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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Procedural Directions and Orders—

2009 WAIRC 00566

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD MICHAEL
	APPELLANT
	-and-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE M T RITTER, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 14 AUGUST 2009
FILE NO	FBA 27 OF 2006
CITATION NO.	2009 WAIRC 00566

Decision	Orders and directions
Appearances	
Appellant	In person
Respondent	Ms R Hartley (of Counsel), by leave

Order

This matter having come on for hearing before the Full Bench on 14 August 2009, and having heard Mr E Michael on his own behalf as appellant, and Ms R Hartley (of Counsel), by leave, on behalf of the respondent, it is this day, 14 August 2009, ordered that:

1. The appellant has leave to file and serve within 7 days a document listing any additional documents from Exhibit R1, at first instance, upon which he relies to support the appeal and submissions about these documents.
2. The respondent may within 7 days thereafter file and serve written submissions in reply to any document which the appellant has filed in accordance with order 1.

3. Upon the receipt of any documents filed in accordance with orders 1 and 2 the decision of the Full Bench stands reserved.

By the Full Bench

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

PRESIDENT—Matters dealt with—

2009 WAIRC 00567

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHIRE OF RAVENSTHORPE

APPLICANT

-and-

JOHN PATRICK GALEA

RESPONDENT

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE FRIDAY, 14 AUGUST 2009
FILE NO PRES 6 OF 2009
CITATION NO. 2009 WAIRC 00567

Decision Application adjourned

Appearances

Applicant Mr S White, as agent

Respondent No appearance

Order

This matter having come on for hearing before me on 14 August 2009, and having heard Mr S White, as agent, on behalf of the applicant, and there being no appearance on behalf of the respondent, it is this day, 14 August 2009, ordered that the application herein be adjourned until Friday, 21 August 2009 at 10:00am.

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

2009 WAIRC 00587

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHIRE OF RAVENSTHORPE

APPLICANT

-v-

JOHN PATRICK GALEA

RESPONDENT

CORAM THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE THURSDAY, 20 AUGUST 2009
FILE NO/S PRES 6 OF 2009
CITATION NO. 2009 WAIRC 00587

Result Application discontinued

Order

Whereas the applicant has filed a notice of discontinuance on 20 August 2009, it is this day, 20 August 2009, ordered that:

1. The application is discontinued

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

PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 00562

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROBERT MCJANNETT
	APPLICANT
	-v-
	KEVIN REYNOLDS, SECRETARY – THE CONSTRUCTION FORESTRY MINING & ENERGY UNION OF WORKERS
	FIRST RESPONDENT
	IAN BOTTERILL RETURNING OFFICER WA ELECTORAL COMMISSION
	SECOND RESPONDENT
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	INTERVENOR
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	WEDNESDAY, 12 AUGUST 2009
FILE NO	PRES 5 OF 2009
CITATION NO.	2009 WAIRC 00562

Decision	Orders and directions
Appearances	
Applicant	In person
First Respondent	Mr K Bonomelli (of Counsel), by leave
Second Respondent	Mr R Bathhurst (of Counsel), by leave
Intervenor	Mr S Millman (of Counsel), by leave

Order

This matter having come on for hearing before me on 12 August 2009, and having heard Mr R Mcjannett on his own behalf as the applicant, Mr K Bonomelli (of Counsel), by leave, on behalf of the first respondent, Mr R Bathurst (of Counsel), by leave, on behalf of the second respondent, and Mr S Millman (of Counsel), by leave, on behalf of the intervenor, it is this day, 12 August 2009, ordered that:

1. Order 2 of the orders made on 7 July 2009 be varied so that the date is 2 September 2009.
2. On or before 2 September 2009 the applicant be at liberty to file and serve upon the respondents and the intervener an additional affidavit or affidavits setting out an outline of the evidence to be adduced in support of the application.
3. There be liberty to apply on 48 hours notice.
4. The application is adjourned to a directions hearing on 11 September 2009 at 10:00am.

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

2009 WAIRC 00614

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROBERT MCJANNETT

APPLICANT

-and-

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

FIRST RESPONDENT

IAN BOTTERILL RETURNING OFFICER WA ELECTORAL COMMISSION

SECOND RESPONDENT

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

INTERVENOR

CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	MONDAY, 31 AUGUST 2009
FILE NO/S	PRES 5 OF 2009
CITATION NO.	2009 WAIRC 00614

Decision	Orders and directions
Appearances	
Applicant	In person
First Respondent	Mr K Bonomelli (of Counsel), by leave
Second Respondent	Mr R Bathurst (of Counsel), by leave
Intervenor	Mr S Millman (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 31 August 2009, and having heard Mr R Mcjannett on his own behalf as the applicant, Mr K Bonomelli (of Counsel), by leave, on behalf of the first respondent, Mr R Bathurst (of Counsel), by leave, on behalf of the second respondent, and Mr S Millman (of Counsel), by leave, on behalf of the intervenor, it is this day, 31 August 2009, ordered that:

1. Orders 1 and 2 of the orders made on 12 August 2009 be varied so that the date is 9 September 2009.
2. The applicant be permitted to retain a copy of the electoral roll provided to him by the second respondent, for use during the course and for the purpose of these proceedings, on the condition that at the conclusion of the proceedings no copies be retained and the electoral roll be returned to the second respondent.
3. The application is adjourned to a directions hearing on 16 September 2009 at 10.00am.
4. The directions hearing listed for 11 September 2009 is vacated

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

2009 WAIRC 00577

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE REGISTRAR
	APPLICANT
	-v-
	MR PHIL WOODCOCK
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	THE HONOURABLE M T RITTER, ACTING PRESIDENT
DATE	TUESDAY, 18 AUGUST 2009
FILE NO/S	PRES 7 OF 2009
CITATION NO.	2009 WAIRC 00577

Result	Order
Representation	
Applicant	Mr R Andretich (of Counsel), by leave
Respondent	Mr J Nolan (of Counsel), by leave

Order

This matter having come on for hearing before me on 18 August 2009, and having heard Mr R Andretich (of Counsel), by leave, on behalf on the applicant, and Mr J Nolan (of Counsel), by leave, on behalf of the respondent, it is this day, 18 August 2009, ordered that:

1. The application is adjourned to a directions hearing at 10:00am on 30 September 2009.
2. The respondent file and serve on or before 23 September 2009 a minute of proposed orders and supporting documentation.
3. The applicant file and serve on or before 25 September 2009 a minute of proposed orders and supporting documentation.
4. There be liberty to apply on 24 hours notice.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2009 WAIRC 00602

COUNTRY HIGH SCHOOL HOSTELS AUTHORITY RESIDENTIAL COLLEGE SUPERVISORY STAFF AWARD 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COUNTRY HIGH SCHOOLS HOSTELS AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 17 OF 2009
CITATION NO.	2009 WAIRC 00602

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondent	Mr A Harper

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Country High School Hostels Authority Residential College Supervisory Staff Award 2005 as varied, be further 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 date of this order.

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

SCHEDULE

1. Clause 22 – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing the Authority's caravan or trailer.

In cases where employees are required to tow the Authority's caravans on official business, the additional rate shall be 7.0 cents per kilometer. When the Authority's trailers are towed on official business the additional rate shall be 4.0 cents per kilometer.

2. Clause 24 – Removal Allowance:

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

(c) An allowance of $546.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the Authority is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3,273.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(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 $1,015.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of four years without the approval of the Authority.

2009 WAIRC 00605

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 20 OF 2009
CITATION NO.	2009 WAIRC 00605

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondent	Mr A Harper

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No 5 of 1983 as varied, be further 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 date of this order.

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

SCHEDULE

1. Clause 37 – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing Employer's caravan or trailer.

In case where officers are required to tow employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 40 – Relieving Allowance: Delete subclause (4) of this clause and insert in lieu thereof the following:

4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $174.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $174.00 in any one period of three (3) years.

3. Clause 41 –Removal Allowance:

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

(c) An allowance of $546.00 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 $3,273.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(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 $1,015.00 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.

4. Schedule G – Overtime Allowance

Delete Part II – Meals, of this schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from first pay period commencing on and from 28 August 2009)

Breakfast	$10.05 per meal
Lunch	$12.35 per meal
Evening Meal	$14.85 per meal
Supper	$10.05 per meal

2009 WAIRC 00607

ELECTORATE OFFICERS AWARD 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE HONOURABLE SPEAKER OF THE LEGISLATIVE ASSEMBLY AND ANOTHER
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 22 OF 2009
CITATION NO.	2009 WAIRC 00607

Result	Award Varied
Representation	
Applicant	Mr M Sims
Respondent	No appearance

Order

HAVING heard Mr M Sims on behalf of the applicant and there being no appearance on behalf of the respondents, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Electorate Officers Award 1986 as varied, be further 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 date of this order.

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

SCHEDULE

1. Clause 36 – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing Electorate Office caravan or trailer.

In case where employees are required to tow Electorate Office caravans on official business, the additional rate shall be 7.0 cents per kilometre. When Electorate Office trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 38 – Removal Allowance

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

(c) An allowance of $546.00 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 $3,273.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(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 $1,015.00 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.

2009 WAIRC 00599

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	APPLICANT
	-v-
	ANIMAL RESOURCES AUTHORITY AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 14 OF 2009
CITATION NO.	2009 WAIRC 00599

Result	Award Varied
Representation	
Applicant	Mr M Sims
Respondent	Mr A Harper

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondents, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 as varied, be further 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 date of this order.

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

SCHEDULE

1. Clause 46 – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert in lieu therefore the following:

(5) Allowance for towing employer's caravan or trailer.

In cases where officers are required to tow the employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When the employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 49 – Relieving Allowance: Delete paragraph (d) of subclause (1) of this clause and insert in lieu thereof the following:

(d) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $174.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $174.00 in any one period of three (3) years.

3. Clause 50 – Removal Allowance:

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

(c) An allowance of $546.00 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 $3,273.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(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 $1,015.00 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.

4. Schedule I – Clause 22 – Overtime Allowance

Delete Part II – Meals, of this schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from the first pay period commencing on or from 28 August 2009)

Breakfast	$10.05 per meal
Lunch	$12.35 per meal
Evening Meal	$14.85 per meal

5. Schedule O - Annual Interstate Allowance Rates

Delete everything within the schedule and insert the following in lieu thereof:

ANNUAL INTERSTATE ALLOWANCE RATES

(Operative from the first pay period commencing on or from 28 August 2009)

	Single	With Dependents
	$	$
Adelaide	$2,643	$3,602
Brisbane	$2,908	$3,879
Melbourne	$2,948	$4,360
Sydney	$4,536	$5,419

2009 WAIRC 00603

GOVERNMENT OFFICERS (SOCIAL TRAINERS) AWARD 1988

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DISABILITY SERVICES COMMISSION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR

COMMISSIONER S WOOD

DATE FRIDAY, 28 AUGUST 2009

FILE NO P 18 OF 2009

CITATION NO. 2009 WAIRC 00603

Result Award varied

Representation

Applicant Mr M Sims

Respondent Mr A Harper

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers (Social Trainers) Award 1988 as varied, be further 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 date of this order.

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

SCHEDULE

1. **Clause 42 – Motor Vehicle Allowance:** Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for Towing the Employer's Caravan or Trailer

In the case where employees are required to tow the Employer's caravans on official business, the additional rate shall be 7.0 cents per kilometre. When the Employer's trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. **Clause 45 – Relieving Allowance:** Delete subclause (4) of this clause and insert in lieu thereof the following:

(4) If an employee whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the employee shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $174.00 to cover incidental personal expenses: Provided that an employee shall receive no more than one lump sum of $174.00 in any one period of three (3) years.

3. **Clause 46 – Removal Allowance**

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

(c) An allowance of $546.00 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 $3,273.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(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 $1,015.00 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.

4. **Schedule E - Overtime Allowance**

Delete Part II – Meals, of this schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from first pay period commencing on and from 28 August 2009)

Breakfast	$10.05 per meal
Lunch	$12.35 per meal
Evening Meal	$14.85 per meal

2009 WAIRC 00601

GOVERNMENT OFFICERS (STATE GOVERNMENT INSURANCE COMMISSION) AWARD, 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)
	APPLICANT
	-v-
	INSURANCE COMMISSION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 16 OF 2009
CITATION NO.	2009 WAIRC 00601

Result	Award Varied
Representation	
Applicant	Mr M Sims
Respondent	Mr A Harper

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Government Officers (State Government Insurance Commission) Award, 1987 as varied, be further 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 date of this order.

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

SCHEDULE

1. Schedule C – Overtime Allowance

Delete Part II – Meals, of this schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from first pay period commencing on and from 28 August, 2009)

Breakfast	$10.05 per meal
Lunch	$12.35 per meal
Evening Meal	$14.85 per meal
Supper	$10.05 per meal

2009 WAIRC 00606

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE METROPOLITAN HEALTH SERVICE BOARD AND ANOTHER
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 21 OF 2009
CITATION NO.	2009 WAIRC 00606

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondents	Mr A Harper on behalf of the Metropolitan Health Service Board

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the Metropolitan Health Service Board, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 as varied, be further 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 date of this order.

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

SCHEDULE

1. Clause 35 – Motor Vehicle Allowance: Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing Departmental caravan or trailer.

In case where officers are required to tow departmental caravans on official business, the additional rate shall be 7.0 cents per kilometre. When departmental trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. Clause 38 – Relieving Allowance: Delete subclause (4) of this clause and insert in lieu thereof the following:

4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $174.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $174.00 in any one period of three (3) years.

3. Clause 39 – Removal Allowance:

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

(c) An allowance of $546.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an officer is required to transport his or her furniture, effects and appliances provided that the Employer is satisfied that the value of household furniture, effects and appliances moved by the officer is at least $3,273.00

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the officer or the officer's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals nor equine animals.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(6) Where an officer is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the officer is obliged to store furniture, the officer shall be reimbursed the actual cost of such storage up to a maximum allowance of $1,015.00 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.

4. Schedule H - Overtime

Delete Part II – Meals, of this schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from the first pay period commencing on or from 28 August 2009)

Breakfast	$10.05 per meal
Lunch	$12.35 per meal
Evening Meal	$14.85 per meal
Supper	$10.05 per meal

The allowances prescribed in this schedule shall apply from the dates indicated and shall be varied in accordance with any movement in the equivalent allowances in the Public Service Award 1992.

2009 WAIRC 00595

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF CONSUMER AND EMPLOYMENT PROTECTION AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
	PUBLIC SERVICE ARBITRATOR
HEARD	BY WRITTEN SUBMISSIONS AND 23 JULY 2009
DELIVERED	MONDAY, 24 AUGUST 2009
FILE NO.	P 6 OF 2006, P 7 OF 2006
CITATION NO.	2009 WAIRC 00595

CatchWords	*Industrial Relations Act 1979* - Public Service Arbitrator - Application to amend Public Service Award and Government Officer Salaries, Allowances and Conditions Award - specified calling Team Leader - issue of operative date - whether operative date should be earlier than the date upon which positions are formally recognised - operative date is date on which essential criterion of particular qualification is formalised - operative date is latter date
Result	Operative date 2 May 2008
Representation	
Applicant	Ms C Reid and with her Ms K Worlock
Respondent	Ms H Dooley and with her Mr A Dores

Reasons for Decision

1 The matter for determination in this case arises from applications to amend the Public Service Award 1992 (PSA) and the Government Officers Salaries, Allowances and Conditions Award 1989 (GOSAC) where the parties reviewed the work value of the specified calling occupations contained with those awards. Negotiations resulted in a memorandum of understanding (the MOU) between the parties dealing with salary increases; structural adjustments to the classifications structure; arrangements for translation to the new salary rates, and operative date arrangements. The MOU was the subject of an order of the Public Service Arbitrator (2008 WAIRC 00160). The MOU formed a schedule to that order, in the following terms:

SCHEDULE

Memorandum of Understanding

CSA Specified Calling Claim

P6/2006 & P7/2006

Parties

1. The Parties to this Memorandum of Understanding (MOU) are the Civil Service Association of Western Australia (CSA), the Labour Relations Division of the Department of Consumer and Employment Protection (DOCEP) and the Department of the Premier and Cabinet (DPC) (sic)

Objectives of this MOU

2. This MOU describes the terms for settlement of the CSA claims detailed in paragraphs 1 (a) and (b) of Applications P6 and P7 of 2006 in the Western Australian Industrial Relations Commission in relation to specified callings occupations. Paragraph 10 of this MOU provides a framework for the resolution (sic) matters listed in paragraphs 1 (c) to (f), inclusive, on which agreement has not yet been reached.

Agreed Matters

3. The Parties have agreed that the salary rates applicable to specified calling occupations, which are currently listed subclause (1) of Clause 12 - Salaries Specified Callings of the Public Service Award 1992 (PSA) and the Government Officers Salaries, Allowances and Conditions Award 1989 (GOSAC) will be increased by a structural adjustment as follows:

   - 13% at Level 2/4;
   - 10% at Levels 5 and 6;
   - 8% at Levels 7, 8 and 9 and Class 1, 2, 3 and 4;

   and amendment of the level descriptions in Column 1 of the specified calling salary schedule as detailed in Attachment 1 of this MOU or alternative level descriptions agreed by the parties.

4. Translation to the new salary rates will occur as indicated in Attachment 1 with staff retaining their existing salary increment date.

5. This MOU is in full and final settlement of all work value changes that occurred prior to the date of this MOU and all other claims in relation to specified calling rates of pay unless agreed between the parties.

6. The Parties agree that the operative date for the agreed salary increase will be 1 July 2007 for all existing specified calling occupations, except specialist title psychologists.

7. The Parties agree that the operative date for the agreed salary increase for specialist title psychologists will be 16 August 2006.

8. The Parties agree that the agreed salary increase will apply to employees employed under subclause (1) of Clause 12 of the PSA and GOSAC on the date an order of the WAIRC incorporating this MOU is issued.

9. The Parties agree that salary increases obtained through future general agreement negotiations, excluding any structural adjustments obtained through GA4, will not be discounted in any way.

Issues For Resolution

10. The Parties agree that the following issues need to be resolved in order to finalise Applications P6 and P7 of 2006. The Parties agree to participate and contribute to a review of issues including, but not limited to:

a) an agreed definition of "specified calling";

b) a procedure for the establishment of new specified callings;

c) any changes to existing specified callings required to meet the future needs of the public sector and the determination of an operative date for the payment of new salary rates for occupations that are established as a specified calling;

d) a process for identifying and dealing with the classification of positions that are incorrectly classified relative to other positions in the particular specified calling. The classification of specialist title psychologists will be subject to a review of WA public sector classification relativities, by a working group including representatives of the agencies that employ specialist title psychologists.

e) a process for determining the classification of specified callings occupations, that is clearly articulated and transparent;

f) options for standardising classification systems and structures across the public sector; and

g) criteria progression arrangements for specified calling occupations.

Dispute Resolution Clause

11. Where agreement cannot be reached on matters contained within this MOU, either party may refer the matter to the WA Industrial Relations Commission.

Time Frames

12. The Parties will agree on an appropriate process to implement the agreed matters and a process, including timeframes and resources, for addressing the issues for resolution the by 25 February 2008.

2 The signatures page and the salary schedules for the new specified callings structure within the awards contained within the MOU has not been included in these Reasons as they are not necessary for the resolution of this issue.

3 The dispute in this case involves Team Leader positions within the Department for Child Protection (the DCP). Those Team Leader positions were not, at the time of the MOU, included within the specified callings contained within the two awards, however as part of the process, those positions were reviewed and were designated specified callings and classified at level 3 as Graduate Welfare Officers, within the specified callings schedule.

4 The dispute between the parties is whether the operative date for the specific callings Team Leader positions to be granted salary increases arising from the review of specified callings should be 1 July 2007 or 2 May 2008. The Civil Service Association of Western Australia Incorporated (the CSA) says it should be the earlier date, and the respondent, the latter date.

5 The parties filed submissions, witness statements and appropriate documents as well as a statement of agreed facts, and a hearing was convened on 23 July 2009 for the purpose of the parties addressing any matters arising from those documents.

6 The applicant submitted evidence from Brian John Dodds, Assistant District Director of the DCP, Peel District and Ian William Gorman, Team Leader with the DCP. The respondent called evidence from Sally Ingham, Manager Human Resources Strategic Services for the DCP. Neither party wished to cross examine the other party's witnesses.

The Applicant's Case

7 The applicant says that the job description form (JDF) for the Team Leader positions registered on 11 June 2007 stated that an essential criterion for the position was "(a) tertiary qualification in social work, psychology or a relevant human service area*… Exemptions to this essential requirement may apply for applicants who are Indigenous Australians or have a Culturally Diverse background or some regional or remote positions" (applicant's document A).

8 A further JDF was registered on 20 August 2007 containing the essential criterion of "(a) tertiary qualification in social work, psychology or a relevant human service area*… Exemptions to this essential requirement may apply for applicants who have proven case work experience in child protection or are Indigenous Australians or have a culturally diverse background or for some regional or remote positions" (applicant's document B).

9 The applicant says that the respondent approved the Team Leader positions as specified callings as of 2 May 2008. On 15 July 2008, following the reclassification of the position of Team Leader to specified callings level 3, the essential criteria for the position was listed as "A tertiary qualification in social work, psychology or a relevant human service area" (applicant's document D).

10 Prior to reclassification to specified callings level 3, Team Leaders were in receipt of an Attraction and Retention Benefit (ARB) allowance of 8% of base salary. The purpose of this ARB was to "attract and retain workers in some frontline positions working with children, families and the whole community" (applicant's document E).

11 The applicant notes that in response to an enquiry the DCP advised that as at 13 February 2009 it employed 94 Team Leaders possessing a tertiary qualification relevant to their position (applicant's document G).

12 The applicant says that the positions of Team Leader were an "existing specified calling" in accordance with the MOU and justify the reclassification of the positions from 1 July 2007. The applicant says that the exemption contained within the JDF,

referred to earlier in applicant's documents A and B, constitute a "genuine occupational qualification for the purposes of s 50 of the *Equal Opportunity Act 1984*" and ought to be recognised for the purposes of the positions otherwise constituting a specified calling. The applicant says that "because the incumbents must ordinarily have a degree to hold the position… and it was never intended to deprive other employees of their ordinary entitlements" (applicant's submission para 22).

13 As to the exemption contained within the JDF registered on 11 June 2007 which provided an exemption to the essential requirement for applicants who are indigenous Australians or of a culturally diverse background or for some regional or remote positions, the applicant says that this was an attraction and retention consideration for those potential applicants with an indigenous or culturally diverse background and would be seen to be advantageous when working with indigenous or other culturally diverse clients.

14 According to the evidence of Mr Dodds, the exemption referred to in the JDF registered on 20 August 2007 which included a proven casework experience, or indigenous Australians, or those with culturally diverse backgrounds, or had some regional and remote positions was due to difficulties in recruiting qualified candidates in the regional areas.

15 Therefore the applicant says that the exemptions in the JDF of 11 June 2007 and 20 August 2007 were to meet the particular circumstances and not to derogate from a requirement to hold a relevant qualification (applicant's submission para 25).

16 The applicant says that the duties and responsibilities of Team Leaders have not changed between 1 July 2007 and 2 May 2008 therefore there is no justification for the operative date for the specified calling level 3 salary rate being 2 May 2008 and refers to the witness statements of Mr Dodds and of Mr Gorman at paragraphs 24 and 21 respectively. The applicant says that Team Leaders have always been positions requiring a tertiary qualification and accordingly should receive the benefit of the operative date applicable to all other specified callings notwithstanding that the position of Team Leader was not formally recognised as a specified calling until 1 May 2008. The applicant also says that a review undertaken by Prudence Ford in January 2007 recommended that "the basic requirement to work in the field of child protection was a relevant tertiary qualification" (Recommendation 22).

17 The applicant says that it does not anticipate any flow on effect to other positions either within the DCP or any other public sector agencies but says that the circumstances of this particular claim are unique.

18 The evidence of Mr Dodds deals with the Ford Review recommendation and also the ARB for the Team Leader position. He says that:

> "19. In February 2008, the Department for Child Protection designated various undergraduate degrees as suitable for Specified Callings requirements. The Job Description Form allows for indigenous or culturally and linguistically diverse applicants to apply, as a genuine qualification for appointment."
>
> …
>
> "23. The reason given by the Department (for back pay for Team Leaders to be applied from 2 May 2008 and not 1 July 2007) was that the Job Description Form for Team Leaders from 1 July 2007 was not considered to be eligible for Specified Callings due to the possible exemptions. When this was queried the Job Description Form was changed to include required and mandatory tertiary qualifications, while also allowing for indigenous, as well as culturally and linguistically diverse applicants to apply. In my opinion, this demonstrates that the Department considered the Team Leader role to be appropriate and eligible for Specified Callings status when Specified Callings was first established on 1 July 2007."

19 Mr Gorman's evidence includes that:

> "15. The JDF 11 June 07 requires a mandatory degree but does add a clause which suggests that an exemption could be considered for indigenous or culturally and Linguistically Diverse applicants. I believe that this clause was relatively standard within the Department to encourage Indigenous workers in particular to apply. The Department has always been conscious that a large percentage of clients are indigenous and does attempt to encourage employment of Indigenous workers. I am not aware of this clause being applied to employ an indigenous worker without qualification as a Team Leader."
>
> "16. The JDF was changed a short time later on 20 August 07, with the inclusion of a further possible exemption for applicants with proven casework experience in child protection. It is my understanding that this clause was fairly standard practice within the Department and was added to all for employment of unqualified workers in country/rural locations where it is often difficult to attract qualified applicants."

The Respondent's Case

20 The respondent notes that for a position to be a specified calling, it is required that an employee both possess a relevant tertiary qualification and be employed in one of the occupations listed in the PSA or GOSAC as determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection (now the Department of Commerce).

21 The Awards list the relevant tertiary qualifications for specified callings as being:

> "Officers, who possess a relevant tertiary level qualification, or equivalent determined by the Executive Director, Labour Relations, Department of Consumer and Employment Protection (DOCEP), and who are employed in the callings of Agricultural Scientist, Architect, Architectural Graduate, Community Corrections Officer, Dental Officer, Dietician, Education Officer, Engineer, Forestry Officer, Geologist, Laboratory Technologist, Land Surveyor, Legal Officer, Librarian, Medical Officer, Medical Scientist, Pharmacist, Planning Officer, Podiatrist, Psychiatrist, Clinical Psychologist, Psychologist, Quantity Surveyor, Medical Imaging Technologist, Nuclear Medicine Technologist, Radiation Therapist, Scientific Officer, Social Worker, Superintendent of Education, Therapist (Occupational, Physio or Speech), Veterinary Scientist, or any other professional calling determined by the Executive Director, Labour Relations, DOCEP, shall be entitled to annual salaries as contained in Schedule B."

22 The respondent notes that in excess of 5000 specified calling positions across the public sector had been reviewed as a result of the MOU and the order of the Commission on 13 March 2008, more than 750 of those positions were within the DCP. The respondent says that the Executive Director of Labour Relations had not approved as a specified calling any position where there is the ability for an employee to be appointed to the position without a qualification recognised by the Executive Director, Labour Relations and has set out some examples of those including "where equivalent qualifications are allowed that are not consistent with prescribed qualification, where experience is listed as an alternative or where progression towards a degree is acceptable." (Department of Commerce: Introduction and Background p.1).

23 The Implementation Guidelines to the specified calling salary increase noted that the implementation required "fair and consistent application for specified calling settlement across the sector and to be strictly in accordance with the Guidelines" and to be "limited to those positions determined by DOCEP, following consultation with agencies, to fall within the scope of the specified calling provisions of Public Service Award 1992 or Government Officers Salaries, Allowances and Conditions Award 1989. DOCEP will advise each agency, in writing, which positions are specified callings and therefore eligible for payment under the MOU." (Circular to Departments and Authorities No. 3 of 2008, 2 May 2008).

24 The Implementation Guidelines prescribed that back pay would apply from a later date than the operative dates specified in the MOU where the job did not meet the criteria for classification as a specified calling position until a later date. The Team Leaders positions were formally divided into 2 groups on 2 May 2008. The first group required particular tertiary qualifications. Those positions had their JDFs updated on 15 July 2008, and on that day they were formally approved as being part of the specified calling of Graduate Welfare Officer by the Executive Director, DOCEP. Their salary increases were then back-dated to the day when their qualifications became mandatory being 2 May 2008. The second group of Team Leader positions, where the exemption to the essential criterion of holding particular tertiary qualifications had been maintained, have not been approved to be specified callings positions and remain within the general classification structure of the Awards.

25 The respondent says that 530 additional positions within the DCP were reclassified as specified callings from 2 May 2008 and accordingly disagrees with the applicant's claim that there would be no flow-on to other positions. The respondent says the risk of flow-on is not limited to the DCP.

26 The evidence of Ms Ingham sets out the history of the specified callings positions within the DCP, the advice and consultation between the DCP and Department of Commerce as to whether the Team Leader positions could be classified as specified calling positions due to the tertiary qualifications not being an essential criterion and the change to that circumstance.

Considerations and Conclusions

27 This issue is about the operative date of the salary increase applicable to the positions of Team Leader and whether it should be from when the position was formally recognised as a specified calling. The process for the review of specified callings within the public sector was based on consideration of work value within the existing specified callings. This process has provided an opportunity for consideration of whether appropriate positions ought to be classified as specified callings and bringing them within that category within the two awards.

28 Following the agreement reached between the parties recognised in the MOU, a Circular to Departments and Authorities No. 3 of 2008 was issued in the following terms:

> CIRCULAR TO DEPARTMENTS AND AUTHORITIES NO.3 OF 2008
>
> **SPECIFIED CALLING SALARY INCREASE - IMPLEMENTATION GUIDELINES**
>
> The Government and the Civil Service Association (CSA) developed a memorandum of understanding (MOU) that describes the terms of the settlement of pay and operative date aspects of CSA applications P6 and P7 of 2006 and outlines issues yet to be resolved. The MOU was issued as an attachment to an order of the Western Australian Industrial Relations Commission on 13 March 2008. A copy of the order is attached as Attachment A of the Guidelines.
>
> The Guidelines attached to this Circular detail arrangements for the implementation of the specified calling rates of pay agreed under the MOU. The increased rates of pay apply only to existing specified callings as defined in the Guidelines.
>
> To ensure the fair and consistent application of the specified calling settlement across the sector payment of the salary increases is:
>
> - to be strictly in accordance with the Guidelines;
> - limited to those positions determined by DOCEP, following consultation with agencies, to fall within the scope of the specified calling provisions of Public Service Award 1992 or Government Officers Salaries, Allowances and Conditions Award 1989. DOCEP will advise each agency, in writing, which positions are specified callings and therefore eligible for payment under the MOU.
>
> If there is any doubt about the eligibility of a position or an individual employee for payment under specified calling provisions payment should not be made. Positions for which the specified calling status is unclear will be subject to further discussions between DOCEP and affected agencies. DOCEP will continue to manage all discussions with the CSA in relation to positions for which the specified calling status is disputed and other MOU related matters.
>
> A response to the unresolved issues identified in paragraph 10 of MOU will be developed by DOCEP and the Department of the Premier and Cabinet (DPC) in consultation with agencies that employ specified calling staff.
>
> Resolution of these issues has significant implications for the whole of the WA public sector and agencies are encouraged to contribute to the development of a position that will meet the needs of the sector. Separate advice in relation to the formation of working groups to address the issues arising from the implementation of the specified calling settlement will be issued in the near future.

If you require further information regarding this Circular please contact your DOCEP Labour Relations Adviser.

BOB HORSTMAN

A/EXECUTIVE DIRECTOR

LABOUR RELATIONS

2 May 2008

29 I note in particular that a number of things have occurred in this matter. Firstly none of the positions of Team Leader was recognised as a specified calling position until 2 May 2008. In accordance with the requirements of the MOU, only positions which were existing specified callings enjoyed the agreed salary increases from the operative date of 1 July 2007. This is recognised in clause 6 of the MOU as follows:

> "6. The Parties agree that the operative date for the agreed salary increase will be 1 July 2007 for all *existing* specified calling occupations, except specialist title psychologists."(emphasis added).

30 As a matter of fact, the positions of Team Leader were not an *existing* specified calling occupation at that time. The question is whether they should be treated as such. The evidence demonstrates that the consideration of the status of the Team Leader positions was not undertaken in isolation. It was part of a substantial review of the salary rates and classification levels of all specified calling positions within the public sector of Western Australia other than the health sector. The position of Team Leader was considered only as a consequence of that overall review. It would appear that it was not a consideration until the Ford Review. It is clear too that there are many classifications or callings within the public sector where some positions require a particular tertiary qualification and others do not. Some require a tertiary qualification but there is provision for exemptions to that in circumstances of particular need, be it cultural or on account of attraction and retention considerations.

31 The position of Team Leader was previously one where it was considered appropriate but not essential to have a tertiary qualification because of other considerations. It was only as part of the specified callings review that the positions of Team Leader have been divided into two groups, those which require particular tertiary qualifications (which have now been recognised as specified calling positions), and those which do not require particular tertiary qualifications or recognise an exemption. Those latter positions have not been recognised as specified calling positions. Until the review and the negotiations which resulted in the recognition of some of the positions as being specified calling positions there was no real delineation between those positions such as to enable a significant proportion of them to be approved as specified calling positions.

32 It must also be noted that specified calling positions are not simply those which the employer determines require a tertiary qualification. The prerequisites for the recognition of specified callings are set out in the respective awards and they contain an arrangement for a central agency, DOCEP (now the Department of Commerce) and a position within that agency, namely the Executive Director, Labour Relations, to determine which positions will be specified calling positions. That power is an exclusive one and is recognised as such within the awards. The Executive Director recognises which offices require a particular range of tertiary qualifications and that they are employed in a particular calling. Only those positions are entitled to the annual salaries contained within the specified callings schedule. The Qualifications Manual – Specified Callings is to be amended and the JDF amended accordingly.

33 I find that:

(a) The determination of an approved specified calling qualification and position is the exclusive responsibility of the Executive Director, Labour Relations, Department of Commerce;

(b) As a consequence of the review of specified callings, a large group of Team Leader positions was designated as requiring as an essential criterion, particular tertiary qualifications;

(c) That group of positions of Team Leader was formally approved as the specified calling, as Graduate Welfare Officer, on 15 July 2008. Until that point, none of the Team Leaders positions met the requirements of a specified calling including approval by the Executive Director;

(d) As a consequence, the positions of Team Leader have been formally divided into two groups: those which require particular tertiary qualifications and have been approved as specified calling positions, and those positions which do not require a tertiary qualification and accordingly have not been approved as specified calling positions;

(e) The MOU between the parties provided for the operative date of the salary increases of 1 July 2007 to be "for all *existing* specified calling occupations, except specialist title psychologists" (emphasis added);

(f) The first group of Team Leader positions were not specified calling positions as a matter of fact at that time and significant negotiation and consultation was required for them to be recognised as specified calling positions subsequent to 1 July 2007; and

(g) Clause 8 of the MOU provided that "the Parties agree that the agreed salary increase will apply to employees employed under subclause (1) of Clause 12 of PSA and GOSAC on the date an order of the WAIRC incorporating this MOU is issued." The date the order was issued was 13 March 2008. The Team Leaders were not employees employed under subclause (1) of clause 12 of PSA and GOSCA at that time.

34 To provide an operative date earlier than the date upon which the positions were formally recognised as being specified calling positions would be contrary to the terms of settlement of the negotiations which occurred between the parties. Even if this were not the state of affairs and the CSA was able to argue that as a matter of merit the positions were really specified callings (with some appropriate and necessary exceptions to the requirement for qualifications) the issue of flow-on would arise.

35 As noted in the submission of the respondent, in excess of 5000 specified calling positions across the public sector were approved in the process of the specified callings review. 750 of those were in the DCP. As a result of the Ford Review recommendations and the specified callings review, a number of positions were examined and formally created as specified callings positions. The evidence demonstrates that the Department of Commerce did not merely look at a particular position of Team Leader for the purposes of creating it as a specified calling position but looked at a broad range of other positions as well.

36 Therefore this is not simply a matter of the merits of this particular position of Team Leader being a specified calling and the date from which that was to apply, but it involves consideration of that situation in the context of a review of the specified callings across the public sector. In those circumstances, the prospect of flow-on cannot be said to be contained to these positions.

37 Therefore the operative date for the salary increases for specified calling Team Leader positions is the date on which the essential criterion of a particular qualification was formalised, being 2 May 2008.

2009 WAIRC 00600

PUBLIC SERVICE AWARD 1992

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	CURRICULUM COUNCIL OF WESTERN AUSTRALIA AND OTHERS
	RESPONDENTS
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	P 15 OF 2009
CITATION NO.	2009 WAIRC 00600

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondent	Mr A Harper

Order

HAVING heard Mr M Sims on behalf of the applicant and Mr A Harper on behalf of the respondents, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Public Service Award 1992 as varied, be further 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 date of this order.

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

SCHEDULE

1. **Clause 47 – Motor Vehicle Allowance:** Delete subclause (5) of this clause and insert in lieu thereof the following:

(5) Allowance for towing Departmental caravan or trailer

In case where officers are required to tow departmental caravans on official business, the additional rate shall be 7.0 cents per kilometre. When departmental trailers are towed on official business the additional rate shall be 4.0 cents per kilometre.

2. **Clause 50 – Relieving Allowance:** Delete subclause (4) of this clause and insert in lieu thereof the following:

(4) If an officer whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the officer shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $174.00 to cover incidental personal expenses: Provided that an officer shall receive no more than one lump sum of $174.00 in any one period of three (3) years.

3. **Clause 51 – Removal Allowance:**

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

(c) An allowance of $546.00 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 $3,273.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $171.00.

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.

B. Delete subclause (6) of this clause and insert in lieu thereof the following:

(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 $1,015.00 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.

4. **Schedule H – Overtime Allowance:**

Delete Part II – Meals, of this Schedule and insert in lieu thereof the following:

PART II - MEALS

(Operative from the first pay period commencing on or from 28 August 2009)

Breakfast	$10.05 per meal
Lunch	$12.35 per meal
Evening Meal	$14.85 per meal
Supper	$10.05 per meal

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 00405

S 40B VARIATION OF THE CLEANERS AND CARETAKERS AWARD, 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES (COMMISSION'S OWN MOTION)

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM SENIOR COMMISSIONER J H SMITH
COMMISSIONER P E SCOTT
COMMISSIONER S M MAYMAN

HEARD THURSDAY, 21 JULY 2005, MONDAY, 14 JULY 2008, WEDNESDAY, 1 APRIL 2009

DELIVERED TUESDAY, 23 JUNE 2009

FILE NO. APPL 556 OF 2005

CITATION NO. 2009 WAIRC 00405

CatchWords Award - Award variation - Commission's Own Motion to reflect statutory requirements - Proposed variations - *Industrial Relations Act 1979* (WA) s 40B

Result Proposed variations

Representation

Ms J O'Keefe on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australia Branch

Mr D Jones on behalf of the Chamber of Commerce & Industry of Western Australia (Inc)

Reasons for Decision

1 This is an application initiated on the Commission's Own Motion pursuant to s 40B of the *Industrial Relations Act 1979* (WA) (the Act) to consider what variations ought to be made to the *Cleaners and Caretakers Award, 1969* (the award).

Background

2 Earlier proceedings were initiated in 2004 on the Commission's Own Motion to consider four State awards pursuant to s 40B of the Act. The four awards to be considered were then titled:

- *Metal Trades (General) Award 1966*;
- *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*;
- *Cleaners and Caretakers Award, 1969;* and
- *Children's Services (Private) Award No. A10 of 1990.*

3 A Statement was issued by the Commission in Court Session on the meaning and effect of s 40B of the Act on 3 September 2004 *Commission's Own Motion v Dardanup Butchering Co and Others* [2004 WAIRC 12690]; 84 WAIG 2739 (*Dardanup Butchering*). The Commission in Court Session asked the parties to the four awards, the interveners, and the organisations mentioned in s 40B(2) of the Act whether they wished to make submissions regarding what issues should be taken into account in considering s 40B amendments to the specified awards.

4 The Commission of its Own Motion then created two separate applications on 30 May 2005 to review the *Metal Trades (General) Award 1966* and the *Cleaners and Caretakers Award, 1969* in Appl 555 and 556 of 2005 respectively. The Commission considered it appropriate in the circumstances, given there were separate yet similar proceedings in relation to the two awards, to initially progress Appl 555 of 2005. The Commission in Court Session adjourned Appl 556 of 2005 pending the outcome of the s 40B considerations in the *Metal Trades (General) Award 1966.*

5 The proposed variations to the *Metal Trades (General) Award* by the Commission in Court Session pursuant to s 40B of the Act were issued on 23 November 2005 [2005 WAIRC 03121]; 87 WAIG 898. Further reasons for decision were issued on 4 April 2007 [2007 WAIRC 00318]; 87 WAIG 903. Supplementary reasons for decision were issued on 16 May 2007 [2007 WAIRC 00448]; 87 WAIG 909 and the *Metal Trades (General) Award* was varied and consolidated on 24 May 2007, [2007 WAIRC 00476]; 87 WAIG 910. This concluded the award modernisation pursuant to s 40B for the *Metal Trades (General) Award.*

6 This matter has taken some time to progress. However the delay has been due to the considerable work being undertaken by Ms J O'Keefe on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australia Branch (the Union) and Mr D Jones on behalf of the Chamber of Commerce & Industry of Western Australia (Inc) (CCIWA). This work resulted in agreement to many of the proposed changes to update the award to suit the modern needs of the industry and employees.

7 We have considered the detailed material placed before the Commission in Court Session in *Dardanup Butchering* and the material provided in those proceedings. The Commission when making amendments to the *Metal Trades (General) Award* said, in relation to material put forward by the parties to the award in s 40B matters [2005 WAIRC 03121]; 87 WAIG 898:

> We consider it important to place weight upon matters where the parties to the awards, and even the persons mentioned in s 40B(2), who work with the awards sometimes on a day-to-day basis have reached agreement. The Statement which issued dealt comprehensively with all of the issues which arise in the application of s 40B(1) of the Act [4].

8 Prior to the coming into operation of the *Work Choices* enactments to the *Workplace Relations Act 1996* (Cth) on 27 March 2006 the industries covered by this award were composed of large corporations in private business who are no longer covered by this award. The employers to which this award now extends are largely composed of organisations who are businesses not in the cleaning industry but employ cleaners or alternatively, are small operators in the cleaning industry who are not incorporated. The changes sought to the award by the Union and CCIWA seek to reflect the needs of this group of employers and employees.

9 The proposed variations which will now issue seek to reflect decisions reached by previous Commissions in Court Session in respect of the *Metal Trades (General) Award* and are, in our opinion, consistent with the facilitation of the efficient organisation and performance of work according to the needs of the employers who are covered by this award balanced with fairness to their employees.

10 The order of proposed clauses that follow in these reasons are those reflected in drafts presented by the Union and CCIWA to the Commission in Court Session on 1 April 2009 and 9 April 2009. The current award clause numbers (as per brackets) are included for ease of reference.

PROPOSED CLAUSE 1.1 - TITLE (currently cl 1. - Title)

11 The clause as proposed remains unchanged.

PROPOSED CLAUSE 1.2 – ARRANGEMENT (currently cl 2. - Arrangement)

12 As set out above we intend to make a similar arrangement clause to that adopted by the Commission in Court Session when varying the *Metal Trades (General) Award*. The Union and CCIWA consented to such an approach at the hearing on 1 April 2009. As stated by the Commission in Court Session when it issued the Statement on 3 September 2004 *Dardanup Butchering* to arrange an award in accordance with a specified structure has the following advantages:

> [S]uch a variation is, in our view, clearly to be for the purposes of s 40B(1)(d) and (e). In particular to ensure an award does not contain provisions that need updating and to facilitate the efficient organisation and performance of work by providing for arrangement clauses to be easily accessed by electronic technology and to be easily read and understood by common numbering.

13 In our view the proposed arrangement provisions should be reflected within the award as follows:

1. GENERAL
    - 1.1 Title
    - 1.2 Arrangement
    - 1.3 Area and Scope
    - 1.4 Term
    - 1.5 Definitions
    - 1.6 Anti-discrimination
2. HOURS AND OVERTIME
    - 2.1 Hours and Weekend Work
    - 2.2 Overtime
    - 2.3 Shiftwork
    - 2.4 Higher Duties
    - 2.5 Effect of 38 Hour Week
3. WAGES AND ALLOWANCES
    - 3.1 Wages
    - 3.2 Minimum Adult Award Wage
    - 3.3 Supported Wage System
    - 3.4 Special Rates and Conditions
    - 3.5 Travelling Time and Expenses
    - 3.6 Location Allowances
    - 3.7 Payment of Wages
    - 3.8 Superannuation
    - 3.9 Time and Wages Record
4. LEAVE AND PUBLIC HOLIDAYS
    - 4.1 Annual Leave
    - 4.2 Leave for Illness or Injury
    - 4.3 Carers' Leave
    - 4.4 Parental Leave
    - 4.5 Bereavement Leave
    - 4.6 Long Service Leave
    - 4.7 Public Holidays
5. TERMINATION AND REDUNDANCY
    - 5.1 Contract of Service and Termination
    - 5.2 No Reduction
    - 5.3 Redundancy
6. OTHER
    - 6.1 Introduction of Change
    - 6.2 Safety Provisions
    - 6.3 Award Modernisation and Enterprise Consultation
    - 6.4 Resolution of Disputes
    - 6.5 Union Right of Entry
    - 6.6 Posting of Award and Union Notices
7. NAMED PARTIES TO THE AWARD

PROPOSED CLAUSE 1.3 - AREA AND SCOPE (currently cl 3. - Area and Scope)

14 The variation proposed by the Union and agreed to by CCIWA seeks to remove the existing exclusion in the award as it currently applies to 'any worker covered by any other award or industrial agreement in force on 7th November, 1969'. The provision is some three decades old and is plainly out of date.

15 The second change sought by the Union is that the scope of the award now be defined by the callings specified in the award as the industries specified in Schedule B – Respondents of the current award are out of date. This amendment is not opposed by CCIWA. The Union seeks to reflect coverage within the scope clause by vocation, based on the callings set out in proposed cl 3.1 - Wages. Cleaners are employed in many varied businesses throughout Western Australia and it is difficult to identify all categories of those businesses with precision. Exclusions are sought for those employees employed by '*constitutional corporation*' as defined in s 4 of the *Workplace Relations Act 1996*. However, churches, clubs, local governments, societies and/or organisations and private industry organisations (other than constitutional corporations) will continue to be specified within the scope clause.

16 Changes proposed by the Union to the scope clause of the award were advertised on two occasions. The Registrar published a notice in the Western Australian Industrial Gazette (the Gazette) on 9 September 2008 [2008 WAIRC 01392]; 88 WAIG 1862. Following the hearing by the Commission in Court Session on 1 April 2009 further changes to the proposed clause were published by way of a notice in the Gazette on the 8 April 2009 [2009 WAIRC 00177]; 89 WAIG 436.

17 We consider that significant clarity is now provided in the scope clause as proposed by the Union. We are of the opinion that given the change in coverage of this award since March 2006 it would be appropriate to vary the award to provide for its scope to be defined by the vocations in the occupations of cleaning and caretaking. This will mean that the 'industry' bound by the award will cover the industry of callings of cleaners and caretakers as defined in proposed cl 3.1 - Wages. At law it is clear that the Commission has jurisdiction to vary the award as proposed by the Union. This issue was raised recently in *Melrose Farm Pty Ltd T/as Milesaway Tours v Milward* [2008 WASCA 175]; 88 WAIG 1751 (*Milesaway Tours*) when the Industrial Appeal Court considered the question as to whether the definition of 'industry' in s 37 of the Act excluded the definition of 'industry' in s 7 of the Act. Section 37(1) of the Act provides:

> An award has effect according to its terms, but unless and to the extent that those terms expressly provide otherwise it shall, subject to this section —
>
> (a) extend to and bind —
>
> (i) all employees employed in any calling mentioned therein in the industry or industries to which the award applies; and
>
> (ii) all employers employing those employees;
>
> and
>
> (b) operate throughout the State, other than in the areas to which section 3(1) applies.

18 Section 7 of the Act provides that unless the contrary intention appears 'industry' includes, 'any calling, service, employment, handicraft, or occupation or vocation of employees'. It was argued in *Milesaway Tours* that the definition of 'industry' in s 7 did not apply to s 37 of the Act. His Honour Le Miere J (with whom Steytler P agreed) observed:

> In this case it is necessary to consider whether the text and context of s 37 show an intention that the word 'industry' should not bear its defined meaning. That does not mean that consideration is confined to s 37 alone. Other provisions of the Act may throw light on the meaning of 'industry' in s 37. For example, an intention may appear in another section of the Act that the word 'industry' does not include vocation or calling of a worker. However, it does not follow from this alone that the statutory definition in s 7 is not applicable to s 37 of the Act [53].

19 After considering the history of the amendments to the Act and previous decisions of the Industrial Appeal Court that interpreted the definition of 'industry' and the predecessor of s 32, Le Miere J held that amendments to the Act in 1979 had the effect that the definition of 'industry' in s 7 applies to s 37 so that the scope clause of the *Transport Workers (Passenger Vehicles) Award* applied to employees employed in the calling of bus driver in the industry of bus driver. This decision, in our view, puts beyond doubt the question as to whether the Commission has power under the Act to make an award that defines the industry to which the award extends by an occupation or occupations in an award.

20 The Commission in Court Session also considers that the Union's proposal to exclude from the scope of the award any employee who is otherwise subject to the terms and conditions of the *Cleaners and Caretakers (Car and Caravan Parks) Award 1975*, the *Contract Cleaners Award, 1986* and the *Security Officers' Award* is appropriate. This should remove any scope for argument that the provisions of this award as a later instrument override the provisions of those awards as it is clear the callings covered by the award should not be extended.

PROPOSED CLAUSE 1.4 - TERM (currently cl 4. - Term)

21 The only change proposed in this clause is to reflect the actual date the award became operative when first issued, namely the beginning of the first pay period on or after 7 November 1969. This minor amendment to the award is in our view appropriate.

PROPOSED CLAUSE 1.5 - DEFINITIONS (currently cl 5. - Definitions)

22 Changes to the clause as proposed by the Union and CCIWA can be categorised as follows:

- modernisation of definitions. For example, 'female lavatory attendant' should be replaced by 'rest room attendant' and 'watchmen' should be replaced by 'security guard';

- the definitions in the clause should be listed alphabetically providing much needed clarity; and
- aspects of the *Minimum Conditions of Employment Act 1993* (the MCE Act) should be included under the definition of 'members of an employee's family or household'. Also included in the definition of an 'employee's family or household' are same sex partners as provided for in the *Equal Opportunity Act 1984.*

23 It is also proposed that the definition of a 'casual' be amended to reflect the definition of 'casual employee' as it operated pursuant to the MCE Act prior to the repeal of the definition of 'casual' in that Act in 2006. We are of the view that because the repeal of the provision occurred subsequent to the date the Commission in Court Session issued the Statement in *Dardanup Butchering* and varied the *Metal Trades (General) Award* to reflect the then current definition of 'casual' in the MCE Act the matters considered by the Commission in those decisions no longer apply. Consequently we are of the view that the definition of 'casual' in the current award should not be amended except to refer to:

- the provision relating to casuals in the proposed cl 5.1 - Contract of Service and Termination; and
- inclusion of the word 'employee' in the heading.

PROPOSED CLAUSE 1.6 - ANTI-DISCRIMINATION (new clause)

24 A clause has been proposed by the Union and agreed to by CCIWA which is wider than is contemplated by s 40B(1)(c) of the Act. For this reason we are of the view that the clause as proposed should not be made. In addition, for the reasons set out in the s 40B Statement in *Dardanup Butchering* [194] the Commission in Court Session proposes to insert the same anti-discrimination clause as cl 1.4 of the *Metal Trades General Award* which provides that:

> The provisions of this Award shall be interpreted and applied so as not to discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984.*

PROPOSED CLAUSE 2.1 - HOURS AND WEEKEND WORK (currently cl 6. - Hours)

25 It is proposed that this clause be relocated together with the provisions relating to weekend work to provide clarity consistent with s 40B(1)(d) of the Act. We agree the amendment should be made. We also agree that the title in the proposed clause should be amended to provide ease in locating provisions within the award.

PROPOSED CLAUSE 2.2 - OVERTIME (currently cl 13. - Overtime)

26 The current clause provides for overtime on a Sunday to be paid at double time for all employees except those employees employed by Schedule C - Respondents (churches) who are entitled to have time off in lieu in the succeeding week. It is proposed by the Union and agreed to by CCIWA to change the entitlement in relation to those employed by churches as it is discriminatory to provide for different conditions of work on a Sunday where such employees have exceeded their contracted hours. The proposed provision provides for time off in lieu of an overtime payment for all employees by agreement between the employer and employee, proportionate to the payment to which the employee is entitled. The Commission in Court Session agrees that this provision should be amended as proposed.

PROPOSED CLAUSE 3.1 - WAGES (currently cl 22. - Wages)

27 A submission has been made by the Union to remove junior wages for any person employed under the award aged between 17 to 20 years inclusive to create an entitlement for adult wages to be paid to any person employed within this age group. The current clause in the award provides in cl 22(1)(c) that junior wages apply from 40% to 90% between the ages of 16 to 21 years. The Union contends that amendments should be made to the existing clause to provide for the following rates of junior wages:

- under 16 years of age 80% of the adult wage;
- 16 to 17 years of age 90% of the adult wage; and
- 17 to 18 years of age 100% of the adult wage.

It is contended by the Union that to amend the clause would be consistent with other legislation in our community relating to achieving the age of majority. By way of explanation Ms O'Keefe submitted:

> [A]t the age of 18 an employee can drive, can have a gun licence, can enter hotels and pubs … sorry, hotels and clubs, can vote, can be sent to war, and it's a nonsense that an 18-year-old who is performing a relatively unskilled activity such as cleaning, toilet attendant or security guard, is receiving considerably lower rates (ts 8-9).

28 CCIWA opposes these proposals and says that such amendments would be improper for the Commission in Court Session to consider in a matter heard under s 40B of the Act without any evidence being presented as to the nature and operation of the industry.

29 We accept that the s 40B process confines the Commission in Court Session in what might be considered. In *Dardanup Butchering* [172] the Commission in Court Session stated:

> It is clear from the opening words of s.40B(1) that the Commission has had conferred upon it wide powers to amend. These powers can be exercised at anytime and more than once in relation to any award. Section 40B(1)(a) does not simply provide that the Commission at any time may vary an award to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under section 51. The power to amend under each subparagraph of s.40B(1) is wide as the opening words provide that the Commission may vary an award "for any one or more of the following purposes…" Consequently, providing the Commission by order, varies an award for one or more of the purposes set out in (a) to (e) of s.40B(1) the Commission acts within power.

30 In respect of the claim to amend junior rates in the award we have little or no evidence before us to grant such a proposal in the Union's favour. Specifically, there is nothing before us to satisfy us that such an amendment would come within any of the powers to amend as set out in s 40B(1)(a) - (e) and no evidence or material has been put before us which shows the number of employers or employees who would be affected by such an amendment. If the Union wishes to pursue this claim it should bring an application under s 40 of the Act to amend the award.

PROPOSED CLAUSE 3.3 - SUPPORTED WAGE SYSTEM (new clause)

31 The clause proposed by the Union and agreed to by CCIWA mirrors the decision of the Australian Industrial Relations Commission issued on 10 October 1994 to amend various awards of that jurisdiction [Print L5723] and has been amended to provide up to date rates for an employee working under this provision for a trial period. For these reasons we agree the proposed clause should be inserted into the award.

PROPOSED CLAUSE 3.4 - SPECIAL RATES AND CONDITIONS (currently cl 20. - Special Rates and Conditions)

32 It is proposed that the terminology be altered to reflect updated references to particular provisions. For example, 'lavatory' should be replaced by the word 'toilet'. We agree these amendments are necessary to up date the award.

33 The Union and CCIWA sought to insert the word 'appropriate' before 'rubber gloves' in the current award where protective equipment included rubber gloves when cleaning involved the use of acid based and/or injurious substances. Whilst the Commission in Court Session adopts the sentiment of the parties we consider the provision should go further given the working environment of these employees includes working with acids and injurious substances. We do not consider such equipment ought be limited to gloves. Consistent with the provisions of the *Occupational Safety and Health Act 1984*, in particular s 19, the proposed provision will be reflected in 3.4.5(5):

> Employees, who are required to clean restrooms/toilets or use injurious acids and/or other injurious substances, shall be supplied with appropriate protective equipment which shall remain the property of the employer.

PROPOSED CLAUSE 3.5 - TRAVELLING TIME AND EXPENSES (currently cl 19. - Travelling Time)

34 It is proposed by the Union and not opposed by CCIWA, to expand this provision to provide that where employees are required during working time to work at more than one location those employees are to be paid as if the time spent in travelling between such locations is time worked. The provision sought by the Union excludes circumstances where employees use their own motor vehicles in which case they are to be paid a vehicle allowance under proposed cl 3.4 – Special Rates and Conditions. The Union says that a feature of the industry is that security officers and cleaners start work at one location and then move to another during working hours. The Commission in Court Session considers that such provision should be made as it is authorised by s 40B(1)(e) of the Act. The amendment is consistent with the facilitation of the efficient organisation and performance of work according to the needs of an industry and enterprises within it balanced with fairness to the employees in the industry and enterprises.

PROPOSED CLAUSE 3.7 - PAYMENT OF WAGES (currently cl 24. - Payment of Wages)

35 The only change sought by the Union and agreed to by CCIWA is to delete the requirement to refer any disputes arising between an employer, the Union and an employee or employees as to how wages will be paid to a Board of Reference and to instead refer such disputes for resolution under proposed cl 6.4 - Resolution of Disputes. We are of the view that such amendment is authorised by s 40B(1)(d) of the Act and should be made.

PROPOSED CLAUSE 3.8 - SUPERANNUATION (currently cl 28. - Superannuation)

36 The Union proposed a clause be inserted that follows the clause adopted in cl 9 - Superannuation of the *Metal Trades (General) Award* with modifications to take account of the differences in current provisions of the award and the *Metal Trades (General) Award.* The *Metal Trades (General) Award* provides for contributions to 'Any other Approved Fund to which an employer or employee who is a member of the religious fellowship known as Brethren elects to contribute'. Prior to the *Metal Trades (General) Award* being amended pursuant to s 40B the *Metal Trades (General) Award 1966* contained this provision. As this provision is not currently in the award under consideration we do not consider any such provision relating to the brethren should be imported into the award.

PROPOSED CLAUSE 3.9 - TIME AND WAGES RECORD (currently cl 15. - Time and Wages Record)

37 It is proposed by the Union and agreed by the CCIWA that the framework of cl 4.7 - Time and Wages Record of the *Metal Trades (General) Award* as modernised in accordance with s 40B and div 2F of pt II of the Act be adopted with minor amendments. Those changes relate specifically to the inclusion of the words 'not less than 24 hours' in proposed cl 3.9.6(1) and (2). The intent of the proposed provision allows some 24 hour period to lapse following notice being received by a relevant person prior to allowing inspection of employment records or the like. We consider this to be consistent with the operations of the industry and the proposed amendments are in our view authorised by s 49N(2) and s 40B(1)(e) of the Act.

PROPOSED CLAUSE 4.1 - ANNUAL LEAVE (currently cl 8. - Annual Leave)

38 The principal changes to this clause proposed by the Union and consented to by CCIWA involve updating or removal of outmoded language consistent with s 40B(1)(d) of the Act and in compliance with minimum conditions under s 40B(1)(b) of the Act. It is also proposed that sub-headings be inserted throughout the clause to provide greater clarity. It is proposed that pro rata entitlements for classes of employees that traditionally receive an extra week's leave should also accrue weekly rather than following the completion of a 12 month period. It is proposed that where a Christmas shutdown occurs an employee may be required to take annual leave in no more than two periods. The total amount of leave required to be taken in such circumstances can be no less than one week. This provision is sought to be inserted as some cleaners will work in places where businesses will shut down over Christmas. We agree these changes should be made to modernise the entitlement to annual leave.

PROPOSED CLAUSE 4.2 - LEAVE FOR ILLNESS OR INJURY (currently cl 12. - Absence Through Sickness)

39 Minor changes are proposed by the Union and CCIWA to make the clause consistent with div 2 pt 4, Leave for illness or injury or family care of the MCE Act. This would remove the requirement for an employee to state the nature of their illness and/or provide a medical certificate and instead provide that such employees will be required to provide evidence to their employer that would 'satisfy a reasonable person of the entitlement'. It is also proposed that cl 4.2.7 reflect the provisions of s 20 of the MCE Act to prohibit payment of such leave in circumstances where illness or injury is the result of 'serious and wilful misconduct' or 'gross and wilful neglect' occurring in the course of their employment. It is proposed to update the title of relevant legislation, namely the *Workers Compensation and Injury Management Act 1981*. These amendments should be made pursuant to s 40B(1)(b) of the Act as the current provisions in the award are less favourable than those provided for in the MCE Act.

PROPOSED CLAUSE 4.3 – CARERS' LEAVE (new clause)

40 It is proposed by the Union and CCIWA that the provisions relating to carers' leave set out in div 2 pt 4, Leave for illness or injury or family care of the MCE Act be reflected as a new clause in the modernised award. In our opinion it is clear that these amendments should be made pursuant to s 40B(1)(b) of the Act

PROPOSED CLAUSE 4.4 - PARENTAL LEAVE (currently cl 16. - Maternity Leave)

41 It is proposed by the Union and CCIWA to amend this clause to comply with the parental leave provisions in div 6 pt 4 of the MCE Act. The amendments are based on the *Metal Trades (General) Award* as varied and consolidated pursuant to s 40B of the Act. In our opinion it is clear that these amendments should be made pursuant to s 40B(1)(b) of the Act

PROPOSED CLAUSE 4.5 - BEREAVEMENT LEAVE (currently cl 26. - Compassionate Leave)

42 It is proposed by the Union and CCIWA to amend this clause to comply with the provisions of the minimum leave conditions in div 4 pt 4 of the MCE Act, specifically s 27 and s 28. The proposed amendments make it clear that a casual employee is entitled to bereavement leave consistent with the decision of Kenner, C in *AWU v Kalgoorlie Consolidated Gold Mines* [2002] WAIRC 07037; (2002) 83 WAIG 3596.

PROPOSED CLAUSE 4.6 - LONG SERVICE LEAVE (currently cl 23. - Long Service Leave)

43 The existing award provision applied the provisions of the Long Service Leave General Order (1986) 66 WAIG 319. It is proposed by the Union and CCIWA to update this clause by applying the provisions of the *Long Service Leave Act 1958* which was recently amended by the enactment of the *Labour Relations Legislation Amendment Act 2006* which repealed the provisions of the Long Service Leave General Order.

PROPOSED CLAUSE 5.1 - CONTRACT OF SERVICE AND TERMINATION (currently cl 10. - Contract of Service)

44 A number of changes are proposed by the Union and CCIWA to the clause, in part to reflect the changes made to the *Metal Trades (General) Award* at the time of the award modernisation process. In respect of the engagement of casual employees the Union made a submission to the Commission in Court Session that difficulties were being experienced as to whether employees are employed as a casual or on a part time basis The Union seeks (without objection from CCIWA) that a provision be placed in the award requiring the employer to not only advise an employee of their status in writing at the time of engagement but also to require an employer to inform the casual employee in writing of the likely hours of employment. We do not accept such a provision is workable or indeed consistent with s 40B(1)(e) of the Act. However we accept that it is reasonable to require such matters be committed to writing in circumstances where the length of employment exceeds a week. The Union seeks that casual employment be described as either full time or part time. We do not find this description helpful. The proposed amendments to this clause put forward by the Union and filed on 14 April 2009 be amended to state the following:

5.1.1 Employees covered by this award shall be engaged as a:

(1) continuing employee (either full time or part time); or

(2) casual employee (to work 38 ordinary hours a week or for less than 38 ordinary hours a week).

5.1.2 Where an employee is engaged pursuant to 5.1.1(1) of this award, at the time of engagement the employer will inform the employee in writing of the terms of the engagement; their classification; whether they are full time or part time and, in the case of part time employees, the number of hours they will be regularly rostered to work.

45 In relation to casual employees we consider the following amendment be made:

5.1.5 Casual Employees

(1) A **"Casual Employee"** means an employee as defined in cl 1.5 – Definitions who is engaged and paid as such.

(2) At the time of engagement the employer will orally inform the employee of:

(a) the likely hours they will be required;

(b) the ordinary hourly rate for a casual employee in their classification;

(c) their lack of entitlement to paid annual, sick or carers' leave; and

(d) their entitlement to bereavement and unpaid leave.

46 It is our view, the remaining provisions of the clause proposed by the Union and agreed to by CCIWA should remain the same. The other changes sought to this clause by the Union and CCIWA seek to reflect the termination provisions of s 661 of the *Workplace Relations Act 1996* to update the clause in accordance with s 40B(1)(d) of the Act. We agree that these changes should be made.

PROPOSED CLAUSE 5.3 - REDUNDANCY (new clause)

47 The provisions sought by the Union and agreed to by CCIWA reflect in part, the General Order issued by the Commission in Court Session in *Trades and Labor Council of Western Australia v Minister for Consumer and Employment Protection and Others* [2005 WAIRC 01341]; 85 WAIG 1667. The only substantial addition proposed is cl 5.3.8 which reflects the provisions of s 43 of the MCE Act which creates an employee's entitlement to access paid leave for job interviews. The Commission in Court Session considers the inclusion of this clause appropriate.

PROPOSED CLAUSE 6.1 - INTRODUCTION OF CHANGE (new clause)

48 The parties seek to insert a new cl 6.1. - Introduction of Change substantially reflecting the General Order as it relates to redundancy, as issued by the Commission in Court Session in *Trades and Labor Council of Western Australia v Minister for Consumer and Employment Protection and Others* together with the requirements of pt 5 of the MCE Act. The Commission in Court Session considers the inclusion of this clause appropriate.

PROPOSED CLAUSE 6.3 - AWARD MODERNISATION AND ENTERPRISE CONSULTATION (currently cl 29. - Award Modernisation and Enterprise Consultation)

49 The proposed clause has been updated to refer to a 'worksite' instead of a 'business'. It is the view of the Union and CCIWA that such terminology more appropriately reflects the nature of the industry as employers in the cleaning industry often provide work at different worksites which are not business premises owned or operated by the employer. We agree that this change is appropriate to bring the award up to date.

PROPOSED CLAUSE 6.4 - RESOLUTION OF DISPUTES (currently Appendix – Resolution of Disputes Requirement)

50 The current clause was first inserted into the award as an appendix resulting from amendments to the Act in 1996. The proposed restructured provision provides for a much wider number of disputes to be referred for resolution and a simple process for parties to the award to follow which, in our view, should enhance the resolution of disputes between employers and employees. It is also proposed to shift the provision from an appendix to a substantive clause in the award.

PROPOSED CLAUSE 6.5 - UNION RIGHT OF ENTRY (currently Appendix – S.49B – Inspection of Records Requirements)

51 The current clause does not comply with pt II div 2G of the Act. The clause proposed by the Union and not objected to by CCIWA simply provides for rights of entry as set out in the Act by incorporating references to the relevant provisions of the Act into the award. In our opinion insertion of the provision in the award, while not necessary, should provide employers and employees with information about the Union's rights of entry,

PROPOSED CLAUSE 7. - NAMED PARTIES TO THE AWARD (currently Schedule A - Parties to the Award, Schedule B – Respondents, Schedule C – Respondents)

52 Pursuant to s 29B and s 27(1)(j) of the Act, parties to awards are those served with an application or claim (and not struck out as parties) or joined to an application or a claim. Under s 38(1) of the Act the parties to proceedings are to be listed as the named parties to an award. Over time the organisations listed in Schedules B and C of the award have been served with applications to vary the award. Consequently pursuant to s 29B they are *prima facie* parties to the award. We say *prima facie* because on the coming into operation of the *Work Choices* legislation which amended the *Workplace Relations Act 1996* in March 2006 organisations which were trading and financial corporations ceased to be bound by the provisions of the award by the operation of the provisions of that Act.

53 The Commission in Court Session intends to create a list of named parties to the award in a new cl 7. – Named Parties to the Award. The clause will contain the union as a named party. From the list of respondents in Schedule B all organisations that are noted currently in the award as no longer being in business will be deleted. The businesses that are obviously trading or financial corporations will be deleted. In making this finding of fact the Commission will rely upon the description of industry in Schedule B of the award in respect of each respondent. We are however of the view that none of the churches (named in Schedule B or Schedule C), clubs or local government organisations should be deleted at this point in time. Whether any of these organisations can be characterised at law as constitutional corporations would depend upon an examination of each organisation's activities. Liberty will be given to each organisation to apply to vary the award to remove their name as a party on the basis they are in fact and in law a constitutional corporation and that pursuant to cl 3 – Area and Scope they are not bound by the provisions of the award.

Other Matters

54 In these reasons for decision we have made little or no comment in respect of a number of clauses that it is proposed to insert in the award. These are where neither the Union, CCIWA or the Commission intend to make changes to clauses other than to renumber. Such clauses include:

2.3 Shiftwork

2.4 Higher Duties

3.5 Effect of 38 Hour Week

3.2 Minimum Adult Award Wage

3.6 Location Allowances

4.7 Public Holidays

5.2 No Reduction

6.2 Safety Provisions

6.6 Posting of Award and Union Notices

55 A number of typographical and grammatical errors were brought to our attention by the Union and the CCIWA during the course the proceedings. The Commission subsequent to 1 April 2009 has made further such changes. These errors will be rectified in a draft of the changes proposed by this Commission in Court Session. This document will be issued to allow:

- the parties to the award; and
- the Trades and Labor Council of Western Australia, the Chamber of Commerce and Industry of Western Australia (Inc), the Australian Mines and Metals Association (Incorporated) and the Minister for Commerce

an opportunity to be heard in relation to variations proposed to the award.

56 The Commission in Court Session takes this opportunity to thank and congratulate the representatives of the Union and CCIWA for their cooperation and hard work in putting forward many drafts of proposed changes to the award for consideration. We recognise the task has at times, not been easy or simple.

2009 WAIRC 00568

SECTION 40B VARIATION OF THE CLEANERS AND CARETAKERS AWARD, 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 14 AUGUST 2009
FILE NO/S	APPL 556 OF 2005
CITATION NO.	2009 WAIRC 00568

Result	Award varied and consolidated
Representation	Ms J O'Keefe and Mr K Sneddon on behalf of the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch
	Mr D Jones on behalf of the Chamber of Commerce and Industry of Western Australia (Inc.)

Order

HAVING HEARD the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch and the Chamber of Commerce and Industry of Western Australia (Inc.), and having issued reasons for decision setting out proposed variations to the Cleaners and Caretakers Award, 1969 on 23 June 2009, and by consent, the Commission, pursuant to the powers conferred on it under s 40B of the *Industrial Relations Act 1979*, hereby orders:—

THAT the Cleaners and Caretakers Award, 1969 be varied in accordance with the following schedule and that such variations shall have effect from the beginning of the first pay period on or after 11 September 2009.

(Sgd.) J H SMITH,
[L.S.] Commission In Court Session.

SCHEDULE

1. Delete the entire contents of the award and insert the following in lieu thereof:

Cleaners and Caretakers Award, 1969

1. - GENERAL

1. 1. - TITLE

This award shall be known as the Cleaners and Caretakers Award, 1969 and replaces Award No. 17 of 1948 as amended.

1.2. - ARRANGEMENT

1.3. - AREA AND SCOPE

1.3.1 This award applies to all employees (as defined in s 7 of the *Industrial Relations Act 1979*) in the callings set out in 3.1 – Wages who are employed in Western Australia by churches, clubs, local government, societies and/or organisations and private industry employers other than constitutional corporations.

1.3.2 Notwithstanding the provisions of 1.3.1 above, this award shall not apply to any employee who:

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

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

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

(b) Contract Cleaners Award, 1986; or

(c) Security Officers' Award.

1.4. – TERM

The term of this award shall be for a period of three years from the beginning of the first pay period commencing on or after 7 November 1969.

1.5. – DEFINITIONS

1.5.1 "Accrued Days Off" means the paid day(s) off accruing to an employee resulting from an entitlement to the 38 hour week as prescribed in 2.1 - Hours and Weekend Work.

"Attendant" shall mean an employee who has the care of an arcade and/or entrance hall of a public building or similar place and shall include employees carrying out the duties of directing and/or escorting clients, customers or other persons in such places. The term shall include employees performing cleaning work in connection with parental rooms and/or rest rooms and/or staff lunch rooms and the making of tea and washing up of any utensils when necessary.

"Caretaker" shall mean an employee required to reside on, or near the employer's premises who shall do such work as the employer may direct. The term 'work' shall not include time spent by a caretaker sleeping or resting or otherwise being on the employer's premises other than for the purpose of carrying out their duties in cleaning and/or supervising cleaning and/or maintaining the premises of the employer in a clean condition.

"Casual Employee" shall mean an employee as defined in 5.1 - Contract of Service and Termination who is engaged by the hour.

"Cleaner" shall mean an employee other than a window cleaner substantially employed in performing cleaning work including glass partitions.

"Commission" means the Western Australian Industrial Relations Commission.

"Lift Attendant" shall mean an employee employed in any mechanical device running in a vertical shaft or well, within or attached to any building. Such device can be worked by any power other than hand, comprise a cage or platform and used for the purpose of raising or lowering persons or goods. Provided this shall not apply to any cage enclosure or platform erected on any mine used solely for mining purposes.

"Member of Employee's Family or Household" means any of the following persons:

(1) the employee's spouse or de facto spouse (including same sex partners);

(2) child, stepchild or grandchild of the employee (including an adult child, stepchild or grandchild);

(3) a parent, step-parent or grandparent of the employee;

(4) a sibling or step sibling of the employee; or

(5) any other person who, at or immediately before the relevant time for assessing the employee's eligibility to take leave, lived with the employee as a member of the employee's household.

"Part time Employee" shall mean an employee who is regularly employed who works a lesser number of hours than 38 per week.

"Rest Room Attendant" shall mean an employee employed in or in connection with toilets, rest rooms or parental rooms which are open to the public.

"Security Guard" shall mean an employee who is required to watch and/or guard and/or patrol the employer's buildings and/or premises.

"Security Guard (mobile)" means an employee who may be required to use a vehicle to patrol the employer's buildings and/or premises.

"Window Cleaner" shall mean an employee employed exclusively on window cleaning.

1.6. - ANTI-DISCRIMINATION

The provisions of this award shall be interpreted and applied so as not to discriminate against an employee on any ground on which discrimination in work is unlawful under the *Equal Opportunity Act 1984*.

2. - HOURS AND OVERTIME

2.1. - HOURS AND WEEKEND WORK

2.1.1 Subject to the provisions of this clause the ordinary hours of duty shall be an average of 38 per week with the hours actually worked being 40 per week or 80 per fortnight to be worked eight hours per day on any five days of the week or 10 days of the fortnight.

Except where provided elsewhere, the ordinary hours shall be worked with two hours of each week's work accruing as an entitlement to a maximum of 12 accrued days off in each 12 month period. The accrued days off shall be taken at a time mutually acceptable to the employer and the employee.

2.1.2 By agreement between the union and an employer and in consultation with the employees covered by this award, the ordinary hours of an employee in lieu of the provisions of 2.1.1 hereof, may be worked:

(1) according to any existing arrangement being worked by other employees not covered by this award employed at the same establishment;

(2) within a 20 day, four week cycle with 0.4 of an hour of each day worked accruing as an entitlement to take the 20th day in each cycle as an accrued day off; or

(3) within a 10 day, two week cycle, with an adjustment to hours worked to enable 76 hours to be worked over nine days of the two week cycle and an entitlement to take the 10th day in each cycle as an accrued day off.

2.1.3 An employer and employee may by agreement substitute the accrued day off the employee is to take off for another day in which case the accrued day off shall become an ordinary working day.

2.1.4 Where accrued days off are allowed to accumulate, the employer may require that they be taken within 12 months of the employee becoming entitled to the accrued day off.

2.1.5 In addition to the foregoing the following specific provisions shall apply:

(1) Security Guard, Security Guard/Cleaner, Security Guard (mobile):

(a) The ordinary working hours on any day shall be worked within a spread of 10 hours and where a broken shift is worked on any day each portion of that shift shall be for a period of not less than three hours.

(b) The ordinary hours of duty shall be rostered over not more than six consecutive days in any one week.

(2) Cleaners, Attendants and Lift Attendants:

(a) The ordinary hours of work shall not exceed eight hours per day Monday to Friday inclusive and four hours on Saturday.

(b) Such hours shall be worked as follows:

(i) Cleaners –

Between 6.00 am and 7.00 pm Monday to Friday and between 6.00 am and 1.00 pm on Saturdays. Provided that in the case of any cleaner working a five day week, work may be performed between 6.00 am and 7.30 pm on Fridays. The starting and finishing times herein prescribed may be varied by arrangement between the employer and the union or pursuant to 6.4 - Resolution of Disputes.

(ii) Attendants –

Between 7.30 am and 6.00 pm Monday to Friday and between 7.30 am and 1.00 pm on Saturdays. The starting and finishing times herein prescribed may be varied by agreement between the employer and the union or pursuant to 6.4 - Resolution of Disputes; and

(iii) Lift Attendants –

Between 7.30 am and 6.00 pm Monday to Friday and between 7.30 am and 1.00 pm on Saturdays.

(3) All employees mentioned in this subclause (other than casual employees) who are employed in retail or wholesale sales establishments or establishments in which the majority of employees not subject to this award work a five day week, shall be rostered off duty on one Saturday in every period of two consecutive weeks, and the ordinary hours of duty in any or each of the weeks in that period may be increased by the ordinary hours usually worked by the employee on the Saturday on which they are rostered off.

(4) A meal break of not less than 30 minutes and not more than one hour shall be given and taken between 12.00 noon and 2.15 pm provided that this clause shall not apply to Security Guard, Security Guard/Cleaner or Security Guard (mobile) whose crib time shall be taken in the employer's time.

Provided further that by agreement in writing between the employer and the union, the foregoing time may be varied.

(5) In the week commencing on Monday immediately preceding Easter day the ordinary hours of work shall, in respect to any employer bound by The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977 be 32 hours on the basis of eight hours each day, Monday to Thursday inclusive, without thereby making the employer liable for payment of overtime by reason of the fact that in a pay week of which any part of such period forms a part, the ordinary hours exceed 40.

2.1.6 Saturday and Sunday Work

(1) Employees whose hours are prescribed in 2.1.5(2) and who may be required to work ordinary hours between 6.00 am and 1.00 pm on Saturdays shall be paid at the rate of time and one quarter for such work on that day.

(2) Employees whose hours, where prescribed in 2.1.5(1), (2) and (3) allow ordinary hours to be worked on Saturdays and Sundays shall be paid at the rate of time and one half for such work on Saturdays and at the rate of time and three quarters for such work on Sundays.

2.1.7 The provisions of this clause apply to a part time employee in the same proportion as the hours normally worked bear to a full time employee.

2.1.8 Any dispute between an employer and the union concerning the operation of this clause shall be dealt with in accordance with the provisions of 6.4 - Resolution of Disputes.

2.2. - OVERTIME

2.2.1 (1) All time worked in excess of the ordinary hours prescribed in 2.1 - Hours and Weekend Work of this award shall except as otherwise provided be paid for at the rate of time and a half for the first two hours and double time thereafter.

(2) In respect of those employees mentioned in 2.1.5(3) - Hours and Weekend Work where more than 38 hours are worked in any week during a period of two consecutive weeks for the purpose of giving effect to those employees being rostered off duty for one Saturday morning the provisions of this clause do not apply unless:

(a) more than 76 ordinary hours are worked in that two week period; or

(b) more than 38 ordinary hours are worked in that two week period if one week of a period of annual leave occurs in that two week period.

2.2.2 All time worked on a public holiday prescribed in 4.7 - Public Holidays shall be paid for at the rate of double time and a one half.

2.2.3 All overtime worked on Sundays shall be paid for at the rate of double time.

2.2.4 (1) Subject to the provisions of 2.2.4(2) an employee, required to work overtime for more than two hours, shall be supplied with a meal by the employer or be paid $9.05 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or paid $6.20 for each meal so required.

(2) The provisions of 2.2.4(1) do not apply:

(a) to any employee who lives in the locality in which the place of work is situated in respect of any meal for which they can reasonably go home; or

(b) in respect of any period of overtime for which the employee has been notified on the previous day or earlier that they will be required except where the employee has provided themselves with a meal or meals and is not required to work overtime or is required to work less overtime than the period notified, they shall be paid, for each meal provided and not required, the appropriate amount prescribed in 2.2.4(1).

2.2.5 When an employee is recalled to work after leaving the job they shall be paid for at least three hours at overtime rates.

2.2.6 (1) When overtime is necessary it shall be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.

(2) An employee who works so much overtime between the termination of their ordinary work on one day and the commencement of the ordinary work on the next day that they have not had at least 10 consecutive hours off duty between those times shall, subject to this subclause be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

(3) If, on the instructions of the employer, such an employee resumes or continues work without having had such 10 consecutive hours off duty, they shall be paid at double rates until the employee is released from duty for such a period and they shall then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

2.2.7 (1) Overtime rates prescribed by this clause shall not apply until after eight hours have been worked on each day or in the case of part time employees until after the ordinary rostered hours have been worked on that day.

(2) Overtime rates prescribed by this clause shall apply to all hours worked on days or shifts additional to the ordinary rostered days or shifts.

2.2.8 (1) By agreement between the employee and employer time off in lieu of payment for overtime may be granted proportionate to the payment to which the employee is entitled. Such time is to be taken in unbroken periods according to each period of overtime worked unless otherwise agreed between the employer and employee concerned.

(2) The actual period of time off may be accrued and taken at a time agreed between the employer and employee concerned.

2.3. - SHIFTWORK

2.3.1 A loading of fifteen per cent shall be paid for time worked on afternoon or night shift as defined hereunder:

(1) Afternoon Shift - commencing at or after 12 noon and before 6.00 pm

(2) Night Shift - commencing at or after 6.00 pm and at or before 4.00 am

2.3.2 This clause will not apply for any work done on Saturdays, Sundays or Public Holidays.

2.4. - HIGHER DUTIES

2.4.1 Any employee called upon to perform work carrying a higher minimum than their regular rate of pay for two hours in any day shall be paid such higher minimum for the whole of that day provided that acting time less than two hours in any one shift shall not be counted.

2.4.2 Any employee required to perform work in a lower grade for any shift or portion thereof shall not be reduced in wages whilst employed in such lower capacity.

2.4.3 Notwithstanding the provisions of this clause payment for higher duties shall not apply to an employee required to act in another position whilst the permanent employee is on a single accrued day off as prescribed by 2.1.2.

2.5. - EFFECT OF 38 HOUR WEEK

2.5.1 Termination

(1) An employee subject to the provisions of 2.1.1 who has not taken any accrued days off accumulated during a work cycle in which employment is terminated, shall be paid the total of hours accumulated towards the accrued days off for which payment has not already been made.

(2) An employee who has taken any accrued day off during a work cycle in which employment is terminated shall have the wages due on termination reduced by the total hours for which payment has already been made but for which the employee had no entitlement toward those accrued days off.

2.5.2 Workers' Compensation

(1) 20 Day Work Cycle

(a) Where an employee is on workers' compensation for periods for less than one complete 20 day work cycle, such employee will accrue towards and be paid for the succeeding accrued day off following such absence.

(b) An employee will not accrue accrued days off for periods of workers' compensation where such period of leave exceeds one or more complete 20 day work cycles.

(c) Where an employee is on workers' compensation for less than one complete 20 day work cycle and an accrued day off falls within the period, the employee will not be re-rostered for an additional accrued day off.

(2) 12 Months' Work Cycle

(a) Where an employee is on workers' compensation for period for less than a total of 20 consecutive work days in a work cycle such employee will accrue towards and be paid for the succeeding accrued days off following such leave.

(b) Where an employee is on workers' compensation for periods greater than a total of 20 consecutive days in a work cycle such employee will have the period of workers' compensation added to the work cycle.

2.5.3 Leave Without Pay

(1) 20 Day Work Cycle

An employee who is absent on any form of leave without pay during a 20 day work cycle shall not accumulate an entitlement to an accrued day off for the period of such leave nor will the employee be entitled to an accrued day off whilst on leave without pay.

(2) 12 Months' Work Cycle

(a) An employee who is absent on any form of leave without pay for less than a total of five days in any work cycle shall not have payment reduced when proceeding on accrued day(s) off.

(b) An employee who is absent on any form of leave without pay for a total of five days or more in any work cycle will have such period of leave added to the work cycle.

(c) Where an employee is on workers' compensation for greater than 20 consecutive work days and an accrued day off as prescribed in 2.1.1. Work of this award falls within the period the employee shall be re-rostered for another accrued day off on completion of the 20 week work cycle following such absence.

3. - WAGES AND ALLOWANCES

3.1. - WAGES

3.1.1 The minimum total rate of wage payable under this award shall be as follows:

(1)

Classification	Base Rate	Arbitrated Safety Net Adjustment	Award Rate
	$	$	$
Attendant	331.70	232.00	563.70
Lift Attendant	336.10	232.00	568.10
Security Guard	338.30	232.00	570.30
Rest Room/Toilet Attendant	338.80	232.00	570.80
Security Guard / Cleaner	339.40	232.00	571.40
Cleaner	340.60	232.00	572.60
Window Cleaner	346.10	232.00	578.10
Security Guard (mobile)	354.20	232.00	586.20
Caretaker	357.20	232.00	589.20

(2) The rates of pay in this award include arbitrated safety net adjustments available since December 1993, under the Arbitrated Safety Net Adjustment Principle.

These arbitrated safety net adjustments may be offset against any equivalent amount in the rate of pay received by employees since 1 November 1991 above the rate prescribed in the award, except where such absorption is contrary to the terms of an industrial agreement.

Increases in rates of pay otherwise made under the State Wage Case Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(3) Junior Employees -

Junior employees shall be paid the prescribed percentage of the adult rates for the class of work on which they are engaged.

	%
Under 16 years of age	40
16 to 17 years of age	50
17 to 18 years of age	60
18 to 19 years of age	70
19 to 20 years of age	80
20 to 21 years of age	90

3.1.2 Casual Employees -

The ordinary hourly rate for a casual employee shall be calculated on the basis of a 20% loading in addition to the ordinary hourly rate for the classification in which they are employed.

3.1.3 Leading Hands -

Any employee in charge of other employees shall be paid in addition to the appropriate wage prescribed, the following –

	Number of Employees Supervised	Per Week
(1)	If placed in charge of not less than three and not more than six other employees	14.20
(2)	If placed in charge of not less than six and not more than 10 other employees	25.30
(3)	If placed in charge of not less than 10 and not more than 15 other employees	31.50
(4)	If placed in charge of not less than 15 and not more than 20 other employees	38.40
(5)	If placed in charge of more than 20 other employees	49.50

3.1.4 The hourly rate shall be calculated by dividing weekly rate in 3.1.1 and 3.1.2 by 38.

3.2. - MINIMUM ADULT AWARD WAGE

3.2.1 No employee aged 21 or more shall be paid less than the Minimum Adult Award Wage unless otherwise provided by this clause.

3.2.2 The Minimum Adult Award Wage for full time employees aged 21 or more is $557.40 per week payable on and from the first pay period on or after 1 July 2008.

3.2.3 The Minimum Adult Award Wage is deemed to include all State Wage order adjustments from State Wage Case Decisions.

3.2.4 Unless otherwise provided in this clause adults employed as casuals, part time employees or piece rate employees or employees who are remunerated wholly on the basis of payment by result shall not be paid less than pro rata the Minimum Adult Award Wage according to the hours worked.

3.2.5 Employees under the age of 21 shall be paid no less than the wage determined by applying the percentage prescribed in the junior rates provision in this award to the Minimum Adult Award Wage.

3.2.6 (1) The Minimum Adult Award Wage shall not apply to apprentices, employees engaged on traineeships or Jobskill placements or employed under the Commonwealth Government Supported Wage System or to other categories of employees who by prescription are paid less than the minimum award rate.

(2) Liberty to apply is reserved in relation to any special category of employees not included here or otherwise in relation to the application of the Minimum Adult Award Wage.

3.2.7 Subject to this clause the Minimum Adult Award Wage shall:

(1) apply to all work in ordinary hours.

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

3.2.8 Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2008 State Wage order. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

3.2.9 Adult Apprentices

(1) Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $488.40 per week on and from the commencement of the first pay period on or after 1 July 2008.

(2) The rate paid in the 3.2.9(1) above to an apprentice 21 years of age or more is payable on superannuation and during any period of paid leave prescribed by this award.

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

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

3.3. - SUPPORTED WAGE SYSTEM

3.3.1 This clause defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award. In the context of this clause, the following definitions will apply:

(1) "Supported Wage System" means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability as documented in "Supported Wages System: Guidelines and Assessment Process".

(2) "Accredited Assessor" means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.

(3) "Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991* (Cth), as amended from time to time, or any successor to that scheme.

(4) "Assessment instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

3.3.2 Eligibility Criteria

Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.

This clause does not apply to any existing employee who has a claim against the employer that is subject to the provisions of workers' compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their current employment.

The clause also does not apply to employers in respect of their facility, programme, undertaking, services or the like which receives funding under the *Disability Services Act 1993* and fulfils the dual role of service provider and sheltered employer to people with disabilities who are in receipt of or are eligible for a disability support pension, except with respect to an organisation which has received recognition under s 10 or s 12A of the Act, or if a part has received recognition, that part.

3.3.3 Supported Wage Rates

Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this award for the class of work which the person is performing according to the following schedule:

Assessed Capacity (clause 3.3.4)	% of Prescribed Award Rate
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than $69.00 per week).

* Where a person's assessed capacity is 10%, they shall receive a high degree of assistance and support.

3.3.4 Assessment of Capacity

For the purpose of establishing the percentage of the award rate to be paid to an employee under this award, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

(1) The employer and the union in consultation with the employee or, if desired by any of these; or

(2) The employer and an accredited assessor from a panel agreed by the parties to the award and the employee.

3.3.5 Lodgement of Assessment Instrument

(1) All assessment instruments under the conditions of this clause, including the appropriate percentage of the award wage to be paid to the employee, shall be lodged by the employer with the Registrar of the Western Australian Industrial Relations Commission.

(2) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the award, is not a party to the assessment, it shall be referred by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

3.3.6 Review of Assessment

The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

3.3.7 Other Terms and Conditions of Employment

Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other employees covered by this award paid on a pro rata basis.

3.3.8 Workplace Adjustment

An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other employees in the area.

3.3.9 Trial Period

(1) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

(2) During the trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(3) The minimum amount payable to the employee during the trial period shall be no less than $69.00 per week; or, in the case of paid rates award, the amount payable to the employee during the trial period shall be $69.00 per week or such greater amount as is agreed from time to time between the parties (taking into account the CentreLink income test free areas for earnings) and inserted into this award.

(4) Work trials should include induction or training as appropriate to the job being trialled.

(5) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under 3.3.4.

3.4. - SPECIAL RATES AND CONDITIONS

3.4.1 Dressing Accommodation -

Suitable provisions shall, where practicable, be made by the employer on the premises for employees to change their clothing. Should any dispute arise as to the suitability of the accommodation so provided, the matter shall be dealt with in accordance with 6.4 - Resolution of Disputes.

3.4.2 Accommodation for Meals -

Employees shall be permitted to eat their meals in a convenient and clean place protected from the weather.

3.4.3 Boiling Water -

Employees shall have access to facilities to boil water.

3.4.4 Overalls and Uniforms -

Clean overalls and/or uniforms shall be supplied by the employer free of charge where the employer requires such to be worn.

3.4.5 Protective Clothing -

(1) Where an employee is required by the employer to work in the rain, suitable protective clothing shall be provided free of charge by the employer.

(2) Where an employee is required to work in exposure to direct sunlight, the employer shall provide or make available protective clothing such as a hat, sunglasses, long clothing and sunscreen of at least SPF 30+.

(3) Where an employee during the course of duty may become wet, they shall be supplied free of cost with protective footwear. In the event of a dispute arising, the matter shall be dealt with in accordance with 6.4 - Resolution of Disputes clause of this award.

(4) The items referred to in this subclause shall remain the property of the employer.

(5) Employees, who are required to clean restrooms/toilets or use injurious acids and/or other injurious substances, shall be supplied with appropriate protective equipment which shall remain the property of the employer.

3.4.6 Appliances and Materials -

All appliances and materials including towels and dusters, required in connection with the performance of the employer's duties, shall be supplied in a safe condition to such employee by the employer without charge.

3.4.7 Washing -

Where an employee is called upon to wash towels and dusters the following payments shall be made:

(1) Washing towels - 38 cents each.

(2) Washing dusters - 29 cents each.

3.4.8 Window Cleaning -

(1) Where it is necessary to go wholly outside a building to clean windows, an employee shall, if such cleaning be 15.5 metres or more from the nearest horizontal plane, be paid an allowance of $2.80 cents per day.

(2) Where an employee is required to clean windows from a swinging scaffold or similar device they shall be paid 47 cents per hour extra for every hour or part thereof so worked.

(3) No employee shall be required to clean the outside of windows in a dangerous situation after daylight.

3.4.9 Split Shifts -

Where an employee is required to carry out the ordinary hours of duty per day in more than one shift and where the break is not less than three hours, an allowance of $3.15 per day shall be paid. This allowance shall not apply to caretakers.

3.4.10 A cleaner shall not be required to work from the top of a ladder more than three metres long which rests on the ground or floor level.

3.4.11 (1) Subject to 3.4.11(2) a security guard and/or shift employee shall only be permitted to leave the employment premises in the case of a personal illness or injury or an illness, injury or unexpected emergency affecting a member of the employee's family or household as defined in 1.5 - Definitions.

(2) This clause shall only apply provided that the employee has contacted the employer or one of the employer's nominated representatives, who shall authorise such absence.

3.4.12 Lift Attendants -

Suitable seating accommodation for the attendant shall be provided in lifts if requested.

3.4.13 Toilet Cleaning -

All employees called upon to clean toilets shall receive an allowance as follows -

	Number of Toilets	Per Week $
(1)	five toilets or greater but less than 10 toilets per day	4.40
(2)	10 toilets or greater but less than 30 toilets per day	13.10
(3)	30 toilets or greater but less than 50 toilets per day	26.10
(4)	50 toilets or greater per day	32.70

For the purpose of this clause, one metre of urinal shall count as one toilet and three urinal stalls shall count as one toilet.

3.4.14 Security Guard -

(1) Where a security guard is required to patrol in the open air, waterproof coats and boots shall be provided by the employer free of cost. Those items shall remain the property of the employer and shall be returned by the employee on the termination of employment.

(2) The employer shall supply and maintain torches, etc, free of cost to the employee.

3.4.15 Vehicle Allowances -

(1) Where an employee is required and authorised to use their own motor vehicle in the course of their duties they shall be paid an allowance not less than that provided for in the table set out in clause 3.4.16(4) below. Notwithstanding anything contained in this subclause the employer and the employee may make any other arrangement as to car allowance not less favourable to the employee.

(2) Where an employee in the course of a journey travels through two or more of the separate areas, payment at the rates prescribed herein shall be made at the appropriate rate applicable to each of the separate areas traversed.

(3) A year for the purpose of this clause shall commence on the 1st day of July and end on the 30th day of June next following.

(4) Rates of hire for use of employee's own vehicle on employer's business:

Schedule 1 - Motor Vehicle Allowance

Area and Details	Engine Displacement (in cubic centimetres) Over 2600cc	1600cc -2600cc	1600cc & under
	Rate per kilometre in cents		
Metropolitan Area:	88.4	76.9	68.0
South West Land Division:	90.9	78.9	70.1
North of 23.5° South Latitude:	99.7	86.9	77.4
Rest of the State:	93.8	81.5	72.3

Motor vehicles with rotary engines are to be included in the 1600-2600cc category.

Schedule 2 - Motor Cycle Allowance

Distance Travelled During a Year on Official Business	Rate per kilometre (cents)
All areas of the State	30.5

3.5. - TRAVELLING TIME AND EXPENSES

3.5.1 Employees required during working hours to work at more than one location shall be paid as if the employee had been working for the time spent in travelling between such work locations.

3.5.2 Employees required during working hours to work outside their usual place of employment and who are not eligible for a vehicle allowance pursuant to 3.4.15 shall be reimbursed reasonable travelling expenses incurred.

3.6. - LOCATION ALLOWANCES

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

TOWN	PER WEEK
	$
Agnew	18.70
Argyle	49.50
Balladonia	19.00
Barrow Island	32.20
Boulder	7.90
Broome	30.00
Bullfinch	8.80
Carnarvon	15.30
Cockatoo Island	32.90
Coolgardie	7.90
Cue	19.20
Dampier	26.00
Denham	15.30
Derby	31.20
Esperance	5.50
Eucla	20.90
Exmouth	27.20
Fitzroy Crossing	37.80
Goldsworthy	16.40
Halls Creek	43.40
Kalbarri	6.60
Kalgoorlie	7.90
Kambalda	7.90
Karratha	31.10
Koolan Island	32.90

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

3.6.2 Except as provided in 3.6.3, an employee who has:

(1) a dependant shall be paid double the allowance prescribed in 3.6.1; or

(2) a partial dependant shall be paid the allowance prescribed in 3.6.1 plus the difference between that rate and the amount such partial dependant is receiving by way of a district or location allowance.

3.6.3 Where an employee:

(1) is provided with board and lodging by their employer, free of charge; or

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

such employee shall be paid 66 2/3% of the allowances prescribed in 3.6.1.

3.6.4 Subject to 3.6.2, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

3.6.5 Where an employee is on annual leave or receives payment in lieu of annual leave they shall be paid for the period of such leave the location allowance to which they would ordinarily be entitled.

3.6.6 Where an employee is on long service leave or other approved leave with pay (other than annual leave) they shall only be paid location allowance for the period of such leave they remain in the location in which they are employed.

3.6.7 For the purposes of this clause:

(1) "Dependant" shall mean –

(a) a spouse or defacto partner; or

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

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

(2) "Partial Dependant" shall mean a "dependant" as prescribed in 3.6.7(1) who receives a location allowance which is less than the location allowance prescribed in 3.6.1 or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.

3.6.8 Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of 3.6.1 shall be such amount as may be agreed between Australian Mines and Metals Association (Incorporated), the Chamber of Commerce and Industry of Western Australia (Inc) and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

3.6.9 Subject to the making of a General Order pursuant to s 50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest 10 cents.

3.7. - PAYMENT OF WAGES

3.7.1 All employees shall be paid weekly or fortnightly at the option of the employer.

3.7.2 For the purpose of effecting the rostering off of employees on the weekly half holiday wages may be paid either for the actual hours worked each week or an amount being the calculated weekly average of the wages accruing over three consecutive weekly periods.

3.7.3 The provisions of this clause may be altered by agreement between the employer, the union and the employee or employees concerned. In the event of a dispute arising, the matter may be dealt with in accordance with 6.4 - Resolution of Disputes.

3.7.4 No deduction shall be made from an employee's wages unless the employee has authorised such deduction in writing.

3.7.5 Payment of wages by arrangement between an employer and employee shall be paid into the employee's bank account or other account or by cheque.

3.7.6 An employee shall be paid for accrued days off at the rate, including penalties, at which it was accumulated.

3.8. - SUPERANNUATION

3.8.1 The employer shall pay contributions in accordance with the Superannuation Legislation (as defined below) on behalf of each eligible employee to an Approved Fund chosen in accordance with 3.8.3.

3.8.2 Definitions:

"Approved Fund" means a superannuation fund or scheme that is a complying superannuation fund or scheme within the meaning of the superannuation legislation and to which, under the governing rules of the fund or scheme, contributions may be made by or in respect of the employee permitted to nominate a fund or scheme.

"Eligible employee" means an employee who is entitled to receive employer superannuation contributions in accordance with the superannuation legislation.

"Ordinary time earnings" means an employee's award classification rate (including supplementary payment) any regular over-award payment, district or location allowances, tool allowance, leading hand allowance and shift loading, including weekend and public holiday rates where the shift worked is part of the employee's ordinary hours of work and any other payments required pursuant to superannuation legislation.

All other allowances and payments are excluded.

"Relevant Fund" means an Approved Fund nominated by the employee, which is able to accept contributions from the employer.

"Superannuation Legislation" means the federal legislation as varied from time to time, governing superannuation rights and obligations, which includes the *Superannuation Guarantee (Administration) Act 1992*, the *Superannuation Guarantee Charge Act 1992*, the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation (Resolution of Complaints) Act 1993*.

3.8.3 Employer Contributions:

(1) An employer shall contribute no less than 9% of ordinary time earnings per eligible employee into one of the following approved funds:

(a) Westscheme;

(b) Any Approved Fund agreed between the employer, employees and the union;

(c) Any Approved Fund which has application to employees in the principal business of the employer, where employees covered by this award are a minority of award covered employees; or

(d) Any Relevant Fund which is nominated by the employee.

(2) Employer contributions shall be paid on a monthly basis for each week of service that the eligible employee completes with the employer.

(3) No contributions shall be made for periods of unpaid leave, or unauthorised absences in excess of 38 ordinary hours or for periods of workers' compensation in excess of 52 weeks.

No contributions shall be made in respect of annual leave paid out on termination or any other payments on terminations.

3.8.4 (1) Employees may nominate a Relevant Fund into which the contributions by an employer on behalf of the employee will be made.

(2) The employer shall notify the employee of the entitlement to nominate an Approved Fund as a Relevant Fund as soon as practicable.

(3) The employee and employer shall be bound by the nomination of the employee unless the employee and employer agree to change the Relevant Fund to which contributions are to be made.

(4) The employer shall not unreasonably refuse to agree to a change of Relevant Fund requested by an employee.

(5) The employer is required to make contributions to Westscheme until the employee nominates a Relevant Fund.

3.8.5 Subject to the Trust Deed to the fund of which an employee is a member, the following provisions will apply:

(1) Paid Leave

Contributions must continue whilst a member of a fund is absent on annual leave, personal leave, long service leave, public holidays, jury service, bereavement leave, or other paid leave.

(2) Unpaid Leave

Contributions will not be required in respect of any period of absence from work without pay of 38 ordinary hours or more.

(3) Work Related Injury or Illness

If an eligible employee's absence from work is due to work related injury or work related illness, contributions at the normal rate must continue for the period of the absence provided that:

(a) the member of the fund is receiving workers' compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements or the provisions of this award; and

(b) the person remains an employee of the employer.

3.8.6 Nothing contained herein shall serve to reduce any superannuation entitlement which an employee was receiving at the time this clause became effective.

3.9. - TIME AND WAGES RECORD

3.9.1 In this clause "relevant person" means:

(1) the employee concerned;

(2) if the employee is a represented person, their representative;

(3) a person authorised in writing by the employee; and

(4) an officer referred to in s 93 of the Act authorised in writing by the Registrar.

3.9.2 An employer is to ensure that the employment records of the employer are kept

(1) by:

(a) making entries in the English language in or on a separate page of a bound or loose-leaf book kept specifically for that purpose; or

(b) recording or storing the particulars required to be entered in the employment records by means of a mechanical, electronic or other device, but so that the particulars so recorded or stored will remain in the form in which they were originally recorded or stored and will be capable of being reproduced in written form in the English language;

(2) with only one employee's records appearing on any one page;

(3) so that the record for each pay period of each employee is identifiable; and

(4) in a manner that enables compliance with s 49D of the Act to be readily ascertained.

3.9.3 A person is not to alter employment records unless the alteration is annotated so as to identify:

(1) the nature of the alteration;

(2) the person making the alteration; and

(3) the date on which the alteration was made.

3.9.4 An employer must ensure that details are recorded of:

(1) the employee's name and, if the employee is under 21 years of age, their date of birth;

(2) any industrial instrument that applies;

(3) the date on which the employee commenced employment with the employer;

(4) for each day:

(a) the time at which the employee started and finished work;

(b) the period or periods for which the employee was paid; and

(c) details of work breaks including meal breaks;

(5) for each pay period:

(a) the employee's designation;

(b) the gross and net amounts paid to the employee under the award; and

(c) all deductions and the reasons for them;

(6) all leave taken by the employee, whether paid, partly paid or unpaid;

(7) the information necessary for the calculation of the entitlement to, and payment for long service leave under the *Long Service Leave Act 1958*, the *Construction Industry Portable Paid Long Service Leave Act 1985* or the industrial instrument;

(8) any other information in respect of the employee required under the award to be recorded; and any information, not otherwise covered by this subsection, that is necessary to show that the remuneration and benefits received by the employee comply with the award.

3.9.5 The employer must ensure that:

(1) the employment records are kept in accordance with reg 4 of the *Industrial Relations (General) Regulations 1997*;

(2) each entry in relation to long service leave is retained:

(a) during the employment of the employee; and

(b) for not less than seven years after the employment terminates;

and

(3) each other entry is retained for not less than seven years after it is made.

3.9.6 (1) An employer, on not less than 24 hours written notice by a relevant person, must:

(a) produce to the person the employment records relating to an employee; and

(b) let the person inspect the employment records at the company's office, the employee's worksite or other convenient place, during usual business hours.

(2) The duty placed on an employer by 3.9.6(1):

(a) continues so long as the records are required to be kept under 3.9.5;

(b) is not affected by the fact that the employee is no longer employed by the employer or that the industrial instrument no longer applies to the employee;

(c) includes the further duties:

(i) to let the relevant person enter premises of the employer for the purpose of inspecting the records; and

(ii) to let the relevant person take copies of or extracts from the records;

and

(d) must be complied with not later than 24 hours after notice has been given.

3.9.7 Nothing in this award limits or otherwise affects the powers of an Industrial Inspector in relation to the inspection of employment records.

4. - LEAVE AND PUBLIC HOLIDAYS

4.1. - ANNUAL LEAVE

Accrual of Leave

4.1.1 (1) An employee is entitled to a period of four consecutive weeks leave annually with payment as prescribed.

(2) A security guard, security guard/cleaner, security guard (mobile) and a rest room attendant shall be allowed one week's leave annually in addition to the annual leave entitlements prescribed in 4.1.1(1)

(3) The entitlement to leave pursuant to this clause accrues on a weekly basis and is fully cumulative.

4.1.2 Where any award holiday falls during an employee's period of annual leave and is observed on a day that would have been an ordinary working day for the employee, a day for each such holiday shall be added to the employee's leave entitlement.

4.1.3 Any time that an employee is absent from work shall not count towards accrual of the employee's amount of annual leave, except time for which the employee is entitled to claim personal, carers or bereavement leave or time for public holidays, annual leave or long service leave as prescribed by this award.

4.1.4 Where an employee is engaged for part of the qualifying twelve monthly period in any classification referred to in 4.1.1(2) of this clause the period of annual leave to which they are entitled pursuant to 4.1.1(1) shall be increased by 0.731 hours for each week so engaged.

4.1.5 When an employee proceeds on the first four weeks' of the annual leave prescribed by 4.1.1 there will be no accrual towards an accrued day off as prescribed in 2.1 - Hours and Weekend Work. Accrual towards an accrued day off shall continue during any other period of annual leave prescribed by this clause.

Payment for Leave

4.1.6 Before going on leave an employee shall be paid the wages they would have received in respect of the ordinary time they would have worked had they not been on leave during the relevant period.

4.1.7 (1) In addition to the payment for annual leave an employee shall be paid a loading of 17.5% calculated on their ordinary rate of wage.

(2) Provided that where the employee would have received any additional rates for the work performed in ordinary hours as prescribed by this agreement, had they not been on leave during the relevant period and such additional rates would have entitled the employee to a greater amount than the loading of 17.5%, then such additional rates shall be added to the ordinary rate of wage in lieu of the 17.5% loading.

(3) Provided further, that if the additional rates would have entitled the employee to a lesser amount than the loading of 17.5%, then such loading of 17.5% shall be added to their ordinary rate of wage in lieu of the additional rates.

Payment of Leave on Termination

4.1.8 (1) (a) If an employee lawfully leaves the employment, or the employment is terminated by the employer through no fault of the employee, the employee shall be paid 2.9231 hours pay in respect of each completed week of continuous service at the rate of pay prescribed in 4.1.1 and 4.1.6.

(b) In the case of a Security Guard, Security Guard/Cleaner, Security Guard (mobile) or rest room attendant the employee shall be paid 3.6541 hours' pay for each completed week of continuous service at the rate of pay prescribed in 4.1.1 and 4.1.6.

(2) An employee whose employment terminates and who has not taken their leave prescribed under this clause shall be paid as prescribed in 4.1.1 and 4.1.6 in lieu of so much of that leave as has not been taken unless:

(a) the employee has been justifiably dismissed for serious misconduct; and

(b) the leave relates to a year of service that was completed after the serious misconduct occurred.

(3) An employee who has been justifiably dismissed for serious misconduct will be paid pursuant to 4.1.1 and 4.1.6 for leave accrued in all years of service completed prior to the serious misconduct.

Taking of Leave

4.1.9 (1) Where requested by the employee the annual leave prescribed in this clause shall be taken in two portions, provided that no portion shall be less than two consecutive weeks.

(2) Provided further, that by mutual agreement between the employer and employee, the annual leave may be further split on one additional occasion, provided that no portion shall be less than one week.

4.1.10 (1) Notwithstanding anything else herein contained an employer who observes a Christmas closedown for the purpose of granting annual leave may require an employee to take annual leave in not more than two periods, but neither of such periods shall be less than one week.

(2) In the event of an employee being employed for only a portion of a year, the employee shall only be entitled, to annual leave on full pay as is proportionate to their length of service during that period with the employer and, if such leave is not equal to the leave given to the other employees, they shall not be entitled to work or pay whilst the other employees are on leave on full pay.

(3) (a) An employee who is not entitled to work or pay pursuant to 4.1.10(2) above may seek an agreement with their employer to be paid leave and loading in advance of its accrual.

(b) The employer may deduct from an employee's termination pay monies equal in value to the leave that has been paid in advance pursuant to 4.1.10(3)(a) above, but has not subsequently accrued in circumstances where the employee does not remain in employment for sufficient time to accrue the paid leave. Such deduction shall be based on the rate of pay applying at the time the advance paid leave was taken.

4.1.11 (1) Where an employer and an employee have not agreed when the employee is to take their annual leave, subject to 4.1.11(2) the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time.

(2) The employee is to give the employer at least two weeks' notice of the period during which the employee intends to take their leave.

4.1.12 Except as provided in this clause an employer may specify a reasonable period during which annual leave may not be taken to meet production requirements at the workplace concerned.

4.1.13 Subject to 4.1.11 an employer may require an employee to take annual leave within 12 months of such leave falling due.

Part Time Employees and Annual Leave

4.1.14 The provisions of this clause shall apply to part time employees on a pro rata basis in the same proportion as the average number of hours worked each week in the qualifying period bears to thirty eight.

Casual Employees and Unpaid Leave.

4.1.15 The provisions of this clause do not apply to casual employees, except that a casual employee shall be allowed four weeks unpaid leave every period of 12 months service.

4.2. - LEAVE FOR ILLNESS OR INJURY

4.2.1 (1) An employee who is unable to attend or remain at the place of employment during the ordinary hours of work by reason of personal ill health or injury shall be entitled to payment during such absence in accordance with the following provisions.

(2) Entitlement to payment shall accrue at the rate of 1.46 hours for each completed week of service up to 76 hours per annum (i.e. two weeks per annum).

(3) If in the first or successive years of service with the employer an employee is absent on the ground of personal ill health or injury for a period longer than their entitlement to paid sick leave, payment may be adjusted at the end of that year of service, or at the time the employee's services terminate, if before the end of that year of service, to the extent that the employee has become entitled to further paid sick leave during that year of service.

4.2.2 The unused portions of the entitlement to paid sick leave in any one year shall accumulate from year to year and subject to this clause may be claimed by the employee if the absence by reason of personal ill health or injury exceeds the period for which entitlement has accrued during the year at the time of the absence.

4.2.3 (1) To be entitled to payment in accordance with this clause the employee shall as soon as reasonably practicable advise the employer of their inability to attend for work due to illness or injury and the estimated duration of the absence.

(2) Provided that such advice, other than in extraordinary circumstances, shall be given to the employer within 24 hours of the commencement of the absence.

4.2.4 The provisions of this clause do not apply to an employee who fails to produce evidence that would satisfy a reasonable person of the entitlement, provided that the employee shall not be required to produce such evidence with respect to absences of two days or less, unless after two such absences in any year of service the employer requests in writing that the next and subsequent absences in that year, if any, shall be accompanied by such certificate.

4.2.5 (1) Subject to the provisions of this subclause, the provisions of this clause apply to an employee who suffers personal ill health or injury during the time when absent on annual leave and an employee may apply for and the employer shall grant paid sick leave in place of paid annual leave.

(2) Application for replacement leave shall be made within seven days of resuming work and then only if the employee was confined to their place of residence or a hospital as a result of their personal ill health or injury for a period of seven consecutive days or more and they produce a certificate from a registered medical practitioner that they was so confined.

Provided that the provisions of this paragraph do not relieve the employee of the obligation to advise the employer in accordance with 4.2.3 if the employee is unable to attend for work on the working day next following their annual leave.

(3) Replacement of paid annual leave by paid sick leave shall not exceed the period of paid sick leave to which the employee was entitled at the time they proceeded on annual leave and shall not be made with respect to fractions of a day.

(4) (a) Where paid sick leave has been granted by the employer in accordance with 4.2.5(1), (2) and (3), that portion of the annual leave equivalent to the paid sick leave is replaced by the paid sick leave.

(b) The replaced annual leave may be taken at another time mutually agreed to by the employer and the employee or, failing agreement, shall be added to the employee's next period of annual leave or, if termination occurs before then, be paid for in accordance with the provisions of 4.1 - Annual Leave.

(5) Payment for replaced annual leave shall be at the rate of wage applicable at the time the leave is subsequently taken provided that the annual leave loading prescribed in 4.1 - Annual Leave shall be deemed to have been paid with respect to the replaced annual leave.

4.2.6 Where a business has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with the *Long Service Leave Act 1958* the paid sick leave standing to the credit of the employee at the date of transmission from service with the transmittor shall stand to the credit of the employee at the commencement of service with the transmittee and may be claimed in accordance with the provisions of this clause.

4.2.7 The provisions of this clause with respect to payment do not apply to employees who are:

(1) entitled to payment under the *Workers' Compensation and Injury Management Act 1981*; nor to

(2) employees whose injury or illness is the result of:

(a) the employee's own serious and wilful misconduct, or

(b) the employee's gross and wilful neglect,

in the course of their employment.

4.2.8 The provisions of this clause do not apply to casual employees.

4.2.9 (1) An employee who works 40 actual hours each week during a particular work cycle shall be paid the wages he would have received had they not proceeded on sick leave and shall have the accrued entitlement to paid sick leave reduced by the time the employee is absent from work on account of paid sick leave.

(2) An employee who works 38 ordinary hours each week during a particular work cycle shall be paid in respect of any absence the normal pay the employee would have received had such employee been at work during the absence.

(3) An employee shall not be entitled to claim payment for non attendance on the ground of personal ill health or injury nor will the employee's sick leave entitlements be reduced if such personal ill health or injury occurs on a day when an employee is absent on an accrued day off in accordance with the provisions 2.1.1 and 2.1.2 unless such illness is for a period of seven consecutive days or more and in all other respects complies with the requirements of 4.2.5 hereof.

4.2.10 An employee whilst on paid sick leave shall continue to accrue an entitlement to an accrued day off as prescribed in 2.1. - Hours and Weekend Work.

4.3. – CARER'S LEAVE

4.3.1 An employee other than a casual employee is entitled to use up to 10 days of their sick leave entitlement in any given year as paid carer's leave to provide care or support to a member of the employee's family or household who requires care or support because of:

(1) an illness or injury to the member; or

(2) an unexpected emergency affecting the member.

4.3.2 An employee, including a casual employee, is entitled to unpaid carer's leave of up to two days for each occasion (a "permissible occasion") on which a member of the employee's family or household requires care or support because of:

(1) an illness or injury to the member; or

(2) an unexpected emergency affecting the member.

4.3.3 An employee is only entitled to take unpaid carer's leave if the employee cannot take paid carer's leave.

4.3.4 For the purposes of this clause a "member of the employee's family or household" is defined in 1.5 - Definitions.

4.3.5 The employee is required to provide to the employer evidence that would satisfy a reasonable person of the entitlement to leave under this clause.

4.4. - PARENTAL LEAVE

4.4.1 Definitions

For the purposes of this clause:

"adoption", in relation to a child, is a reference to a child who:

(1) is not the child or the stepchild of the employee or the employee's spouse or the employee's de facto partner;

(2) is less than five years of age; and

(3) has not lived continuously with the employee for six months or longer;

"continuous service" means service under an unbroken contract of employment and includes any period of leave or absence authorised by the employer or by an employer-employee agreement, an award, a contract of employment or the *Minimum Conditions of Employment Act 1993*;

"expected date of birth" means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee's spouse or de facto partner, as the case may be, to give birth to a child; or if the employee could not obtain a medical certificate, the date of birth of the child that could reasonably be expected if the pregnancy were to go to full term;

"employee" does not include a casual employee who is not an eligible casual employee;

"eligible casual employee" means a casual employee who:

(1) has been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and

(2) but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to adoption of the child by the employee would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

Without limiting the above, a casual employee is also an eligible casual employee if:

(1) the employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period, "the first period of employment", of less than 12 months;

(2) at the end of the first period of employment, the employee ceased, on the employer's initiative, to be so engaged by the employer;

(3) the employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period "the second period of employment", that started not more than three months after the end of the first period of employment;

(4) the combined length of the first period of employment and the second period of employment is at least 12 months; and

(5) the employee, but for an expected birth of a child to the employee or the employee's spouse or de facto partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

4.4.2 Eligibility for Parental Leave

(1) An employee is entitled to take up to 52 consecutive weeks of unpaid leave in respect of the:

(a) birth of a child to the employee or the employee's spouse or de facto partner; or

(b) placement of a child with the employee with a view to the adoption of the child by the employee.

(2) An employee is not entitled to take parental leave unless the employee has:

(a) before the expected date of the birth or placement, completed at least 12 months' continuous service with the employer; and

(b) given the employer at least 10 weeks' written notice of their intention to take the leave.

(3) The requirement for 10 weeks' written notice in 4.4.2(2) does not apply if it was not reasonably practicable for the employee to comply because of:

(a) the premature birth of the employee's child;

(b) the date when the placement was expected to start; or

(c) any other compelling reason.

(4) An employee is not entitled to take parental leave at the same time as the employee's spouse or de facto partner but this subclause does not apply to one week's parental leave or short adoption leave of three weeks taken by the:

(a) spouse or de facto partner of the person who gave birth to the child, immediately after the birth of the child; or

(b) employee and the employee's spouse or de facto partner immediately after a child has been placed with them with a view to their adoption of the child.

(5) An employee seeking to obtain approval to adopt a child is entitled to a period of up to two days unpaid leave to attend any interviews or examinations required to obtain the approval. An employee is not entitled to such unpaid leave if their employer requires the employee to use other leave entitlements that are available to the employee. The two days unpaid leave is able to be taken as a single, unbroken, period or in any separate periods as agreed between the employee and their employer.

(6) An employee may request the employer to extend the period of parental leave to which the employee is entitled under 4.4.2(1) for a further consecutive period of not more than 52 consecutive weeks. Such a request is to be in writing and must be made at least four weeks before the day on which the employee would have finished parental leave if the request had not been made.

(7) An employee may request the employer to extend the period of parental leave which the employee is entitled under 4.4.2(1) to take at the same time as the employee's spouse or de facto partner for a further period of not more than seven consecutive weeks. Such a request is to be in writing and can be made at any time before the end of the leave referred to in 4.4.2(1).

(8) An employer is to agree to a request under 4.4.2(6) and 4.4.2(7) unless:

(a) the employer, having considered the employee's circumstances, is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(b) there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of operations or business of the employer and those grounds would satisfy a reasonable person.

The employer is to give written notice of its decision and if the employer refuses the request, the notice is to set out the reasons for the refusal.

(9) The entitlement of an employee to parental leave is reduced by any period of parental leave taken by the employee's spouse or de facto partner in relation to the same child, except:

(a) the period of leave referred to in 4.4.2(1); or

(b) an extended period of parental leave agreed to pursuant to 4.4.2(7).

(10) An employee who has given notice of their intention to take parental leave, other than for adoption is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's spouse or de facto partner, as the case may be, is pregnant and the expected date of birth (or, where relevant, stating that the employee's spouse or de facto partner has given birth to a living child and specifying the date of birth).

(11) An employee who has given notice of their intention to take parental leave or who is actually taking parental leave is to give notice supported by a statutory declaration to the employer of particulars of any period of parental leave taken or to be taken by the employee's spouse or de facto partner in relation to the same child.

(12) The period of parental leave may be shortened by written agreement between the employee and the employer.

4.4.3 Period of Leave and Commencement of Leave

(1) Subject to 4.4.4 and 4.4.6, a female employee who has given notice of her intention to take parental leave, other than for adoption, is to commence the leave six weeks before the estimated date of birth unless a medical practitioner has certified that she is fit to work closer to the date.

(2) An employee who has given notice of their intention to take parental leave must notify the employer of the dates on which the employee wishes to start and finish the leave. An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.

4.4.4 Transfer to a Safe Job

(1) This clause applies where an employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:

(a) illness, or risks, arising out of her pregnancy; or

(b) hazards connected with that position.

(2) If the employee's employer thinks it to be reasonably practicable to transfer the employee to a safe job the employer must transfer the employee to the safe job, with no other change to the employee's terms and conditions of employment; or

(3) If the employee's employer does not think it to be reasonably practicable to transfer the employee to a safe job:

(a) the employee may take paid leave immediately for a period ending at the time mentioned in 4.4.4(5)(b); or

(b) the employer may require the employee to take paid leave immediately for a period ending at the time mentioned in 4.4.4(5)(b).

(4) If the employee takes paid leave under 4.4.4(3)(a) or 4.4.4(3)(b) during a period, the employer must pay the employee for that period the amount the employee would have received as her payment at the time the leave is taken. Where the number of hours cannot be determined, the total number of hours worked in the 52 weeks immediately before the leave is taken are to be averaged.

(5) If the employee takes paid leave under 4.4.4(3)(a) or 4.4.4(3)(b):

(a) the entitlement to leave is in addition to any other leave entitlement she has; and

(b) the period of leave ends at the earliest of whichever of the following times is applicable:

(i) the end of the period stated in the medical certificate;

(ii) if the employee's pregnancy results in the birth of a living child the end of the day before the date of birth;

(iii) if the employee's pregnancy ends otherwise than with the birth of a living child the end of the day before the end of the pregnancy.

(6) Leave taken under 4.4.4(3)(a) or 4.4.4(3)(b) shall be treated as parental leave for the purposes of 4.4.7, 4.4.8 and 4.4.9.

4.4.5 Cancellation of Parental Leave

(1) Parental leave applied for, but not commenced, will be cancelled when the pregnancy of an employee or an employee's spouse or de facto partner terminates other than by the birth of a living child or when the proposed placement of a child with an employee is cancelled.

(2) Where the pregnancy of an employee then on parental leave terminates other than by the birth of a living child, the employee has the right to resume work at a time nominated by the employer which date must not be less than four weeks from the date the employee gives notice in writing to the employer that the employee desires to resume work.

(3) Where an employee is on parental leave and gives birth to a living child but the child later dies, the employee's entitlement to parental leave is not affected by the death of a child, except that the employer may give written notice to the employee that from a stated day the parental leave is cancelled. The stated day must be no earlier than the later of four weeks from the day the notice was given or six weeks after the date of birth.

(4) Where an employee is on parental leave for adoption and the placement is cancelled or discontinued, the employee's entitlement to parental leave is not affected by the cancellation or discontinuation of the placement, except that the employer may give written notice to the employee that from a stated day the parental leave is cancelled. The stated day must be no earlier than four weeks from the day the notice was given.

(5) If during a substantial period while an employee is on parental leave the employee is not the child's primary care-giver and it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period, the employer may give written notice that from a stated day the parental leave is cancelled. The stated day must be no earlier than four weeks after the notice is given.

4.4.6 Special Parental Leave and Sick Leave

(1) Where the pregnancy of a female employee not then on parental leave has ended within 28 weeks before the expected date of birth of the child otherwise than by the birth of a living child then she must be entitled to such period of unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before her return to work.

(2) Where a female employee not then on parental leave suffers illness related to her pregnancy, she may take such paid sick leave as to which she is then entitled and such further unpaid leave (to be known as special parental leave) as a duly qualified medical practitioner certifies as necessary before her return to work, provided that the aggregate of paid sick leave, special parental leave and parental leave must not exceed 52 weeks, or a further extended period of parental leave agreed to under 4.4.2(6).

(3) For the purposes of 4.4.7, 4.4.8 and 4.4.9, parental leave includes special parental leave.

(4) An employee returning to work after the completion of a period of leave taken pursuant to this subclause will be entitled to the position which she held immediately before proceeding on such leave or, in the case of an employee who was transferred to a safe job pursuant to 4.4.4, to the position she held immediately before such transfer. Where such position no longer exists but there are other positions available, for which the employee is qualified and the duties of which she is capable of performing, she will be entitled to a position as nearly comparable in status and pay to that of her former position.

4.4.7 Parental Leave and Other Leave Entitlements

(1) Provided the aggregate of leave including leave taken pursuant to 4.4.4 and 4.4.6 does not exceed 52 weeks, or a further extended period of parental leave agreed to under 4.4.2(6), an employee may, instead of or in conjunction with parental leave, take any annual leave or long service leave or any part of annual leave or long service leave to which the employee is then entitled.

(2) Paid sick leave or other paid authorised award absences (excluding annual leave or long service leave) will not be available to an employee during the employee's absence on parental leave.

4.4.8 Effect of Parental Leave on Employment

Absence on parental leave does not break the continuity of service of an employee but is not to be taken into account in calculating the period of service for any purpose of the award.

4.4.9 Termination of Employment

(1) An employee on parental leave may terminate their employment at any time during the period of leave by notice given in accordance with this award.

(2) An employer must not terminate the employment of an employee on the ground of the employee's pregnancy or of the employee's absence on parental leave, but otherwise the rights of an employer in relation to termination of employment are not affected.

4.4.10 Return to Work after Parental Leave

(1) Upon finishing parental leave an employee will be entitled to the position which the employee held immediately before proceeding on parental leave or, in the case of an employee who was transferred to a safe job pursuant to 4.4.4, to the position which the employee held immediately before such transfer.

(2) If the position referred to in 4.4.10(1) no longer exists but there are other positions available for which the employee is qualified and the duties of which the employee is capable of performing, the employee will be entitled to the position most comparable in status and pay to that of the employee's former position.

(3) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of, the position referred to in 4.4.10(1), that subclause applies only in respect of the position held by the employee immediately before taking the acting or temporary position.

(4) An employee may request the employer to permit the employee, on finishing parental leave, to work on a modified basis in a position to which the employee is entitled under 4.4.10(1) or 4.4.10(2). Such a request is to be made in writing least seven weeks before the day on which the employee finishes parental leave.

(5) If the employee has been permitted to work on a modified basis, the employee may subsequently request the employer permit the employee to resume working on the same basis as the employee worked immediately before starting parental leave. Such a request is to be made in writing at least six weeks before the day the employee wishes to resume working on the basis as the employee worked immediately before starting parental leave.

(6) The employer is to agree to a request under 4.4.10(4) unless:

(a) the employer, having considered the employee's circumstances, is not satisfied that the request is genuinely based on the employee's parental responsibilities; or

(b) there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the operations or business of the employer and those grounds would satisfy a reasonable person.

(7) The employer is to agree to a request under 4.4.10(5) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the operations or business of the employer and those grounds would satisfy a reasonable person.

(8) The employer is to give the employee written notice of its decision on a request under 4.4.10(4) or 4.4.10(5) and, if the request is refused, the notice is to set out the reasons for the refusal.

(9) If the employee has been permitted to work on a modified basis, the employer may subsequently require the employee to resume working on the same basis as the employee worked immediately before starting parental leave. The employer must give at least six weeks' notice before the day on which the employer wishes the employee to resume working on the basis as the employee worked immediately before starting parental leave. The employer is to give notice in writing setting out the reasons for the requirement.

(10) A requirement can be made under 4.4.10(9) if, and only if:

(a) the requirement is made on the grounds relating to the adverse effect that the employee continuing to work on a modified basis would have on the conduct of the operations of business of the employer and those grounds would satisfy a reasonable person; or

(b) the employee no longer has a child below school age.

(11) The employer is to give written notice of a decision under 4.4.10(9) and the notice is to set out the reasons for the decision.

(12) In 4.4.10(4) "modified basis" means a basis that involves the employee working

(a) on different days or at different times, or both; or

(b) on fewer days or for fewer hours, or both,

than the employee worked immediately before starting parental leave.

(13) Replacement Employees

(a) A replacement employee is an employee specifically engaged as a result of an employee proceeding on parental leave.

(b) Before an employer engages a replacement employee under this subclause, the employer must inform that person of the temporary nature of the employment and of the rights of the employee who is being replaced.

(c) Before an employer engages a person to replace an employee temporarily promoted or transferred in order to replace an employee exercising their rights under this clause, the employer must inform that person of the temporary nature of the promotion or transfer and of the rights of the employee who is being replaced.

(d) Nothing in this subclause will be construed as requiring an employer to engage a replacement employee.

(e) A replacement employee will not be entitled to any of the rights conferred by this clause except where the replacement employee's employment continues beyond the 12 months' qualifying period.

4.5. - BEREAVEMENT LEAVE

4.5.1 (1) An employee including a casual employee shall on the death of a member of the employee's family or household, be entitled on notice, of leave up to and including the day of the funeral of such relation and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee in two ordinary rostered working days.

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

(3) An employee who claims to be entitled to paid leave under 4.5.1(1) is to provide to the employer, upon request, evidence that would satisfy a reasonable person as to the death that is the subject of the leave sought and the relationship of the employee to the deceased person.

4.5.2 Provided that payment in respect of bereavement leave is to be made only where the employee otherwise would have been on duty and shall not be granted in any case where the employee concerned would have been off duty in accordance with the roster, or on long service leave, annual leave, sick leave, workers' compensation, leave without pay or on a public holiday.

4.5.3 An employee shall not be entitled to claim payment for bereavement leave on a day when that the employee is absent on an accrued day off in accordance with the provisions of 2.1 - Hours and Weekend Work.

4.5.4 An employee, whilst on bereavement leave prescribed by this clause shall continue to accrue an entitlement to an accrued day off as prescribed in 2.1 - Hours and Weekend Work.

4.6. - LONG SERVICE LEAVE

An employee covered by this award is entitled to long service leave in accordance with the *Long Service Leave Act 1958*.

4.7. - PUBLIC HOLIDAYS

4.7.1 The following days or the days, observed in lieu, shall subject to 4.7.3 hereof, be allowed as holidays without deduction of pay, namely: New Year's Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Labour Day, State Foundation Day, Sovereign's Birthday, Christmas Day and Boxing Day.

4.7.2 (1) When any of the days mentioned in 4.7.1 hereof, falls on a Saturday or a Sunday the holiday shall be observed on the next succeeding Monday and when Boxing Day falls on a Sunday or a Monday the holiday shall be observed on the next succeeding Tuesday.

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.

(2) When any of the days observed as a holiday under this clause falls on a day when an employee is rostered off duty and has not been required to work on that day the employee shall be paid as if the day was an ordinary working day, or, if they agree, be allowed a day's leave with pay in lieu of the holiday at a time mutually acceptable to the employer and the employee.

4.7.3 An employee who, on a day observed as a holiday under this clause is required to work during his ordinary hours of work shall be paid for the time worked at the rate of double time and one half or, if they agree, be paid for the time worked at the rate of time and one half and in addition be allowed to take a day's leave with pay on a day mutually acceptable to the employer and the employee.

4.7.4 Where -

(1) a day is proclaimed as a public holiday or as a public half-holiday under s 7 of the *Public and Bank Holidays Act 1972*, and,

(2) that proclamation does not apply throughout the State or to the metropolitan area of the State,

that day shall be a whole holiday or, as the case may be, a half holiday for the purposes of this award within the district or locality specified in the proclamation.

4.7.5 When any of the days observed as a holiday prescribed in this clause fall on a day when an employee is on an accrued day off the employee shall be allowed to take a day's holiday in lieu of the holiday on a day immediately following the employee's annual leave or at a time mutually acceptable to the employer and the employee.

4.7.6 An employee whilst on a public holiday prescribed by this clause shall continue to accrue an entitlement to an accrued day off as prescribed in 2.1.1 and 2.1.2.

4.7.7 Where an employee has additional leave granted pursuant to 4.7.2, the employer may require such leave to be taken within 12 months of falling due.

4.7.8 The provisions of this clause shall not apply to casual employees.

5. - TERMINATION AND REDUNDANCY

5.1. - CONTRACT OF SERVICE AND TERMINATION

Contract of Service

5.1.1 Employees covered by this award shall be engaged as a:

(1) continuing employee (either full time or part time); or

(2) casual employee (to work 38 ordinary hours a week or for less than 38 ordinary hours a week).

5.1.2 Where an employee is engaged pursuant to 5.1.1(1), at the time of engagement the employer will inform the employee in writing of the terms of the engagement; their classification; whether they are full time or part time and, in the case of part time employees, the number of hours they will be regularly rostered to work.

5.1.3 Full Time Employees:

A "Full Time Employee" means an employee engaged to work an average of 38 ordinary hours per week in accordance with the provisions of 2.1 – Hours and Weekend Work.

5.1.4 Part Time Employees

(1) A "Part Time Employee" means an employee who:

(a) works less than 38 ordinary hours per week; and

(b) has reasonably predictable hours of work; and

(c) receives, on a pro rata basis, equivalent pay and conditions to those of full time employees who do the same kind of work.

(2) At the time of engagement the employer and employee will agree in writing on a regular pattern of work specifying at least:

(a) the hours worked each day;

(b) the days of the week to be worked; and

(c) the actual starting and finishing times each day.

(3) Any agreed variation to the regular pattern of work will be recorded in writing.

(4) A part time employee shall be rostered for a minimum of three consecutive hours on any shift.

(5) Part time employees shall be paid for ordinary hours worked at the rate of 1/38 of the weekly rate prescribed for their classification.

5.1.5 Casual Employees

(1) A "Casual Employee" means an employee as defined in 1.5 – Definitions who is engaged and paid as such.

(2) At the time of engagement the employer will orally inform the employee of:

(a) the likely hours they will be required;

(b) the ordinary hourly rate for a casual employee in their classification;

(c) their lack of entitlement to paid annual, sick or carer's leave; and

(d) their entitlement to bereavement and unpaid leave.

(3) Where a Casual Employee is required to work for more than one week the employer will provide the information required pursuant to 5.1.5(2) above in writing to the employee.

(4) The ordinary hourly rate for a casual employee shall be calculated on the basis of one thirty eighth of the weekly rate prescribed for the class of work performed plus a casual loading of 20%.

(5) A casual employee shall be employed for a minimum of three consecutive hours on each occasion.

Termination of Employment

5.1.6 Notice of Termination by Employer

(1) In order to terminate the employment of an employee the employer shall give the employee the following notice:

PERIOD OF CONTINUOUS SERVICE WITH THE EMPLOYER	PERIOD OF NOTICE
1 year or less	At least 1 week
More than 1 year up to and including 3 years	At least 2 weeks
More than 3 years up to and including 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

(2) An employee who at the time of being given notice is over 45 years of age and who at the date of termination has completed two years' continuous service with the employer, shall be entitled to one week's notice in addition to the notice prescribed in 5.1.6(1)

(3) Payment in lieu of the notice prescribed in 5.1.6(1) and (2) shall be made if the appropriate notice period is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(4) In calculating any payment in lieu of notice the employer shall pay the employee an amount that is equal to, or exceeds, the total of all amounts that, if the employee's employment had continued until the end of the required notice period, the employer would have become liable to pay to the employee because of the employment continuing during that period. That total must be worked out on the basis of:

(a) the employee's ordinary hours of work (even if they are not standard hours);

(b) the amounts ordinarily payable to the employee in respect of those hours, including for example, allowances, loadings and penalties; and

(c) any other amounts payable under the employee's contract of employment.

5.1.7 The employment of a casual employee may be terminated by one hour's notice on either side or the payment by the employer or forfeiture by the employee (as the case may be) of one hour's pay.

5.1.8 Nothing in this clause shall prevent an employer from dismissing an employee at any time for serious misconduct in which case wages shall be paid up to the time of dismissal only.

5.1.9 The employer may engage an employee on a probationary period for not longer than three months during which time it will be possible for either the employee or employer to end the contract with one day's notice.

5.1.10 An employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training.

5.1.11 Upon request by an employee, the employer shall provide a written statement specifying the period of employment and the classification or type of work performed by the employee.

5.2. - NO REDUCTION

Nothing contained in this award shall entitle an employer to reduce the wage of any employee who at the date of this award is being paid a higher rate of wage than the minimum prescribed for their class of work.

5.3. - REDUNDANCY

5.3.1 Definitions

(1) "Business" includes trade, process, business or occupation and includes part of any such business.

(2) "Redundancy" occurs where an employer has made a definite decision that the employer no longer wishes the job the employee has been doing done by anyone.

(3) "Transmission" includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and "transmitted" has a corresponding meaning.

(4) "Weeks' pay" means the ordinary time rate of pay for the employee concerned. Provided that such rate shall exclude:

(a) overtime;

(b) penalty rates;

(c) disability allowances;

(d) shift allowances;

(e) special rates;

(f) fares and travelling time allowances;

(g) bonuses; and

(h) any other ancillary payments of a like nature.

5.3.2 Consultation Before Terminations

(1) Where an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and that decision may lead to termination of employment, the employer shall consult the employee directly affected and if an employee nominates a union to represent them, the union nominated by the employee.

(2) The consultation shall take place as soon as is practicable after the employer has made a decision to which 4.2(a) applies and shall cover the reasons for the proposed terminations, measures to avoid or minimise the terminations and/or their adverse affects on the employees concerned.

(3) For the purpose of the consultation the employer shall, as soon as practicable, provide in writing to the employees concerned and if an employee nominates a union to represent them, the union nominated by the employee, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of employees normally employed and the period over which the terminations are likely to be carried out. Provided that an employer shall not be required to disclose confidential information, the disclosure of which would be adverse to the employer's interests.

5.3.3 Transfer to Lower Paid Duties

(1) Where an employee is transferred to lower paid duties by reason of redundancy the employee shall be entitled to the same period of notice of transfer as the employee would have been entitled to if the employee's employment had been terminated.

(2) The employer may, at the employer's option, make payment in lieu thereof of an amount equal to the difference between the former amounts the employer would have been liable to pay and the new lower amount the employer is liable to pay the employee for the number of weeks of notice still owing.

(3) The amounts must be worked out on the basis of:

(a) the ordinary working hours to be worked by the employee;

(b) the amounts payable to the employee for the hours including for example, allowances, loading and penalties; and

(c) any other amounts payable under the employee's contract of employment.

5.3.4 Severance Pay

(1) In addition to the period of notice prescribed for ordinary termination, an employee whose employment is terminated by reason of redundancy must be paid, subject to further order of the Commission, the following amount of severance pay in respect of a continuous period of service: Provided that the entitlement of any employee whose employment terminates on or before 1 February 2006 shall not exceed eight weeks' pay.

Period of continuous service	Severance pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay

Period of continuous service—*continued*	Severance pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

(2) Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

(3) For the purpose of this clause continuity of service shall not be broken on account of:

(a) any interruption or termination of the employment by the employer if such interruption or termination has been made merely with the intention of avoiding the obligations of this clause in respect of leave of absence;

(b) any absence from work on account of leave granted by the employer; or

(c) any absence with reasonable cause, proof whereof shall be upon the employee;

Provided that in the calculation of continuous service any time in respect of which any employee is absent from work except time for which an employee is entitled to claim paid leave shall not count as time worked.

Service by the employee with a business which has been transmitted from one employer to another and the employee's service has been deemed continuous in accordance with the definition of continuous service contained in the *Long Service Leave Act 1958* (WA) shall also constitute continuous service for the purpose of this clause.

5.3.5 Employee Leaving During Notice Period

An employee whose employment is terminated by reason of redundancy may terminate their employment during the period of notice and, if so, will be entitled to the same benefits and payments under this clause had they remained with the employer until the expiry of such notice. However, in this circumstance the employee will not be entitled to payment in lieu of notice.

5.3.6 Alternative Employment

(1) An employer, in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied if the employer obtains acceptable alternative employment for an employee.

(2) This subclause does not apply in circumstances involving transmission of business as set out in 4.7.

5.3.7 Transmission of Business

(1) The provisions of 4 are not applicable where a business is before or after the date of this order, transmitted from an employer (in this subclause called "the transmittor") to another employer (in this subclause called "the transmittee"), in any of the following circumstances:

(a) Where the employee accepts employment with the transmittee which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service of the employee with the transmittee; or

(b) Where the employee rejects an offer of employment with the transmittee:

(i) in which the terms and conditions are substantially similar and no less favourable, considered on an overall basis, than the terms and conditions applicable to the employee at the time of ceasing employment with the transmittor; and

(ii) which recognises the period of continuous service which the employee had with the transmittor and any prior transmittor to be continuous service with the transmittee.

(2) The Commission may vary 5.3.7(1)(b) if it is satisfied that this provision would operate unfairly in a particular case.

5.3.8 Entitlement to Paid Leave for Job Interviews

(1) An employee, other than a seasonal worker, who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to eight hours for the purpose of being interviewed for further employment.

(2) The eight hours' paid leave referred to 5.3.8(1) need not be consecutive.

(3) An employee who claims to be entitled to paid leave under 5.3.8(1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

5.3.9 Notice to Centrelink

Where a decision has been made to terminate employees in the circumstances outlined in 5.3.2 - Consultation Before Terminations, the employer shall notify Centrelink as soon as possible giving all relevant information about the proposed

terminations, including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected, the number of employees normally employed and the period over which the terminations are intended to be carried out.

5.3.10 Employees Exempted

This clause does not apply:

(1) Where employment is terminated as a consequence of serious misconduct that justifies dismissal without notice.

(2) Except for 5.3.2 - Consultation Before Terminations, to employees with less than one year's service.

(3) Except for 5.3.2 - Consultation Before Terminations, to probationary employees.

(4) To apprentices.

(5) To trainees.

(6) Except 5.3.2 - Consultation Before Terminations, to employees engaged for a specific period of time or for a specified task or tasks; or

(7) To casual employees.

5.3.11 Employers Exempted

Subject to an order of the Commission, in a particular redundancy case, 5.3.4 - Severance Pay shall not apply to employers who employ less than 15 employees.

5.3.12 Incapacity to Pay

An employer in a particular redundancy case, may make application to the Commission to have the severance payment prescribed varied on the basis of the employer's incapacity to pay.

6. - OTHER

6.1. - INTRODUCTION OF CHANGE

6.1.1 Employer's Duty to Notify

(1) Where an employer decides to introduce 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 their union.

(2) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of a job opportunity, a promotion opportunity or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs.

6.1.2 Employer's Duty to Consult Over Change

(1) The employer shall consult with the employees affected and the union about the introduction of the changes, the effects the changes are likely to have on employees, (including the number and categories of employees likely to be dismissed, and the time when, or the period over which, the employer intends to carry out any dismissals), and the ways to avoid or minimise the effects of the changes (eg by finding alternate employment).

(2) The consultation shall commence as soon as is reasonably practicable after making the decision referred to in the "Employer's Duty to Notify" referred to in 6.1.1 and the employer shall give prompt consideration to matters raised by the employees and/or their union in relation to the changes..

(3) For the purpose of such discussion, the employer shall provide in writing to the employees concerned and their union or unions, 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 provided that any employer shall not be required to disclose information the disclosure of which may seriously harm the employer's business undertaking or the employer's interest in the carrying on, or disposition, of the business undertaking.

6.2. - SAFETY PROVISIONS

6.2.1 A reasonable means of communication shall be available for a mobile security guard to communicate with the employer or the employer's nominated representative.

6.2.2 Any dispute as to whether a means of communication is reasonable for the purposes of this clause may be dealt with in accordance with 6.4 - Resolution of Disputes.

6.3. - AWARD MODERNISATION AND ENTERPRISE CONSULTATION

6.3.1 The parties to this award are committed to cooperating positively to increase the efficiency and productivity of the employer's business to enhance the career opportunities and job security of employees in the industry.

6.3.2 At each worksite a consultative mechanism may be established by the employer, or shall be established upon request by the employees or their union. The consultative mechanism and procedure shall be appropriate to the size, structure and needs of the employer's business.

6.3.3 Where a consultative committee is established, it will be free to address any matter which is consistent with the objectives of 6.3.1.

6.3.4 Discussions that take place will have regard to the following requirements:

(1) the changes sought shall not affect provisions reflecting State standards;

(2) the majority of employees affected by the change at the plant or worksite must genuinely agree to the change;

(3) any agreement shall not, in the context of a total package, provide for a set of conditions of a lesser standard than that provided by the award and no employee shall have a lesser income as a result of the conditions provided for in such agreement;

(4) the union must be a party to any agreement which affects the wages and/or conditions of employment of employees;

(5) the union shall not unreasonably oppose any agreement;

(6) any agreement relating to award matters shall be subject to approval by the Western Australian Industrial Relations Commission and, if approved, shall operate as a schedule to this award and take precedence over any provision of this award to the extent of any inconsistency; and

(7) if agreement cannot be reached on a particular issue, then the matter may be referred to the Western Australian Industrial Relations Commission for determination.

6.4. - RESOLUTION OF DISPUTES

6.4.1 Any dispute or matter raised by the employer or employee(s) shall be settled in accordance with the following procedure:

6.4.2 As soon as practicable after the dispute has arisen, the appropriate supervisor, the employee(s) concerned and where requested by an employee or employees the union workplace representative or other representative shall attempt to resolve the matter.

6.4.3 If the dispute is not resolved the appropriate senior representative of the employer, the employee(s) concerned, and where requested by an employee or employees, the union workplace representative or other representative shall attempt to resolve the matter.

6.4.4 If the dispute is not resolved the employer, employee, union or other employee representative may refer it for conciliation and/or arbitration by the Commission.

6.4.5 Unless otherwise agreed between the parties to the dispute, the status quo as existing before the dispute arose shall prevail until the dispute is resolved pursuant to this clause

6.5. - UNION RIGHT OF ENTRY

6.5.1 Discussions with Employees

An authorised representative of the anion, as defined by the Act, may enter, during working hours, the premises of the employer in accordance with the provisions of sections 49G and 49H of the Act.

6.5.2 Investigation of Breaches

An authorised representative may enter any premises during working hours where relevant employees work to investigate any suspected breach of the Act, the *Minimum Conditions of Employment Act 1993* the *Occupational Safety and Health Act 1984*, the *Mines Safety and Inspection Act 1994* or an award, order, industrial agreement or employer-employee agreement that applies to any such employee in accordance with section 49I of the Act.

6.6. - POSTING OF AWARD AND UNION NOTICES

The employer shall keep a copy of this award in a convenient place in the workplace and the employer shall also provide a notice board for the posting of union notices.

7. - NAMED PARTIES TO THE AWARD

Liquor Hospitality and Miscellaneous Union, Western Australian Branch

The Anglican Church

Anzac Club

Cottesloe Town Council

Freemasons

Perth City Council

The Presbyterian Church

Roman Catholic Administration

The Trinity Congregational Church

The Uniting Church in Australia (formerly Presbyterian Church)

The Wesley Church

8. - LIBERTY TO APPLY

Liberty is given to each organisation named in clause 7 - Named Parties to the Award to apply to vary the award to remove their name as a party on the basis they are in fact and in law a constitutional corporation and that pursuant to 1.3 – Area and Scope they are not bound by the provisions of the award.

2009 WAIRC 00647

SECTION 40B VARIATION OF THE CLEANERS AND CARETAKERS AWARD, 1969.

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION)
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
	COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 SEPTEMBER 2009
FILE NO/S	APPL 556 OF 2005
CITATION NO.	2009 WAIRC 00647

Result Correction Order to Location Allowances issued

Correction Order

WHEREAS an error occurred in the Order dated 14 August 2009 issued in APPL 556 of 2005 Citation Number 2009 WAIRC 00568, the Commission, in order to correct this error and pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT clause 3.6.1 of the Schedule attached to that Order be amended to read in accordance with the following schedule.

(Sgd.) J H SMITH,
[L.S.] Commission In Court Session.

SCHEDULE

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

TOWN	PER WEEK
Agnew	$18.90
Argyle	$50.10
Balladonia	$19.20
Barrow Island	$32.60
Boulder	$7.90
Broome	$30.30
Bullfinch	$8.90
Carnarvon	$15.50
Cockatoo Island	$33.20
Coolgardie	$7.90
Cue	$19.40
Dampier	$26.30
Denham	$15.50
Derby	$31.50
Esperance	$5.60
Eucla	$21.20
Exmouth	$27.50
Fitzroy Crossing	$38.20
Goldsworthy	$16.50
Halls Creek	$43.90
Kalbarri	$6.60
Kalgoorlie	$7.90
Kambalda	$7.90
Karratha	$31.50

TOWN—*continued*	PER WEEK
Koolan Island	$33.20
Koolyanobbing	$8.90
Kununurra	$50.10
Laverton	$19.30
Learmonth	$27.50
Leinster	$18.90
Leonora	$19.30
Madura	$20.20
Marble Bar	$48.30
Meekatharra	$16.70
Mount Magnet	$20.80
Mundrabilla	$20.70
Newman	$18.10
Norseman	$16.50
Nullagine	$48.20
Onslow	$32.60
Pannawonica	$24.60
Paraburdoo	$24.40
Port Hedland	$26.20
Ravensthorpe	$10.00
Roebourne	$36.20
Sandstone	$18.90
Shark Bay	$15.50
Shay Gap	$16.50
Southern Cross	$8.90
Telfer	$44.50
Teutonic Bore	$18.90
Tom Price	$24.40
Whim Creek	$31.20
Wickham	$30.20
Wiluna	$19.20
Wittenoom	$42.70
Wyndham	$47.00

2009 WAIRC 00604

PARLIAMENTARY EMPLOYEES AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA (INCORPORATED)

APPLICANT

-v-

THE GOVERNOR OF WESTERN AUSTRALIA IN COUNCIL AND OTHERS

RESPONDENTS

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S WOOD

DATE FRIDAY, 28 AUGUST 2009

FILE NO P 19 OF 2009

CITATION NO. 2009 WAIRC 00604

Result	Award varied
Representation	
Applicant	Mr M Sims
Respondents	No appearance

Order

HAVING heard Mr M Sims on behalf of the applicant and there being no appearance on behalf of the respondents, the Public Service Arbitrator, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders:

THAT the Parliamentary Employees Award 1989 as varied, be further 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 date of this order.

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

SCHEDULE

1. Clause 9 – Meal Allowance: Delete subclause (1) of this clause and insert in lieu thereof the following:

(1) An employee who is required to work overtime under Clause 7 of this Award and where such overtime extends beyond 5.00 p.m., a meal allowance shall be paid in accordance with the provisions of the Public Service Overtime Award No. 10 of 1978 Clause 8 as amended. Provided that where such overtime extends beyond 6.00 a.m. the following day, an allowance of $14.85 or the amount charged by the House, whichever is the higher, for such a three course meal shall be paid

AGREEMENTS—Industrial—Retirement from—

2009 WAIRC 00648

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. PSAAG 5 of 2007

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act

The Office of Health Review ceased to be a party to the Office of Health Review Agency Specific Agreement 2007, No PSAAG 5 of 2007 on and from the 29th day of August 2009.

DATED THIS 8th DAY OF SEPTEMBER 2009.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 00645

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANDERSON
	APPLICANT
	-v-
	SOLOMONS ELECTRICS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 7 SEPTEMBER 2009
FILE NO	B 142 OF 2009
CITATION NO.	2009 WAIRC 00645

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 25 August 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 00644

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL ANDERSON
	APPLICANT
	-v-
	SOLOMONS ELECTRICS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 7 SEPTEMBER 2009
FILE NO	U 142 OF 2009
CITATION NO.	2009 WAIRC 00644

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 25 August 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 00611

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARMEN BRANSBY
	APPLICANT
	-v-
	BELSWAN LIFESTYLE ESTATES
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 31 AUGUST 2009
FILE NO	U 122 OF 2009
CITATION NO.	2009 WAIRC 00611

Result Application discontinued

Order

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

WHEREAS a conciliation conference was convened on 18 August 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 19 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 00571

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID CLARKE
	APPLICANT
	-v-
	4 X 4 AND MORE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	MONDAY, 17 AUGUST 2009
FILE NO	B 115 OF 2009
CITATION NO.	2009 WAIRC 00571

Result Application Discontinued

Order

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

WHEREAS a conciliation conference was convened on 21 July 2009 at the conclusion of which the matter was resolved; and

WHEREAS the applicant advised the Commission on 7 August 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 00640

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IRINA CUOMO
	APPLICANT
	-v-
	BEGA GARNBIRRINGU HEALTH SERVICES ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 7 SEPTEMBER 2009
FILE NO	U 139 OF 2009
CITATION NO.	2009 WAIRC 00640

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 20 August 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 00569

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARUNEE HORWOOD
	APPLICANT
	-v-
	BEACHPARK INVESTMENTS PTY LTD (ACN: 098 072 649) T/AS LA TROPICANA CAFE COTTESLOE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 17 AUGUST 2009
FILE NO/S	B 120 OF 2008
CITATION NO.	2009 WAIRC 00569

Result	Application discontinued
Representation	
Applicant	In person
Respondent	Mr C Chazen, director

Order

HAVING heard the applicant in person and the respondent director in person the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2009 WAIRC 00118

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA LEE LEAHY
	APPLICANT
	-v-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 MARCH 2009
FILE NO.	U 188 OF 2008
CITATION NO.	2009 WAIRC 00118

Result	Direction issued
Representation	
Applicant	Mr S Heathcote of counsel
Respondent	Mr R Hooker of counsel

Direction

HAVING heard Mr S Heathcote of counsel on behalf of the applicant and Mr R Hooker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby directs –

1. THAT the applicant file and serve further and better particulars of claim in the terms of pars 3.1 to 3.8 inclusive of the schedule to the respondent's notice of application for further and better particulars filed on 10 March 2009 by Friday 20 March 2009; and
2. THAT the respondent file and serve further and better particulars of answer by Wednesday 25 March 2009.

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

2009 WAIRC 00580

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA LEE LEAHY
	APPLICANT
	v-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	MONDAY, 2 FEBRUARY 2009, MONDAY, 16 MARCH 2009, THURSDAY, 26 MARCH 2009, MONDAY, 8 JUNE 2009, TUESDAY, 9 JUNE 2009, WEDNESDAY, 10 JUNE 2009, THURSDAY, 11 JUNE 2009, FRIDAY, 12 JUNE 2009, TUESDAY, 23 JUNE 2009, WEDNESDAY, 24 JUNE 2009, THURSDAY, 25 JUNE 2009, FRIDAY, 26 JUNE 2009, MONDAY, 29 JUNE 2009, TUESDAY, 14 JULY 2009, THURSDAY, 16 JULY 2009
DELIVERED	TUESDAY, 18 AUGUST, 2009
FILE NO.	U 188 OF 2008
CITATION NO.	2009 WAIRC 00580

Catchwords	Industrial Law - Termination of employment - Harsh, oppressive and unfair dismissal - Applicant's attitude and conduct - Duty of trust and confidence - Breakdown in employment relationship - Dismissal on annual leave - Dismissal not unfair or unlawful - *Industrial Relations Act 1979 (WA)* s 29(1)(b)(i)
Result	Application dismissed
Representation	
Applicant	Mr S Heathcote of counsel with Ms J Pilkington of counsel
Respondent	Mr R Hooker of counsel with Mr N Whitehead of counsel

Reasons for Decision

The Application

1 At all material times the applicant Ms Debra Leahy was employed by the respondent as an Organiser and subsequently a Lead Organiser. The applicant's employment was terminated by the respondent on 5 December 2008 by letter from the respondent's Secretary Mr Kelly, in circumstances that are controversial.

2 The applicant now brings this claim pursuant to s 29(1)(b)(i) of the Industrial Relations Act 1979 ("the Act"). By it she alleges that her dismissal by the respondent was harsh, oppressive and unfair. In short, the applicant complains that the conduct alleged to have been engaged in by her did not warrant dismissal. She also says the investigative and decision making process of the respondent that it used in its decision to dismiss her, was flawed.

3 The applicant seeks re-instatement and compensation for loss.

4 The respondent opposes the applicant's claim and denies it has acted harshly, oppressively or unfairly in any material particular or at all. Even if it is found to have so acted by the Commission, the remedy of re-instatement is opposed.

5 Mr Heathcote of counsel appeared on behalf of the applicant. Mr Hooker of counsel appeared on behalf of the respondent.

Contentions of the Parties

6 The contentions of the parties in summary form are set out in the applicant's further and better particulars and the respondent's amended notice of answer.

7 The applicant advances five principal contentions in support of her claim. First, she says that the allegations relied upon by the respondent, as set out in the respondent's letter of dismissal to her dated 5 December 2008, were baseless and/or trivial. It is said that the allegations put against the applicant by the respondent are grouped into four categories and include:

(a) Inappropriate remarks made by the applicant to a more junior employee Ms Orr on or about 15 October 2008 in the presence of other employees, including Ms Ovens;

(b) A conversation on the same day between the applicant and Ms Ovens in the stairwell of the respondent's building in which it was alleged the applicant denigrated the respondent's senior officers and the respondent generally ("the Ovens Allegations");

(c) That in or about June 2008 at the Australian Labour Party (ALP) State Conference held in Perth, the applicant called a more junior Organiser Ms Otter an "arse-licker" because she had lunch with the respondent's Secretary Mr Kelly ("the Otter Allegations"); and

(d) That in or about May 2008 the applicant spoke inappropriately to another officer of the respondent Mr McCallum in his capacity as the internal ALP Whip within the respondent, in relation to attendance at an ALP Executive meeting ("the McCallum Allegations").

8 It is said by the applicant that the allegations made against her are either without foundation or so trivial so as not to warrant disciplinary action, let alone termination of employment.

9 Secondly, the applicant says that the respondent should not have relied on the Ovens Allegations as her opportunity to overhear the discussions said to have taken place in the presence of Ms Orr was limited. The alleged conversation in the respondent's stairwell according to the applicant is a fabrication, given Ms Ovens' prior history of dishonesty at the respondent.

10 The third and fourth complaints of the applicant are that the respondent failed in its obligation to properly investigate the allegations against her by not having the requisite certainty of mind as to factual allegations, failing to interview all relevant parties and not according the applicant a proper opportunity to respond to the complaints as to her conduct.

11 Fifthly and sixthly, it is said by the applicant that even if the allegations against her were sustained, they were not of themselves, taken individually or collectively, sufficient to constitute grounds to dismiss an employee. Further, given the respondent's workplace culture, the applicant's work history and other options open to the respondent, the dismissal of the applicant is said to have been a disproportionate response in all these circumstances.

12 Finally, it is contended on behalf of the applicant that the respondent took into account other complaints by an employee of the respondent, Mr De Souza that had been investigated and not acted upon ("the De Souza Allegations").

13 For the respondent, its omnibus contention was that the applicant, by her conduct as a senior officer of the respondent, had lost the confidence and trust of the senior management, necessary for the maintenance of an ongoing employment relationship. The respondent denies that its investigation of the various complaints against the applicant was inadequate or that the applicant was not given the appropriate opportunity to respond to the allegations.

14 Specifically, it is said by the respondent that the conduct of the applicant in relation to the Ovens, Otter and McCallum Allegations, demonstrated that the applicant, in a senior leadership position, had breached the implied term of her contract of employment to not act in a manner calculated to destroy or seriously damage the relationship of trust and confidence between her and her employer. Furthermore, it was also contended by the respondent that the applicant's conduct viewed overall, showed a disregard for the duty of good faith that she owed to the respondent.

15 As to the Ovens Allegations, the respondent says that it was aware of the prior act of dishonesty of the employee in question, and did not consider that it was material to the resolution of the complaints against the applicant. The respondent preferred the version of events as outlined by Ms Ovens as being more consistent with a pattern of behaviour displayed by the applicant.

16 In terms of the "standard of proof" that it adopted in the investigation process, the respondent said that the views it had formed as to the various allegations, after due investigation, were open to it and no higher test is applicable in the circumstances. Furthermore, the investigation process was proper, thorough and gave the applicant every reasonable opportunity to respond to the matters raised with her.

17 It is also said by the respondent that it had a valid reason for dismissing the applicant, by way of its loss of confidence in her as a senior officer. Other options to dismissal were considered, but were not appropriate in the circumstances.

18 The respondent denies that the use of profane language was acceptable or common practice by its staff. In particular, however, the respondent emphasised the context of the applicant occupying a senior leadership position and the inappropriateness of the comments made in that context.

19 Finally, as to the De Souza Allegations, the respondent submitted that these matters were one of a series of complaints investigated by it and which ultimately lead to the applicant's dismissal.

Brief Background

20 The hearing of this matter was somewhat lengthy. It occupied 12 sitting days and some 17 witnesses were called by the parties to give evidence. It is not necessary in the following reasons to canvas all of the evidence. The Commission's consideration of the evidence will be primarily confined to those central allegations which formed the basis for the respondent's decision to terminate the applicant's employment. For ease of reference, after considering a general chronological background, these reasons will deal with these central allegations leading to the respondent's decision to dismiss the applicant, separately.

21 The applicant was first employed by the respondent on secondment in or about July 2003. Various contract positions then followed. In 2004 the applicant was offered and she accepted a permanent position with the respondent as an Organiser initially in the education portfolio and then in the hospitality portfolio. In July 2007 the applicant was appointed a Lead Organiser on a six month probationary period.

22 In or about June or July 2007, the applicant suffered a considerable personal crisis and also a major health problem. This meant the applicant being on a period of leave until about August 2007.

23 Whilst it is not entirely clear on the evidence, it seems that in or about January 2008 the applicant completed her probationary period and was appointed permanently to the position of Lead Organiser in the hospitality portfolio. In that position, the applicant was responsible for a team of Organisers as the team leader.

24 In about mid May 2008, an incident occurred involving the applicant and Mr McCallum, another team leader, who also occupied the position of Internal Political Officer, know as the ALP Whip. This incident involved allegations that the applicant spoke inappropriately to a co-worker, in relation to a request by Mr McCallum, as to whether the applicant was attending an upcoming ALP State Executive meeting.

25 In about mid June 2008 Mr De Souza resigned from his employment as an Organiser within the applicant's hospitality team. At the time of his resignation, he informed both Mr Kelly the Secretary and Ms Smith an Assistant Secretary of the respondent that the reason for his departing from the respondent was as a result of the applicant's conduct and behaviour in the work place, particularly the manner by which she managed her team. A detailed list of Mr De Souza's complaints was compiled with the assistance of Ms Smith. These were tendered in evidence as exhibit A9.

26 Not long after these matters, over the weekend of 28 and 29 June 2008, the ALP State Conference was held in Perth. The applicant and a number of other delegates representing the respondent were in attendance. An attendee, and an Organiser colleague of the applicant, Ms Otter, alleged that the applicant engaged in inappropriate conduct on two separate occasions.

27 The first occasion was the participation by the applicant, along with a colleague Ms Anderson, another Lead Organiser, in "passing around" and discussing the list of allegations made against the applicant by Mr De Souza. The second matter, and one which the respondent ultimately placed considerably more weight upon, was an allegation by Ms Otter that the applicant called her an "arse-licker" because Ms Otter said she had had lunch with Mr Kelly at the conference. These allegations were denied by the applicant.

28 The De Souza Allegations caused the respondent considerable concern and led to a decision by Mr Kelly to commence an investigation. It is common ground that numerous meetings were held between the applicant, her colleague Ms Anderson as a support person, Mr Kelly, Ms Smith and on occasions others, to deal with the De Souza Allegations. Those meetings took place in June, July, August, and September, 2008. In mid to late October 2008, the Ovens Allegations were made and an investigation into them was also commenced by Mr Kelly. These matters were the subject of further inquiry and meetings in October and November 2008.

29 Additionally, at about the same time as the Ovens Allegations were raised, the Otter allegations came to light and were also the subject of inquiry by Mr Kelly.

30 As a consequence of these matters, and further meetings held in late November 2008, the respondent, through Mr Kelly and Ms Smith, came to the conclusion that the substance of the Ovens and Otter Allegations were well-founded. In conjunction with reservations as to the applicant's staff management skills, it was decided that termination of employment was the appropriate outcome. By letter dated 5 December 2008, tendered as exhibit A7, the applicant's employment was terminated effective that date by payment of five weeks salary in lieu of notice. Formal parts omitted, exhibit A7 is in the following terms:

> "It is after long consideration and with regret that I have come to the conclusion that I no longer have confidence in your capacity as a Lead Organiser.

The matters that have led me to this decision are as follows;

1. I do not believe it was appropriate that when asked if Keryn Anderson would be returning from leave you said, in the presence of a number of organisers 'why the fuck would she come back'. You have acknowledged the comment but claimed that it was casual rather than a negative comment. I have considered this and I can't contemplate a context in which it would be appropriate for a Lead to make such a comment to organisers.

2. I have concluded that Claire Ovens' version of the conversation you had with her in the stairwell is more probable.

   She said you expressed strong dissatisfaction with your treatment by the LHMU and in particular you said that Carolyn Smith hated you, that management are a bunch of fuckers, that you were doing little work and that you were using your private laptop to avoid detection of personal work.

   I believe Ms Ovens' version of events because;

   a) She has no motive to make up such a story

   b) The level of dissatisfaction you expressed is similar in substance to the conversation you had with Kimberly Hoover, a conversation you have not challenged.

   c) You said you only bought your laptop to work on a few days and that as Ms Ovens does not work in your area it is unlikely she would have known about it unless you told her.

   d) You have previously said that you believed Carolyn and you had an unsatisfactory working relationship.

   I have considered the disciplinary issue concerning Ms Ovens that you raised.

   Nevertheless in all the circumstances I believe Ms Ovens' version of the events. I consider it totally inappropriate for a Lead to have such a conversation with an organiser.

3. I have considered the complaint made by Ms Otter, namely that at the conclusion of the ALP State Conference you said to her that she was an "arse-licker" because she had lunch at my table.

   I can see no reason why Ms Otter would make such a claim if it were not true. The totally unacceptable nature of this comment should be obvious.

While these items alone justify termination, I have also considered that you have been spoken to on a number of occasions concerning your general attitude to other staff, most recently when Alan McCallum believed you spoke inappropriately to him in his role as Internal Team Lead and ALP whip.

Considering the above, I have decided to terminate your employment with 5 weeks pay in lieu of notice from Friday 5 December 2008.

Please return all Union property so that final payments can be made.

If you wish to return to the Union office for any reason, please notify me so that an appointment can be made.

I have enclosed Jacque Otter's email, as it relates to you, as requested."

The Allegations

31 As noted at the outset of these reasons, and as reflected in the applicant's letter of dismissal, the central allegations leading to the respondent's decision to terminate the applicant's employment were those relating to Ms Ovens and Ms Otter. To a lesser extent, the McCallum Allegations also come into focus. Whilst considerable evidence was led by the parties in relation to the De Souza Allegations, in the final analysis, on the evidence of in particular Mr Kelly and Ms Smith, the principal decision makers involved in this matter, those allegations played little formal part in the respondent's decision to terminate the applicant's employment.

32 I do not say that the issues raised within those complaints are irrelevant. However, to the extent that they go to issues of the applicant's team management skills, they form the contextual background within which the respondent's ultimate decision to dismiss was taken.

33 As Mr Kelly observed in his evidence and Ms Smith in hers, the applicant was given the benefit of the doubt in relation to the De Souza Allegations which originally prompted the respondent's investigation into the applicant's dealings with staff and others. Before turning to consider the specifics of the central allegations, I consider some background issues.

The Union

34 The respondent is one of Western Australia's largest unions with over 20,000 members across a broad range of industries including, health, education, child care, contract cleaning, security, aged care and manufacturing.

35 The profile of the respondent's membership is predominately low paid and a high proportion of the membership is female with many coming from a migrant background.

36 Mr Kelly gave evidence as to some of the challenges he faced on assuming the Secretary's position in 2002. This included falling membership numbers and the need to refocus the union's resources and internal structures to meet the new environment. In particular, he spoke of the creation of the Lead Organiser position, originally called Leading Hands. These positions were established to provide leadership to teams of Organisers, participate in formulating industry campaign plans and to take part in the strategic decision making within the respondent.

37 To this end, a formal leadership group within the respondent was established in 2004, comprising the Secretary, the two Assistant Secretaries and the Lead Organisers. The creation of the Lead Organiser positions and the seniority of them were reflected in a revised salary structure. Whilst the main group of the respondent's staff progress through a seven level salary structure based on length of service, the Lead Organiser positions are at Level 8 which appointments are only made by the Branch Executive. The only positions above this are the Secretary and Assistant Secretaries.

38 The seniority of the Lead Organiser position is reflected in the criteria for appointment to Level 8 and Level 9 positions as contained in the respondent's national conditions of employment, tendered by consent, as exhibit R18, as follows:

> "There is no automatic progression to Levels 8 and 9. Advancement is discretionary, subject to the decision of the Branch/National Executive. These levels apply to an official who demonstrates a very high level of skills, and provides leadership in areas of work impacting directly on the Union as a whole. *An employee at these levels is one who holds the confidence of the Executive to provide sound leadership to others and is relied upon to make decisions and/or recommendations that are consistent with the strategic direction of the LHMU."* (My emphasis)

39 The role of Organisers and in particular Lead Organisers in a modern union context was the subject of evidence given by Mr Crosby, an experienced union official and the author of a book in relation to union renewal. Mr Crosby gave evidence about the challenges facing modern unions, particularly those that operate in low paid and itinerant industries such as the respondent.

40 In 2002 Mr Crosby undertook a review of the Western Australian Branch of the respondent and one of his recommendations was the creation of the Lead Organiser position which he described as a crucial position to the success of organising in a union such as the respondent. In particular, he emphasised the importance of the Lead Organiser having the confidence of the union Executive and to model appropriate behaviours and performance to the Organisers in their teams. In this respect, Mr Crosby referred to the importance of Lead Organisers not undermining the Executive of a union in dealings with Organisers and other staff.

41 Also, Mr Crosby testified as to the particular importance of Lead Organisers in managing and motivating Organisers in their teams to ensure that each of them is working to maximise their output. He said if a Lead Organiser is not doing their job effectively it may be critical to the success of a campaign.

Early Stages

42 As noted in the brief factual background above, the applicant was initially employed as an Organiser. It was common ground that the applicant was keen to progress her career and gave evidence on occasions, as expressing a desire to be appointed to a Lead Organiser position. These discussions took place primarily with Ms Smith to whom the applicant reported.

43 Ms Smith testified that she would meet with the applicant on a regular basis in 2006 as part of meetings with Senior and Lead Organisers in her group. She said that the applicant was a relatively ambitious person who frequently raised with her the possibility of promotion to a Lead Organiser role and her concern that she had not progressed to that level by that time.

44 Whilst Ms Smith was of the view that the applicant was very good with dealing with delegates and union representatives her concern with the applicant's progression was her "people management" skills. Ms Smith in her evidence-in-chief put it this way:

> "So in 2006 and moving into the first half of 2007, did you form a view about Debra Leahy's readiness or capacity to become a team leader?---Yeah. Look, she had some very good skills, but I think the question that was always against Deb's name was her people management skills. I had a number of conversations with her. One of the … I guess threads of conversation that I had with her, she was very good at dealing with delegates, with Union reps, and I … I remember on a number of occasions saying the sort of patience and positive attitude that she had towards the Union delegates, she needed to develop that same patience and positive attitude with the organisers. And, yeah, so that … that issue I did discuss with her on a number of occasions."

45 In cross-examination on this issue Ms Smith accepted that the applicant was very good at recruiting.

46 In late 2006 or early 2007 the applicant, along with Organisers from other States, took part in a programme developed by the respondent's national office for the casino industry, the LEAP programme. This programme, developed by Mr Burton, who also gave evidence on behalf of the respondent, had as its objective the development of Lead Organisers through a "live" campaign in the casino industry. An outline of the programme was contained in an overview document tendered as exhibit R3. It was particularly targeted at those branches of the respondent with new or developing Lead Organisers, in order that they could further develop their skills.

47 Ms Smith testified that she discussed the applicant's participation in this programme with Mr Kelly and it was decided to include her from the WA Branch. She also discussed with Mr Burton the applicant's strengths and weaknesses and an area identified for improvement was her management of staff. This was also the view expressed by Mr Kelly in his testimony.

48 In her evidence, the applicant acknowledged, at times somewhat reluctantly, that Ms Smith had raised her skills in managing staff, on previous occasions, but not in any disciplinary sense.

49 As to the conduct of the LEAP programme and the applicant's participation in it, Mr Burton, now the respondent's Assistant National Secretary said that Ms Smith had expressed reservations as to the applicant's team management skills. He testified that as the person in charge of the LEAP programme he worked closely with the applicant over a period of about four months. He raised some concerns as to how the applicant was proposing to deal with an under performing Organiser, Ms Ovens. It was Mr Burton's evidence that the applicant had intended to make Ms Ovens' life difficult so she would leave the respondent. Mr Burton said he assisted the applicant by suggesting other ways of managing performance issues with staff in her team.

50 According to Mr Burton, who regularly provided feedback on the applicant's performance in the LEAP programme to Ms Smith, the applicant's initial performance was good. She started to use positive approaches to staff management however the improvement was not sustained. By the end of the LEAP programme, Mr Burton testified that the applicant had begun to revert to her former approach and was somewhat aggressive and bitter towards other Organisers.

51 This was evidenced in Mr Burton's view by observations he made of the applicant in a final session of the LEAP programme in Brisbane. There the applicant expressed some negative remarks as to leadership of the respondent and other Organisers and indicated she was not receiving sufficient recognition for her efforts.

52 Mr Burton passed on his reservations as to these aspects of the applicant's work performance to Ms Smith at the time of the conclusion of the LEAP programme. This was confirmed by Ms Smith who testified that Mr Burton had informed her that the applicant could be hard on staff in particular those not performing well, as opposed to proving positive assistance to develop them.

53 Having said that, Ms Smith also observed that after the conclusion of the LEAP programme, she noted some improvement in the performance of the hospitality team and a positive approach by the applicant. This was up to about June or July 2007.

54 At about this stage, the issue of the promotion of the applicant to a Lead Organiser position arose for consideration. This had been a topic of discussion between Ms Smith and Mr Kelly for some time. Whilst the respondent recognised the applicant's strengths as an Organiser, the issue of team management skills was an area that Ms Smith and Mr Kelly wished to see some further development of. Notwithstanding this, a decision was made to appoint the applicant to a Lead Organiser position on probation for six months from July 2007.

55 It was common ground that around the same time as the applicant's appointment to the Lead Organiser position, she experienced significant personal and health problems, that resulted in her taking leave for about six weeks.

56 On the applicant's return Ms Smith testified that the personal issues had a substantial impact on the applicant's capacity to perform affectively in her Lead Organiser role. Both Ms Smith and Mr Kelly gave evidence that they made allowances for this in giving the applicant time to resolve her personal difficulties.

Some Context – The De Souza Allegations

57 As noted earlier in these reasons, the De Souza Allegations were the subject of a substantial body of evidence in this case. Some 22 or so issues or incidents raised by Mr De Souza were the subject of extensive discussion between the applicant, Mr Kelly, Ms Smith and others over the course of many weeks between about June and November 2008. For reasons which will become apparent later, it is unnecessary for me to deal with all of the evidence as to each and every complaint made.

58 The respondent, in the main, Mr Kelly, and to a lesser extent Ms Smith, undertook an investigation into the various complaints raised by Mr De Souza. These complaints were first raised by him with Ms Smith and Mr Kelly at the time of Mr De Souza's resignation being provided to the respondent in June 2008. Mr De Souza said his decision to resign was motivated by his inability to continue to work with the applicant. The complaints in summary related to insensitivity in the applicant's dealings with other staff members, in particular, remarks about race and national origin, the sexual orientation of staff members and team management and interpersonal skills generally.

59 It is fair to say on the evidence as a whole that the applicant agreed with some of the De Souza Allegations, denied others and said that many had simply been taken out of context. I cite several as examples of some of these matters which were considered with a degree of seriousness by the respondent.

60 The first of the allegations was that during a campaign involving major Perth hotels, employees were being encouraged by the Organisers, including Mr De Souza and another Organiser Ms Innes, to sign a bed sheet as part of a national campaign. This was in about May or June 2008. Mr De Souza is Burmese and Ms Innes is Sudanese. In the afternoon of the day in question both Mr De Souza and Ms Innes decided to sign the bed sheet themselves in their native languages. The applicant on seeing this is alleged to have asked whether the signatures were handprints. Mr De Souza said he took offence at these remarks. In her defence the applicant testified that the comment was connected to her prior work in disabilities where people would sign in handprint or with wheelchair marks. The applicant said that the comments made by her were taken out of context.

61 A further matter raised concerned an allegation that when referring to a delegate at the Burswood Casino the applicant always referred to him by reference to his skin colour, sometimes in unflattering terms. This was also raised by Ms Pullen in her testimony. The applicant said in her defence that she did not refer to this person by his skin colour and had a good relationship with him.

62 Further issues were raised by Mr De Souza to the effect that the applicant made inappropriate remarks of a religious kind when both he and Ms Innes were deeply religious and which caused them offence. Some of these were admitted by the applicant but again, she said that she meant no harm in making the comments she did.

63 I also accept that a number of the complaints raised by Mr De Souza were misconceived and were simply expressions of differences in points of view by the applicant and others as to, for example, the ethnic background of a particular person or persons. One example of such was an allegation that when "debriefing" some hotel home visits Mr De Souza referred to some of the employees as Burmese and the applicant having the view that they were Chinese, from previous contact with them.

64 As to whether certain persons were Burmese or Chinese, is simply an expression of different perspectives and cannot on any basis, be reasonably seen to be racist in orientation. As I have already noted however, the De Souza Allegations whilst occupying a considerable body of the evidence in this matter, did not, in the final analysis, form a central basis upon which the respondent's decision to dismiss was made.

65 It is the case on the evidence of Mr Kelly and Ms Smith, that after extensive investigation as to the various complaints by Mr De Souza and Ms Pullen, a conclusion was reached that the applicant was not motivated by malice nor had she any negative intent in the remarks made. In many cases, the conduct reflected a lack of sensitivity and awareness of the impact certain remarks made to others can have, particularly coming from a senior officer. Based upon the evidence, in my opinion this conclusion was reasonably open and the appropriate conclusion to reach.

66 From my observations of the applicant giving her evidence over several days, she struck me as a person who "calls a spade a spade" and could be somewhat blunt in her method of communication and did not give these matters much, if any, attention in her dealings with others. This was confirmed in the evidence of other witnesses. This is perhaps illustrated in the following exchange in the applicant's cross-examination:

> "--- about these specific allegations. I'm coming back to them directly, but it's an important general point which is relevant to … I'll be submitting … the Commissioner's evaluation and his assessment of Mr Kelly's evaluation of these matters that for all of us day to day how we express certain words in a particular tone can be critical to the impression that's given?---Yes.
>
> And … and you paused again and partly shrugged your shoulders, haven't you?---Well, because I don't really … you know, I just … I don't think about that sort of thing, so when you're explaining it to me, so I'm like, "Yes, okay. Yes."
>
> And … and perhaps we don't think about it because it's second nature to all of us. It's something we all know intuitively that a given set of words to one person in tone A and the same set of words to another person in tone B can have completely different meanings, can't they?---I would imagine so, yes.
>
> Not even just yes, absolutely?---Well, I … I would imagine so, yes.
>
> So do you have any clear recollection of what your tone was when you said the words you've just given evidence about concerning dot point 2 on A9?---No, I don't." (93T)

67 The conclusion reached by Mr Kelly and Ms Smith that the applicant be provided with some additional training in equal opportunity matters and that the parties "move on" from these events, was an appropriate response in all of the circumstances in my opinion.

68 I am satisfied however, that some of the allegations of Mr De Souza did cause the respondent legitimate concern as to the applicant's skills in managing staff and bore out its reservations initially held prior to the applicant's appointment as a Lead Organiser. To this extent, whilst not specifically referred to as a ground of termination of employment in the respondent's letter of 5 December 2008, the De Souza Allegations are at least capable of forming some context for the respondent's concerns as to the applicant's general attitude to other staff as referred to in the letter and I regard them in that light for present purposes.

The McCallum Allegations

69 Mr McCallum has been an official with the respondent since about 2001. From that time he was an Organiser in the respondent's child care team. In August 2006 he was appointed the Lead Organiser for the respondent's internal organiser team. Since about February 2009 Mr McCallum has been in the position of Political Coordinator and the ALP Whip. The later position requires him to ensure that the respondent's delegates to various ALP bodies attend meetings and the respondent's ALP functions are carried out.

70 Mr McCallum had worked with the applicant in the past on various projects and in his capacity as the ALP Whip. Mr Kelly in his evidence described the ALP Whip position as one of the most difficult in the office and said he had told staff in the past not to give Mr McCallum "a hard time."

71 Mr McCallum testified as to an incident that occurred in about May 2008 as part of his role in getting delegates from the respondent to attend an upcoming ALP Executive meeting. According to Mr McCallum, a large meeting was scheduled for 19 May and given the subject matter, it was important for all of the respondent's delegates to attend.

72 On the preceding Friday 16 May, Mr McCallum saw the applicant in the respondent's office. He knew the applicant was on annual leave at the time. Mr McCallum was at his desk and in close proximity to the applicant, who was speaking to another Lead Organiser, and her friend, Ms Anderson.

73 Mr McCallum said that on seeing the applicant he rose from his seat and spoke to the applicant over a partition which was at about chest height. He said he spoke in a normal tone of voice and asked the applicant if she was available to attend the ALP State Executive meeting the following Monday night. He said the applicant responded in a loud and firm tone that "she was not talking to me because she's on annual leave" (304T). Mr McCallum said he knew the applicant was due back at work on the following Monday.

74 Having received this reply, Mr McCallum gave evidence that he asked her again politely as follows:

> "What happened next?---When she responded that she wasn't going to talk to me, I just asked her again politely, "Look," I said to her, "Look, Deb, I just need to know if you're going to be available on Monday night. I just need to finalise the numbers." (304T)

75 Mr McCallum was then asked about his tone of voice and the applicant's further reply and he said as follows:

> "When you asked that second question that you've just given evidence about, how was your tone then? ---Probably the same as I've just said it there.
>
> All right?---Yeah.
>
> And can you … can you describe … can you put into words the extent to which there was any difference in your tone when you put the second question?---I probably emphasised the urgency a bit more because I did want to finalise the numbers, so I was trying to emphasise the importance of the need.

> Through your tone - - -?---Yeah.
>
> --- is what you're saying in your evidence now. And what was Debra Leahy's response then?---Again, she responded more loudly that she wasn't going to talk to me, she's on annual leave, and she doesn't have to talk to me at this time and then she left." (304T)

76 In cross-examination Mr McCallum described the applicant's tone as "loud and aggressive." (312T)

77 Mr McCallum further said in cross-examination while he accepted the applicant may not have wanted to have spoken to him whilst she was on annual leave, he had to know if she was to attend the meeting as delegate lists were due in by 4pm that afternoon. He considered the applicant's response to him demeaning, particularly in the presence of members of his own team. He said he also sent a text message and an email to the applicant about her attendance at the meeting but received no reply. Mr McCallum accepted that the applicant was entitled not to attend the meeting if she did not wish to.

78 A couple of weeks later Mr McCallum raised this incident with Mr Kelly during a normal work meeting. He told Mr Kelly that he considered the applicant's behaviour unprofessional.

79 Mr Kelly confirmed this issue was raised with him and said his concern was the response of one Lead Organiser (the applicant) to another (Mr McCallum) in front of other Organisers and that it was consistent with the pattern of past behaviour engaged in by the applicant. He said he would investigate the matter.

80 In her testimony, the applicant admitted that she was abrupt in her dealings with Mr McCallum but that she was under stress at the time. She did not recall a text message or an email from Mr McCallum about attendance at the ALP Executive meeting.

81 Ms Anderson, also in attendance at the time of this incident, confirmed that Mr Kelly had informed staff not to give the ALP Whip a "hard time" and that the applicant was "a little harsh" in her responses to Mr McCallum.

82 It was concluded as a result of the investigation process, that the events had occurred largely as outlined by Mr McCallum.

The Otter Allegations

83 Ms Otter has been an Organiser with the respondent since January 2005. Whilst she did not work directly with the applicant, she did have some association with her prior to working for the respondent, when employed as a Teachers' Assistant.

84 As noted above, the ALP State Conference for 2008 was held over the weekend of 28 and 29 June in a major Perth hotel. Ms Otter, along with a number of other delegates from the respondent, including the applicant, attended the conference.

85 Ms Otter gave evidence as to the seating arrangements at the conference. She described it as a series of long tables and she was asked to sit at one of them. Seated next to her were other employees of the respondent, Ms O'Driscoll and Ms Power. Seated opposite her were the applicant and Ms Anderson.

86 She said she heard the applicant and Ms Anderson talking about the respondent and in particular, making derogatory remarks about Ms Smith and the leadership of the respondent. Ms Otter also said the applicant was anxious and referred to a list of 20 or so complaints about behaviours she had displayed as a Lead Organiser. Ms Otter said she saw a note passed around the table to other people and also saw the applicant pass it to Ms Lord outside the conference room during the break. She did not see it but understood that it was the list of the complaints made by Mr De Souza.

87 Ms Otter testified that at the end of the second day of the conference as she was packing up, the applicant spoke to her. According to Ms Otter, the applicant said she was an "arse-licker" for having had lunch at the same table as Mr Kelly. Ms Otter's evidence-in-chief on this point was a follows:

> "All right. Now, did Debra Leahy say anything to you on the second day of the ALP state conference? ---We were getting up to finish for the … the last day of the conference and we're all picking up our stuff and Deb said to me that I was an arse-licker because I had lunch at the same table that Dave Kelly was sitting at.
>
> And what, to the best of your recollection, were here actual words when you said … when she said that to you?---She said that I was an arse licker. I asked her not to call me an arse-licker and she just looked at me straightaway and said, "Well, why can't I call you an arse-licker?" and I told her that I didn't have to take it from her. And she said, "Well, why don't you have to take it from me?"
>
> Did she say anything else?---No, because I'd walked off by then.
>
> What was her tone when she said those words to you?---It was … there was that … I don't know, it's a little glint in her eye that she was … because she was talking about all the other stuff. It was with that same sort of … I don't know, it just seems nasty.
>
> How close were the two of you standing when you had that conversation?---Originally when it started, about two metres away. She was on one side of the table, I was on the other.
>
> Was anyone else present?---Keryn Anderson was there.
>
> And how close was Keryn Anderson to the conversation?---Keryn was right next to Deb.
>
> So I think you've said earlier in your evidence that you said you didn't like being addressed in that way? ---Mm'hm.
>
> Did Debra Leahy say anything in response to that?---She just asked me why … I asked her not to call me that. She said, "Why can't I call you that?" and I said, "Well, I don't have to take that from you."
>
> And what happened after that?---I walked off after that.
>
> How did those comments make you feel?---I was quite humiliated, actually.

> Why did you feel humiliated?---Well, they were coming from a lead organiser and also my direct lead was there and there was nothing said or there was no pulling up of the conversation and because we were right … we were surrounded by our work colleagues.
>
> Who was your direct lead?---Keryn Anderson.
>
> Did you have any other conversation with Debra Leahy on that second day at the ALP state conference, 29 June?---Not that I can remember." (316T)

88 After the conference Ms Otter spoke to another employee of the respondent Ms Gurrin who was a Lead Organiser. Ms Otter said she told Ms Gurrin that she was concerned about the inappropriate remarks made by the applicant and Ms Anderson about the leadership of the respondent and that "it would cause grief within the organisation." (317T)

89 When pressed on the allegations in cross-examination, Ms Otter said she stood by what she had said regarding her conversation with the applicant.

90 Ms Otter testified that she did not raise these matters for some months afterwards. When this was put to her both in examination-in-chief and cross-examination, Ms Otter said she did not so because she was fearful of Ms Anderson as a Lead Organiser, as both the applicant and Ms Anderson were good friends. By the time she raised the matter with Mr Kelly in October 2008 Ms Otter was moving teams and did not feel exposed to any possible retribution for raising the issue. In re-examination she referred to occasions where Ms Anderson had taken work off her in the past following complaints made.

91 Mr Kelly confirmed in his testimony that Ms Otter had come to see him in about mid October 2008 and raised two issues. The first was that a copy of the De Souza Allegations was passed around at the ALP State Conference in June 2008 and was the subject of discussion. He said that Ms Otter considered that this was not appropriate as the applicant and others were "poking fun" and Mr De Souza was present. The second issue raised was the fact that Ms Otter had been called an "arse-licker" for sitting at Mr Kelly's table for lunch. He said that she found this comment very offensive.

92 As to the reported De Souza Allegations having been discussed and a copy of them passed around the conference table, Mr Kelly testified he was disappointed that it had occurred. Ultimately however, he was unable to conclude positively that the allegations were sustained, given the lack of clarity in some of the surrounding accounts. As to the "arse-licker" allegations, Mr Kelly said that he regarded this issue as very serious as it involved a senior officer of the respondent speaking to more junior employee in a derogatory fashion. He put it this way in his evidence:

> "Why's that?---Well Deb is a senior person in the organisation. She's a lead organiser. She's someone who the organisation, if you like, has given a tick to because we promoted her to a position of responsibility. On any ... based on anyone's standards for a senior person to call a junior employee an arse-licker I don't think anyone in their right mind could see that as acceptable behaviour. So, yeah I saw it as a very serious thing, it obviously affected Jacque.
>
> Why was it obvious?---Well just her demeanour. You know she felt humiliated if you like by the comment." (588T)

93 Mr Kelly raised the issue of Ms Otter's delay in referring these matters to him. He said Ms Otter explained the position and that she thought the applicant would make life difficult for her had they been raised earlier. Given the seriousness of the allegations, Mr Kelly told Ms Otter that he needed to go and speak to other people about the incident.

94 The applicant confirmed she attended the June 2008 ALP State Conference. She went to it with Ms Anderson. She did not take her copy of the De Souza Allegations, but Ms Anderson did. The applicant confirmed she showed the list to Mr O'Donnell, an Organiser in the applicant's team.

95 When confronted with these matters by Mr Kelly at a meeting on 18 November 2008, the applicant denied calling Ms Otter an "arse-licker" and said she did not even recall who was at her table at the conference. She also said she did not recall even seeing Ms Otter and had no idea whether she had lunch with Mr Kelly.

96 Also in attendance at the ALP State Conference was Ms Anderson. She testified that she spent most of her time with the applicant apart from during breaks and meal times. She confirmed she took her copy of the De Souza Allegations and gave it to the applicant who in turn showed it to Mr O'Donnell and another Organiser, Mr Reid.

97 Her evidence was she did not hear the "arse-licker" comment but accepted that she was not with the applicant at all times. In the course of a break during the meeting on 18 November 2006, she said she put the allegation to the applicant who denied it. Ms Anderson confirmed an observation by Mr Kelly in that meeting that if the applicant had spoken to Ms Otter in the manner alleged, he considered it serious enough to warrant dismissal.

98 A person in attendance at the ALP Conference, who was suggested as being present when the applicant was alleged to have called Ms Otter an "arse-licker", was Ms Bifield. Ms Bifield was employed by the respondent from April 2006 to about August 2008.

99 She testified that sometime in June 2008 she received a phone call from Mr Kelly to ask her if she recalled a conversation between the applicant and Ms Otter at the ALP State Conference, where the applicant had called Ms Otter an "arse-licker." Ms Bifield told Mr Kelly that she did not recollect such a conversation.

100 Ms Bifield did testify however, that on occasions both she and Ms Otter would engage in light hearted banter and use such language. She gave evidence that on the day after the ALP Conference, that being Monday 30 June, both she, the applicant, Ms Otter and Ms Anderson were in the car park of the conference venue. Whilst Ms Bifield did not have a good recall of the conversation, she said that Ms Otter said words to the effect that she had lunch with Mr Kelly the previous day to which the applicant responded with words to the effect "lick-arse" and laughed.

101 Ms Bified testified that she waited for a reaction from Ms Otter but there was none. In cross-examination she said that there was no indication either way as to how Ms Otter had received the comment from the applicant. It was Ms Bifield's evidence that she did not know if a similar conversation had taken place prior to this over the weekend.

102 As to this issue Mr Kelly testified that he did speak to Ms Bifield but she could not recall any such comments from the applicant to Ms Otter during the ALP Conference. Mr Kelly said that Ms Bifield did not volunteer to him the conversation she recounted in her testimony, that took place on the following Monday as outlined above.

103 Whilst Ms Anderson was also said to be present at the time of the "arse-licker" comment to Ms Otter, Mr Kelly said he did not speak with her as she was acting as the applicant's advocate in the disciplinary process and Ms Anderson had previously requested not to be questioned about incidents involving the applicant.

104 On balance, Mr Kelly considered that Ms Otter's allegation was credible as he took the view that it would be quite out of character for her to come and see him and make up such a story. He said in his evidence that he took into account the period of time which had elapsed between the ALP Conference and when Ms Otter came to see him, and regarded her explanation for that delay as credible.

Ovens Allegations

105 Ms Ovens was employed as an Organiser with the respondent and started in mid 2004. From about September 2006 she worked in the hospitality team with the applicant. She said she got to know the applicant quite well but was however, wary of her because of things the applicant had told her that she had done to other staff members in the past. Ms Ovens described the applicant as "a person you would not want to mess with…" (454T).

106 It was common ground that in early 2008 Ms Ovens was disciplined for an act of dishonesty in misleading the respondent that she had performed certain work when she had not done so. She was issued with a first and final warning by Ms Shay the respondent's other Assistant Secretary. Ms Ovens said that she felt ashamed about her conduct and had learnt from it.

107 Ms Ovens gave evidence about two incidents that occurred on or about 15 October 2008. The first incident occurred in the stairwell of the respondent's building. It was common ground that Ms Ovens had been off work prior to this for a lengthy period of time due to a serious medical condition. The applicant has also been away on sick leave prior to the incident.

108 According to Ms Ovens both her and the applicant met in the rear stairwell of the respondent's building between the first and second floors and in her evidence-in-chief said the following:

> "And on what day, to the best of your recollection, did these conversations take place?---15 November, I - - -
>
> All right?---Or the 15th, sorry, of October it was. Sorry. It was in October. Yeah.
>
> So you, as I understand your earlier evidence, ran into Debra Leahy in the stairwell?---It was the first sort of time we'd sort of directly crossed paths where there was no other choice but to acknowledge each other and interact. That's how I felt anyway.
>
> What happened then?---Well, she sort of said to me, "Oh, you know, I've … you know, how're you going, mate? I heard you've been sick," and I said, "Yeah. Yeah, I have, but I'm much better now. Thank you." And … and then she, you know, went into … then she started just talking about the Union in really negative terms that, you know, I was really taken aback actually. I was like - - -
>
> What did Debra Leahy tell you about the Union?---Well, she said, you know, that she … that Carolyn Smith hates her and had always hated her, and I was like, "Oh, really? Oh."
>
> Yes?---And that, you know, management … they're giving her no work to do, but you know, she doesn't care. She's still getting paid.
>
> Right?---That she's bringing her laptop into work every day so that management … you know, she can go on the Internet and management can't monitor what she's doing.
>
> Yes?---You know, that she's happy to sit around and do nothing all day; that it's their way of trying to squeeze her out.
>
> Yes?---But that it won't work; that she's smarter than them. And she also, you know, said that, "Oh, you know, management, they're a bunch of fuckers."
>
> Did she use those words?---Those exact words."

109 Ms Ovens said the applicant during this exchange, used a quiet tone of voice and was leaning in towards her when she spoke, as if telling her a secret. After the incident Ms Ovens spoke to other staff members about it, one of whom was Ms Pullen, who she worked with at the respondent. Ms Ovens said she spoke to these other employees to try and get some guidance as to what she should do in light of her conversation with the applicant.

110 In relation to this incident, Ms Pullen confirmed in her testimony that Ms Ovens had spoken to her about it immediately after it occurred. Ms Pullen's office at the time was next to the stairwell. She said that from her demeanour, Ms Ovens seemed agitated at what she had just heard and was going to speak to Mr Kelly about it. Mr Kelly was not it seems, aware of this conversation between Ms Ovens and Ms Pullen at the time of his subsequent investigations.

111 The second incident referred to by Ms Ovens was later on the same day when she was in an open planned area of the office where her team was working called a "pod."

112 According to Ms Ovens, she was at her desk taking telephone calls and two other staff members Ms Corvi (nee Orr) and "Shane" were present. Ms Corvi was at a whiteboard making notes in relation to an upcoming campaign in the aged care industry. Ms Ovens was on and off the telephone and whilst not engaged speaking on the telephone, discussed issues with Ms Corvi. Ms Anderson, the Lead Organiser for the aged care area, was on leave at the time. Apparently also, Ms Anderson was in the process of seeking other employment.

113 The applicant came into the work area. She started speaking to Ms Corvi and making suggestions to her as to what Ms Anderson may do in the campaign and according to Ms Ovens' evidence-in-chief the conversation continued as follows:

> "So while Jasmine was writing about those things on the whiteboard - - -?---Mm'hm.
>
> - - did Debra Leahy say anything?---Yeah. She came down into the pod and was also telling Jasmine … she was saying, "This is what Keryn," you know … as … as she knew Keryn, this is what Keryn would be thinking when developing, you know, how to prioritise those sites and then she said, "But, you know, Keryn … Keryn won't be back. It's unlikely she'll be back," and, you know, I think Jasmine had said to her, "Why?" and, you know, she said, "Oh, why the fuck would she?"
>
> What was her tone when she said those words?---It … it was a tone like, you know … like an exclamation; almost comical, I suppose, you know. She was like, "Oh, why the fuck would she?" sort of thing, you know.
>
> Did you have any other conversation with Debra Leahy on that day in October 2008?---Yes; earlier that day."

114 A few days after these incidents, Ms Ovens went to see Mr Kelly and told him what had occurred. She subsequently put the content of the conversations in writing and gave it to him. A copy of this was tendered as exhibit R11. Following this, Ms Ovens said Mr Kelly spoke with her again to confirm her version of the events which she did.

115 Mr Kelly confirmed in his evidence that Ms Ovens came to see him. Mr Kelly was aware that Ms Ovens was leaving the respondent. In their meeting, Ms Ovens raised the two incidents with the applicant. Mr Kelly said that given that the respondent had afforded the applicant the benefit of the doubt in relation to the De Souza Allegations, and had offered the applicant remedial training, the new allegations were seen by him in a serious light.

116 In particular, he saw the statement by the applicant, that the management of the respondent were are "bunch of fuckers," as particularly serious. He considered it was very derogatory of the respondent and in particular coming from a senior staff member in a conversation with a relatively junior staff member. Mr Kelly also viewed the comments by the applicant in the pod in the presence of two quite junior employees as a matter of concern.

117 The substance of the Ovens Allegations were put to the applicant in a meeting which took place on or around 10 November 2008. Whilst the applicant agreed that she had seen Ms Ovens in the stairwell she said they only had a brief conversation, exchanging pleasantries and discussing that both had been on sick leave. The applicant denied the substance of what Ms Ovens had alleged she had said.

118 Also in the same meeting, the applicant had agreed that she had said what Ms Ovens alleged in the pod with Ms Corvi, but she meant it not in a derogatory sense towards the respondent or its management. Rather she meant by this comment why would Ms Anderson return from annual leave if she was going to a new position with another employer.

119 Also relevant at this juncture is an earlier conversation between the applicant and an employee of the national office of the respondent, Ms Hoover, in or about September 2008.

120 Ms Hoover is the Development Coordinator for the respondent's national office. She was requested to visit the WA Branch to do some work with the Lead Organisers and to try to assist in increasing membership levels.

121 Ms Hoover testified that at the time of her visit to the WA Branch, she was broadly aware that the applicant was not then performing her Lead Organiser duties and that some accusations had been made against her. Otherwise, she was not aware of any detail. While in the office Ms Hoover said she saw the applicant who asked her to go for a cup of coffee across the road from the respondent's office which she did.

122 During the course of this, Ms Hoover testified that the applicant began to outline how badly she was being treated by the Branch and in particular Ms Smith. Ms Hoover testified that while the applicant did not go into all of the detail of the allegations, she referred to the list of complains against her and expressed the view she had lost confidence in the management of the Branch.

123 Ms Hoover said that although it appeared that the applicant was attempting to get her to empathise she remained neutral during the conversation. After Ms Hoover had left Perth, she was contacted by Mr Kelly and asked about the meeting with the applicant. He requested that she put the content of the conversation in writing which she did. A copy of that note was tendered as exhibit R10.

124 Mr Kelly further said in his evidence, that on several occasions as to these matters, he indicated to the applicant that if he considered the Ovens and Otter Allegations to be properly founded, that it would lead to the applicant's dismissal.

The Decision to Dismiss

125 There was a substantial body of evidence led by both parties as to the series of meetings that took place between the applicant and representatives of the respondent, to discuss the various allegations and claims that had been set out above in some detail. These meetings took place over the period June to November 2008. This evidence included notes made of these meetings by both Ms Anderson on behalf of the applicant and Ms Smith on behalf of the respondent, along with copies of the various allegations reduced to writing, as made by a number of persons connected with them.

126 It is neither necessary nor fruitful to explore the content of these meetings or the other documentary evidence in any detail. Evidence as to the incidents, the applicant's responses to them, and the surrounding circumstances, have been referred to above.

127 It is fair to observe from the totality of the applicant's testimony over the course of some two days or so that she did not consider that the allegations made against her, and the course of the respondent's investigation, would lead to termination of her employment. This is perhaps best illustrated in the following exchange in cross-examination:

> " And you weren't in any doubt, were you, when the … you left the meeting of 18 November that these issues that Mr Kelly was examining were serious enough in his mind that he may have reached the conclusion in due course to terminate you?---I never … I never thought at any point that Mr Kelly would terminate me. I thought that he would see through the allegations and that we would be able to move forward. So even if he was saying that to me, in my heart I was still believing that Mr Kelly would see through his investigations and that I would not … that wouldn't happen, that I expected to be performance managed, disciplined, but never to really be terminated.
>
> If there was … could have been no doubt, could there, at the conclusion of the meeting of 18 November that these issues were serious enough that your employment was potentially at risk - - -?---No.
>
> - - - - --if Mr Kelly reached a certain view?---Not … not for myself. For myself, I was
>
> always still believing that Dave would not terminate my employment." (56T)

128 And further in cross- examination the applicant said as follows:

> "And that was because that was a very real issue in your mind, wasn't it?---I had asked him several times in other meetings if he was going to terminate my employment and he had said no…" (57T)
>
> And … and to get to that point in your own mind, Ms Leahy, you must've appreciated the earlier point, that is your employment was at risk?---I never felt that my employment was at risk. I felt that maybe my lead position was at risk. I felt that I was going to be performance managed. I felt that, you know, possibly I'd be moved from the hospitality team, but I never actually thought Dave would terminate my employment." (57T)

129 I pause to note at this stage that this evidence was at odds with the clear evidence of Mr Kelly, Ms Smith, and Ms Anderson, that termination of employment was referred to as a possible outcome of the disciplinary process.

130 The decision to dismiss the applicant was principally the responsibility of Mr Kelly. Ms Smith testified that she and Mr Kelly discussed the issue at some length and from all of the information disclosed in the investigation process, that the continued employment of the applicant would not be tenable in view of the behaviour and attitude to the respondent that the applicant had displayed. Ms Smith referred to the respondent having given the applicant the benefit of the doubt as to the De Souza Allegations, but it was the Ovens and Otter Allegations that "tipped the scales" in her assessment of the conduct of the applicant.

131 The decision to terminate the applicant's employment followed the last meeting between the parties which took place on or about 27 November 2008. Earlier, arising from a meeting between the parties on 1 September 2008 concerning the applicant's conduct and behaviour, Mr Kelly had come to the conclusion that it was not tenable for the applicant to be retained in her Lead Organiser position, following her being declared fit for work arising from a stress related worker's compensation claim.

132 Whilst this may at law have constituted a dismissal by demotion, as raised by the Commission with the parties, the issue was not pursued by the applicant and I take it no further for present purposes. I pause to note that the applicant remained on her full salary for this period and still attended leadership meetings. A variety of Organiser work was undertaken by the applicant over this period.

133 Mr Kelly's testimony on the decision making process revolved principally around the Ovens and Otter Allegations. The McCallum, and to a lesser extent, the De Souza Allegations, provided the context for the respondent's concerns as to the applicant's interaction with other staff of the respondent, including those in her team and for whom she had supervisory responsibility.

134 As part of the backdrop to the meeting of 27 November 2008, it was common ground that the issue of the applicant considering a voluntary resignation had arisen. The examination-in-chief of Mr Kelly as to the meeting of 27 November included the following:

> "So, at the meeting of 27 November, 2008 what did you talk about?---Well, I started the meeting, my memory, asking Deb well, you know, what have you decided you're going to do or where are you up to? Deb then explained that at the previous meeting when she'd asked for additional time she hadn't been asking for an additional week, she'd actually wanted additional time which would run into a period of leave that she had booked that would run right up until sometime in February.
>
> So she had expected to be given until February to make up her mind. I was a bit surprised by that. I said to her we weren't in a position to wait until then before we reached a conclusion on this issue. Those people who'd come forward and made the complaints were entitled really to have us deal with them in a reasonable way. She was now absent from being the lead of the hospitality team and it was an important campaign for us. And, you know, we needed to make a decision about what was going to happen with that position. So, Deb then expressed views as well, she didn't think she'd done anything wrong, she was the victim in all this. She wasn't going to resign, you know, she wasn't going anywhere. So, I said to her, well that's fine, I'll now have to make a determination as to whether or not I think these complaints are justified. I told her I'd go and speak to people because Claire and Jacque had indentified people who, you know, would be able to shed light on whether or not these complaints had been, you know ... would be substantiated. So I said to Deb, all right I'll go away, I'll investigate these issues, I'll make a decision but if I decide that you know, you've made these statements as these people have alleged that I would terminate her employment. And that's pretty much where the ... and I said to her I'd get back to her within about a week. And that's pretty much where the meeting ended." (598T)

135 In relation to the allegations, and in particular the role played by Ms Anderson as the support person for the applicant, Mr Kelly gave the following evidence-in-chief:

> "On ... to the extent you did go into the content of those allegations did Ms Leahy say anything different concerning the claims to what she'd said at any earlier meetings?---Well, substantially the same. There was a few slight variations. In respect of the discussion with Jasmine Orr where she'd previously admitted without question that she'd said, "why the fuck should Keryn come back?" she started to say she'd probably said it in that meeting and she said that a number of times. And, so I questioned her about that and again she went back to acknowledging that she had in fact said it. In respect of whether or not a piece of paper had been passed around at the ALP conference, she previously denied that categorically. When I questioned her at the meeting on the 27th, I think I asked her, look if it wasn't your paper was it someone else's? And, she made a comment, "well possibly." That's the first time she'd sort of acknowledged that there may have been something in that. And that was the point at which Keryn was there, I sort of said, "well if it wasn't your paper was it Keryn's paper?" And that's when Keryn said, you know, "no way."
>
> Just pausing there. That question you've just said in your evidence, you've put, can you tell us what the question was and to whom you did put it?---I was asking Deb about what had gone on at the ALP state conference and having denied handing a piece of paper around in previous meetings she said something ... well, when I asked her if it could have been someone else's and she said, sort of "possibly." So, you know, I thought well the only other person that it could be ... the only people I knew had copies of that bit of paper were her and Keryn, so I said "well, was it Keryn's piece of paper?"
>
> Yes?---And I looked at Keryn and Keryn then said "no way."
>
> What was Keryn's manner or demeanour when she gave that answer?---It was pretty emphatic that it wasn't her piece of paper.
>
> Why did you take that to be Keryn Anderson's meaning in answering your question?---Well it was obvious, that was the question that was asked, you know was it your piece of paper Keryn (sic) or was it Keryn's piece of paper and she said "no way." You know, so.
>
> Could it possibly have been Keryn Anderson's meaning to convey, in giving the answer, "no way" that she didn't want to be answering any questions at all on the matter?---No. No. That's completely absurd." (599T)

136 I will return to the latter observation when dealing with the issue of the credibility of those giving evidence in this case.

137 At the conclusion of the 27 November meeting Mr Kelly said he would speak further with those persons identified who may be able to shed further light on the allegations.

138 As to the Otter Allegations, Mr Kelly, as noted above, reconfirmed with Ms Otter her version of the events and that Ms Bifield could not recall the material events. He considered the matter carefully and came to the conclusion that there was no basis to suggest why Ms Otter would fabricate such allegations against the applicant and that it would be completely inconsistent with Ms Otter's character for her to do so. As also referred to above, Mr Kelly took into account Ms Otter's reason for the delay in raising the issue with him found that to be credible.

139 As to the Ovens Allegations, Mr Kelly considered the conflicting versions of the events. The applicant denied the content of what Ms Ovens had said. He took into account that Ms Ovens had previously been disciplined by the respondent for a dishonest response in relation to her work duties and had been formally disciplined about it. He spoke to Ms Shay about the circumstances of that matter and Ms Oven's remorse for her conduct.

140 Mr Kelly considered that there was no obvious rationale for Ms Ovens to make the allegations she did. Of some importance for Mr Kelly was the consistency between the comments alleged to have been made by the applicant to Ms Ovens and those contained in the conversation where between the applicant and Ms Hoover a little earlier. He concluded that the theme of complaints about the applicant's treatment by the respondent, not doing work and other matters and suggestions that Ms Smith was out to get her, were in common.

141 Mr Kelly also confirmed that the respondent had given the applicant the benefit of the doubt as to the De Souza Allegations and that the dominant considerations were the Ovens and Otter Allegations. The applicant's interaction and insensitivity with staff was an issue in the background.

142 Having considered all of these matters Mr Kelly testified in examination-in-chief as follows:

> "After you reached the conclusions you did about what had happened what did you consider next?
>
> ---I thought about, well, obviously what should I do? And, I ... you know, I came to the conclusion that Deb couldn't work in a lead role anymore.
>
> Why's that?---You know a lead role is very important in the organisation. She's responsible and I suppose has got the trust of the organisation on a number of levels. You know we've got to trust leads to deal with organisers in a positive and respectable way, they are the people who are responsible for management on a day to day basis. You know developing those sort of things. Leads have direct contact, at a fairly senior level, with employers that we'll deal with. So, they're the face of the Union to sort of external people. Leads are responsible for drawing up plans, at least at initial level, although they are ticked off sort higher up the level about the plans we implement. All those things I consider to be really important. But on top of that they are important for driving, I suppose, they have a culture ... well they're got an important role in driving the culture of the place.
>
> Yes?---You know we try and represent ourselves as a Union that ... we're a Union that's growing, we're a Union that's going to take on the challenges of being able to represent low paid workers in a really challenging environment. You know that's not easy and the work we ask organisers to do is not easy. We need organisers who can push a positive

message about the work of the organisation to those organisers. And, given the conclusions I'd reached about the comments that Deb had made, you know, to junior organisers, I just didn't believe I could be confident that we could leave her in that role. If she was saying things like she'd said to Claire Ovens, to Jacque Otter, to Jasmine Orr, all people who were junior staff members and you know, especially in Jacque's case she found it quite humiliating what had been said to her. How could I leave Deb in that role to supervise junior staff again? You know how could I take Deb into my confidence as part of the leadership group on a range of issues that, you know, are quite important."(602-603T)

143 The further issue was that of alternatives to dismissal. As to this Mr Kelly said in examination-in-chief as follows:

"Having formed that view what range of possible disciplinary sanctions did you have regard for?

---Sure. I thought about giving Deb a letter of warning. But I thought that really wasn't going to be of much use. My experience, letters of warning if you ... they are of most benefit if there's some acknowledgment by the person who's going to get them, that they've made a mistake but they're going to work to improve.

Right?---Deb flatly denied making the comments that she ... Jacque and Claire had alleged that she'd made. So she point blank refused to acknowledge them. And, I suppose right up to towards the end she was still talking about herself being the victim in all this. So, I just didn't see that giving her a letter of warning when that was her attitude would really be much use at all.

Did you consider anything else?---I considered, you know, a demotion if you like and asking her to continue to work as an organiser rather than a lead and quite frankly I just didn't think Deb would accept that, I didn't think she'd get on and do the job. She was pretty unhappy having been asked to work as an organiser for the last few months, whilst we organised some additional training. I just thought, you know, if she's not happy she's not going to be a positive person around the building in an organiser role. It just wouldn't have worked. So, that was the basis upon which I made my decision that termination was the appropriate course.

Did you consider any matters in Ms Leahy's favour or actually or potentially mitigatory of what happened?---Look, she had been a good delegate and she'd been a good organiser with us. You know there's no doubt about that, that she'd put in work for the organisation. I looked at that. But, you know, you've got to get to a point where you know, I felt as though over an extended period of time we had tried to accommodate the difficulties that she had in being a lead organiser. You know, we made it clear to her before appointing her that she had some issues that she needed to deal with as far as the people management skills. You know, when she got into the job she had some, you know, serious issues that basically stopped her functioning in that role which we accommodated. You know, we bent over backwards for her in that regard, you know to try and ease her through that difficult period of time that she had. But, coming out the end of it, almost 12 months after that she still had a really negative attitude to the organisation. And, at some point I suppose the points that you accumulate for being a good organiser, if you hold the organisation in such low regard you know, that outweighs what you might have done previously"(603T)

144 As a consequence of all of these considerations, Mr Kelly came to the conclusion that the applicant's employment should be terminated by the letter of 5 December 2008, set out earlier in these reasons.

Relevant Law

Unfair Dismissal

145 The relevant inquiry as to these matters is in the main, well settled. The primary issue for determination for the purposes of s 29(1)(b)(i) of the Act, is whether the contractual right of the respondent to terminate the applicant's employment has been exercised in such a manner so as to amount to an abuse to that right: *Miles v Federated Miscellaneous Workers Union* (1985) 65 WAIG 385.

146 It must also always be born in mind that the jurisdiction of the Commission in all matters that come before it is to be exercised in a manner consistent with s 26(1) (a) and (c) of the Act. The Commission in a case such as this is required to take into account all of the relevant circumstances of the case and the interests of the employer as well as those of the employee. The discretion is a broad one under the Act and in my opinion, care needs to be taken not to impose an artificial gloss upon the statutory injunction on the Commission under s 26(1) of the Act.

147 As pointed out by Mr Hooker in his closing submissions, reference has been made to the tendency in the past to elevate the notion of "procedural fairness" and "substantive fairness" as separate and distinct limbs of inquiry for the purposes of claims before the Commission under s 29(1)(b)(i) of the Act. This approach attracted observations by Anderson J in *Dellys v Elderslie Finance Corporation Ltd* (2002) 82 WAIG 1193 (Scott and Hasluck JJ agreeing) as follows at pars8-9:

"8 The provisions of the *Industrial Relations Act* which refer to harsh, oppressive or unfair dismissal make no distinction between a dismissal which is "substantively" harsh, oppressive or unfair and a dismissal "procedurally" harsh, oppressive or unfair. However, it has been the long standing practice of the Commission to employ the dichotomy as a convenient method of distinguishing between dismissals which are unfair in the sense that there should have been no dismissal at all and dismissals which are unfair in the sense that, although the employer was, broadly speaking, justified in bringing the relationship of master and servant to an end when he did, the employer went about it harshly, oppressively or unfairly. The distinction is regarded as relevant to the quantification of the compensation to which the employee may be entitled under s23A(1)(ba). It would appear that the "loss or injury" within the meaning of that subsection is invariably assessed differently, depending on whether the Commission concludes that the employee should not have been dismissed at all, or whether it concludes that it was only the manner of dismissal which was unfair. See, for example, ***WA Access Pty Ltd v. Vaughan*** (2000)81WAIG373."

148 The role of procedural fairness in unfair dismissal cases was also the subject of consideration by the Industrial Appeal Court *Shire of Esperance v Mouritz* (1991) 71 WAIG 891. In that case, the Court (Kennedy, Rowland and Nicholson JJ) considered that whilst the procedure adopted in effecting a dismissal may be significant, that is not the only consideration and a breach of procedural fairness alone, will not entitle a claimant to a remedy. Emphasis is laid on the broad discretion given to the Commission in dealing with such claims under s 26(1) of the Act. The Commission must in my opinion, in dealing with these issues, necessarily balance any procedural defects in a particular dismissal circumstance, with the substantial merits of the employer's decision.

149 Whilst counsel for the respondent referred, in dealing with procedural fairness issues, to the decision of the Full Bench in *The Department of Education and Training v Peter Hans-Weygers* (2009) 89 WAIG 267, in my opinion, some caution needs to be adopted when considering relevant administrative law principles of natural justice and procedural fairness arising in a public sector employment context, pursuant to a specific statutory scheme, and transposing those principles to claims under s 29(1)(b)(i) of the Act.

150 In my view, the relevant propositions as outlined in *Shire of Esperance* are still authoritative, to the extent that the *stare decisis* doctrine has any application in this jurisdiction, given the terms of s 26(1) of the Act.

151 Whilst counsel in their submissions addressed some of the relevant principles in relation to summary dismissal for misconduct, it is important to keep in mind that the applicant was not dismissed in the exercise of this common law right. Rather her employment was terminated on notice, albeit by payment in lieu thereof.

Implied Duties

152 As contracts of employment are a species of contract, the general common law principles applicable to contracts will have application. This is subject to the particular features of employment relationships, particularly their personal character that will impact upon the implication of terms into contracts of employment.

153 However, the principles applicable to the implication of terms generally, apply no less to employment contracts as any other kinds of contract: *BP Refinery (Westernport) Pty Ltd v Hasting Shire Council* (1977) 52 ALJR 20; *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

154 It is well settled that as part of the implied duties of an employee at common law, there exists an all encompassing obligation of fidelity and good faith. A classic exposition of this obligation is found in *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 where Dixon and McTiernan JJ said at 81-82:

> "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 the future conduct arises."

155 It is a breach of this obligation, and the maintenance of trust and confidence by the employer that goes with it, which the respondent refers to and relies upon in this case.

156 A more controversial issue is that associated with what is said to be the implied term of mutual trust and confidence existing in an employment relationship.

157 Whilst the existence of this duty of mutual trust and confidence was raised by the respondent in its amended notice of answer and was the subject of submissions by the parties, in the final analysis, little reliance seems to be placed upon it and I will deal with it only in passing.

158 The existence of such an implied contractual obligation is said to give rise to the proposition that as part of the implied contractual duty, an employer will not "without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee": *Woods v WM Car Services (Petersborough) Ltd* [1981] ICR 666 per Browne-Wilkinson VC. The implied term of mutual trust and confidence, has been more recently considered and adopted in a line of United Kingdom cases, commencing with *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20.

159 To date in Australia, the High Court has not decided authoritatively whether such a duty should be regarded as a part of the Australian common law with regard to employment contracts. A number of first instance judgements and some observations have been made by appellate courts, on the existence of such a duty but the issue seems far from settled.

160 Recently, the Federal Court in a series of first instance judgements has given consideration to the existence of the implied duty of trust and confidence in Australian law and doubted its existence. In *Van Efferen v CMA Corporation Limited* [2009] FCA 597 Tracey J referred to this issue in the context of a pleaded cause of action based on a claim for damages for a breach of the implied duty of trust and confidence. This was founded upon the decision of Rothman J in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104; (2007) 69 NSWLR 198.

161 In considering this issue, Tracey J at pars 80-85 said as follows:

> 80. "The question of whether or not such terms may be implied in contracts of employment is one of some controversy on which the High Court has yet to make a definitive pronouncement: see Riley, J, "The Boundaries of Mutual Trust and Good Faith" (2009) 22 *Australian Journal of Labour Law* 73; Riley, J, "Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace" (2003) 16 *Australian Journal of Labour Law* 1.

Given my findings in relation to the breach of clause 2.10 it is not necessary that I embark on a detailed examination of this alternative basis of Mr Van Efferen 's claim. I would, however, venture some short observations.

81. Mr Van Efferen submitted that the terms ought to be implied, not in the AWA to which he was a party, but in the common law contract of employment which was evidenced by his acceptance of the letter of offer dated 27 July 2006. That letter recorded very few terms of the contract. It dealt mainly with the protection of CMA's intellectual property and its commercial secrets. It was to be read in conjunction with the AWA.

82. In *Russell* Rothman J held that both terms should be implied in contracts of employment. In that case they did not avail the employee because, although they had been breached, the plaintiff had suffered no damage by reason of the breaches. On appeal, the New South Wales Court of Appeal went no further than holding that such terms may be implied in contracts of employment. Basten JA was (at [2008] NSWCA 217; (2008) 176 IR 82 [32]) inclined to treat the two implied terms as a single obligation. He considered (at [33]) that there was uncertainty as to the "scope and extent of the implied duties." Campbell JA was prepared to assume, without deciding, that an employer owed implied contractual obligations of the kind relied on by Mr Van Efferen . Giles JA (at [1]) was also prepared to assume rather than determine that such implied terms were incorporated in contracts of employment.

83. In this Court single judges have adopted a more guarded approach. In *McDonald* (at 398-400) Buchanan J reviewed the authorities relating to the mutual trust and confidence term. He expressed disquiet about the notion that such a term could have escaped judicial notice for so long. More significantly he queried whether such a term could be implied consistently with the principles expounded by the High Court in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283. I respectfully share his Honour's reservations.

84. In *Walker v Citigroup Global Markets Pty Ltd* [2005] FCA 1678; (2005) 226 ALR 114 at 156-157 Kenny J held that, in Australia, a term of good faith "does not apply to employment contracts." On appeal the Full Court did not need to express a view on her Honour's finding: see *Walker v Citigroup Global Markets Australia Pty Ltd* [2006] FCAFC 101; (2006) 233 ALR 687 at 708 [86].

85. As a single judge I would follow the decisions of other single judges unless I considered them to be clearly wrong: see *Bank of Western Australia Ltd v Commissioner of Taxation* (1994) 55 FCR 233 at 255. Although Buchanan J's observations in *McDonald* were obiter I nonetheless consider them to be correct. Kenny J's ruling in *Walker* forms part of the ratio of her decision in that case. I do not consider either decision to be clearly wrong. Had it been necessary I would have followed them."

162 In *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 Buchanan J dealt with this issue, again in the context of a claim for damages for a breach of such a term pleaded as being implied into the applicant's contract of employment in that case. After considering some of the Australian authorities dealing with the issue, most recently *Russell*, his Honour observed at pars 90-93 as follows:

"90 The tests for the implication of a term into a contract are usually accepted to be those stated in *B.P. Refinery (Westernport) Pty Limited v Hastings Shire Council [1977] HCA 40;* (1977) 180 CLR 266 at 283 – namely that:

'... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'

(See also *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales [1982] HCA 24;* (1982) 149 CLR 337 at 347.)

91 I confess to some disquiet about the notion that the suggested implied term (which has apparently lain dormant for so long and is now the subject of so much contentious debate) meets the conditions stated in (2) and (3) above. However that may be, in many cases in which the suggested term is sought to be invoked it will collide to some extent or another with express terms of the contract of employment. In the present case, it would be of no avail to suggest that such an implied term restricted a right of termination in accordance with the express terms of the contract of employment.

92 Ms McDonald relies upon the suggested existence of such a term to support a claim for damages arising from the circumstances of her dismissal. She alleges that it was distressing and humiliating. Evidence which I set out earlier is relied upon to support this proposition. The argument is contrary to the analysis in *Burazin*. For so long as *Addis* remains good law in Australia, any such argument cannot lead to the grant of relief.

93 There was, in any event, no support in the present case for any claim for damages for distress. There was no psychiatric evidence. There was no evidence of any kind except for Ms McDonald 's assertions of immediate and continuing distress. Termination of employment is bound always to bring disappointment, distress and perhaps humiliation. That has not hitherto, in Australia, been regarded as a ground for general damages."

163 Very recently the Full Court of the South Australian Supreme Court in *State of South Australia v McDonald* [2009] SASC 219 came to the conclusion that on the facts of the appeal before it, the term of mutual trust and confidence was not necessary to imply, given the statutory and regulatory arrangements applying to the employee's contract of employment in that case. The wider issue of the implication of the term generally into contracts of employment in Australia was left to another occasion.

164 Whilst the existence of such an implied term has been averted to and tacitly accepted in a number of decisions of the Full Bench of the Commission including some of which I was a member, and by the Industrial Appeal Court, the issue has yet to be raised fairly and squarely for consideration at appellate level: *Bone Densitometry Australia Pty Ltd T/as Bone Densitometry v Lenny* (2006) 86 WAIG 1485; *Matthews v Cool or Cosy Pty Ltd* (2003) 83 WAIG 2749; *Smith v Tungsten Group Pty Ltd* (2004) 84 WAIG 1311; *Brown v University of Western Australia* (2004) 84 WAIG 189.

165 Given that the issue has not been pressed by either party in this case, it is not necessary to finally decide the issue for present purposes. However, based on recent developments in the case law, I do have some reservations as to whether such a term should be implied, having regard to the established tests for the implication of terms into contracts generally. In my opinion, this issue is best left to be considered on another occasion if and when the existence or otherwise of such an implied term directly arises.

Consideration

166 As with many cases of the present kind, the evidence adduced on behalf of the applicant and the respondent, as to the central matters in issue, is diametrically opposed.

167 In relation to the Ovens Allegations and the Otter Allegations, the applicant denies the substance of them and says the relevant events complained of did not occur. This necessarily involves the resolution of the conflict on the evidence which ultimately comes down to an assessment of the credibility of the witnesses as they gave their evidence.

168 The major conflict on the evidence arose between the evidence given by the applicant, and by Ms Ovens and Ms Otter. It was common ground that in relation to the Ovens Allegations concerning the stairwell incident, no other person was present at the time.

169 In relation to the Otter allegations, the central witnesses involved were again the applicant and Ms Otter, although to an extent the alleged presence of Ms Anderson is a relevant consideration. Additionally, consideration needs to be given to the evidence given by Ms Bifield concerning the events that took place on the Monday immediately following the ALP State Conference.

170 In relation to the McCallum Allegations as noted above, the factual circumstances were not seriously in contest. I have previously said that the De Souza Allegations were raised and dealt with more by way of background context, and were not specifically identified by the respondent in its decision to terminate the applicant's employment.

171 During the course of the hearing of this matter, I carefully observed all of the witnesses giving their evidence. In relation to the central allegations, that being the Ovens Allegations and the Otter Allegations, to the extent that the evidence of the applicant and respondent was in conflict, I prefer the versions of the events as outlined by the respondent's witnesses. I reach this conclusion for the following reasons.

172 In relation to Ms Ovens, I generally found her to be a compelling witness. Her account of the relevant events as they took place on or about 15 October 2008 firstly in the stairwell of the respondent's building, and then at the "pod" in the office area used by the hospitality team, was clear and cogent and was not substantially disturbed in cross-examination.

173 The account that Ms Ovens gave of the conversation in the stairwell on the day in question was detailed as to the content and context of the conversation. There were seven key points that Ms Ovens raised in her recollection of the conversation which were expressed in some detail. I also find it to be of some significance that the content of the stairwell conversation between Ms Ovens and the applicant was reduced to writing a relatively short time after its occurrence, on or about 20 October 2008, when Ms Ovens provided a note of it to Mr Kelly. A copy of that note was attached to a letter dated 31 October 2008 sent to the applicant.

174 There was no cogent basis advanced on the evidence as to any motive for Ms Ovens to concoct such an elaborate conversation and to report the same to Mr Kelly. I also find quite persuasive, the evidence given by Ms Pullen as to this matter. I found Ms Pullen to be a credible witness and whilst there was some evidence of an earlier degree of tension between her and the applicant following the applicant's personal difficulties in mid 2007, I am not persuaded that formed any reasonable basis for Ms Pullen's evidence to be deliberately coloured against the applicant.

175 It is of some significance that Ms Pullen corroborated Ms Ovens' versions of the events to the effect that Ms Ovens saw her shortly after the incident in the stairwell and recounted it broadly to her. Whilst this matter was not known to Mr Kelly at the time, in my opinion, it adds to the credibility of Ms Ovens' testimony.

176 An attack on Ms Ovens' credibility was mounted by Mr Heathcote because of the prior disciplinary action taken by the respondent against her for dishonesty in the workplace. I have carefully considered this matter and the circumstances of this incident as recounted in the evidence of Ms Shay. I have taken into account Ms Ovens' explanation for her conduct and the remorse and sense of shame she recounted in her testimony. I am satisfied on the evidence of Ms Ovens that she paid a price for her lack of judgement through a first and final warning, which took into account the circumstances of the incident.

177 I am not persuaded that this prior event means that Ms Ovens' reliability generally is to be questioned.

178 In connection with the Ovens Allegations, I refer to the later conversation between the applicant and Ms Hoover, from the respondent's national office. I found Ms Hoover to be an impressive witness. She was largely at arms length from the events as they were unfolding in the WA Branch involving the applicant. Her evidence was she had little knowledge of the specific circumstances surrounding the investigation process into the applicant's conduct. Ms Hoover's evidence as to the coffee shop conversation with the applicant, where the applicant without prompting, expressed her dissatisfaction at her perceived treatment by the respondent's management, and in particular, her lack of confidence in the management, is telling.

179 In my opinion, the tenor of that conversation is consistent with the broad thrust of the applicant's dissatisfaction and antagonism towards the respondent's management in response to events that she perceived had wronged her. In my view, there is a consistent theme in relation to these matters, which lends itself to accepting the version of the events as outlined by the respondent's witnesses as opposed to that of the applicant.

180 I also find it of some significance, that Ms Hoover was requested, and she agreed albeit reluctantly it seems, to put her recollection of that coffee shop conversation in writing and provide a copy of it to Mr Kelly which was tendered as exhibit R10. I note that the written account of the conversation was some two months after the relevant events however, from a perusal of exhibit R10 it is broadly consistent with the oral evidence given by Ms Hoover in relation to the relevant events.

181 In my opinion it is of some significance also, that both Ms Ovens and Ms Hoover have compiled written accounts of their recollection of events, which accounts were provided to the respondent in support of the assertions made. I also find that the evidence of Ms Ovens to the effect that she relayed this incident to Mr Kelly on the occasion of her leaving the respondent, and the fact she had not done so prior because of concerns about retribution, was also consistent with a broad theme as to this issue about which a number of the witnesses gave evidence.

182 Likewise, I found Ms Otter's evidence to be inherently credible as to the events about which she testified. Again, there was nothing on the evidence to suggest any underlying motive as to why Ms Otter would fabricate the allegation made by her that the applicant called her an "arse-licker" at the ALP State Conference in June 2008 and that she was offended by that conduct. I have also given consideration to the issue of the delay in this matter being raised with Mr Kelly. The reason being possible retribution from Ms Anderson or the applicant and the fact they were close friends. This evidence and the explanation given to Mr Kelly at the time, was also generally consistent with the theme referred to above about fears in this regard.

183 I find on the whole of the testimony, such an explanation to be credible and it does not cause me to form the view that Ms Otter's evidence, for that reason, is to be regarded as unreliable. I also note in passing, that the substance of the conversation between Ms Otter and Mr Kelly regarding these matters was reduced to writing and provided to Mr Kelly, a copy of which was tendered as exhibit R6. This communication included matters other than the "arse-licker" comment and generally referred to derogatory comments made by the applicant and Ms Anderson about the senior management of the respondent.

184 I found Ms Bifield to be a forthright and credible witness. She gave evidence that she could not recollect the "arse-licker" comment being made during the conference but did recollect it being made by the applicant to Ms Otter on the Monday immediately following it. This evidence in my view is of some significance. Whilst Mr Kelly was not aware of that matter at the time, Ms Bifield's testimony does go to the issue that a comment of that nature was made by the applicant to Ms Otter. Importantly also, there was no indication on Ms Bifield's evidence, that Ms Otter took the comment made by the applicant in a jocular or light fashion.

185 In relation to the McCallum Allegations, I also found the evidence given by Mr McCallum as to these matters to be inherently credible. As I have noted above, there was some acceptance of the complaint made by the applicant although she regarded it as a matter of context and being under stress at the time. The central thrust of the incident however is not in dispute.

186 Whilst not entirely necessary in view of the ultimate decision making process, I make some observations on the evidence given by Mr De Souza. I have some reservations about some aspects of Mr De Souza's evidence. In particular I have reservations about Mr De Souza's evidence in relation to the matter of his time keeping and the efforts undertaken by the applicant to record the incidents when Mr De Souza was late for work or not in attendance for work.

187 Mr De Souza was questioned in relation to the content of exhibit A8 which was a contemporaneous note kept by the applicant of occasions when Mr De Souza was either late or not in attendance at work and various conversations between the applicant and Mr De Souza about these matters. The extent that the evidence of the applicant and Mr De Souza was in conflict about these matters I prefer the evidence of the applicant. I accept the evidence of the applicant that Mr De Souza found the hotels campaign challenging and one he did not enjoy.

188 However, my reservations about aspects of Mr De Souza's evidence do not cause me to reject his evidence in its entirety. I do not doubt Mr De Souza's genuine sense of offence at some of the remarks made by the applicant about himself and others, and his sensitivity to some of the issues raised. Some of the matters raised in exhibit A9, about which there was considerable evidence, were also consistent with the testimony given by Ms Pullen and as contained in exhibit A10, concerning insensitive and critical remarks made by the applicant about co- workers and others.

189 Whilst I therefore do not reject Mr De Souza's evidence as to these matters, I have reservations in concluding that the decision he made to leave the respondent's employment in or about June 2008, was wholly motivated by the applicant's conduct. It is open to infer and I do infer, that it was also influenced by the type of work he was undertaking at or around that time which he was not enjoying. That however, does not detract from the other body of evidence before the Commission, as to the applicant's tendency at times to be abrupt and insensitive in dealings with others. This reflects a consistent pattern on the evidence.

190 I do not have any reason to doubt the overall veracity of the evidence given by Mr Kelly and Ms Smith as to the steps they took once the various allegations came to their attention and the respondent's decision making process generally.

191 In relation to the evidence of Ms Anderson called on behalf of the applicant, I generally found her evidence to be credible, although much of it involved a recitation of her notes taken at various meetings as a support person on behalf of the applicant during the respondent's disciplinary process. Ms Anderson was not present at the time of the Ovens Allegations and was said to be present at the time of the Otter Allegations.

192 Her evidence as to the "arse-licker" allegation simply was she did not recollect or hear any such comment made whilst she was with the applicant. Importantly her evidence was also to the effect that she was not with the applicant at all times during the ALP State Conference.

193 However, I do have some reservations as to one aspect of Ms Anderson's evidence. That relates to her comments in a meeting involving the applicant and Mr Kelly in November 2008, when questions were being asked about whose copy of the De Souza Allegations were allegedly being passed around at the ALP Conference. As to this matter, I prefer the version of the events as advanced by Mr Kelly on his evidence.

194 When Ms Anderson said "no way" in relation to a question as to whether it was her copy passed around at the conference, this could not credibly be taken to be an assertion that she did not want to be questioned about matters arising on the investigation, as she said in her evidence. From a review of the meeting notes and the evidence of those in attendance, the timing and rhythm of the questioning and answers were such that it was a response to whether it was her copy of the document being passed around and not other issues.

195 Necessarily, my acceptance of the versions of events as outlined by Ms Ovens and Ms Otter in particular, regarding the central allegations, necessarily involves my rejection of the applicant's denial of them. I have no doubt that the applicant felt wronged by the allegations made against her and that certainly by the time of the encounter with Ms Ovens in the stairwell of the respondent's building, that she felt a considerable degree of animosity towards the senior management of the respondent.

196 I also found on occasions during the applicant's testimony, that she was somewhat reluctant to make concessions against interest on even relatively inconsequential matters. On other occasions, the applicant had a tendency to not answer the specific questions put to her for example in relation to the passing around of the list of the De Souza Allegations at the ALP Conference and discussions with Ms Smith at various times, as a part of regular work meetings, about her staff management skills.

197 Therefore on the whole of the evidence I am satisfied and I find that as a Lead Organiser, the applicant was a member of the respondent's leadership group and involved in the strategic direction of the union. The Lead Organiser position is one entailing a very significant degree of trust and confidence by the employer as reflected in the criteria for appointment in the respondent's terms and conditions of employment set out above.

198 I am also satisfied and I find that the position of Lead Organiser at the respondent is a crucial one for the purposes of the success of the respondent's campaigning and the motivation and leadership of Organisers. Such officers are required to display high standards at all times.

199 I am also satisfied on the evidence and I find that the respondent, upon proper grounds, had, prior to the appointment of the applicant as a Lead Organiser, concerns as to the applicant's staff management skills. Attempts were made to address some of those issues through participation in training and development in particular the LEAP programme, during which, the applicant demonstrated signs of progress in this respect.

200 I also accept on the evidence that the respondent, after some pressuring by the applicant over a period of time, took a decision to promote the applicant to a Lead Organiser position on probation, to give her the opportunity to demonstrate her capacity, skills and performance in such a position.

201 I accept on the evidence that at all times, the applicant was regarded as a very competent Organiser, and her capacity to engage with members and delegates was held in high regard. I am also satisfied on the evidence and I find that at all times, it is incumbent upon a Lead Organiser to demonstrate in particular to junior employees, the higher standards of conduct and behaviour as an occupant of a leadership position within the organisation.

202 On the evidence as a whole, and from my careful observations of the applicant whilst giving her evidence, I am satisfied that she could at times be blunt in her method of communication, and be insensitive to the way in which some of her treatment of others is received. I accept on the evidence that in many respects, some of the De Souza complaints involved such matters and there was a commitment to move forward and resolve these issues by providing the applicant with additional training, some of which started to occur.

203 I am also satisfied that the respondent on the evidence, gave the applicant the benefit of the doubt in relation to many of her short comings in this regard as alleged, and resolved to put those matters behind it. Reservations about the applicant's team management skills persisted however.

204 I accept on the evidence and I find that the applicant did call Ms Otter an "arse- licker" in circumstances which caused Ms Otter offence. I am satisfied that as a more junior employee, it was completely inappropriate for the applicant to address Ms Otter in this fashion. I am also satisfied on the evidence and find that other derogatory remarks were made about the respondent by both the applicant and Ms Anderson at the ALP State Conference, some of which were contained in the written note prepared by Ms Otter and provided to Mr Kelly as exhibit R6.

205 In my opinion, on any view, it is not appropriate for a senior officer to address a more junior officer in such a fashion. Nor in my opinion, was it in any event, appropriate for senior officers at such a venue to discuss the senior management of the respondent in a derogatory fashion. Whilst some submissions were made during the course of argument that attendance of the ALP State Conference was not at the respondent's workplace, in my view there was a sufficient connection between the applicant's employment and attendance at the conference such that these matters could be properly taken into account by the employer: *Hussein v Westpac Banking Corporation* [1995] IRCA 147.

206 In relation to the Ovens Allegations, I am satisfied and I find that a conversation did take place on or about 15 October 2008 in the stairwell of the respondent's premises between the applicant and Ms Ovens. I am satisfied that the content of the conversation was as largely outlined by Ms Ovens in her testimony and that in part, the applicant was highly derogatory of the senior management of the respondent to a more junior officer. Whilst technically, it may be said that at the time, the applicant was not discharging Lead Organiser duties, there was no serious contention put that the applicant was other than a senior officer of the respondent and had occupied that role for some time.

207 On any view, those observations in relation to the respondent's management, and the other comments made by the applicant to Ms Ovens, constituted a challenge to the authority of the employer not only in quite abusive terms, but that she was also repudiating her obligations under her contract to work in a diligent fashion. In my opinion, such comments by a senior officer to a more junior officer clearly demonstrated a fundamental breakdown in the employment relationship. As it was subsequently demonstrated in the applicant's conversation with Ms Hoover, a complete loss of confidence in the management of the respondent had occurred by in or about this time.

208 I also accept that the applicant spoke about Ms Anderson's return from annual leave in the presence of Ms Corvi and Ms Ovens largely as outlined in Ms Ovens' testimony. It is the case, and I accept, that the remarks made by the applicant could have been taken in one of two ways. They could have been taken in a derogatory sense towards the respondent. Alternatively,

they could have been seen in a more neutral fashion, as simply an exclamation as to why Ms Anderson would return to work from annual leave if she had secured alternative employment. In my view both the versions of events were equally open. However in the context of all of the events as they were unfolding, it was in my opinion not inappropriate for the respondent's management to regard the applicant's comments as part of a consistent pattern of behaviour critical of it.

209 There was some evidence about the use of profane language in the respondent's workplace from time to time. Whilst I accept that evidence, context is important and crucially so in this case. How words and language are used and to whom it is addressed and in what setting can be critical as to meaning and effect.

210 I am also satisfied and I find that in a conversation with Ms Hoover of the respondent's national office, the applicant expressed negative sentiments towards the respondent and expressed her views that she was being unfairly treated and had lost confidence in the union senior management. In my opinion, as I have mentioned above, this conversation and the evidence about it given by Ms Hoover, was consistent with a theme of complaint by the applicant about the respondent and criticisms of her treatment generally and of senior officers of the respondent.

211 When taken as a whole, in conjunction with the Ovens Allegations, in my opinion, it was reasonably clear that by late 2008 the relationship between the applicant and the respondent had broken down to an irretrievable level. Indeed, this was illustrated on Ms Hoover's evidence, when she asked the applicant why the applicant would remain in her employment if she was so disgruntled and lacking in confidence in the respondent as a consequence of the perceived wrong doing of others against her.

212 From all of the evidence I am also satisfied and I find that in particular Ms Ovens and Ms Otter and to a lesser extent Mr De Souza, felt apprehension about raising issues concerning the applicant's performance and conduct, for fear of retribution against them.

213 As I have noted above, the substance of the McCallum Allegations are not really an issue and I am satisfied and I find that they occurred largely as Mr McCallum outlined them. I accept however, the applicant's testimony that at the time, she was suffering from stress by reason of very difficult personal circumstances she was then experiencing. I also find on the evidence that at the time of these personal difficulties the respondent afforded the applicant considerable latitude in the performance of her duties as a Lead Organiser.

214 I am far from persuaded that the procedure adopted by the respondent, principally through Mr Kelly and Ms Smith, to enquire into and investigate the various allegations raised, was in some way improper, inadequate or flawed. I have said on previous occasions, that employers in matters such as these, cannot be expected to undertake investigations or relevant enquires, to the standards expected of the police or other investigatory agencies: *Whelan v City of Joondalup* (2004) 84 WAIG 2975. Additionally, the Commission is required to consider objectively, whether the procedure adopted by the employer in dismissing an employee was, in all the circumstances, reasonable and fair, based upon the material then before the employer.

215 In all the circumstances of this case, I am far from satisfied that a procedure which in all, ran from about June 2008 to the end of November 2008, could be regarded as anything other than fair. The decision to terminate the applicant's employment could hardly be described as having been rushed. I have considered carefully all of the evidence of the very many meetings between the applicant and representatives of the respondent at which the various allegations were raised and put to her. Some of those were put in writing and some not.

216 There is of course no requirement that allegations be put in writing. The law simply requires that a person who may be adversely affected by a decision, be given every reasonable opportunity of answering the relevant allegations.

217 I am also well satisfied that the applicant was given ample time to consider her responses to the various allegations and as to her future within the organisation. I am satisfied on the evidence in particular of Mr Kelly and to a lesser extent Ms Smith that all reasonable steps were taken to investigate the complaints raised against the applicant. I am also satisfied that the applicant was given every reasonable opportunity to suggest who ought to be spoken to regarding the various allegations made against her and that she was not able to add to those that Mr Kelly had approached as a part of his enquiries.

218 Whilst considerable significance was based upon the fact that Mr Kelly did not speak with Ms Anderson about the Otter Allegations, I am not persuaded on all of the evidence that that failure was fatal to the process undertaken by the respondent. Firstly and reasonably, Mr Kelly took at face value Ms Anderson's request that she not be questioned about the issues arising concerning the applicant. Secondly, she was acting as the applicant's support person during the course of the disciplinary process and Mr Kelly not unreasonably, had reservations about engaging with her for that reason. Thirdly, from my observations of Ms Anderson giving her evidence, she did not strike me as a person unwilling to come forward if she felt strongly about a particular issue.

219 On the whole, had Ms Anderson wished to raise any particular matters, whether about the Otter Allegations or otherwise she could have. In any event however, as to the "arse-licker" allegation, as noted above, it was Ms Anderson's evidence that she did not hear such a comment, not that she was with the applicant at all times and such a comment was never made. Moreover, in my view, Mr Kelly's acceptance of Ms Otter's version of the events, in the overall circumstances as presented to him was not unreasonable. This is all the more so, when taken in the context of the other matters that were coming to light at around that time concerning the applicant's conduct and behaviour.

220 I am also satisfied that on several occasions during the course of meetings with the applicant, particularly towards the end of the disciplinary process, the applicant was informed by Mr Kelly that the respondent regarded the Ovens and Otter Allegations seriously enough, as to warrant consideration of termination of employment. I simply do not accept that the applicant could have been under any misapprehension as to this matter by this time. Importantly, as I have mentioned above, this was also the evidence of Ms Anderson, who was at all material times, acting as the applicant's support person in the various disciplinary interviews and was present at the time when these statements were made.

221 There was some suggestion during oral argument and in the written submissions from the applicant that the applicant's workers compensation claim played a role in the respondent's decision to terminate the applicant's employment. I am not persuaded that this was the case based on the evidence before the Commission.

222 In the final analysis, the relevant evidence in relation to the various allegations raised against the applicant cannot be viewed individually or in isolation. In particular, the Ovens, Otter and McCallum Allegations, supported by the evidence of Ms Hoover, evidenced in my opinion, a progressive breakdown in the working relationship between the applicant and the respondent. In my opinion, there was ample material from which the respondent properly and reasonably formed the view that it no longer could hold the trust and confidence in the applicant, as a necessary ingredient in the employment relationship, particularly between a senior employee and the employer, and given the nature of the employment in this case.

223 I am also satisfied that despite submissions to the contrary, that the applicant's terms and conditions of employment did permit the respondent to terminate the applicant's employment by payment in lieu of notice. The applicant's original letter of appointment as an officer of the respondent dated 15 October 2005 and tendered as exhibit A2, contained the following "The LHMU Conditions of employment are available for all staff on the intranet." A copy of the LHMU National Conditions of Employment consolidated to June 2008, was tendered by consent as exhibit R18.

224 Whilst there seemed to be some conjecture raised by counsel for the applicant during the course of closing addresses as to the status of this document, I accept that for present purposes it reflected the applicant's terms and conditions of employment. In particular I note clause 20 dealing with termination of employment which provides that :

> "the employment of a weekly or part-time employee may be terminated by a minimum of one week's notice on either side which may be given at any time or by the payment by the employer or forfeiture by the employee of a week's pay in lieu of notice. This shall not affect the right of the employer to dismiss an employee without notice in case (sic) of an employee guilty of serious misconduct. Where relevant awards (howsoever described) in a state or territory prescribe further incidental obligations or entitlements with respect to termination of employment then those provisions shall also apply."

225 While the giving of one week's notice now must be modified by the operation of statute as contained in s 661 of the Workplace Relations Act 1996 (Cth) ("the WR Act") the terms of clause 20 of the general conditions are sufficient to overcome the difficulties highlighted by the High Court in this regard in *Sanders v Snell* (1998-1999) 196 CLR 329 at 337.

226 It is the case of course that nothing in s 661 of the WR Act displaces the common law as to an implied term of reasonable notice: *Stewart v Nickles* [1999] FCA 888. In my opinion, whilst the matter was not argued to any great extent, I do not regard five weeks notice in the case of the applicant's employment, as being inherently unreasonable.

227 Having regard to all of the circumstances of this case, I am not persuaded that the reliance by the respondent on the applicant's conduct as referred to in the letter of dismissal of 5 December 2008, in order to terminate the applicant's employment, or the process it engaged in to investigate the various allegations, constituted an abuse of its lawful right to do so.

228 I now turn to consider a final issue that arises on the evidence and submissions in this case, that being the dismissal of the applicant whilst she was on annual leave.

Dismissal on Annual Leave

229 The second of the two issues raised by the Commission with counsel for the parties during the course of the hearing, is whether anything turns on the fact that it appears common ground that the dismissal of the applicant effective 5 December 2008 took place whilst the applicant was on annual leave. From the evidence before the Commission, the applicant testified that she was due to commence leave on 1 December 2008 and return from leave on 1 February 2009, a period of two months. It was whilst she was on her first week of annual leave, that she received the letter from Mr Kelly terminating her employment effective 5 December 2008 by payment of five weeks salary in lieu of notice.

230 The issue that arises in this circumstance is whether the dismissal by the respondent whilst the applicant was on annual leave, constituted a lawful exercise of its contractual right. There is good authority in this jurisdiction to the effect that termination of employment cannot be effective during a period of annual leave under an award: *CW and BR McSharer t/as Hillview Nursing Home v Hospital Employees Industrial Union of Workers WA* (1975) 55 WAIG 1545.

231 In his case the Industrial Appeal Court, on an appeal from a decision of an Industrial Magistrate, held that a purported termination of employment by the giving of notice to an employee which notice was to expire prior to the expiration of a period of annual leave under an award of this Commission was unlawful. Burt J (Wickham J agreeing) in dealing with this issue said at 1546 as follows:

> "Much argument was addressed to us upon the question whether consistently with the award provisions which I have set out, the appellants could have given notice of termination of the employment during the currency of the annual leave. But that I think is not an accurate statement of the question raised by the facts. *The question, as it seems to me, is whether the appellants could consistently with the award give notice terminating the worker's employment as from a date falling within the period of that worker's annual leave.* The question is not whether they could have given notice terminating the employment as from 21st February, which they did not purport to do, but whether they could give notice terminating the workers employment as from 13th of February 1974, which is what they did purport to do.
>
> In my opinion the effect of the annual leave provisions in operation is that the contract of service continues throughout the period of five weeks, this being a notion conveyed by the word "leave" and by the expression "on full pay". This is something to which in the terms of the clause the worker is entitled. The right to terminate the employment on one week's notice should be read subject to Clause 9(1)(b) and to the entitlement which that clause

> when it operates creates, *and hence in my opinion it should be held that an employer cannot give notice which in its terms would terminate the employment within the period of annual leave.* The notice given in the instant case purported to do this and in my opinion it was an ineffective notice. See Automatic Fire Sprinklers v Watson (1946) 72 CLR 435 at p 467 per Dixon J. No further or effective notice was given and the appellant's in my opinion were correctly convicted of failing to pay the worker one week's pay in lieu of notice. It is unnecessary to decide whether the appellant's could have given notice which would have expired at the end of the leave period. That question does not arise and can wait another day." (My emphasis)

232 Wallace J delivered a separate judgement coming substantially to the same conclusion.

233 The principle in *Hillview* was adopted and affirmed in a further decision of the Industrial Appeal Court in *Amalgamated Metal Workers and Shipwrights Union of Western Australia v Multicon Engineering (WA) Pty Ltd* (1980) 60 WAIG 1055. Furthermore, the principle stated in those two decisions has been adopted and applied by the Full Bench of the Commission in relation to a dismissal purportedly effected whilst an employee was on sick leave: *John James Reynolds v Swift and Moore Pty Ltd* (1994) 74 WAIG 861.

234 On the facts of that case, it was held that the appellant's dismissal whilst he was on sick leave, by payment of one month's pay in lieu of notice, was, on the authority of *Hillview* and *Multicon Engineering,* unlawful and invalid and rendered the dismissal in that particular case, unfair. The Full Bench held at 864-865, that the dismissal purportedly effected whilst the employee was on sick leave constituted the interference with a vested right, the same as the vested right to long service leave or annual leave.

235 Mr Hooker suggested that the decision in *Hillview* ought now be called into question by reason of the decision of the High Court in *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410. Counsel submitted that in *Byrne,* the majority judgment of Brennan CJ, Dawson and Toohey JJ, favoured the minority judgement of Latham CJ and Starke J in *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435, to the effect that even in cases where a dismissal may be unlawful, that does not invalidate the decision and render it a nullity. In this circumstance, the dismissed employee is left to their remedies under legislation such as the Act, or the bringing of a common law action for damages. It is on this basis that it was submitted that the judgement of Burt J in *Hillview* should now be called into question, presumably because of his Honour's reference to *Automatic Fire Sprinklers*.

236 I agree that the majority view in *Byrne* should now be seen to prevail over the views of Dixon J in *Automatic Fire Sprinklers.* That is a dismissal effected unlawfully generally puts an end to the employment relationship and does not generally render the dismissal invalid or a nullity. To the extent that the Full Bench in *Reynolds* concluded that the appellant's dismissal was rendered a nullity in that case, because he was dismissed while on sick leave, must, with respect, be considered as wrongly decided on this point in view of the analysis of the majority in *Byrne.*

237 However, that does not mean in my opinion, that the broad proposition established in *Hillview* and the cases to which it referred, is to be now regarded as overturned. The primary issue determined in these cases is that a period of leave conferred by an award and being enjoyed by an employee at the time of a dismissal, is a vested right that cannot be taken away by an act of termination of employment, that interferes with this entitlement. The vested right to the entitlement is independent of the continued existence of an employment relationship.

238 It was also accepted in *Byrne* as good law in Australia, that despite the termination of the employment relationship, a contract of employment may still continue until the repudiation caused by the wrongful dismissal, is accepted by the employee and the contract is brought to an end. Although it must also be said that given the nature of an employment contract and the requirement to perform services for wages or salary, not much may turn on this in the majority of cases.

239 Indeed, the possible continuation of an employment contract, despite the ending of an employment relationship, recognised by the Court in *Byrne* and also in *Automatic Fire Sprinklers*, is quite consistent with the continued existence of an entitlement that has become fully vested under a contract of employment. That this is so is self evident given the terms of s 29(1)(b)(i) of the Act dealing with the recovery of denied contractual benefits and s 83 of the Act dealing with the recovery of award and industrial agreement entitlements.

240 In my opinion, there is nothing in the judgment of the Court in *Byrne,* that means a dismissal effected while an employee is on a period of accrued and approved leave, as a vested right, cannot be both unlawful in terms of constituting a breach of an obligation under a statute or an industrial instrument and possibly as a consequence, also being unfair.

241 For these reasons in my opinion, the propositions outlined in *Hillview* and *Multicon Engineering,* remain good law and should be regarded as authoritative in relation to similar circumstances.

242 In this case, it is the position that the applicant was not bound by an award or industrial agreement. The entitlement to annual leave which she was enjoying at the time of her dismissal springs from the LHMU National Conditions of Employment which provide at Clause 16.1 annual leave for officials of six weeks per annum. Additionally, it is also the case that the annual leave entitlements prescribed in the Minimum Conditions of Employment Act 1993 (WA) are implied as a minimum condition, into a contract of employment, not governed by an award: s 5 and Division 3.

243 In my opinion, regardless as to whether the entitlement to annual leave arises under an award, industrial agreement or common law contract of employment, in any of those cases, the entitlement to leave constitutes a vested right which cannot be interfered with unless there are clear words in the contract of employment or industrial instrument to the contrary. There is nothing on a plain reading of clause 20 of the LHMU National Conditions of Employment, dealing with termination of employment, or other terms, which suggest that the proposition just stated has no application in this case. Nor is there any provision in the MCE Act that would alter the position.

244 There was little evidence before the Commission in relation to the applicant's annual leave entitlements at the time of her dismissal. To avoid the time and cost to the parties of re-listing the matter, I instructed my Associate to contact the parties to clarify by consent, the applicant's annual leave arrangements and the payments made to her on dismissal. Clarification was sought as to the applicant's date of commencement and expected date of return from leave and the date up to which the applicant's annual leave accruals were paid.

245 That enquiry reveals that the applicant went on annual leave in 1 December 2008 and was due to return from annual on 2 February 2009. The applicant was paid all of her accrued entitlements on termination including that for accrued annual leave and annual leave loading in the total sum of $15,259.46 representing some 341 hours of accrued annual leave and loading. That being so, in my opinion the dismissal of the applicant, whilst she was on approved annual leave, in accordance with her contract of employment, did not constitute an interference with a vested right and it was not unlawful. The applicant was not deprived of a vested right to which she was entitled on the termination of her employment.

246 In any event, it is not in every case that an unlawful dismissal will also constitute an unfair dismissal. As I have said above, all of the relevant circumstances need to be taken into account: *Newmont Australia v The Australian Workers Union* (1988) 68 WAIG 677. The degree of any unlawfulness may be a relevant consideration as to whether such a dismissal is also unfair for the purposes of s 29(1)(b)(i) of the Act.

Conclusion

247 For all of the foregoing reasons the application is dismissed.

2009 WAIRC 00579

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBRA LEE LEAHY
	APPLICANT
	-v-
	LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 18 AUGUST 2009
FILE NO/S	U 188 OF 2008
CITATION NO.	2009 WAIRC 00579

Result	Application dismissed
Representation	
Applicant	Mr S Heathcote of counsel and Ms J Pilkington of counsel
Respondent	Mr R Hooker of counsel and Mr N Whitehead of counsel

Order

HAVING heard Mr S Heathcote of counsel on behalf of the applicant and Mr R Hooker of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2009 WAIRC 00573

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MISTIE BREEANNE BREWER
	APPLICANT
	-v-
	PHARMACY 777 MANDURAH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 17 AUGUST 2009
FILE NO/S	U 85 OF 2009
CITATION NO.	2009 WAIRC 00573

Result	Discontinued
Representation	
Applicant	Ms M Brewer on her own behalf
Respondent	Ms D Pearson and Mr I Hamilton

Order

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

WHEREAS on 26 May 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 2 June 2009 the respondent advised the Commission that it was having difficulties complying with one of the terms of settlement; and

WHEREAS on 9 June 2009 the Commission convened a further conference; and

WHEREAS at the conclusion of that conference the respondent undertook to further investigate complying with the outstanding term of settlement; and

WHEREAS on 15 June 2009 the respondent provided information to the Commission about the outstanding term of settlement and advised that it had written to the applicant detailing the outcome of its investigation; and

WHEREAS on 22 June 2009 the Commission contacted the applicant by telephone and the applicant advised that given the correspondence she had received from the respondent all of the settlement terms with respect to this matter had been finalised; and

WHEREAS on 23 June 2009 and 31 July 2009 the Commission contacted the applicant about lodging a Notice of Discontinuance; and

WHEREAS on 11 August 2009 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 17 August 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 00594

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MICHELLE MORTON
	APPLICANT
	-v-
	BEGA GARNBIRRINGU HEALTH SERVICES ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 24 AUGUST 2009
FILE NO	U 140 OF 2009
CITATION NO.	2009 WAIRC 00594

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 13 August 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 00610

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH JANE SUTTON
	APPLICANT
	-v-
	AARDENT DENTAL CENTRE AND OTHERS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 31 AUGUST 2009
FILE NO/S	U 89 OF 2009
CITATION NO.	2009 WAIRC 00610

Result	Discontinued
Representation	
Applicant	Ms D Sutton on her own behalf
Respondent	Mr G Lilleyman as agent

Order

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

WHEREAS on 17 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 with respect to the application; and

WHEREAS on 13 August 2009 the applicant filed Notices of Discontinuance in relation to the application; and

WHEREAS on 26 August 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 00576

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN WILSON
	APPLICANT
	-v-
	DAWSON'S GARDEN WORLD TRUST
	RESPONDENT
CORAM	COMMISSIONER P E SCOTT
DATE	TUESDAY, 18 AUGUST 2009
FILE NO/S	U 124 OF 2009
CITATION NO.	2009 WAIRC 00576

Result	Application dismissed

Order

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

WHEREAS by a letter dated the 10th day of August 2009 the Commission directed the applicant to respond to particular matters raised in the respondent's Notice of Answer and Counter Proposal by no later than fourteen (14) days from the date of the letter; and

WHEREAS on the 13th day of August 2009 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
David Kilgariff	Paupiyala Tjarutja Aboriginal Corporation	U 15/2009	Commissioner J L Harrison	Discontinued

CONFERENCES—Matters arising out of—

2009 WAIRC 00584

DISPUTE RE PENALTY ENFORCED ON UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPELLANT

-v-

COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES, GOVERNMENT OF WESTERN AUSTRALIA

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER J L HARRISON

DATE THURSDAY, 20 AUGUST 2009

FILE NO PSAC 39 OF 2007

CITATION NO. 2009 WAIRC 00584

Result Order revoked

Representation

Applicant Mr W Claydon

Respondent Ms K Jack

Order

WHEREAS on 1 November 2007 the Civil Service Association of Western Australia Incorporated ("the applicant") lodged an application in the Commission pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") in relation to two of its members, Mr Gary Hampson and Mr Michael Rowley ("the officers") who were employed by the Commissioner, Department of Corrective Services, Government of Western Australia ("the respondent"); and

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

WHEREAS on 7 November 2007 and 5 December 2007 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS as the respondent disputed the Commission had jurisdiction to deal with this matter the parties were provided with a timeframe for filing submissions in relation to this issue and on 21 April 2008 the Commission found that it had jurisdiction to deal with the matter; and

WHEREAS the Commission convened further conferences on 23 May 2008 and 3 June 2008 and at the second conference the applicant requested that interim orders issue with respect to the officers; and

WHEREAS after hearing from the parties by way of written submissions, the Commission issued the following orders ("the Order") pursuant to s 44 of the Act on 17 June 2008:

"1. THAT the respondent immediately lift the ban on Mr Hampson and Mr Rowley being able to apply for higher duty positions.

2. THAT the respondent allow Mr Hampson and Mr Rowley to apply for acting opportunities in Senior Officer positions at Banksia Hill Detention Centre in the same way Mr Hampson and Mr Rowley applied for these positions prior to 10 August 2007.

3. THAT the respondent consider Mr Hampson and Mr Rowley for acting Senior Officer positions as they arise.

4. THAT this order remain in place until this matter is heard and determined.

5. THAT liberty to apply be granted to the parties in relation to this order."; and

WHEREAS after a further conference was held in the Commission on 18 June 2008 the matter was adjourned pending the disciplinary process against the officers being finalised; and

WHEREAS on 3 July 2008 the respondent advised the Commission that it was not proceeding with disciplinary action against the officers; and

WHEREAS at a conference held on 25 July 2008 the Commission advised the parties that the application would remain on foot whilst the parties held discussions to clarify the disciplinary process relevant to the officers; and

FURTHER after hearing from the parties by way of written submissions, on 4 August 2008 the Commission advised the parties that the Order would remain in place whilst the parties continued these discussions; and

WHEREAS on 23 September 2008 the Commission convened a report back conference; and

WHEREAS following this conference the Commission contacted the parties on a number of occasions about the status of the matter; and

WHEREAS on 6 August 2009 the applicant filed a Notice of Discontinuance in respect of the application; and

FURTHER on this date the applicant also filed a copy of a document containing the common understanding reached between the parties with respect to the application of the disciplinary provisions contained in the *Young Offenders Regulations 1995*; and

WHEREAS on 18 August 2009 the Commission wrote to the parties about revoking the Order; and

WHEREAS on 18 August 2009 the respondent advised that Commission that it was the respondent's view that the Order should be revoked as the dispute the subject of this application had been resolved; and

WHEREAS on 19 August 2009 the applicant advised the Commission that it consented to the Order being revoked; and

WHEREAS the Commission, having considered the respective positions of the parties and when taking into account equity and good conscience and the fact that the parties have reached an agreement on the application of relevant disciplinary proceedings, has formed the view that the Order should be revoked as the dispute between the parties the subject of this application has been resolved;

NOW THEREFORE having heard Mr W Claydon on behalf of the applicant and Ms K Jack on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the Order which issued in this matter dated 17 June 2008 is hereby revoked.

2. THAT this application otherwise be, and is hereby discontinued.

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

2009 WAIRC 00598

DISPUTE RE PROPOSED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	(COMMISSION'S OWN MOTION) PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA AND THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
CORAM	COMMISSIONER P E SCOTT
DATE	THURSDAY, 27 AUGUST 2009
FILE NO/S	C 28 OF 2009
CITATION NO.	2009 WAIRC 00598

Result	Interim Order made
Representation	Mr B Appleby – Public Transport Authority of Western Australia
	Mr P Woodcock – The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

Interim Order

WHEREAS on Tuesday 25 August 2009, the Western Australian Industrial Relations Commission (the Commission) was advised of a notice to railcar drivers, members of the Australian Rail, Tram and Bus Industry of Employees, West Australian Branch (the Union) notifying members in the following terms:

> "Today I attended a meeting called of railcar drivers as a request from Metropolitan Sub Branch Secretary which resolved to call a meeting of Railcar **Drivers to hold a stop work meeting as follows:**
>
> **Date Friday: 28th August,**
>
> **Time: 14:00**
>
> **Venue: Outside 10 Nash Street, Perth.**
>
> **Agenda: To discuss the implementation of changes proposed in letter from PTA dated 21st August 2009.**
>
> This notice is provided for your information as a request from those who attended today's meeting.
>
> Phillip Woodcock, WA Branch Secretary, 25 August 2009."; and

WHEREAS the Commission convened a conference of its own motion pursuant to s 44 of the *Industrial Relations Act, 1979* (the Act) at 2:30pm on Wednesday, 26 August 2009; and

WHEREAS at that conference the Commission was informed by the Union that the Public Transport Authority of Western Australia (the PTA) had issued a memorandum to railcar drivers on 21 August 2009 which dealt with a number of issues including rostering, yearly leave allocation process and credit days (accumulated days off), which memorandum causes the railcar driver members of the Union considerable concern that the PTA has unilaterally made significant changes to the rostering arrangements which will adversely affect the capacity of railcar drivers to have certainty as to their roster and potentially creates difficulties regarding their work-life balance; and

WHEREAS the PTA informed the Commission that the memorandum reflected both its rights and obligations in respect of managing the rosters, that a draft of the memorandum had been circulated and that no significant concerns were raised regarding the memorandum, that the concerns of the railcar drivers were not warranted, that it is prepared to monitor the effect of the memorandum and meet with the Union within a reasonable period of time, such as 8 weeks, for the purpose of considering any adverse affects which may arise; and

WHEREAS the Union and the railcar drivers say that there is no need for the change in the rostering arrangements as railcar drivers have always been sufficiently flexible to enable changes to the roster where the PTA requires them without the unreasonable requirements of the terms of the memorandum; and

WHEREAS the PTA informed the Commission that it does not believe there would be any significant changes from those which had been practiced for some time but rather that the memorandum constitutes a restatement of existing practice with some minor changes; and

WHEREAS the Commission discussed with the Union and its members and the PTA the circumstances of the memorandum regarding the rosters and discussed means for resolution of that issue however the matter was unable to be resolved during the course of the conference; and

WHEREAS the railcar drivers say that it is necessary for them to have a meeting of all members to discuss this issue and to consult with the members together; and

WHEREAS the PTA says that it is unnecessary for there to be a stop work meeting for the Union to consult with its members, that there are other mechanisms available for the members to confer including emailing or writing to all members, and that it is prepared to facilitate those methods such as the Union speaking to the members at the various depots; and

WHEREAS the PTA says that there will be considerable adverse affects upon the general public should the stop work meeting proceed on Friday 28 August 2009 at 2:00pm as this would require the railcars to stop one hour prior to the meeting and for at least 2 hours after that time to enable the system to be properly coordinated and function; that at 2:30pm school students come out of school and need to be transported home; that between 3:30pm and 4:00pm the peak hour traffic commences and that on Friday evening there are significant sporting events which require the availability of public transport; and

WHEREAS the railcar drivers advised the Commission that they had given the PTA sufficient notice of the stop work meeting to enable it to arrange for buses to transport the members of the public in the absence of train services; and

WHEREAS the PTA informed the Commission that the particular timing of the stop work meeting, with its effect on peak time, meant that insufficient buses would be available at that time because the buses are already engaged in that peak traffic transportation, and further that as an example 15 buses are required to replace one train to Mandurah and that there would not be sufficient buses in the system to enable an adequate substitution; and

WHEREAS at the conclusion of the conference the PTA sought that the Commission issue an order that there be no industrial action for a period of 8 weeks to enable further discussions and assessment of the impact, if any, of the memorandum to railcar drivers; and

WHEREAS the railcar drivers sought that an order be issued that the PTA withdraw the letter and make no changes to rostering practices until a matter before the Acting President of the Commission is resolved such as to enable the railcar drivers to have their representation clarified; and

WHEREAS the Commission having heard from the parties and having regard to the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question until they are resolved by conciliation or arbitration, and pursuant to the powers vested in it by s 44(6) of the Act hereby orders that –

(a) the Union by its officers, agents, employees and members (who are railcar drivers) are not to hold a stop work meeting or take other industrial action in relation to the dispute about the arrangements for rostering for a period of 14 days of the date of this Order;

(b) the Union by its officers, agents, employees and members (who are railcar drivers) are required to ensure that the continuity of all rail services is not disrupted during the period referred to in paragraph (a);

(c) the Union by its officers, agents and employees is required to inform its members (who are railcar drivers) of this Order and direct its members who are railcar drivers to comply with this Order no later than 5:00pm on Thursday, 27 August 2009;

(d) the parties are to report back to the Commission at a conference to be convened by Senior Commissioner Smith at a time to be advised on Wednesday 2 September 2009;

(e) there be liberty to the parties to apply to vary this Order on 24 hours' notice.

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

2009 WAIRC 00638

DISPUTE RE PROPOSED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA AND THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	FRIDAY, 4 SEPTEMBER 2009
FILE NO/S	C 28 OF 2009
CITATION NO.	2009 WAIRC 00638

Result	Interim Order issued
Representation	Mr B Appleby – Public Transport Authority of Western Australia
	Mr P Woodcock and Mr G Ferguson – The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch

Interim Order

WHEREAS it is established at law that:

(a) An employer has a right to manage and direct what and how work is to be performed. This is known as "management prerogative";

(b) Employees have no general contractual entitlement to have the way in which they perform their work unchanged;

(c) The terms and conditions of employment of employees are found in a diversity of sources. These include written contracts of employment, industrial instruments such as an award. In addition, there are implied terms of employment, one of which is the employees' duty to obey lawful and reasonable orders given by an employer;

AND WHEREAS the Commission is satisfied that the Public Transport Authority of Western Australia (the PTA) understands its obligation as an employer to act reasonably when making roster changes;

AND WHEREAS the PTA has informed the Commission that it will implement a dispute resolution process that will enable any railcar driver who is of the opinion that a proposed change to their roster will have an unfair effect upon them to have that dispute dealt with promptly. In the event that the dispute is unable to be resolved the matter will be referred to the Commission to determine whether the PTA has acted unreasonably in making, or seeking to make, any change to a person's hours of work;

AND WHEREAS the Commission is satisfied that it is not in the public interest that there be any threat to disrupt the urban rail services during the period leading up to and during the Perth Royal Show and school holidays in late September and early October 2009, the Commission is of the opinion that paragraph (a) of Order 2009 WAIRC 00598 should be varied;

NOW THEREFORE the Commission having heard from the parties and having regard to the public interest and the interests of the parties directly involved and to prevent any further deterioration of industrial relations in respect of the matters in question until they are resolved by conciliation or arbitration, and pursuant to the powers vested in it by s 44(6) of the *Industrial Relations Act 1979* hereby orders that —

1. Order 2009 WAIRC 00598 made on 27 August 2009 be and is hereby varied by deleting paragraph (a) and the following words inserted in lieu thereof:

   (a) the Union by its officers, agents, employees and members (who are railcar drivers) are not to hold a stop work meeting or take other industrial action in relation to the dispute about the arrangements for rostering for a period up to and including Thursday, the 15th day of October 2009.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

2009 WAIRC 00635

DISPUTE RE PUBLIC HOLIDAY ENTITLEMENTS FOR PART TIME EMPLOYEES

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 HEALTH CORPORATE NETWORK
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 3 SEPTEMBER 2009
FILE NO	PSAC 17 OF 2008
CITATION NO.	2009 WAIRC 00635

Result Order issued

Order

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

WHEREAS the Public Service Arbitrator (the Arbitrator) convened a conference for the purpose of conciliation on the 6th day of August 2008; and

WHEREAS on the 7th day of August 2008, the Arbitrator issued a Direction; and

WHEREAS further conferences were convened by the Arbitrator on the 12th day of January 2009, the 27th day of January 2009, the 26th day of February 2009 and the 6th day of August for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the last mentioned conference the parties had reached agreement on the disputed matters; and

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

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

In order to fairly satisfy the provisions of the Health Services Union – WA Health State Industrial Agreement 2008 clause 36(3)(b) - Public Holidays, the following arrangements shall apply to the determination of entitlements to public holidays for employees on rotating rosters from April 2006 to August 2008 inclusive:

1. Full Time Employees

(i) Those employees who are subject to a contract of employment which specifies they work only on specific days of the week and who do not usually work on the day of the week the public holiday has

fallen on shall be subject to the provisions of the Health Services Union – WA Health State Industrial Agreement 2008 subclause 14.9(d) - Personal leave, annual leave and public holidays, which provides:

14.9(d) For the purpose of public holidays a day shall be credited at the standard hours, or rostered ordinary hours, whichever is greater and treated as a work day for the purpose of accumulating rostered days off.

(ii) For those employees who are working fixed duration shifts an ordinary working day is the number of hours in their usual shift. This is clearly reflected in the Health Services Union – WA Health State Industrial Agreement 2008 subclause 14.9(d) - Personal leave, annual leave and public holidays, which provides:

14.9(d) For the purpose of public holidays a day shall be credited at the standard hours, or rostered ordinary hours, whichever is greater and treated as a work day for the purpose of accumulating rostered days off.

(iii) For full time employees who are working shifts of variable length, in either a rotating or fixed roster pattern, the number of hours credited for a public holiday shall be 7.6 hours.

2. Part-time Employees

(i) Part-time employees who are subject to a contract of employment which specifies they work only on specific days of the week and who do not usually work on the day of the week the public holiday has fallen on shall not have an entitlement to be compensated for the particular public holiday.

(ii) For all other part-time employees, the principles associated with part-time employment take effect as per the Health Services Union – WA Health State Industrial Agreement 2008 clause 12. – PART-TIME EMPLOYMENT; which provides for part-time employees to be compensated for public holidays on a pro-rata basis in accordance with subclause 12.3 which provides:

12.3 Part-time employees shall be entitled to the same leave, penalties and other conditions as prescribed in this Agreement for full time employees, with payment being in the proportion to which the employee's weekly hours relate to the weekly hours of an employee engaged full time in that class of work.

3. Date of Effect and Implementation

This order shall take effect from the date of issue, however the parties are agreed that individual employees may seek compensation in retrospect, for public holidays occurring since 1 April 2006 and the employer shall implement the entitlement on a case by case basis.

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

2009 WAIRC 00586

DISPUTE RE FAILURE OF TEACHERS AND ADMINISTRATORS TO DISCHARGE THEIR DUTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 20 AUGUST 2009
FILE NO/S	C 13 OF 2008
CITATION NO.	2009 WAIRC 00586

Result Order issued

Order

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") on 5 May 2008 whereby the applicant sought an urgent conference seeking the Commission's assistance to resolve a dispute between the parties involving the respondent issuing its members a directive to ban teachers and administrators from implementing the National Assessment Program Literacy and Numeracy ("NAPLAN") testing to take place in the week beginning 12 May 2008; and

WHEREAS on 7 and 8 May 2008 the Commission convened conferences for the purpose of conciliating between the parties; and

WHEREAS after hearing from the parties the Commission issued the following orders ("the Order") pursuant to s 44 of the Act on 8 May 2008:

"1. THAT the respondent, its officers, agents, employees and members lift the Directive and cease the foreshadowed industrial action in the form of its members not implementing the NAPLAN testing.

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

3. THAT the respondent, its officers, employees and members are not to engage in any activity to prevent or hinder the implementation of the NAPLAN testing whilst this order remains in force.

4. THAT further discussions are to be held between the parties with a view to resolving the issues in dispute between the parties with respect to NAPLAN testing and a report back conference will be held in the Commission in June 2008 to review the progress of these negotiations.

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

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

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

FURTHER the matter was set down for report back conferences on 30 June 2008 and 30 March 2009 however the conferences were vacated at the request of the parties; and

WHEREAS on 1 July 2009 the applicant requested that the matter be closed given no further issues had arisen in relation to NAPLAN testing since the Order issued; and

WHEREAS on 20 July 2009 the Commission wrote to the parties about closing the file and revoking the Order; and

WHEREAS on 22 July 2009 the applicant advised the Commission that it had no objection to the Order being revoked on the basis that industrial action referred to in the Order did not eventuate and the applicant reiterated its request that the file be closed; and

WHEREAS on 27 July 2009 the respondent advised that it did not oppose the Order being revoked however the respondent requested that the file remain open due to outstanding issues between the parties with respect to NAPLAN testing; and

WHEREAS the Commission having considered the respective positions of the parties and when taking into account equity and good conscience has formed the view that the Order should be revoked as no industrial action has taken place by the respondent and its members since the Order issued and none is foreshadowed; and

FURTHER the Commission is of the view that as this application relates to bans with respect to NAPLAN testing which took place in May 2008 and as this dispute no longer exists then the file should be closed; and

WHEREAS in making this decision the Commission notes that any future disputes the parties may have with respect to NAPLAN testing may be referred to the Commission for conciliation and/or arbitration;

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

1. THAT the Order which issued in this matter dated 8 May 2008 is hereby revoked.

2. THAT this application otherwise be, and is hereby discontinued.

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

2009 WAIRC 00128

DISPUTE RE DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 23 MARCH 2009
FILE NO/S	C 8 OF 2009
CITATION NO.	2009 WAIRC 00128

Result	Order issued
Representation	
Applicant	Mr M Amati
Respondent	Mr R Andretich (of counsel)

Order

WHEREAS on 27 February 2009 the State School Teachers' Union of W.A. (Incorporated) ("the applicant") applied to the Commission for an urgent conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") in relation to the termination of one of its members Ms Catherine Motteram by the Director General, Department of Education and Training ("the respondent"); and

WHEREAS the Commission convened an urgent conference on 3 March 2009 for the purpose of conciliating between the parties, however no agreement was reached; and

WHEREAS as the applicant was seeking interim orders with respect to Ms Motteram's termination the parties were required to file and serve submissions in respect to this application; and

WHEREAS on 5 March 2009 the applicant filed written submissions in the Commission seeking the following interim orders:

1. That Ms Motteram be reinstated on full salary, without loss of entitlements and/or continuity of service, to her teaching position at Atwell College until this application has been fully heard and determined by the Commission.
2. That a (sic) discovery of all documents relied upon and generated by the employer in this matter – be it at the school, District or Departmental level – including but not limited to any statements, letters, minutes, electronic and/or handwritten and/or recorded, including the Respondent's recommendations to dismiss Ms Motteram as presented to the Director General.
3. An interim order for the discovery of all documents relied upon by the employer in this matter, including:
   (a) A complete, unedited copy of the investigation report; including written copies of all statements made by each person interviewed and relied upon by the employer;
   (b) Such statements are to be provided in a written form, *verbatim*, in an (sic) "question-answer" (sic) format, without any editing or any alteration whatsoever, including the electronic compact-disks from which these have been transcribed.
   (c) A full, unedited copy of the entire file – whether it be hard-copy or electronically stored – held in the Standard and Integrity Directorate of the Respondent relating to Ms Motteram.
   (d) A complete copy of Ms Motteram (sic) personal file; and

WHEREAS on 5 March 2009 the applicant made the following submissions in support of its application for the interim orders it was seeking:

- the applicant relies on the tests to be applied as to whether an interim order should issue as set down in *Thomas James Brown v President, State School Teachers Union of WA (Inc) and Others* [1989] 69 WAIG 1390;
- the applicant argues that the Commission has the power to issue the interim orders the applicant is seeking pursuant to s 44 of the Act, in particular, s 44(6)(ba)(i) and s 44(6)(bb)(i) and (ii);
- the applicant maintains that Ms Motteram was harshly, oppressively and unfairly dismissed by the respondent;
- the applicant argues that the respondent failed to take into account the following when deciding to terminate Ms Motteram:
  - Ms Motteram has been employed by the respondent as a teacher for 14 years, she has not been the subject of any alleged misconduct during this period until the current allegation and her talents as a music teacher have been recognised by various school communities during her career with the respondent;
  - Ms Motteram disputed that she had interacted inappropriately with the student the subject of the allegation against her and maintains that her interactions with this student have been consistent with her responsibilities and duties as a teacher;
  - Ms Motteram did not breach any of the respondent's policies or the public sector Code of Conduct or Code of Ethics with respect to her interactions with this student and Ms Motteram's actions therefore did not warrant the respondent losing confidence in her as an employee;
  - Ms Motteram was never directed to stop all of her interactions with the student and she was transparent and open about her interactions with this student;
  - both the investigation and the inquiry reports fail to meet the necessary test of proof on the balance of probabilities and the reports fail to take into account relevant considerations;

- as the investigation and inquiry conducted by the respondent took 16 months this excessive timeframe has disadvantaged Ms Motteram as the evidence relied upon by the respondent to terminate Ms Motteram has become contaminated and is unreliable;
- the applicant disputes that the results of the inquiry substantiates the charge against Ms Motteram;
- the inquirer did not recommend that Ms Motteram's employment be terminated;
- even if Ms Motteram acted inappropriately towards the student the severity of the respondent's actions towards Ms Motteram is inconsistent with Ms Motteram's actions and alternatives to termination were available to the respondent under *Public Sector Management Act 1994* ("the PSM Act");
- as the respondent relied on hearsay information and malicious comments to form the view that Ms Motteram should be terminated the respondent's actions are inconsistent with its mandatory responsibilities under s 8(1)(c) of the PSM Act;
- Ms Motteram has been teaching since the allegations were raised without any issues arising about her behaviour or performance;

- the applicant argues that the respondent's dismissal of Ms Motteram was unlawful in that:
  - the respondent failed to afford her natural justice and procedural fairness and/or to properly and diligently apply the provisions of Part 5, Division 3 of the PSM Act;
  - the respondent did not provide Ms Motteram with a timely and unabridged copy of the investigator's report;
  - the respondent failed to disclose details about the grounds on which it relied to terminate Ms Motteram;
  - the respondent failed to identify the policy or legal basis for terminating Ms Motteram;
  - the inquirer informed himself of matters dealt with by the investigator thereby tainting his inquiry;
- the respondent will not suffer any detriment if the interim orders being sought issue however Ms Motteram will suffer a substantial detriment if the interim orders do not issue as she has extensive financial commitments and she will have difficulty finding a teaching position until the final determination of this matter as the respondent is the largest employer of teachers in Western Australia;
- if the interim orders issue they are not irreversible;
- the application was lodged promptly as it was lodged on the same day that Ms Motteram received the dismissal letter.
- the issuance of the orders is consistent with s 26(1)(a) and (b) and the objects of the Act;
- the orders with respect to discovery are necessary as the investigator's report provided to the applicant does not contain all of the information used to reach the decision to proceed to the charge against Ms Motteram and the applicant is unaware of the nature of the original complaint made against Ms Motteram; and

WHEREAS on 9 March 2009 the respondent made the following submissions in support of its claim that interim orders should not issue:

- Ms Motteram had frequent and inappropriate out of hours contact with the student despite being advised by her Principal in March 2007 to stay within the professional boundaries between a student and teacher with respect to inappropriate contact;
- notwithstanding these concerns being raised with Ms Motteram she made no apparent attempt to reduce the level of her out of hours contact with the student;
- teachers occupy a position of trust and as their ongoing employment is dependent upon public confidence they should therefore not put themselves in a position where suspicions arise as to the propriety of their dealings with students (see *The State School Teachers' Union of W.A. (Incorporated) v Director-General of the Department of Education and Training* (2008) 88 WAIG 2049 at 2060);
- Ms Motteram acted in a way which raised concerns about her relationship with the student not only in the community but amongst her colleagues over a significant period of time;
- the Director General has lost confidence in Ms Motteram's ongoing suitability for employment as a teacher as she did not demonstrate the requisite judgement and appreciation that a teacher must have with respect to his or her conduct with students and where an employer has lost confidence in an employee occupying a position of trust it would not be a proper exercise of the power granted under s 44 of the Act to order re-employment;
- the Director General gave Ms Motteram sufficient reasons for her termination in her letter dated 8 January 2009;
- the interim orders sought are unnecessary to prevent the deterioration of industrial relations between the parties nor are they necessary to enable conciliation or arbitration to determine the dispute as this can occur independently of interim orders being made;
- Ms Motteram's behaviour is incompatible with her ongoing employment as a teacher and as such constitutes misconduct under s 80 of the PSM Act; and

WHEREAS the Commission is of the view that the matter before it is an industrial matter as it relates to Ms Motteram's rights as an employee; and

WHEREAS the Commission is of the view that it has jurisdiction to issue an interim order to reinstate Ms Motteram pursuant to s 44(6) of the Act in particular under s44(6)(ba)(ii) and s 44(6)(bb)(i) and (ii) which enables the Commission to issue orders which the Commission is otherwise authorised to make under this Act in relation to an industrial matter and in the case of a claim of harsh, oppressive or unfair dismissal make any interim order the Commission thinks appropriate pending resolution of the claim; and

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

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

> "It seems to me that the principles which apply to the granting of interim injunction proceedings are most applicable here, with such modifications as this jurisdiction requires.
>
> The applicant must therefore establish: –
>
> (a) That as a matter of discretion, it is just and correct for me to make the order in all the circumstances.
>
> (b) That, in fact, there is a substantial matter to be tried.
>
> (c) That the plaintiff has a *prima facie* case for relief if the evidence on which the order is made is accepted at trial.
>
> In addition, the Commission must consider: –
>
> (a) The damage which may be done to the respondent by granting the order as against the damage to the applicant if it is not granted.
>
> (b) Any irreversible consequences of the granting of the order.
>
> (c) The promptness or otherwise of the application.
>
> (d) Any other relevant consideration."; and

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

WHEREAS after considering the arguments put by both parties the Commission has formed the view that it is just that an interim reinstatement order and orders for discovery should issue based on the following preliminary views:

1. On the information currently before me it is my view that the applicant has demonstrated that there may be substantial issues to be tried in relation to Ms Motteram's termination with respect to the merits of this case and the manner of the investigation and inquiry and there is a *prima facie* case for relief if the applicant can demonstrate its case at hearing;
2. In issuing an interim reinstatement order I also take into account the applicant's submissions that prior to the respondent's investigation and inquiry into Ms Motteram's actions she has not been subject to any other disciplinary proceedings and since leaving North Albany Senior High School no other issues have been raised about her behaviour or performance. Additionally, Ms Motteram has been highly regarded as a music teacher at schools where she has previously worked;
3. I find that the balance of convenience in relation to whether or not the interim orders sought should issue lies with the applicant in this instance as I accept that Ms Motteram will have difficulty obtaining alternative employment and I accept that Ms Motteram will continue to suffer a financial detriment if an interim reinstatement order does not issue;
4. I find that the issuance of a reinstatement order pending the issue of Ms Motteram's ongoing employment with the respondent being dealt with is not irreversible and I accept that this application was lodged expeditiously as it was lodged on the same day Ms Motteram received her letter of termination;
5. In my view the discovery orders being sought should issue, in part, as the applicant and Ms Motteram have not had the benefit of all of the information used by the respondent to form the view that Ms Motteram be terminated; and

WHEREAS in the circumstances I will issue an interim order reinstating Ms Motteram to her former position with the respondent as a teacher on an interim basis to undertake the same duties as those that she was undertaking prior to her termination pending the issue of her termination being heard and determined and I will issue orders with respect to discovery;

NOW THEREFORE having heard Mr M Amati by way of written submissions on behalf of the applicant and Mr R Andretich of counsel 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* hereby orders:

1. THAT Ms Catherine Motteram be reinstated on full salary, without any loss of pay, entitlements and/or continuity of service, to a teaching position undertaking her normal duties at a school to be agreed between the parties until this application has been heard and determined by the Commission.

2. THAT discovery of all documents relied upon and generated by the respondent with respect to this matter, including but not limited to any statements, letters, minutes, electronic and/or handwritten and/or recorded information which have not already been provided to the applicant and Ms Motteram, be made by the respondent to the applicant within 14 days of the date of this order.

3. THAT a complete unedited copy of the investigation report including written copies of all statements made by persons interviewed, and the electronic compact-disks from which these statements have been transcribed, be discovered by the respondent to the applicant within 14 days of the date of this order.

4. THAT liberty to apply be granted to the parties in relation to Orders 1 to 3.

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

2009 WAIRC 00590

DISPUTE RE DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 AUGUST 2009
FILE NO/S	C 8 OF 2009
CITATION NO.	2009 WAIRC 00590
Result	Order issued

Order

WHEREAS on 27 February 2009 the State School Teachers' Union of W.A. (Incorporated) ("the applicant") applied to the Commission for an urgent conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") in relation to the termination of one of its members Ms Catherine Motteram by the Director General, Department of Education and Training ("the respondent"); and

WHEREAS the Commission convened an urgent conference on 3 March 2009 for the purpose of conciliating between the parties, however, no agreement was reached; and

WHEREAS as the applicant was seeking interim orders with respect to Ms Motteram's termination the parties were required to file and serve submissions in respect to this application; and

WHEREAS after considering the submissions of both parties the Commission issued the following orders ("the Order") pursuant to s 44 of the Act on 23 March 2009:

"1. THAT Ms Catherine Motteram be reinstated on full salary, without any loss of pay, entitlements and/or continuity of service, to a teaching position undertaking her normal duties at a school to be agreed between the parties until this application has been heard and determined by the Commission.

2. THAT discovery of all documents relied upon and generated by the respondent with respect to this matter, including but not limited to any statements, letters, minutes, electronic and/or handwritten and/or recorded information which have not already been provided to the applicant and Ms Motteram, be made by the respondent to the applicant within 14 days of the date of this order.

3. THAT a complete unedited copy of the investigation report including written copies of all statements made by persons interviewed, and the electronic compact-disks from which these statements have been transcribed, be discovered by the respondent to the applicant within 14 days of the date of this order.

4. THAT liberty to apply be granted to the parties in relation to Orders 1 to 3."; and

WHEREAS on 19 May 2009 the matter was referred for hearing and determination; and

WHEREAS on 15 June 2009 the applicant advised the Commission that the parties had reached a settlement with respect to the matter and requested that the Order remain in place pending the finalisation of the settlement; and

WHEREAS on 24 June 2009 the applicant sought leave to discontinue application CR 8 of 2009; and

WHEREAS on 20 July 2009 the Commission wrote to the applicant seeking its views about the interim order; and

WHEREAS on 21 July 2009 the applicant advised that it did not object to the Order being rescinded; and

WHEREAS on 30 July 2009 the respondent advised that it had no issue with the Order being revoked; and

WHEREAS the Commission is of the view that as the parties have resolved the issues in dispute the Order which issued on 23 March 2009 should be revoked;

NOW THEREFORE having heard Mr M Amati on behalf of the applicant and Mr R Andretich on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Order which issued in this matter dated 23 March 2009 is hereby revoked.

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

2009 WAIRC 00639

DISPUTE RE IMPLEMENTATION OF INDEPENDENT PUBLIC SCHOOLS PROGRAM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 4 SEPTEMBER 2009
FILE NO/S	C 27 OF 2009
CITATION NO.	2009 WAIRC 00639

Result	Application for interim orders dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr R Andretich (of Counsel)

Order

WHEREAS this application was lodged pursuant to s 44 of the *Industrial Relations Act, 1979* ("the Act") on 25 August 2009 whereby the State School Teachers' Union of W.A. (Incorporated) ("the applicant") sought the Commission's assistance to resolve a dispute between the parties with respect to a decision by the Director General, Department of Education and Training ("the respondent") to introduce major changes in a number of public schools that are likely to have significant effects on the employment conditions of the applicant's members; and

FURTHER the dispute relates to the respondent implementing its Independent Public Schools Program ("IPSP"); and

WHEREAS after a conference was held on 31 August 2009 the parties met on two occasions to discuss the IPSP and a further report back conference was held in the Commission on 3 September 2009; and

WHEREAS following this conference the parties were given time to hold further discussions about the issues in dispute and to exchange documentation relevant to the IPSP; and

WHEREAS on 4 September 2009 the applicant advised the Commission that as it needed further time to discuss the industrial impact of the implementation of the IPSP on its members with the respondent it was seeking the following interim orders prior to the substantive issue of the determination of industrial codes and consultative processes relevant to the impact of the IPSP:

1. That the timelines for consultation and deadline for election by schools to express an interest in becoming an Independent Public School be extended to the end of Term 4, 2009;
2. That the commencement of the implementation of Independent Public Schools be postponed to the end of Term 4, 2010; and

WHEREAS on 4 September 2009 the Commission convened a conference to hear from the parties with respect to whether or not the interim orders being sought by the applicant should issue; and

WHEREAS at this conference the Commission was advised by the parties that the IPSP was announced by the Government on 12 August 2009 and schools were given until 7 September 2009 to express interest in taking part in the IPSP; and

WHEREAS the IPSP is to commence in up to 30 schools in Term 1, 2010; and

WHEREAS documentation prepared by the respondent about the IPSP confirms that over time all schools will be given the opportunity to become an Independent Public School ("IPS"); and

WHEREAS at the conference the applicant argued the following in support of its application for the interim orders it was seeking:

- the applicant relies on the principles set out in *Thomas Brown v President, State School Teachers Union of WA (Inc) and Others* (1989) 69 WAIG 1390 in support of its application that the interim orders issue;
- the applicant and its members have not been adequately consulted about the details of the IPSP and the industrial ramifications of this policy and the applicant's members have not had the opportunity to properly consider the nature of the IPSP and its impact on their working conditions prior to nominating for the IPSP on 7 September 2009;
- the applicant has not been provided with any meaningful details about the IPSP and there has been no consultative process between the applicant and the respondent inconsistent with Clause 60. – Notification of Change of the *Teachers (Public Sector Primary and Secondary Education) Award 1998 (No T A 1 of 1992)*;
- on the limited information before it the applicant has concerns about a range of industrial matters including:
  - changes to the conditions of employment of those teachers employed at an IPS;
  - the escalation of administrators' workloads given the numerous functions that are envisaged to be devolved to an IPS;
  - the role of school councils in the appointment of the Principal at an IPS;
  - the impact on teachers being able to transfer to a non-IPS;
  - the status of employees made redundant by an IPS or who choose to become redeployees of an IPS;
  - how disciplinary processes will apply to employees working at an IPS;
  - the impact of the IPSP on staff at remote schools; and

WHEREAS the applicant argues that there is a substantial issue to be tried given the significant and possible detrimental impact of the IPSP on the conditions of employment of teachers and administrators, the balance of convenience lies with the applicant as a result of the numerous changes proposed under the IPSP and the potential damage to employees if the IPSP is implemented with undue haste, the applicant maintains that further time for consultation will benefit both parties, the interim orders sought are not irreversible and this application was lodged promptly; and

WHEREAS the respondent argues that it is unreasonable to issue the interim orders being sought and delay the implementation of the IPSP as this program was endorsed by the electorate in 2008 and the Government therefore has a mandate to implement the IPSP; and

WHEREAS the respondent maintains that as it has instituted an ongoing working document which addresses the applicant's concerns about the IPSP and as it has undertaken to meet regularly on an ongoing basis with the applicant about its concerns with respect to the implementation of the IPSP, with the Director General being available when necessary to attend these discussions, it is therefore unnecessary to delay the implementation of the IPSP; and

WHEREAS the respondent argues that the impact on the conditions of employment of the applicant's members as a result of the implementation of the IPSP will be minimal; and

WHEREAS the respondent argues that as the respondent has committed to meaningful and regular negotiations with the applicant then the balance of convenience lies with the respondent and the respond argues that the applicant and its members will not be prejudiced if the IPSP goes ahead as planned as any issues unable to be resolved between the parties through negotiation can be brought before the Commission for conciliation and/or arbitration; and

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

WHEREAS the Commission is of the view that it has jurisdiction to issue the interim orders sought pursuant to s 44(6) of the Act in particular s44(6)(ba)(ii) and s 44(6)(bb)(i); and

WHEREAS the Commission is of the view that it is appropriate to take into account relevant objects of the Act, s 26 of the Act and the principles set out in *Thomas Brown v President, State School Teachers Union of WA (Inc) and Others* (op cit) when considering an application for interim relief; and

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

> "It seems to me that the principles which apply to the granting of interim injunction proceeding are most applicable here, with such modifications as this jurisdiction requires.
>
> The applicant must therefore establish: –
>
> (a) That as a matter of discretion, it is just and correct for me to make the order in all the circumstances.
>
> (b) That, in fact, there is a substantial matter to be tried.
>
> (c) That the plaintiff has a prima facie case for relief if the evidence on which the order is made is accepted at trial.

In addition, the Commission must consider: –

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

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

(c) The promptness or otherwise of the application.

(d) Any other relevant consideration."; and

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

WHEREAS having heard from the applicant and the respondent and having weighed up the varying contentions of the parties and when taking into account equity and fairness and the substantial merits of this case and the objects of the Act the Commission has formed the view that the interim orders being sought by the applicant should not issue; and

WHEREAS the Commission has formed this view based on the following considerations:

- the respondent has in place an ongoing working document which clarifies a range of issues and concerns already raised by the applicant with respect to the IPSP;
- the respondent has committed to hold meaningful and regular negotiations with the applicant to discuss issues relevant to the implementation of the IPSP and its impact on the applicant's members;
- if these negotiations reach an impasse either party can bring relevant matters before the Commission for conciliation and/or arbitration;
- the applicant can seek an order to delay the implementation of the IPSP at a later date if it can demonstrate to the Commission that it is appropriate to do so;

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

THAT the applicant's application for an interim order be and is hereby dismissed.

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

CONFERENCES—Matters referred—

2009 WAIRC 00582

ALLEGED UNFAIR DISMISSAL OF A UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN LIQUOR, HOSPITALITY AND MISCELLANEOUS WORKERS UNION, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	CUDDLES GROUP
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 19 AUGUST 2009
FILE NO/S	CR 161 OF 2004
CITATION NO.	2009 WAIRC 00582
Result	Discontinued

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission listed the matter for hearing and determination on 8 July 2005; and

WHEREAS on 22 June 2005 the applicant advised the Commission that the parties had reached an in principle agreement in respect of the matter and on 27 June 2005 the hearing was vacated and the matter adjourned sine die; and

WHEREAS the Commission contacted the applicant on numerous occasions about the status of the settlement of the matter; and

WHEREAS as the applicant did not respond to correspondence sent by the Commission on 23 September 2008 the matter was listed for a show cause hearing on 27 October 2008; and

WHEREAS at the hearing on 27 October 2008 the Commission agreed to adjourn the matter for six months to allow the applicant further time to pursue the payment of the settlement monies; and

WHEREAS on 11 May 2009 the Commission wrote to applicant seeking advice about the status of the matter however the applicant did not respond; and

WHEREAS the Commission listed the matter for mention on 14 August 2009; and

WHEREAS on 14 August 2009 prior to the hearing commencing the applicant advised the Commission that it was seeking leave to discontinue the application and the hearing was vacated; and

WHEREAS the Commission has formed the view that in the circumstances it is appropriate to issue an order to discontinue the application;

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

2009 WAIRC 00591

DISPUTE RE DISMISSAL OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 AUGUST 2009
FILE NO/S	CR 8 OF 2009
CITATION NO.	2009 WAIRC 00591
Result	Order issued

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission listed the matter for hearing and determination on 6, 7, 9 and 10 July 2009; and

WHEREAS on 15 June 2009 the applicant advised the Commission that the parties had reached a settlement with respect to the matter; and

WHEREAS on 24 June 2009 the applicant sought leave to discontinue the matter and the hearing was vacated; and

WHEREAS the respondent consented to the matter being discontinued;

NOW THEREFORE pursuant to the powers vested in it by the *Industrial Relations Act, 1979*, the Commission, hereby orders:

THAT the application be, and is hereby, discontinued.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Cuddles Group Pty Ltd	Harrison C	C 177/2004	14/10/2004 4/02/2005 27/10/2008	Dismissal of a Union Member	Discontinued
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Cuddles Group	Harrison C	C 176/2004	14/10/2004 4/02/2005 27/10/2008	Dismissal of a Union Member	Discontinued
Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch	Cuddles Group	Harrison C	C 161/2004	30/08/2004	unfair dismissal of a union member	Concluded
Commissioner, Department of Corrective Services	The Civil Service Association of Western Australia Incorporated	Harrison C	PSAC 25/2007	13/08/2007 30/08/2007 17/09/2007 19/10/2007 2/11/2007 12/11/2007 14/11/2007 15/11/2007 30/11/2007 3/12/2007 4/12/2007 6/12/2007 10/12/2007 14/01/2008 18/02/2008 12/03/2008 28/03/2008	Dispute in relation to the workload of Community Corrections Officers and Juvenile Justice Officers	Referred
Liquor, Hospitality and Miscellaneous Union WA Branch	Australind Primary School Parents & Citizens Association Inc.	Harrison C	C 42/2008	23/12/2008 30/01/2009	Dispute re impending termination of union member	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Department of Education and Training	Wood C	C 23/2009	N/A	Dispute re possible dismissal of union members on fixed contract	Withdrawn
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority	Smith SC	C 2/2009	16/01/2009	Dispute re discipline of a union member	Concluded
The Civil Service Association of Western Australia Incorporated	Director General, Disability Services Commission	Wood C	PSAC 20/2009	N/A	Dispute re suspension without pay of union member.	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, Department of Education and Training	Harrison C	C 8/2009	3/03/2009	Dispute re dismissal of union member	Discontinued
The State School Teachers' Union of Western Australia (Inc)	Director-General of the Department of Education and Training	Harrison C	C 5/2009	13/02/2009 26/02/2009	Dispute re termination of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2009 WAIRC 00589

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN PATRICK GALEA
	APPLICANT
	-v-
	SHIRE OF RAVENSTHORPE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 AUGUST 2009
FILE NO/S	U 175 OF 2008
CITATION NO.	2009 WAIRC 00589

Result	Order issued
Representation	
Applicant	Mr J Hodgkinson (of Counsel)
Respondent	Mr S White (as Agent)

Order

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

WHEREAS the matter was set down for hearing on 19 March 2009 as to whether the application should be accepted out of time and whether the respondent was a constitutional corporation; and

WHEREAS after hearing from the parties, on 17 July 2009 the Commission issued an order accepting the application out of time and declaring that the during the time the applicant was employed by the respondent, the respondent was not a trading corporation; and

WHEREAS on 24 July 2009 the Commission wrote to the parties about setting down a programming conference in relation to the hearing of the substantive matter; and

WHEREAS on 24 July 2009 the respondent's representative advised the Commission that an appeal was to be lodged against the Commission's decision that issued on 17 July 2009 and an appeal against the Commissioner's decision that the respondent was not a constitutional corporation was lodged on 5 August 2009; and

WHEREAS on 14 August 2009 the respondent requested that the Commission adjourn this application pending the determination of the appeal to the Full Bench; and

FURTHER the respondent sought an adjournment on the basis of the cost and inconvenience to both parties in proceeding with the substantive hearing which may be invalidated by the Full Bench; and

WHEREAS on 14 August 2009 the applicant's representative advised the Commission that the applicant wanted his application to proceed as soon as practicable but would leave the decision about adjourning the matter to the Commission's discretion; and

WHEREAS the Commission having considered the respective positions of the parties in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19) and when taking into account equity and fairness is of the view that the matter should be adjourned pending the hearing and determination of application FBA 6 of 2009; and

WHEREAS the Commission accepts that the respondent will suffer some prejudice if its appeal to the Full Bench is successful if the hearing in relation to the substantive application is held in the interim; and

WHEREAS the Commission is also of the view that the applicant has not highlighted any significant disadvantage he will suffer if the adjournment is granted;

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

THAT the hearing and determination of application U 175 of 2008 be and is hereby adjourned pending the hearing and determination of application FBA 6 of 2009, or until further order.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2003 WAIRC 10029

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP JOHN JONES
	APPLICANT
	-v-
	YDALIA HOLDINGS WA PTY LTD T/A DARLING EARTH MOVERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 13 NOVEMBER 2003
FILE NO	APPLICATION 94 OF 2003
CITATION NO.	2003 WAIRC 10029
Result	Order issued
Representation	
Applicant	Mr K Trainer as agent
Respondent	Ms K O'Neill as agent

Order

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

(1) THAT until further order the herein application be and is hereby stayed.

(2) THAT the hearing date of 23 October 2003 be and is hereby vacated.

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

2003 WAIRC 09382

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLIFFORD JOHN BAKER
	APPLICANT
	-v-
	GOLDFIELDS CONTRACTORS WA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 SEPTEMBER 2003
FILE NO/S	APPLICATION 903 OF 2003
CITATION NO.	2003 WAIRC 09382
Result	Order issued
Representation	
Applicant	Mr C Baker on his own behalf
Respondent	Mr F Gaffney of counsel

Order

HAVING heard Mr C Baker on his own behalf and Mr F Gaffney of counsel on behalf of the administrator appointed by the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

2003 WAIRC 09385

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDGAR WILLIAMS
	APPLICANT
	-v-
	ST BARBARA MINES LIMITED ACN 009 165 066
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 16 SEPTEMBER 2003
FILE NO	APPLICATION 1219 OF 2003
CITATION NO.	2003 WAIRC 09385
Result	Order issued
Representation	
Applicant	Mr E Williams on his own behalf
Respondent	Ms K Taylor as agent

Order

HAVING heard Mr E Williams on his own behalf and Ms K Taylor 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 until further order the Commission refrains from hearing the herein application.

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

2004 WAIRC 10764

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLEN LESLIE BAKER
	APPLICANT
	-v-
	CROSSPOINT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 24 FEBRUARY 2004
FILE NO/S	APPLICATION 1470 OF 2003
CITATION NO.	2004 WAIRC 10764
Result	Direction issued
Representation	
Applicant	Mr B Richardson of counsel
Respondent	Mr S Bonni of counsel

Direction

HAVING heard Mr B Richardson of counsel on behalf of the applicant and Mr S Bonni 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 shall file and serve upon the respondent further and better particulars of notice of application by no later than 26 March 2004.
2. THAT the respondent shall file and serve upon the applicant further and better particulars of notice of answer by no later than 23 April 2004.
3. THAT each party shall give an informal discovery by serving its list of documents by 21 May 2004.
4. THAT inspection of documents shall be completed no later than 21 days prior to the date of hearing.

5. THAT the matter be listed for hearing for two days.
6. THAT the parties have liberty to apply on short notice.

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

2004 WAIRC 12177

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALLEN LESLIE BAKER
	APPLICANT
	-v-
	CROSSPOINT PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 2 AUGUST 2004
FILE NO/S	APPLICATION 1470 OF 2003
CITATION NO.	2004 WAIRC 12177
Result	Order issued
Representation	
Applicant	Mr R Clohessy as agent
Respondent	Mr W Turly for the appointed liquidator

Order

HAVING heard Mr R Clohessy as agent on behalf of the applicant and Mr W Turly on behalf of the liquidator appointed to wind up the respondent in insolvency, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT until further order the herein application be and is hereby stayed.

(2) THAT the hearing dates of 28 and 29 July 2004 be and are hereby vacated.

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

2004 WAIRC 11826

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHARON MARGUERITE THOMAS
	APPLICANT
	-v-
	CONSOLIDATED BUSINESS MEDIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 25 JUNE 2004
FILE NO/S	APPLICATION 1722 OF 2003
CITATION NO.	2004 WAIRC 11826
Result	Application stayed
Representation	
Applicant	Mr G Newton as agent
Respondent	No appearance

Order

HAVING heard Mr G Newton as agent on behalf of the applicant and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT until further order the herein application be and is hereby stayed.

(2) THAT the hearing date of 26 July 2004 be and is hereby vacated.

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

2005 WAIRC 03306

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIELLA CANDIDA FAHEY
	APPLICANT
	-v-
	BLUEJACS MANDURAH OF ROSEMOUNT HOLDINGS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 13 DECEMBER 2005
FILE NO/S	APPL 100 OF 2005
CITATION NO.	2005 WAIRC 03306

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Ms D Fahey on her own behalf and there being no appearance on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT until further order the herein application be and is hereby stayed.

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

2009 WAIRC 00592

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIE-HELENE MALLET
	APPLICANT
	-v-
	DEPT. OF CONSUMER & EMPLOYMENT PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER P E SCOTT
DATE	FRIDAY, 21 AUGUST 2009
FILE NO.	PSA 7 OF 2007
CITATION NO.	2009 WAIRC 00592

Result	Direction Issued

Direction

WHEREAS this is an application in which the applicant challenges the respondent's decision to refuse to reclassify the position she occupied; and

WHEREAS on Thursday the 20th day of August 2009 the Public Service Arbitrator convened a conference for the purposes of scheduling the hearing; and

WHEREAS at the conference the Public Service Arbitrator issued directions;

NOW THEREFORE the Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs that:

1. By the 10th day of September 2009, the applicant is to file and serve upon the respondent a Statement of Evidence attaching all documents to be relied upon at the hearing.
2. By the 1st day of October 2009 the respondent is to file and serve upon the applicant a Response to the Statement of Evidence attaching all documents to be relied upon at the hearing.
3. The matter is to be listed for hearing during the second half of the week commencing 12 October 2009 or in the week commencing 19 October 2009, such hearing to take no more than 2 hours.
4. Within seven (7) days of the 20th day of August 2009 the applicant is to inform the Commission of her representative's name, contact details and unavailable dates for the hearing during the period specified in Direction 3.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Christ Church Grammar School Inc (Enterprise Bargaining) Agreement 2009 AG 39/2009	31/08/2009	The Independent Education Union of Western Australia, Union of Employees, Christ Church Grammar School (Inc),	(Not applicable)	Commissioner S M Mayman	Agreement registered
Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary / LHMU Non - Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 11/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary	Commissioner S J Kenner	Agreement registered
Congregation of the Presentation Sisters / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 25/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Congregation of the Presentation Sisters	Commissioner S J Kenner	Agreement registered
Department of Environment and Conservation Common Fire Service Provisions Agreement 2009 [Registered 27 August 2009] PSAAG 2/2009	3/09/2009	The Civil Service Association of Western Australia Incorporated	Director General, Department of Environment and Conservation and Liquor, Hospitality and Miscellaneous Union	Commissioner P E Scott	Agreement Registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Edmund Rice Education Australia / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 15/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Edmund Rice Education Australia	Commissioner S J Kenner	Agreement registered
Institute of the Blessed Virgin Mary / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 20/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Institute of the Blessed Virgin Mary	Commissioner S J Kenner	Agreement registered
John XXIII College Council / LHMU Non - Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 19/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	John XXIII College Council	Commissioner S J Kenner	Agreement registered
Norbertine Canons / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 23/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Norbertine Canons	Commissioner S J Kenner	Agreement registered
Office of the Auditor General Agency Specific Agreement 2009 PSAAG 8/2009	20/08/2009	The Auditor General, Office of the Auditor General	Civil Service Association of Western Australia Incorporated	Commissioner S Wood	Agreement registered
Rangers (National Parks) General Agreement 2009 [Registered 27 August 2009] AG 29/2009	3/09/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Department of Environment and Conservation	Commissioner P E Scott	Agreement Registered
Roman Catholic Archbishop of Bunbury / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 24/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Roman Catholic Bishop of Bunbury	Commissioner S J Kenner	Agreement registered
Roman Catholic Archbishop of Perth / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 21/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Roman Catholic Archbishop of Perth	Commissioner S J Kenner	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2009 - The AG 37/2009	14/08/2009	The Independent Education Union of Western Australia, Union of Employees, Roman Catholic Archbishop of Perth	(Not applicable)	Commissioner S J Kenner	Agreement registered
Roman Catholic Bishop of Broome / LHMU Non - Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 17/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Roman Catholic Bishop of Broome	Commissioner S J Kenner	Agreement registered
Roman Catholic Bishop of Geraldton / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 22/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Roman Catholic Bishop of Geraldton	Commissioner S J Kenner	Agreement registered
Servite College Council / LHMU Non - Teaching Staff Enterprise Bargaining Agreement 2009 - The AG 13/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Servite College Council	Commissioner S J Kenner	Agreement registered
Sisters of Mercy Perth (Amalgamated) / LHMU Non-Teaching Staff Enterprise Bargaining Agreement 2009 - The AG 14/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Sisters of Mercy Perth (Amalgamated) Ltd	Commissioner S J Kenner	Agreement registered
Sisters of Mercy West Perth Congregation / LHMU Non-Teaching Staff Enterprise Bargaining Agreement 2009 - The AG 12/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Sisters of Mercy West Perth Congregation	Commissioner S J Kenner	Agreement registered
Sisters of The Holy Family of Nazareth / LHMU Non-Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 18/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Sisters of the Holy Family of Nazareth	Commissioner S J Kenner	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Telethon Speech & Hearing Centre (Enterprise Bargaining) Agreement 2009 - The AG 40/2009	31/08/2009	The Independent Education Union of Western Australia, Union of Employees, The Telethon Speech & Hearing Centre for Children WA (Inc), Liquor, Hospitality and Miscellaneous Union, Western Australian Br	(Not applicable)	Commissioner S M Mayman	Agreement registered
Trustees of the Marist Brothers Southern Province / LHMU Non - Teaching Staff Enterprise Bargaining Agreement, 2009 - The AG 16/2009	11/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Trustees of Marist Brothers Southern Province	Commissioner S J Kenner	Agreement registered
Waikiki Private Hospital and LHMU Industrial Agreement 2009 AG 27/2009	13/08/2009	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Waikiki Private Hospital	Commissioner S Wood	Agreement Registered
Western Australia Police Industrial Agreement 2009 PSAAG 7/2009	13/08/2009	The Commissioner of Police	The Western Australian Police Union of Workers	Commissioner P E Scott	Agreement Registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2008 WAIRC 01756

APPLICATION FOR ENTERPRISE ORDER PURSUANT TO S.42I OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING AND OTHERS

APPLICANT

-v-

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

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE TUESDAY, 23 DECEMBER 2008

FILE NO/S APPL 18 OF 2008

CITATION NO. 2008 WAIRC 01756

Result Order issued

Representation

Applicant Mr D Matthews (of Counsel)

Respondent Mr S Millman (of Counsel)

Order

WHEREAS on 24 July 2008 the Director General, Department of Education and Training and a number of Managing Directors of TAFEs ("the applicants") lodged an application for an enterprise order under s 42I(1) of the *Industrial Relations Act, 1979* and on 5 September 2008 the State School Teachers' Union of W.A. (Incorporated) ("the respondent") lodged a Notice of Answer and Counter-proposal with respect to the proposed enterprise order; and

WHEREAS a directions conference was held on 31 July 2008 with respect to this application and the matter was set down for hearing on 13 to 17, 20 to 24 and 27 to 31 October 2008 inclusive; and

FURTHER by letter dated 5 August 2008 the parties were given directions in respect to the hearing of the matter which included an opportunity for either party to apply to vary the directions; and

WHEREAS on 29 August 2008 the respondent made an application for liberty to apply with respect to the directions that issued on 5 August 2008; and

WHEREAS on 8 September 2008 the Commission convened a conference for the purpose of dealing with the respondent's request to vary the directions; and

WHEREAS at the conference on 8 September 2008 the respondent argued that the hearing be adjourned until February 2009 so that the respondent could adequately prepare for the hearing given the range and complexity of the matters to be heard and determined and requested that the directions to apply to the parties be altered accordingly; and

FURTHER the respondent requested that its application for an interim order as set out in its Notice of Answer and Counter-proposal lodged in the Commission on 5 September 2008 be dealt with in September 2008 prior to the substantive matter being heard; and

WHEREAS the applicants argued that in their view nothing had changed since the Commission issued its directions on 5 August 2008 however if there was to be a change to the hearing dates the hearing should take place in November 2008; and

WHEREAS after hearing from the parties the Commission advised the parties that given the respondent's limited access to its members since the directions issued and the difficulties faced by both parties if this matter was listed in December 2008 and January 2009 the hearing dates in October 2008 would, albeit reluctantly, be vacated and the matter listed in February 2009; and

WHEREAS the applicants were given until the close of business 10 September 2008 to consider the draft timetable proposed by the respondent; and

WHEREAS on 10 September 2008 the applicants proposed a change to the date of filing submissions prior to the hearing; and

WHEREAS after considering the submissions of the parties and taking into account equity and fairness and the substantial merits of the case, and the objects of the Act, on 11 September 2008 the Commission issued orders with respect to this matter; and

WHEREAS the orders contained a provision that the matter would be set down for hearing on 2 to 6, 9 to 13 and 16 to 20 February 2009, and 9 to 11 March 2009 inclusive for closing submissions; and

FURTHER the orders contained provisions in respect to the hearing of the matter which included an opportunity for either party to apply to vary the orders; and

WHEREAS by letter dated 7 November 2008 received in the Commission on 10 November 2008 the respondent advised the Commission that the parties had recently re-commenced negotiations and to facilitate these discussions the parties were seeking to vary the orders that issued on 11 September 2008; and

WHEREAS on 11 November 2008 the Commission convened a conference for the purpose of dealing with the request to vary the orders; and

WHEREAS at the conference the parties confirmed that negotiations between the parties had re-commenced and that the revised programming and hearing dates were agreed to by both parties; and

WHEREAS the parties were advised that the Commission was satisfied that the hearing of this application should be delayed to facilitate negotiations between the parties; and

WHEREAS on 13 November 2008 the Commission issued orders with respect to this matter; and

WHEREAS the orders contained a provision that the matter would be set down for hearing on 9 to 13, 16 to 20 and 23 to 27 February 2009, and 9 to 11 March 2009 for closing submissions.; and

FURTHER the orders contained provisions in respect to the hearing of the matter which included an opportunity for either party to apply to vary the orders; and

WHEREAS on 18 December 2008 the applicants' representative advised the Commission that the parties had reached an in-principle agreement in respect to an industrial agreement which, subject to the agreement of the respondent's members, may result in this application not proceeding to hearing; and

FURTHER the applicants' representative requested a directions hearing be set down to seek a review of the orders that issued on 13 November 2008; and

WHEREAS on 22 December 2008 the Commission convened a conference; and

WHEREAS at the conference the parties confirmed that they had reached an in-principle agreement which had been endorsed by the respondent's executive, this package would be voted on by the respondent's members and the result would be know by 10 March 2009 and the parties were therefore seeking the revocation of the orders that issued on 13 November 2008; and

WHEREAS the parties were advised that in the circumstances the Commission was satisfied that the hearing dates with respect to this application and the associated programming orders should be revoked given an in-principle agreement had been reached between the parties and the respondent's members needed time to review and vote on the proposed agreement;

NOW THEREFORE having heard Mr D Matthews (of Counsel) on behalf of the applicants and Mr S Millman (of Counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:

1. THAT the Commission's orders that issued on 13 November 2008 be revoked.
2. THAT the hearing dates of 9 to 13, 16 to 20 and 23 to 27 February 2009, and 9 to 11 March 2009 inclusive be vacated.
3. THAT a programming conference with respect to this application be listed after 10 March 2009.

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

2009 WAIRC 00588

APPLICATION FOR ENTERPRISE ORDER PURSUANT TO S.42I OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION AND TRAINING AND OTHERS
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 21 AUGUST 2009
FILE NO/S	APPL 18 OF 2008
CITATION NO.	2009 WAIRC 00588

Result	Discontinued
Representation	
Applicant	Mr D Matthews (of Counsel) and Mr P Wishart
Respondent	Mr S Millman (of Counsel)

Order

WHEREAS on 7 December 2007 the State School Teachers' Union of WA (Incorporated) ("the respondent") lodged a Notice to Initiate Bargaining with the Director General, Department of Education and Training and a number of Governing Councils of TAFE ("the applicants") to negotiate on an industrial agreement under s 42 of the *Industrial Relations Act 1979* ("the Act") for TAFE Lecturers employed in all TAFE Colleges in Western Australia; and

WHEREAS negotiations for an industrial agreement were unsuccessful; and

WHEREAS on 3 July 2008 after hearing from the parties the Commission issued a declaration that bargaining between the applicants and the respondent had ended; and

WHEREAS on 24 July 2008 the applicants lodged an application for an Enterprise Order under s 42I(1) of the Act and this application was listed for hearing on 13 to 17, 20 to 24 and 27 to 31 October 2008; and

WHEREAS on 5 September 2008 the respondent lodged a Notice of Answer and Counter-proposal containing two Enterprise Orders in satisfaction of the dispute between the parties; and

WHEREAS on 11 September 2008 after hearing from the parties the Commission issued an order adjourning the hearing to 2 to 6, 9 to 13 and 16 to 20 February 2009 inclusive and 9 to 11 March 2009; and

FURTHER the respondent's application for the making of an Interim Order in the form of Attachment A to its Notice of Answer and Counter-proposal lodged in the Commission on 5 September 2008 was listed for hearing on 24 September 2008; and

WHEREAS on 21 October 2008 the Commission dismissed the respondent's application for an Interim Order; and

WHEREAS on 10 November 2008 the respondent advised the Commission that the parties had re-commenced negotiations and to facilitate these discussions the parties were seeking to vary the orders that issued on 11 September 2008; and

WHEREAS after hearing from the parties, on 13 November 2008 the Commission issued orders with respect to this matter confirming that the matter would be set down for hearing on 9 to 13, 16 to 20 and 23 to 27 February 2009 and 9 to 11 March 2009; and

WHEREAS on 18 December 2008 the applicants' representative advised the Commission that the parties had reached an in-principle agreement with respect to an industrial agreement and the respondent's members had to vote on the in-principle agreement and the result would be known by 10 March 2009; and

WHEREAS after hearing from the parties, on 23 December 2008 the Commission issued an order vacating the hearing dates; and

WHEREAS on 28 April 2009 the Commission registered an industrial agreement that settled the matters the subject of this application; and

WHEREAS on 2 and 24 June 2009 the Commission wrote to the applicants' representative requesting advice as to when a Notice of Discontinuance would be lodged; and

WHEREAS on 1 July 2009 the applicants filed a Notice of Discontinuance in respect of the application; and

WHEREAS on 13 August 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.

NOTICES—Union Matters—

2009 WAIRC 00650

NOTICE

FBM 4 of 2009

Notice is given of an application by "The Civil Service Association of Western Australia Incorporated" to the Full Bench of the Western Australian Industrial Relations Commission for the alteration to Rule 6 – Membership, sub rule 6(b).

Existing Rule 6(b)

(b) Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of the Civil Service Association of WA (Incorporated).

(bb) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of the Civil Service Association of Western Australia (Inc).

Proposed Rule 6(b)

(The proposed alterations are indicated in bold print and underlined.)

"(b) **(i)** Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of ~~the Civil Service Association of WA (Incorporated)~~ **The Civil Service Association of Western Australia Incorporated**.

(b) (ii) Notwithstanding the proviso in rule 6(b)(i), and without limiting the generality of rules 6(a)(10) and 6(a)(11), dental technicians, their apprentices or their trainees employed in the Perth Dental Hospital or Community Dental Health Services or any other entity or unit however described or named which provides any of the services formerly provided by Perth Dental Hospital or Community Dental Health Services shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

~~(bb)~~

(b) (iii) Provided further that save and except for the employees referred to in Rule 6(a)(11) and (12) all salaried employees (being professional, administrative, clerical, technical and supervisory employees) (including those listed in Schedule A to the Rules of the Hospital Salaried Officers' Association of Western Australia (Union of Workers)) employed by the Boards of any public hospital constituted under the Hospital and Health Services Act 1927 (as amended) in such hospitals or for the provision of health services in any district or area in which such board or boards are required or have a duty to provide such services shall not be eligible for membership of ~~the Civil Service Association of WA (Incorporated)~~ **The Civil Service Association of Western Australia Incorporated**."

The matter has been listed before the Full Bench at 10.30 am on Monday, 2 November 2009 in the President's Court (Floor 17). A copy of the Rules of the organisation and the proposed rule alterations may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979,* or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the *Industrial Relations Commission Regulations 2005.*

S. HUTCHINSON
DEPUTY REGISTRAR **9 SEPTEMBER 2009**

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2009 WAIRC 00615

REFERRAL OF DISPUTE RE APPLICANTS' ENTITLEMENT TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	BRIAN BYRON AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	SENIOR COMMISSIONER J H SMITH
DATE	MONDAY, 31 AUGUST 2009
FILE NO/S	OSHT 3, 7-43 AND 45-79 OF 2008
CITATION NO.	2009 WAIRC 00615

Result	Applications dismissed.
Representation	
Applicants	Mr G S MacLean and Mr J M Nicholas (both of counsel)
Respondents	Mr J B Blackburn and Ms L S Gibbs (both of counsel)

Order

1. WHEREAS these are applications pursuant to s 28(2) of the *Occupational Safety and Health Act 1984;*

2. AND WHEREAS on 30 July 2008, an order was made to join the applications the subject of this order with others into a single proceeding known as joined referrals OSHT 3, 7-43 and 45-79 of 2008;

3. AND WHEREAS on 27 October 2008, the Tribunal was advised by the applicants' representative that it was anticipated that all the applications would be discontinued shortly;

4. AND WHEREAS on 30 October 2008, the Tribunal informed the parties that they were released from complying with the direction order;

5. AND WHEREAS on 15 April 2009, the Tribunal wrote to each of the applicants and advised that unless they filed a Notice of withdrawal or discontinuance or contacted the Tribunal within 21 days of the date of that letter, the Tribunal would make an order dismissing their applications;

6. AND WHEREAS the applicants' agent informed the Tribunal in a letter dated 24 July 2009 that they had written to each of the applicants and advised them that they would no longer provide representation or assistance, and they also informed each of the applicants that if they wished to continue with their claim they should contact the Tribunal within 21 days from the date of their letter;

7. AND WHEREAS on 31 August 2009, the applicants of matters OSHT 7 of 2008, OSHT 9 of 2008, OSHT 13 of 2009, OSHT 15 of 2008, OSHT 16 of 2008, OSHT 17 of 2008, OSHT 18 of 2008, OSHT 19 of 2008, OSHT 21 of 2008, OSHT 22 of 2008, OSHT 23 of 2008, OSHT 24 of 2008, OSHT 25 of 2008, OSHT 27 of 2008, OSHT 28 of 2008, OSHT 29 of 2008, OSHT 32 of 2008, OSHT 34 of 2008, OSHT 35 of 2008, OSHT 37 of 2008, OSHT 38 of 2008, OSHT 39 of 2008, OSHT 41 of 2008, OSHT 42 of 2008, OSHT 46 of 2008, OSHT 49 of 2008, OSHT 51 of 2008, OSHT 54 of 2008, OSHT 56 of 2008, OSHT 60 of 2008, OSHT 62 of 2008, OSHT 63 of 2008, OSHT 64 of 2008, OSHT 67 of 2008, OSHT 73 of 2008, OSHT 74 of 2008, OSHT 75 of 2008 and OSHT 77 of 2008 had not contacted the Tribunal nor filed a Notice of withdrawal or discontinuance in respect of these matters;

8. NOW THEREFORE, the Tribunal, pursuant to the powers conferred on it under s 51I of the *Occupational Safety and Health Act 1984* and s 27 of the *Industrial Relations Act*, hereby orders —

THAT the applications set out in paragraph 7 of this order be and are hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Senior Commissioner.

2009 WAIRC 00252

REFERRAL OF DISPUTE RE ENTITLEMENTS TO ANY PAY OR BENEFITS.

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS C/O THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 5 MAY 2009
FILE NO/S	OSHT 2 OF 2009
CITATION NO.	2009 WAIRC 00252

Result	Order issued
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS the Tribunal has convened a conciliation conference in the aforementioned proceedings; and

WHEREAS on 5 May 2009 the applicant's counsel requested the application be adjourned to Collie for the purposes of site inspections and further conciliation; and

WHEREAS the respondent's counsel opposed the request to adjourn to Collie and considered inspections were not appropriate in the circumstances; and

WHEREAS the Tribunal has considered the submissions of both parties and having been informed by the parties of the safety issue on site; and

NOW THEREFORE the Tribunal, pursuant to the power conferred under s 27(p) and (q) of the *Industrial Relations Act 1979* hereby orders:

THAT OSHT 2 of 2009 be adjourned and reconvened in Collie on 6 May 2009 at 9.00am for worksite inspections;

THAT representatives of the Hitachi Plant Technologies OSH Committee accompany the Tribunal on the inspection;

THAT a further conference be held at 1.30pm at a place yet to be advised.

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

2009 WAIRC 00574

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS
	APPLICANT
	-v-
	HITACHI PLANT TECHNOLOGIES LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 17 AUGUST 2009
FILE NO/S	OSHT 2 OF 2009
CITATION NO.	2009 WAIRC 00574

Result	Deletion of applicant's name
Representation	
Applicant	Mr T Kucera (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Consent Order

WHEREAS on 14 August 2009 the Occupational Safety and Health Tribunal (the Tribunal) received application seeking to delete the name of Shane Lowry from OSHT 2 of 2009;

AND WHEREAS the matter was listed on 17 August 2009 to hear from the parties on the issue;

AND WHEREAS at the hearing the parties to OSHT 2 of 2009 sought to delete Shane Lowry from the application;

AND WHEREAS the Tribunal has formed the view that it was appropriate to make the amendment;

NOW THEREFORE the Tribunal pursuant to the powers as conferred, and by consent, hereby orders:

THAT one of the two applicants to OSHT 2 of 2009, namely Shane Lowry, be deleted from the application.

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

2009 WAIRC 00593

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	MONDAY, 24 AUGUST 2009
FILE NO	OSHT 26 OF 2009
CITATION NO.	2009 WAIRC 00593

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was lodged in the Occupational Safety and Health Tribunal pursuant to s 51A of the *Occupational Safety and Health Act 1984*; and

WHEREAS on 3 August 2009 the applicant filed a Notice of Discontinuance in respect of the application; and

WHEREAS the Tribunal has formed the view it is appropriate to discontinue the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me, hereby orders –

THAT this application be, and is hereby discontinued.

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

2009 WAIRC 00529

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	SHANE LOWRY AND ANOTHER AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
HEARD	THURSDAY, 14 MAY 2009, WEDNESDAY, 27 MAY 2009, THURSDAY, 25 JUNE 2009, TUESDAY, 30 JUNE 2009
DELIVERED	FRIDAY, 7 AUGUST 2009
FILE NO.	OSHT 2 OF 2009, OSHT 3 OF 2009, OSHT 4 OF 2009, OSHT 5 OF 2009, OSHT 6 OF 2009, OSHT 12 OF 2009, OSHT 15 OF 2009, OSHT 17 OF 2009, OSHT 18 OF 2009, OSHT 22 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009
CITATION NO.	2009 WAIRC 00529

CatchWords	Occupational health and safety law – Whether employees or employers of constitutional corporations able to seek determination of dispute by Occupational Safety and Health Tribunal (Tribunal) – Whether powers of Tribunal excluded by s 16 of *Workplace Relations Act 1996* (Cth) - Whether state laws invalidated by s 109 of *the Constitution* – How Tribunal is constituted - Where powers of Tribunal are drawn from - *Industrial Relations Act 1979* (WA) s 8 – *Occupational Safety and Health Act 1984* (WA) s 28(2), s 51G, s 51I
Result	Jurisdiction found
Representation	
Applicant	Mr D Schapper (of counsel) on behalf of Shane Lowry, Matthew Gibbs, Matthew Dempsey, Clayton Higgins, Dean Lloyd and Antony Thompson
	Mr T Kucera (of counsel) on behalf of Shane Lowry and Matthew Gibbs
	Ms N Ireland on behalf of Matthew Dempsey, Clayton Higgins, Dean Lloyd and Antony Thompson
	Mr S Millman and Mr J Nicholas (both of counsel) on behalf of Grant Veal, Andrew Liley, Dane Pridmore and Tony Woodhead
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Reasons for Decision

1 These matters involve a series of health and safety disputes referred to the Occupational Safety and Health Tribunal (the Tribunal) by employees on the Bluewaters Power Station Project in Collie. The Tribunal was advised:

a health and safety issue affecting some 600 employees was continuing;

the health and safety issue was referred by a number of employees as a dispute under s 28(2) of the *Occupational Safety and Health Act 1984* (WA) (the OSH Act);

work had ceased on 1 May 2009 under s 26(1) of the OSH Act resulting from a health and safety issue on the site;

payment and benefits owed under s 26(1) of the OSH Act were in dispute; and

for the period 1 to 6 May 2009 the employees claimed a risk to their health and/or safety had been posed by the release of ash onto the site.

2 The employers opposed the employees' claims.

3 The Tribunal scheduled a conference in Perth on 5 May 2009 and further conciliation was held the next day at the Bluewaters Power Station Project in Collie following site inspections. No agreement was reached between the parties.

4 At a preliminary hearing on 27 May 2009 the employers raised two jurisdictional issues. In circumstances where jurisdiction is challenged, such matters must be decided before the merits of the applications are considered. These principles were reflected by the Industrial Appeal Court in *Springdale Comfort Pty Ltd t/as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1987) 67 WAIG 325.

5 The employers raised several jurisdictional objections stating as they are constitutional corporations and, by virtue of the federal *Workplace Relations Act 1996* (Work Choices), the applications as referred are excluded by the state legislation, namely the *Occupational Safety and Health Act 1984* (the OSH Act).

6 Because the jurisdictional matters involved issues of inconsistency with Commonwealth legislation the employers were directed to give notice under s 78B of the *Judiciary Act 1903* (Cth) to the Attorneys General of the Commonwealth and the states as to the matters arising under s 109 of the *Australian Constitution* (the Constitution) or involving its interpretation by close of business on 29 May 2009.

7 The **first** jurisdictional issue as notified by the employers was the Tribunal was unable:

> [T]o order payment of amounts due under federal industrial instruments – in particular, workplace agreements and notional agreements preserving state awards (**NAPSAs**) made under the federal *Workplace Relations Act 1996* (Cth) (**WR Act**).
>
> …
>
> The role of the Tribunal under s 28 of the OSH Act is to determine "whether a person is entitled" to any "pay or benefit": see s 28(2)(a) and (b). In performing that role the Tribunal is exercising a judicial function.
>
> The respondents are constitutional corporations covered by workplace agreements and NAPSAs made under the WR Act. Any entitlement to pay or other benefits will arise, if at all, under those instruments.
>
> The Tribunal is therefore being asked to exercise judicial power in relation to entitlements arising under federal industrial instruments.
>
> By reason of s 71 of the Commonwealth *Constitution* the Tribunal cannot exercise judicial power in relation to the respondents' federal instruments unless the Commonwealth Parliament has invested it with federal jurisdiction.

This issue was later withdrawn by the employers who submitted the claimed entitlements were benefits arising under s 28 of the OSH Act consistent with the Full Bench decision in *Thiess Pty Ltd v AFMEPKIU* [2006] WAIRC 04715; (2006) 86 WAIG 2495 [51], [73].

8 The **second** jurisdictional issue raised by the employers was:

> [W]hereas the OSH Act is not excluded by the WR Act in its application to constitutional corporations, the Tribunal is constituted by and is reliant on powers drawn from the *Industrial Relations Act 1979* (WA) (IR Act) and the IR Act is relevantly excluded in its application to constitutional corporations.
>
> …
>
> It follows that, save for provisions dealing with right of entry on occupational safety and health matters and other irrelevant exceptions, the IR Act, being a "State or Territory industrial law" within the meaning of s 4 of the WR Act, is excluded so far as it would apply not only "to" but "in relation to" constitutional corporations.
>
> The Tribunal is the Commission sitting as the Tribunal: s 51G(1) and (2) OSH Act.
>
> The Commission is constituted under the IR Act.
>
> The Commission sitting as the Tribunal draws powers from the IR Act (in particular s 27 of the IR Act): s 51I OSH Act.

Accordingly the employers submit the Tribunal has no jurisdiction to deal with the referrals.

9 There were third, fourth and fifth jurisdictional or procedural issues raised by the employers. These issues either lapsed or were withdrawn shortly after the commencement of the hearing on 30 June 2009.

10 In these reasons for decision:

> Hitachi Plant Technologies Ltd, OSHT 2 of 2009, OSHT 3 of 2009 (application listed for hearing and discontinued 30 June 2009 WAIRC 00423), OSHT 5 of 2009, OSHT 12 of 2009 (application listed for hearing and discontinued 30 June 2009 WAIRC 00423), OSHT 22 of 2009, OSHT 23 of 2009;
>
> Electrical Construction and Maintenance Australia Pty Ltd, OSHT 4 of 2009;
>
> K & K Electrical Pty Ltd, OSHT 6 of 2009;
>
> Safe & Sound Scaffolding Pty Ltd, OSHT 15 of 2009 (application listed for hearing and discontinued 30 June 2009 WAIRC 00423), OSHT 25 of 2009;

United Industries (WA) Pty Ltd, OSHT 17 of 2009 (application listed for hearing and discontinued 30 June 2009 WAIRC 00423), OSHT 24 of 2009; and

Essential Fire Services Pty Ltd, OSHT 18 of 2009

will be referred to as the employers.

11 In these reasons for decision:

Shane Lowry and another, OSHT 2 of 2009;

Matthew Dempsey, OSHT 4 of 2009;

Clayton Higgins, OSHT 5 of 2009;

Dean Lloyd, OSHT 6 of 2009; and

Antony Thompson, OSHT 18 of 2009

will be referred to as the **first** group of employees.

12 In these reasons for decision:

Grant Veal, OSHT 3 of 2009 (application listed for hearing and discontinued 30 June 2009 WAIRC 00423);

Andrew Liley, OSHT 12 of 2009 (application listed for hearing and discontinued on 30 June 2009 - 2009 WAIRC 00423);

Dane Pridmore, OSHT 15 of 2009 (application listed for hearing and discontinued on 30 June 2009 - 2009 WAIRC 00423);

Tony Woodhead, OSHT 17 of 2009 (application listed for hearing and discontinued on 30 June 2009 - 2009 WAIRC 00423);

Andrew Liley, OSHT 22 of 2009;

Grant Veal, OSHT 23 of 2009;

Dane Pridmore, OSHT 24 of 2009; and

Tony Woodhead, OSHT 25 of 2009

will be referred to as the **second** group of employees.

Employers' Submissions

13 A question arises as to whether there is an inconsistency between the OSH Act and Work Choices such that s 109 of the Constitution renders invalid the operation of the Tribunal to the extent of that inconsistency. This question arises from the fact that Work Choices excludes a number of laws in the states and territories. In Western Australia the relevant law is the *Industrial Relations Act 1979* (WA) (the IR Act). The employers submit the Tribunal is formally established by and dependent on authorities reflected in the IR Act. The IR Act under Work Choices is excluded in its application to constitutional corporations. It is not disputed that each of the employers in these proceedings is a constitutional corporation.

14 Counsel for the employers submitted the OSH Act is not excluded by s 16(1) of Work Choices and therefore is broader in its application to constitutional corporations than the savings exceptions provided for by s 16(2) and s 16(3). Even though specific sections of Work Choices set out various exclusions including a law that 'deals with' occupational health and safety, namely s 16(2)(c) together with s 16(3)(c) of Work Choices, the employers submit that none of the provisions of the IR Act (with the exception of right of entry provisions) 'deals with' occupational health and safety in any specific or direct sense.

15 Whether a subject matter is relied upon as an excluded issue is dependent upon whether the provision 'deals with' occupational health and safety. Critical therefore is the meaning of that term as reflected in s 16 of Work Choices. In support of the employers' submissions the Tribunal was referred to a decision of the Full Bench of the Federal Court in *Endeavour Coal Pty Ltd and Others v Construction, Forestry, Mining and Energy Union* (2007) 165 FCR 1 [61], [65], a decision which reflected on the provisions of the *Industrial Relations Act 1996* (NSW) (the NSW IR Act) in so far as that law is limited by s 16 of Work Choices:

> It is against this background that we must consider whether ss 10 and 11 of the State Act, constituting part of a law which generally was no longer to operate on constitutional corporations and their employees, nonetheless had limited operation because it relevantly dealt, in some respect, with long service leave. Sections 10 and 11 do not, in terms, deal with the matter of long service leave. They confer an award making power which is not expressly confined as to subject matter otherwise than by the general description of "conditions of employment". It was not disputed in this appeal that long service leave is a condition of employment.
>
> …
>
> The appellants' thesis is, in our opinion, consistent with the overall objectives introduced by the Amending Act and is supported by the language and structure of s 16. In the section, a distinction is drawn between a law which deals with a subject matter (s 16(1)(b) and (2)(c)), and laws which might authorise a tribunal or court to make an order or determination concerning a specified subject matter. Provisions of the latter type are s 16(1)(c) and (d). This suggests a "law deal[ing]" with one of the matters specified in s 16(3) must deal with the matter itself and directly in the sense that the express subject matter of the legislation is the specified matter (or perhaps one of a number of them). On this approach, a law which may authorise a tribunal or court to deal with the subject matter is not a law dealing with the matter. Also, it must be remembered that not only do ss 10 and 11 not deal with long service leave

> in any direct or obvious way, but the powers they confer might never be exercised to deal with that matter or any of the other matters specified in s 16(3). It is difficult to accept that the Commonwealth Parliament had contemplated that these empowering provisions were "dealing with" those matters in circumstances where none of those matters might be addressed by an award or order made in exercise of the power.

16 The Tribunal was further referred to the decision of the Federal Court in *Tristar Steering and Suspension Ltd and Another v Industrial Relations Commission of New South Wales and Another* (2007) 158 FCR 104 [45], [47], [49], [50], [54], [55] where Buchanan J referred to the effect of s 16(1) of Work Choices on the NSW IR Act. In the same reasons Gyles J at [22] reflected on the scope of Work Choices it was acknowledged by the employers in these proceedings the findings of Gyles J were to be read subject to the exclusions provided for in s 16(2) and s 16(3) of Work Choices:

> [22] Whilst the NSW Act may not be wholly invalid, it can have no effect upon constitutional corporations concerning their relations with actual or potential employees. Indeed, the NSW Act cannot be concerned with the regulation of constitutional corporations at all. It follows that s 146(1)(d) of the NSW Act is invalid for present purposes as it authorises conduct that may affect constitutional corporations. Thus, the current inquiry has no legislative base and no capacity to affect constitutional corporations generally and, in particular, concerning the relations of such corporations with actual or potential employees.

17 The employers submitted the Tribunal is the Western Australian Industrial Relations Commission (the IR Commission) sitting as the Tribunal as reflected in s 51G of the OSH Act. The IR Commission is constituted under the IR Act. Relevant also are the powers of the Tribunal in that although references are made to powers in s 51I of the OSH Act, the powers are actually drawn, by way of example s 27, from the IR Act. An order of the Tribunal may only be enforced under the IR Act as per s 51G(3) of the OSH Act. The provisions of the IR Act that are referred to in the OSH Act are not saved by inclusion in the OSH Act. The provisions of s 16(2) and s 16(3) of Work Choices provide the exclusions to the operation of s 16(1) of Work Choices. The OSH Act, as already referred to, is not excluded by s 16 of Work Choices as it does not fall within the definition of a state or territory law in s 4 of Work Choices.

18 In responding, the employers submitted the Tribunal is prohibited from performing any task that relates to constitutional corporations therefore the Tribunal has no jurisdiction to deal with the current referrals. There are no relevant OSH provisions that are saved within the IR Act. The provisions constituting the IR Commission are not saved because they do not deal with occupational safety and health in any specific or direct manner. Accordingly the OSH Act is omitted from the matters excluded under s 16 of Work Choices.

19 As the Tribunal is unable to deal with the current referrals, specifically OSHT 2 of 2009, OSHT 4 of 2009, OSHT 5 of 2009, OSHT 6 of 2009, OSHT 18 of 2009, OSHT 22 of 2009, OSHT 23 of 2009, OSHT 24 of 2009 and OSHT 25 of 2009 the employers submitted each of the matters ought be struck out.

First Group of Employees - Submissions

20 Counsel for the **first** group of employees submitted the Tribunal draws no powers from the IR Act but rather from the OSH Act. By way of s 51G(1) of the OSH Act the Tribunal has jurisdiction to 'hear and determine' matters that may be referred to it. That the Tribunal has the jurisdiction to 'hear and determine' matters necessarily carries all those powers required to make the determination effective. The Tribunal was referred to the decision of the High Court of Australia in *Slonim v Fellows* (1984) 8 IR 175, 178. The Tribunal is reliant on powers specified in the OSH Act.

21 The Tribunal was addressed on the interface between the operation of s 16 of Work Choices and the IR Act. In the first instance the Tribunal was referred specifically to the preamble to s 16(1) of Work Choices:

> 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:

This was identified as the core provision by which the Commonwealth had entered the field to the exclusion of the State in respect of constitutional corporations.

22 The Tribunal was referred to three distinct means at the state level whereby s 16 of Work Choices does not operate to exclude the IR Act. The first was by way of Pt II Div 1 ss 8 – 22 of the IR Act, the provisions that constitute the Commission. The mere constitution of the Commission under the IR Act is not excluded by s 16 of Work Choices. Secondly, s 16 of Work Choices does not exclude constitutional corporations in any capacity other than as an employer. In this regard the Tribunal was referred to the decision in *Construction, Forestry, Mining and Energy Union (NSW) (o/b of Hemsworth) v Brolrik Pty Ltd t/as Botany Cranes & Forklift Services* (2007) 167 IR 214, 224. The IR Act continues to apply to a constitutional corporation in circumstances where that corporation appears before the IR Commission in circumstances other than as an employer. By way of example, where a party issues a summons under s 33(1)(a) of the IR Act to a constitutional corporation to appear and give evidence before the Commission, s 16 of Work Choices does not operate to exclude the operation of the IR Act.

23 The third means is by way of direct exclusion. The **first** group of employees submitted even if the OSH Act is not excluded by reason of s 16(1) of Work Choices, as was suggested by the employers, in fact the contrary applies as s 49I of the IR Act is contained within the scope of s 16(1) as it is part of a state industrial law as defined by s 4 of Work Choices.

24 The **first** group of employees submitted that by direct exclusion from s 16(2) of Work Choices, occupational health and safety is reflected as a matter that arises under a law of a state or territory. The OSH Act in this state is such a law or alternatively, the OSH Act is not excluded by reason of s 16(1) of Work Choices as s 49I(1) of the IR Act is within the scope of s 16(1) of Work Choices as it reflects a provision relating to occupational health and safety.

25 The Tribunal is not constituted or created by the IR Act but by the OSH Act and chaired by a person who is a IR Commissioner under s 51G and s 51H of the OSH Act. Alternatively, the constitution of the Tribunal by the IR Commission is

unaffected by the exclusion of the IR Act by s 4 of Work Choices. The creation of the IR Commission or constitution of the IR Commission by the IR Act is not an application of that law in relation to employers from constitutional corporations and therefore the creation and existence of the Tribunal is, for these proceedings, not excluded by Work Choices.

26 The reasons for decision in *Endeavour Coal v CFMEU* dealt with a different legislative regime from that under consideration in these proceedings, namely the NSW IR Act. In the present proceedings the **first** group of employees seek to invoke the jurisdiction of the Tribunal under s 28(2) of the OSH Act, a law which is excluded from the national system under s 16 of Work Choices.

27 The Tribunal was referred to the *Bluewaters Power Station Projects Hitachi Plant Technologies Ltd and AMWU Agreement 2007*, a federally registered collective agreement that applies to the site. Clause 14.5(b) of the agreement provides:

> Subject to the provisions of the *Occupational Safety and Health Act 1984* (WA) employees shall have no right to be paid for any time that they are not ready, willing and available to follow all lawful directions of the Employer or to carry out all duties that they are capable of performing.

The clause is qualified by reference to the OSH Act, a reference that reflects the parties' agreement that employees are entitled to be paid for lost time if the Tribunal so determines. The Tribunal in such circumstances draws power to determine the matter in effect as a private arbitrator of the dispute. In such a case, the Tribunal's powers are derived from the agreement of the parties.

28 In conclusion, the **first** group of employees submitted the employers' view that the Tribunal is without jurisdiction because the IR Act is excluded by s 16(1) of Work Choices to be incorrect. The Tribunal is able, by way of the jurisdiction and powers created by s 51G(1) and s 51I of the OSH Act to hear and determine the matters without relying on any power of the IR Act, rather the powers as specified within the OSH Act.

29 In response the **first** group of employees submitted:

> The mere fact that the Commission's role in relation to occupational health and safety is contained in the Occupational Health and Safety Act as against the IR Act makes no difference to its validity. Put differently, if it would be valid by reason of being contained in the IR Act why is it not valid when it's contained in a separate Act devoted to occupational health and safety. … What we say is that the constitution of the Commission is not something which relevantly has effect in connection with these companies (ts 62).

Second Group of Employees - Submissions

30 Counsel for the **second** group of employees submitted there was no inconsistency between the OSH Act and the operation of Work Choices. Further, the provisions and jurisdiction of the Tribunal are valid laws that deal with occupational health and safety as contemplated by s 16(2) of Work Choices.

31 The **second** group of employees submitted that the Work Choices provisions dealing with non-excluded matters such as occupational health and safety may be found in the IR Act even though that Act is a 'state or territory industrial law' as defined under s 4 of Work Choices. Section 16(2)(a) of Work Choices expressly provides that any matter dealt with as an equal opportunity matter is only non-excluded in circumstances where it is not contained in a state or territory industrial law such as the IR Act. The **second** group of employees submitted this qualification did not apply to occupational health and safety matters and s 16(2)(c) of Work Choices provided for such matters to be located in a state or territory industrial law. The Federal Court of Australia in *Endeavour Coal v CFMEU* [67]:

> Similarly s 16(2)(a) serves to illustrate the Commonwealth Parliament's intention of excluding, for present purposes, any operation of the State Act by permitting or providing for the continued operation of the law dealing with discrimination or equality in the workplace unless it was dealt with in a State industrial law such as the State Act. This provision really says nothing about whether a law deals with one of the specified matters only if it deals with it directly as the legislative subject matter or whether the law can deal with the matter indirectly.

32 The NSW Industrial Relations Commission in *CFMEU v Brolrik* [78] when referring to the interface between the NSW IR Act and the *Occupational Health and Safety Act 2000* (NSW) reflected in their reasons:

> In our opinion the fact that there were similar provisions within both the OH & S Act and the Act, lends weight to our finding that ss 210(1)(j) and 213 (so far as it is read in conjunction with s 210(1)(j)) fall clearly within the exceptions contained in ss 16(2)(c) and (3)(c). If the provisions within the OH & S Act ought to be properly characterised as occupational health and safety laws, we see no reason to detract from this characterisation simply because the relevant, related provisions are located within industrial law.

33 The provisions referred to in s 51I of the OSH Act are machinery or procedural in nature. The OSH Act by reference incorporates provisions from the IR Act. Specific provisions as reflected in s 51I(1) of the OSH Act deal with and relate to occupational safety and health when applied to a referral made under s 28(2) of the OSH Act. The **second** group of employees submitted there was no irregularity between the machinery provisions of the OSH Act raised by the employers in these proceedings and Work Choices. Such provisions, as referred to in s 51I of the OSH Act are valid laws that deal with occupational health and safety as contemplated by the operation of s 16(2) of Work Choices.

34 In support of the issue of Commonwealth law demonstrating an intention to 'cover the field' the Tribunal was referred to *Ex parte Maclean* (1930) 43 CLR 472, 483 and *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1979) 142 CLR 237, 243, 253, 274, 275, 282.

35 In reply the **second** group of employees submitted:

> It's our position that the machinery provisions are contained in the Industrial Relations Act; ergo, section 16(1) applies as far as the exclusions are concerned. The machinery provisions are laws dealing with occupational safety

> and health as soon as this Tribunal is constituted. Now, the mere location of those machinery provisions in the Industrial Relations Act can't foil the exceptions that are contained in section 16(3) of the Workplace Relations Act, and that's consistent with all of the cases that have decided these points, that the mere location of those machinery provisions … because these are claims brought in furtherance of the objects of the Occupational Safety and Health Act and we say they enliven the jurisdiction of the Safety Tribunal (ts 64).

Conclusion

36 The referrals made by the **first** and **second** groups of employees to the Tribunal were filed under s 28(2) of the OSH Act. Each referral sought entitlements and/or benefits for the period 1 to 6 May 2009.

37 The jurisdictional issue raised by the employers, although prescribed in a number of different ways, focussed on the following central submission:

> the OSH Act is not a State or Territory industrial law as defined by s 4(1) of Work Choices;
>
> the OSH Act is not referred to in s 16(1) of Work Choices therefore the provisions of the OSH Act are not saved by the exceptions referred to in s 16(2)(c) and s 16(3)(c) of Work Choices;
>
> the Tribunal is constituted by the IR Act;
>
> the Tribunal's powers, specifically those referred to in s 51G(3) and s 51I of the OSH Act, rather than being saved by reference within the OSH Act, continue to operate when utilised by the Tribunal, as provisions of the IR Act.

Therefore the Tribunal is prevented from hearing or determining matters involving constitutional corporations by the application of Work Choices.

38 To consider the issues the Tribunal is required to have regard for the statutory frameworks that operate at a federal and state level.

The Constitution

109 Inconsistency of laws

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

39 Work Choices provides in s 4(1), the definitions section:

> ***State or Territory industrial law*** means:
>
> (a) any of the following State Acts:
>
> (i) the *Industrial Relations Act 1996* of New South Wales;
>
> (ii) the *Industrial Relations Act 1999* of Queensland;
>
> (iii) the *Industrial Relations Act 1979* of Western Australia;
>
> (iv) the *Fair Work Act 1994* of South Australia;
>
> (v) the *Industrial Relations Act 1984* of Tasmania; or
>
> (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
>
> (i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);
>
> (ii) providing for the determination of terms and conditions of employment;
>
> (iii) providing for the making and enforcement of agreements determining terms and conditions of employment;
>
> (iv) providing for rights and remedies connected with the termination of employment;
>
> (v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 779); or
>
> (c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or
>
> (d) a law that:
>
> (i) is a law of a State or Territory; and
>
> (ii) is prescribed by regulations for the purposes of this paragraph.

40 Section 16 of Work Choices provides:

> **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***.

(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.

41 At the state level the OSH Act provides in its long title:

> An Act to promote and improve standards for occupational safety and health, to establish the Commission for Occupational Safety and Health, **to provide for a tribunal for the determination of certain matters and claims**, to facilitate the coordination of the administration of the laws relating to occupational safety and health and for incidental and other purposes. (emphasis added)

42 Section 3(1) Terms of the OSH Act provides:

> ***Tribunal*** has the meaning given to that term in section 51G(2);

43 Part VIB of the OSH Act provides:

Part VIB — Occupational Safety and Health Tribunal

51F. Terms used

In this Part —

Commission and ***Chief Commissioner*** have the meanings given to those terms in section 7(1) of the *Industrial Relations Act 1979*;

matter includes a claim under section 35C.

51G. Industrial Relations Commission sitting as the Occupational Safety and Health Tribunal

(1) By this subsection the Commission has jurisdiction to hear and determine matters that may be referred for determination under sections 28(2), 30(6), 30A(4), 31(11), 34(1), 35(3), 35C, 39G(1), (2) and (3) and 51A(1).

(2) When sitting in exercise of the jurisdiction conferred by subsection (1) the Commission is to be known as the Occupational Safety and Health Tribunal (the ***Tribunal***).

(3) A determination of the Tribunal on a matter mentioned in subsection (1) has effect according to its substance and an order containing the determination is an instrument to which section 83 of the *Industrial Relations Act 1979* applies.

51H. Jurisdiction to be exercised by Commissioner with requisite qualifications

(1) The jurisdiction conferred by section 51G in respect of any matter is to be exercised —

(a) by the Commissioner appointed for the purposes of section 8(2a) of the *Industrial Relations Act 1979*; or

(b) if that Commissioner is unable to act by reason of sickness, absence or other cause —

(i) by another Commissioner; or

(ii) an Acting Commissioner appointed under section 17 of the *Industrial Relations Act 1979*,

to whom the Chief Commissioner may allocate the matter under section 16 of that Act.

(2) In allocating a matter for the purposes of subsection (1)(b) the Chief Commissioner is to have regard to the desirability of the Commissioner concerned having relevant knowledge in the field of occupational safety and health.

(3) A Commissioner to whom a matter has been allocated under subsection (1)(b) may continue and complete the hearing and determination of part-heard proceedings after the Commissioner referred to in subsection (1)(a) has resumed his or her duties.

51I. Practice, procedure and appeals

(1) The provisions of sections 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the *Industrial Relations Act 1979* that apply to and in relation to the exercise of the jurisdiction of the Commission constituted by a Commissioner apply to the exercise of the jurisdiction conferred by section 51G —

(a) with such modifications as are prescribed under section 113 of that Act; and

(b) with such other modifications as may be necessary or appropriate.

(2) For the purposes of subsection (1), section 31(1) of the *Industrial Relations Act 1979* applies as if paragraph (c) were deleted and the following paragraph were inserted instead —

“

(c) by a legal practitioner.

”.

51J. Conciliation

(1) This section applies where a matter has been referred to the Tribunal for determination under section 28(2), 30(6), 30A(4), 31(11), 35(3) or 39G.

(2) …

44 In considering the jurisdictional issue referred to in [37] of these reasons the Tribunal has had careful regard for the oral and written submissions of the employers and the **first** and **second** groups of employees.

45 It is important, given the interrelationship between the OSH Act, the IR Act and the federal overlay of Work Choices to consider the principles of statutory construction. The Full Bench in *Thiess v AFMEPKIU* [54], [55], [56], [57] referred to a number of decisions when considering the construct of laws, including the necessity when engaging in the exercise of statutory construction to focus attention ‘upon the crucial language of the relevant provisions before other aids to construction are considered’ *Attorney General for the State of Queensland v Australian Industrial Relations Commission and Others* (2002) 213 CLR 485 [113].

46 The introduction of Work Choices has had a major effect on state industrial relations systems. In summary, the scope of the federal workplace relations legislation has moved to exclude the operation of state and territory industrial laws and systems specifically in relation to constitutional corporations, their employers and employees covered by the federal laws. Particular areas have been exempted from the exclusion and are specified in s 16 and s 17 of Work Choices.

47 Section 3 of Work Choices sets out the 'principal object' of the legislation that applied at the time the applications were filed. Pertinent aspects of the object to current considerations include:

> The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:
>
> …
>
> (b) establishing and maintaining a simplified national system of workplace relations; and
>
> …
>
> (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and
>
> …
>
> (h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and
>
> …

48 At the state level when determining the purpose or object of a law s 18 of the *Interpretation Act 1984* (WA) provides:

> In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

49 The long title of the IR Act sets out the purpose of the state legislation:

> An Act to consolidate and amend the law relating to the prevention and resolution of conflict in respect of industrial matters, the mutual rights and duties of employers and employees, the rights and duties of organisations of employers and employees, and for related purposes.

50 The decision of the Industrial Appeal Court in *Hotcopper Australia Ltd v Saab* (2002) 82 WAIG 2020, 2024 stated the principal objects of the IR Act to be:

> The principal objects of the Act are, relevantly, to encourage the settling of industrial disputes and to provide means for preventing and settling industrial disputes not resolved by amicable agreement: s 6(b) and (c).

51 The long title of the OSH Act reflects on the purpose of that legislation:

> An Act to promote and improve standards for occupational safety and health, to establish the Commission for Occupational Safety and Health, to provide for a tribunal for the determination of certain matters and claims, to facilitate the coordination of the administration of the laws relating to occupational safety and health and for incidental and other purposes.

52 The OSH Act should be regarded as beneficial and interpreted accordingly, D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (6th ed, 2006), [9.3]. Occupational health and safety laws can be classified as remedial or beneficial and therefore interpreted liberally, a principle reflected by the High Court of Australia in *Waugh v Kippen and Another* (1986) 160 CLR 156; 64 ALR 195.

53 The decision of Buchanan J in *Tristar Steering v IR Commission of NSW* was relied upon by the employers to explain the breadth of s 16(1) of Work Choices and in particular the scope of the words used in the federal statute to 'cover the field' in industrial relations. In these proceedings the Federal Court of Australia was dealing with an application which sought to restrain the NSW Industrial Relations Commission from continuing an inquiry into long service leave under s 146 of the NSW IR Act. Buchanan J said at [45]:

> By its term s 16 of the WR Act declares an intent that the WR Act occupy, to the exclusion of the IR Act, (subject only to the exceptions in s 16(2), (3) and (4) - which are not here relevant), the whole field of legislative activity "*in relation to* an employee *or* employer" (my emphasis) where the employer is an entity identified by s 6(1) of the WR Act, including a constitutional corporation. The words "in relation to" are broad. They are not confined to exclude only actual regulation of specific rights and obligations but anything done by or under a State or Territory industrial law.

Buchanan J acknowledged there were exceptions to the intent by the Commonwealth Parliament to cover the field in industrial relations, including constitutional corporations. The OSH Act is not incorporated within the definition of a 'state or territory industrial law' under s 4(1) of Work Choices.

54 Section 16(2)(c) when read with s 16(3)(c) of Work Choices saves state or territory laws dealing with occupational health and safety. The Tribunal considers it was not the intention of the Commonwealth Parliament to exclude a state or territory law from the national system, in this case the OSH Act, where that law:

> deals with one of excluded matters listed in s 16(3) of Work Choices; and
>
> deals directly with that excluded matter; and
>
> deals with the excluded matter itself.

55 Having regard for the prerequisites for exclusion, as referred to in Work Choices:

> the OSH Act deals with one of the excluded matters referred to in s 16(3) of Work Choices, namely occupational health and safety; and
>
> the OSH Act deals directly with that subject matter. For example, the right of an employee or contractor to cease work where they hold a reasonable belief if they continued to work they would be exposed to a serious risk of injury or harm to health, s 26 of the OSH Act.

56 In *Endeavour Coal v CFMEU* the NSW Industrial Relations Commission was requested to utilise at first instance the award making powers of the NSW IR Act, provisions excluded by Work Choices. In the current proceedings the **first** and **second** group of employees have sought to exercise the jurisdiction of the Tribunal through referral of applications by way of the OSH Act, namely s 28(2). The OSH Act has not been excluded by Work Choices. The considerations in *Endeavour Coal v CFMEU* by the Federal Court may therefore be distinguished. The provisions referred to in s 51I(1) of the OSH Act, for example, cannot be characterised as general powers of the IR Act.

57 When considering whether a law 'deals with' a matter and the scope of matters the Commonwealth intended to exclude as per s 16(2) together with s 16(c) of Work Choices there was no intention to limit the provisions to occupational health and safety within a 'state or territory industrial law'. Commonwealth, *Parliamentary Debates*, House of Representatives, Thursday, November 2005, The Hon. K.J. Andrews MP, Minister for Employment and Workplace Relations and Minister Assisting the Prime Minister for the Public Service, in second reading the *Workplace Relations Amendment (Work Choices) Bill 2005* said of a single national system at [18]:

> Single National System
>
> We live in an integrated national economy and it makes no sense whatsoever to adopt anything other than a national approach to workplace relations. By using a combination of constitutional heads of power, Work Choices will cover up to 85 per cent of employees across Australia.
>
> While employers and employees covered by Work Choices will not be subject to regulation by state employment laws, state laws will continue to cover such matters as occupational health and safety, workers compensation, trading hours and public holidays.

58 Section 15AB of the *Acts Interpretation Act 1901* (Cth) provides for extrinsic material to be used in the interpretation of legislation to confirm the intent. In passing Work Choices, the Commonwealth Parliament moved to exclude constitutional corporations from the state systems, create a national system and thereby cover the field. This intent related to industrial relations matters. The jurisdiction of the Tribunal does not rely upon the existence of an 'industrial matter' as defined in the IR Act under s 23. The Tribunal is expressly excluded from determining any matters as 'industrial matters' as per s 7(3) of the IR Act. It was not the intention of the Commonwealth Parliament, in passing Work Choices, to exclude the operation of the OSH Act in Western Australia.

59 The determination of whether the OSH Act is inconsistent with Work Choices, incorporating the principles as reflected by the High Court of Australia in *Ansett Transport v Wardley* srequires a search for legislative intent. Each statute is different both in nature and in general content although there are similarities in that the issues dealt with relate to relations between employees and employers. The OSH Act gives legislative effect throughout Western Australia to a policy dealing with the improvement of health and safety standards in the workplace. Work Choices on the other hand seeks to implement a single national system of industrial relations in Australia. No inconsistency can be identified.

60 In the Full Bench decision in *Marina Saldanha v Fujitsu Australia Pty Ltd* [2008] WAIRC 01732; (2008) 89 WAIG 76 [188] Ritter AP commented on the *Tristar Steering* v *IR Commission of NSW* decision, in particular the reasoning of Gyles J:

> In my opinion the breadth of the comment of Gyles J at [22] cannot apply to *the Act.* From s16(2)(c) and s16(3)(c) of *the WRA*, s16(1)(a) does not apply to a law of a State or Territory so far as the law deals with "occupational health and safety". Within this exception is the *Occupational Safety and Health Act 1984* (WA) (*the OHSA*). *The OHSA* provides the Commission, sitting as the Occupational Safety and Health Tribunal, with jurisdiction to hear and determine the matters specified therein. Section 51I of *the OSHA* provides that, in exercising its jurisdiction, certain sections of *the Act* apply with necessary modification. Accordingly it cannot be said of *the Act* that the effect of s16 of *the WRA* is that it does not apply to "constitutional corporations".

61 It was suggested to the Tribunal that the comments made by Ritter AP in the *Marina Saldanha v Fujitsu* proceedings referred to at [188] were obiter dicta and because no similar mention was made by Beech CC or Kenner C, should therefore be disregarded. The Tribunal considers when there is superior consideration, in this case by the Acting President of the Western Australian Industrial Relations Commission, to expand on an important rule even where motivated by, rather than relevant to, the facts of the case then such reasons can be referred to and principles followed in subsequent cases. This principle was reflected in *Central London Property Trust Limited v High Trees House Ltd* [1947] KB 130.

62 The Tribunal is established under the OSH Act to 'determine certain matters and claims' as referred to in the long title of the OSH Act. The OSH Act is a law that is being applied and, as earlier stated, is not a state or territory industrial law as defined by s 4(1) of Work Choices. This latter aspect was not disputed in the proceedings before the Tribunal. The Tribunal considers the jurisdiction of the Tribunal to emanate from s 51G of the OSH Act, an issue also not disputed.

63 Having regard for:

> the overall purpose of the OSH Act;
>
> the OSH Act's long title;
>
> its associated reference to the Tribunal;

the definition of the Tribunal as reflected in s 3(1) together with Part VIB — Occupational Safety and Health Tribunal; and

in these proceedings; Part III, Division 6 – Resolution of workplace issues, and refusal to work on grounds of risk,

the OSH Act 'deals with' occupational health and safety as envisaged by s 16(2)(c) of Work Choices. The OSH Act is considered by the Work Choices provisions, specifically s 16(3)(c), to be a 'non-excluded matter'. Therefore the OSH Act applies to, among others, constitutional corporations; their employers and employees.

64 An aspect of the employers' challenge is that the Tribunal is 'constituted by and reliant on powers drawn from the IR Act and where those powers are drawn from the IR Act none refer specifically to occupational health and safety therefore are not incorporated within the s 16(3)(c) and s 16(2)(c) exclusions reflected in Work Choices. The IR Act includes a number of sections which constitute the Commission; ss 8 - 22 of the IR Act. These sections refer, among other provisions, to the constitution of the Commission, qualifications for appointment, age limits for members, exercise of powers and jurisdiction of President and Commission. Relevant to the issue raised is s 8 of the IR Act:

Constitution of Commission

(1) The Commission by the name The Western Australian Industrial Commission established under the repealed Act is hereby continued in existence subject to this Act under the name The Western Australian Industrial Relations Commission.

(2) The Commission shall consist of the following members —

(a) a President;

(b) a Chief Commissioner;

(c) a Senior Commissioner; and

(d) such number of other commissioners as may, from time to time, be necessary for the purposes of this Act,

who shall be respectively appointed to their offices by the Governor by commission in Her Majesty's name.

(2a) For the purposes of section 51H of the *Occupational Safety and Health Act 1984*, one commissioner appointed under subsection (2)(d) is to be a person who, in addition to the other attributes required for appointment, has —

(a) knowledge of or experience in the field of occupational safety and health; and

(b) knowledge of that Act, the *Mines Safety and Inspection Act 1994*, the *Petroleum and Geothermal Energy Resources Act 1967*, the *Petroleum Pipelines Act 1969* or the *Petroleum (Submerged Lands) Act 1982*,

but the function given by section 51H(1) of that Act to the commissioner so appointed does not preclude that commissioner from otherwise performing the functions of a commissioner under this Act.

65 The Tribunal is constituted under the OSH Act. A member of the IR Commission, subject to the provisions of s 51H of the OSH Act becomes a constituent part of an independent tribunal separate from the IR Act. The Tribunal, as defined in s 3(1) of the OSH Act, is established under Part VIB — Occupational Safety and Health Tribunal. Once constituted, the jurisdiction of the Tribunal is as specified in s 51G of the OSH Act. To suggest that reference to an IR Commissioner appointed under s 8 of the IR Act is sufficient to exclude constitutional corporations, their employers and employees from referring matters to the Tribunal for hearing and determination is at best, moot.

66 Turning to the second aspect, as to whether the provisions relating to the Tribunal as specified in s 51I and s 51G(3) of the OSH Act operate as provisions of external statute, in this case the IR Act or, whether the provisions as referred to are considered to be part of procedures and provisions able to be accessed by the Tribunal. When considering the reference to provisions of other laws, D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* commented at [6.18]:

Another common legislative device which avoids repetition is to incorporate in one Act the provisions of another.

67 Section 16 of the *Interpretation Act 1984* (WA) includes:

Reference to written law is to written law as amended

(1) A reference in a written law to a written law shall be deemed to include a reference to such written law as it may from time to time be amended.

(2) A reference in a written law to a provision of a written law shall be construed as a reference to such provision as it may from time to time be amended.

(3) A reference in a written law to an Imperial Act or a Commonwealth Act, or to a provision of an Imperial Act or a Commonwealth Act, shall be construed so as to include a reference to such Act or provision as it may from time to time be amended.

68 D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* at [6.31] suggest in circumstances where reference to a written law occurs:

> However, except in a situation where the legislation referred to is lengthy, it is a wiser and safer course to set out the provisions again. This also has the very great advantage of avoiding the reader having to consult two Acts to find out the law on a topic: see the comments of *Goodfellow v FCT* (1976) 10 ALR 543 at 555

69 Unfortunately, the drafting of the provisions which preceded the introduction of the *Occupational Safety and Health Legislation Amendment and Repeal Bill 2004* into the State Parliament in 2004 failed to draft the provisions in their entirety into the OSH Act. For a law to be most effective it should be easily understood by those that use it; in this case employers and employees.

70 In considering s 51I of the OSH Act the provisions ought be applied as a two step process having regard to the beneficial aspects of the OSH Act. The construct of the statutory language refers, in broad terms, to two steps:

> the first step; the preamble to s 51I of the OSH Act seeks to adopt ss 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the IR Act in the same way as such provisions apply to the exercise of the IR Commission's jurisdiction; and
>
> the second step; applies the provisions as referred to the Tribunal 'to the exercise of the jurisdiction conferred by section 51G as provisions of the OSH Act:
>
> (a) with such modifications as are prescribed under section 113 of that Act; and
>
> (b) with such other modifications as may be necessary or appropriate.'

71 The reference to various sections from the IR Act in s 51I reflect an intention on the part of the State Parliament for the provisions as referred to, to operate as prescribed provisions within the jurisdiction of the OSH Act, separate from the IR Act, with modifications as may be prescribed by s 113 of the IR Act from time to time or 'as may be necessary or appropriate'.

72 In the alternative it may be that ss 22B, 26(1), (2) and (3), 27, 28, 31(1), (2), (3), (5) and (6), 33, 34(1), (3) and (4), 36 and 49 of the IR Act as referred to and modified as appropriate, are considered to remain provisions of IR Act. In such circumstances it would remain possible for such provisions to be exercised within the jurisdiction of the Tribunal.

73 The basis of the Tribunal's powers originate from a source separate from the IR Act, namely the OSH Act. The Tribunal is a court of limited jurisdiction as defined by statute. The jurisdiction and powers are distinct from those of the IR Commission. These principles were reflected by the Full Bench in *Thiess v AFMEPKIU* [90] when Ritter AP said of the Tribunal's jurisdiction and powers:

> The Commission sitting as the Tribunal exercises a distinct jurisdiction which is separate to that of the Commission proper. In its exercise of the jurisdiction provided to the Tribunal, the Commission sitting as the Tribunal has certain powers expressed in s102 of the *MSIA* and s51I and s51J of the *OSHA*. The legislature has not provided that the Tribunal is to simply sit as the Commission with all of the powers that the Commission possesses. For example, as referred to earlier in these reasons, the Tribunal possesses particular powers of conciliation as stated in s51J of the *OSHA* rather than the powers of conciliation provided to the Commission under *the Act* when sitting as the Commission. The jurisdictions of the Tribunal and the Commission have different scope and they possess powers from different statutory sources. The present applications were purportedly referred to the Tribunal under s74(2) of the *MSIA*. The applications purported to invoke the Tribunal's jurisdiction. Simply because the Tribunal is constituted by the Commission does not mean the Commission can ignore this fact and without more continue to hear and determine the applications as if referred to the Commission under s29 of *the Act*. Further, the powers given to the Tribunal do not include a power to amend and transfer or "*cross-vest*" an application purportedly referred to it to one before the Commission proper.

In *Thiess v AFMEPKIU* the matters were initially referred to the Tribunal under s 74(2) of the *Mines Safety and Inspection Act 1994*, a provision similar to s 28(2) of the OSH Act.

74 The action able to be taken by the Tribunal varies according to the specific section of the OSH Act under which a matter is referred. The range of persons able to refer applications to the Tribunal is, in many ways, more diverse than those under the IR Act. Relevant to a s 28(2) of the OSH Act matter is where a dispute arises as to whether a person is entitled to payment or benefit including what payment or benefit that person is entitled to – the dispute may be referred by any person 'party to the dispute'. Such a person may include, among others:

> a person or persons;
>
> a contractor or contractors;
>
> sub-contractors;
>
> an employer or employers ;
>
> an employee;
>
> a member of a workplace OSH committee or the entire workplace OSH committee; or
>
> a number of committees from the site; and
>
> an occupational health and safety representative or a number of occupational health and safety representatives.

75 The powers of the Tribunal to hear and determine a matter are contained in the particular provision of the OSH Act under which the matter is referred. Those powers vary from section to section of the OSH Act. In these proceedings all applications were referred by employees 'party' to a series of disputes under s 28(2) of the OSH Act. Where a dispute arises as to whether a person is entitled to payment or benefit including what payment or benefit the person is entitled to – the dispute may be referred by any person 'party to the dispute' as explained by the Full Bench in *Thiess v A AFMEPKIU* [68].

76 Examples of various referral provisions under the OSH Act include:

> s 28(2) provides for the Tribunal to determine 'whether a person is entitled to any pay or benefit; or the pay or benefit to which a person is entitled,';
>
> s 30(6) provides the power to the Tribunal to determine 'the matter' relating to consultation on unresolved matters relevant to elections of occupational health and safety representatives (OSH reps);
>
> s 30A(4) provides the power to the Tribunal to determine the matter relating to the setting up of an election scheme;
>
> s 31(11) provides the power to the Tribunal to determine 'the matter' relating to the conduct of elections of OSH reps;
>
> s 34(1) provides the power to the Tribunal to determine whether an OSH rep should be disqualified;
>
> s 35(3) provides the power to the Tribunal to determine whether an OSH rep's entitlements to perform functions or attendance at courses accredited under s 14(1)(h) ought to be varied;
>
> s 35C provides the power to the Tribunal to determine whether an OSH rep has been discriminated against in their employment. Remedies available to the Tribunal where the Tribunal finds in the affirmative include reinstatement where a dismissal occurred, payment of adequate compensation or both;
>
> s 39G(1) provides the power to the Tribunal to review a decision made by the WorkSafe Commissioner as to whether an occupational health and safety committee (OSH committee) should be established;
>
> s 39G(2) provides the power to the Tribunal to review a decision made by the WorkSafe Commissioner as to how an OSH committee should be constituted;
>
> s 39G(3) provides the power to the Tribunal to review a decision made by the WorkSafe Commissioner under s 39F(5) relating to an OSH committee, and 'the Tribunal may confirm, vary or revoke a decision or determination of the Commissioner'; and
>
> s 51A(1) provides the power to the Tribunal to review a decision where a person has been issued with a notice by the WorkSafe Commissioner relating to the issuance of an improvement or prohibition notice. In s 51A(5) powers are prescribed to 'affirm the decision' of the WorkSafe Commissioner, 'affirm the decision of the Commissioner with such modifications as seem appropriate;' or 'revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,'.

77 Counsel for the employers described the Tribunal, based on s 51G(2) of the OSH Act to be:

> no more than the nomenclature to be applied to the Commission (ts 50).

The Tribunal considers it necessary to:

> have regard for the OSH Act as a whole;
>
> consider the Act's purpose to 'provide for a tribunal for the determination of certain matters and claims'; and
>
> interpret the statute, specifically the provisions of s 51G;

which prescribe the Tribunal as a distinct body, specified by statute.

78 In conclusion, the OSH Act:

> is not a state or territory industrial law as envisaged by s 4 of Work Choices;
>
> does not apply to s 16(1) of Work Choices;
>
> is a law that 'deals with' occupational health and safety, one of the matters referred to in s 16(3) of Work Choices, namely, s 16(3)(c) together with s 16(2)(c) of Work Choices; and
>
> does apply as a law of Western Australia.

79 The Tribunal:

> is constituted by Part VIB of the OSH Act;
>
> is not excluded in the exercise of powers by s 109 of the Constitution.
>
> has the power to hear and determine matters as specified by s 51G of the OSH Act;
>
> is able to hear and determine matters as referred by employers and employers from constitutional corporations;
>
> powers vary according to the specific section of the OSH Act under which a matter is being heard and determined; and
>
> procedures, particularly those referred to in s 51I, but also s 51G(3), are prescribed as provisions of the OSH Act.

80 The jurisdictional challenges by the employers in OSHT 2 of 2009, OSHT 4 of 2009, OSHT 5 of 2009, OSHT 6 of 2009, OSHT 18 of 2009, OSHT 22 of 2009, OSHT 23 of 2009, OSHT 24 of 2009 and OSHT 25 of 2009 are hereby dismissed. The Tribunal declares all applications as referred under s 28(2) of the OSH Act to be valid referrals. The Tribunal will proceed to list the applications for hearing and determination. Given the number of persons involved in these proceedings at the *Bluewaters Power Station Project* the Tribunal determines that a copy of the declaration is to be placed in a prominent position at the workplace and distributed to occupational health and safety committee members.

81 A minute will accompany the issuing of these reasons for decision.

2009 WAIRC 00575

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 17 AUGUST 2009
FILE NO/S	OSHT 2 OF 2009, OSHT 4 OF 2009, OSHT 5 OF 2009, OSHT 6 OF 2009, OSHT 18 OF 2009, OSHT 22 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009
CITATION NO.	2009 WAIRC 00575

Result	Declaration issued
Representation	
Applicants	Mr D Schapper (of counsel) on behalf of Matthew Gibbs, Matthew Dempsey, Clayton Higgins, Dean Lloyd and Antony Thompson
	Mr T Kucera (of counsel) on behalf of Matthew Gibbs
	Ms N Ireland on behalf of Matthew Dempsey, Clayton Higgins, Dean Lloyd and Antony Thompson
	Mr S Millman and Mr J Nicholas (both of counsel) on behalf of Grant Veal, Andrew Liley, Dane Pridmore and Tony Woodhead
Respondents	Mr J Blackburn and Ms L Gibbs (both of counsel)

Declaration

WHEREAS the Occupational Safety and Health Tribunal (the Tribunal) heard a jurisdictional challenge to the validity of applications OSHT 2 of 2009, OSHT 4 of 2009, OSHT 5 of 2009, OSHT 6 of 2009, OSHT 18 of 2009, OSHT 22 of 2009, OSHT 23 of 2009, OSHT 24 of 2009 and OSHT 25 of 2009;

AND WHEREAS the applications were referred to the Tribunal pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

NOW THEREFORE pursuant to powers conferred by s 51I of the *Occupational Safety and Health Act 1984* that the Tribunal issues the following declaration:

1. THAT the jurisdictional challenge by the respondents to applications OSHT 2 of 2009, OSHT 4 of 2009, OSHT 5 of 2009, OSHT 6 of 2009, OSHT 18 of 2009, OSHT 22 of 2009, OSHT 23 of 2009, OSHT 24 of 2009 and OSHT 25 of 2009 be dismissed.
2. THAT the applications as referred to the Tribunal pursuant to s 28(2) of the OSH Act be declared valid referrals.
3. THAT the Tribunal proceed to list the applications for hearing and determination.
4. THAT a copy of the declaration be placed in a prominent position at the workplace and distributed to the occupational health and safety committee members.

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

2009 WAIRC 00597

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATTHEW GIBBS AND OTHERS
	APPLICANTS
	-v-
	HITACHI PLANT TECHNOLOGIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 25 AUGUST 2009
FILE NO/S	OSHT 2 OF 2009, OSHT 4 OF 2009, OSHT 5 OF 2009, OSHT 6 OF 2009, OSHT 18 OF 2009, OSHT 22 OF 2009, OSHT 23 OF 2009, OSHT 24 OF 2009, OSHT 25 OF 2009
CITATION NO.	2009 WAIRC 00597

Result	Directions issued
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr J Blackburn and Ms L Gibbs (of counsel)

Directions

WHEREAS these matters were listed for a Directions hearing before the Occupational Safety and Health Tribunal (the Tribunal) on 25 August 2009;

AND WHEREAS having considered it necessary to give directions for the expeditious and just hearing and determination of this matter;

AND WHEREAS having heard from Mr Millman (of counsel) on behalf of the applicants and Mr Blackburn (of counsel) on behalf of the respondents;

NOW THEREFORE the Tribunal pursuant to the powers of the *Occupational Safety and Health Act 1984* hereby directs:

1. The schedule of persons seeking leave to be joined to OSHT 2 of 2009 be filed and served by close of business on 4 September 2009;
2. Hearing of the substantive matter is set down for 8 days, 4 days in Collie and 4 days in Perth;
3. Hearing of the substantive matter is listed for 26 to 29 October 2009 inclusive in Collie and 17 to 20 November 2009 inclusive in Perth;
4. Discovery of documents is to be informal. The parties are to exchange any documents they will be relying upon at the hearing by no later than close of business on 25 September 2009;
5. In liaison with the respondents, the applicants are to draw up an Agreed Statement of Facts and documents relevant to this matter. The Agreed Statement of Facts and associated documents are to be filed in the Registry by no later than close of business on 9 October 2009;
6. The parties are to exchange the names of witnesses to be called to give evidence by no later than close of business on 18 September 2009;
7. The parties file and serve any documents they intend to rely on at the hearing by close of business on 2 October 2009;
8. Liberty to apply at short notice is granted to the parties in relation to the above matter.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2009 WAIRC 00608

REFERRAL OF DISPUTE RE PAYMENT OF CLAIMS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TOKARA TRANSPORT
	APPLICANT
	-v-
	MICK QUADRIO
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	RFT 15 OF 2009
CITATION NO	2009 WAIRC 00608

Catchwords	Owner-driver contract - Referral of dispute re payment of claims - Owner-Drivers (Contracts and Disputes) Act 2007 - ss38, 44 and 47
Result	Application dismissed
Representation	
Applicant	Ms S Woolford on behalf of the applicant
Respondent	Mr M Quadrio

Reasons for Decision

1 The Owner-Drivers (Contracts and Disputes) Act 2007 was enacted:

- to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so; and
- to establish the Road Freight Transport Industry Tribunal and the Road Freight Transport Industry Council,

and for related purposes.

2 Section 38 permits the Commission, sitting as the Road Freight Transport Industry Tribunal, to hear and determine certain disputes. Section 40 (a) provides:

> **"40. Persons who may refer disputes and matters to the Tribunal**
>
> A dispute or matter may be referred to the Tribunal —
>
> (a) in the case of a dispute arising under or in relation to an owner-driver contract, by —
>
> (i) a person who is a party to the owner-driver contract; or
>
> (ii) a transport association in which a party to the owner-driver contract is eligible to be enrolled as a member; or
>
> (iii) an inspector; or
>
> (iv) the Minister;"

3 Sections 4 and 5 are relevant and state:

> **"4. Meaning of "owner-driver"**
>
> …….
>
> (2) For the purposes of this Act an **"owner-driver"** is —
>
> (a) a natural person —
>
> (i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and
>
> (ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators); or
>
> (b) a body corporate (other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are —
>
> (i) supplied by the body corporate or an officer of the body corporate; and
>
> (ii) operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles; or
>
> (c) a partnership of persons, at least one of whom is a person referred to in paragraph (a).
>
> **5. Meaning of "owner-driver contract"**
>
> (1) For the purposes of this Act, an **"owner-driver contract"** is a contract (whether written or oral or partly written and partly oral) entered into in the course of business by an owner-driver with another person for the transport of goods in a heavy vehicle by the owner-driver.
>
> (2) It does not matter that an owner-driver contract provides for an owner-driver to perform services other than transporting goods, as long as the services to be performed under the contract predominantly relate to the transport of goods.
>
> (3) To avoid doubt, an owner-driver contract does not include a contract that is a contract of employment."

4 In this application the dispute involves the non-payment of two tax invoices for the transportation of goods. Both invoices are made out by Tokara Transport and directed to Fishers Interstate Transport Solutions, PO Box 107, Cardross Vic. 3496. Mr and Mrs Woolford are partners in the business, Tokara Transport. It is common ground that Mr Woolford transported the goods. The invoices read as follows:

> "TAX INVOICE
>
> For Fishers Interstate

Transport Solutions

PO Box 107

CARDROSS VIC 3496

Date	Docket No Description Hours	Cost
9/6/08	For Swick Mining and Brandrill	
	1 compression truck HV209 from Perth to Woody Woody	$5800.00
	1 trailer of equipment to EREA C	$3900.00
	Sub total	$9700.00
	GST	$ 970.00
	TOTAL	$10670.00

TAX INVOICE

For Fishers Interstate

Transport Solutions

PO Box 107

CARDROSS VIC 3496

Date	Docket No Description Hours	Cost
16/5/08	2 Trailers from Kwinana to Jimble Bar Mine Newman	$6000.00
	For AGC 2 racks of steel fixings + 2 utes	
	Sub total	$6000.00
	GST	$ 600.00
	TOTAL	$6600.00”

5 Section 44 provides for conciliation of a dispute. This matter came on for conference on 10 July 2009 and the respondent failed to attend. At all times the respondent has maintained that the claim does not relate to him. Section 47 then provides:

“47. Determination of dispute where no resolution by conciliation

(1) If —

(a) a dispute is referred to the Tribunal; and

(b) the Tribunal takes action under section 44(2)(a); and

(c) section 44(5)(b) does not apply,

the Tribunal may hear and determine the dispute for the purposes of section 38(1)(a).

(2) The Tribunal does not have jurisdiction to make a determination under this section in respect of a matter arising in relation to the conduct of joint negotiations for an owner-driver contract.

(3) In making a determination mentioned in subsection (1), the Tribunal must endeavour to ensure that the matter is resolved —

(a) taking into account any agreement reached by the parties on any particular issue; and

(b) subject to paragraph (a), on terms that could reasonably have been agreed between the parties in the first instance or by conciliation.

(4) In making a determination mentioned in subsection (1), the Tribunal may do one or more of the following —

(a) order the payment of a sum of money —

(i) found by the Tribunal to be owing by one party to another party; or

(ii) by way of damages (including exemplary damages and damages in the nature of interest); or

(iii) by way of restitution;

(b) order the refund of any money paid under an owner-driver contract;

(c) make an order in the nature of an order for specific performance of an owner-driver contract;

(d) declare that a debt is, or is not, owing;

(e) order a party to do, or to refrain from doing, something;

(f) make any other order it considers fair, including declaring void any unjust term of an owner-driver contract.

(5) In making an order under subsection (4), the Tribunal cannot —

(a) insert a term into; or

(b) subject to subsection (4)(f), otherwise vary,

an owner-driver contract."

6 The question that arises in this dispute is whether the owner-driver contract was made with Mr Quadrio and hence whether Mr Quadrio is responsible for the payment.

Evidence

7 Evidence was given by Mrs Sherry Anne Woolford and Mr Woolford who are husband and wife and partners in the business Tokara Transport. Her evidence is that they did some work for Mr Quadrio. She was originally told by her husband to invoice another address which she did. After many telephone calls she was told to get in touch with Mr Quadrio and he said he would take full responsibility for it. He paid one account but did not pay two other accounts. They had to hire a truck, a trailer and pay their own fuel and she says her husband did the job for Mr Quadrio to help him out; to do the right thing.

8 Mrs Woolford invoiced Fishers Interstate for the jobs and then later sent the invoices to Mr Quadrio. She was told by her husband to "invoice that address". Nothing happened and so Mrs Woolford telephoned a gentleman at Fishers Interstate whose name she cannot remember. She says that, "He told us that he hadn't been paid for the work and that as soon as he was paid he would pay us". After numerous phone calls, he said to us that, "I'm sorry, but I don't have the money". Then a man known as "Wolf" from Greenlea Transport told her to get in touch with Mr Quadrio. She telephoned Mr Quadrio and he told her that he would be taking responsibility for the payments and paid one account. Mrs Woolford says, "he said the following money would be coming shortly". She says the first payment was made on the same date she telephoned him, ie 10 October 2008.

9 Mrs Woolford says:

> "After the … after that one came through, I rang him again in November, December and right through I have our phone bills where I've rung on numerous occasions. A couple of the occasions he told me he was sitting at his computer and was going to send the other one, like another lot through, which never eventuated and that happened quite a few times and then he did say to me that, "Oh, I've got the money. I'm waiting for a cheque to be cleared. As soon as that cheque clears, I will pay you."
>
> All right. And why do you think the debt is Mr Quadrio's?---Because … well, I'm … I'm really not sure. I was just told that, you know, it was Mr Quadrio that was taking it over and he did say that he was taking it over." (T5)

10 Mrs Woolford tendered a bank statement but did not want details irrelevant to the claim to be seen by Mr Quadrio. The relevant line on the statement indicated a payment was made to Tokara Transport on 9 October 2008 of $8360 and the only other information is "CHH, Netbank, 068523". She was asked:

> "All right. How do I know this is Mr Quadrio's?---Well, you don't, but as I said, it's only what we've … that's all we've got from them, so, you know, I mean, the invoice was there. That's the amount of the invoice and he did pay that one. Well, he … he rang me as soon as he'd done it to say that it had been done." (T6)

11 Mr Mervyn Woolford gave evidence that he was looking for work and spoke to Mr Ned Green who runs Greenlea Transport. Mr Green told him that Mr Quadrio had some work He then says:

> "Mick told me the loads, where they had to go, how much the loads were, so it was a verbal … only a verbal agreement with Mick and then I said to him afterwards, "Who do I send the account to?" and he said, "Oh, Fishers Interstate Transport," or what, Fisher Group, or whatever it was in Melbourne, which we did, and which we had no success in getting our money. I mean, it cost us over $14,000 to do the work and he then … I went to Ned Green of Greenlea and I said we didn't have any joy with any money there and he said, "No," he said, "Mick's going to sort it out," and ring him and send all your paperwork to him and then Mick paid the first one and then had agreed to pay the others. I mean, somebody has been paid for the work I've done. I know … I don't know who it is, but Mick obviously knows and he's … like I said, he said that he'd take responsibility of the payment of it," (T7)

12 Mr Woolford says that he has had telephone conversations with Mr Quadrio over 12 months and asked him when he could have the money. He says that Mr Quadrio has replied:

> "Yeah. No worries, mate. I'll … I'm at the computer right now and I'll transfer some money through. I'll put 7000 through now and then 10,000," or something, "And it's all settled," and that was all I'd get and then you'd wait a week, no money. And I guess we were the soft touch that never hassled him for the money," (T8)

13 As for the actual work Mr Woolford says:

> "The first one for the 10,670 was two trailers, one to Woody Woody, which was a compressor truck, which has got the number of the compressor truck, the amount for that, and then another trailer load to area C just out of Newman. That was one trip.
>
> And is this the trip you did?---Yes. And then the next invoice was two trailers from Kwinana to Jimblebar, Newman, two racks of steel fixings on one, or, no, a rack of steel fixings on each trailer with a ute as well on each trailer. So it was two trailers and that was for that 6000, yeah.
>
> ……
>
> Well, I was given instructions sort of between … from Mick and Ned Green of Greenlea Transport.
>
> On both occasion?---Yes, on both - - -
>
> Or just one occasion?---No, both occasions.

All right. And you mentioned a third account that was paid. What was that job?---That was a compressor truck to Woody Woody and then, I don't know, I'm pretty sure it was a load back out of … I haven't got it here with me, but it was another … it was a backload out of another mine out of Mount Magnet.

Well, who told you about those loads?---Mick." (T8)

14 Mr Woolford explained the invoices as follows:

"Yes, because I was to go and work for Greenlea. He had a job that was about to start up and this basically was going to be … well, it wasn't just going to be a fill-in, but we were going to work with Mick, do his work as well as the work that Greenlea had obtained. That hadn't started, so we just … I just started to do these loads for Mick and … and I used Greenlea's cart notes because I didn't have … or Mick didn't supply me with any cart notes or anything, so I just used Greenlea's.

All right. And, again, in relation to Fishers Transport, why was it invoiced to Fishers Transport?---Yeah, good question. That's who Mick said to send the invoice to.

When did that happen?---Well, after I'd done the jobs, pretty much." (T8-9)

15 Mr Woolford says that he was not engaged to do the work by Mr Ned Green. He says that Mr Green simply put him on to Mr Quadrio to get the work. Finally Mr Woolford was asked:

"How do you know these jobs were paid for at all?---Well I don't, but they're three large companies which I would imagine would've paid by now. I mean, they might not have paid for 90 days, I don't know, but I believe Mr Quadrio still does work for them, so I guess they must pay somewhere down the line." (T9)

16 Mr Michael Quadrio gave evidence as follows:

"Basically, I'd just like to point out that M.J. Quadrio Contractors was offered some work from Fishers Interstate Transport. They actually gave me Edward Green's contact number because they knew he was chasing work, whom I contacted and passed the … the subcontract work on to him and … and at that stage I was led to believe he was going to do it all himself, but then involved other contractors. So at … at no time did Quadrio Contractors have anything to do with the subcontractors, other than … than Greenlea Transport. I'd like to point out that … that the … the comments in relation to the phone calls did actually take place and … and … and, yes, I certainly said I would endeavour to … to resolve the problems and get them sorted out because they were having trouble contacting Fisher, the same as I was. The … the job that got paid … I didn't actually pay it and this is something that's fairly important for everybody to know … I … I didn't pay that account. That was actually paid by CHH, which is Contract Heavy Haulage. The reason they paid it is they hadn't paid Fishers Transport at that stage." (T10)

17 He says of Contract Heavy Haulage that;

"Now, they … they hadn't paid Fishers Interstate at that stage or Greenlea, so they paid it direct to … to Tokara. Strictly speaking, Contract Heavy Haulage is … is in … is in a … in a bit of a predicament on … in … in that regards because they haven't paid Fishers Transport. The invoices that've been raised have been raised to Fishers Transport, so really Contract Heavy Haulage shouldn't have got involved in it, but nevertheless they did after a discussion I had with them and I've since taken that matter up with Mr Fisher, but in essence, you know, Tokara has never worked for M.J. Quadrio Contractors. That's … that's pretty much in a nutshell. If they did, they would've been on my con notes. We would've been invoiced for it. We were invoiced for the jobs, no question about it, and … and the jobs that … that Merv explained to yourself, yes, he … he definitely did it. I know that for a fact, but those jobs were invoiced by another party."

18 Mr Quadrio says that the jobs should be paid for by Greenlea Transport or Fishers Interstate, but probably Fishers Interstate as they got paid for a big percentage of the jobs. Mr Quadrio says that he did tell Mr Woolford, in some cases, about the loads, where to go and what to do with the loads. He says that he was the point of contact for the dispatch; the details were emailed or faxed to him and he passed them on to the appropriate parties, whether that be Greenlea Transport or Contract Heavy Haulage or whoever.

19 Mr Quadrio says that Greenlea Transport did the actual hiring of Tokara Transport. Mr Quadrio says that he was only handling the matter at a supervisor level. He believes the jobs have been paid for; he is quite confident of that. He believes that Fishers Interstate has been paid for some and Greenlea Transport for some. He denies that he told Mr and Mrs Woolford that he would pay for the jobs; he did say that he would look into it as he had done. He did get Contract Heavy Haulage to pay Tokara Transport directly for one job. He says he works for Contract Heavy Haulage.

20 Under cross-examination Mrs Woolford and Mr Quadrio had this exchange:

"And also the phone conversations you and I had, you … did you not tell me on numerous occasions that you were going to sit down at your computer and transfer money straightaway then?---I was certainly going to look at it, yes. Yes, I don't dispute any of them conversations.

So you're still saying that you were going to pay us and - - -?---It was subject to what was owed to Mr Fisher. I … I can't pay you something that someone else has already been paid. I can certainly intervene - - -

But - - -?--- - - - if they haven't been paid something for another job. I can say, "Well, I'm paying these people because you haven't paid them," and do a … an offset.

But you were telling me at the time, "Oh, my money hasn't come through. They haven't paid me for it yet. That's why I can't pay you," on other occasions when we spoke?---Yeah, but not on those particular jobs. See, strictly speaking, I can't pay youse anyway, Sherry. I don't have an invoice from you people.

Yes?---So it's … I should've kept my nose out of it." (T12)

Considerations

21 It is the case that neither the consignment notes, nor the invoices, were raised against the name Mick Quadrio. The consignment note was on Greenlea Transport paperwork and the invoices were directed to Fishers Interstate. It was only later, on the evidence of both Mr and Mrs Woolford, when they did not receive payment that they were directed by another individual, Wolf from Greenlea Transport, to Mr Quadrio. More particularly, they say they are pursuing Mr Quadrio for the debt as he said he would pay the amounts. Mr Quadrio says, however, that he was not responsible for the payments, agreed to help sort the matter out, and did not make the first payment. This was paid by Contract Heavy Haulage, which would seem to be the case from the bank statement displayed by Mrs Woolford.

22 It is the case that neither Mr nor Mrs Woolford pursued Mr Quadrio for the payment in the first instance. He was pursued only after the payment was not initially made. Mr Woolford who was the one who instructed his wife to direct the invoices to Fishers Interstate says that after having no success with getting any money from Fishers Interstate he approached Mr Green who said that, "Mick's going to sort it out". This is not evidence that Mr Quadrio was responsible for the payments and could be construed as evidence consistent with Mr Quadrio's evidence that he was trying to sort it out, but should have kept his nose out of it.

23 Mr Quadrio says that the contract was with Fishers Interstate and with Greenlea Transport as the subcontractor. He says that he did supervise the work, but had no direct relationship with the contract or subcontract. On balance, I accept this evidence as the most probable explanation of what transpired with the contract. Mr Woolford says that Mr Quadrio told him about the loads and where they were to go. He says that Mr Quadrio told him to invoice Fishers Interstate; which of course Mr Woolford accepted and arranged through his wife to raise the invoices. Importantly, Mrs Woolford says that she first contacted someone at Fishers Interstate for the money and was told that he had not been paid for the work and would pay her as soon as he was paid. After numerous telephone calls to this person he simply stated that he was sorry but he did not have the money. The evidence is not that the person at Fishers Interstate denied that he owed a debt to Tokara Transport but that he was not financial.

24 The evidence does not support the view of Mr and Mrs Woolford that Mick Quadrio personally paid the first account. It was in fact paid by CCH.

25 In these circumstances, on all the evidence presented to me, I cannot reach the conclusion that the contract was made between Tokara Transport and Mick Quadrio personally. That being the case I will issue an order dismissing the application. This does not mean that Tokara Transport does not have a claim. All the evidence supports the view that Mr Woolford did the work and Tokara Transport is out of pocket as a result. However, the claim, on the evidence before me, has been pursued against the wrong party. I am not able in the circumstances of this matter to simply amend the respondent's name as the other parties appear separate from Mr Quadrio and the applicant is adamant that Mr Quadrio is responsible for the payment.

2009 WAIRC 00609

REFERRAL OF DISPUTE RE PAYMENT OF CLAIMS

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TOKARA TRANSPORT
	APPLICANT
	-v-
	MICK QUADRIO
	RESPONDENT
CORAM	COMMISSIONER S WOOD
DATE	FRIDAY, 28 AUGUST 2009
FILE NO	RFT 15 OF 2009
CITATION NO.	2009 WAIRC 00609

Result	Application dismissed
Representation	
Applicant	Ms S Woolford on behalf of the applicant
Respondent	Mr M Quadrio

Order

HAVING heard Ms S Woolford on behalf of the applicant and Mr M Quadrio on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby orders:

THAT the application be and is hereby dismissed.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the Owner-Drivers (Contracts and Disputes) Act 2007 that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
Rapido Investments T/a D&S Knighton	Bulldog Haulage Pty Ltd	Smith SC	RFT 12/2009	8/06/2009	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Mines Express	Wood C	RFT 14/2009	3/07/2009 11/08/2009	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Kings Transport Services Pty Ltd	Smith SC	RFT 6/2009	14/05/2009 9/06/2009	Referral of dispute re conduct of negotiations	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Truck and Transport Solutions	Smith SC	RFT 4/2008	27/11/2008 12/12/2008	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Golden Hiabs	Smith SC	RFT 3/2008	27/11/2008 11/03/2009	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	All Earth Group Pty Ltd	Smith SC	RFT 1/2009	N/A	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Cockburn Transport	Smith SC	RFT 8/2009	N/A	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Nexus WA Pty Ltd t/a Nexus Freight	Smith SC	RFT 5/2009	24/03/2009	Referral of dispute re payment of a claim	Discontinued
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch	Cockburn Transport	Smith SC	RFT 7/2009	N/A	Referral of dispute re payment of a claim	Discontinued