHORITY

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER P E SCOTT

DATE FRIDAY, 7 AUGUST 2009

FILE NO. PSA 24 OF 2007, PSA 25 OF 2007, PSA 26 OF 2007, PSA 27 OF 2007, PSA 28 OF 2007, PSA 29 OF 2007, PSA 30 OF 2007, PSA 31 OF 2007, PSA 32 OF 2007, PSA 33 OF 2007, PSA 34 OF 2007, PSA 43 OF 2007

CITATION NO. 2009 WAIRC 00527

Result Direction Issued

Direction

WHEREAS on Thursday 6 August 2009 the Public Service Arbitrator convened a conference for the purposes of scheduling;

AND WHEREAS at the conference the parties agreed that directions be issued;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred under the Industrial Relations Act 1979, hereby directs, by consent that:

(1) By seven (7) days before the hearing of this matter the Applicants are to file and serve upon the Respondent:

a. a book of documents upon which they intend to rely; and

b. an outline of submissions.

(2) By three (3) days before the hearing the Respondent is to file and serve upon the Applicants:

a. a book of documents upon which it intends to rely; and

b. an outline of submissions

(3) The matters be listed for a four (4) days hearing commencing at 10.30am on Monday 21 September 2009, and continuing on Tuesday 22 September 2009, Wednesday 23 September 2009 and Tuesday 6 October 2009.

(4) There be liberty to apply upon the giving of 48 hours notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Anglican Schools Commission (Enterprise Bargaining) Agreement 2008 AG 33/2009	7/08/2009	The Independent Education Union of Western Australia, Union of Employees, AND The Anglican Schools Commission (Inc.)	(Not applicable)	Commissioner S J Kenner	Agreement registered
CMI Industrial Agreement 2008 AG 3/2009	13/07/2009	Combined Metal Industries	The Automotive Food Metal Engineering Printing & Kindred Industries Union of Workers (WA Branch)	Commissioner S J Kenner	Agreement registered
Combined Metal Industries and Transport Workers' Union Enterprise Agreement 2008 AG 23/2008	13/07/2009	Combined Metal Industries	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Commissioner S J Kenner	Agreement registered
Department for Child Protection Country Residential Sevices General Agreement 2009 PSAAG 5/2009	29/07/2009	The Civil Service Association of Western Australia Incorporated, The Director-General of the Department for Child Protection	(Not applicable)	Commissioner P E Scott	Agreement Registered
Family Resources Employees and Parent Helpers General Agreement 2009 PSAAG 6/2009	29/07/2009	The Civil Service Association of Western Australia Incorporated, Director General, Department for Child Protection and Director General, Department for Communities	(Not applicable)	Commissioner P E Scott	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Government Schools (Agricultural Colleges and Schools) Residential Supervisors' Agreement 2009 PSAAG 3/2009	6/08/2009	The Civil Service Association of Western Australia Incorporated	Director General, Department of Education and Training	Commissioner S J Kenner	Agreement registered
Hale School Non-Teaching Staff (Enterprise Bargaining) Agreement 2009 AG 30/2009	7/07/2009	The Independent Education Union of Western Australia, Union of Employees, AND OTHERS	(Not applicable)	Commissioner S J Kenner	Agreement Registered
Public Transport Authority Railway Employees (Trades) Industrial Agreement 2009 AG 34/2009	28/07/2009	Chief Executive Officer Public Transport Authority	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch.; Automotive, Food, Metals, Engineer	Commissioner S Wood	Agreement registered
Public Transport Authority Salaried Officers (APEA) Agreement 2008 AG 35/2009	7/08/2009	The Chief Executive Officer, Public Transport Authority	WA Branch Director, The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees (APEA)	Senior Commissioner J H Smith	Agreement registered
Social Trainers General Agreement 2008 PSAAG 4/2009	29/07/2009	The Civil Service Association of Western Australia Incorporated, The Director General, Disability Services Commission	(Not applicable)	Commissioner P E Scott	Agreement registered

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2009 WAIRC 00521

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to section 47 of the *Industrial Relations Act 1979*, intends, by order, to cancel the following award, namely the -

Ethnic Children's Services Industrial Award, 1993 No. A 10 of 1989

on the grounds that there are no longer any persons employed under the provisions of that award.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. APPL 128 of 2008 on all correspondence.

DATED THIS 29TH DAY OF JULY 2009

(Sgd.) J SPURLING,

[L.S.] Registrar.

PUBLIC SERVICE APPEAL BOARD—

2009 WAIRC 00517

APPEAL AGAINST THE DECISION MADE ON 9 OCTOBER 2008 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR ANDREW POWER
	APPELLANT
	-v-
	DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER P E SCOTT - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MR H NEESHAM - BOARD MEMBER
DATE	TUESDAY, 4 AUGUST 2009
FILE NO	PSAB 16 OF 2008
CITATION NO.	2009 WAIRC 00517

Result Appeal dismissed

Order

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

WHEREAS on the 24th day of November 2008 the Board convened a conference for the purpose of scheduling; and

WHEREAS the appeal was listed for hearing and determination on the 18th and 19th days of March 2009; and

WHEREAS on 17 March 2009 the Appellant's representative advised that the parties had reached an in principle agreement for the resolution of the appeal, and as a consequence the hearing was adjourned pending the finalisation of the terms of the agreement; and

WHEREAS on the 10th day of July 2009, the Appellant's representative advised the Board in writing that the Appellant wished to discontinue the appeal;

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

That this appeal be, and is hereby dismissed.

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

EMPLOYMENT DISPUTE RESOLUTION ORDERS—Notation of—

Award, order or industrial agreement varied	Parties to order		Application No.	Date of Order
N/A	Jack Cawte	Mr Steve Cherry, AHG Driving Centre	APPL 29/2009	9/07/2009

RECLASSIFICATION APPEALS—

2009 WAIRC 00493

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LENORE BATT
	APPELLANT
	-v-
	LEE CLISSA - WA POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 29 JULY 2009
FILE NO	PSA 9 OF 2009
CITATION NO.	2009 WAIRC 00493

Result Name of Respondent Amended

Order

WHEREAS this is an application pursuant to Section 80E of the *Industrial Relation Act* 1979; and

WHEREAS the Commission convened a conference for the purposes of conciliating between the parties on the 23rd day of July 2009; and

WHEREAS at the conference the parties agreed that the name of the Respondent be amended to "Commissioner of Police";

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 application be amended to "Commissioner of Police".

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

2009 WAIRC 00520

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEOFF ROBINSON
	APPELLANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE HEALTH INDUSTRIAL RELATIONS SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	TUESDAY, 4 AUGUST 2009
FILE NO	PSA 5 OF 2009
CITATION NO.	2009 WAIRC 00520

Result Appeal dismissed

Order

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

WHEREAS on Thursday, the 2nd day of July 2009 the Public Service Arbitrator (the Arbitrator) convened a conference for the purpose of conciliating between the parties to be followed immediately by a hearing; and

WHEREAS at the conclusion of the conference the appellant sought time to consider how to proceed with this matter; and

WHEREAS on Friday, the 3rd day of July 2009 the appellant advised the Arbitrator that he wished to discontinue the appeal; and

WHEREAS on Tuesday, the 7th day of July 2009 the appellant filed a Notice of discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

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

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2009 WAIRC 00404

REFERRAL OF DISPUTE RE DISCRIMINATION AGAINST SAFETY AND HEALTH REPRESENTATIVE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MICHAEL CONNOLLY
	APPLICANT
	-v-
	FUEL DISTRIBUTORS OF WESTERN AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 23 JUNE 2009
FILE NO/S	OSHT 21 OF 2009
CITATION NO.	2009 WAIRC 00404

Result	Application discontinued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr A Drake-Brockman and Ms E Moran (both of counsel)

Order

WHEREAS this is an application pursuant to s 35C of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal listed the matter for hearing on 29 May 2009;

AND WHEREAS the Tribunal, with the consent of the parties, adjourned into an informal meeting;

AND WHEREAS at the conclusion of that meeting agreement was reached between the parties;

AND WHEREAS on 19 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

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

2009 WAIRC 00513

REFERRAL FOR FURTHER REVIEW OF NOTICE DATED 23/07/2009 RE IMPROVEMENT NOTICES 70021092, 70021108 & 70021120

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	NATIONAL FRANCHISE SYSTEMS PTY LTD
	APPLICANT
	-v-
	THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 31 JULY 2009
FILE NO/S	OSHT 26 OF 2009
CITATION NO.	2009 WAIRC 00513

Result Order issued

Order

WHEREAS the Occupational Safety and Health Tribunal has received a referral pursuant to s 51A of the *Occupational Safety and Health Act 1984* for a review of the Commissioner's notice dated 23 July 2009 relating to Improvement Notices 70021092, 70021108 and 70021120;

NOW THEREFORE, the Tribunal pursuant to the powers conferred on it under the *Occupational Safety and Health Act 1984* hereby orders:

1. A copy of the notice of referral is to be served forthwith upon the respondent, the WorkSafe Western Australia Commissioner, Westcentre, 1260 Hay Street, West Perth WA 6005. For the purpose of service forthwith the Tribunal will accept service by prepaid post, or in electronic format or facsimile.
2. The applicant is to file in the Western Australian Industrial Relations Commission Registry, 16th Floor, 111 St Georges Terrace, Perth within 24 hours of service a statutory declaration of service (Form 4).

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

Parties		Commissioner	Application Number	Dates	Matter	Result
Cotter Family Trust T/A Tilt-A-Crane	Gordon Francis Floyd	Wood C	RFT 4/2009	28/07/2009	Referral of dispute re payment of claims	Discontinued