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PRESIDENT—Unions—Matters dealt with under Section 66—

2009 WAIRC 01192

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY D MULLEN AND CHRISTOPHER C SHARPE
	APPLICANTS
	-and-
	ANNE GISBORNE, PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC.)
	RESPONDENT
	-and-
	THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA INC
	INTERVENER
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	FRIDAY, 13 NOVEMBER 2009
FILE NO/S	PRES 9 OF 2009
CITATION NO.	2009 WAIRC 01192

Decision	Directions Order issued
Appearances	
Applicants	In person
Respondent	Mr D Balfour (as agent)
Intervener	Mr S Millman (of Counsel), by leave

Order

This matter having come on for a directions hearing before me on 6 November 2009, and having heard Mr A D Mullen on behalf of the applicants, and Mr D Balfour as agent on behalf of the respondent and Mr S Millman (of Counsel), by leave, on behalf of the intervener, it is ordered that —

1. The applicants file and serve particulars of the grounds for seeking an order that the intervener's claim for legal professional privilege be set aside, by 4:00 pm on Friday, 13 November 2009;
2. The applicants file and serve a list of all documents relevant to the application, by 4:00 pm on Friday, 13 November 2009;

3. The intervener file and serve its response to the applicants' application to set aside the intervener's claim of legal professional privilege, by 4:00 pm on Wednesday, 18 November 2009;

4. The applicants, respondent and intervener file and serve a Statement of Agreed Facts, by 4:00 pm on Friday, 20 November 2009;

5. The applicants, respondent and intervener are to exchange and file witness statements, by 4:00 pm on Friday, 4 December 2009;

6. The applicants, respondent and intervener are to file and serve a list of the authorities they rely upon by 4:00 pm on Monday, 11 January 2010;

7. The application be adjourned to a hearing at 111 St Georges Terrace, Perth in Court 3 on Level 18 on Wednesday, 13 January 2010 and Thursday, 14 January 2010 at 10:30 o'clock in the forenoon to hear the abovementioned matter.

(Sgd.) J H SMITH,
[L.S.] Acting President.

2009 WAIRC 01286

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY D MULLEN, CHRISTOPHER C SHARPE
	APPLICANT
	-and-
	ANNE GISBORNE,
	PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC.)
	-and-
	THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA INC
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	FRIDAY, 4 DECEMBER 2009
FILE NO/S	PRES 9 OF 2009
CITATION NO.	2009 WAIRC 01286

Decision	Order varied
Appearances	
Applicants	Mr C Sharpe, in person
Respondent	Mr D Balfour (as agent)
Intervener	Mr S Millman (of Counsel, by leave)

Order

This matter having come on for a directions hearing before me on 2 December 2009, and having heard Mr C Sharpe on behalf of the applicants, and Mr D Balfour on behalf of the respondent, and Mr S Millman on behalf of the intervener, by consent it is ordered that –

1. Order [2009] WAIRC 01192 be varied by:

   (a) amending the time for compliance for order (4) to 4.00pm on Tuesday, 8 December 2009;

   (b) amending the time for compliance for order (5) to 4.00pm on Tuesday, 8 December 2009;

   (c) amending the time for compliance for order (6) to 4.00pm on Friday, 29 January 2010;

2. The hearing on Wednesday 13 January 2010 and Thursday 14 January 2010 be and is hereby adjourned to Wednesday 3 February 2010 and Thursday 4 February 2010.

(Sgd.) J H SMITH,
[L.S.] Acting President.

2009 WAIRC 01360

ALLEGED BREACH OF UNION RULES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY D MULLEN, CHRISTOPHER C SHARPE
	APPLICANTS
	-and-
	ANNE GISBORNE, PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC.)
	RESPONDENT
	-and-
	THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA INC
	INTERVENER
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	WEDNESDAY, 2 DECEMBER 2009
DELIVERED	THURSDAY, 24 DECEMBER 2009
FILE NO.	PRES 9 OF 2009
CITATION NO.	2009 WAIRC 01360

CatchWords	Discovery - Application to set aside advice privilege - Legal professional privilege - Waiver - Substance of legal advice disclosed in report - Whether disclosure of report to applicants inconsistent with the maintenance of confidentiality of the content of advice - *Industrial Relations Act 1979* (WA) s 62(1), s 62(2), s 66(1)(a).
Result	Application dismissed
Representation	
Applicants	Mr C Sharpe, in person
Respondent	Mr D Balfour (as agent)
Intervener	Mr S Millman (of Counsel, by leave)

Reasons for Decision

Background

1 This is an application made pursuant to s 62(1) and s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicants make the application under s 66(1)(a) of the Act as persons who are members of an organisation. The organisation is The State School Teachers' Union of W.A. (Incorporated) (SSTUWA), who is the intervener in this matter. The applicants' application arises out of a resolution made on 14 September 2007 by the intervener's Executive Committee. The resolution was to dismiss each of the applicants as a district delegate to the SSTUWA State Council.

2 On 17 November 2007, the SSTUWA State Council resolved that the Executive decision be endorsed. At the time the applicants were elected as district delegates to State Council the applicants were both employees of the intervener.

3 In the minutes of particulars filed by the applicants on 21 September 2009, the applicants state their particulars of claim as follows:

> The Applicant asserts the true interpretation of the Rules of the SSTUWA is that Industrial Staff Employee members of the SSTUWA are eligible to be elected as delegates to the SSTUWA State Council.
>
> The Orders sought by the Applicant under s66 of the Industrial Relations Act 1979 (WA) are as follows:
>
> 1. That the true interpretation of the Rules of the SSTUWA being that Industrial Staff Employee members of the SSTUWA are eligible to be elected as delegates to the SSTUWA State Council, SSTUWA State Council is ordered to rescind the decision of 17 November 2007 (SC 2), namely, 'That the Executive decision be endorsed.'
> 2. That the true interpretation of the Rules of the SSTUWA being that Industrial Staff Employee members of the SSTUWA are eligible to be elected as delegates to the SSTUWA State Council, SSTUWA Executive is ordered to rescind the decision of 14 September 2007 (E 491), namely,
>
> 'That Executive
>
> (a) notes that Chris Sharpe and Tony Mullen did not resign from their employment with the Union before the commencement of their terms of office as district delegates to State Council.
>
> (b) find that under the rules of the Union that failure to so resign renders Chris Sharpe and Tony Mullen ineligible to hold office as district delegates to State Council.

(c) hereby dismisses Chris Sharpe from office as a district delegate to State Council.

(d) hereby dismisses Tony Mullen from office as a district delegate to State Council.

(e) directs the Union President to report this resolution to the next meeting of State Council.'

4 Pursuant to orders made on 13 October 2009, the intervener filed a list of discoverable documents on 4 November 2009. The intervener listed in part 2 of the first schedule of the list, a number of documents which it says are confidential communications passing between the intervener and the intervener's solicitors and advisers in this matter with reference solely to matters which are now in question in this action, for the purpose of obtaining legal advice, or are documents which have come into existence after the matters in present in dispute in this action were in controversy, and have been obtained or prepared by or on behalf of the intervener in this action and solely for the purpose of this action.

5 On 6 November 2009, the applicants made an oral application to set aside legal professional privilege in respect of the documents listed in part 2 of the first schedule of the intervener's list of documents. On 16 November 2009, the applicants filed grounds for seeking an order to set aside the claim of legal professional privilege. Their grounds are:

> The Order sought by the Applicants relates specifically to the disclosure of documents originating during the period June 2007 to September 2007, generally from the time of the State Council on 16 & 17 June until the meeting of the SSTUWA Executive Committee on 14 September. These are the documents related to the Applicants' status as Delegates to the SSTUWA State Council in 2007.
>
> The Applicants do not dispute the principle and application of legal (or client) professional privilege in general terms. The Applicants submit, however, the common law doctrine that voluntary disclosure by the client effectively waives legal professional/client privilege and that this applies in this particular situation.
>
> In August 2007 The President of the SSTUWA voluntarily provided the Applicants with a copy of a document headed: 'SSTUWA Executive 3-4 August 2007.' The document is entitled 'Report Item: Union Employees as Delegates to State Council.' It provides a brief background to the issue, gives legal advice on the matter, canvasses three options for prospective action by the SSTUWA Executive and makes a recommendation based on one of the options. The document appears to have been drafted on behalf of the SSTUWA President by Slater and Gordon, the Union's lawyers.
>
> A copy of the document is attached.
>
> The Applicants note, in the second paragraph, that the matter of Union employees, ie ourselves, being State Council delegates has been raised as a result of, 'Questions (having) arisen as to the validity of those staff members serving the union in both capacities at the same time.' This implies that other parties may have raised such questions.
>
> The Applicants also note that the recommended option for Executive action is worded the same as the decision taken by the SSTUWA Executive at its meeting on 14 September 2007.
>
> The Applicants submit that the voluntary disclosure of this document, and the contents contained therein, to us by the SSTUWA President, Acting on behalf of the SSTUWA Executive and the organization generally, effectively waives the legal/client professional privilege the Intervener is relying on to deny us access to the various relevant communications cited in Part 2 of Schedule 1 of the Intervener's list of discoverable documents.
>
> The documents we are seeking to be provided with that are germane to the Union Report of 3-4 August 2007, and which date from June to September 2007, are:
>
> 1. Letters, written memoranda, emails and notes of verbal communications between the SSTUWA (including Senior Officers and Executive Officers) and Slater and Gordon lawyers.
> 2. Letters, written memoranda, emails, statements and notes of verbal communications between SSTUWA Senior Officers and Executive Officers) [sic] and State Council delegates and/or prospective expert and other witnesses.
> 3. Letters, written memoranda, statements and notes of verbal communications between State Council delegates and/or prospective and other witnesses and Slater and Gordon lawyers.
> 4. Details of instructions given to Slater and Gordon lawyers by the SSTUWA (including Senior Officers and Executive Officers).

6 When the application to set aside legal professional privilege was heard on 2 December 2009, Mr Sharpe on behalf of the applicants informed the Commission that they now only seek discovery of the legal advice which is referred to the document titled "SSTUWA Executive 3 - 4 August 2007 Report Item: Union Employees as Delegates to State Council" (the Report).

7 In the intervener's reply to the applicants' application to set aside the legal privilege, the intervener admits that the Report was provided to the applicants at the request of the applicants by the then President of the intervener. The intervener also says in its reply that:

(a) The Report was prepared for the State executive of the SSTUWA and is a summary of the matter for the use of the State executive;

(b) The documents were provided to the applicants in the interests of natural justice as their position was affected;

(c) The Report is specifically not a document that provides legal advice and on these facts cannot be said to constitute a document that clearly and unequivocally waives privilege; and

(d) Merely by providing a copy of the Report to the applicants the intervener has not waived legal professional privilege.

8 The material part of the Report states:

Background

1. Members of Executive will recall that, at the most recent meeting of State Council, two members of the union who are also members of the union's industrial staff, participated as district delegates to Council.

2. Questions have arisen as to the validity of those staff members serving the union in both capacities at the same time. Legal advice has been sought.

Advice

3. The advice that has been received concludes that the holding of an elected office in the union is incompatible with continuing service as an employee of the union.

4. This conclusion arises from rule 25(f), which states

> *Any employee of the SSTUWA who is elected to an office of the Union shall resign their employment with the Union by no later than the day that that person commences his or her term of office.*

5. We are advised that the effect of this rule is that it is permissible for a member of staff to nominate for election, and it is valid for a member of staff to be declared elected while remaining an employee. However, if the employee has not resigned such employment before commencing his or her term of office, then as soon as that term of office commences, the person concerned ceases to be eligible to hold that office.

   The rule does not affect the employment relationship. In other words, the election to office as a district delegate to Council does not, we are advised, operate to 'automatically' (or otherwise) terminate the employment relationship.

6. State Council has a power to dismiss from office any person elected to an office within the Union who has ceased according to the rules of the Union to be eligible to hold the office. That power comes from rule 23(b)(iv). We are advised that this power affords the appropriate remedy under the rules to deal with the present circumstance.

7. Executive has a general authority under the rules to exercise State Council's powers (with some exceptions, none of which are presently relevant). Executive's power in that regard comes from rules 24(a) and 24(d).

8. It follows that Executive has a power to dismiss from office any person elected to an office within the Union who has ceased according to the rules of the Union to be eligible to hold the office.

Correspondence

9. I have written to the two members concerned. Copies of those letters are attached to this report. In summary, I have drawn their attention to the issues discussed above, and informed them that I intended to raise the matter at Executive. The members were invited to provide a written submission that could be considered by Executive at the same time as it received this report.

9 The intervener made the following submissions in writing about the legal principles that should be applied when considering this application:

> The rationale for legal professional privilege is that promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers (see *Grant v Downs* (1976) 135 CLR 674).
>
> As the Applicants are unrepresented, the intervener makes no submission on the requirement that admissible evidence is required to displace a claim of privilege. In any event the facts on which the allegation of waiver (provision of the Document to the Applicants by the then president of the Interevner [sic]) are not disputed.
>
> The law will impute a waiver of legal professional privilege for documents from the acts or omissions of the person entitled to the privilege ('the client') *(Goldberg v Ng* (1995) 185 CLR 83 at 96).
>
> What brings about the waiver is the inconsistency between the conduct of the client and the maintenance of confidentiality *(Mann v Carnell* (1999) CLR 1 at 13).
>
> If there is a waiver as to part of a protected communication the waiver may extend to the rest of the communication, but not the source material from which the privileged documents are created *(Attorney-General (NT)* v *Maurice* (1986) 161 CLR 475 at 491).
>
> A mere reference in a document to legal advice does not ordinarily constitute a waiver of the legal professional privilege.
>
> Privilege is not waived merely by discovery of a document that refers to other documents *(Prus-Grzbowski v Everingham* (1987) 44 NTR 7).

10 The interveners say that when these principles are applied to the circumstances that arise in this matter, the scope of the request made by the applicants is inconsistent with the principles in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475. They also say in relation to the applicants' claim that the production of these materials will cure procedural unfairness that any procedural irregularity on behalf of the intervener, (which is denied), is more than adequately cured by the commencement of these proceedings, and that there is nothing in its conduct which would constitute a waiver of legal professional privilege. Consequently it asserts privilege over the materials sought.

Legal principles - Legal professional privilege

11 The onus of establishing that a communication occurred or a document was brought into existence for the dominant purpose of giving or obtaining legal advice is on the party claiming privilege: *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 [44(1)]. However, there is an evidentiary onus on the applicants to displace the claim of privilege. The intervener produced to the Commission for inspection a copy of the legal advice referred to in the Report. The legal advice is set out in a letter dated 20 July 2007 addressed to the then President of the intervener from solicitors Slater and Gordon. There is no dispute that the advice set out in the letter dated 20 July 2007 is protected by advice privilege. The only issue in dispute is whether by referring to the advice in the Report the intervener has waived the advice privilege in respect of that advice.

12 The applicants argue that the intervener has expressly waived legal professional privilege as it has revealed the content of part of the legal advice in the Report. Express waiver occurs when a person entitled to claim legal privilege provides a copy of a privileged document or discloses the privileged communication without claiming privilege, such as counsel reading into open court part of a memorandum of legal advice: *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529; [1981] 2 All ER 485 (CA). That has not occurred in this matter as the Report is not a document that itself is legal advice. Waiver may, however, occur by implication where there is a limited disclosure of the existence and effect of legal advice.

13 In *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 Gibbs CJ explained how a Court or Tribunal should determine whether legal privilege has been impliedly waived (481):

> The principle applicable in these circumstances seems to me to be well stated in *Wigmore*, op cit, par 2327:
>
> > 'In deciding it, regard must be had to the double elements that are predicated in every waiver, ie, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.'
>
> The decisions in which this question has been considered seem to me to be particular applications of the rule that in a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production. Thus it has been held that the privilege in respect of a document is not waived by the mere reference to that document in pleadings.

14 The issue is not, however, to be determined by any principle of fairness at large. In *Mann v Carnell* (1999) 201 CLR 1; [1999] HCA 66 Gleeson CJ, Gaudron, Gummow and Callinan JJ observed [29]:

> Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law' (for example, *Goldberg v Ng* (1995) 185 CLR 83 at 95; 132 ALR 57). This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank* (1993) 35 NSWLR 110, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

15 The intervener argues that the Report contains only mere reference to legal advice. In *Temwood Holdings Pty Ltd v Western Australian Planning Commission and Anor* [2003] WASCA 112, Wheeler J distinguished characterising a disclosure of a portion of the content of legal advice and mere reference to it [21]:

> A disclosure which was difficult to categorise was analysed with some care by Rolfe J in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1966) 40 NSWLR 12. His Honour was concerned with the provision of the *Evidence Act 1995* (NSW), which provided that legal professional privilege (known under that Act as 'client legal privilege') did not extend to prevent the adducing of evidence 'if a ... party has ... disclosed to another person the substance of the evidence.' There were two statements in particular which his Honour had to consider. One was a view expressed by a corporation in a Part B statement as to the likely outcome of certain litigation. The corporation asserted that on the basis of legal advice received, it would be successful. It went on to set out the corporation's views as to the likely outcome of the litigation, prefacing those views with the observations:
>
> > 'The views set out below have regard to the pleadings, the evidence available ... and the advice of the barristers and the solicitors engaged ...'
>
> His Honour formed the view that what was set out in those passages was to be characterised properly as a statement of the corporation's view of the likely outcome of the litigation, rather than a statement of either the substance or effect of the legal advice received. Although it was true that the views were formed relying, or at least relying in part, on legal advice, his Honour considered that at no point did the statement rise above a statement of the corporation's own view and, because it did not purport to state the advice, its substance or effect, it did not amount to a disclosure of the advice. His Honour contrasted those passages with a statement which appeared elsewhere in the Part B statement which read:

> 'There is a dispute about the conversion ratio. Ampolex maintains that the correct ratio is 1 : 1 and has legal advice supporting this position.'
>
> His Honour held that those words amounted to a disclosure that the substance of the legal advice was that the correct ratio was 1 : 1 and therefore meant that there had been a waiver of privilege.

16 In *Ampolex Ltd* a statement that: '[o]n the basis of legal advice received, Ampolex believes it will be successful in the Convertible Note litigation', did not purport to state the advice or its substance or effects (18). When this statement is compared to the statement about the conversion ratio set out in the reasons by Wheeler J in *Temwood Holdings Pty Ltd*, it is apparent that the statement about the conversion ratio did disclose the substance or effect of the legal advice as it stated a conclusion given in legal advice. The former statement by Ampolex however did not disclose any advice or the effect of advice but was simply a statement by Ampolex about its own assessment of prospects of the litigation in question.

17 In this matter it is apparent from reading paragraphs 2. to 8. of the Report that part of the legal advice to the intervener has not only been referred to but been disclosed. For example, paragraph 3. commences with the words: '[t]he advice that has been received concludes that'. These words are followed by a stated conclusion. Also in paragraphs 5. and 6. it is clear that the substance of at least part of the legal advice has been disclosed by the use of the words in each case: '[w]e are advised that the', and a statement of consequence that follows, which are purported statements of legal effect.

18 Despite the fact that the substance of at least part of the legal advice has been disclosed by the intervener to the applicants it does not necessarily follow that legal privilege has been waived. Disclosure of a conclusion expressed in legal advice may or may not result in waiver of privilege. It depends upon the consideration of the whole of the context in which that occurs. In *Secretary to the Department of Justice v Osland* (*Osland* CA) [2007] VSCA 96, Maxwell P of the Victorian Court of Appeal explained at [63] - [67]:

> 63 Amongst the circumstances relevant to determining inconsistency, it is clear from *Carnell* and *Bennett* that the purpose for which the privilege-holder made the disclosure is highly relevant. The question here was whether the use made by the Minister of the disclosed portion of the privileged communication – more particularly, the purpose for which the conclusion was disclosed – was inconsistent with the maintenance of confidentiality in respect of the content of the advice.
>
> 64 First it is necessary to restate the purpose of the confidentiality which the privilege preserves. In *Grant v Downs*, Stephen, Mason and Murphy JJ said:
>
> > 'The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.' [1976] HCA 63; (1976) 135 CLR 674 at 685.
>
> 65 Later, in *Baker v Campbell*, Mason J noted that the underlying policy of the privilege covering legal advice –
>
> > 'involved the promotion of freedom of consultation generally between lawyer and client.' [1983] HCA 39; (1983) 153 CLR 52 at 74.
>
> In the same case, Deane J said that the principle underlying the privilege was that –
>
> > 'a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by the subsequent disclosure of confidential communications.'
>
> 66 The evident purpose of the Attorney-General's disclosure was to inform the public that the recommendation he had made to the Governor – that the petition for mercy be denied – was based on independent legal advice, advice which recommended that each ground advanced in the petition should be rejected. The Attorney-General evidently wished it to be known that, in considering whether or not the prerogative of mercy should be exercised, he had taken independent advice and was making a recommendation which accorded with that advice. In the language of *Carnell*, this was a disclosure 'for the purpose of explaining or justifying' the Attorney-General's actions. The purpose was similar to that of the disclosure in *Carnell* itself, where the Chief Minister wished to satisfy the relevant member of Parliament that the ACT Government 'had acted responsibly and in accordance with legal advice'.
>
> 67 In my opinion, there was no inconsistency between disclosing the fact of, and the conclusions of, the independent advice for that purpose, and wishing to maintain the confidentiality of the advice itself. This was not a case of a party to litigation 'deploying' a partial disclosure for forensic advantage, while seeking unfairly to deny the other party an opportunity to see the full text of the privileged communication. Nor was it 'the laying open of the confidential communication to necessary scrutiny'.
>
> (approved on appeal in *Osland v Secretary to the Department of Justice* (*Osland* HCA) (2008) 234 CLR 275; 249 ALR 1; [2008] HCA 37)

19 To constitute waiver, the conduct of the party entitled to the privilege must be judged inconsistent with the maintenance of the confidentiality which the privilege is intended to protect: *Osland* HCA [45]. In considering this issue it is relevant to consider the purpose of disclosing the advice and the element of fairness.

20 Whether a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality will depend upon the circumstances of the case. Questions of waiver are matters of fact and degree: *Osland* HCA [49]; *Nine Films and Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442 [26].

21 The Report discloses part of the substance of advice that is confidential. Whilst there is nothing before me to suggest that the Report was disclosed for the purpose of obtaining an unfair advantage, could it be said that it is unfair that only part of the legal advice has been disclosed? As Mason and Brennan JJ in *Maurice* explained, fairness usually requires that where one part of a communication has been waived, waiver should result in the disclosure of the whole of the communication so that the opposing litigant is not mislead by an inaccurate perception (487 - 488) (applied by in *Goldberg v NG* (1995) 185 CLR 83, 96 Deane, Dawson, Gaudron JJ):

> An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. Professor Wigmore explains: 'When his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder' (Wigmore: *Evidence in Trials at Common Law* (1961) vol 8, par 2327, p 636). In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: see *Great Atlantic Insurance Co*.

22 A copy of the Report was provided to the applicants sometime in August 2007. The Report was provided to the applicants prior to the meeting of the SSTUWA Executive on 14 September 2007 which was also prior to the meeting of the State Council of the SSTUWA on 17 November 2007 at which the decision of the SSTUWA Executive to dismiss the applicants was endorsed. During oral submissions Mr Sharpe, however, informed the Commission (without objection) that copies of letters from the then President of the intervener to the applicants which were referred to in the Report were not provided to the applicants until after the meeting of the Executive.

23 The intervener says that the Report was provided to the applicants to provide them with procedural fairness as their position was affected. Other than obvious fact that the applicants are unable to judge (in the absence of an examination of the legal advice) whether the statements about the advice in the Report are accurate or complete, no issue of unfairness to the applicants appears to arise in this matter. On the other hand, the fact that part of the legal advice was disclosed with the purpose of providing procedural fairness to the applicants can be said to raise fairness in favour of the applicants. In providing a copy of the Report has the intervener acted inconsistently with the maintenance of the confidentiality which the privilege protects? In my opinion the answer is no, as the purpose for which the portion of legal advice was disclosed was not inconsistent with the maintenance of confidentiality. In *Osland* the Attorney-General disclosed in a press statement that he had made a recommendation to the Governor that a petition of mercy be denied and his recommendation was based on independent legal advice. Maxwell P in *Osland* CA considered this to be a disclosure 'for the purpose of explaining or justifying' the Attorney-General's actions. He found there was no inconsistency between disclosing the fact of, and the conclusions of, the independent advice for that purpose, with wishing to maintain the confidentiality of the advice itself. On appeal to the High Court, Gleeson CJ, Gummow, Heydon and Kiefel JJ in *Osland* HCA stated in conclusion that the reasoning of Maxwell P was correct [50]. Kirby J in his separate judgment also agreed there had been no waiver and found the purpose of issuing a press statement was compatible with non-disclosure as the purpose of issuing the press statement was to show the State had taken a proper course in obtaining and considering advice [97]-[98].

24 The purpose of providing a copy of the Report was to provide to the applicants the basis on which the Executive acted to make the resolutions to dismiss the applicants in each case from the office as a district delegate to State Council. As it is not in dispute that this was done in the interests of natural justice as the position of the applicants were affected, the provision of the copy of the Report to the applicants can not be said to be inconsistent with the confidentiality of the privilege as it can not be said that the Report was provided to advance a forensic purpose or any other purpose to disadvantage the applicants.

25 For these reasons the applicants' application to set aside legal privilege will be dismissed.

2009 WAIRC 01359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANTHONY D MULLEN, CHRISTOPHER C SHARPE
	APPLICANTS
	-and-
	ANNE GISBORNE, PRESIDENT OF THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA (INC.)
	RESPONDENT
	-and-
	THE STATE SCHOOL TEACHERS UNION OF WESTERN AUSTRALIA INC
	INTERVENER
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 24 DECEMBER 2009
FILE NO/S	PRES 9 OF 2009
CITATION NO.	2009 WAIRC 01359

Decision	Application dismissed
Appearances	
Applicants	Mr C Sharpe, in person
Respondent	Mr D Balfour (as agent)
Intervener	Mr S Millman (of Counsel)

Order

HAVING heard Mr C Sharpe on behalf of the applicants, Mr D Balfour as agent on behalf of the respondent and Mr S Millman of counsel on behalf of the intervener, pursuant to the powers conferred on the President under the *Industrial Relations Act 1979*, the President hereby orders that —

The application to set aside legal professional privilege is hereby dismissed.

(Sgd.) J H SMITH,
[L.S.] Acting President.

2009 WAIRC 01313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2009 WAIRC 01313
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	THURSDAY, 3 DECEMBER 2009
DELIVERED	**:**	TUESDAY, 15 DECEMBER 2009
FILE NO.	**:**	PRES 13 OF 2009
BETWEEN	**:**	WILLIAM CLEVERLEY BEATTS-RATTRAY Applicant AND AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH Respondent

CatchWords:	Industrial Law (WA) – s 66 of the *Industrial Relations Act 1979* (WA) - application for election of organisation's offices – whether there are corresponding counterpart Federal body offices – s 71 certificate no longer in effect – respondent offices vacant - no Sections from which Branch Councillors can be elected as required by respondent's rules.
Legislation:	*Industrial Relations Act 1979* (WA) s 66, s 69, s 71, s 71(1), s 71(2), s 71(3), s 71(4), s 71(5).
Result:	Application granted
Representation:	
Applicant :	Mr D Schapper (of counsel)
Respondent :	Ms P Byrne

Reasons for Decision

SMITH AP:

Background

1 This is an application made pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the Act). The application is brought by the applicant who is a member of the respondent for the purpose of bringing about elections for offices within the respondent. The reason the application is made is because the applicant formed a view that a certificate issued to the respondent on 24 June 1985 under s 71 of the Act was no longer operative and as a consequence there were no validly elected officials of the respondent holding office. The application seeks an order that the respondent call elections to be held for the offices of President, Vice-President, Treasurer and Secretary of the respondent. The application also seeks an order that the number of Branch Councillors be set at eight and that elections be called for each of those eight positions.

2 The respondent filed a Notice of Answer and Counter-Proposal in which it briefly stated it consents to the claim made by the applicant. Ms Byrne who appeared on behalf of the respondent informed the Commission that the respondent consented to orders being made to cause elections to be held.

3 In an statutory declaration made on 13 November 2009 titled 'Affidavit of Wayne Michael Wood', Mr Wood states as follows:

1. I am the Secretary of the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union (the ASU).

2. I swear this my affidavit on the basis of my personal knowledge and on the basis of information acquired by me in the course of my duties as Secretary. I have been a member of the respondent since 13 March 2000.

3. The ASU is an organisation registered under the Fair Work Act and its predecessor Acts.

4. I have also believed that I am the Secretary of the respondent.

5. The applicant has been a member of the respondent since at least 1 July 1994.

6. In 1985 the respondent, then named the Federated Clerks Union of Australia Industrial Union of Workers W.A. Branch, obtained a declaration under s71 of the Industrial Relations Act.

7. Since that time

7.1 there have been no elections separately conducted within the respondent; and

7.2 the ASU and the respondent have for all practical purposes been operated as if they were one and the same organisation.

8. For many years the application form to join the ASU and the respondent has been in the form attached and marked 1.

9. In 2003 the rules of the ASU were substantially changed including the rules of the WA Branch. At that time, changes to the offices within the WA Branch of the ASU were made such that there was no longer an office within the ASU for each office within the respondent.

10. One of the changes made to the rules of the ASU at that time was the abolition of sections within the Branch. However, the rules of the respondent were not similarly altered to abolish sections. In fact, sections ceased to exist with the ASU rules changes in 2003.

11. In addition, the changes within the ASU have included a number of amalgamations by which the eligibility rule of the ASU is now greatly different from and wider than that of the respondent.

12. I have recently received legal advice to the effect that elections should be held for the offices within the respondent as, by reason of the above changes, the declaration under section 71 of the Act may no longer be effective to remove the requirement for elections.

13. The respondent also seeks directions as to the offices for which elections are to be held in view of the fact that sections no longer exists.

4 On 30 November 2009, the parties filed a joint submission. The material paragraphs of the joint submission are as follows:

2. The evidence shows that elections are required for the offices within the respondent.

3. This is because the section 71 certificate issued many years ago can no longer have had effect, at least since 2003.

4. The respondent believed that the section 71 certificate had removed the necessity for elections notwithstanding the changes that occurred in the Counterpart Federal Body.

5. The respondent's belief was mistaken.

6. The offices for which elections are required are those set out in clauses 6a and 8 of the respondent's rules being:

> President, Vice-President, Secretary, Treasurer, 3 Executive Councillors and a number of Branch Councillors elected by whole of the membership.

7. It is not possible to have elections for the Councillors elected by sections in accordance with rule 6b because the evidence shows that there are no sections.

8. A quorum of the Council is 15: rule 6e.

9. Accordingly it is proposed that the number of branch councillors be set at 8 so that a full complement of the elected officers will constitute a quorate Council.

10. It is not necessary to make provision for interim office holders because there is nothing that the respondent requires to be done that immediately requires officers.

11. As it is anticipated that elections may be held promptly, the respondent will soon have officers who can alter the respondent's rules to modernise them and have them reflect the respondent's actual situation.

5 After hearing evidence in this matter, I formed the view that the application should be granted and that an order should be made pursuant to s 66 of the Act. The reasons why I made the order are set out in the following reasons.

Section 71 and the Rules of the Respondent

6 Section 71(1) to (5) of the Act provides:

> (1) In this section —
>
> ***Branch*** means the Western Australian Branch of an organisation of employees registered under the Commonwealth Act;
>
> ***counterpart Federal body***, in relation to a State organisation, means a Branch the rules of which —
>
> (a) relating to the qualifications of persons for membership; and
>
> (b) prescribing the offices which shall exist within the Branch,
>
> are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and
>
> ***State organisation*** means an organisation that is registered under Division 4 of Part II.
>
> (2) The rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.
>
> (3) The Full Bench may form the opinion that the rules referred to in subsection (2) are substantially the same notwithstanding that a person who is —
>
> (a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or
>
> (b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.
>
> (4) The rules of a counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.
>
> (5) Where, after the coming into operation of this section —
>
> (a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body; and
>
> (b) the committee of management of the State organisation decides and, in the prescribed manner notifies the Registrar accordingly, that from a date specified in the notification all offices in the State organisation will be filled in accordance with the rule referred to in paragraph (a),
>
> the Registrar shall issue the State organisation with a certificate which declares —
>
> (c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation; and
>
> (d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation,
>
> and the certificate has effect according to its tenor.

7 In 1985, the name of the respondent was the Federated Clerks' Union of Australia Industrial Union of Workers, WA Branch. At that time, its counterpart Federal body was the Western Australian Branch of the Federated Clerks' Union of Australia Industrial Union of Workers. Pursuant to s 71 of the Act, on 6 June 1985, the Full Bench issued a Declaration that the rules of the Western Australian Branch of the Federated Clerks' Union of Australia Industrial Union of Workers relating to the qualifications of persons for membership of the Branch and prescribing the offices which shall exist within the Branch were deemed, for the purposes of s 71 of the Act, to be the same as the rules of the respondent relating to the corresponding subject matter.

8 On 24 June 1985, the Acting Registrar of the Commission issued a Certificate of Registrar pursuant to s 71(5) of the Act. This certificate states as follows:

> I, the undersigned, Acting Registrar of The Western Australian Industrial Relations Commission, acting pursuant to section 71 of the Industrial Relations Act, 1979, hereby declare –
>
> (1) that the provisions of the Industrial Relations Act, 1979 relating to elections for office within a union do not, from June 28, 1985 apply in relation to offices in the 'Federated Clerks' Union of Australia Industrial Union of Workers, WA Branch';
>
> and

(2) that, from June 28, 1985 the persons holding office in the 'Federated Clerks' Union of Australia Industrial Union of Workers, WA Branch', and organisation registered under the provisions of the 'Conciliation and Arbitration Act, 1904', shall, for all purposes, be the officers of the 'Federated Clerks' Union of Australia Industrial Union of Workers, WA Branch'.

9 As Mr Schapper points out, the basis on which the s 71 certificate was made was twofold. Firstly, it was made following the Declaration made by the Full Bench that it had formed the opinion that the qualifications of persons for membership of the respondent and the counterpart Federal body were deemed to be the same. Section 71 of the Act requires that the qualifications of persons for membership requirement are deemed to be the same if they are substantially the same. What is meant by the words 'substantially the same' in s 71(2) is qualified by s 71(3) of the Act which makes it clear that the rules in each case need not be identical as some classes of persons eligible to be a member of the State organisation can be ineligible to be a member of the counterpart Federal body or alternatively a person who is eligible to be member of the counterpart Federal body can be a particular class of persons ineligible to be a member of the State organisation. Consequently it is contemplated that there may be some classes of membership which are different.

10 The second matter that needs to be satisfied for a s 71 certificate to be issued and for the certificate to have effect is the rules of the counterpart Federal body must prescribe a corresponding office in the Branch for every office in the State organisation.

11 Rule 5 of the rules of the respondent currently provides:

> The Union shall consist of persons, male or female, engaged in any clerical capacity, including telephonists, or in the occupation of shorthand writing or typing or on calculating, billing or other machines designed to perform, or assist in performing any clerical work whatsoever within the State of Western Australia, but excepting that portion of the State within the 20th and 26th parallels of latitude and the 125th and 129th meridians of longitude.
>
> Provided that no person shall be a member who is not a [sic] employee within the meaning of the 'Industrial Relations Act, 1979'.

12 It is clear from rule 5 that the respondent consists of persons engaged in clerical work within the State of Western Australia which would include both public and private sectors of industry.

13 The current rules of the counterpart Federal body whose name is now the Australian Municipal, Administrative, Clerical and Services Union contain very extensive categories of persons eligible to be members of the Federal branch of the counterpart body. The eligibility rule is contained in rule 5 of the counterpart Federal body's rules. In the copy of the extract of the rules provided to the Commission the eligibility rule extends to 26 pages. The eligibility rule covers a number of specific industries such as local government, maintaining and servicing business equipment, shipping, social and welfare work, the health and insurance industry, building societies and credit unions. It also covers those employed by the Australian Federal Police, the customs service and covers all those persons engaged within those industries in the clerical industry. It also covers professional engineers engaged by the Western Australian Government Railways Commission or its successor. It includes other professional groups such as those who are employed as social workers within Western Australia. Whilst the categories of persons eligible to be members of the counterpart Federal body are different it could be argued that this may not preclude a Full Bench from forming the view that the rules of the counterpart Federal body are substantially the same because of the operation of s 71(3) of the Act. However, s 71(4) of the Act must be satisfied for a s 71 certificate to have effect. Section 71(4) requires that for every office in the State organisation there must be a corresponding office in the Branch. Rule 6 and rule 8 of the respondent's rules establish the offices of the respondent to be the President, Vice-President, Treasurer, three Executive Councillors, the Secretary, (Assistant Secretary when acquired to be elected as provided for by rule 33) and Branch Councillors, some are which are elected as members of each Section of the Branch and others who are additional Branch Councillors are elected by the whole of the membership.

14 The counterpart Federal body is the Western Australian Branch of the Australian Municipal, Administrative, Clerical and Services Union (the Western Australian Branch). Pursuant to rule 4 of Division 5 of the rules of the Western Australian Branch, the Branch Executive Council controls and manages the affairs of the Western Australian Branch. The Branch Executive Council consists of the Branch Executive Committee; which in turn consists of the Branch President, the Deputy Branch President, the Branch Vice-President (Women), the Branch Secretary, the Assistant Branch Secretary and the Branch Treasurer. The other members of the Council consist of Branch Executive Councillors representing Divisions. The number of Branch Executive Councillors is calculated in accordance with rule 8 of the Western Australian Branch rules and the number of Branch Executive Councillors (Women) as may be required pursuant to rule 19 of the Western Australian Branch rules.

15 It is clearly apparent that the offices of the Western Australian Branch do not correspond with the respondent's offices. It is difficult to say who in the Western Australian Branch would be regarded as the corresponding office for the respondent's office of Vice-President in the Western Australian Branch as the Federal rules provide for a Deputy Branch President and a Branch Vice-President (Women). In addition, the number of Branch Executive Councillors required by the Western Australian Branch rules is calculated on the basis of each Division is entitled to one Branch Executive Councillor for each 600 financial members or part thereof (rule 8 of the Western Australian Branch rules). Whereas under the respondent's rules each Section of the Branch is entitled to elect one Branch Councillor for the first 500 financial members or part thereof in the Section and one for each succeeding 500 members or part thereof shown in the records of the Branch office on the last day of the quarter immediately preceding any such election as financial members (rule 6 b.). In addition, additional Branch Councillors are required to be elected by the whole of the membership which equal the number of Branch Councillors elected by the Sections (rule 6 d.).

16 As the evidence establishes that since at least sometime in 2003 not all offices of the respondent correspond with offices in the counterpart Federal body, I am satisfied that the s 71 certificate currently has no effect, which in turn has the effect in law that the offices of the respondent are vacant, and elections should be held to fill those offices. However, as foreshadowed in the

parties' joint submission the election of the offices of Branch Councillors can not proceed in accordance with requirements of the respondent's rules as Sections of the respondent do not currently exist. To rectify this difficulty and enable the respondent to generally act within the requirements of its rules the parties agreed that an order should be made to set the number of Branch Councillors at eight to enable an election for positions of Branch Councillors to proceed and to enable a quorum for Branch Council to be convened.

17 To enable the election of the offices of the respondent to proceed as if an election had been called in accordance with the provisions of the Act and the respondent's rules, I made an order on 7 December 2009 that the election of the offices were to proceed as if a request in writing had been duly made to the Registrar under s 69 of the Act. The terms of the order also makes it clear that once elected, each Branch Councillor is to exercise all the powers and carry out all the functions of office pursuant to the rules of the respondent as if each were elected from a Section of the Branch or by the whole of the membership pursuant to the rules of the respondent.

2009 WAIRC 01294

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WILLIAM CLEVERLEY BEATTS-RATTRAY
	APPLICANT
	-and-
	AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	MONDAY, 7 DECEMBER 2009
FILE NO/S	PRES 13 OF 2009
CITATION NO.	2009 WAIRC 01294

Decision	Order issued
Appearances	
Applicant	Mr D Schapper (of Counsel)
Respondent	Ms P Byrne

Order

HAVING heard Mr D Schapper (of Counsel), on behalf of the applicant, and Ms P Byrne on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (the Act) and by consent hereby orders that:—

1. Elections are to be held forthwith for the following offices in accordance with the rules of the respondent (except as varied or modified by this Order) as if a request in writing had been duly made to the Registrar in accordance with s 69 of the Act:

   President;

   Vice-President;

   Treasurer;

   Secretary;

   3 Executive Councillors;

   8 Branch Councillors;

2. Each person elected to the office of President, Vice-President, Treasurer, Secretary and Executive Councillor in accordance with this Order shall have the authority to exercise all the powers and carry out all the functions of their office pursuant to the rules of the respondent;

3. Each person elected to the office of Branch Councillor in accordance with this Order shall have the authority to exercise all the powers and carry out all the functions of office pursuant to the rules of the respondent as if each were elected from a Section of the Branch or by the whole of the membership pursuant to the rules of the respondent;

4. There be liberty to apply on 72 hours' notice;

5. The application be otherwise adjourned sine die.

(Sgd.) J H SMITH,
[L.S.] Acting President.

2009 WAIRC 01358

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE REGISTRAR

APPLICANT

-and-

MR PHIL WOODCOCK

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

RESPONDENT

CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 24 DECEMBER 2009
FILE NO/S	PRES 7 OF 2009
CITATION NO.	2009 WAIRC 01358

Result	Order issued
Appearances	
Applicant	Mr J Spurling
Respondent	Mr J Nolan (of Counsel)
Proposed Interveners	Mr P Momber (of Counsel)

Order

This matter having come on for a directions hearing before me on 23 December 2009, and having heard Mr J Spurling, Mr J Nolan (of Counsel) and Mr P Momber (of Counsel), pursuant to the powers conferred on the President under the *Industrial Relations Act 1979*, hereby orders that —

1. The Registrar carry out an investigation and make a written report as to whether the Interim Branch Executive is functioning;
2. The Registrar is to provide a copy of the written report to the parties by no later than close of business on 5 January 2010;
3. This matter is adjourned to 19 January 2010 at 9:30 o'clock in the forenoon in Court 3 on Level 18, 111 St Georges Terrace, Perth;
4. There be liberty to apply on two days' notice.

(Sgd.) J H SMITH,
[L.S.] Acting President.

AWARDS/AGREEMENTS—Variation of—

2009 WAIRC 01321

BURSWOOD HOTEL (MAINTENANCE EMPLOYEES') AWARD, 1990

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH

APPLICANT

-v-

BURSWOOD RESORT AND OTHERS

RESPONDENTS

CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 67 OF 2009
CITATION NO.	2009 WAIRC 01321

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	Ms S Walker on behalf of The Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and Ms S Walker on behalf of The Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Burswood Hotel (Maintenance Employees') Award, 1990 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. - Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or if no meal is supplied be paid $10.80 for a meal, and if owing to the amount of overtime worked, a second subsequent meal is required they shall be supplied with each such meal by the Company or be paid $7.40 for each meal so required.

2. Clause 14. – Wage Rates: Delete subclauses (2), (3), (4), (7), (8), (9) and (10) of this clause and insert the following in lieu thereof:

(2) NOMINEE

A Licensed Electrical Mechanic or Fitter who acts as nominee for an Electrical Contractor shall be paid an allowance of $59.90 per week.

(3) In addition to the weekly wage rate provided by subclause (1) of this clause an adult employee shall be paid:

(a)	After the completion of one years continuous service	$17.80
(b)	After the completion of two years service	$35.90

Such payment shall be deemed part of the weekly wage rate for all purposes of the Award.

(4) In addition to the weekly wage rate provided by subclause (1) of this clause a Leading Hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$24.90
(b)	If placed in charge of more than ten and not more than 20 other employees	$38.20
(c)	If placed in charge of more than 20 other employees	$49.10

(7) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid $9.60 per week in additions to their ordinary rate.

(8) An employee who holds, and in the course of their employment is required to use, a current "A" Grade or "B" Grade, or "L" Grade or "R" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the Electricity Act 1945 shall be paid an allowance of $19.90 per week.

(9) An employee, who is in possession of, and is requested by the company to use, a plumber's licence issued by the Metropolitan Water Supply, Sewerage and Drainage Board, shall, in each week so requested, be paid an allowance of $36.80 per week.

(10) A plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act shall be paid $25.40 per week in addition to their ordinary rate.

2009 WAIRC 01320

BURSWOOD ISLAND RESORT (MAINTENANCE EMPLOYEES') AWARD NO. A 22 OF 1986

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	BURSWOOD RESORT (MANAGEMENT) LTDAND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 66 OF 2009
CITATION NO.	2009 WAIRC 01320

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	Ms S Walker on behalf of The Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and Ms S Walker on behalf of The Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Burswood Island Resort (Maintenance Employees') Award No. A 22 of 1986 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 11. - Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) An employee required to work overtime for more than two hours shall be supplied with a meal by the Company or if no meal is supplied be paid $11.00 for a meal and, if owing to the amount of overtime worked, a second subsequent meal is required they shall be supplied with each such meal by the Company or be paid $7.50 for each meal so required.

2. Clause 13. – Wage Rates: Delete subclauses (2) through to (9) of this clause and insert the following in lieu thereof:

(2) In addition to the weekly wage rate provided by subclause (1) hereof an adult employee shall be paid:

		Per Week $
(a)	After the completion of one year's continuous service	17.80
(b)	After the completion of two years' continuous service	35.90

Such payments shall be deemed part of the weekly wage rate for all purposes of the award.

(3) Leading Hand: In addition to the appropriate total wage prescribed in this Clause a Leading Hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	24.90
(b)	If placed in charge of more than ten and not more than twenty other employees	38.20
(c)	If placed in charge of more than twenty other employees	49.10

(4) A casual employee shall be paid 20 per cent of the ordinary rate in addition to the ordinary rate for the calling in which they are employed.

(5) Nominee

A licensed electrical mechanic or fitter who acts as nominee for the Company shall be paid an allowance of $59.90 per week.

(6) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the Company to perform first aid duties, shall be paid $9.30 per week in addition to their ordinary rate.

(7) An employee who holds, and in the course of their employment is required to use, a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $19.90 per week.

(8) An employee who is in possession of, and is requested by the Company to use, a plumber's licence issued by the Metropolitan Water Supply, Sewerage and Drainage Board, shall, in each week so requested, be paid an allowance of $34.40 per week.

(9) A plumber holding registration in accordance with the Metropolitan Water Supply, Sewerage and Drainage Act shall be paid $14.30 per week in addition to their ordinary rate.

2009 WAIRC 01314

ELECTRICAL CONTRACTING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ELECTRICAL & COMMUNICATIONS ASSOCIATION OF WA (INC) AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 59 OF 2009
CITATION NO.	2009 WAIRC 01314

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	No Appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electrical Contracting Industry Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. - Overtime: Delete subclause (2)(e) of this clause and insert the following in lieu thereof:

(e) (i) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work overtime shall be supplied with a meal by the employer or be paid $11.90 for such meal and for a second or subsequent meal if so required.

(ii) No such payments shall be made to any employee living in the same locality as their place of work who can reasonably return home for such meals.

(iii) If an employee to whom subparagraph (i) of paragraph (e) of subclause (2) hereof applies has, as a consequence of the notice referred to in that paragraph, 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, $11.90.

2. Clause 18. – Special Rates and Provisions:

(A) Delete subclauses (1), (2), (3), (4) and (5) of this clause and insert the following in lieu thereof:

(1) **Height Money**: An employee shall be paid an allowance of $2.40 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons.

(2) **Dirt Money**: An employee shall be paid an allowance of 49 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Grain Dust**: Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 82 cents per hour.

(4) **Confined Space**: An employee shall be paid an allowance of 58 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(5) **Diesel Engine Ships**: The provisions of subclauses (2) and (4) of this Clause do not apply to an employee when they are engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 82 cents per hour whilst so engaged.

(B) Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) **Hot Work**: An employee shall be paid an allowance of 49 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

(C) Delete subclauses (9), (10), (11), and (12) of this clause and insert the following in lieu thereof:

(9) **Percussion Tools**: An employee shall be paid an allowance of 30 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(10) **Chemical, Artificial Manure and Cement Works**: An employee other than a general labourer, in chemical, artificial manure and cement works shall, in respect of all work done in and around the plant outside the machine shop, be paid an allowance calculated at the rate of $12.20 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(11) **Abattoirs**: An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $16.20 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this Clause.

(12) **Phosphate Ships**: An employee shall be paid an allowance of 72 cents for each hour they work in the holds 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

(D) Delete subclause (19) of this clause and insert the following in lieu thereof:

(19) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $9.70 per week in addition to their ordinary rate.

(E) Delete subclause (21) of this clause and insert the following in lieu thereof:

(21) **Nominee**: A licensed electrical installer or fitter who acts as a nominee for an electrical contractor shall be paid an allowance of $60.10 per week.

3. Clause 27. – Grievance Procedure and Special Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof:

(3) (a) Subject to paragraph (e) of this subclause, a special allowance of $29.80 per week shall be paid as a flat amount each week except where direct action takes place.

(b) Provided that a general combined union meeting called by the Unions W.A., or any absence declared by the Commission under Section 44 as being an authorised absence, shall not be regarded as non-adherence to the disputes procedure Clause or affect the payment of this allowance.

(c) In the event of the need for a meeting not covered by the circumstances outlined by the above, a Union Official shall give 24 hours' notice to the employer and the reason for the meeting and $29.80 shall be paid.

(d) Any time which an employee is absent from work on annual leave, public holidays, bereavement leave or paid sick leave shall not affect the payment of this allowance.

(e) An apprentice shall be paid a percentage of $29.80 being the percentage which appears against their year of apprenticeship set out in subclause (4) of the First Schedule - Wages.

4. Clause 30. – Special Provisions – Western Power: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) (a) An employee to whom the provisions of Clause 21. - Distant Work of this Award, applies who work at Muja and who elects not to live in Construction Camp Accommodation shall, subject to paragraph (b) of this subclause, be paid a living-out allowance at the rate of $398.30 per week to meet the expenses reasonably incurred by the employee for board and lodging.

(b) (i) The allowance prescribed in paragraph (a) shall only apply to an employee while they continue to live with their spouse (including de facto partner) in accommodation provided by the employee.

(ii) The accommodation shall be of a reasonable standard.

(iii) The employee shall continue to maintain their original residence.

(iv) The employee shall satisfy the employer, upon request, that their circumstances meet the requirements of this subclause.

(v) Any dispute as to the application of this Clause shall be subject to discussion between the employer and the Union and, failing agreement, shall be referred to a Board of Reference for determination.

(c) Provided that the provisions of subclause (6) of Clause 21. - Distant Work of this Award shall not apply.

5. Clause 36. – Superannuation: Delete subclause (2)(b)(i) of this clause and insert the following in lieu thereof:

(i) For Apprentices not engaged on construction work, a weekly contribution calculated as 9% of the rate of pay prescribed in the First Schedule - Wages of this Award as follows:

Four Year Term	**Three and a Half Year Term**	**Three Year Term**
1st Year $24.98	Six Months $24.98	1st Year $32.66
2nd Year $32.66	Next Year $32.66	2nd Year $42.91
3rd Year $42.91	Next Year $42.91	3rd Year $50.59
4th Year $50.59	Final Year $50.59	

6. First Schedule – Wages:

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

(3) Leading Hands - In addition to the appropriate rates shown in subclause (2) hereof a leading hand shall be paid -

(a)	If placed in charge of not less than three and not more than ten other employees	$25.10
(b)	If placed in charge of more than ten and not more than twenty other employees	$38.50
(c)	If placed in charge of more than twenty other employees	$49.60

(B) Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) Tool Allowance:

(a) In accordance with the provisions of subclause (20) of Clause 18. – Special Rates and Provisions of this award the tool allowance to be paid is:

(i) $14.40 per week to such tradesperson, or

(ii) In the case of an apprentice a percentage of $14.40 being the percentage which appears against the apprentice's year of apprenticeship set out in subclause (4) of this schedule.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(6) Construction Allowance:

(a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid:

(i) $44.70 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $40.30 per week if the employee is engaged on a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $23.70 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Board of Reference.

(C) Delete subclauses (9) and (1) of this clause and insert the following in lieu thereof:

(9) Licence Allowance:

A tradesperson who holds and in the course of their employment may be required to use a current "A" Grade or "B" Grade licence issued pursuant to the relevant regulation in force at the date of this Award under the Electricity Act, 1945, shall be paid $21.30 per week.

(10) Commissioning Allowances:

An "Electrician Commissioning" as defined shall be paid at the rate of $32.50 per week in addition to rates prescribed in this schedule.

2009 WAIRC 01316

ELECTRICAL TRADES (SECURITY ALARMS INDUSTRY) AWARD, 1980

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	CHUBB ELECTRONIC SECURITY AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 62 OF 2009
CITATION NO.	2009 WAIRC 01316

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	No appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electrical Trades (Security Alarms Industry) Award, 1980 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 11. - Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.40 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $7.80 for each meal so required.

2. Clause 15. – Special Rates and Provisions:

(A) Delete subclauses (1) to (4) of this clause and insert the following in lieu thereof:

(1) **Height Money:** An employee shall be paid an allowance of $2.50 for each day on which they work at a height of 15.5 metres or more above the nearest horizontal plane but this provision does not apply to linespersons nor to riggers and splicers on ships or buildings.

(2) **Dirt Money**: An employee shall be paid an allowance of 51 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(3) **Confined Space**: An employee shall be paid an allowance of 64 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(4) **Hot Work:** An employee shall be paid an allowance of 51 cents per hour when they work in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees celsius.

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

(6) **Percussion Tools:**

An employee shall be paid an allowance of 32 cents per hour when working a pneumatic rivetter of the percussion type and other pneumatic tools of the percussion type.

(C) Delete subclauses (13) and (14) of this clause and insert the following in lieu thereof:

(13) An employee, holding either a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.40 per week in addition to his ordinary rate.

(14) A Serviceperson - Special Class, a Serviceperson or an Installer who holds, and in the course of their employment may be required to use, a current "A" Grade or "B" Grade Licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act 1945 shall be paid an allowance of $21.10 per week.

3. Clause 28. – Wages: Delete subclauses (3) to (5) of this clause and insert the following in lieu thereof:

(3) (a) Where an employer does not provide a tradesperson with the tools ordinarily required by that tradesperson in the performance of their work as a tradesperson the employer shall pay a tool allowance of $14.60 per week to such tradesperson for the purpose of such tradesperson supplying and maintaining tools ordinarily required in the performance of their work as a tradesperson.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson shall replace or pay for any tools supplied by the employer if lost through their negligence.

(4) (a) In addition to the appropriate rates of pay prescribed in this Clause an employee shall be paid -

(i) $47.20 per week if they are engaged on the construction of a large industrial undertaking or any large civil engineering project.

(ii) $42.70 per week if they are engaged in a multi-storeyed building but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which they are required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $24.60 per week if they are engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(c) An allowance paid under this subclause includes any allowance otherwise payable under Clause 15. - Special Rates and Provisions of this Award except the allowance for work at heights, the first aid allowance and the licence allowance.

(5) **Leading Hand:** In addition to the appropriate total wage prescribed in subclause (1) of this clause, a leading hand shall be paid –

(a)	If placed in charge of not less than three and not more than ten other employees	$26.80
(b)	If placed in charge of more than ten and not more than twenty other employees	$40.90
(c)	If placed in charge of more than twenty other employees	$52.60

2009 WAIRC 01315

ELECTRONICS INDUSTRY AWARD NO. A 22 OF 1985

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ACTION ELECTRONICS PTY. LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 60 OF 2009
CITATION NO.	2009 WAIRC 01315

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	No appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Electronics Industry Award No. A 22 of 1985 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. - Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.30 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 each such meal by the employer or be paid $7.60 for each meal so required.

2. Clause 20. – Special Provisions: Delete subclauses (1) – (4), (6) - (8) and (14) of this clause and insert the following in lieu thereof:

(1) **Dirt Money**: An employee shall be paid an allowance of 51 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

(2) **Confined Space**: An employee shall be paid an allowance of 63 cents per hour when, because of the dimensions of the compartment or space in which they are working, the employee is required to work in a stooped or otherwise cramped position or without proper ventilation.

(3) **Hot Work**: An employee shall be paid an allowance of 51 cents per hour when working in the shade in any place where the temperature is raised by artificial means to be between 46.1 and 54.4 degrees celsius.

(4) **Height Money**: An employee shall be paid an allowance of $2.45 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane.

(6) **Diesel Engine Ships**: The provisions of subclauses (1) and (2) hereof do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 86 cents per hour whilst so engaged.

(7) **Percussion Tools**: An employee shall be paid an allowance of 32 cents per hour when working pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

(8) **Chemical, Artificial Manure and Cement Works**: An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $12.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

(14) An employee holding either a Third Year First Aid Medallion of the St. John Ambulance Association of a "C" standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.00 per week in addition to their ordinary rate.

3. Clause 33. – Wages: Delete subclauses (2) and (5) of this clause and insert the following in lieu thereof:

(2) Leading Hands:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$26.50
(b)	If placed in charge of more than ten but not more than twenty other employees	$40.00
(c)	If placed in charge of more than twenty other employees	$52.00

(5) **Tool Allowance**

(a) Where an employer does not provide a technician, serviceperson, installer or an apprentice with the tools ordinarily required by that person in the performance of work as a technician, serviceperson, installer or an apprentice the employer shall pay a tool allowance of -

(i) **$**14.60 per week to such technician, serviceperson, installer; or

(ii) In the case of an apprentice a percentage of **$**14.60 being the percentage which appears against their year of apprenticeship in subclause (3) of this clause for the purpose of such technician, serviceperson, installer or apprentice applying and maintaining tools ordinarily required in the performance of work as a technician, serviceperson, installer or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of technicians, servicepeople, installers or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A technician, serviceperson, installer or apprentice shall replace or pay for any tools supplied by the employer if lost through his negligence.

PART II – CONSTRUCTION

4. Clause 5. – Special Rates and Provisions: Delete subclause (2) of this clause and insert the following in lieu thereof:

(2) (a) The employer shall, where practicable, provide a waterproof and secure place on each job for the safekeeping of a employee's tools when not in use and an employee's working clothes and where an employee is absent from work because of illness or accident and has advised the employer to that effect in accordance with the provisions of Clause 11. - Sick Leave of PART I - GENERAL of this award the employer shall ensure that the employee's tools and working clothes are securely stored during their absence.

(b) Subject to paragraph (c) hereof where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under paragraph (a) hereof the employer shall reimburse the employee for that loss but only up to a maximum of $306.10.

(c) The provisions of paragraph (b) hereof shall only apply with respect to tools and working clothes used by an employee in the course of their employment as set out in a list furnished to the employer at least twenty four hours before being lost by fire or theft and if the employee has reported any theft to the police.

5. Clause 10. – Wages: Delete subclauses (5), (6) and (7) of this clause and insert the following in lieu thereof:

(5) Construction Allowances:

(a) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid -

(i) $46.60 per week if engaged on the construction of a large industrial undertaking or any large civil engineering projects.

(ii) $42.10 per week if engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which the employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(iii) $24.70 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Definitions of PART I - GENERAL of this award.

(b) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

(6) Leading Hand:

In addition to the appropriate rate of wage prescribed in subclause (1) of this clause a leading hand shall be paid:

(a)	If placed in charge of not less than three and not more than ten other employees	$26.50
(b)	If placed in charge of more than ten but not more than twenty other employees	$40.00
(c)	If placed in charge of more than twenty other employees	$52.00

(7) (a) Where an employer does not provide a Technician, Serviceperson, Installer or Apprentice with the tools ordinarily required by that Serviceperson, Technician or Installer in the performance of work as a Technician, Installer or Apprentice the employer shall pay a tool allowance of -

(i) $14.60 per week to such Technician, Serviceperson or Installer, or

(ii) In the case of an apprentice a percentage of $14.60 being the percentage referred to in subclause (3) of Clause 33. - Wages of PART I - GENERAL of this award,

for the purpose of such Technician, Serviceperson, Installer or Apprentice supplying and maintaining tools ordinarily required in the performance of work as a Technician, Serviceperson, Installer or Apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(c) An employer shall provide for the use of Technicians, Servicepersons, Installers and Apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A Technician, Serviceperson, Installer or Apprentice shall replace or pay for any tools supplied by the employer if lost through that person's negligence.

2009 WAIRC 01347

ENGINEERING TRADES (GOVERNMENT) AWARD, 1967 AWARD NOS. 29, 30 AND 31 OF 1961 AND 3 OF 1962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	THE MINISTER FOR WORKS, THE MINISTER FOR EDUCATION, THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 15 DECEMBER 2009
FILE NO/S	APPLA 61 OF 2009
CITATION NO.	2009 WAIRC 01347

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondents	Mr A Harper

Order

HAVING HEARD Ms Ireland on behalf of the applicant and Mr Harper on behalf of the respondents, and by consent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Engineering Trades (Government) Award, 1967 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 15 December 2009

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 14. - Overtime:

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

(e) Subject to the provisions of paragraph (f) of this subclause, an employee required to work overtime for more than one hour shall be supplied with a meal by the employer or be paid $11.20 for a meal if, owing to the amount of overtime worked, a second or subsequent meal is required, he/she shall be supplied with each such meal by the employer or be paid $7.85 for each meal so required.

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

(h) An employee required to work continuously from 12 midnight to 6.30 a.m. and ordered back to work at 8.00 a.m. the same day shall be paid $5.20 for breakfast.

2. Clause 17. – Special Rates and Provisions:

(A) Delete subclauses (1) – (5) of this clause and insert the following in lieu thereof:

(1) **Height Money:** An employee shall be paid an allowance of $2.40 for each day in which they work at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespersons nor to riggers and splicers in ships or buildings.

(2) **Dirt Money**: Dirt Money of 50 cents per hour shall be paid as follows:-

(a) To employees employed on hot or dirty locomotives, or stripping locomotives, boilers, steam, petrol, diesel or electric cranes, or when repairing Babcock and Wilcox or other stationary boiler in site (except repairs on bench to steam and water mounting), or when repairing the conveyor gear in conduit of power houses and when repairing or overhauling electric or steam pile-driving machines and boring plants.

(b) Bitumen Sprayers - Large Units:

(i) To employees whilst engaged on work appertaining to the spraying of bitumen but exclusive of the standard chassis engine form the front end of the main tank to the back end of the plant. Provided that work on the compressor and its engines shall not be subject to dirt money.

(ii) To motor mechanics in the motor section for all work performed on the standard chassis from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature, where clothes are necessarily unduly soiled or damaged by the nature of the work done. Provided that to employees engaged as above on sprays of the Bristow type, dirt money of 55 cents per hour shall be paid.

(c) Bitumen Sprayers - Small Units:

(i) To employees for work done on main tank, its fittings, pump and spray arms.

(ii) To motor mechanics on work from and including the sump to the rear end of the chassis, but excluding the engine and parts forward thereto unless the work is of a specially dirty nature where clothes are necessarily unduly soiled or damaged by the nature of the work done.

(d) To employees on all other dirty tar sprays and kettles.

(e) Diesel Engines: Work on engines, or on gear box attached to engines, but excluding work on rollers (wheels) on which a diesel powered roller travels.

(f) Dirt Money shall only be paid during the stages of dismantling and cleaning and shall not cover employees who receive portions of the work after cleaning has taken place.

(g) Notwithstanding anything contained in the foregoing provisions, dirt money shall not be paid unless the work is of an exceptionally dirty nature where clothes are necessarily unduly soiled of damaged by the nature of the work done.

(3) Confined Space:

62 cents per hour extra shall be paid to an employee working in any place, the dimensions of which necessitate the employee working in an unusually stooped or otherwise cramped position, or where confinement within a limited space is productive of unusual discomfort.

(4) Any employee actually working a pneumatic tool of the percussion type shall be paid 31 cents per hour extra whilst so engaged.

(5) **Hot Work**: An employee shall be paid an allowance of 50 cents per hour while working in the shade in any place where the temperature is raised by artificial means to between 46.1 and 54.4 degrees Celsius.

(B) Delete subclauses (8) – (16) of this clause and insert the following in lieu thereof:

(8) Any employee working in water over his/her boots or, if gumboots are supplied, over the gumboots, shall be paid and allowance of $1.45 per day.

(9) Employees using Anderson-Kerrick steam cleaning units or unit of a similar type on cranes or other machinery shall be paid an allowance of 50 cents.

(10) Well Work: Any employee required to enter a well nine metres or more in depth for the purpose in the first instance of examining the pump, or any other work connected therewith, shall receive an amount of $2.95 for such examination and $1.07 per hour extra thereafter for fixing, renewing or repairing such work.

(11) **Ship Repair Work**: Any employee engaged in repair work on board ships shall be paid an additional $5.35 per day for each day on which so employed.

(12) An employee shall, whilst working in double bottom tanks on board vessels, be paid an allowance of $2.07 per hour.

(13) An employee shall, whilst using explosive powered tools, be paid an allowance of 18 cents per hour, with a minimum payment of $1.25 per day.

(14) **Abattoirs -**

An employee employed in and about an abattoir shall be paid an allowance calculated at the rate of $16.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause. The allowance prescribed herein may be reduced to $15.60 with respect to any employee who is supplied with overalls by the employer.

(15) Employees engaged to iron ore and manganese or loading equipment at the Geraldton Harbour shall be paid an allowance of 52 cents per hour, with a minimum payment for four hours.

(16) **Morgues -**

An employee required to work in a morgue shall be paid 52 cents per hour or part thereof, in addition to the rates prescribed in this clause.

(C) Delete subclause (19) of this clause and insert the following in lieu thereof:

(19) An employee required to repair or maintain incinerates shall be paid $3.15 per unit.

(D) Delete subclauses (21) – (24) of this clause and insert the following in lieu thereof:

(21) (a) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 37 cents for each hour worked to compensate for all disagreeable features associated with foundry work, including heat, fumes, atmospheric conditions, sparks, dampness, confined space and noise.

(b) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(c) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(d) For the purpose of this subclause foundry work shall mean:

(i) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(ii) Where carried on as an incidental process in connection with and in the course of production to which paragraph (i) of this definition applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock-out processes and dressing operations, but shall not include any operation performed in connection with:

(aa) Non-ferrous die casting (including gravity and pressure);

(bb) Casting of billets and/or ingots in metal mould;

(cc) Continuous casting of metal into billets;

(dd) Melting of metal for use in printing;

(ee) Refining of metal.

(22) An electronics tradesperson, an electrician - special class, an electrical fitter and/or an armature winder or an electrical installer who holds and in the course of employment may be required to use a current "A" grade or "B" grade licence issued pursuant to the relevant regulation in force on the 28th day of February, 1978 under the Electricity Act, 1948 shall be paid an allowance of $20.60 per week.

(23) Where an employee is engaged in a process involving asbestos and is required to wear protective equipment, i.e: respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, a disability allowance of 66 cents per hour shall be paid for each hour or part thereof that such employee is so engaged.

(24) **Towing Allowance**: A Level 1, 2 or 3 Tradesperson who drives a tow truck towing an articulated bus in traffic shall be paid an allowance of $4.67 per shift when such duties are performed. This allowance shall be payable irrespective of the time such work is performed and is not subject to any premium of penalty additions.

(E) Delete subclauses (26) – (29) of this clause and insert the following in lieu thereof:

(26) **First Aid Allowance**: A worker, holding either a Third Year First Aid Medallion of the St John Ambulance Association or a “C” Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $10.00 per week in addition to their ordinary rate.

(27) Polychlorinated Biphenyls

Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs) for which protective clothing must be worn shall, in addition to the rates and provisions contained in this Clause, be paid an allowances of $2.07 per hour whilst so engaged.

(28) Nominee Allowance:

A licensed electrical fitter or installer who acts as a nominee for the employer shall be paid an allowance of $17.90 per week.

(29) Hospital Environment Allowance:

Notwithstanding the provisions of this clause, the following allowances shall be paid to maintenance employees employed at hospitals listed hereunder:

(a) (i) $14.40 per week for work performed in a hosp ital environment; and

(ii) $4.90 per week for disabilities associated with work performed in difficult access areas, tunnel complexes, and areas with great temperature variation at -

Princess Margaret Hospital

King Edward Memorial Hospital

Sir Charles Gairdner Hospital

Royal Perth Hospital

Fremantle Hospital

(b) $10.40 per week for work performed in a hosp ital environment at -

Kalgoorlie Hospital
Osborne Park Hospital
Albany Hospital
Bunbury Hospital
Geraldton Hospital
Mt. Henry Hospital
Northam Hospital
Swan Districts Hospital
Perth Dental Hospital

(c) $6.90 per week for work performed in a hospital environment at -

Bentley Hospital	Derby Hospital
Narrogin Hospital	Port Hedland Hospital
Rockingham Hospital	Sunset Hospital
Armadale Hospital	Broome Hospital
Busselton Hospital	Carnarvon Hospital
Collie Hospital	Esperance Hospital
Katanning Hospital	Merredin Hospital
Murray Hospital	Warren Hospital
Wyndham Hospital	

3. Clause 18. – Car Allowance: Delete subclause (3) of this clause and insert the following in lieu thereof:

(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:

RATES OF HIRE FOR USE OF EMPLOYEE'S OWN VEHICLE ON EMPLOYER'S BUSINESS

	MOTOR CAR		
AREA AND DETAILS	ENGINE DISPLACEMENT (IN CUBIC CENTIMETRES)		
DISTANCE TRAVELLED EACH	Over	Over 1600cc	1600cc
YEAR ON OFFICIAL BUSINESS	2600cc	-2600cc	& Under
Rate per Kilometre (Cents)			
Metropolitan Area	89.5	64.5	53.2
South West Land Division	91.0	65.4	54.0
North of 23.5º South Latitude	98.6	70.6	58.3
Rest of the State	94.3	67.5	55.6
Motor Cycle (In All Areas)	31.0 cents per kilometre		

4. Clause 21. – District Allowances: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) The weekly rate of District Allowance payable to employees pursuant to subclause (3) of this clause shall be as follows:

COLUMN I DISTRICT	**COLUMN II STANDARD RATE**	**COLUMN III EXCEPTIONS TO STANDARD RATE**	**COLUMN IV RATE**
	$ Per Week	**Town Or Place**	**$ Per Week**
6	79.30	Nil	Nil
5	64.90	Fitzroy Crossing	87.50
		Halls Creek	
		Turner River Camp	
		Nullagine	
		Liveringa (Camballin)	81.60
		Marble Bar	
		Wittenoom	
		Karratha	76.70
		Port Hedland	71.10
4	32.90	Warburton Mission	88.10
		Carnarvon	30.70

COLUMN I DISTRICT	COLUMN II STANDARD RATE	COLUMN III EXCEPTIONS TO STANDARD RATE	COLUMN IV RATE
	$ Per Week	Town Or Place	$ Per Week
3	20.70	Meekatharra	32.90
		Mount Magnet	
		Wiluna	
		Laverton	
		Leonora	
		Cue	
2	14.70	Kalgoorlie	4.90
		Boulder	
		Ravensthorpe	19.50
		Norseman	
		Salmon Gums	
		Marvel Loch	
		Esperance	
1	Nil	Nil	Nil

Note: In accordance with subclause (4) of this clause employees with dependants shall be entitled to double the rate of district allowance shown.

5. First Schedule – Wages:

(A) Delete subclause (5) of this clause and insert the following in lieu thereof:

(5) (a) In addition to the rates contained in subclauses (2) and (3) hereof, employees designated in classifications C 14 to C 7 inclusive shall receive an all purpose industry allowance of $16.20.

(b) This allowance shall be paid in two instalments, as follows:

(i) $8.10 of the allowance shall be paid after the first 12 months of Government service; and

(ii) the remaining $8.10 - totalling $16.20 - shall be paid on completion of 24 months of Government service.

(c) The industry allowance shall be adjusted in accordance with any movements to the wage prescribed in subclause (2) hereof, as follows:

(i) The increase shall apply to the 'plus 24 months of service' rate;

(ii) The increase is to be rounded to the nearest ten cents;

(iii) The rate is to be divided by two to calculate instalments in accordance with subparagraphs (i) and (ii) of paragraph (b) hereof, provided that the instalment rates are not expressed in less than ten cents amounts; and

(iv) In the event of such an equal division of the industry allowance not resulting in the rates being expressed in less than ten cent amounts, as provided in subparagraph (iii) hereof, the division shall be unequal and weighted to the 12 months' service instalment.

(B) Delete subclause (8) of this clause and insert the following in lieu thereof:

(8) (a) Leading Hands

A tradesperson placed in charge of three or more other employees shall, in addition to the ordinary rate, be paid per week:

	$
If placed in charge of not less than three and not more than ten other employees	26.00
If placed in charge of more than ten and not more than twenty other employees	39.60
If placed in charge of more than twenty other employees	50.90

(b) Any tradesperson moulder employed in a foundry where no other jobbing moulder is employed shall be paid at the rate prescribed for leading hands in charge of not less than three and not more than ten other employees.

(c) A Certificated Rigger or Scaffolder on ships and buildings, other than a Leading Hand, who, in compliance with the provisions of the Occupational Health, Safety and Welfare Act and Regulations 1988, is responsible for the supervision of not less than three other employees, shall be deemed to be a Leading Hand and be paid at the rate prescribed for a Leading Hand in charge of not less than three and not more than ten other employees.

(d) In addition to any rates to which an employee may be entitled under this clause a Mechanic-in-Charge, employed by the Department of Conservation and Land Management in the following towns, shall be paid per week -

	$
Manjimup, Collie	63.50
Harvey, Dwellingup, Mundaring, Yanchep	31.70
Ludlow, Nannup, Margaret River, Kirup, Walpole, Pemberton	16.00
Jarrahdale	16.00

(C) Delete subclauses (10) – (12) of this clause and insert the following in lieu thereof:

(10) Construction Allowance

(a) In addition to the appropriate rate of pay prescribed in subclause (1) hereof, an employee shall be paid -

(i) $45.50 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(ii) $41.00 per week if engaged on a multi-storeyed building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storeyed building" is a building which, when completed will consist of at least five storeys.

(iii) $24.20 per week if engaged otherwise on construction work falling within the definition of construction work in Clause 5. - Classification Structure and Definitions of this Award.

(b) Any dispute as to which of the aforesaid allowances applies to particular work shall be determined by the Western Australian Industrial Relations Commission.

(c) Any allowance paid under this subclause includes any allowance otherwise payable under Clause 17. - Special Rates and Provisions of this Award.

(11) Tool Allowance

(a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of -

(i) $14.40 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage which appears against the relevant year of apprenticeship in this Schedule,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or as an apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) hereof shall be included in, and form part of, the ordinary weekly wage prescribed in this Schedule.

(c) An employer shall provide, for the use of tradespersons or apprentices, all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by the employer, if lost through the negligence of such employee.

(12) Drilling Allowance

A driller using a Herbert two-spindle sensitive machine to drill to a marked circumference shall be paid an additional $2.38 per hour whilst so engaged.

6. Fifth Schedule – Building Management Authority Wages and Conditions:

(A) Delete subclause (5)(c), (d) and (e) of this clause and insert the following in lieu thereof:

(c) In addition to the wage rates provided in paragraph (a) hereof, electricians employed by the Building Management Authority will receive an all purpose payment of $27.20 per week.

(d) In addition to the wage rates prescribed in paragraph (a) hereof, by agreement between the employer, the employee and the Union, evidenced in writing, a Mechanical Fitter and a Refrigeration Mechanic may receive 25% loading in lieu of overtime payments.

(e) Leading hand electricians who are required to perform duties over and above those normally required of leading hands shall be paid an all purpose allowance of $36.60 per week in addition to the relevant leading hand rate prescribed in subclause (8) of the First Schedule - Wages of this Award.

(B) Delete subclause (7) of this clause and insert the following in lieu thereof:

(7) Computing Quantities:

An employee, other than a leading hand, who is required to compute or estimate quantities of materials in respect of work performed by others, shall be paid $3.85 per day, or part thereof, in addition to the rates otherwise prescribed in this award.

2009 WAIRC 01317

LIFT INDUSTRY (ELECTRICAL AND METAL TRADES) AWARD 1973

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	KONE ELEVATORS PTY. LIMITED, OTIS ELEVATOR CO PTY LTD, SCHINDLER LIFTS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 63 OF 2009
CITATION NO.	2009 WAIRC 01317

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	No appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Lift Industry (Electrical and Metal Trades) Award 1973 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 12. - Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.40 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 each such meal by the employer or be paid $7.80 for each meal so required.

2. Clause 16. – Special Rates and Provisions: Delete subclauses (5) and (6) of this clause and insert the following in lieu thereof:

(5) An Electrician Special Class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of the employee's employment may be required to use a current "A" Grade or "B" Grade License issued pursuant to the relevant regulation in force on 28th day of February 1979 under the Electricity Act, 1945 shall be paid an allowance of $20.90 per week.

(6) An employee holding either a First Aid Medallion of the St. John Ambulance Association or a Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties shall be paid $10.30 per week in addition to his/her ordinary rate.

3. Clause 28. – Lift Industry Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) Tradespeople and their assistants who perform work in connection with the installation, servicing, repairing and/or maintenance of lifts and escalators, other than in the employer's workshops, shall be paid an amount of $98.10 per week as a lift industry allowance in consideration of the peculiarities and disabilities associated with such work and in recognition of the fact that employees engaged in such work may be required to perform and/or assist to perform, as the case may be, any of such work.

4. First Schedule – Wages: Delete subclauses (3) and (6) and insert the following in lieu thereof:

(3) Leading Hands:

In addition to the appropriate total wage prescribed in this Clause, a leading hand shall be paid -

			$
	(a)	If placed in charge of not less than three and not more than ten other employees	26.40
	(b)	If placed in charge of more than ten and not more than twenty other employees	40.20
	(c)	If placed in charge of more than twenty other employees	51.90

(6) (a) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of his/her work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:-

(i) $14.60 per week to such tradesperson; or

(ii) In the case of an apprentice a percentage of $14.60 being the percentage which appears against his/her years of apprenticeship in Clause 3 of this schedule, for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his/her work as a tradesperson or apprentice.

(b) Any tool allowance paid pursuant of paragraph (a) of this Clause shall be included in, and form part of, the ordinary weekly wage prescribed in this schedule.

(c) An employer shall provide for the use of tradesperson or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by his/her employer if lost through his/her negligence.

2009 WAIRC 01355

METAL TRADES (GENERAL) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	ANODISERS WA AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 21 DECEMBER 2009
FILE NO	APPL 68 OF 2009
CITATION NO.	2009 WAIRC 01355

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	No appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Metal Trades (General) Award 1966 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 18 December 2009.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

SCHEDULE

1. Clause 3.2 – Overtime: Delete subclause 3.2.3(6) of this clause and insert the following in lieu thereof:

(6) Subject to the provisions of 3.2.3(7), an employee required to work overtime for more than two (2) hours shall be supplied with a meal by the employer or be paid $11.45 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 each such meal by the employer or be paid $7.75 for each meal so required.

2. Clause 4.8 – Wages and Supplementary Payments:

(A) Delete subclause 4.8.2(1) of this clause and insert the following in lieu thereof:

4.8.2 (1) Leading Hands:

In addition to the appropriate total wage prescribed in this clause, a leading hand shall be paid per week –

		$
(a)	If placed in charge of not less than three and not more than 10 other employees	26.60
(b)	If placed in charge of more than 10 and not more than 20 other employees	40.60
(c)	If placed in charge of more than 20 other employees	52.50

(B) Delete subclause 4.8.6(1) of this clause and insert the following in lieu thereof:

(1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice the employer shall pay a tool allowance of:

(a) $14.60 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $14.60 being the percentage which appears against the year of apprenticeship in 4.8.3;

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of work as a tradesperson or apprentice.

(C) Delete subclause 4.8.7 of this clause and insert the following in lieu thereof:

4.8.7 An employee employed in rock quarries, limestone quarries or sand pits shall be paid an allowance of $23.60 per week to compensate for dust and climatic conditions when working in the open and for deficiencies in general amenities and facilities, but an employee so employed for not more than three days shall be paid on a pro rata basis.

This subclause shall not apply to employees employed by Cockburn Cement Limited.

3. Clause 5.2 – Special Rates and Facilities: Delete this clause and insert the following in lieu thereof:

5.2.1 Height Money:

An employee shall be paid an allowance of $2.45 for each day on which the employee works at a height of 15.5 metres or more above the nearest horizontal plane, but this provision does not apply to linespeople nor to riggers and splicers on ships and buildings.

5.2.2 Dirt Money:

An employee shall be paid an allowance of 52 cents per hour when engaged on work of an unusually dirty nature where clothes are necessarily unduly soiled or damaged or boots are unduly damaged by the nature of the work done.

5.2.3 Grain Dust:

Where any dispute arises at a bulk grain handling installation due to the presence of grain dust in the atmosphere and the Board of Reference determines that employees employed under this Award are unduly affected by that dust, the Board may, subject to such conditions as it deems fit to impose, fix an allowance or allowances not exceeding 88 cents per hour.

5.2.4 Confined Space:

An employee shall be paid an allowance of 62 cents per hour when, because of the dimensions of the compartment or space in which the employee is working, the employee is required to work in a stooped or otherwise cramped position, or without proper ventilation.

5.2.5 Diesel Engine Ships:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee when the employee is engaged on work below the floor plates in diesel engine ships, but the employee shall be paid an allowance of 88 cents per hour whilst so engaged.

5.2.6 Boiler Work:

An employee required to work in a boiler which has not been cooled down shall be paid at the rate of time and one-half for each hour or part of an hour so worked in addition to any allowance to which the employee may be entitled under 5.2.2 and 5.2.4.

5.2.7 Hot Work:

An employee shall be paid an allowance of 52 cents per hour when the employee works in the shade in any place where the temperature is raised by artificial means to between 46.1 degrees and 54.4 degrees Celsius.

5.2.8 (1) Where, in the opinion of the Board of Reference, the conditions under which work is to be performed are, by reason of excessive heat, exceptionally oppressive, the Board may -

(a) fix an allowance, or allowances, not exceeding the equivalent of half the ordinary rate;

(b) fix the period (including a minimum period) during which any allowance so fixed is to be paid; and

(c) prescribe such other conditions, relating to the provision of protective clothing or equipment and the granting of rest periods, as the Board sees fit.

(2) The provisions of 5.2.8(1) do not apply unless the temperature in the shade at the place of work has been raised by artificial means beyond 54.4 degrees Celsius.

(3) An allowance fixed pursuant to paragraph 5.2.8(1) includes any other allowance which would otherwise be payable under this clause.

5.2.9 Tarring Pipes:

The provisions of 5.2.2 and 5.2.4 do not apply to an employee engaged in tarring pipes in the Cast Pipe Section but the employee shall, in lieu thereof, be paid an allowance of 84 cents per day whilst so engaged.

5.2.10 Percussion Tools:

An employee shall be paid an allowance of 30 cents per hour when working a pneumatic riveter of the percussion type and other pneumatic tools of the percussion type.

5.2.11 Chemical, Artificial Manure and Cement Works:

An employee, other than a general labourer, in chemical, artificial manure and cement works, in respect of all work done in and around the plant outside the machine shop, shall be paid an allowance calculated at the rate of $12.90 per week. This allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to any other allowance under this clause.

5.2.12 Abattoirs and Tallow Rendering Works:

An employee, employed in and about an abattoir or in a rendering section of a tallow works shall be paid an allowance calculated at the rate of $16.90 per week. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause.

5.2.13 An employee who is employed at a timber sawmill or is sent to work at a timber sawmill shall be paid for the time there engaged a disability allowance equivalent to what the majority of the employees at the mill receive under the appropriate Award. The allowance shall be paid during overtime but shall not be subject to penalty additions. An employee receiving this allowance is not entitled to receive any other allowance under this clause with the exception of that prescribed in 5.2.1 - Height Money.

5.2.14 Phosphate Ships:

An employee shall be paid an allowance of 74 cents for each hour the employee works in the holds or 'tween decks of ships which, immediately prior to such work, have carried phosphatic rock, but this subclause only applies if and for as long as the holds and 'tween decks are not cleaned down.

5.2.15 An employee who is sent to work on any gold mine shall be paid an allowance of such amount as will afford the employee a wage not less than he or she would be entitled to receive pursuant to the Award which would apply if such employee was employed in the gold mine concerned.

5.2.16 An employee who is required to work from a ladder shall be provided with an assistant on the ground where it is reasonably necessary for the employee's safety.

5.2.17 The work of an electrical fitter shall not be tested by an employee of a lower grade.

5.2.18 Special Rates Not Cumulative:

Where more than one of the disabilities entitling an employee to extra rates exists on the same job, the employer shall be bound to pay only one rate, namely - the highest for the disabilities prevailing. Provided that this subclause shall not apply to confined space, dirt money, height money, or hot work, the rates for which are cumulative.

5.2.19 Protective Equipment:

(1) An employer shall have available a sufficient supply of protective equipment as, for example, goggles (including anti-flash goggles), glasses, gloves, mitts, aprons, sleeves, leggings, gumboots, ear protectors, helmets, or other efficient substitutes thereof) for use by employees when engaged on work for which some protective equipment is reasonably necessary.

(2) An employee shall sign an acknowledgement when issued with any article of protective equipment and shall return that article to the employer when finished using it or on leaving employment.

(3) An employee to whom an article of protective equipment has been issued shall not lend that article to another employee and if the employee does, both employees shall be deemed guilty of wilful misconduct.

(4) An article of protective equipment which has been used by an employee shall not be issued by the employer to another employee until it has been effectively sterilised but this paragraph only applies where sterilisation of the article is practicable and is reasonably necessary.

(5) Adequate safety gear (including insulating gloves, mats and/or shields where necessary) shall be provided by employers for employees required to work on live electrical equipment.

5.2.20 (1) Subject to the provisions of this clause, an employee whilst employed on foundry work shall be paid a disability allowance of 37 cents for each hour worked to compensate for all disagreeable features associated with foundry work including heat, fumes, atmospheric conditions, sparks, dampness, confined spaces, and noise.

(2) The foundry allowance herein prescribed shall also apply to apprentices and unapprenticed juniors employed in foundries; provided that where an apprentice is, for a period of half a day or longer, away from the foundry for the purpose of receiving tuition, the amount of foundry allowance paid to the employee shall be decreased proportionately.

(3) The foundry allowance herein prescribed shall be in lieu of any payment otherwise due under this clause and does not in any way limit an employer's obligations to comply with all relevant requirements of Acts and Regulations relative to conditions in foundries.

(4) For the purpose of this subclause 'foundry work' shall mean -

(a) Any operation in the production of castings by casting metal in moulds made of sand, loam, metal, moulding composition or other material or mixture of materials, or by shell moulding, centrifugal casting or continuous casting; and

(b) where carried on as an incidental process in connection with and in the course of production to which 5.2.20(4)(a) applies, the preparation of moulds and cores (but not in the making of patterns and dies in a separate room), knock out processes and dressing operations, but shall not include any operation performed in connection with -

(i) non-ferrous die casting (including gravity and pressure);

(ii) casting of billets and/or ingots in metal moulds;

(iii) continuous casting of metal into billets;

(iv) melting of metal for use in printing;

(v) refining of metal.

5.2.21 An employee, holding a Third Year First Aid Medallion of the St. John Ambulance Association or a "C" Standard Senior First Aid Certificate of the Australian Red Cross Society, appointed by the employer to perform first aid duties, shall be paid $10.10 per week in addition to the employee's ordinary rate.

5.2.22 An electronics tradesperson, an electrician - special class, an electrical fitter and/or armature winder or an electrical installer who holds and, in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant Regulation in force on the 28th day of February 1978 under the *Electricity Act 1945,* shall be paid an allowance of $21.00 per week.

PART 2 – CONSTRUCTION WORK

4. Clause 13. – Wages: Delete subclauses 13.4, 13.5 and 13.6 of this clause and insert the following in lieu thereof:

13.4 Construction Allowance

(1) In addition to the appropriate rates of pay prescribed in this clause an employee shall be paid:

(a) $47.00 per week if the employee is engaged on the construction of a large industrial undertaking or any large civil engineering project.

(b) $42.20 per week if the employee is engaged on a multi-storeyed building, but only until the exterior walls have been erected and the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which such employee is required to work. A multi-storeyed building is a building which, when completed, will consist of at least five storeys.

(c) $24.80 per week if the employee is engaged otherwise on construction work falling within the definition of construction work in Clause 1.6 - Definitions and Classification Structure of PART 1 - GENERAL of this Award.

(2) Any dispute as to which of the aforesaid allowances apply to particular work shall be determined by the Board of Reference.

13.5 Leading Hands

In addition to the appropriate total wage prescribed in this clause a leading hand shall be paid:

		$
(1)	If placed in charge of not less than three (3) and not more than ten (10) other employees	26.60
(2)	If placed in charge of more than ten (10) and not more than twenty (20) other employees	40.60
(3)	If placed in charge of more than twenty (20) other employees	52.50

13.6 (1) Where an employer does not provide a tradesperson or an apprentice with the tools ordinarily required by that tradesperson or apprentice in the performance of work as a tradesperson or as an apprentice, the employer shall pay a tool allowance of –

(a) $14.60 per week to such tradesperson; or

(b) in the case of an apprentice a percentage of $14.60 being the percentage which appears against his or her year of apprenticeship in 4.8.3 of Clause 4.8 – Wages and Supplementary Payments of PART 1 - GENERAL (subject to Clause 12.2 Apprentices of PART 2) of this Award,

for the purpose of such tradesperson or apprentice supplying and maintaining tools ordinarily required in the performance of his or her work as a tradesperson or apprentice.

(2) Any tool allowance paid pursuant to 13.6(1) shall be included in, and form part of, the ordinary weekly wage prescribed in this clause.

(3) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(4) A tradesperson or apprentice shall replace or pay for any tools supplied by his or her employer if lost through his or her negligence.

5. Clause 15.1 – Special Allowances and Provisions:

(A) Delete subclause 15.1.2(2) of this clause and insert the following in lieu thereof:

(2) Subject to 15.1.3 where the employee's tools or working clothes are lost by fire or breaking and entering whilst securely stored in the place provided by the employer under 15.1.2(1) the employer shall reimburse the employee for that loss but only up to a maximum of $799.00.

(B) Delete subclause 15.1.4 of this clause and insert the following in lieu thereof:

15.1.4 An Electronics Tradesperson, an Electrician Special Class, an Electrical Fitter and/or Armature Winder or an Electrical Installer who holds, and in the course of employment may be required to use, a current "A" Grade or "B" Grade license issued pursuant to the relevant regulation in force on the 28th day of February 1978 under the *Electricity Act 1945*, shall be paid an allowance of $21.00 per week.

6. Clause 15. – Allowances and Provisions: Delete subclause 15.4.2 of this clause and insert the following in lieu thereof:

15.4.2 In addition to the wage otherwise payable to an employee pursuant to the provisions of PART 2 - CONSTRUCTION WORK of this Award, an employee (other than an apprentice) shall be paid -

(1) $2.09 per hour for each hour worked if employed at Muja;

(2) $1.23 per hour for each hour worked if employed at Kwinana;

(3) a safety footwear allowance of eleven (11) cents per hour for each hour worked to compensate for the requirement to wear approved safety footwear which is to be maintained in sound condition by the employee. Failure to wear approved safety footwear or to maintain it in sound condition as determined by the employer shall render the employee liable to dismissal.

2009 WAIRC 01318

RADIO AND TELEVISION EMPLOYEES' AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	HILLS INDUSTRIES LTD AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 64 OF 2009
CITATION NO.	2009 WAIRC 01318

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	No appearance

Order

HAVING HEARD Ms N Ireland on behalf of the applicant and there being no appearance on behalf of the respondents, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the Radio and Television Employees' Award be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 9. - Overtime: Delete subclause (3)(f) of this clause and insert the following in lieu thereof:

(f) Subject to the provisions of paragraph (g) of this subclause, an employee required to work overtime for more than two hours shall be supplied with a meal by the employer or be paid $11.40 for a meal and, if owing to the amount of overtime worked, a second or subsequent meal is required they shall be supplied with each such meal by the employer or be paid $7.70 for each meal so required.

2. Clause 29. – Wages: Delete subclauses (2) and (5) of this clause and insert the following in lieu thereof:

(2) **Leading Hands:**

In addition to the appropriate total wage prescribed in subclause (1) of this Clause a leading hand shall be paid:

		$
(a)	If placed in charge of not less than three and not more than ten other employees	26.50
(b)	If placed in charge of more than ten and not more than twenty other employees	40.30
(c)	If placed in charge of more than twenty other employees	52.00

(5) (a) Where an employer does not provide a Serviceperson, Installer, Assembler or an apprentice with the tools ordinarily required by that Serviceperson, Installer, Assembler or apprentice in the performance of their work as a Serviceperson, Installer, Assembler or as an apprentice the employer shall pay a tool allowance of:-

(i) $14.50 per week to such Serviceperson, Installer or Assembler; or

(ii) In the case of an apprentice a percentage of $14.50 being the percentage which appears against their year of apprenticeship in subclause (3) of this Clause,

for the purpose of such Serviceperson, Installer, Assembler or apprentice supplying and maintaining tools ordinarily required in the performance of their work as a Serviceperson, Installer, Assembler or apprentice.

(b) Any tool allowance paid pursuant to paragraph (a) of this subclause shall be included in, and form part of, the ordinary weekly wage prescribed in this Clause.

(c) An employer shall provide for the use of tradespersons or apprentices all necessary power tools, special purpose tools and precision measuring instruments.

(d) A tradesperson or apprentice shall replace or pay for any tools supplied by their employer if lost through their negligence.

2009 WAIRC 01325

WA GOVERNMENT HEALTH SERVICES ENGINEERING AND BUILDING SERVICES AWARD 2004

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING, AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING & ELECTRICAL DIVISION, WA BRANCH
	APPLICANT
	-v-
	DEPARTMENT OF HEALTH AND OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO	APPL 65 OF 2009
CITATION NO.	2009 WAIRC 01325

Result	Award varied
Representation	
Applicant	Ms N Ireland
Respondent	Ms S Smith on behalf of the Department of Health
	Ms S Walker on behalf of The Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch

Order

HAVING HEARD Ms N Ireland on behalf of the applicant, Ms S Smith on behalf of the Department of Health and Ms S Walker on behalf of The Construction, Forestry, Mining and Energy Union of Workers Western Australian Branch, and by consent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the WA Government Health Services Engineering and Building Services Award 2004 be varied in accordance with the following Schedule and that such variation shall have effect from the beginning of the first pay period commencing on or after 11 December 2009.

(Sgd.) S M MAYMAN,
[L.S.] Commissioner.

SCHEDULE

1. Clause 19. – Leading Hand Allowance: Delete subclause (1) of this clause and insert the following in lieu thereof:

(1) An employee placed in charge of 3 or more other employees shall, in addition to the employee's ordinary salary, be paid -

(a) Not less than 3 and not more than 10 other employees - $38.90 per week;

(b) More than 10 and not more than 20 other employees - $52.20 per week;

(c) More than 20 other employees - $65.30 per week.

2. Clause 23. – Special Rates and Provisions:

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

(1) Disability Allowances

(a) Except as otherwise provided in this clause, the annual base salaries prescribed in this Award incorporate a commuted allowance which is in full substitution for all disability allowances and other special rates and provisions which are contained in any of the awards named in Clause 1. - Title, as at the date of registration of this Award.

(b) Polychlorinated Biphenyls: Employees required to remove or handle equipment or fittings containing polychlorinated biphenyls (PCBs), for which protective clothing must be worn, shall be paid an allowance of $1.97 for each hour or part thereof whilst so engaged.

(c) Asbestos:

(i) Employees required to use materials containing asbestos or to work in close proximity to employees using such materials shall be provided with and shall use all necessary safeguards as required by the appropriate occupational health authority

(ii) Employees engaged in a work process involving asbestos who are required to wear protective equipment, ie. respiratory protection in the form of a high efficiency class H particulate respirator and/or special clothing, shall be paid an allowance of $0.65 per hour for each hour or part thereof whilst so engaged.

(d) Furnace Work

Employees engaged in the construction or alteration or repairs to boilers, flues, furnaces, retorts, kilns, ovens, ladles, steam generators, heat exchangers and similar refractory work or on underpinning shall be paid $1.43 per hour or part thereof whilst so engaged.

(e) Construction Allowance

(i) In addition to the appropriate rate of pay prescribed in Appendix A. - Salaries of this Award, an employee shall be paid -

(aa) $43.10 per week if engaged on the construction of a large industrial undertaking or any large civil engineering project;

(bb) $38.80 per week if engaged on a multi-storey building but only until the exterior walls have been erected, the windows completed and a lift made available to carry the employee between the ground floor and the floor upon which he/she is required to work. A "multi-storey building" is a building which, when completed, shall consist of at least five stories.

(cc) $22.90 per week if engaged otherwise on Construction Work.

(ii) The rates specified in paragraph (1)(e)(i) shall be discounted by $17.80 per week, the amount of the commuted allowance granted under paragraph (1)(a) of this subclause.

(f) Asbestos Eradication

(i) This sub-clause shall apply to employees engaged in the process of asbestos eradication on the performance of work within the scope of this Award.

(ii) For the purposes of this clause "asbestos eradication" means work on or about buildings, involving the removal or any other method of neutralisation of any materials which consist of, or contain asbestos.

(iii) All aspects of asbestos work shall meet as a minimum standard the provisions of the National Health and Medical Research Council codes, as varied from time to time, for the safe demolition/removal of asbestos based materials.

Without limiting the effect of the above provision, any person who carried out asbestos eradication work shall do so in accordance with the legislation/regulations prescribed by the appropriate authorities.

(iv) An employee engaged in asbestos eradication (as defined) shall receive an allowance of $1.42 per hour worked in lieu of rates prescribed in paragraph (1)(c) of Clause 23.- Special Rates and Provisions

(v) Respiratory protective equipment, conforming to the relevant parts of the appropriate Australian Standard (ie. 1716 "Specification of Respiratory Protective Devices") shall be worn by all personnel during work involving eradication of asbestos.

(g) Where more than one of the disabilities entitling an employee to extra rates exists on the same job the employee shall be paid only the highest rate for the disabilities so prevailing.

(B) Delete subclause (3)(b), (d), (e) and (f) of this clause and insert the following in lieu thereof:

(b) Permit Work

Any licensed plumber called upon by the Employer to use the licence issued to him/her by the Metropolitan Water Supply, Sewerage and Drainage Board for a period in any one week shall be paid $16.80 for that week in addition to the rates otherwise prescribed.

(d) Scaffolding Certificate Allowance:

A tradesperson who is the holder of a scaffolding certificate or rigging certificate issued by an accredited training provider and is required to act on that certificate whilst engaged on work requiring a certified person shall be paid $0.53 per hour or part thereof: in addition to the rates otherwise prescribed in this Award.

(e) Nominee Allowance

A licensed electrical fitter or mechanic who acts as nominee for the Employer shall be paid an allowance of $16.80 per week.

(f) Setter Out:

A setter out (other than a leading hand) in a joiner's shop shall be paid $5.05 per day in addition to the rates otherwise prescribed.

3. Clause 25. – Overtime: Delete subclause (7)(a) of this clause and insert the following in lieu thereof:

(a) An employee required to work 2 hours or more overtime continuous with their rostered hours, which necessitates taking a meal break, shall be paid a meal allowance of $12.25 for each meal so required or may be provided with a meal ticket.

Provided that this subclause shall not apply to an employee notified on the previous day of the requirement to work such overtime.

4. Appendix A – Salaries: Delete subclause (1) of this Appendix and insert the following in lieu thereof:

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

(1) Rates of Pay

Subject to this Appendix, employees shall be paid the rates of pay specified in the following table in accordance with the level to which they are from time to time classified.

	Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
Carpenter	Building Tradesperson Level 04	100	365.20	52.00	246.30	663.50	12.40	89.30	12.00	0.00	40,543
	Building Tradesperson Level 05	105	383.50	54.60	246.30	684.40	13.04	89.54	12.00	0.00	41,680
	Building Tradesperson Level 06	110	401.70	57.20	246.30	705.20	13.68	89.80	12.00	0.00	42,812
	Building Tradesperson Level 07	115	420.00	59.80	244.30	724.10	14.22	90.04	12.00	0.00	43,838
	Building Tradesperson Level 08	120	438.20	62.40	244.30	744.90	14.86	74.73	12.00	0.00	44,158
	Building Tradesperson Level 09	125	456.50	65.00	244.30	765.80	15.50	75.05	12.00	0.00	45,298
Painter	Building Tradesperson Level 04	100	365.20	52.00	246.30	663.50	12.40	69.20	12.00	0.00	39,495
	Building Tradesperson Level 05	105	383.50	54.60	246.30	684.40	13.04	69.46	12.00	0.00	40,632
	Building Tradesperson Level 06	110	401.70	57.20	246.30	705.20	13.68	69.71	12.00	0.00	41,764
	Building Tradesperson Level 07	115	420.00	59.80	244.30	724.10	14.22	69.96	12.00	0.00	42,791
	Building Tradesperson Level 08	120	438.20	62.40	242.30	742.90	14.86	54.60	12.00	0.00	43,004
	Building Tradesperson Level 09	125	456.50	65.00	244.30	765.80	15.50	54.97	12.00	0.00	44,251
Plasterer	Building Tradesperson Level 04	100	365.20	52.00	246.30	663.50	12.40	84.60	12.00	0.00	39,657
	Building Tradesperson Level 05	105	383.50	54.60	246.30	684.40	13.04	84.84	12.00	0.00	41,434
	Building Tradesperson Level 06	110	401.70	57.20	246.30	705.20	13.68	85.10	12.00	0.00	42,566
	Building Tradesperson Level 07	115	420.00	59.80	244.30	724.10	14.22	85.34	12.00	0.00	43,593
	Building Tradesperson Level 08	120	438.20	62.40	244.30	744.90	14.86	70.01	12.00	0.00	43,912
	Building Tradesperson Level 09	125	456.50	65.00	244.30	765.80	15.50	70.33	12.00	0.00	45,052
Plumber	Building Tradesperson Level 04	100	365.20	52.00	246.30	663.50	12.40	108.66	12.00	0.00	41,553
	Building Tradesperson Level 05	105	383.50	54.60	246.30	684.40	13.04	108.90	12.00	0.00	42,690
	Building Tradesperson Level 06	110	401.70	57.20	246.30	705.20	13.68	109.15	12.00	0.00	43,821

Level	Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
Building Tradesperson Level 07	115	420.00	59.80	244.30	724.10	14.22	109.40	12.00	0.00	44,848
Building Tradesperson Level 08	120	438.20	62.40	244.30	744.90	14.86	94.06	12.00	0.00	45,166
Building Tradesperson Level 09	125	456.50	65.00	244.30	765.80	15.50	94.40	12.00	0.00	46,308
Other Building employees not elsewhere classified	78	284.86	40.56	244.30	569.72	9.68	61.54	14.00	0.00	34,166
Building Employee Entrant Level	82	299.46	42.64	244.30	586.40	10.20	61.70	14.00	0.00	35,071
Building Employee Level 1	87	319.18	45.45	244.30	608.93	10.87	61.95	14.00	0.00	36,294
Building Employee Level 2	92	337.44	48.05	244.30	629.79	11.51	62.16	14.00	0.00	37,427
Building Employee Level 3	100	365.20	52.00	246.30	663.50	12.40	62.64	14.00	0.00	39,257
Building Employee Level 4										
Mechanical Fitter, Motor Mechanic, Refrigeration Fitter & other engineering trades employees not elsewhere classified	78	284.86	40.56	244.30	569.72	14.68	60.49	14.00	0.00	34,372
Engineering Employee Level 14										
Engineering Employee Level 13	82	299.46	42.64	244.30	586.40	15.40	60.67	14.00	0.00	35,289
Engineering Employee Level 12	87.4	319.18	45.45	244.30	608.93	16.47	60.90	14.00	0.00	36,532
Engineering Employee Level 11	92.4	337.44	48.05	244.30	629.79	17.41	61.13	14.00	0.00	37,681
Engineering Tradesperson Level 10	100	365.20	52.00	246.30	663.50	18.80	75.56	12.00	0.00	40,161
Engineering Tradesperson Level 09	105	383.50	54.60	246.30	684.40	19.70	75.81	12.00	0.00	41,311
Engineering Tradesperson Level 08	110	401.70	57.20	246.30	705.20	20.70	76.06	12.00	0.00	42,461
Engineering Tradesperson Level 07	115	420.00	59.80	244.30	724.10	21.60	76.31	12.00	0.00	43,507
Engineering Tradesperson Level 06	125	456.50	65.00	246.30	767.80	23.50	61.23	12.00	0.00	45,099
Engineering Tradesperson Level 05	130	474.80	67.60	244.30	786.70	24.40	61.40	10.00	0.00	46,036

Level		Percentage Relativity to C10 Trades-person	Award Base Weekly – Metal, Engineering and Associated Industries Award, 1998 Part I.	Supple-mentary Payment	State Wage Order Adjustment	Minimum Rate	Additional Payment	Annualised Weekly Allowances and Loading	Commuted Overtime and Mobility Allowance (Salary Increase for value for money trade-offs in award safety net of conditions)	Above Award Payment - Subject to Absorption	Salary
Electrical Fitter/ Mechanic	Engineering Tradesperson Level 10	100	365.20	52.00	246.30	663.50	18.80	95.63	12.00	0.00	41,207
	Engineering Tradesperson Level 09	105	383.50	54.60	246.30	684.40	19.70	95.88	12.00	0.00	42,358
	Engineering Tradesperson Level 08	110	401.70	57.20	246.30	705.20	20.70	96.13	12.00	0.00	43,508
	Engineering Tradesperson Level 07	115	420.00	59.80	244.30	724.10	21.60	96.38	12.00	0.00	44,554
	Engineering Tradesperson Level 06	125	456.50	65.00	244.30	765.80	23.50	81.21	12.00	0.00	46,037
	Engineering Tradesperson Level 05	130	474.80	67.60	244.30	786.70	24.40	81.47	10.00	0.00	47,083

INDUSTRIAL MAGISTRATE—Claims before—

2009 WAIRC 01357

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

PARTIES	JOHN MARTIN WALL; TREVOR JAMES WARD **CLAIMANTS** **-v-** CHIEF EXECUTIVE OFFICER, DEPARTMENT OF AGRICULTURE AND FOOD **RESPONDENT**
CORAM	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	WEDNESDAY, 16 DECEMBER 2009, WEDNESDAY, 26 AUGUST 2009
DELIVERED	WEDNESDAY, 16 DECEMBER 2009
CLAIM NO.	M 32 AND M 33 OF 2008
CITATION NO.	2009 WAIRC 01357

CatchWords	Alleged failure to comply with the *Public Service Award 1992* and the *Public Service General Agreement 2006*; Claim for 2.5 hours overtime for each week worked from 2002 until 2008; Public sector employees not paid for hours worked in excess of 37.5 ordinary hours per week specified in the *Public Service Award 1992*; effect of *Labour Relations Reform Act 2002* on workplace agreements; Interaction between workplace agreements and industrial agreements; Statutory construction; Construction of s 4H of the *Workplace Agreements Act 1993.*
Legislation	*Agriculture Act 1988 (repealed)* *Public Sector Management Act 1994* *Industrial Relations Act 1979* *Workplace Agreements Act 1993* *Labour Relations Reform Act 2002*
Industrial Instruments:	*Public Service Award 1992* *Public Service General Agreement 2002* *Public Service General Agreement 2004* *Public Service General Agreement 2006* *Public Service General Agreement 2008* *Department of Agriculture Agency Specific Agreement 2003* *Department of Agriculture Agency Specific Agreement 2005* *Department of Agriculture and Food Western Australia Agency Specific Agreement 2007* *System of Hours Agreements 2004*
Cases Referred to In Judgement:	*John Martin Wall and Trevor James Ward v Chief Executive Officer, Department of Agriculture and Food* (2007) 87 WAIG 2853, (2007) 87 WAIG 2872 *Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward and John Martin Wall* (2008) 88 WAIG 156 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 *Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights Union of Western Australia and Others* (1987) 67 WAIG 1097 *City of Wanneroo v Holmes* (1989) 30 IR 362 *Public Service Commissioner v Arthur Alfred Dixon* (1995) 75 WAIG 1822 *BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch)* [2006] WASCA 124

Cases also Cited:	*Amcor Limited v Construction, Forestry, Mining and Energy Union and Others* [2005] 222 CLR 241
	Kucks v CSR Ltd (1996) 66 IR 182
	Webster v MacIntosh (1980) 32 ALR 603
	Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424
	AMP Ltd v Chaplin (1978) 18 ALR 385
	Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
	Commonwealth v Verwayen (1990) 170 CLR 394
	Giumelli v Giumelli (1999) 196 CLR 101
Result	Claims Proven
Representation	
Claimant	Mr R Hooker instructed by *Lavan Legal,* appeared for the Claimant
Respondent	Mr D Matthews instructed by the *State Solicitor for Western Australia,* appeared for the Respondent

REASONS FOR DECISION

Background

1 The facts in this matter are uncontroversial.

2 The Respondent employs the Claimants John Martin Wall and Trevor James Ward. Mr Wall, a Level 2 Administration Officer, has worked for the Respondent at Merredin for 11 years. Mr Ward, a Level 3 Financial Officer, has worked for the Respondent in Perth since 2000. Both are public service officers. They were initially employed pursuant to s 11 of the *Agriculture Act 1988* (now repealed) and are subject to Part 3 of the *Public Sector Management Act 1994* (PSMA). They are also government officers for the purpose of Division 2 of Part IIA of the *Industrial Relations Act 1979* (IRA).

3 Their employment was, until 31 December 2002, governed by workplace agreements made pursuant to the *Workplace Agreements Act 1993* (WAA). The *Labour Relations Reform Act 2002* (LRRA) among other effects amended the WAA so as to cease the legal operation of workplace agreements and to produce certain transitional arrangements. Pursuant to the provisions of the WAA, as amended, workplace agreements expired on 31 December 2002. On 1 January 2003 the Claimants moved from workplace agreements to so called Statutory Contracts of Employment (SCOEs) which preserved their pre-existing terms and conditions of employment so as to ensure that they would not be worse off by the change. Their hours of work did not change.

4 In an explanatory memorandum concerning the proposed changes issued to government employees on individual workplace agreements by the Department of Consumer and Employment Protection (DOCEP) on 22 November 2002, the following statement was made:

> *"Hours of work will not change as a result of the ceasing of workplace agreements. If the hours of work in statutory contracts of employment are greater than the ordinary hours provided for in awards/EBAs, the additional time worked will be treated as overtime in accordance with the provisions of awards/EBAs. This does not necessarily mean the additional time worked will be paid as overtime. Some awards require minimum additional time to be worked before overtime is paid."*

[Exhibit 3]

5 From 1 January 2003 onwards the Claimants' employment was governed by the SCOE, an award and other industrial instruments. The industrial instruments which have at different times governed their employment have been the *Public Service Award 1992* (PSA), the *Public Service General Agreement 2002* (PSGA 2002), the *Public Service General Agreement 2004* (PSGA 2004), the *Public Service General Agreement 2006* (PSGA 2006), the *Department of Agriculture Agency Specific Agreement 2003* (ASA 2003), the *Department of Agriculture Agency Specific Agreement 2005* (ASA 2005), the *Department of Agriculture and Food Agency Specific Agreement 2007* (ASA 2007), and the *System of Hours Agreements 2004*. The Claimants' employment is currently governed by the PSA, the *Public Service General Agreement 2008* (PSGA 2008), the ASA 2007, and the *System of Hours Agreements 2004.*

6 The workplace agreements which formerly governed the Claimants' employment provided for the working of and payment for an average of 40 hours per week at an agreed ordinary rate. Since the expiration of the workplace agreements the Claimants have continued to work an average of 40 hours per week notwithstanding that the respective instruments that have subsequently governed their employment have provided for the working of and payment for an average of 37.5 hours per week at the ordinary rate of pay. Since 1 April 2006 the Claimants have not been paid for all of the average 40 hours per week worked. Indeed they have been paid for having worked an average of 37.5 hours per week.

7 The Claimants contend that, under the applicable industrial instruments, from 1 January 2003 onwards they were entitled, as provided by Part 1A of the WAA, to continue to be paid at the ordinary rate of pay for the average of 40 hours worked each week. Their argument was rejected by the Full Bench of the Western Australian Industrial Relations Commission (WAIRC) (see *Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward and John Martin Wall* (2008) 88 WAIG 156). For the purpose of these proceedings the Claimants maintain that argument but say in the alternative that they should have otherwise, from 1 January 2003, been paid overtime for the 2.5 hours worked each week in excess of the 37.5 ordinary hours prescribed by the applicable industrial instruments.

8 The Respondent disputes the claims and says that the payment of 37.5 hours per week at the ordinary rate of pay, is all that is contemplated and able to be paid under the applicable industrial instruments. In that regard the Respondent maintains that the applicable instruments prevail over the workplace agreements because of the transitional provisions of the WAA. The effect being that any contract for work, more than an average 37.5 hours per week as ordinary time is unlawful and invalid and may not be enforced. The Respondent says that the claims for overtime are untenable because the Claimants had never considered any part of their working week to be overtime, and in any event they were not directed to work overtime. A direction to work overtime is a precondition for the payment of overtime. Further, the Respondent points out that some parts of the claims fall outside the 6 year limitation period referred to in s 83A(2) of the IRA. The Respondent also disputes the quantum claimed.

History of Litigation

9 In or about March 2007, the Claimants commenced proceedings in the WAIRC seeking certain remedies for the Respondent's alleged underpayment of their entitlements. The Respondent denied that the Claimants had been underpaid. On 24 September 2007 Senior Commissioner Smith (as she then was) determined the matters and ordered that the Respondent pay each Claimant a specified amount. She further ordered that the Respondent pay the Claimants for 40 hours per week at the ordinary rate of pay specified in the applicable industrial instruments until a variation or termination is made of the SCOE under s 4H(5) of the WAA. (see *John Martin Wall and Trevor James Ward v Chief Executive Officer, Department of Agriculture and Food* (2007) 87 WAIG 2853, (2007) 87 WAIG 2872).

10 In October 2007, the Respondent appealed the decision to the Full Bench of the WAIRC. In February 2008 the Full Bench allowed the appeal and quashed the decision of Smith SC (see *Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward and John Martin Wall* (2008) 88 WAIG 156). In the course of their Reasons for Decision the members of the Full Bench expressed opinions as to the meaning of s 4H of the WAA, and with respect to the appropriate forum for enforcement. The Full Bench held that following the commencement of the LRRA on 1 January 2003, it was no longer possible for the Claimants to work 40 hours per week as ordinary hours under the PSA and the other instruments which had effect. The Full Bench held that as from 1 January 2003 the Claimants could only work 37.5 hours as ordinary hours. The Claimants have appealed the decision of the Full Bench. The appeals to the Western Australian Industrial Appeal Court are yet to be heard.

These Claims

11 The Claimants seek relief for the alleged underpayment of salary. In each instance their claims relate to the period commencing the week ending 26 September 2002 and concluding the week ending 20 August 2009. They contend that they should have been paid for time worked at either ordinary time, or alternatively, at overtime rates. The Claimants recognise that success in these claims in so far as they relate to payment at ordinary rates for 2.5 hours worked each week will be difficult in light of the decision of the Full Bench.

12 Mr Ward claims an amount of $14,042.30 and Mr Wall an amount of $15,462.34. The amounts represent the value of 2.5 hours overtime worked at time and a half, less the commuted overtime allowances which they have recently been paid. In order to achieve industrial harmony the Respondent has, from 7 March 2008, in Mr Wall's case, and from 4 April 2008 in Mr Ward's case, paid each of them a commuted overtime allowance for 2.5 hours worked per week.

13 The Claimants also seek the payment of pre-judgement interest on the amounts claimed, the imposition of a penalty for the contravention of the relevant instruments, an order preventing further contravention, and costs.

Issues

14 The pivotal issues to be determined are:

1. whether the Respondent was obliged, over the relevant period, to pay the Claimants in addition to their fortnightly remuneration an amount for the extra 2.5 hours they worked each week; and
2. if so, the rate/s at which those amounts are to be paid.

Determination

15 From 1 January 2003 until 31 March 2006 each of the Claimants were paid 40 hours ordinary time for having worked a 40 hour week. From 1 April 2006 the Respondent stopped paying them for a 40 hour week and instead paid them on the basis of having worked 37.5 hours per week. Notwithstanding this, the Claimants continued to work 40 hours per week in accordance with their contracts of employment.

16 Employees are entitled to be paid for all hours worked pursuant to their respective contracts of employment (see *Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward and John Martin Wall* (supra) per Beech CC at [186] and Wood C at [193]).

17 In these matters the undisputed fact is that each Claimant has, during the period of the Claim, except when on leave for various reasons, worked 40 hours each week. Notwithstanding that as from 1 April 2006 they have only been paid for 37.5 hours of the 40 hours worked. The Respondent suggests that the Claimants have brought the situation onto themselves by choosing not to terminate the SCOE under which they are currently employed. If they were to terminate the SCOE they would work and be paid for 37.5 hours per week. Indeed, they choose to continue to work 40 hours per week knowing that they can only be paid for 37.5 hours per week at the ordinary rate of pay. In my view such a criticism of the Claimants is harsh, particularly given that statutory provisions preserved their contractual entitlement to work 40 hours per week. The statutory provisions were enacted to ensure that they would not be disadvantaged by what was contained in the LRRA. In the end the Claimants have been doing no more than to exercise their contractual entitlements. It is unfair to blame the Claimants for the protracted dispute.

18 The Respondent submits that it is not true to contend, as the Claimants do, that 2.5 hours worked each week have not counted for anything. Rather the true position is that the Claimants have been paid at least that which they have been contracted to receive pursuant to their respective workplace agreements. It follows therefore they have been paid for work that they have done and that no unfairness results. That submission is, with respect, illusory. It ignores industrial reality. The Claimants have been paid at an hourly rate for 37.5 hours worked with the result being that they have not been paid for 2.5 hours worked each week. If the Respondent's contention is correct it would not have mattered whether they worked 40 hours or alternatively 37.5 hours because in either case they would have received the same amount of weekly pay. It follows that the 2.5 hours worked in addition to the 37.5 hours will have been for nothing.

Claim to be Paid at Ordinary Rates

19 The Claimants' starting position is that they should have been paid at ordinary rates for the additional 2.5 hours worked each week. The Full Bench of the WAIRC in *Chief Executive Officer, Department of Agriculture and Food v Trevor James Ward and John Martin Wall* (88 WAIG 156) held that following the commencement of the LRRA on 1 January 2003, it was no longer possible for them to work 40 hours per week as ordinary hours under the PSA and the various General Agreements which have had affect since then. The Claimants could only work 37.5 hours as ordinary hours.

20 Although the Claimants seem to dispute the correctness of that decision I am bound to follow it. Accordingly, the unpaid 2.5 hours worked each week cannot be paid at ordinary rates. The Respondent says that the Claimants' claim for payment of overtime does not arise because they never considered they were working 2.5 hours overtime each week. Rather the claim is made because the Full Bench rejected their claims that they be paid at ordinary rates. Consequently the claims for payment of overtime have been brought notwithstanding there is no evidence to support it. The Respondent submits that there is no basis upon which the Claimants may be renumerated for the 2.5 hours worked each week in addition to their ordinary hours.

Claim for Overtime

21 The 2.5 hours per week over and above the 37.5 hours per week worked may be paid at overtime rates if the Claimants are able to demonstrate that such is required by the industrial instruments that regulated their employment.

22 The Respondent submits that save for the fact that the General Agreements prescribe that no more than 37.5 hours per week may be worked as ordinary hours, the hours of work of the Claimants were regulated by the Agency Specific Agreements which have been in place since 1 January 2003 and the System of Hours Agreements made under them which have been in place since 2 January 2004. The Respondent says also that the *Department of Agriculture Agency Specific Agreement 2003* had application from 1 January 2003 and that Clause 10.10 thereof, which relates to overtime, did not apply. Further, no evidence was brought to support coverage of the Claimants within Clause 10.9 of that Agreement which relates to additional hours worked in excess of 75 credit hours.

23 The Respondent points out further that the System of Hours Agreements which applied to the Claimants from 2 January 2004 provided that penalty rates would only apply for time in excess of 30 minutes worked outside of the 12 hours standard flexi time period between Monday to Friday, weekends and public holidays. Given that both Claimants submitted that the System of Hours arrangements applied to them and that they had been enjoying the benefits of that system, that is, accumulating and clearing credit hours, it has not been shown that any part of the Claimants' claims were covered by the System of Hours Agreements which entitled them to the payment of overtime. Finally the Respondent argues that the General Agreements provide that the Agency Specific Agreements prevail over General Agreements and the PSA to the extent of any inconsistency except when the General Agreements identify a condition as a core condition. The overtime conditions are not identified as core conditions. The Agency Specific Agreements and System of Hours Agreements made under them provide that penalty rates will only apply for time in excess of 30 minutes worked outside of the 12 hours standard flexi time period. This has precedence over differing provisions in the General Agreements or the PSA for those employees such as the Claimants who take advantage of the flexi time arrangements.

24 The implicit contention by the Respondent is that the Claimants are not entitled to be paid for the 2.5 hours worked in excess of the ordinary hours, in excess of ordinary time. The issue to be determined is whether, on a proper construction of the applicable industrial instruments, the extra 2.5 hours worked each week was payable at overtime rates. That of course requires the construction of the applicable instruments.

25 The contemporary approach to construction which stems from *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 is that factors such as purpose, general policy and context have to be taken into account rather than just the literal meaning of a provision so as to create consistency and fairness. The interpretation of the relevant industrial instruments in these matters begins with a consideration of the words used and their natural meaning but they cannot be interpreted in a vacuum divorced from industrial realities. (See *City of Wanneroo v Holmes* (1987) 30 IR 362 per French J at 378 and *BHP Billiton Iron Ore Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers (Western Australian Branch)* [2006] WASCA 124 per Pullin J at [19] - [23]).

26 A consideration of the applicable industrial instruments must start with the Award from which all other instruments flow. Clause 11(3)(d) of the PSA provides that the hourly rate shall only be applied to an average of no more than 37.5 hours per week worked as ordinary hours whether under the PSA or the SCOE. It follows that the issue to determine is whether the 2.5 extra hours worked was done so as overtime. Clause 22 of the PSA contains the overtime provisions. Subclause 22(1)(a) of the PSA defines "overtime" to mean:

> *"….all work performed only at the direction of the employer or a duly authorised officer outside the prescribed hours of duty."*

27 Subclause 22(3)(a) of the PSA states when and how overtime is to be paid. It provides:

> *"An officer who works overtime for a greater period than 30 minutes, shall be entitled to payment in accordance with paragraph (d) of this subclause, or time off in lieu of payment in accordance with paragraph (b) of this subclause, or any combination of payment or time off in lieu."*

28 What is readily apparent from the aforementioned provisions is that working overtime for a period greater than 30 minutes, entitles the employee to the payment of overtime, to time in lieu or a combination of both. There has been no suggestion made in these matters that the Claimants have been offered time in lieu or a combination of time in lieu and overtime for the extra 2.5 hours worked each week. Reference to the 30 minute period in the PSA is not expressed to apply to any particular period whether it be a day or a week. The Claimants' contend that Clause 22(3)(a) of the PSA is designed to preclude claims for overtime for short ad hoc periods arising from time to time, the duration of which is not more than 30 minutes. It is not designed to restrict access to the entitlement where, as an ongoing arrangement or sustained course of conduct, an employee regularly works in excess of 37.5 hours per week. There seems to be force in that argument and I accept that that is a better contextual construction of that particular provision.

29 The 2004, 2006 and 2008 General Agreements provide with respect to "Hours" that the provisions of the relevant clauses in each instance replace the PSA provision relating to "Hours". The relevant clauses with respect to overtime provide inter alia that where an employee is directed by the employer to work more than 7.5 hours in any one day, that overtime applies. In that regard, the Respondent argues that the Claimants were never directed to work overtime which was a necessary pre-condition to their payment of overtime. On the other hand the Claimants argue that a specific direction was not necessary and that a direction or requirement to work overtime could be satisfied by implication. That argument is supported by the finding of an Industrial Magistrate sustained on appeal by the Full Bench in *Public Service Commissioner v Dixon* (1995) 75 WAIG 1823.

30 The express terms of their contracts of employment required the Claimants to work 40 hours per week, which they did. The Respondent knew, however, that the Claimants could not be paid for any more than 37.5 hours worked per week at the ordinary rate. The Respondent was therefore conscious of and acquiesced to that ongoing arrangement in which the Claimants worked an extra 2.5 hours per week. Indeed the proforma time sheets created by the Respondent reflected a 40 hour per week regime. There was an expectation by the Respondent that the Claimants would work 40 hours for the week. In those circumstances the Respondent implicitly directed and/or required the Claimants to work an extra 2.5 hours per week in overtime.

31 The Claimants have conceded in their evidence that they were not given a specific direction to work overtime. That however, is not fatal to their claims. The reality of their situation was that they were contractually obligated to work 40 hours per week but only 37.5 hours of those hours could be paid at ordinary time. It follows that the remaining 2.5 hours were required to be worked as overtime because the alternate position would be that they would have provided their employer with 2.5 hours labour for no reward. A direction to work overtime resulted by implication in their circumstances by virtue of their contracts of employment. The Respondent acquiesced to the ongoing performance of 40 hours work each week but now says that the Claimants should not be remunerated for any more than 37.5 hours worked. That is patently unfair and offends the principle that employees should be paid for hours worked. That is particularly so in this instance where the Claimants did not go off on a folly of their own. The extra 2.5 hours was worked by agreement and in the full knowledge of the Respondent. In those circumstances the Respondent is estopped from denying the Claimants were required, and by implication directed, to work an excess of 2.5 hours per week over and above the 37.5 hours ordinary time.

32 The Respondent says that in any event the ASAs prevail over the PSA and General Agreements and as a consequence whether or not a direction was given is of no significance. Accordingly I need to consider whether the ASAs prevail over the General Agreements and the PSA.

33 The General Agreements provide, except where the General Agreement identifies conditions as core, that the ASA will prevail over the General Agreement and the PSA. The overtime provision in each of the General Agreements is not expressed to be a core condition. The ASAs will assume ascendancy over both the General Agreements and the PSA to the extent of any inconsistency. Clause 5 of the ASAs make it clear that the ASAs do not replace the General Agreement to which it relates and that it should be read together with the PSA and the General Agreement. In each instance, Clause 10 of the ASAs deals with the System of Hours. They provide for flexible working hours, permitting the storage of extra hours worked to be credited within certain limits and thereafter debited. The express reference to overtime, other than in circumstances where flexible working arrangements have been exhausted, relate only to the circumstances when not less than 24 hours notice is given to work outside those outlined in Clause 10 and further, in circumstances where a declared emergency exists. It follows that the ASA provisions with respect to overtime are discreet and are particular to situations which do not apply to the Claimants. In those circumstances there is no conflict between the ASA overtime provisions and those contained in the PSA and General Agreements. The PSA and General Agreement provisions are not excluded.

34 The Respondent's contention that the System of Hours Agreements, which at Clauses 6 and 7 provide that overtime penalty rates apply only for time worked in excess of 30 minutes outside the 12 hour standard flexi time period between Monday to Friday, weekends and public holidays, seems at first instance to have force. Indeed, Clause 10 of the ASAs provides inter alia that work groups or work sites may develop their own System of Hours. The Claimants in each instance were part of work sites that developed their own System of Hours which addressed the issue of payment of overtime. However the question which arises is, whether the ASAs provided the requisite legal source to exclude that provided by the General Agreements and the PSA. The answer to that question is no. There were inherent limitations in what the System of Hours Agreements could provide and in so far as the System of Hours Agreements purports to exclude the overtime entitlements provided by the

General Agreements and the PSA, it cannot operate to that effect. Indeed, that which was provided for by the Systems of Hours Agreements was extraneous to and not contemplative of the ongoing arrangement to work an extra 2.5 hours each week. Clause 3 of the Systems of Hours Agreements reflects that employees work a daily average 7.5 hours. The Claimants however, by virtue their respective SCOE, are expected to work an average of 8 hours per day. The creation of the System of Hours Agreements was predicated on a false premise that all employees covered by the agreements work an average of 37.5 hours per week. That however is not the case and was not the case for the Claimants. It follows that the specific overtime provisions therein can only relate to employees who work an average of 37.5 hours per week and cannot have the effect of excluding the Claimants' entitlement to overtime for 2.5 hours worked each week.

Are the Claimants Entitled to be Paid for the 2.5 Hours Worked Each Week in Excess of their Ordinary Time?

35 The Respondent says that the protracted dispute stems from the Claimants' refusal to accept that they cannot work 40 hours per week and be paid at ordinary rates. That however, ignores the fact that their respective contract of employment obligated them to work 40 hours per week, which they did. Of course they could only be remunerated at ordinary rates for 37.5 of those hours. The implication of the Respondent's submission is that the remaining 2.5 hours worked per week amounted to nothing and should not be remunerated. The Respondent's contention is that the Claimants have been paid at least what they had contracted to receive pursuant to their workplace agreements. That however, fails to recognise that the Claimants were contractually entitled to work 40 hours per week and be remunerated accordingly. The Respondent's argument also seems to ignore the industrial reality of the Claimants' situation and suggests an absurd result in that the Claimants are entitled to same amount of pay irrespective of whether they have worked 37.5 hours or 40 hours per week.

36 Although it is true to say that the Claimants cannot be paid at ordinary rates for 40 hours it does not follow that the Respondent should receive the benefit of the their efforts over 2.5 hours per week for free. The Claimants are entitled to be remunerated in some form with respect to those 2.5 hours worked. Given that there were no other alternative arrangements made and given that the Claimants were by implication, required and directed to work overtime it follows that in respect to the 2.5 hours worked each week they should have been paid for their endeavours at the overtime rate. If the Respondent's argument were to be accepted it would result in the Claimants being be worse off than they had been under their respective workplace agreements because their paid hours would have been reduced. In those circumstances their terms and conditions will not have been preserved but rather would have been unilaterally altered. That would be contrary to the representations made by DOCEP.

Quantum

37 Section 83A(2) of the IRA provides that an order may only be made in respect of an amount relating to a period being not more than 6 years prior to the commencement of proceedings. Given that the proceedings were commenced on 6 June 2008 orders may only cover the period 6 June 2002 to 6 June 2008 with the later date being excluded.

38 There can be no claim for the period 6 June 2002 to 31 December 2002 in any event given that the Claimants were, during that period being paid in accordance with their respective workplace agreements. From 1 January 2003 to 31 March 2006 the Claimants were paid at the ordinary hourly rate for 40 hours per week. Accordingly the Claimants were entitled to be paid an extra 0.5 times the hourly rate for 2.5 hours worked each week during that period in which they worked 40 hours. For the period 1 April 2006 to 6 March 2008 in Mr Wall's case and to 3 April 2008 in Mr Ward's case, they were entitled to the payment of 2.5 hours worked for each week in which they worked 40 hours at time and a half. From 7 March 2008 in Mr Wall's case and 4 April 2008 in Mr Ward's case, the payment for 2.5 hours per week was covered by a commuted overtime allowance pursuant to Clause 10 of the 2007 ASA (see Exhibits 1 and 4).

39 The Claimants contend that from the commencement of their respective agreements to 6 June 2008 they should be paid an increment reflecting the margin in excess of the commuted overtime allowance represented by 1.5 times 2.5 hours each week. The Respondent on the other hand says the payment for 2.5 hours per week was covered by a commuted overtime allowance which, by its very nature, must extinguish the claims for overtime during that period. Clause 10.10 of the 2007 ASA enables hours of "*accrued ordinary hours*" (my emphasis) to be converted into a monetary equivalent representing an additional 8% of an employee's salary. The first observation to be made with respect to this provision is that it follows the flexi time provisions in the preceding clauses. The subclause is clearly aimed at a situation where extra hours are worked as ordinary hours in contemplation of receiving time in lieu but where time in lieu cannot be cleared as agreed and as a consequence the hours are to be paid out as overtime. The commuted overtime allowance operates in those circumstances. That, however, did not have application in these matters where the Claimants worked overtime as opposed to accrued ordinary time in lieu. It seems to me that there is no proper legal foundation for the introduction of the commuted overtime allowance agreements entered into, and accordingly the Claimants are entitled to recover the difference between what they have been paid and that to which they are entitled.

40 The Respondent submits that there is no evidential basis whatsoever to properly determine when overtime was worked and no evidential basis for the proper calculation of the quantum payable. The Claimants worked an average of 40 hours per week and on that basis they claim that they should be paid 2.5 hours per week as overtime. The Respondent points out that no attempt has been made to demonstrate on what days overtime has actually been worked. It follows therefore that the Claimants' claim is a blanket claim for 2.5 hours per week regardless of how many hours were actually worked in any given day or in any given week.

41 Although the quantification of the Claimants' entitlements is not easy to achieve it does not follow that their claims ought to be rejected. Indeed, there is documentary evidence before me in the form of time sheets (see Exhibits 1 and 4) and in the summaries created by Mr Durnin (see Exhibits 5 and 6) which if collated, are capable of precisely establishing the hours worked by each Claimant for each day and each week over the relevant period. The documentary evidence is also capable of establishing the leave periods taken in various forms during which overtime cannot be paid. The precondition for the payment

of overtime is the actual performance of work. The Claimants submit that they are entitled to the payment of 2.5 hours per week at single time in addition to the 37.5 hours per week paid whilst on leave. In my view, the Full Bench has made it clear that such is not permissible.

42 It is not correct to say, as the Respondent does, that there is no evidential basis whatsoever to determine the overtime worked and the quantum payable. Clearly the evidence required with respect to those issues is before the Court. That evidence however is not in a compendious form. A determination of the issue requires a laborious examination of records appertaining to each Claimant over 6 years and calculations that flow from such examination. In my view, valuable judicial time will not be well served by trawling through the documents to ascertain the precise quantum payable. I accordingly invite the parties to calculate the quantum in accordance with these Reasons for Decision. What is required is the identification of each week from 1 January 2003 until 6 June 2008 in which the Claimants actually worked 40 hours. The performance of 40 hours work is a pre-requisite to the payment of overtime. For each of those weeks 2.5 hours overtime is payable. Overtime is not payable whilst the Claimants were on leave or where the combination of leave taken and work performed did not amount to 40 hours. For the period 7 March 2008 in Mr Wall's case and 4 April 2008 in Mr Ward's case to 6 June 2008, the payments received by them in the form of a commuted overtime allowance needs to be setoff against their entitlement.

G Cicchini

Industrial Magistrate

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2009 WAIRC 01350

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
HEARD	FRIDAY, 24 APRIL 2009, FRIDAY, 17 JULY 2009, TUESDAY, 11 AUGUST 2009, WEDNESDAY, 16 SEPTEMBER 2009, THURSDAY, 1 OCTOBER 2009
DELIVERED	FRIDAY, 18 DECEMBER 2009
FILE NO.	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 01350

CatchWords	Removal of Police Officer - Loss of confidence by Commissioner of Police - Off duty behaviour towards other police officer - Behaviour in context of past performance and conduct - Police Act 1891 (WA) s 33P, s 33Q
Result	Appeal dismissed
Representation	
Appellant	Mr GJ Laurent, in person
Respondent	Ms D Scaddan, of counsel

Reasons for Decision

1 This is our unanimous decision. These reasons for decision relate to Mr Laurent's substantive claim that the decision of the Commissioner of Police to remove him from office was harsh, oppressive or unfair. Since Mr Laurent's Notice of Appeal was filed in the WAIRC on 23 December 2008 there have been five interlocutory applications made by Mr Laurent which have been separately decided prior to the hearing of Mr Laurent's appeal on 1 October 2009. The reasons for decision in those five interlocutory applications will be referred to in the course of these reasons for decision as they become relevant to the issues before us.

2 The proceedings for the hearing of Mr Laurent's appeal are prescribed in s 33Q(1) of the *Police Act 1892* (WA) ("the Police Act") as follows:

"**33Q. Proceedings on appeal**

(1) On the hearing of an appeal instituted under this Part, the WAIRC shall proceed as follows -

(a) first, it shall consider the Commissioner of Police's reasons for deciding to take removal action;

(b) secondly, it shall consider the case presented by the appellant as to why that decision was harsh, oppressive or unfair;

(c) thirdly, it shall consider the case presented by the Commissioner in answer to the appellant's case."

3 We therefore commence these reasons by considering first the Commissioner of Police's reasons for deciding to take removal action.

The Commissioner of Police's Reasons for Deciding to Take Removal Action

4 The reasons for Mr Laurent's removal are contained in the letter to him dated 18 November 2008 (Vol 1, Tab 3 of the Respondent's documents). In summary form, those reasons are:

- Having reviewed Mr Laurent's performance and conduct as a police officer since his graduation from the Police Academy in February 1997, the Commissioner of Police is satisfied that he has demonstrated a consistent pattern of substandard work, poor productivity and performance throughout his career, together with a poor sense of judgment exemplified by his conduct in Northbridge on 8 March 2008.
- Mr Laurent's response to the Summary of Investigation and Notice of Intention to Remove amplified, rather than mitigated, the Commissioner of Police's concerns about Mr Laurent's performance, conduct, ethics, integrity and competence. The response demonstrated not only shortcomings in Mr Laurent's written communication and conceptual skills but also the more substantive issues that underlie Mr Laurent's unsuitability.
- That throughout Mr Laurent's career his supervisors have made extensive efforts to explain to him their concerns about Mr Laurent's performance and conduct, and he has been provided with training and development opportunities that are afforded to every police officer. However Mr Laurent appears to have been more interested in attacking the individual who brought these issues to his attention than in dealing with the issues themselves. Mr Laurent labels himself as being the subject of "victimisation", "poor governance" and "unjust treatment" but provides no evidence to substantiate the claims and this has left the Commissioner of Police with the impression that any person who attempted to performance manage Mr Laurent or regulate his conduct risked being the subject of such accusations.
- That whilst the Commissioner of Police is aware that Mr Laurent refers to a medical condition, or medical conditions, in his response, Mr Laurent has provided the Commissioner of Police with no evidence of these conditions nor any indication of precisely how these conditions have affected Mr Laurent's past performance.
- That Mr Laurent's allegations and statements about "senior police's criminal behaviours" and the "abuse of office" by "senior managers" are nonsensical and have provided the Commissioner of Police with no assistance whatsoever in assessing the material before the Commissioner of Police other than to reinforce the Commissioner of Police's concerns about Mr Laurent's suitability to be a police officer.
- The Commissioner of Police believed that Mr Laurent demonstrated to him serious deficiencies in Mr Laurent's understanding of the legal process and caused the Commissioner of Police serious concern that as a police officer Mr Laurent has been exercising powers in a legal system which Mr Laurent profoundly misunderstands. The Commissioner of Police refers in this context to the decision of the Director of Public Prosecutions not to proceed with a charge against Mr Laurent on the grounds that it was not in the public interest to proceed, and Mr Laurent's interpretation of the discontinuation as evidence that the "charge was corrupt" or that Mr Laurent was "shown to be having told the truth".

5 The Commissioner of Police's Response of 12 February 2009 (Vol 1, Tab 1) to the Notice of Appeal sets out the detail of the matters relied on by the Commissioner of Police. The response runs to 59 pages and 353 points, and we will refer to it as appropriate in the course of these reasons for decision. During the hearing, Ms Scaddan, on behalf of the Commissioner of Police, drew attention to a number of the documents which had been provided to us either as part of the Commissioner of Police's Response to the Notice of Appeal or in the three volumes of documents relied on by the Commissioner of Police.

6 The submissions made by the Commissioner of Police during the hearing clarified that the material prior to 2006 relevant to Mr Laurent is seen by him as being historical, however, it is relied upon to point to a consistent pattern of substandard work, poor performance and conduct, and as the record of the training and development opportunities provided to Mr Laurent. In the period after 2006, the Northbridge incident was seen by the Commissioner of Police as a catalyst because it was brought to the attention of the Commissioner of Police by the Internal Affairs Unit following an allegation of criminal behaviour against Mr Laurent. As part of their investigation, the Internal Affairs Unit looked at Mr Laurent's history and this led to the Loss of Confidence nomination.

7 The Northbridge incident to which the Commissioner of Police refers also forms an important point in Mr Laurent's appeal so it is appropriate to now set out the Commissioner of Police's understanding of what occurred which led to an allegation of criminal behaviour against Mr Laurent, behaviour which Mr Laurent denies. This incident occurred on 8 March 2008 outside the Aberdeen Hotel in Aberdeen Street whilst Mr Laurent was off duty and on sick leave.

8 The Commissioner of Police says (Vol 1, Tab 1, p 4) that during this incident Mr Laurent:

> "(a) hindered and obstructed a Police Sergeant who was issuing a Move On Notice to a member of the public;
>
> (b) inappropriately incited members of the public to become aggressive;
>
> (c) was charged with obstructing a public officer under s 172(2) of the *Criminal Code*;
>
> (d) displayed inappropriate, aggressive and confrontational behaviour towards members of the public and Police Staff when he challenged his criminal charge; and
>
> (e) was insubordinate to more senior police officers."

9 The details of Mr Laurent's actions are set out in Vol 1, Tab 1, pp 41-46. The Commissioner of Police notes that Mr Laurent was at the Aberdeen Hotel in Northbridge with a group celebrating a buck's night and that Mr Laurent was off duty and on sick leave at the time. Mr Laurent was a member of a group which was directed by the hotel's head crowd controller to move away from the hotel and to keep the footpath and hotel accesses clear. Mr Laurent refused, stating that the crowd controller had no authority to remove him and Mr Laurent then addressed the crowd advising them not to move. The crowd controller requested the Police to attend.

10 Four police officers attended: Acting Senior Sergeant Fisher, Constable Procopis, and two recruits Constables Wooler and Nagy. Whilst beginning to issue a Move On Notice to a member of the public (Mr Dekker) who failed to leave, Sergeant Fisher was confronted by Mr Laurent who was positioned behind a barrier separating the road and the footpath. Mr Laurent began arguing with Sergeant Fisher over the legality of the Move On Notice being issued to Mr Dekker, stating that he (Mr Laurent) was a police officer and demanding to know the grounds of the Notice. The Commissioner of Police says that Mr Laurent was requested by Sergeant Fisher to move on and he refused, turning to address his group and others, advising them not to listen to the police and not to move on. The groups were influenced by him and remained.

11 Sergeant Fisher moved away from Mr Laurent, taking Mr Dekker with him. Mr Laurent jumped over the waist-high barrier and approached Sergeant Fisher again requesting Sergeant Fisher's justification in issuing the Move On Notice to Mr Dekker. Sergeant Fisher advised Mr Laurent that he was interfering and obstructing him in his duties, but Mr Laurent persisted and told him he was a police officer. When Sergeant Fisher demanded that Mr Laurent display his police ID, Mr Laurent produced a photo driver's licence. As the crowd was becoming increasingly vocal and aggressive, Sergeant Fisher considered, in the circumstances, that it was not appropriate to arrest Mr Laurent and eventually, Mr Laurent and his group moved away from the Aberdeen Hotel.

12 The Commissioner of Police notes that Mr Laurent was to re-commence work after his sick leave ceased on 15 March 2008 but, he failed to report and no contact was made to the Police Station or his supervisors until 17 March 2008. When Mr Laurent eventually made contact he advised that he would be taking a further period of sick leave until 4 April 2008.

13 The Commissioner of Police then refers to 19 March 2008 when Mr Laurent attended the Perth Police Station to collect an infringement notice for the incident that had occurred on 8 March 2008 (Vol 1, Tab 1, from p 43). The Commissioner of Police states that after Sergeant Fisher had handed the infringement notice to Mr Laurent and was escorting him back to the exit/entry door, Mr Laurent became hostile and aggressive, and Sergeant Fisher ordered him to leave the premises.

14 The Commissioner of Police notes that on 18 April 2008 Mr Laurent was interviewed by the Internal Affairs Unit and the transcript of that interview is at Vol 1, Tab 11.

15 The Commissioner of Police states (Vol 1, Tab 1, p 46) that Mr Laurent was later summonsed to attend the Perth Magistrate's Court on the charge of "Obstructing a Public Officer" under section 172(2) of the *Criminal Code*. On 5 September 2008, Mr Ken Bates, the Director of the Legal Services Division of the Director of Public Prosecutions office wrote that in his opinion, the brief against Mr Laurent disclosed a *prima facie* case with reasonable prospects of a conviction but the charge would be discontinued by the State because it was not in the public interest to proceed, having regard to the availability of an appropriate alternative, namely disciplinary proceedings (this letter is contained at Vol 1, Tab 5, Attachment 3).

The Case Presented by Mr Laurent

16 It is now appropriate to consider the case presented by Mr Laurent. The reasons, or "grounds of appeal", why Mr Laurent believes his removal is harsh, oppressive or unfair are contained in the four-page letter attached to his Notice of Appeal. One of the interlocutory applications lodged by Mr Laurent sought to amend these reasons. As a result of that interlocutory application the WAIRC added to his reasons a further reason: "That I was not allowed any office time during my working time at Scarborough Police Station and therefore it was difficult to catch up on administrative duties" (2009) 89 WAIG 934; [2009] WAIRC 00515, 3 August 2009). For convenience, we now set out, and deal with, Mr Laurent's reasons under the heading "grounds".

Ground 1

17 The first paragraph of Mr Laurent's letter contains his first reason why he believes his removal is harsh, oppressive or unfair:

> "With regards to the Northbridge incident it will become evident from my statement below that the Commissioner has mistakenly identified me as the person of interest (the offender) which will be evidenced by witness statements to be provided in due course".

18 We record here that no witness statements were "provided in due course". Section 33R of the Police Act would make any such statements new evidence. Mr Laurent did apply for leave to tender new evidence. As we recorded in the reasons for decision ((2009) 89 WAIG 2177; [2009] WAIRC 00839), on 5 and 17 August 2009 Mr Laurent advised the WAIRC that he intended to forward new evidence and on 23 August 2009 that he intended to summons 20 witnesses. The documents he wished to have tendered as new evidence are listed by us in those reasons commencing at [19]. None of those documents was a witness statement directed to Mr Laurent's assertion that the Commissioner of Police had mistakenly identified him as the person of interest.

19 Further, when Mr Laurent supplied the list of witnesses he wished to call to the WAIRC, he did not identify within the list that any of these persons were the persons who would be able to show that the Commissioner of Police has mistakenly identified him as the person of interest. At [39] of the above reasons, we made a point of referring to Mr Laurent's wish to summons Mr Dekker and concluded that there was nothing before us to show that Mr Laurent wished to call Mr Dekker for this reason. Therefore, although Mr Laurent's appeal regarding the Northbridge incident is based upon an allegation of mistaken identity he has not provided us with any evidence proving his allegation.

The Statement in the Letter attached to the Notice of Appeal

20 The "statement below" to which Mr Laurent refers in his first paragraph sets out what he says occurred on 8 March 2008 outside the Aberdeen Hotel. It commences partway down page 2 of the letter under the heading "Background pertaining to the Northbridge incident", includes all of page 3 and the first two paragraphs of page 4. (Mr Laurent also recounted the events of the Northbridge incident in his submission to us during the appeal commencing at transcript, p 21.) Commencing partway down page 2 of his appeal, Mr Laurent says that it was Mr Gailey who "went on to abuse the Police who was issuing the notice on the other side of the hotel barrier" and that Mr Laurent was speaking to Constable Procopis explaining that he, Mr Laurent, was leaving the area whilst waiting for other friends to exit the building and whilst waiting for the bus.

21 Mr Laurent states that Constable Procopis later heard Sergeant Fisher "screaming for help" and that "Adam proceeded to leave the area upon the arrival of Constable Procopis whilst at the same time provoking the group not to comply with Police demands". Mr Laurent says that during this time he was attempting to defuse the situation. Mr Laurent continues that "[a] short time later it was brought to my attention that Adam had not moved on as requested but continued to abuse the Police Officer to the extent of jumping the barrier and menacing (pointing at) the Police Officer". Mr Laurent continues that within a few minutes Mr Gailey was continuing to abuse the police which led Sergeant Fisher to approach the barrier and to caution Mr Gailey that he could be arrested and the Sergeant unsuccessfully attempted to retrieve Mr Gailey's full name and personal details.

22 Mr Laurent says that as Mr Gailey then stepped away, Sergeant Fisher approached Mr Laurent and demanded Mr Laurent move on without providing any plausible explanation for the request to move on and that "[a]s a Police Officer and a law abiding Citizen I am aware that I have the right to ask the reason as to why I was being asked to move on which I did". Sergeant Fisher continued to ask that Mr Laurent move on and Mr Laurent continued to exercise "my citizen's right asking for what reason". Mr Laurent says that Sergeant Fisher said to him that he was on licensed premises and Mr Laurent replied that the licensing terminated at the entrance door. Sergeant Fisher said that Mr Laurent had attempted to enter the licensed premises and that Mr Laurent obstructed and hindered police. Mr Laurent replied, "Mate if you are going to make up false charges then you may as well arrest me".

23 Sergeant Fisher then demanded Mr Laurent's police number which he refused to give but Mr Laurent did provide him with his driver's licence. Mr Laurent continues that Sergeant Fisher requested Mr Laurent's police number again and mentioned that Sergeant Fisher wanted to write a report about Mr Laurent, and Mr Laurent explained that he was well within his rights not to provide him with a police number. Mr Laurent says "[f]ollowing receipt of my Driver's Licence details and my Police number, [Sergeant] Fisher became very agitated and requested I leave the area with abusive foul language directed specifically at me. Following [Sergeant] Fisher's abusive language towards me I immediately left the scene in total shock whilst making him aware that he didn't know what he was doing as a police officer to protect and serve the public".

Mr Laurent's Submissions during the Hearing on the Northbridge Incident

24 Mr Laurent referred to the Northbridge incident in his submissions before us in the appeal. These submissions (transcript, p 21), were principally directed to Mr Laurent saying that all he was doing was questioning Sergeant Fisher issuing a Move On Notice to Mr Dekker without giving Mr Dekker a reason:

> "The Northbridge incident is a clear evident … it … how the Police Service works. I'm a 11-year constable. I've served move on notice every weekend at Geraldton at the … at the nightclubs. Every weekend I worked there is ample of move on notice and I can tell you the nine criterias for move on notices. What I found to be … when I was at Northbridge and my brother-in-law was carrying up all the way through the night, being drunk, unable to control his alcohol, I sat there and listened to Senior Sergeant Fisher call out, "Mate, you've got to move." The officer says, "Why?" The person says … Mr Decker (*sic*) says, "Why do you have to move?" "Mate, come over here, I'll give you a move on notice." My question to him was that if someone asks you as … as a police for 11 years and I know, "Please give me a reason." You give the person a reason otherwise it becomes in a … in a judicial process, questionable or unlawful because you don't give a person no reason. If … if Mr Fisher had done his … his … had given an instruction or … or direction to … a lawful direction, he would have to give a reason and at no stage did Mr Decker (*sic*) say that he gave a reason.
>
> He actually said that because a bouncer had told him before to leave, that he was asked to leave and he was about five metres away from the door that the bouncer walked away from the door, didn't come to him, he came to us, and spoke to it. When … when Fisher spoke to the bouncer, the bouncer … that Fisher got it wrong. He went … instead of speaking

> to us, which the bouncer was referring to, he spoke to Mr Decker (*sic*). He made an example out of Mr Decker (*sic*). So when he … when he gave the instruction to Mr Decker, (*sic*) "You've got to move. Mate, you've got to move," and he says, "Why?" and he doesn't give, "Come over here, I'll give you a move on notice." That becomes a questionable of lawfulness of the order. That's all I was questioning."
>
> (Extracts from transcript, p 21)

25 Further, on page 23, referring to Sergeant Fisher, Mr Laurent states:

> "He came … he was going to charge me. I know I shouldn't have reacted and, unfortunately, I shouldn't have reacted. I should have said … when the police asked to move, let's move. I suffer post-natal response and … and there's evidence from my evidence through the medical ground … information that I have and I don't take it back for … when I know that I've done nothing wrong and I … that's why I'm here and I lost my job. "Give me a reason," but he couldn't give me a reason. Instead of working with me, he charged me for an offence, 15 days after, and asked me for an explanation. Then he wanted … the worst thing he said, he said I swore to him. I don't swear to people. I might've been assertive and … and maybe, if you call it aggression, but … but in … you know, the manner and response … but I don't swear and … and it's evident for all the way through for the … for the matters at … at the … of the medical centre and all that. I don't swear, because it's not part of me to swear. It shows that this officer didn't … go with the false charge. He … he felt that the Liquor Act wasn't enough, yet he's going to … with an amount of cohesion and … and coercion convince other people that … that he did that, but unfortunately … and unfortunate on my behalf, I had my brother-in-law, who didn't want to tell the truth, but he admits to what he did in an email that I received. He … however, he goes on to say that, "You deserved it because police were trying to get rid of you for the last six, seven years."
>
> (Extracts from transcript, pp 23-24)

26 Further on, Mr Laurent was critical of the Internal Affairs Unit interview of Mr Dekker stating that the police officers concerned did not put the right questions to Mr Dekker. Mr Laurent states (from transcript, p 26 onwards) that in Sergeant Fisher's statement to the Internal Affairs Unit he should cross out Mr Laurent's name and put Mr Gailey's name up to the point where Mr Laurent had produced his identification to Sergeant Fisher. Mr Laurent referred to the Northbridge incident again at transcript, pp 64-65.

Response of Commissioner of Police to Mr Laurent's Submissions during the Hearing

27 In response to Mr Laurent's submissions made during the hearing, the Commissioner of Police observed that to the extent that Mr Laurent's submission was on the basis that Sergeant Fisher was issuing Mr Laurent with a Move On Notice, the Commissioner of Police submitted that Sergeant Fisher never sought to issue Mr Laurent with a Move On Notice. Rather, Mr Laurent had interjected himself into a situation in which he had no right to inject himself (transcript, p 75). Sergeant Fisher was dealing with a member of the public in the course of his duties as a police officer, and Mr Laurent was informed by Sergeant Fisher to leave and go away because he had no business interposing himself between Sergeant Fisher and Mr Dekker.

28 The Commissioner of Police points out that there were four police officers, two of whom were recruits, one of whom was a junior constable and the other an Acting Sergeant, patrolling Northbridge at midnight facing a crowd of people coming out of the Aberdeen Hotel and it was a potentially volatile situation. The Commissioner of Police submitted that police officers are at risk in those particular situations and Mr Laurent ought to have known better.

Conclusion on the Northbridge Incident

29 We consider the essence of Mr Laurent's appeal on this point is his submission that he did not obstruct or hinder Sergeant Fisher and that he was mistakenly charged for something he did not do. Mr Laurent has not provided the WAIRC with any evidence to support his submission. His statement in the letter attached to his Notice of Appeal is not evidence of what he alleges; neither is his submission during the hearing before us.

30 During the hearing, Mr Laurent stated (transcript, p 24) that there is one person, whom he named as Mr Duckerill, who had been in Northbridge and would be a person who would "tell it as it is", however we note that Mr Duckerill was not listed amongst the list of eventually 96 persons Mr Laurent said he wished to summons as witnesses. During the hearing, when we pointed out to Mr Laurent that he had indicated in the exchanges of emails leading up to the hearing that he had evidence, or that he knew of witnesses, Mr Laurent replied to us that he did but that he cannot tell us:

> **BEECH CC:** - - - you've indicated that you … you have evidence or you know who witnesses are - - -
>
> **MR LAURENT:** I have. Yeah. I can't tell you. It's like - - -
>
> **BEECH CC:** Well, and if you can't tell us there's … if you can't tell us - - -
>
> **MR LAURENT:** I understand that.
>
> **BEECH CC:** - - - we can't take it into account.
>
> **MR LAURENT:** I understand that and I … and I empathise with you - - -
>
> (Extract from transcript, pp 29-30)

31 In the absence of any evidence from Mr Laurent to support his submission, we look to the material that we do have before us. That material does not support Mr Laurent's submission that the Commissioner of Police has mistakenly identified him as "the person of interest". Sergeant Fisher was interviewed by the Internal Affairs Unit on 9 April 2008 which is only four weeks after the Northbridge incident. His statement makes it clear that he knows the person he was describing was Mr Laurent because Mr Laurent identified himself to Sergeant Fisher, initially by showing a driver's licence and then by giving his regimental number.

32 Sergeant Fisher says in his interview (Vol 3, Tab 3) that when he was starting to speak to a person who we understand to be Mr Dekker, he was approached by Mr Laurent who was leaning over the barrier, said that he was a police officer and said he wanted to know on what grounds he, Sergeant Fisher, was issuing a Move On Notice (p 5). He asked Mr Laurent to go away but Mr Laurent refused and Mr Laurent started yelling to his friends "[y]ou don't have to listen to the police, you don't have to move away, you don't have to move". Sergeant Fisher moved away together with the person to whom he was speaking. He states that Mr Laurent started to climb the barrier and Sergeant Fisher said "Mate, don't come near me, you're obstructing me, its done, this is what I'm doing, don't – you're just interfering at the moment". He says "[He] then climbed the barrier anyway and started coming towards me… [and]… confronted me". Sergeant Fisher asked him to produce his police identification and he refused however he did produce his driver's licence in the name of Gerald Laurent, and Sergeant Fisher noted those details in his notes. Eventually, Mr Laurent gave his regimental number. Sergeant Fisher thought that Mr Laurent should have been arrested because Mr Laurent was agitated and seemed quite confrontational, however, Sergeant Fisher felt that Mr Laurent would have resisted and he decided to issue an infringement later on (p 11).

33 It is clear that Sergeant Fisher is saying that the person who approached him, who queried what he was doing, who climbed the barrier and confronted him is the person who produced the driver's licence to him, and who eventually gave him his regimental number. There is no room in Sergeant Fisher's statements to suggest that he confused Mr Laurent with another person. On this point, the statement of Constable Procopis, who was interviewed by the Internal Affairs Unit on 11 April 2008 distinguishes between Mr Laurent and another person. At Vol 3, Tab 12, pp 9-10 Constable Procopis was asked about "the group that this off duty officer was with" and he said:

> "One of them was shouting out. I can't remember the big guy in the group. He was the one that was – that told Scott, the security, that he [i.e. Mr Laurent] was a sergeant in Geraldton" and "[h]e was – apart from the off duty cop, he was probably the loudest of the group."

34 That is, Constable Propcopis refers to a "big guy" who was not "the off duty cop". At page 20, Constable Procopis again refers to "… a really big guy in that group and he was quite aggressive as well…". Constable Procopis differentiates this person from the person he identified as Mr Laurent. However, when Constable Procopis recalls a person yelling out to both him and Sergeant Fisher that they could not do that (a reference to the issuing of the Move On Notice); that this same person was originally behind the barrier and then he climbed over the barrier and came over towards them and was still being argumentative (p 9); that he [Constable Procopis] advised Sergeant Fisher that he had information that this person was an off duty police officer or a Sergeant from Geraldton; that Sergeant Fisher had asked this person if he was a police officer and for the person's ID, and the person showed his driver's licence; that the person was being "a real interference"; and that when this person gave his regimental number he wrote it in his notebook and it was Mr Laurent's regimental number, the person he is referring to is Mr Laurent. Constable Procopis's identification of Mr Laurent as being this person who was "a real interference" is quite clear. Constable Procopis is not confusing Mr Laurent with "the big guy" in the group.

35 It was Mr Laurent whom Constable Procopis described as being "very argumentative and border line aggressive" (p 12) and Constable Procopis was sufficiently concerned that when Mr Laurent approached them, Constable Procopis told the recruits to watch his friends and adopted a defensive stance (p 19). Constable Procopis was asked whether the person who was the off duty police officer said anything to the people that Sergeant Fisher was issuing the Move On Notice to and Constable Procopis answered:

> "Not that I recall, no. He did yell out something like –, now, I am not sure if it was directed – I'm assuming it was probably directed at him. He goes, you know, they can't do this to you sort, of thing, yes." (p 14)

36 Constable Procopis thought that Mr Laurent's actions were going to make it harder for him and Sergeant Fisher because in the end these people might not have moved on as they would listen to this person. It was clearly Mr Laurent whom Constable Procopis believed was "very close to being locked up if he had kept on"; it was Mr Laurent whom Constable Procopis would have been compelled to arrest (p 20).

37 In contrast, we note that the statement of Mr Dekker (Vol 3, Tab 12) at p 6 says that Mr Laurent was not aggressive. However, Mr Dekker does say that he thought Mr Laurent was "pretty rude" and a "smart a*** type" which seems to us to be a description which is not inconsistent with the statements of Mr Laurent's behaviour by Sergeant Fisher and Constable Procopis.

38 We also consider the statements of Sergeant Fisher and Constable Procopis in their interviews to be credible because in part they are consistent in important respects with Mr Laurent's own statements in his interview conducted by the Internal Affairs Unit on 18 April 2008 (Vol 1, Tab 11). In his interview, Mr Laurent states that Adam Gailey was present and was very aggressive (interview, p 4), and incited the Sergeant (p 5) (in Constable Procopis's statement is the reference to "the big guy in the group who was, apart from Mr Laurent, probably the loudest of the group). When Sergeant Fisher, who was standing on the other side of the barrier, said "Look, you guys got to move on", Mr Laurent replied "Look, please, tell me what we did wrong. Why are you asking us to move?" (in Sergeant Fisher's statement it was Mr Laurent wanting to know on what grounds he, Sergeant Fisher, was issuing a Move On Notice).

39 In his interview, Mr Laurent states that he "stood over the barrier", had a little stumble and Sergeant Fisher said something to the effect of "Wow, watch out". Mr Laurent says that Sergeant Fisher was "a bit paranoid in relation to my actions" (in Sergeant Fisher's statement Mr Laurent started to climb the barrier and Sergeant Fisher said "Mate, don't come near me, you're obstructing me, it's done, this is what I'm doing, don't – you're just interfering at the moment". He says "[He] then climbed the barrier anyway and started coming towards me… [and]… confronted me").

40 Mr Laurent was inquisitive as to why they were being asked to move on. At page 6, Mr Laurent states that he jumped the barrier and Sergeant Fisher said "look, you're on legally licensed premises" and Mr Laurent replied "[w]ith due respect, legally licensed premises finish at 3 metres away by the door and no way am I on legally licensed premises". Mr Laurent's statement

to the Internal Affairs Unit confirmed that Sergeant Fisher asked Mr Laurent for his regimental number and Mr Laurent believed there was no requirement for providing regimental numbers and he did not give to him until after having been asked a second or third time. At some stage he gave Sergeant Fisher his driver's licence and this was then returned to him (p 6) (in Sergeant Fisher's statement, Sergeant Fisher asked Mr Laurent to produce his police identification and he refused however he did produce his driver's licence in the name of Gerald Laurent and Sergeant Fisher noted those details in his notebook. Eventually, Mr Laurent gave his regimental number).

41 Mr Laurent's statement shows his replies to points put to him by the Internal Affairs Unit officers which arose from their interviews of Sergeant Fisher, Constable Procopis, Constable Wooler and the head of security of the Aberdeen Hotel Mr Scott Simpson. In his replies, Mr Laurent admitted that he spoke to Sergeant Fisher after Sergeant Fisher came to Mr Laurent to try to give him a Move On Notice (p 25) but denies that he went and spoke to Sergeant Fisher while Sergeant Fisher was issuing a Move On Notice to Mr Dekker. He also denied following Sergeant Fisher, Constable Procopis and Mr Dekker down the road and confronting Sergeant Fisher (p 26). He denied that he was shouting at the crowd at the time (pp 27-28), and said that he did not approach Sergeant Fisher in an aggressive manner (p 28). He said that it was Mr Gailey who was confronting (pp 36-37) and who interfered with Mr Dekker (p 41). However, we note that these responses are at odds with the statements of Sergeant Fisher and Constable Procopis. Further, in his submissions before us during the appeal Mr Laurent stated that "I might've been assertive and … and maybe, if you call it aggression..." (transcript, pp 23-24). This, in our view, indicates that the statements of Sergeant Fisher and Constable Procopis are reliable and we therefore do not accept Mr Laurent's claims.

42 In relation to the Northbridge incident, Mr Laurent has sought to blame others by suggesting that it was Adam Gailey who behaved in the manner attributed to Mr Laurent but did not seek to prove this notwithstanding his statement in his Notice of Appeal that witness statements will be forthcoming. He has not shown that there was any mistaken identity and the evidence before us shows that there was not. He also attacked Sergeant Fisher's behaviour on the night when the issue is the behaviour of Mr Laurent, not of Sergeant Fisher.

43 Whatever Mr Gailey may or may nor have done outside the hotel, Mr Laurent's own behaviour towards Sergeant Fisher was, in his own words, at least assertive and possibly could be seen as aggressive. Certainly, Constable Procopis adopted a defensive stance towards Mr Laurent when Mr Laurent approached, which suggests to us that Mr Laurent's manner was confrontational. Even in the observations of the member of the public, Mr Dekker who was with Sergeant Fisher, Mr Laurent was rude and a smart a***. Mr Laurent has not provided us with a reason not to accept as correct the statements of Sergeant Fisher and Constable Procopis that Mr Laurent yelled at his friends that they did not have to listen to the police, that he was confrontational, that he obstructed and interfered with Sergeant Fisher carrying out his duty and was a real interference who was very close to being locked up if he had kept on.

44 In our view, Mr Laurent's behaviour in Northbridge could only have made the potentially volatile situation more difficult for Sergeant Fisher and his fellow officers. Constable Procopis's defensive stance illustrates the risk to police safety in these situations. Mr Laurent's behaviour was inexcusable given he was himself a police officer with 12 years of service. He had no business interfering with Sergeant Fisher, and his submissions before us suggest that he still regards Sergeant Fisher's actions in issuing a Move On Notice to Mr Dekker to have been incorrect.

45 Therefore on the only material available to us, there is no basis upon which we could conclude that Mr Laurent has shown that the Commissioner of Police has mistakenly identified him as "the person of interest". This ground of appeal is not made out.

Ground 2

46 Mr Laurent next says that that the reasons for his removal were unfounded to the extent that the Commissioner of Police was made aware, and has been fully aware, that his performance was hindered due to injury he sustained whilst carrying out his duties as a police officer. He writes that "[s]ince my injury which occurred in 1997, I have received no assistance whatsoever from the WA Police". During the hearing we asked Mr Laurent to clarify the injury to which he there refers (transcript, pp 33-34). He mentioned a back injury from the arrest of Mr Batka in February 2004 and a rash from the Geraldton Police Station air-conditioning refurbishment from August-September 2007. Mr Laurent had previously provided the WAIRC with a bundle of medical reports in support of his request for an adjournment and he was asked during the hearing whether those medical reports are the matters to which he is referring and he replied (transcript, p 39) "…I think so…".

47 Also at transcript, p 39 the Chief Commissioner put to Mr Laurent that the date "1997" was a misprint and should read "2007"; Mr Laurent replied: "That's correct, sir, yes". Later in the hearing, during the Commissioner of Police's submissions in answer to Mr Laurent's case, Ms Scaddan put to us that the presumption of a misprint was not appropriate and that Mr Laurent had also submitted a first medical certificate in 2002 regarding a back complaint arising out of work and sport (transcript, p 77). We note also that within Mr Laurent's submissions to us during the hearing is a passing reference to him having "suffered a workload injury sometimes which caused me to suffer anxiety attacks, stress and blurred vision, that … that is noted that it was my time when I worked at Midland and … and the time to 2002 … 2000 … 2000". (transcript, p 56).

48 Mr Laurent's submissions therefore leave us quite unsure to what injury Mr Laurent is referring as having "hindered" his performance as a police officer. Although Mr Laurent did not refer us to any particular document in the three volumes of material we have before us, we note Mr Laurent's response to the Commissioner's loss of confidence process (Vol 1, Tab 5, Att 1) which has a heading "Injuries". Under that heading is a list of 7 alleged injuries. However, none of them is earlier than February 2004 where Mr Batka is mentioned, although further in this document at page 2 is a heading "Loss of Confidence Issues" under which at point 5 is a sentence containing the words: "I suffered a work related injury sometime in 1997, which caused me to suffer from an anxiety attack, stress, blurred vision and trauma". This is so vague we are unable to accept it as establishing anything relevant.

49 We point out that our concern is not so much about whether Mr Laurent suffered an injury sustained whilst carrying out his duties as a police officer; it is whether, as Mr Laurent says in this ground of appeal, his performance as a police officer when

he was at work was hindered by injury. We understand Mr Laurent to be submitting to us that any substandard work, poor productivity or performance is to be excused as it was due to injury sustained whilst carrying out his duties as a police officer.

50 In reply to this ground, during the hearing Ms Scaddan submitted that Mr Laurent had the opportunity to present medical evidence to the Commissioner of Police as part of his response to the Notice of Intention to Remove explaining how the performance of his duties as a police officer was affected by injury. He did not do so. She stated the presentation of a medical certificate by Mr Laurent does no more than purport to say that he has a medical condition. There is no connection at that stage between it and the workplace. There is no evidence that Mr Laurent's rash has any nexus with his poor performance and conduct and no evidence in any way to suggest that the rash caused his behaviour in the Northbridge incident.

51 We note that Mr Laurent has not drawn to our attention any medical certificate or report which shows that his performance as a police officer was hindered by injury. For example, it is one thing for Mr Laurent to produce medical or other reports to show that he suffered from a rash but there is nothing in that to show that it caused the poor performance or poor conduct to which the Commissioner of Police refers. We note that during the Internal Affairs Unit Interview about the Northbridge incident Mr Laurent did not suggest that his behaviour was due to injury. However, during the hearing (transcript, p 42) Mr Laurent stated the following in relation to the treatment for his rash not working:

> "And … and so I lost the plot. I honestly lost the plot and I saw Sergeant Fisher come to me and say, "Mate, nick off, go." I said, "Well, give me a reason." It's only because I am so anti-police at the moment that I am quite adamant I will catch a few of them and I will catch them quite severely and that's unfortunate, so that's … that's why I'm here. I'm not being vexatious or malicious, I just want what I … what I was legally entitled to prior to losing my employment and prior to sustaining injury."

52 Any issue of the treatment for his rash not working or that this affected his behaviour at Northbridge was not raised in his response to the Commissioner's Loss of Confidence, nor in his Notice of Appeal and nor in his application to amend his grounds of appeal. In any event, there is no evidence before us to this effect.

53 During the hearing we drew to Mr Laurent's attention a letter from a doctor dated 21 February 2005 (Vol 2, Tab 24) saying that Mr Laurent was sufficiently recovered to return to full duties. Mr Laurent's reply was there are other similar letters but that "I kept on hurting myself and I couldn't get the … the assistance not to prolong sitting, so I was hurting myself and … and I was coming back again" (transcript, p 41). Although Mr Laurent has made a submission to us in the hearing that he kept on hurting himself he did not direct us to any medical evidence to support that submission although there are relevant reports at Vol 2, Tab 24. In relation to these reports, the issue for this appeal is not whether Mr Laurent had further time off work after 21 February 2005 (which he did as is shown in Tab 24) but rather whether there is medical evidence to show that when he was at work, the sub-standard performance relied upon by the Commissioner of Police occurred due to injury. In our view, there is no such medical evidence and Mr Laurent did not direct our attention to any such evidence.

54 We note that one of the reasons for Mr Laurent's removal in the letter to him dated 18 November 2008 is that whilst the Commissioner of Police is aware that Mr Laurent refers to a medical condition or medical conditions in his response, Mr Laurent has provided the Commissioner of Police with no evidence of these conditions nor any indication of precisely how these conditions have affected Mr Laurent's past performance. Mr Laurent did not submit that was incorrect and we too are unable to conclude on the material before us that Mr Laurent has shown that his removal was unfair on the ground that the Commissioner of Police was made aware and has been fully aware that his performance as a police officer was hindered due to injury he sustained whilst carrying out his duties as a police officer. This ground is not made out.

Ground 3

55 The next paragraph of Mr Laurent's letter contains the following two sentences:

> "Since my injury, which occurred in 1997, I have received no assistance whatsoever from the WA Police. I was made to feel inadequate from my peers and Supervisors and constantly harassed because of my pending claim for compensation for the injury I sustained as a Police Officer".

56 As to the first of those sentences, we have already dealt with the uncertainty from Mr Laurent's submissions to what injury in 1997 he is referring. We also observe that even if he had received no assistance whatsoever from the WA Police, that would not by itself make his removal for the reasons of poor performance relied upon by the Commissioner of Police harsh, oppressive or unfair; it would suggest a breach of Mr Laurent's entitlements which he would pursue elsewhere.

57 However, the material before us shows that Mr Laurent did receive assistance. The Commissioner of Police points out that during his time as a police officer Mr Laurent took 2131 hours of fully paid sick leave, which is the equivalent of 266 days (Vol 2, Tab 3). All medical consultations have been organised for him by the Commissioner of Police and all treatment has been fully funded by the WA Police under the relevant industrial agreement (for example Vol 2, Tab 24). In total, the WA Police has paid $16,522 to Mr Laurent in the way of medical and pharmaceutical expenses (transcript, p 77). When Mr Laurent requested a country transfer to an area that had a regional hospital or had sufficient facilities to accommodate his injury he was transferred to Geraldton, which is a large regional centre in Western Australia (Vol 3, Tab 1). He was provided with a chair in response to his request (Vol 3, Tab 3) although he considers it took too long for it to be provided (email 22 March 2006 at Vol 3, Tab 7). When the belt he had to wear caused him discomfort, the officer in charge requested that as there was to be a trial of a new belt, Mr Laurent should be the trialling officer (also Vol 3, Tab 1) and Mr Laurent has undertaken several supported rehabilitation programs, developed by rehabilitation officers employed by the WA Police (for example Vol 2, Tab 24).

58 Mr Laurent appeared to agree that he had received this assistance (transcript, pp 39-40) although he mentioned that this assistance was provided because a specialist wrote that he needed those things and that although the injury happened in 2004 it took until 2007 for the assistance to happen during which he had to type for two weeks standing up. Even if that was so,

Mr Laurent's claim that since his injury, which occurred in 1997, he has received no assistance whatsoever from the WA Police just is not made out on the material before us.

59 As to the second sentence, that he was made to feel inadequate by his peers and supervisors and constantly harassed because of his pending claim for compensation for the injury he sustained as a police officer, we were not informed by Mr Laurent of the claim to which he refers. We do not know what it is or whether and when it was made. Mr Laurent has not provided any details about how he was made to feel inadequate by his peers and supervisors. It is a claim which seems at odds with the material we have mentioned above which shows the assistance given to him by the WA Police. This ground is not made out.

Ground 4

60 The next paragraph of Mr Laurent's letter is as follows:

> It has recently been brought to my attention that there are certain reports about my conduct and performance which was never brought to my attention during my time as a Police Officer. I would have liked the opportunity to have defended myself on untrue allegations, a right which is given to every law abiding Citizen. As a result of not being offered that due right, I can only conclude that I was the subject of victimisation, corruption and discrimination from the WA Police.

61 The letter itself does not identify the reports to which he refers and Mr Laurent did not identify them in the hearing. During the hearing, Mr Laurent did mention reports going on to his file which he didn't know about (for example, transcript, p 54 with apparent reference to him not updating the Custody system whilst at Scarborough) however he did so as part of wide-ranging submissions and it is not easy to identify from this to which reports this ground of appeal refers.

62 It is apparent to us from reading the material relied upon by the Commissioner of Police that there are reports written about Mr Laurent which, on the face of the report, were not copied to him or sent to him for his comment at the time they were written, but it is not up to us to guess whether it is to those reports that Mr Laurent refers. Further, there are some reports of which he was aware because he responded to them at the time (Vol 2, Tabs 18 and 25).

63 Mr Laurent has had access to all of the documents, including reports, referred to in the Summary of Investigation and to which the Commissioner of Police had access prior to making his decision to remove Mr Laurent. He was provided with the opportunity to respond to any of the documents, including reports, in his response to the Notice of intention to remove. Even if he was too ill to do so at the time, as he has submitted, all of these documents have been part of his appeal since at least February 2009 and we consider that he has had ample time since then to identify those reports to us.

64 The conclusion drawn by Mr Laurent that there are certain reports about his conduct and performance which were never brought to his attention and he was therefore "the subject of victimisation, corruption and discrimination" is not a conclusion that is open to him. It is a serious matter to allege victimisation, corruption or discrimination. In this case, there is no evidence offered by Mr Laurent to support such allegations and the claims, and this ground of appeal is not made out.

Ground 5

65 Mr Laurent's letter next says:

> I sincerely feel that I have been unfairly dismissed as a result of my performance which was caused by injury sustained in carrying out my duties as a Police Officer, taking into account the pain and suffering, harassment, threats, assaults, discrimination, false statements and reports and vexatious allegations I have had to endure during my tenure as a Police Officer.

66 We have already referred to the lack of detail in Mr Laurent's submissions to us regarding the injury, or injuries, to which he is there referring and have noted Mr Laurent's response to the Commissioner's loss of confidence process (Vol 1, Tab 5, Att 1) with its references to an unspecified event "sometime in 1997", to the arrest of Mr Batka in February 2004 and to the Geraldton Police Station air-conditioning refurbishment in August-September 2007. We also have referred to the 21 February 2005 letter from a doctor saying that he was sufficiently recovered to return to full duties (Vol 2, Tab 24) which, in the absence of any credible reason not to, we accept as truthful and accurate.

67 Mr Laurent makes sweeping allegations of having suffered harassment, threats, assaults, discrimination, false statements and reports and vexatious allegations during his tenure as a police officer. He has made these allegations in a number of the documents he has previously submitted to us in support of the various interlocutory applications he has made (for example the "Appellant's Issues, Facts and Contentions for Dismissal of Employment, 9 September 2009). None of those documents constitute evidence of these allegations. The allegations remain just that, allegations, and they are not made out on the material before us. This ground of appeal is not made out.

Ground 6

68 Mr Laurent's letter next says:

> The threats, harassment, assaults and discrimination exacerbated after his complaint to the State Administrative Tribunal for reasons to prevent prolonged pain and suffering.

69 The reliance by Mr Laurent on this claim and that his removal was therefore harsh, oppressive or unfair suffers from the same difficulty as set out above. Mr Laurent has not established before us that he suffered threats, harassment, assaults, or discrimination. He manifestly believes he has suffered those things, but has not proven it before us. As to his complaint to the State Administrative Tribunal, Mr Laurent has, on a number of occasions, sent to us copies of his submissions to that Tribunal, however, he has never provided us with a copy of his complaint to that Tribunal nor told us when he made it.

70 In reply to Mr Laurent's submissions on this ground, the Commissioner of Police points out that it was Mr Laurent's own conduct in Northbridge, which occurred whilst Mr Laurent was on paid sick leave, that had precipitated an investigation by the Internal Affairs Unit and which brought his poor performance and conduct to the attention of the Commissioner of Police via the Loss of Confidence nomination. Further, and contrary to Mr Laurent's assertion, he has subjected various supervisors to threats of victimisation whenever they have attempted to manage his poor performance. Thus, the Commissioner of Police submits, is was open to him to find that rather than accept criticisms and seek out training and development opportunities to address these conclusions, Mr Laurent was defensive and aggressive, and subjected his supervisors to threats of victimisation. The material before us in the Commissioner of Police's Response to the Notice of Appeal, including the three volumes of documents, supports these observations. We find that this ground is not made out.

Ground 7

71 Mr Laurent says that if his performance as a police officer was "substandard" he would not have moved up to the rank of First Class Constable after four years and to the rank of Senior Constable after eight years of dedicated service. This includes positive accolades from senior police as well as having conducted approximately 250 successful prosecutions. During the hearing, we asked Mr Laurent specifically about this ground however he did not make a submission directly on this issue (transcript, p 48).

72 The Commissioner of Police informed us during the proceedings that the ranks of Constable, First Class Constable and Senior Constable are progressive and require an officer to complete a number of years of service and complete nominated courses prior to moving through to the next rank; the promotional positions in the WA Police do not start until the rank of Sergeant (transcript, p 78). In the case of Mr Laurent, he became First Class Constable and Senior Constable by length of service and educational qualification (Vol 2, Tabs 23 and 29).

73 This information was not contested by Mr Laurent. It shows that his progression to the rank of First Class Constable after four years and to the rank of Senior Constable after eight years was not made upon an assessment of performance but rather upon his attaining a set length of service and his completion of nominated courses. That being the case, his submission that if his performance as a police officer was "substandard" he would not have moved up to those ranks is not a convincing submission. As to his service including positive accolades from senior police as well as having conducted approximately 250 successful prosecutions, Mr Laurent did not produce evidence of any accolades from senior police and neither did he produce any evidence regarding any prosecutions he has done. This ground is not made out.

74 We observe that the material before us on this point, in the circumstances of this case, also leads to the conclusion that a member whose performance is substandard is able to progress up to those ranks without that substandard performance being properly addressed. We would not wish to be taken as tacitly endorsing such a position by not commenting upon it. We do comment upon it and express the hope that it is addressed by the Commissioner of Police in the future.

Final ground

75 The final ground of appeal is that while at Scarborough Police Station Mr Laurent was provided no time to complete paperwork. During the hearing, Mr Laurent appeared to deal with this issue (transcript, p 54) although it is not entirely clear that he was referring to this ground. He referred to being given "a task which is unattainable" and that "Inglewood" was given the credit over an investigation and arrest done by him, however the greater part of his submission seems to be an attack upon others and we have not found it particularly helpful to his appeal.

76 The issues at Scarborough of relevance are set out in Vol 3, Tabs 2 and 4. In the case of Tab 2, the memorandum at that Tab includes a copy of an email sent to Mr Laurent at the time; he was therefore aware of the issue even if he was not aware of the memorandum. An issue raised in the email at Tab 2 (dated 2 March 2006) refers to a person being still listed as "Unknown Male" and that "this should not happen, particularly for a summons or an arrest matter because unless you identify the person it makes it impossible to complete the summons or the arrest brief". The email continues "Custody should be updated with the persons *(sic)* details when you identify them, certainly prior to final release on the system".

77 Mr Laurent submitted during the hearing that this was "a total distortion". At transcript pp 54-55 he referred to an example where if an arrested person gives a name but it comes up "unknown" he will need to make enquiries but he doesn't need to detain the person while he finds out why Custody doesn't "take" his name, "[so] one of the things they teach you to do is put the person as unknown and come back to it …". Even if we accept this submission as an answer to the issue in the email, we cannot attach a great deal of weight to it: Mr Laurent did not put this to the Commissioner of Police in response to the Notice of Intention to Remove and he has not sought to tender as new evidence under s 33R of the Police Act the training given to officers regarding the Custody system.

78 Further, the document at Vol 3, Tab 2 shows that Mr Laurent was given extra time to complete paperwork: approximately two half-shifts. Even if Mr Laurent submits that this was insufficient time, his ground that he was provided "no time" to complete paperwork is not made out. The Commissioner of Police also points out that Mr Laurent's submissions do not adequately explain his consistent poor performance at other Police Stations. It is noted in the reports that when given extra time to prepare paperwork, Mr Laurent was also given correctional advice which he ignored, and became aggressive and defensive. He has been provided with numerous training opportunities and numerous informal counselling and remedial action by senior officers. Therefore the Commissioner of Police has complied with his duty to ensure that Mr Laurent received appropriate education, training, information and supervision in order for him to make decisions appropriate to the proper discharge of his duties. However, the Commissioner of Police submits that Mr Laurent has failed to discharge the requirements of his commission both on and off duty by failing to perform at a suitable standard and by conducting himself in a manner inconsistent with that required and expected by the public. We consider these submissions to be quite consistent with the material before us.

CONCLUSION

79 The task of the WAIRC is to decide whether Mr Laurent's removal was harsh, oppressive or unfair. Mr Laurent has at all times the burden of establishing that it was. For the reasons set out above, Mr Laurent has not discharged that burden at all. Mr Laurent's appeal is set out in his Notice of Appeal, as amended by order of the WAIRC. His submissions before us, however, were not structured to follow the grounds of appeal, he did not refer us to any of the documentary material which may have assisted him and he also did not produce any evidence, or seek to tender new evidence, directed towards the matters set out in his Notice of Appeal.

80 Rather, Mr Laurent's submissions tended to attempt to excuse his own behaviour by blaming or criticising the behaviour of other officers and even accusing some of them of committing offences. As we have set out above, Mr Laurent told us that he is "so anti-police at the moment that I am quite adamant I will catch a few of them and I will catch them quite severely and that's unfortunate, so that's … that's why I'm here". This shows a misunderstanding of the appeal process under Part IIB of the Police Act which does not provide a forum for an appellant to "catch" other police officers. In any event, his criticisms of other police officers are not supported by any evidence and are therefore unsubstantiated.

81 We have considered all of the circumstances of the history of Mr Laurent's behaviour, including but not limited to the events surrounding the Northbridge incident. It has been viewed in the context of the material before us presented by the Commissioner of Police in response to Mr Laurent's Notice of Appeal which reaches back into his 12 years' service. We conclude that Mr Laurent has not shown that his removal was harsh, oppressive or unfair and accordingly we dismiss his appeal.

2009 WAIRC 01351

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERALD JEAN-NOEL LAURENT
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 18 DECEMBER 2009
FILE NO/S	APPL 135 OF 2008
CITATION NO.	2009 WAIRC 01351

Result Appeal dismissed

Order

The WAIRC, pursuant to the powers conferred on it under Part IIB of the *Police Act, 1892*, hereby orders –

THAT the appeal be dismissed.

(Sgd.) A R BEECH,
Chief Commissioner,
[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2009 WAIRC 01356

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AMANDA BUDD
	APPLICANT
	-v-
	VIVIENNE BALDWIN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 21 DECEMBER 2009
FILE NO/S	U 189 OF 2009
CITATION NO.	2009 WAIRC 01356

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

AND WHEREAS the Commission convened a conference on 13 November 2009 for the purpose of conciliating between the parties;

AND WHEREAS prior to the conference the Commission was advised that a settlement was reached between the parties;

AND WHEREAS on 25 November 2009 the Commission wrote to the applicant requesting a Notice of discontinuance be filed;

AND WHEREAS the applicant failed to file a Notice of discontinuance;

AND WHEREAS the Commission listed this matter on 21 December 2009 for the applicant to show cause why her application ought not be struck out of want of prosecution;

AND WHEREAS the applicant failed to attend that hearing;

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 01346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYNDELL BONNIE DRYDEN
	APPLICANT
	-v-
	NINDILINGARRI CULTURAL HEALTH SERVICES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 DECEMBER 2009
FILE NO/S	U 106 OF 2009
CITATION NO.	2009 WAIRC 01346

Result	Application discontinued
Representation	
Applicant	Ms L B Dryden
Respondent	Mr S Bibby (as agent)

Order

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

AND WHEREAS on 2 July 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 15 December 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 01309

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REBECCA ANN FITZPATRICK
	APPLICANT
	-v-
	ALESSIA BECCEGATO, TRADING AS MILANOS HAIR LOUNGE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 14 DECEMBER 2009
FILE NO	U 205 OF 2009
CITATION NO.	2009 WAIRC 01309

Result	Application discontinued
Representation	
Applicant	Mr D Leask (of counsel)
Respondent	Ms A Beccegato

Order

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

AND WHEREAS on 26 November 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 30 November 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 01322

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TERESA ANNE PRINCE
	APPLICANT
	-v-
	COMMUNITY FIRST INC.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO/S	U 132 OF 2009
CITATION NO.	2009 WAIRC 01322

Result	Discontinued
Representation	
Applicant	Ms T Prince on her own behalf
Respondent	Mr L Pilgrim as agent

Order

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

WHEREAS the Commission listed a conference on 4 September 2009, which date was later changed to 3 September 2009, for the purpose of conciliating between the parties and to deal with scheduling issues in relation to an issue of jurisdiction raised by the respondent; and

WHEREAS on 2 September 2009 the applicant advised the Commission that the parties had reached an agreement in principle in respect of the application and the conference was vacated; and

WHEREAS the Commission contacted the applicant on several occasions with respect to the applicant filing a Notice of Withdrawal or Discontinuance; and

WHEREAS on 4 December 2009 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 7 December 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 01331

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JAMES RICHTER
	APPLICANT
	-v-
	BEGA GARNBIRRINGU HEALTH SERVICES, ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 16 DECEMBER 2009
FILE NO/S	U 97 OF 2009
CITATION NO.	2009 WAIRC 01331

Result	Dismissed
Representation	
Applicant	Mr J Richter on his own behalf
Respondent	Mr S Bibby as agent

Order

WHEREAS this application was lodged on 12 May 2009 pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 10 June 2009 the Commission convened a conference for the purpose of conciliating between the parties however no agreement was reached; and

WHEREAS on 25 June 2009 the Commission was advised by the respondent's representative that the parties were having further discussions; and

WHEREAS on 13 August 2009 the respondent's representative requested that the matter be set down for a further conference; and

WHEREAS the Commission contacted the applicant on a number of occasions about setting a further conference; and

WHEREAS the Commission listed a further conference on 14 October 2009 for the purpose of conciliating between the parties; and

WHEREAS on 13 October 2009 the Commission was contacted by a person on behalf of the applicant to advise that the applicant was unable to attend the conference on 14 October 2009 and the conference was vacated; and

FURTHER on 13 October 2009 the applicant was advised by way of electronic mail that if he wished to proceed with his application he was to contact the Commission by no later than the close of business on 27 October 2009 to advise his availability to attend a conference by telephone however, this did not occur; and

WHEREAS the matter was listed for a show cause hearing on 9 December 2009 and the applicant was advised that non-attendance by the applicant at these proceedings would result in an order being issued dismissing the application for want of prosecution; and

WHEREAS the applicant did not attend the show cause hearing on 9 December 2009 nor did he advise the Commission beforehand as to any reason why he was unable to attend the hearing; and

WHEREAS the Commission is satisfied that the applicant has been given numerous opportunities to pursue his claim and has chosen not to do so;

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.) J L HARRISON,
[L.S.] Commissioner.

2009 WAIRC 01324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANET STEVENS
	APPLICANT
	-v-
	THE PANTRY DOOR / TRACEY HOGAN AND JONATHON LEGROS AS TRUSTEES FOR THE GUSTOSO UNIT TRUST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO/S	B 129 OF 2009
CITATION NO.	2009 WAIRC 01324

Result Application dismissed

Order

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

WHEREAS on the 8th day of December 2009 the applicant advised the Commission that the matter had settled; and

WHEREAS on the 9th day of December 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.] Acting Senior Commissioner.

2009 WAIRC 01323

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JANET STEVENS
	APPLICANT
	-v-
	THE PANTRY DOOR / TRACEY HOGAN AND JONATHON LEGROS AS TRUSTEES FOR THE GUSTOSO UNIT TRUST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 15 DECEMBER 2009
FILE NO/S	U 129 OF 2009
CITATION NO.	2009 WAIRC 01323

Result	Application dismissed

Order

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

WHEREAS on the 8th day of December 2009 the applicant advised the Commission that the matter had settled; and

WHEREAS on the 9th day of December 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.] Acting Senior Commissioner.

2009 WAIRC 01310

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELEN JUNE WRIGHT (NEE RODDA)
	APPLICANT
	-v-
	THE PURSUITS GROUP
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 14 DECEMBER 2009
FILE NO	U 127 OF 2009
CITATION NO.	2009 WAIRC 01310

Result	Application discontinued
Representation	
Applicant	Mrs H J Wright
Respondent	Ms P Tassell

Order

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

AND WHEREAS on 26 November 2009 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference agreement was reached between the parties;

AND WHEREAS on 26 November 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.

CONFERENCES—Matters arising out of—

2009 WAIRC 01352

DISPUTE RE TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
HEARD	FRIDAY, 11 DECEMBER 2009
DELIVERED	FRIDAY, 18 DECEMBER 2009
FILE NO.	C 42 OF 2009
CITATION NO.	2009 WAIRC 01352

CatchWords	Dismissal of employee – claim that dismissal is unfair referred for hearing and determination – claim for interim order reinstating employee pending hearing and determination refused – *Industrial Relations Act, 1979* (WA) s 44(6)(bb)(ii) - *Prisons Act, 1981* (WA) s 13(3) and (4)
Result	Application for interim order dismissed
Representation	
Applicant	Mr T Clark
Respondent	Ms K Jack

Reasons for Decision

1 In this matter the Western Australian Prison Officers' Union of Workers ("the Union") claims that the dismissal of Mr Dunn on 1 December 2009 by the Minister for Corrective Services ("the Minister") from his employment as a Prison Officer is harsh, oppressive or unfair. A conference called by the Commission at relatively short notice was held at which it was apparent to the Commission that no agreement was going to be able to be reached on the Union's claim. Accordingly, the claim will be referred for hearing and determination. The Union seeks an interim order pursuant to s 44(6)(bb)(ii) of the *Industrial Relations Act, 1979* (WA) ("the IR Act") reinstating Mr Dunn pending the hearing and determination of the Union's claim. The Minister opposed the issuing of an interim order.

2 The Commission has been assisted in this matter by the detail in the Schedule attached to the Union's Notice of Application and by the comprehensive written submission of the Minister, to which the Union was given an opportunity to reply.

3 The leading authority in this jurisdiction dealing with such interim orders is the decision of the Full Bench in *The Director General Department of Education and Training v. The State School Teachers' Union of W.A. (Incorporated)* (2009) 89 WAIG 622; [2009] WAIRC 00283. That matter was an appeal against an interim order which had been issued for the reinstatement of a teacher in whom the Director General of Education and Training had lost confidence (2009) 89 WAIG 1151; [2009] WAIRC 00128. As Ms Jack, who appears for the Minister in this matter, correctly observes at [49] of the Minister's submission, Ritter AP (with whom Smith SC and Mayman C agreed) stated at [36]:

> "…whether an [interim] order should be made must depend upon the particular facts and circumstances which are before the Commission. Those facts and circumstances will inevitably vary from case to case. They will include the reasons for the loss of confidence occurring and the teacher's prior performance."

4 Ritter AP continued that loss of confidence, is in his opinion, a factor of "considerable importance", although he based his conclusion upon his observations of the duties of care which the Director General has to school children and the public to ensure that only properly performing teachers are working in state schools and because the Director General will have formed her opinion after an investigation and inquiry of the alleged misconduct under the *Public Sector Management Act, 1994* (WA). I am not sure that both these factors are relevant to the circumstances of this case.

5 In this case, the letter from the Commissioner of Corrective Services to Mr Dunn of 1 December 2009 shows that he is of the opinion that Mr Dunn has irreparably breached the trust placed in him as an employee of the Department and he is no longer confident that Mr Dunn will fulfil his responsibilities in the manner expected of a Prison Officer. This view was formed after considering Mr Dunn's recent criminal conviction for breaching a Police Order pursuant to s 61(2) of the *Restraining Orders Act, 1997* (WA) together with Mr Dunn's employment disciplinary history.

6 The union refers to the circumstances whereby Mr Dunn breached the Police Order, submits that the dismissal may have been procedurally unfair and that dismissal was disproportionate to the misconduct, particularly given comments purportedly made by the Magistrate when imposing a penalty of $40.00 that a spent conviction would be recorded so that Mr Dunn's employment would not be affected.

7 However, I am not persuaded that there is a *prima facie* case for relief. Mr Dunn was dismissed pursuant to s 13(3) of the *Prisons Act, 1981* (WA) ("the Prisons Act"). This provides as follows:

> (3) Where a prison officer to whom Part X applies is convicted of an offence other than under this Act but which relates to the performance of his duties or his fitness to hold office as a prison officer, the chief executive officer may, with the consent of the Minister, dismiss that prison officer.

8 Mr Dunn has been convicted of an offence, in this case a criminal offence. A breach of the *Restraining Orders Act, 1997* may well impact upon his fitness to hold office as a Prison Officer even though Mr Dunn was fined only $40.00 and the Magistrate recorded a spent conviction, and may have done so out of consideration for the consequence for Mr Dunn's employment. Whether it does impact upon his fitness to hold office as a Prison Officer is a matter for substantive argument rather than an argument in support of interim relief.

9 A similar conclusion applies to the Union's references in its reply submissions at [16] and [18] to the circumstances of other Prison Officers who may have been either suspended immediately or against whom no action was taken in similar circumstances. Much turns upon individual circumstances; in *Wayne Russell McGrath v. Commissioner of Police* (2005) 85 WAIG 2006; [2005] WAIRC 01989 a former Police Officer sought to rely upon evidence of what had happened to other Police Officers in similar circumstances. The Commission commented at [42] that where comparative unfair treatment is alleged, it is not appropriate to assume that punishment which appears more lenient on one occasion is the standard by which punishment in a different circumstance on a later occasion should be measured:

> "To put it another way, the punishment that may have been given on the earlier occasion may have been due to particular circumstances not revealed or have been simply too lenient. It cannot be safely used for comparative purposes unless all the facts are the same."

10 I also consider that Mr Dunn's disciplinary history argues against the Union's submission that there is a *prima facie* case for relief. Unlike the teacher who had 14 years without being the subject of any alleged misconduct in *The Director General Department of Education and Training v. The State School Teachers Union* (above), the Minister lists 17 documented prior disciplinary-related matters against Mr Dunn, and states it is aware of more charges laid against him. At [16] of the Minister's submission, it is stated that "many of the matters resulted in penalties imposed against Mr Dunn, and Mr Dunn has already received at least one prior letter … detailing his disciplinary history to date and formally warning him that should any further disciplinary matters be raised against him this may result in termination of his employment" (a letter to that effect dated August 2003 is attached to the Minister's submission). Therefore, whilst the fairness of his dismissal may be arguable, and I expressly make no comment about that in these Reasons for Decision, in the context of this application for an interim order of reinstatement, Mr Dunn's disciplinary history including written advice that further matters may result in termination of employment, argues against there being a *prima facie* case for relief.

11 The Union in its reply submissions at [9] to [13] states that the chronology taken from the "Statement of Evidence" of Mr O.J. Wood (which is a document accompanying the written submission of the Minister) shows that the correct procedure for dismissal under s 13(3) of the *Prisons Ac*t has not been followed in this case. The Union says that the chronology shows that at the time Mr Dunn was written to on 29 October 2009 the Minister had been advised by the Commissioner of Corrective Services that a decision had been made to dismiss Mr Dunn, the conclusion being that Mr Dunn had not been shown due process or natural justice as "his response could not make any difference to the outcome".

12 While this submission may be arguable in the substantive hearing, it does not establish a *prima facie* case for relief. The requirement in s 13(3) of the *Prisons Act* is for the Commissioner to have the consent of the Minister to dismiss a Prison Officer. There is no "correct procedure" set out in s 13(3) and it is therefore difficult to establish on the papers that the correct procedure has not been followed. The statement of Mr Wood at [20] shows that the Commissioner's advice to the Minister was "pending a response being received from Mr Dunn". This does not suggest that his response could not make any difference to the outcome.

13 It is certainly the case that a statutory power to affect rights, privileges and legitimate expectations must be exercised in accordance with the common law requirements of natural justice (see *re Railway Appeal Board; Ex Parte The Western Australian Government Railways Commission* [1999] WASCA 63; (1999) 21 WAR 1 per Malcolm CJ at [39]). In this case, Mr Dunn was at least entitled to know the case sought to be made against him and given an opportunity of replying to it (*Kioa & Others v West & Another* (1985) 159 CLR 550 as referred to in *Re Kenner; Ex Parte Minister for Education* [2003] WASCA 37 at [56]). The material before me shows that Mr Dunn was given that opportunity and took advantage of it.

14 The Union, in the schedule attached to the Notice of Application at [12] to [15], has suggested that Mr Dunn's dismissal may have been procedurally unfair because the Minister may in fact not have given his consent. This does not appear now to be pursued other than in the context of timing. In the reply submissions at [13] the Union suggests in the alternative that if the decision had not been taken by the Commissioner to dismiss Mr Dunn on 29th October, the chronology shows that the decision was taken after the 13th November in which case the Commissioner failed to receive the consent from the Minister.

15 In my view, while this submission may be put in the substantive hearing, it is not so apparent from my reading of s 13(3) and (4) of the *Prisons Act* that the Minister needs to give consent after the Commissioner has decided to dismiss Mr Dunn, as the Union submits in the reply submissions at [10(i)]. Further, whether to grant the interim order sought is ultimately a question of discretion. The exercise of discretion involves notions of equity and it is not irrelevant to note that the Minister maintains that Mr Dunn himself did not notify the Minister in accordance with proper process that he had committed an offence (see [9] of the Minister's submission). For the purposes of this application for an interim order, the weight of the submission that Mr Dunn's dismissal may have been procedurally unfair is somewhat lessened as a result.

16 I recognise Mr Dunn's family and personal commitments referred to in the reply submissions at [20] and the potential as stated for him to be placed in severe financial hardship very quickly. That is likely to be felt by most persons upon their dismissal, however there is no presumption in s 44(6)(bb)(ii) of the IR Act that reinstatement pending the hearing and determination will be the rule rather than the exception. It is to be anticipated that the claim of unfair dismissal will be dealt with promptly and Mr Dunn will be paid his salary up to 30 December 2009. I also note with approval the Minister's undertaking at [67] enabling Mr Dunn to remain in his government housing until such time as the claim of unfair dismissal has been finally heard and determined. The Minister has pointed out, correctly in my view, that if the Union is successful in its claim that Mr Dunn's dismissal was harsh, oppressive or unfair, either reinstatement or compensation will adequately compensate Mr Dunn for the loss he will otherwise incur.

17 For the above reasons, I decline to issue the interim order as requested and an order now issues giving effect to this decision.

2009 WAIRC 01353

DISPUTE RE TERMINATION OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER OF CORRECTIVE SERVICES
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 18 DECEMBER 2009
FILE NO/S	C 42 OF 2009
CITATION NO.	2009 WAIRC 01353

Result Application for an Interim Order Dismissed

Order

HAVING HEARD Mr T Clark 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:

THAT the application for an interim order reinstating Mr Dunn pending the hearing and determination of the claim that his dismissal was harsh, oppressive or unfair be dismissed.

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

CONFERENCES—Matters referred—

2009 WAIRC 01348

DISPUTE RE DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION, GOVERNMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	WEDNESDAY, 25 NOVEMBER 2009
DELIVERED	THURSDAY, 17 DECEMBER 2009
FILE NO.	PSACR 24 OF 2009
CITATION NO.	2009 WAIRC 01348

CatchWords	Public Service Arbitrator - Industrial Law (WA) - Matter referred for hearing and determination pursuant to s 44 - Whether jurisdiction of Arbitrator ousted by Public Service Appeal Board - *Generalia specialibus non derogen*t - Jurisdiction of Arbitrator and Board - "Government officer" - Public Service Officer" - "Conditions of Service" - Disciplinary process under Public Sector Management Act 1994 - Whether employer has power to initiate or continue a disciplinary investigation against a former public service officer
Legislation	*Industrial Relations Act 1979*, s 7(1)(a), s 80C, s 80E, s 80I(1)(a)
	Public Sector Management Act 1994, s 3, s 64, s 65, s 66, s 67, Part V, Part VI, s 102
Result	Jurisdiction of Public Service Appeal Board prevails - matter dismissed
Representation	
Applicant	Ms C Reid and with her Mr W Claydon
Respondent	Mr E Rea and with him Mr D Hughes

Reasons for Decision

1 This matter was the subject of a conference pursuant to s 44 of the *Industrial Relations Act 1979* (the *IR Act*). There was no agreement reached and the matter was referred for hearing and determination in the following terms:

"**The Applicant says that:**

1. It is an organisation of employees authorised to represent Mr Luke van der Zanden, a former employee of the Department for Child Protection ("the Respondent").
2. It is in dispute with the Respondent over its power to continue a breach of disciplinary process under the *Public Sector Management Act 1994* ("the Act"), when Mr van der Zanden is no longer its employee.
3. Mr van der Zanden was presented with a suspected breach of discipline letter dated 20 April 2009.
4. Mr van der Zanden provided his written response addressing the allegations to the Respondent on 8 May 2009.
5. After Mr van der Zanden had submitted his response his fixed term contract of employment expired as at 4 June 2009 and was not renewed.
6. On 11 June 2009, the Respondent sent Mr van der Zanden a letter notifying him that an investigation into the suspected breaches of discipline would be commenced pursuant to s 81(2) of the Act.
7. The Respondent advised the Applicant in a letter dated 17 September 2009 that it would continue with the investigation notwithstanding the cessation of employment.
8. The Respondent has no power under the Act to pursue a disciplinary investigation of a former employee.
9. Furthermore, the Act provides a statutory mechanism for regulating disciplinary investigations of current employees only.

The Applicant seeks an order that the Respondent ceases the disciplinary process immediately and any other orders the Public Service Arbitrator deems appropriate to resolve the dispute.

The Respondent says that:

1. There is no legislative impediment to its continuing to undertake an investigation upon the cessation of employment of the officer.
2. It is desirable and appropriate to continue with the investigation and reach a conclusion regarding Mr van der Zandin's conduct.
3. Objects to the orders sought."

2 For the purposes of the determination of a jurisdictional issue raised by the respondent, the parties provided the following Statement of Agreed Facts:

"1. The Applicant is The Civil Service Association of Western Australia Incorporated ("the CSA").
2. The CSA is a registered organisation of employees authorised to represent Mr Luke van der Zanden.
3. The Respondent is the Director General, Department for Child Protection.
4. Mr van der Zanden was employed with the Respondent pursuant to Section 64(1)(b) of the *Public Sector Management Act* 1994 ("the Act") as a Residential Care Officer.
5. The Respondent presented Mr van der Zanden with a suspected breach of discipline letter dated 20 April 2009 identifying three suspected breaches of discipline.
6. Mr van der Zanden responded to the three allegations in writing and provided his response to the Respondent on 8 May 2009.
7. Mr van der Zanden's fixed term contract of employment expired as at 4 June 2009. As of the expiration of Mr van der Zanden's fixed term contract Mr van der Zanden was no longer an employee of the Respondent.

8. On 11 June 2009 the Respondent sent Mr van der Zanden a letter notifying him that an investigation into the suspected breaches of discipline would be commenced pursuant to section 81(2) of the the (sic)Act.

9. On 11 September 2009 the Applicant sent the Respondent a letter stating that as Mr van der Zanden was no longer an employee of the Respondent and the Respondent had no ability to continue its investigation.

10. On 17 September 2009 the Respondent wrote to the Applicant and advised that the Respondent believed that it did have the ability to continue its investigation.

11. On 23 September 2009 the Applicant wrote to the Respondent requesting the disciplinary investigation be stayed until such time as the matter could be determined by the Public Service Arbitrator.

12. The Respondent acceded to this request.

13. The Applicant contends that the Respondent does not have the power under the Act to continue the breach of discipline process against Mr van der Zanden.

14. The Respondent contends that it does have the power under the Act to continue the breach of discipline process against Mr van der Zanden."

The Respondent's Case

3 The respondent raised an issue of jurisdiction, that the Public Service Arbitrator (the Arbitrator) does not have jurisdiction to determine the claim, that the dispute between the parties relates a decision of the respondent in relation to the interpretation of the disciplinary procedures contained in Part 5 - Substandard performance and disciplinary matters of the *Public Sector Management Act 1994* (the *PSM Act*), that such an interpretation is specifically within the jurisdiction of the Public Service Appeal Board (the Board) (s 80I(1)(a) of the *IR Act*), and that the particular jurisdiction set out there overrides the general jurisdiction of the Arbitrator set out in s 80E of the *IR Act*.

4 In that regard the respondent referred to the decision of the Full Bench in ***Ronald Thomas Bellamy v Chairman, Public Service Board*** (1986) 66 WAIG 1579 where the principle underlying the *generalia specialibus* applied.

5 In that case, the applicant, a government officer, had applied to the Commission for relief under s 29(2)(b) of the *IR Act* rather than appealing to the Board, against the decision to dismiss him. The application of the *generalia specialibus* principle meant that because the legislature had made special provisions for government officers to make a claim relating to dismissal by reference to the Board, that those provisions prevailed over the general provisions for claims by employees of unfair dismissal under s 29(2)(b).

6 The respondent argues that the jurisdiction of the Board is to deal with the particular issue of a challenge to a decision of the respondent relating to the employing authority's interpretation of the *PSM Act* concerning conditions of service of public service officers. The issue between the parties is, according to the respondent, a dispute as to the interpretation of the *PSM Act* as to whether the employing authority has power to pursue a disciplinary investigation of a former employee. According to the respondent that requires an interpretation of the disciplinary provisions of the *PSM Act* and whether it applies to former employees. The respondent says that once that issue is resolved, the dispute is resolved.

7 Mr Rea conceded that the terms of the Schedule may suggest that the dispute goes beyond the bare or bald interpretation of the employing authority's powers under the *PSM Act* to include the question of merit, that is to include whether, if such an interpretation were that the employing authority may continue or instigate a disciplinary investigation against a former employee, the circumstances of the case justify the continuation or investigation of the investigation. This is reflected in the orders sought by the applicant and the respondent's position set out in that Schedule which includes:

"2. It is desirable and appropriate to continue with the investigation and reach a conclusion regarding Mr van der Zanden's conduct".

8 However, ultimately, the respondent says that an examination of the statement of the applicant's position in the Schedule clearly relates to power under the *PSM Act* and the statutory mechanism and not to any question of merit. The claim relates to the special jurisdiction of the Board, and this prevails over the jurisdiction of the Arbitrator.

The Applicant's Case

9 The applicant says that the Arbitrator has jurisdiction to deal with the matter on the basis that it is an industrial matter; that this matter involves an abuse of the disciplinary process, which in this case relates to an industrial matter in the form of "conditions of employment which are to take effect after the termination of employment" (See the definition of "industrial matter', s 7(1)(a) of the *IR Act*).

10 In the course of the hearing, I put to Ms Reid for the applicant whether what "the matters referred for hearing and determination requires is a bare interpretation, or an interpretation for the purpose of moving to a next stage dealing with merit". Her response was that it was the latter. She went on to say:

Ms Reid: Commissioner, in this particular matter obviously it is to finalise this issue and I think it's to achieve a result for this particular member."

(Transcript p 13)

11 Following the hearing on 25 November 2009, I directed my Associate to write to the parties inviting them to make further submissions regarding s 80I(1)(a) of the *IR Act*. These Reasons also take account of those submissions.

Consideration and Conclusions

12 The first question to be asked is what is the matter in dispute about and what does the applicant seek? The Schedule is set out in para 1 above. The essential parts of that are that:

1. The respondent has advised the applicant that it will continue with the disciplinary investigation into Mr van der Zanden's suspected breach of discipline, notwithstanding that his employment has ceased.

2. The applicant claims that the respondent has no power to do so.

3. "The applicant seeks an order that the respondent ceases the disciplinary process immediately and any other orders the Public Service Arbitrator deems appropriate to resolve the dispute".

13 I have noted the terms of the Schedule and the parties' submissions and conclude that the dispute does not simply involve a question of interpretation and a consequential declaration as to the meaning of the provisions of the *PSM Act*. The interpretation of the provisions of the *PSM Act* would be for the purpose of dealing with a matter going beyond that interpretation, to include whether the respondent, if power exists to continue the investigation, should be prevented from doing so. This would include questions of merit. It may involve the issuing of orders to require the respondent to cease the investigation.

14 The next issue is whether the jurisdiction of the Arbitrator is ousted by that of the Board on account of the principle of *generalia specialibus*.

15 The jurisdiction of the Arbitrator is set out in s 80E of the *IR Act*. The relevant parts are as follows:

"**80E. Jurisdiction of Arbitrator**

(1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

…

(5) Nothing in subsection (1) or (2) shall affect or interfere with the exercise by an employer in relation to any government officer, or office under his administration, of any power in relation to any matter within the jurisdiction of an Arbitrator, but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction in respect of that matter under this Division.

…"

16 Division 3 of Part II of the *IR Act* relates to General Orders and is not relevant to this matter.

17 Subsection (6) of s 80E relates to referrals to the Full Bench and Commission in Court Session and is not relevant. Subsection (7) excludes from the Arbitrator's jurisdiction "any matter in respect of which a procedure referred to in section 97(1)(a) of the PSM Act 1994 is, or may be, prescribed under that Act" and is also not relevant to this matter.

18 The Arbitrator's jurisdiction is an exclusive jurisdiction to enquire into and deal with any industrial matter relating, in this case, to a government officer.

19 For the purposes of this matter, an "industrial matter" is defined in s 7 of the *IR Act* as:

"any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to -

(a) …;

(b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;

…

20 As I have found earlier, the dispute between the parties involves an interpretation of the provisions of the *PSM Act* as to the respondent's powers and a consequent question of merit regarding whether that power ought to have been exercised.

21 I also note that in ***Director General Department of Justice v Civil Service Association of Western Australia Incorporated*** [2005] WASCA 244, Wheeler and Le Miere JJ said:

30 An inquiry into an industrial matter will, where that industrial matter is affected by other legislation, or where the actions of persons involved in the industrial matter are, in some respect, governed by other legislation, involve an inquiry into what was done, in that legislative context. In order to determine how to "deal with" an industrial matter, the Arbitrator must find relevant facts. If it is the case that a relevant factual finding suggests that a person has been guilty of unlawful or improper conduct, that is a finding which it is open to the Arbitrator to make, not as an end in itself, but as a step in determining how the industrial matter is to be dealt with.

31 Where, as is presently the case, the way in which officers in the public service deal with each other is the subject of principles and requirements contained in legislation such as the PSM Act, it will often be desirable for the Arbitrator to consider whether the behaviour of individuals involved in the industrial matter has been in conformity with those principles and requirements. Again, findings of that kind would not be made as an end in themselves, but would be made in order to determine how, in the broad statutory context, it would be appropriate to deal with the industrial matter.

32 It will on occasion, as part of that process, be necessary for the Arbitrator to undertake a consideration of the relevant statutes, so as to ascertain how they apply to the facts as found. That exercise is undertaken, not in order authoritatively to declare the meaning of the statutory provision, but again as a step in the process of ascertaining what is required, in the statutory context, to deal with the industrial matter.

22 The power of the Arbitrator to provide a remedy is set out in s 80E(1), "to enquire into and deal with" the industrial matter. Further s 80E(5) provides for the employer's decision to be "reviewed, nullified, modified or varied by the Arbitrator in the course of the exercise of" jurisdiction. Therefore the Arbitrator has very wide powers to deal with the industrial matter for the purpose of its resolution. In any event, it is the respondent's contention that the Arbitrator would have jurisdiction but for it being ousted because the jurisdiction of the Board is more particular to this matter.

23 The jurisdiction of the Board is set out in s 80I of the *IR Act* to include:

"**80I. Appeals**

(1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine -

(a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the Public Sector Management Act 1994 , and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;

…

and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e)."

24 Section 52 of the *PSM Ac*t provides that issues relating to the appointment and other matters associated with chief executive officers are not industrial matters. This is not relevant to the matters being considered. Subsection (3) of s 80I excludes from the Board's jurisdiction an appeal from a government officer against a decision made under regulations referred to in s 94 of the *PSM Act*. Neither party suggested that this matter relates to such an appeal and is therefore not relevant.

25 I note the terms of s 80I(1)(a) are that the Board has power to hear and determine "an appeal by any public service officer against any decision of employing authority in relation to an interpretation of any provision of the (*PSM Act)* concerning conditions of service … of public service officers".

26 The provision does not simply provide for an appeal against the employing authority's interpretation of a provision of the *PSM Act*. Rather, it provides for an appeal "against <u>any decision</u> … <u>in relation</u> to an interpretation of any provision of the Public Sector Management Act … concerning the conditions of service … of public service officers". (emphasis added) It is therefore not a bare or bald interpretation referred to in the decision of the Commission in *Crewe and Sons Pty Ltd v AMWSU* (1989) 69 WAIG 2624. It can be clearly distinguished from an interpretation envisaged by s 46 of the *IR Act* as it relates to the Commission's general jurisdiction. It involves an appeal against the employer's decision. That decision *relates to* an interpretation of the *PSM Act* concerning conditions of employment of public service officers.

27 An examination of the *PSM Act* shows that the term "conditions of service" is not defined. However, one might look at, for example, Div 3 - Public Service Officers other than Executive Officers, in particular s 64 - s 67 which deal with appointments; transfers within and between departments and organisations; secondments and vacation of office. Part V - Substandard performance and disciplinary matters deals with a range of conditions of service which include rights to procedural fairness and rights of appeal in the substandard performance and disciplinary processes. Part VI - Redeployment and redundancy provisions also sets out some provisions of the *PSM Act* dealing with conditions of service. Other miscellaneous conditions include s 102 - Employees not to engage in activities unconnected with their functions. These then might be the flavour of conditions of service for public service officers about which an employing authority may make a decision relating to an interpretation of the *PSM Act*.

28 The jurisdiction of the Board includes the power to adjust all such matters (s 80I(1) of the *IR Act*). In this case the adjustment would be to the decision of the employing authority in relation to the interpretation of any provision of the *PSM Act* concerning conditions of service of public service officers.

29 Therefore the jurisdiction of the Board provides for the adjustment of the employer's decision in relation to the interpretation of a provision of the *PSM Act* concerning, in this case, what can be described as a condition of service, that is, whether the conditions of service include the capacity of the employer to instigate or continue to investigate a suspected breach of discipline when the employment has ended. Therefore, the subject of the application also falls within the jurisdiction of the Board.

30 The next question is whether one jurisdiction prevails over the other by reference to the *generalia specialibus* principle, that is has the legislature made special provisions which deal with the matter in dispute as opposed to provisions which apply generally?

31 The Arbitrator's jurisdiction is to deal with industrial matters generally as they relate to government officers. Examples of industrial matters are given including conditions which are to take effect after termination of employment.

32 "Government officer" is defined in s 80C of the *IR Act* in the following terms:

government officer means -

(a) every public service officer;

(aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992* ;

(ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the Parliamentary and Electorate Staff (Employment) Act 1992 ;

(b) every other person employed on the salaried staff of a public authority; and

(c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the Acts Amendment and Repeal (Industrial Relations) Act (No. 2) 1984 1 ,

but does not include -

(d) any teacher;

(e) any railway officer as defined in section 80M; or

(f) any member of the academic staff of a post-secondary education institution;"

33 The Board's jurisdiction is in respect of an appeal against a decision of the employer in relation to an interpretation of the *PSM Act* concerning conditions of employment of public service officers. Although the Schedule and the Statement of Agreed Facts do not explicitly record whether Mr van der Zanden was a public service officer, point 4 of the Statement of Agreed Facts refers to his appointment pursuant to s 64(1)(b) of the *PSM Act*. This relates to the appointment of public service officers. Therefore I conclude that Mr van der Zanden was a public service officer.

34 Public service officer is defined in s 3 of the *PSM Act* as being "executive officer, permanent officer or term officer employed in the Public Service under Part 3".

35 When considering to whom the respective jurisdictions of the Arbitrator and the Board apply, the Board's jurisdiction in s 80I(1)(a) is more limited - that is to "public service officers", who are a subset of "government officers", whereas the Arbitrator's jurisdiction is broader, dealing as it does with "government officers".

36 In relation to the subject matter, the Board's jurisdiction covers the dispute as to the employer's decision in relation to an interpretation of the *PSM Act* concerning conditions of service of public service officers. This is more narrowly focussed on the issue in dispute than a dispute about an industrial matter in respect of conditions which are to take effect after termination of employment. This is because the dispute is about the particular decision of the respondent, which relies on an interpretation of the provisions of the *PSM Act*. That provision relates to a condition of service, being the disciplinary process.

37 The Full Bench in *Bellamy* (op cit) referred to the rule in *generalia specialibus non derogent* and quoted from a number of authorities as follows:

"… In Refrigerated Express Lines (A/Asia) Pty Ltd v. Australian Meat and Live-Stock Corporation and Others (1979-80) 29 ALR 33, Deane J. at 347 referred to the rule in the following terms:-

> As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative …" [per Romilly MR: Pretty v. Solly (1859) 26 Beav 606 at 610]. Repugnancy can be present in cases where there is no direct contradictions between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter.

It was earlier pointed out in these reasons that the intention that the special provisions should prevail is indicated by inclusion in the general provision of the words "Subject to this Act".

There is a reference in Pearce (*supra*) to a particular application of the principle underlying the *generalia specialibus* approach where there is a grant of power in general terms and specific terms. It relates to Anthony Hordern and Sons Ltd v. Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1 at 7 in which, in the majority judgment, it was observed:-

> Extensive and unfettered as the authority of the Court of Conciliation and Arbitration to award preference in settlement of a dispute might have been in virtue of its general power, yet, when section 40 expressly gives a special power, subject to limitations and qualifications, surely it must be understood to mean that the Court shall not exercise an unqualified power to do the same thing. When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

Pearce also refers to an excerpt from the judgment of Megarry J. in No. 20 Cannon St Ltd v. Singer and Friedlander Ltd (1974) Ch 229 at 235:-

> … the proper principle to apply if an enactment contains two similar prohibitions, one wide and the other applying only to a limited class of case wholly within the wide prohibition, is to treat the wide prohibition as not applying to cases within the limited prohibition, especially if the limited prohibition is made subject to some exception and the wide prohibition is not."

38 Taking account of these authorities I conclude that the legislature intended there to be a special and particular tribunal whose purpose was to deal with a claim of the nature as the matter referred for hearing and determination. The legislature provided, within the *IR Act*, the Board, to deal with the decisions of employers of public service officers relating to the interpretation of the *PSM Act* concerning the power of the employer in the disciplinary process set out in that Act.

39 Therefore I conclude that while the Arbitrator has jurisdiction which is broad and encompasses the issue in dispute, the Board's jurisdiction is more specific and specialised. The jurisdiction of the Board must prevail.

2009 WAIRC 01349

DISPUTE RE DISCIPLINARY PROCESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION, GOVERNMENT OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 17 DECEMBER 2009
FILE NO/S	PSACR 24 OF 2009
CITATION NO.	2009 WAIRC 01349

Result Jurisdiction of Public Service Appeal Board prevails - matter dismissed

Order

Having heard Ms C Reid and with her Mr W Claydon for the applicant, and Mr E Rea and with him Mr D Hughes, and pursuant to the powers conferred by the *Industrial Relations Act 1979* the Commission hereby orders:

That this matter be and is hereby dismissed

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

CORRECTIONS—

2010 WAIRC 00001

CORRIGENDUM

Whereas an error occurred in the Publication of the "Variation Schedule" for "The Western Australian Surveying (Private Practice) Industry Award, 2003"at 88 WAIG 1596-1598 following the General Order which issued on 17 June 2008 in application 115 of 2007, the "Variation Schedule" is hereby republished. The correction is made in respect to the hourly, weekly and annual salaries for the Level 11, 5.1.1(k) Trainee Assistant Survey classification where the amounts of $16.75, $636.50 and $331123.83 are replaced with $15.99, $607.50 and $31610.83 respectively.

Dated at Perth this 29th day of September 2009.

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

5.1 - SALARIES

The rates of pay in this Award include Arbitrated Safety Net adjustments available since December 1993 under the Arbitrated Safety Net Adjustment Principle and includes the 2003 Safety Net Wage Case Increase of 5 June 2003 (2003 WAIRC 08452).

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.

Wage	Classification title	Minimum Salaries - $			Skill relativity to level 10 after full minimum rate\broadbanding adjustments
		Hourly	Weekly	Annual	%
Level 1 5.1.1(a)	Manager/Professional - Business/Specialist	29.82	1133.1	58946.50	210
Level 2 5.1.1(b)	Manager/Professional - Project/Specialist	26.52	1008.00	52441.50	180
Level 3 5.1.1(c)	ExperiencedProfessional Surveyor including Licensed Surveyor/Engineer	24.33	924.50	48099.50	160
Level 4 5.1.1(d)	Experienced Surveyor/Town Planner	23.31	886.00	46097.83	150
Level 5 5.1.1(e)	Technician V / Survey Party Leader	22.79	865.90	45052.83	145
Level 6 5.1.1(f)	Technician IV / Survey Party Leader	21.69	824.19	42883.83	135
Level 7 5.1.1(g)	Technician III / Survey Technician, Senior (part-time party leader)Graduate Professional Engineer/Surveyor/Town Planner - 4 year	21.14	803.40	41802.83	130
Level 8 5.1.1(h)	Technician II / Survey Technician,Graduate Surveyor - under Articles/Town Planner – 3 year	20.59	782.50	40715.83	125
Level 9 5.1.1(i)	Technician I / Trainee Technician, Survey	19.00	721.90	37564.83	110
Level 10 5.1.1(j)	Technical Assistant Survey	17.91	680.50	35411.83	100
Level 11 5.1.1(k)	Trainee Assistant Survey	15.99	607.50	31610.83	90
Level 12 5.1.1(l)	Unskilled	15.87	603.10	31386.83	82
Entry level 5.1.1(m)	For entry level for employees who possess relevant technical/professional qualifications see clause 5.1.2				
5.1.1(n)	The skill relativities to level 10 set out in the above table apply subject to any future award or safety net increases by the Commission. Any such safety net increases will not vary the percentages set out above as being the indicative wage relativities of classifications under this award.				

5.1.3 - SALARIES CLERICAL EMPLOYEES

5.1.3(a) Adult

Grade	Weekly Rate
	$
1	579.60
2	600.50
3	634.20

Provided that:

(a) No employee employed as at the commencement of this award is to receive less pay as a result of regrading under this award. In the event that such regrading results in a lower grading, the present salary is to be maintained until overtaken by award increases.

(b) Overaward payments may be absorbed into any increase arising under this award.

5.1.3(b) Juniors

The following percentage of Grade 1 weekly rates shall be minimum rates of wages per week for junior employees:

Age	Rate per Week
17	60%
18	70%
19	80%
20	90%

5.3 - MINIMUM ADULT AWARD WAGE

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

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

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

(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.

(6) 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.

(7) 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.

(8) Subject to this clause the minimum adult award wage shall –

(a) Apply to all work in ordinary hours.

(b) 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.

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

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

(10) Adult Apprentices

(a) 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.

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

(c) 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.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Congregation of Presentation Sisters WA Teachers Enterprise Bargaining Agreement 2009 - The AG 64/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Congregation of the Presentation Sisters of WA Inc	(Not applicable)	Commissioner S M Mayman	Agreement registered
Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary Teachers Enterprise Bargaining Agreement 2009 - The AG 68/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Congregation of the Missionary Oblates of the Most Holy and Immaculate Virgin Mary	(Not applicable)	Commissioner S M Mayman	Agreement registered
Edmund Rice Education Australia Teachers Enterprise Bargaining Agreement 2009 - The AG 48/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and Edmund Rice Education Australia	(Not applicable)	Commissioner S M Mayman	Agreement registered
Institute of the Blessed Virgin Mary Teachers Enterprise Bargaining Agreement 2009 - The AG 65/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Institute of the Blessed Virgin Mary	(Not applicable)	Commissioner S M Mayman	Agreement registered
John XXIII College Teachers Enterprise Bargaining Agreement 2009 - The AG 57/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and John XXIII College Inc	(Not applicable)	Commissioner S M Mayman	Agreement registered
Norbertine Canons Teachers Enterprise Bargaining Agreement 2009 - The AG 66/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Norbertine Canons Incorporated	(Not applicable)	Commissioner S M Mayman	Agreement registered
Roman Catholic Bishop of Broome Teachers Enterprise Bargaining Agreement 2009 - The AG 67/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and Roman Catholic Bishop of Broome	(Not applicable)	Commissioner S M Mayman	Agreement registered
Roman Catholic Bishop of Bunbury Teachers Enterprise Bargaining Agreement 2009 - The AG 52/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and Roman Catholic Bishop of Bunbury	(Not applicable)	Commissioner S M Mayman	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Roman Catholic Bishop of Geraldton Teachers Enterprise Bargaining Agreement 2009 - The AG 54/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees AND The Roman Catholic Bishop of Geraldton	(Not applicable)	Commissioner S M Mayman	Agreement registered
Servite College Council Teachers Enterprise Bargaining Agreement 2009 - The AG 70/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Servite College Council Inc	(Not applicable)	Commissioner S M Mayman	Agreement registered
Sisters of Mercy Perth (Amalgamated) Teachers Enterprise Bargaining Agreement 2009 - The AG 56/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Sisters of Mercy Perth (Amalgamated) Inc	(Not applicable)	Commissioner S M Mayman	Agreement registered
Sisters of Mercy West Perth Congregation Teachers Enterprise Bargaining Agreement 2009 - The AG 44/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Sisters of Mercy West Perth Congregation	(Not applicable)	Commissioner S M Mayman	Agreement registered
Sisters of the Holy Family of Nazareth Teachers Enterprise Bargaining Agreement 2009 - The AG 50/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Sisters of the Holy Family of Nazareth	(Not applicable)	Commissioner S M Mayman	Agreement registered
Trustees of the Marist Brothers Southern Province Teachers Enterprise Bargaining Agreement 2009 - The AG 69/2009	17/12/2009	The Independent Education Union of Western Australia, Union of Employees and The Trustees of the Marist Brothers Southern Province,	(Not applicable)	Commissioner S M Mayman	Agreement registered

RECLASSIFICATION APPEALS—

2009 WAIRC 01311

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LENORE BATT

APPELLANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 14 DECEMBER 2009

FILE NO PSA 9 OF 2009

CITATION NO. 2009 WAIRC 01311

Result Reclassification appeal dismissed

Order

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

WHEREAS on the 23rd day of July 2009 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS on the 10th day of December 2009, the appellant filed a Notice of Withdrawal or Discontinuance in respect of the appeal;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTOPHER JOHN GRAHAM
	APPELLANT
	-v-
	MAIN ROAD WA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 16 DECEMBER 2009
FILE NO	PSA 54 OF 2008
CITATION NO.	2009 WAIRC 01329

Result Reclassification appeal dismissed

Order

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

WHEREAS by Notice of Hearing dated the 30th day of November 2009, the Public Service Arbitrator advised the appellant that a hearing would be convened on Wednesday, the 9th day of December 2009 at 2.15 pm for the appellant to show cause why the appeal should not be dismissed; and

WHEREAS at the hearing on Wednesday, the 9th day of December 2009 there was no appearance for or by the appellant;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID DOUGLAS MOTT
	APPELLANT
	-v-
	MAIN ROADS WA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 16 DECEMBER 2009
FILE NO	PSA 44 OF 2008
CITATION NO.	2009 WAIRC 01328

Result Reclassification appeal dismissed

Order

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

WHEREAS by Notice of Hearing dated the 30th day of November 2009, the Public Service Arbitrator advised the appellant that a hearing would be convened on Wednesday, the 9th day of December 2009 at 2.15 pm for the appellant to show cause why the appeal should not be dismissed; and

WHEREAS at the hearing on Wednesday, the 9th day of December 2009 there was no appearance for or by the appellant;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID WILSON
	APPELLANT
	-v-
	MAIN ROADS W.A.
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 16 DECEMBER 2009
FILE NO	PSA 60 OF 2008
CITATION NO.	2009 WAIRC 01330

Result Reclassification appeal dismissed

Order

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

WHEREAS by Notice of Hearing dated the 30th day of November 2009, the Public Service Arbitrator advised the appellant that a hearing would be convened on Wednesday, the 9th day of December 2009 at 2.15 pm for the appellant to show cause why the appeal should not be dismissed; and

WHEREAS at the hearing on Wednesday, the 9th day of December 2009 there was no appearance for or by the appellant;

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

THAT this appeal be, and is hereby dismissed.

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

2009 WAIRC 01326

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ZELJKO ZAGORAC
	APPELLANT
	-v-
	MAIN ROADS WA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 16 DECEMBER 2009
FILE NO	PSA 41 OF 2008
CITATION NO.	2009 WAIRC 01326

Result	Reclassification appeal dismissed

Order

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

WHEREAS by Notice of Hearing dated the 30th day of November 2009, the Public Service Arbitrator advised the appellant that a hearing would be convened on Wednesday, the 9th day of December 2009 at 2.15 pm for the appellant to show cause why the appeal should not be dismissed; and

WHEREAS at the hearing on Wednesday, the 9th day of December 2009 there was no appearance for or by the appellant;

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

THAT this appeal be, and is hereby dismissed.

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