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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

NOTICES—General Matters—

2010 WAIRC 00443

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

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

The figure that will apply 1 July 2010 has been calculated by the Registrar as being $129,100.00. The amount is a matter for the Commission to determine so that figure must be seen as a guide, until such time as the Commission may determine a different amount.

GENERAL ORDERS—

2010 WAIRC 00369

RESCIND GENERAL ORDER NO. 24/09 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	COMMISSION IN COURT SESSION
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 23 JUNE 2010
FILE NO.	APPL 117 OF 2010
CITATION NO.	2010 WAIRC 00369

RESULT GENERAL ORDER ISSUED

General Order

HAVING heard Mr R Davenport on behalf of the Honourable Minister for Commerce; Mr T Dymond on behalf of the Trades and Labor Council of Western Australia; and there being no appearance on behalf of the Chamber of Commerce and Industry of Western Australia (Inc), the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

(1) THAT each award, industrial agreement or order cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award, industrial agreement or order the location allowance provisions in Schedule B of this General Order.

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2010.

(3) THAT this General Order replace the General Order in Matter No 24 of 2009 which thereby shall be rescinded.

(Sgd.) P.E. SCOTT,
Acting Senior Commissioner,
[L.S.] For and On behalf of the Commission In Court Session.

SCHEDULE A

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SCHEDULE B

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

TOWN	PER WEEK
Agnew	$19.30
Argyle	$51.30
Balladonia	$19.70
Barrow Island	$33.40
Boulder	$8.10
Broome	$31.00
Bullfinch	$9.10
Carnarvon	$15.90
Cockatoo Island	$34.00
Coolgardie	$8.10
Cue	$19.80
Dampier	$26.90
Denham	$15.90
Derby	$32.20
Esperance	$5.70
Eucla	$21.60
Exmouth	$28.20
Fitzroy Crossing	$39.00
Goldsworthy	$16.90
Halls Creek	$44.90
Kalbarri	$6.80
Kalgoorlie	$8.10
Kambalda	$8.10
Karratha	$32.20
Koolan Island	$34.00
Koolyanobbing	$9.10
Kununurra	$51.30
Laverton	$19.70
Learmonth	$28.20
Leinster	$19.30
Leonora	$19.70
Madura	$20.70
Marble Bar	$49.50
Meekatharra	$17.10
Mount Magnet	$21.30
Mundrabilla	$21.20
Newman	$18.50
Norseman	$16.90
Nullagine	$49.40
Onslow	$33.40
Pannawonica	$25.10
Paraburdoo	$25.00
Port Hedland	$26.80
Ravensthorpe	$10.20
Roebourne	$37.10
Sandstone	$19.30
Shark Bay	$15.90
Shay Gap	$16.90
Southern Cross	$9.10

Telfer	$45.60
Teutonic Bore	$19.30
Tom Price	$25.00
Whim Creek	$31.90
Wickham	$30.90
Wiluna	$19.60
Wittenoom	$43.70
Wyndham	$48.10

(2) Except as provided in subclause (3) of this clause, an employee who has:

(a) a dependent shall be paid double the allowance prescribed in subclause (1) of this clause;

(b) a partial dependent shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.

(3) Where an employee:

(a) is provided with board and lodging by his/her employer, free of charge; or

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

such employee shall be paid $66^{2}/_{3}$ per cent of the allowances prescribed in subclause (1) of this clause.

The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.

(4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.

(5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.

(6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

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

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

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

(8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.

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

2010 WAIRC 00337

2010 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
HEARD	TUESDAY, 1 JUNE 2010, TUESDAY, 8 JUNE 2010
DELIVERED	FRIDAY, 11 JUNE 2010
FILE NO.	APPL 2 OF 2010
CITATION NO.	2010 WAIRC 00337

CatchWords	State Wage order - Commission's own motion - Minimum wage for employees under Minimum Conditions of Employment Act 1993 - Award rates of wage - Award minimum wage -State wage principles - Industrial Relations Act 1979 s 50A
Result	2010 State Wage order issued
Representation	Mr A Lyon, and with him Ms S Haynes, on behalf of the Hon. Minister for Commerce
	Mr J Ridley on behalf of the Chamber of Commerce and Industry of WA (Inc.)
	Mr D Ellis on behalf of the Trades and Labor Council of WA

Reasons for Decision

1 This is the unanimous decision of the Commission in Court Session. The Commission is required by s 50A of the *Industrial Relations Act 1979* (the Act) before July in each year to make a General Order (the State Wage order) setting the minimum wage applicable under s 12 of the *Minimum Conditions of Employment Act 1993* (MCE Act) to employees who have reached 21 years of age, and to apprentices and trainees. The Commission is also to adjust rates of wages paid under State awards.

2 The Commission placed advertisements in two local newspapers on 17, 21 and 22 April 2010 calling for public submissions. The advertisement was also published on the Commission's website and in the WA Industrial Gazette ((2010) 90 WAIG 213; [2010] WAIRC 00211).

3 The Commission sat on 1 June 2010 and heard oral submissions and evidence from the Hon Minister for Commerce, the Chamber of Commerce and Industry of Western Australia (Inc) (CCIWA) and the Trades and Labor Council of Western Australia (TLC). Written submissions were received from Australian Mines and Metals Association (AMMA), Australian Hotels Association WA Branch (AHAWA), the Western Australian Council of Social Services Inc (WACOSS), Mr F. Nicoletti and Mr G. Gray. Copies of all submissions were placed on the Commission's website and the proceedings were webcast.

SUMMARY OF POSITIONS

The Hon Minister for Commerce

4 The Minister proposes a flat dollar adjustment to the State adult minimum wage and adult award rates based on the 2009-10 estimated consumer price index (CPI) for Perth as published in the 2010-11 State Budget. This is a figure of 2.25% which would lead to an increase of $12.80 per week. The Minister also submits that the minimum wage and award wage rates for junior employees, apprentices and trainees should be increased by the appropriate relativities. The Minister does not support a minimum wage adjustment beyond inflation in 2010 given the potential risks to the State's economic outlook including WA's focus on global resource markets, the rapid increase in global public debt and uncertainty surrounding the proposed introduction of the 40% Resource Super Profits Tax (RSPT).

5 Given the continued increases in costs for workers reliant on the State minimum wage, the Minister submits that an adjustment below inflation is not an appropriate outcome. Rather, an inflation-based increase to the State minimum wage and award wage rates is moderate and sustainable in the context of the slow economic recovery.

6 The Minister compared the nominal cumulative increases in WA's wage price index (WPI) against State minimum wage increases and Perth's CPI over the last 10 years. This shows that the State minimum wage has been broadly maintained in line with the WPI: since 1999 WA's WPI has cumulatively increased by 50.7% compared to 47.8% for the State minimum wage. The real increase to the minimum wage over the past decade has been 6.3%.

7 The Minister acknowledges that there have been significant increases in costs for essential items like housing, health, education and transportation, and that these increases are likely to be most keenly felt by lower paid employees. The Minister submits that there is no evidence to suggest the previous increases to the State minimum wage rate and award wage rates have provided a disincentive to enterprise bargaining. Previous State minimum wage increases for apprentices and trainees have not discouraged their uptake in WA; there has been a 14.1% increase in the annual uptake of apprenticeships in WA in the six years to February 2010, and during the same period the number of traineeships commenced each year increased by 24.7%.

8 The Minister acknowledges that women are over-represented among low paid and award-dependent employees and submits that if adjustments in the minimum wage fail to keep pace with inflation this will be disproportionately felt by women. In WA the gender pay gap is 24.2%, is the largest of any State and well above the national average of 17.9%. The Minister carefully addresses each of the criteria in s 50A(3) of the Act.

Relevant decisions of other courts and tribunals

9 The Minister submits that the wage disparity between the minimum wages in each jurisdiction is a consequence of the different legislative criteria considered by each tribunal when adjusting their respective minimum wages, the timing of determinations and the different economic circumstances experienced in each jurisdiction. In relation to the legislative criteria to be observed by Fair Work Australia in its current review of the national minimum wage, the Minister submits that although similarities now exist between the national minimum wages objective and the State minimum wages criteria, important differences remain. Primarily the national minimum wages objective does not require consideration of:

a. The state of the WA economy;

b. The WA award framework; or

c. Relevant decisions of other industrial courts or tribunals.

10 The Minister submits therefore that little weight should be attributed to this current disparity between the WA and national minimum wages.

State jurisdiction coverage

11 The Minister presents information taken from the Australian Bureau of Statistics (ABS) *Employee Earnings and Hours, Australia*, August 2008 (Catalogue number 6306.0). Table 4 of the Minister's submission is reproduced below and it updates the information before the Commission in 2008 (2008 WAIRC 00347 at [22]) which had been made available to it by the Australian Taxation Office.

Table 4: Methods of Pay Setting by Jurisdiction, States and Territories, August 2008[1]

Proportion of employees (%)		**NSW**	**VIC**	**QLD**	**SA**	**WA**	**TAS**	**NT**	**ACT**	**Australia**
Federal jurisdiction										
	Federal award or agreement (a)	36.5	55.3	35.8	38.0	**32.4**	43.5	62.9	75.3	42.0
	State award or agreement (b)	1.2	-	2.8	2.7	**0.8**[1]	2.6[1]	-	-	1.3
	Unregistered arrangement (c)	31.0	39.0	23.1	26.0	**27.8**	16.3	32.4	21.6	30.2
	Working proprietor or incorporated business	5.4	5.7	4.0	5.2	**4.7**	2.7	4.5	3.1	5.0
	Total Federal jurisdiction	*74.1*	*100.0*	*65.7*	*71.9*	***65.7***	*65.1*	*100.0*	*100.0*	*78.5*
State jurisdiction										
	State award or agreement	10.4	-	17.8[1]	17.6	**14.0**[1]	19.5[1]	-	-	10.0
	Unregistered arrangement (c)	2.8	-	5.1	4.1	**6.2**	4.7	-	-	2.9
	Total State jurisdiction	*13.2*	-	*22.8*	*21.7*	***20.3***	*24.3*[1]	-	-	*13.0*
Unable to be determined		12.6	-	11.5	6.4	**14.1**	10.6	-	-	8.6
Total		**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

[1] Estimate has a relative standard error of between 25 and 50 per cent and should be used with caution.

(a) Includes employees transitioning out of the federal jurisdiction.

(b) Employees transitioning into the federal jurisdiction.

(c) Includes employees receiving over award pay.

(d) Employees whose jurisdictional coverage for pay-setting was unable to be determined.

12 The Minister concludes that it is difficult to clearly and conclusively identify how many employees in WA are covered under the State industrial relations system. Looking at pay setting methods does not provide an accurate estimate of the coverage due to the large portion of undetermined jurisdiction and pay setting information. By using the Type of Legal Organisation (TOLO) of the employer, it is estimated that in 2006-07 there were approximately 22,383 unincorporated employing businesses in WA. Unincorporated businesses employ approximately 26.9% of WA's workforce and the WA State Government employs approximately 11.6% of WA's workforce. Relying upon the 2006 report to the Commission by Professor Plowman and analysis of unpublished data from the ABS *Employee, Earnings and Hours, Australia*, August 2008 (Catalogue 6306.0) it can be estimated that a maximum of 38.5% of WA employees will be subject to the General Order, although there is no information which can accurately identify the proportion of employees directly or indirectly affected.

[1] ABS, Jurisdictional coverage article, *Australian Labour Market Statistics, July 2009*, (cat. no. 6105.0)

Evidence from the Department of Treasury and Finance

13 In support of his submission, the Minister called evidence from Michael Eckermann, the Assistant Director of the Forecasting and Quantitative Services Division within the Department of Treasury and Finance (DTF). Mr Eckermann's evidence presented a comprehensive overview of global conditions and risks to the global outlook, domestic conditions, the labour market, wages, prices and the economic forecasts for the State. We express our thanks to Mr Eckermann for his presentation.

14 Mr Eckermann's key messages were that the recovery of the WA economy is strengthening but the next few years are not expected to be as strong as the previous resource-boom years; the outlook for the future is still quite complex; some capacity constraints are likely to develop over the next few years but not as severely as recent resource-boom years; and although the outlook is much better than a year ago, risks to the outlook remain acute, complex and very dynamic. Key domestic risks are interest rates moving higher than expected, the consequences of the unwinding of the domestic stimulus packages, the effect of the Commonwealth's proposed 40% RSPT and business investment volatility. We will refer further to Mr Eckermann's evidence in what is to follow in these Reasons.

Chamber of Commerce and Industry of Western Australia (Inc)

15 The CCIWA requests that the Commission should award only a moderate increase to the adult rate of pay. It proposes an increase of $12.00 per week up to the tradesperson level and a $10.00 increase to wage levels above the tradesperson rate, with a proportionate increase to juniors, trainees and apprentices. CCIWA submits this tiered approach is based upon a contemporary assessment of the facts and evidence to promote the role of the minimum wage as a safety net for low-paid employees. It says that an increase beyond that advocated by the CCIWA may result in job losses and otherwise disadvantage businesses recovering from the economic downturn.

16 CCIWA remains of the view that it is no longer sustainable that minimum wages should necessarily increase in each calendar year or that any increase should exceed inflation and there is no legislative presumption to the contrary. Although much of the economic risk and uncertainty in 2009 nationally and in WA has diminished, difficulties remain in forecasting the effects of an increase from the State Wage Case. Such difficulties are exacerbated by the uncertainty about the current global economic instability and the ramifications for the WA economy of the Commonwealth's proposed RSPT. The paramount concern should be support for business to retain and create jobs and to ensure that a strong and sustainable recovery is underpinned, not compromised. CCIWA presents a comprehensive submission which also addressed the criteria under s 50A(3) of the Act. The CCIWA supplied copies of

- the March quarter 2010 *WA Economic Compass – Outlook*;
- the *Commonwealth Bank – CCI Survey of WA Business Expectations* and the *Curtin Business School – CCI Survey of Consumer Confidence* for the March quarter 2010;
- the CCI *Profile of WA Business 2010*;
- the CCI Discussion Paper – *Women in the Workforce* – October 2008; and
- the ACCI Issues Paper - *Youth Employment* May 2010.

Australian Mines and Metals Association

17 AMMA submits that WA is again starting to benefit from an international environment where increasing commodity prices are favouring WA's export industries and in particular the mineral commodity export industries. The outlook for the WA economy in 2009-10 is a vast improvement on 2008-09 indicating that the WA economy can withstand a modest increase in the minimum wage without fuelling inflationary pressures or impacting unemployment growth. AMMA presents a detailed submission of significant resource projects in Australia with particular emphasis on the Gorgon Joint Venture on Barrow Island.

18 AMMA submits that the real value of the minimum wage should be maintained when the prevailing economic circumstances of the State are favourable. AMMA supports a modest increase to the minimum wage, similar increases to adult award wages and a proportionate increase to juniors, trainees and apprentices. The increase should not exceed the estimated 2010-11 CPI for Perth as stated in the WA State Budget. Economic growth in WA in 2008-09 was below that of the national economy and AMMA submits that the Commission should be cognisant of the fact that the State minimum wage is currently at a level which exceeds all other States and the federal minimum wage, and any further widening of the difference would not appear to be justified on current economic data.

Australian Hotels Association WA Branch

19 AHAWA submits that hospitality industry employees are more likely to be employed under the Award system than in most other industries. Any adjustment to the minimum wage significantly affects hospitality businesses and these have experienced difficult trading conditions over the past 12 months. The AHAWA submits details of the impact upon its members in regional areas and the impact of smoking, packaged liquor sales and utilities costs. The hospitality industry is primarily a 7-day business operation and any wage increase also flows on to overtime, allowances, superannuation and payroll tax.

20 AHAWA recommends that the increase to the minimum wage be $12.00 per week and be effective from 1 October 2010. If the increase to the minimum wage is to operate from 1 July 2010 then the increase in the hospitality awards should operate from 1 October 2010 to assist in reducing the significant operating costs for businesses in the 2010-11 financial year.

Trades and Labor Council of Western Australia

21 The TLC seeks a 5.5% increase to the minimum wage and to award wages. The TLC emphasises that this is not an extravagant amount when compared to increases granted to the minimum wage in 2008. The claim is comparable to the last two November national increases in Average Weekly Earnings (AWE) of 5.4% in 2008 and 5.9% in 2009, and is less than the November WA increase in the AWE of 7.9% in 2008 and 7.2% in 2009. The TLC submits that any increase less than the TLC claim will not keep minimum wage earners up with earnings elsewhere in the economy. The TLC submits that minimum wage earners in WA are falling behind minimum wage earners in other States relative to mean weekly full-time earnings in WA and in other States respectively.

22 The TLC states that the threat of the global financial crisis has receded and that the WA and national economies have performed better than anticipated. It submits that employees reliant on the minimum and award wages should benefit from that improved outlook. It refers to the CPI and to the WPI for WA and nationally, and states that price increases in education, health and in utilities were higher for Perth than for the rest of Australia. The TLC submits that recent increases in the cost of utilities announced in the WA Budget are likely to be felt most by minimum wage earners. The TLC presents information about housing affordability movements as a proportion of the minimum wage compared to movements in average weekly earnings. It also presents evidence in support of its submission that WA has a persistently higher gender pay gap than the rest of Australia and submits that the increase it claims would stop the gap from widening.

WA Council of Social Services

23 WACOSS endorses the claim of the TLC for a 5.5% increase to the minimum wage. This would take into account a significant increase in the price of utilities, an increase in the CPI in the year to March 2009 of 3.4% and an AWE increase in WA in the year to March 2009 of 7.2%. It submits that many West Australians living on low incomes continue to feel the adverse effects of the economic downturn despite the positive signs of recovery. Perth and WA continues to be an expensive place in which to live and the headline CPI figure is inadequate as a measure of the cost of living for low income earners due to the composition and weighting of the basket of goods used to calculate the CPI. While the ABS approach yields a useful and accurate measure of overall consumer price movements, WACOSS urges the Commission to have regard to the composition of low-income earners' budgets when judging the adequacy of any proposed increase to the minimum wage. An approach which merely aims to preserve the real value of the minimum wage by adjusting it by the 3.4% CPI movement for Perth to the March quarter will in fact represent a reduction in its real value. WACOSS presents information on the community services sector, the gender pay gap in WA and upon unemployment and underemployment and the effect of minimum wages. It attaches copies of its *Close the Gender Pay Gap* and *Cost of Living* papers of 2009.

Mr G. Gray

24 Mr Gray, who describes himself as a retired industrial agent, submits that employees aged 18, 19 and 20 should be paid as adults because at the age of 18, persons are eligible to vote, enlist in the armed services and serve in a theatre of war, consume alcoholic beverages, enter into commercial contracts and if convicted of a criminal offence be named and sent to an adult prison. Mr Gray acknowledges that the Commission does not have the jurisdiction under the *Minimum Conditions of Employment Act, 1993* to make these changes.

Mr F. Nicoletti

25 Mr Nicoletti, who is a teacher employed in a government high school, made a written submission referring to the cleaners, gardeners, support staff and education assistants. He submits that they carry out many tasks that are additional to their core duties and gave examples of these. He submits that a minimum wage increase of 5% be awarded to low wage earners over-and-above a wage adjustment that also matches a CPI and WPI increase in WA for the previous year and that this occur yearly from 2010.

CONSIDERATION

26 In the 2009 State Wage Order decision ((2009) 89 WAIG 735; [2009] WAIRC 00375), we noted the State's economy and the national economy had been significantly affected by the global financial crisis and observed that the outlook for the State's economy for 2009-10 was most uncertain. We accept the DTF overview of the current conditions, that over the second half of 2009 and into 2010 confidence returned, and there are now indications that WA is on relatively sturdy footing towards recovery. We also recognise the global and key domestic risks to this position.

27 In WA, employment grew for six consecutive months to March 2010, although it fell in April 2010. The State's unemployment rate fell and remains low at 4.7% in April 2010. The CPI to the March quarter 2010 from the March quarter 2009 was 3.4%; as measured in annual average growth, it was 2.25%. The movement in the CPI is much lower than that experienced in the economic upswing. Similarly, rates of growth of the State's WPI have been at a much slower pace. The annual average growth of the WPI in WA was 3.7% to March 2010. The Reserve Bank has raised interest rates on six occasions since October 2009 to a rate of 4.5% in May 2010.

28 For 2009-10 the DTF forecasts a 2.25% CPI increase for Perth from the previous financial year and the State's WPI is forecast to grow by 3.5% over the same period. The WA economy is expected to expand by 4.5% in 2010-11, the outlook for both employment and unemployment is positive and wages growth of 3.75% is forecast for that period. Nevertheless, WA's focus on global resource markets means it is particularly exposed to global economic conditions relative to other States.

29 In the context of the coverage of the General Order to issue from these proceedings, we pay particular attention to the information before us regarding those industry sectors which are likely to employ minimum-wage dependent employees. These are more likely to be small businesses. We note the Minister's submission that as measured by Gross Operating Surplus plus Gross Mixed Income, profits of WA industries as a whole increased by 5.1% in 2008-09 and that award-reliant industries such as accommodation, cafes and restaurants and retail trade continued to record profit growth during this period.

We also note the limitation of this measure when considering the capacity to pay of employers as a whole and the submission of CCIWA that it cannot be deduced with any certainty, especially in regard to low-paid/low skilled industries that there is a generalised capacity to pay by all or most employers. We acknowledge the AHAWA submission that many businesses have experienced a downturn in income and even losses in order to retain existing staff during the economic downturn and that since 2009 the hotel industry has experienced an across-the-board decrease of 8-15% on previous years' takings. Not all sectors of the economy are recovering at the same pace and the retail sector recorded only a 0.4% increase in turnover in March 2010 after a fall of 1.3% in February 2010.

30 The evidence before us is that some of WA economic indicators are tracking quite close to the national economic indicators. Table 1 of the Minister's Submission in Reply helpfully sets out a comparison of the major economic indicators for WA and for Australia. The evidence particularly from DTF shows the State's economy as measured by Gross State Product recorded growth of only 0.7% in 2008-09 compared with growth of 1.1% nationally. National CPI to the March quarter 2010 rose by 2.9% compared to WA's rise of 3.4%; the slowdown in the inflation rate in Perth was almost identical with national consumer price trends. WA's unemployment rate at 4.7% for April 2010 is the lowest in Australia and below the national rate of 5.3%. The State's annual average WPI growth is still higher than nationally although in year-ended terms the rates of wages growth are quite similar. Average weekly total earnings in WA were 5.6% higher in February 2010 than in February 2009, compared to growth of 5.7% nationally.

31 We turn to consider the level of the minimum wage in WA and in the other States. These are set out below.

Jurisdiction	State minimum wage	Effective date
New South Wales	$568.20	30 July 2009
Western Australia	$569.70	1 July 2009
Tasmania	$558.10	27 July 2009
South Australia	$560.65	21 August 2009
Queensland	$568.20	1 September 2009

32 The minimum wages in other States and in WA range between $558.10 and $569.70, respectively. As we observed in our 2009 decision, these differences have occurred because of the differing legislative criteria which each court or tribunal is required to observe and the differing economic circumstances experienced by each State. We consider that the referral on 1 January 2010 by the States of NSW, Queensland, South Australia and Tasmania to the Commonwealth of their coverage of the unincorporated private sector is significant. In those States, the States' minimum wages will apply primarily to employees of State and local government where the impact of the minimum wage is not likely to be as significant as it would have been in the unincorporated private sector. Accordingly, the minimum wages of the other States now have less relevance to our consideration.

33 In the 2009 decision, we referred to the changes to the setting of the minimum wage under the *Fair Work Act 2009* (Cth) (the FW Act) to occur in 2010. Section 285(2) of the FW Act obliges Fair Work Australia (FWA) to complete an annual review in each financial year during which FWA:

> "(2) …
>
> (a) must review:
>
> (i) modern award minimum wages; and
>
> (ii) the national minimum wage order; and
>
> (b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
>
> (c) must make a national minimum wage order."

34 The statutory criteria by which FWA is to reach its determination are as follows:

> "**284 The minimum wages objective**
>
> *What is the minimum wages objective?*
>
> (1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

(b) promoting social inclusion through increased workforce participation; and

(c) relative living standards and the needs of the low paid; and

(d) the principle of equal remuneration for work of equal or comparable value; and

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability."

35 The FWA delivered its decision in the Annual Wage Review 2009-10 on 3 June 2010 ([2010] FWAFB 4000). Section 50A(3)(f) of the Act obliges the Commission to take into consideration relevant decisions of other industrial courts and tribunals, and we consider that FWA is within that description. We acknowledge, as the Minister has submitted, that the statutory criteria in the FW Act does not require consideration of the state of the WA economy, the WA award framework or relevant decisions of other industrial courts or tribunals. Nevertheless, we note also that CCIWA considers that minimum wage movements in other jurisdictions should be given more, not less, weight as a guide. We also note that CCIWA and AMMA submit that any further widening of the difference between the State minimum wage and all other States and the federal minimum wage would not appear to be justified on current economic data.

36 Further, notwithstanding that s 284(1) of the FW Act does not include those matters to which the Minister has drawn to our attention, we consider it significant that s 284(1) obliges FWA to establish and maintain a safety net of fair minimum wages. Sections 50A(3)(a)(i) and (iii) require us to take fairness into consideration as follows:

"(3) In making an order under this section, the Commission shall take into consideration —

(a) the need to —

(i) ensure that Western Australians have a system of fair wages and conditions of employment;

(ii) …

(iii) provide fair wage standards in the context of living standards generally prevailing in the community."

37 The safety net of fair minimum wages determined by FWA applies throughout Australia to the unincorporated private sector to which the General Order to issue from these proceedings will have particular application. We accept the CCIWA description of the employing businesses in the private sector in WA which fall within the State's jurisdiction as a "small minority" (submission [268]) and note that correspondingly, the safety net of fair minimum wages determined by FWA is applicable to the majority of employees in the private sector in WA.

38 Importantly too, the minimum wage set by FWA operates from 1 July 2010 (s 286(1) of the FW Act) which is the same date as the operation of the General Order to issue from these proceedings. The timing of the FWA Annual Wage Review and the date of operation of the minimum wage to be set by FWA is contemporaneous with the obligations on this Commission under s 50A of the Act. For all of these reasons, we consider the decision of the FWA in its Annual Wage Review to be a relevant consideration under s 50A(3)(f) of the Act.

39 The federal minimum wage is now $569.90 per week representing a $26.00 per week increase to the previous federal minimum wage of $543.90 set in July 2008. WA's minimum wage is almost the same figure: $569.70. The $26.00 per week increase resulting from the FWA decision is an increase which, in part, takes into account that there had been no increase to the federal minimum wage since July 2008. FWA took into account the developments of the last two years in reaching its decision (see [2010] FWAFB 4000 at [330]). However, in the last two years in WA we awarded a $12.30 per week increase to the minimum wage which came into effect in October 2009. Our consideration will necessarily need to consider the circumstances particular to the WA economy since our last decision.

40 We consider that the evidence that the WA economy is on a relatively sturdy footing towards recovery and strengthening compared to the position last year suggests that to:

(i) ensure that Western Australians have a system of fair wages and conditions of employment;

(ii) meet the needs of the low paid;

(iii) provide fair wage standards in the context of living standards generally prevailing in the community; and

(iv) contribute to improved living standards for employees,

an increase to the minimum wage greater than the increase of $12.30 granted in 2009 is warranted. However, the fact that the economy is not as strong as the boom years is seen particularly from the submissions of CCIWA and AHAWA in relation to those industries with a significant number of unincorporated businesses.

41 We set out below the increases to the minimum wage in WA since s 50A was enacted in 2006.

Year	Increase to Minimum Wage
1 July 2006[2]	$20.00
1 July 2007[3]	$24.00
1 July 2008[4]	$29.00
1 July 2009[5]	$12.30

42 In relation to the minimum wages we have set, we note the Minister's submission that a comparison of real wage movements in average weekly ordinary time earnings illustrates that the WA minimum wage has declined relative to AWE over the 10 years to December 2009. A comparison of the WA minimum wage with WA's WPI and CPI for Perth shows that the WA minimum wage has broadly tracked WPI and CPI movements over the 10 years to December 2009. We note also that the real increase to the minimum wage over the past decade has been 6.3%. We are conscious that the gender pay gap in WA is greater than for the rest of the country although it is not entirely clear what effect increases to the minimum wage, including the $29.00 per week increase granted in 2008, have had upon the gender pay gap in this State.

43 The cost of living as measured by the CPI to the March quarter 2010 is greater in Perth at 3.4% than it is nationally at 2.9%. There have recently been significant increases to utility costs in WA although we are conscious that these are borne not just by the low-paid employees referred to in s 50A(3)(ii) of the Act but also by their employers. Although there is room for optimism that there is a capacity of employers as a whole to bear the costs of an increased minimum wage, there is still some way to go before the effects of the global financial crisis can be said to have passed.

44 Given that the risks to the economic outlook for WA remain uncertain, we consider it appropriate to adjust the minimum wage by reference to movements in the cost of living in WA which is measured as 2.25% in annual average terms and 3.4% for the year since our last decision. We do not disregard the criticisms presented particularly by WACOSS of the adequacy of the CPI in measuring the costs incurred by low-paid employees, however we consider the CPI to be the most appropriate and widely accepted measure for our purposes. We consider that an amount some $5.00 more than the increase of $12.30 awarded by us last year adequately recognises the strengthening of the economy since July 2009 whilst taking into account both the risks to the WA economy and those industry sectors which have experienced difficult trading conditions over the past 12 months.

45 An increase of $17.50 per week is not an increase beyond inflation and in the context of the existing WA minimum wage will, to the extent we consider possible in the current economic climate, maintain WA's system of fair wages and conditions of employment, meet the needs of the low-paid and provide fair wage standards in the context of living standards generally prevailing in the community. We consider it will be unlikely to impact adversely on the level of employment, inflation and productivity in WA. It will have the effect of reducing the current difference between the WA and federal minimum wages of $25.80 to a difference of $17.30.

CONCLUSION

46 We have therefore concluded that the minimum wage will be set at $587.20. We consider also that the economic evidence before us does not warrant a departure from the presumption in s 50A(5) of the Act that the State Wage order takes effect on 1 July in the year it is made and the minimum wage to be set also takes effect from that date. The new minimum wage will take effect from the commencement of the first pay period on or after 1 July 2010.

47 We are obliged by s 50A(4) to ensure, to the extent possible, that there is consistency and equity in relation to the variation of awards. No person appearing submitted that we should not correspondingly adjust rates of wages paid under awards. Given that position, and the role of awards in providing fair wage standards, we will adjust award wages by $17.50 per week from the first pay period on or after 1 July 2010. The increase will apply only to employees who are paid the award wage; any wage paid over the award wage is able to be used to offset the increase. In relation to the submissions of Mr Nicoletti, s 50A of the Act does not permit specific regard to be given to individual classifications within individual awards, nor for those individual classifications to be treated differently from the conclusions we have reached.

The Minimum Weekly Rate of Pay Applicable to Apprentices and Trainees

48 Section 50A(3)(a)(vi) requires the Commission to take into consideration the need to encourage ongoing skills development. The evidence before us shows that previous minimum wage increases for apprentices and trainees have not discouraged their uptake in WA. We accept the Minister's submission (at [39]) that a responsible increase to minimum apprentice and trainee wages, having regard to ss 13 and 14 of the MCE Act, award relativities and the methodology applied by the Registrar in previous State Wage orders, will not have a detrimental effect on the uptake of training arrangements in the current economic climate.

49 No submissions were put to us on this occasion to warrant a departure from the manner by which the Commission has previously set minimum wages applicable to adult apprentices (see (2006) 86 WAIG 3129), and to apprentices and trainees generally. We propose to apply the increase to adult apprentices, other apprentices and to trainees in accordance with the usual practice of the Commission. The submission of Mr Gray recognises the inherent legislative difficulties in his submission and we do not take his submission any further.

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[2] (2006) 86 WAIG 2683; date of operation 1 September 2006
[3] (2007) 87 WAIG 1487; date of operation 1 July 2007
[4] (2008) 88 WAIG 773; date of operation 1 July 2008
[5] (2009) 89 WAIG 735; date of operation 1 October 2009

Part-time and School-based traineeships

50 The Minister has drawn our attention to the current provision in Clause 6(e) of the 2009 General Order. This clause was first introduced following a minimum wages review in 2003[6] and is modelled on the National Training Wage Award 2000 (the NTW Award). In 2009 the *Vocational Education and Training Award Act 2006* (WA) (the VET Act) was amended to ensure that apprentices and trainees are paid for all time spent in training, and the provisions of Clause 6(e)(ii) of the 2009 General Order is now inconsistent with that legislation. Pursuant to s 60B of the VET Act, that Act takes precedence over the General Order and therefore Clause 6(e)(ii) should be deleted. This was not opposed by any person appearing and we also agree that Clause 6(e)(ii) should be deleted.

51 Further, the Minister submitted that there is some confusion over the appropriate rates of pay for school-based trainees. This arises because it is not clear whether the provision in Clause 6(e)(i) refers to the highest year of schooling completed or the current year of schooling. The Minister recommends that this confusion be addressed by adopting similar formatting to that expressed in the NTW Award. We agree that this does reflect the intention of Clause 6(e)(i) and no person appearing objected to the Minister's suggestion that Clause 6 be replaced with a new Clause as proposed by the Minister. This will be done and the change is reflected in the Minute which issues.

Industry/Skill Levels

52 As in previous years, the Minister has provided an updated industry/skill level classifications table based on advice from the Department of Education and Training. This updated table will be included in Attachment A to the 2010 State Wage order to issue. We thank the Minister for providing this information and for the helpful submissions presented in relation to the part-time and school-based traineeships issues.

THE STATE WAGE PRINCIPLES

53 No person suggested that any change is required to be made to the State Wage Principles. Section 50A(1)(d) of the Act obliges the Commission to set out a statement of principles to be applied and followed in relation to the exercise of jurisdiction to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment. The Statement of Principles July 2010 to issue remains unchanged from the Statement of Principles July 2009 apart from the necessary and consequential amendments to Principle 9.

MINUTE OF PROPOSED GENERAL ORDER

54 A minute of proposed General Order now issues. The Commission should be advised by 2:00pm on Tuesday, 15 June 2010 whether or not a speaking to the minutes is requested. If a speaking to the minutes is necessary, it will be dealt with on the papers and written submissions should be received by 10.00am on Friday, 18 June 2010.

2010 WAIRC 00347

2010 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 16 JUNE 2010
FILE NO.	APPL 2 OF 2010
CITATION NO.	2010 WAIRC 00347

Result	2010 State Wage order issued
Representation	Mr A Lyon, and with him Ms S Haynes, on behalf of the Hon. Minister for Commerce
	Mr J Ridley on behalf of the Chamber of Commerce and Industry of WA (Inc.)
	Mr D Ellis on behalf of the Trades and Labor Council of WA

[6] (2003) 83 WAIG 3537

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2010 State Wage order and thereby orders as follows:

1. THAT the 2010 State Wage order takes effect on 1 July 2010.

2. THAT the General Order which issued in matter No. APPL 1 of 2009 ((2009) 89 WAIG 747) is rescinded with effect on and from the commencement of the first pay period on or after 1 July 2010.

3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be $587.20 per week on and from the commencement of the first pay period on or after 1 July 2010.

Apprentices

4. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:

   (a) In relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.

   (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2010:

	1 July 2010
Four Year Term	
First year	$286.02
Second year	$374.55
Third year	$510.75
Fourth year	$599.28
Three and a Half Year Term	
First six months	$286.02
Next year	$374.55
Next year	$510.75
Final year	$599.28
Three Year Term	
First year	$374.55
Second year	$510.75
Third year	$599.28

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be $510.75 per week on and from the commencement of the first pay period on or after 1 July 2010.

Trainees

6. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship ("trainee") shall be:

   (a) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant award where an employer-employee agreement is in force.

   (b) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the *Metal Trades (General) Award* contained in Table 1 as follows:

   Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2010:

Industry/Skill Level A			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	201.00	240.00	296.00
Plus 1 year out of school	240.00	296.00	342.00
Plus 2 years	296.00	342.00	400.00
Plus 3 years	342.00	400.00	458.00
Plus 4 years	400.00	458.00	
Plus 5 years or more	458.00		
Industry/Skill Level B			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	201.00	240.00	287.00
Plus 1 year out of school	240.00	287.00	327.00
Plus 2 years	287.00	327.00	385.00
Plus 3 years	327.00	385.00	440.00
Plus 4 years	385.00	440.00	
Plus 5 years or more	440.00		
Industry/Skill Level C			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	201.00	240.00	279.00
Plus 1 year out of school	240.00	279.00	313.00
Plus 2 years	279.00	313.00	352.00
Plus 3 years	313.00	352.00	395.00
Plus 4 years	352.00	395.00	
Plus 5 years or more	395.00		

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

Australian Qualification Framework (AQF)

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

Part-time and School-Based Trainees

(e) This provision shall apply to trainees who undertake a traineeship on a part-time basis, or as a school-based trainee, by working less than full-time hours and by undertaking the approved training at the same or lesser training time than a full-time trainee.

(i) School-based trainees will receive the following minimum hourly rates of pay, as for school leavers:

	Current year of schooling	
	Year 11	Year 12
Wage levels A, B and C	$5.29	$6.32

(ii) The minimum hourly rate of pay for part-time trainees shall be calculated by taking the full-time rates expressed in Clause 6(b) Table 1 and dividing that rate by 38 in accordance with section 10 of the *Minimum Conditions of Employment Act 1993* (WA).

(iii) As per the requirement under 60E(1)(iv) of the *Vocational Education and Training Act 1996* (WA), any time spent by a trainee in performing his or her obligations under the training contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer.

(f) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force and who has reached 21 years of age, the minimum weekly rate of pay is the rate of pay that applies to that class of trainee determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship under the award or under the relevant award where an employer-employee agreement is in force.

(g) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is entered into and who has reached 21 years of age, the minimum weekly rate of pay shall be that determined by reference to the highest weekly wage rate for the skill level relevant to the traineeship set out below:

On and from the commencement of the first pay period on or after 1 July 2010 -

Industry/Skill Level A	$458.00 per week
Industry/Skill Level B	$440.00 per week
Industry/Skill Level C	$395.00 per week

7. THAT

(a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b).

(i) AWU National Training Wage (Agriculture) Award 1994;

(ii) Food Industry (Food Manufacturing or Processing) Award;

(iii) Furniture Trades Industry Award;

(iv) Licensed Establishment (Retail and Wholesale) Award 1979;

(v) Metal Trades (General) Award;

(vi) Motor Vehicles (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;

(vii) Printing Award;

(viii) Sheet Metal Workers' Award No. 10 of 1973;

(ix) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;

(x) Soft Furnishings Award; and

(xi) Vehicle Builders' Award 1971.

(b) Trainee rates be adjusted as follows:

(i) Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.

(ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.

(iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the former is adjusted in line with the latter rate in order to maintain consistency.

Award Rates of Pay

8. THAT weekly rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by $17.50 per week on and from the commencement of the first pay period on or after 1 July 2010 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.

9. THAT any increase to wages resulting from this State Wage order on and from the commencement of the first pay period on or after 1 July 2010, unless provided for elsewhere, shall be calculated on the basis that:

(a) Where the award prescribes an adult fortnightly rate of pay, the fortnightly rate of pay is increased by $35.00 per fortnight.

(b) Where the award prescribes an adult annual rate of pay, the annual rate of pay is increased by $913.00 per annum.

(c) Where the award prescribes an adult hourly rate of pay, the hourly rate of pay is increased by the amount of $17.50 per week divided by the number of ordinary hours of work prescribed by the relevant award for a full-time employee. Where applicable, casual loadings are to be calculated based on the hourly rate.

10. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of $17.50 per week to the adult award wage on and from the commencement of the first pay period on or after 1 July 2010.

11. THAT increases under previous State Wage Case decisions prior to 1 July 2010, except those resulting from enterprise agreements, are not to be used to offset this State Wage order increase of $17.50 per week.

12. THAT on and from 1 July 2010 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:

(a) deleting the amount of "$569.70" wherever it appears and inserting in lieu the amount of "$587.20".

(b) Deleting the words "$497.60 per week on and from the commencement of the first pay period on or after 1 October 2009" in the Adult Apprentices section and inserting in lieu the words "$510.75 per week on and from the commencement of the first pay period on or after 1 July 2010".

(c) Deleting the dates "1 July 2009" or "1 October 2009" wherever they appear and inserting in lieu the date "1 July 2010".

(d) Deleting the words "2009 State Wage order decision" wherever they appear and inserting in lieu the words "2010 State Wage order decision".

Statement of Principles

13. THAT the Statement of Principles – July 2009 under the General Order in matter No. Appl 1 of 2009 be replaced by the Statement of Principles – July 2010 in Schedule 2.

Publication

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

COMMISSION IN COURT SESSION

ATTACHMENT A

INDUSTRY / SKILL LEVEL A (as at May 2010)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Aeroskills Industry (MEA)	
Aeroskills (Aircraft Mechanical)	II
Aeroskills Engineer - Avionics	Diploma
Aeroskills Engineer – Mechanical	Diploma
Aviation (AVI)	
Aviation Flight Operations	II & III
Aviation Ground Operations & Service	II & III
Beauty (WRB)	
Beauty Services	III
Beauty Therapy	IV
Business Services (BSB)	
Business Administration	III & IV
Business	II & III & IV
Customer Contact	III & IV
Legal Administration	III & IV
Recordkeeping	III & IV
Marketing	IV
Human Resources	IV
Medical Administration	III
Union Recruitment and Organising	IV
Civil Construction (RII)	
Bituminous Surfacing	II & III
Civil and Structural Engineering Draftsperson	Diploma
Civil Construction	II & III
Civil Construction Manager	Diploma
Civil Construction Senior Designer	Advanced Diploma
Civil Construction Senior Manager	Advanced Diploma
Civil Construction Supervisor	IV
Civil Construction Designer	IV & Diploma
Civil Foundations	III
Plant Operations	III
Pipelaying	III
Road Marking	III
Road Construction and Maintenance	III
Bridge Construction & Maintenance	III
Trenchless Technology	III
Tunnel Construction	III
Community Services (CHC)	
Career Development Officer	III & IV
Community Care Work	III
Community Services (Aged Care Work)	III & IV
Community Services (Children's Services)	III
Community Services (Youth Work)	III

Community Services Contact Work	II
Community Services Support Work	II
Community Services Work	II & III & IV
Disability Work	III & IV
Aboriginal & Islander Education Worker	III & IV
Aboriginal Child Care Work	III
Child Care Worker	Diploma
Before & After School Care Supervisor	Diploma
Bi-Lingual/Bi-Cultural Community Services Work	II & III
Christian Ministry Work	III & IV & Diploma
Out of School Hours Care Work	IV
Social Housing Work	III & IV
Protective Care Worker	IV
Youth Work	IV
Construction Plumbing and Services (CPC)	
Building Maintenance	II
Concreting	III
Dogging	III
Drainage	II
General Construction	II
General Construction (Demolition)	III
Estimating (Housing)	IV
Site Management	IV
Scaffolding	III
Rigging	III
Steel fixing	III
Residential Drafting	IV
Correctional Services (CSC)	
Correctional Practice (Custodial)	III & IV
Correctional Practice	III & IV
Financial Services (FNS)	
Financial Services	III & IV
Financial Services (Accounts Clerical)	III
Financial Services (Financial Practice Support)	IV
Financial Services (Accounting)	IV
Financial Services (Superannuation)	IV
Financial Services Bookkeeping	IV
Insurance Services	III & IV
Drilling(RII)	
Drillers Operations	II & IV
Driller	III
Drilling (Mining Exploration)	II, III & IV
Electricity Supply – Generation (UEP)	
ESI Generation (Electrical/Electronic)	IV
ESI Generation (Mechanical)	IV
ESI – Generation Operations Manager	Diploma
Electrical/Electronic Service Technician	Diploma
ESI Generation (Operations)	III & IV
ESI Generation (Systems Operations)	IV
Electricity Supply – Transmission, Distribution, Rail (UET)	
ESI Cable Jointing	III
ESI - Power Systems Manager	Diploma & Adv Diploma
ESI Distribution (Powerline)	III
Lineworker (Transmission)	III
Electrotechnology (UEE)	
Antennae Equipment	II
Appliance Servicing - Refrigerants	II
Business Equipment Servicing	II
Fire Alarms Servicing	II
Hazardous Areas	IV
Refrigeration and Air Conditioning Systems	IV
Remote Area Essential Service	II
Electrotechnology Systems Electrician	IV

Computer Assembly & Repair	II
Computer Systems	IV
Computer Systems Engineer	Diploma & Adv Diploma
Data and Voice Communications	II & III
Electrical/Electronic Service Technician	Diploma
Electrical Engineer	Diploma & Adv Diploma
Electronic Assembly	II
Electronics	II
Electronics and Communications	IV
Electronics & Communications Engineering	Diploma & Adv Diploma
Industrial Electronics and Control	IV
Renewable Energy	II
Security Assembly and Setup	II
Video and Audio Systems	IV
Winding and Assembly	II
Floristry (WRF)	
Floristry	III & IV
Food Processing (FDF)	
Food Processing	III
Food Processing (Wine)	III
Food Processing (Sales)	III
Pharmaceutical Manufacturing	III
Furnishing (LMF)	
Soft Furnishing	III
Gas Industry (UEG)	
Gas Operations	III & IV
Gas Industry Advanced Technician	Advanced Diploma
Gas Industry Operations	II, III & IV
Gas Industry Technician	Diploma
Gas Operations	III & IV
Information and Communication Technology (ICA)	
Information Technology	II & III
Information Technology (Networking)	IV
Information Technology (Websites)	IV
Information Technology (Multimedia)	IV
Information Technology (Support)	IV
Information Technology (Systems Analysis & Design)	IV
Laboratory Operations(MSL)	
Sampling and Measurement	II
Laboratory Skills	III
Laboratory Techniques	IV
Laboratory Technician	Diploma
Senior Laboratory Technology	Advanced Diploma
Local Government (other than operational works) (LGA)	
Local Government	II & III
Local Government Administration	IV
Local Government Planning	IV
Manufacturing (MEM)	
Aluminium Window and Frames	II
Aluminium Windows and Frames Manufacturing	II
Glass Processor	II
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Metal and Engineering (MEM)	
Engineering Assistant	Advanced Diploma
Engineering Production	II
Engineering Technician	III
Draftsperson	Diploma
Production Systems (Surface Finishing)	III
Engineering (Advanced Trade)	Diploma
Engineering – Higher Engineering Trade	IV
Metallurgical Technician	Diploma & Adv Diploma
Production Systems (Foundry)	III

Production Systems (General Engineering)	III
Production Systems (Surface Finishing)	III
Metalliferous Mining (RII)	
Underground Metalliferous Mining	II & III & IV
Underground Metalliferous Mining Manager	Diploma
Museum and Library/Information Services (CUL)	
Library and Information Services	II & III & IV
Museum Practice	II & III
Plastics, Rubber and Cablemaking (PMB)	
Plastics	III
Process Manufacturing	III
Polymer Technology	IV
Plastics – Film	III
Plastics – Blow Moulding	III
Plastics – Extrusion	III
Plastics – Fabrication	III
Plastics – Injection Moulding	III
Plastics – Thermoforming	III
Plastics – Rotational Moulding	III
Plastics – Polystyrene	III
Rubber	III
Process Manufacturing (Rubber - Injection Moulding)	III
Rubber - Belt Splicing	III
Rubber – Rubber Lining	III
Process Manufactured Mineral Products	III & IV
Process Plant Operations	III
Process Plant Technology	IV
Process Support	III
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Process Plant Advanced Technician	Diploma
Public Safety (PUA)	
Firefighting Operations	III
Policing	Diploma
Public Sector (PSP)	
Government	II & III & IV
Government – Fraud Controller	IV
Government – Investigator	IV
Property Services(PRM)	
Property Management	IV
Spatial Services Technician	Diploma
Surveyor	Diploma
Retail (including Wholesale and Community Pharmacy) (SIR)	
Retail	III
Retail Management	IV
Community Pharmacy	III
Wholesale	III
Telecommunications (ICT)	
Telecommunications	II & III
Telecommunications Cabling	II
Telecommunications (Access Network)	II
Telecommunications (Cabling & Customer Premises Equipment)	III
Telecommunications Engineering	IV
Customer Contact	III & IV
Data and Voice Communications	II & III
Telecommunications Engineering	IV
Textile Clothing and Footwear (LMT)	
Textile Fabrication	III
Textile Production	III
Laundry Operations	III
Clothing Production	III & IV
Dry Cleaning Operations	III
Early Stage Wool Processing	III

Leather Production	III
Footwear Repair	III
Tourism, Hospitality and Events (THC: SIT: CUE)	
Events Technical	III
Hospitality (Accommodation Services)	III
Hospitality (Food and Beverage)	III
Hospitality – (Asian Cookery)	II
Hospitality – (Catering Operations)	II
Hospitality – (Commercial Cookery)	II
Hospitality – (Patisserie)	II
Hospitality – (Operations)	II & III
Hospitality Gaming	III
Hospitality - Supervision	IV
International Retail Travel Sales	III
Tourism (Attractions and Theme Parks)	II
Tourism (Guiding)	II & III & IV
Tourism (Sales/Office Operations)	II
Tourism (Visitor Information Services)	III
Venues & Events (Customer Service)	III
Costume for Performance	IV
Live Production Theatre & Events	II
Entertainment (Front of House)	II
Live Production Theatre & Events (Technical Operations) Lighting	III & IV
Live Production Theatre & Events (Technical Operations) Vision Systems	III & IV
Live Production Theatre & Events (Technical Operations) Audio	III & IV
Transport and Distribution (TLI)	
Integrated Rating	III
Logistics Operations	III
Cash in Transit	III
Transport and Distribution (Marine Engine Driving)	III
Transport and Distribution (Maritime Operations)	III
Mobile Cranes	III
Rail Infrastructure	III
Rail Operations	III & IV
Road Transport	III & IV
Stevedoring	III
Warehousing & Storage	III & IV
Water Industry(NWP)	
Water Operations	III & IV

INDUSTRY / SKILL LEVEL B (as at May 2010)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Animal Care & Management (RUV)	
Veterinary Nursing	IV
Animal Studies	II
Animal Technology	III
Captive Animals	III
Companion Animal Services	III & IV
Animal Control and Regulation	IV
Asset Maintenance (PRM)	
Asset Maintenance (Cleaning Operations)	II & III
Asset Maintenance (Waste Management)	II & III
Asset Maintenance (Fire Protection Equipment)	II & III
Pest Management Technician	III
Australian Meat Industry (MTM)	
Meat Processing (Abattoirs)	II
Meat Processing (Boning)	III
Meat Processing (Food Services)	II & III
Meat Processing (General)	III
Meat Processing (Rendering)	III
Meat Processing (Smallgoods) Manufacture	III
Meat Processing (Smallgoods) General	II & III

Meat Processing (Slaughtering)	III
Meat Processing (Leadership)	IV
Meat Processing (Quality Assurance)	IV
Automotive Industry Manufacturing (THC)	
Recreational Vehicle Production Assistant	II
Recreational Vehicle Production Team Leader	III
Automotive Industry/Retail Service and Repair (AUR)	
Automotive (Administration)	II & III
Automotive Administration (Rental Vehicles)	III
Automotive Electrical Technology	II
Automotive Management	IV & V
Automotive (Mechanical)	II
Automotive (Sales)	II & III
Automotive (Vehicle Body)	II
Automotive Aftermarket Warehousing Distribution Operations	II & III
Bicycles	II
Marine	II
Outdoor Power Equipment	II
Vehicle Servicing	II
Automotive Retail Service and Repair (Tyre Fitting)	III
Mechanical Driveline	II
Mechanical Engine Overhaul	II
Mechanical Hydraulics	II
Mechanical Machine Assembly	II
Mechanical Transmissions	II
Beauty (WRB)	
Make-Up Services	II
Nail Technology	II
Retail Cosmetic Services	II
Caravan Industry (THC)	
Caravan Park Operations	II & III
Civil Construction (RII)	
Civil Construction for entry level Indigenous Workers	I
Community Recreation Industry (SRC)	
Community Recreation	II & III
Extractive Industries(RII)	
Extractive Industries Senior Manager	Advanced Diploma
Field/Exploration Operations	II
Minerals Processing	Diploma
Resource Processing	II & III & IV
Surface Extraction Operations	II & III & IV
Surface Operations Manager	Diploma
Fitness Industry (SRF)	
Fitness	III & IV
Floristry (WRF)	
Floristry	II
Food Processing Industry (FDF)	
Food Processing	II
Food Processing (Sales)	II
Food Processing (Wine)	II
Forest and Forest Products Industry (FPI)	
Forest Growing and Management	II & III
Harvesting & Haulage	II & III
Sawmilling and Processing	II & III
Timber Manufactured Products	II & III
Timber Merchandising	II & III
Wood Panel Products	II & III
Production Technician (Timber)	IV
Forester (Operations)	IV
Furnishing (LMF)	
Furnishing (Flooring)	II
Furnishing (Polishing)	II
Furnishing (Upholstery)	II

Furniture Making	II
Glass and Glazing	II
Interior Design – Retail Services	III
Picture Framing	III
Soft Furnishing	II & III
Gas Industry (UEG)	
Gas Industry Advanced Technician	Adv Diploma
Gas Industry Technician	Diploma
Gas Industry Operations	II & III & IV
Health (HLT)	
Aboriginal Environmental Health	II & III
Allied Health Assistance	III & IV
Client/Patient Support Services	III
Dental Assisting	III & IV
Health Service Assistant	III
Health Support Services	II & III
Optical Dispensing	IV
Sterilization Services	III
Local Government (Operational Works) (LGA)	
Local Government (Operational Works)	Diploma
Metal and Engineering (MEM)	
Engineering – Production	II
Aluminium Windows and Frames Manufacturing	II
Winding & Assembly	II
Outdoor Recreation (SRO)	
Outdoor Recreation	III & IV
Community Recreation	II & III
Sport and Recreation	II & III & IV
Plastics, Rubber and Cablemaking (PMB: PMC)	
Process Manufacturing	II
Process Manufacturing (Cablemaking)	II
Plastics	II
Plastics – Film	II
Plastics – Blow Moulding	II
Plastics – Composites	II
Plastics – Extrusion	II
Plastics – Fabrication	II
Plastics – Injection Moulding	II
Plastics – Thermoforming	II
Plastics – Rotational Moulding	II
Plastics – Polystyrene	II
Rubber	II
Rubber – Rubber Lining	II
Process Manufacturing (Rubber – Injection Moulding)	II
Rubber - Belt Splicing	II
Process Manufactured Mineral Products	II
Process Plant Operations	II
Process Support	II
Printing and Graphic Arts (ICP)	
Desktop Publishing	II
Graphic Arts Services	II
Print Production Support	II
Printing and Graphic Arts (Instant Print)	II
Printing and Graphic Arts (Multimedia)	III
Screen Printing	II
Property Services (CPP)	
Property Management	IV
Property Services (operations)	III
Technical Security	II & III
Security Operations	III
Hazardous Areas	IV
Spatial Services Technician	V
Surveying	IV & V

Retail (SIR) (including wholesale and Community Pharmacy)	
Retail	II
Community Pharmacy	II
Salon Assistant	II
Warehouse	II
Screen and Media (CUF)	
Broadcasting (Radio)	II & III & IV
Broadcasting (Remote Area Operations)	III
Broadcasting (Television)	III & IV
Screen	II & III & IV
Multimedia	II & III & IV
Sport Industry (SRS)	
Sport (Career Orientated Participation)	II &III
Textile, Clothing and Footwear (LMT)	
Clothing Production	III & IV
Dry Cleaning Operations	II & III
Footwear Repair	II & III
Laundry Operations	II & III
Leather Production	III
Textile Fabrication	III
Textile Production (Complex or Multiple Processes)	II
Textile Production	III
Transport and Logistics (TLI)	
Transport and Distribution (Aviation Flight Operations)	II
Aviation Ground Operations and Service	II
Transport and Distribution (Marine Engine Driving	II
Transport and Distribution (Maritime Operations)	II
Transport & Distribution (Maritime Operations – Coxswain)	II
Rail Infrastructure	II
Rail Operations	II
Road Transport	II
Stevedoring	II
Logistics Operations	II
Warehousing & Storage	II
Water Industry(NWP)	
Water Operations	II

INDUSTRY / SKILL LEVEL C (as at May 2010)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Amenity Horticulture (RTF)	
Horticulture	II & III & IV
Horticulture (Arboriculture)	II & III & IV
Horticulture (Floriculture)	II & III & IV
Horticulture (Landscape)	II & IV
Horticulture (Retail Nursery)	II & IV
Horticulture (Wholesale Nursery)	II & IV
Horticulture (Parks and Gardens)	II & IV
Horticulture (Turf)	II & IV
Conservation and Land Management (RTD)	
Conservation and Land Management	II & III & IV
Funeral Services (SIF)	
Funeral Services (Embalmer)	IV
Music (CUS)	
Music	III & IV
Music Industry (Foundation)	II
Music Industry (Technical Production)	III & IV
Music Industry (Business)	III
Racing Industry (RGR)	
Racing - Stablehand	II
Racing - Advanced Stablehand	III
Racing - Trackrider	III
Racing - Jockey	IV

Racing (Harness Driver)	III
Rural Production (RTE)	
Agriculture	II & III & IV
Agriculture (Beef Cattle Production)	III & IV
Agriculture (Dairy)	III
Agriculture (Goat Production)	III
Agriculture (Grain Production)	III
Agriculture (Horse Breeding)	III
Horticulture (Production)	II & III & IV
Agriculture (Pig Production)	III
Agriculture (Sheep and Wool)	III
Agriculture (Rural Merchandising)	III
Advanced Wool Handler	III
Irrigation	II & III & IV
Rural Operations	II & III
Shearing	II & III & IV
Wool Handling	II
Wool Clip Preparation	III
Wool Classing	IV
Seafood Industry (SIF)	
Seafood Processing	II & III
Seafood Sales and Distribution	II & III
Seafood (Aquaculture)	II & III & IV
Seafood (Fishing Operations)	II & III
Seafood (Fisheries Compliance)	III

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER

Awards that do not contain wages and are therefore excluded:

Alcoa Long Service Leave Conditions Award, 1980

Catering Employees' (North West Shelf Project) Long Service Leave Conditions Award 1991

Catering Workers' (North Rankin A) Long Service Leave Conditions Award No. A 40 of 1987

The Contract Cleaning (F.M.W.U.) Superannuation Award 1988

Health Care Industry (Private) Superannuation Award 1987

Hospital Salaried Officers (Joondalup Health Campus) Award, 1996

Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award

Miscellaneous Government Conditions and Allowances Award No A 4 of 1992

Miscellaneous Workers' (Security Industry) Superannuation Award, 1987

Ngala Superannuation Award

Printing Industry Superannuation Award 1991

Public Service Allowances (Fisheries and Wildlife Officers) Award 1990

Supported Employees Industry Award

The Swan Brewery Company Limited (Superannuation) Award 1987

West Australian Petroleum Pty Ltd Long Service Leave conditions Award 1991

Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984

Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks' (Racing Industry - Betting) Award 1978 **– Schedule C**

Iron Ore Production & Processing (Locomotive Drivers) Award 2006 - The – **Clause 2.1**

Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 **– Clause 6**

Shearing Contractors' Award of Western Australia 2003 **– Clause 4.3**

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

Clothing Trades Award 1973 **– Clause 18**

Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 **– Schedule F**

Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 **– Schedule I**

Egg Processing Award 1978 **– Appendix 4**

Electorate Officers Award 1986 **– Schedule G**

Family Day Care Co-Ordinators' and Assistants' Award, 1985 **- Schedule C**

Government Officers (Social Trainers) Award 1988 **– Schedule K**

Government Officers (State Government Insurance Commission) Award, 1987 **–**

Schedule D

Government Officers Salaries, Allowances and Conditions Award 1989 **- Schedule P**

Juvenile Custodial Officers' Award **– Schedule G**

Public Service Award 1992 **– Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2010

1. Application of the Statement of Principles

1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.

1.2 In these Principles, wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of employment will be referred to as "wages".

1.3 In making a decision in respect of any application brought under these Principles the primary consideration in all cases will be the merits of the application in accordance with equity, good conscience and the substantial merits of the case pursuant to section 26(1)(a) of the Act.

1.4 These Principles do not have application to Enterprise Orders made under section 42I of the Act or to applications made under section 40A of the Act to incorporate industrial agreement provisions into an award by consent.

2. (deleted)

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

3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:

3.1.1 To include previous State Wage Case increases in accordance with Principle 4.

3.1.2 To incorporate test case standards in accordance with Principle 5.

3.1.3 To adjust allowances and service increments in accordance with Principle 6.

3.1.4 To adjust wages pursuant to work value changes in accordance with Principle 7.

3.1.5 To adjust wages for total minimum adjustments in accordance with Principle 8.

3.1.6 To vary an award to include the minimum wage in accordance with Principle 9.

4. Previous State Wage Case Increases

4.1 Wage increases available under previous State Wage Case Decisions such as structural efficiency adjustments, and previous arbitrated safety net adjustments will, on application, still be accessible.

4.2 Minimum rates adjustments may also be progressed under this Principle.

5. Test Case Standards

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

6. Adjustment of Allowances and Service Increments

6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.

6.2 Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Case Decisions.

6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order in Principle 8.

6.4 In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.

6.5 Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7.

6.6 New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.

6.7 Where changes in the work have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant Principles of this Statement of Principles. The relevant Principles in this context may be Principle 7 and Principle 11.

6.8 New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of Principle 7 of this Statement of Principles.

7. Work Value Changes

7.1 Applications may be made for a wage increase under this Principle based on changes in work value.

7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.

7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.

7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.

7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.

7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.

7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.

7.10 The expression "the conditions under which the work is performed" relates to the environment in which the work is done.

7.11 The Commission should guard against contrived classifications and over-classification of jobs.

7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. Total Minimum Rate Adjustments

8.1 Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and State Wage order adjustments to be combined so that the award specifies only the total minimum rate for each classification.

8.2 By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates or weekly rates. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.

8.3 The State Wage order arising from this decision is $17.50 per week.

9. Minimum Adult Award Wage

9.1 A minimum adult award wage clause will be required to be inserted in all new awards.

9.2 The minimum adult wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

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

The minimum adult award wage for full-time employees aged 21 or more is $587.20 per week payable on and from the first pay period on or after 1 July 2010.

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

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

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

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

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

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

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

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2010 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Adult Apprentices

Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $510.75 per week on and from the commencement of the first pay period on or after 1 July 2010.

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

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

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

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

10.1 An application or reference for a variation in wages which is not made by an applicant under any other Principle and which is a matter or concerns a matter to vary wages above or below the award minimum conditions may be made under this Principle. This may include but is not limited to matters such as equal remuneration for men and women for work of equal or comparable value.

10.2 Claims may be brought under this Principle irrespective of whether a claim could have been brought under any other Principle.

10.3 All claims made under this Principle will be referred to the Chief Commissioner for him to determine whether the matter should be dealt with by a Commission in Court Session or by a single Commissioner.

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

11.1 The following shall apply to the making of wages in a new award (including an interim award) and an extension to an existing award:

11.1.1 In the making of wages in an interim award the Commission shall apply the matters set out in section 36A of the Act.

11.1.2 A new award (including an interim award) shall have a clause providing for the minimum award wage [see Principle 9] included in its terms.

11.1.3 In the extension of wages in an existing award to new work or to award-free work the wages applicable to such work shall ensure that any award or order made:

(1) meets the need to facilitate the efficient organisation and performance of work according to the needs of an industry and or enterprises within it, balanced with fairness to the employees in the industry or enterprises; and

(2) sets fair wages.

12. Economic Incapacity

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

13. Duration

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

FULL BENCH—Appeals against decision of Commission—

2010 WAIRC 00402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES AND OTHERS

APPELLANTS

-and-

RESPONDENT

CORAM FULL BENCH
THE HONOURABLE J H SMITH, ACTING PRESIDENT
COMMISSIONER S J KENNER
COMMISSIONER J L HARRISON

DATE WEDNESDAY, 7 JULY 2010

FILE NO/S FBA 3 – 12 OF 2010

CITATION NO. 2010 WAIRC 00402

Result	Order issued
Appearances	
Appellants	Mr S Melville (as agent)
Respondent	Mr B Tilbury

Order

HAVING heard Mr S Melville, as agent on behalf of the appellants, and Mr B Tilbury on behalf of the respondent; and

WHEREAS on 29 June 2010, the appellants filed a notice of application for leave to discontinue these appeals; and

WHEREAS on 1 July 2010, the respondent in writing informed the Full Bench that it consents to the appeals being discontinued;

NOW THEREFORE, the Full Bench pursuant to the powers conferred on it under the *Industrial Relations Act 1979* and the *Industrial Relations Commission Regulations 2005* reg 103A, hereby orders —

THAT these appeals be discontinued.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Application for Alteration of Rules—

2010 WAIRC 00391

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2010 WAIRC 00391
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	**:**	MONDAY, 28 JUNE 2010
DELIVERED	**:**	FRIDAY, 2 JULY 2010
FILE NO.	**:**	FBM 3 OF 2010
BETWEEN	**:**	THE ELECTRICAL AND COMMUNICATIONS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS) Applicant AND (NOT APPLICABLE) Respondent
CatchWords	**:**	Industrial law (WA) - Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - Qualification for membership rule - Statutory criteria satisfied - Application granted. *Income Tax Assessment Act 1997* (Cth) s 50-15; *Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(a), s 55(4)(b); s 55(4)(c), s 55(4)(d), s 55(4)(e), s 56(1), s 62(2), s 64(2).
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr K Kutasi and with him Mr M Nazareth

Reasons for Decision

THE FULL BENCH:

Introduction

1 This application by The Electrical and Communications Association of Western Australian (Union of Employers) (the applicant) was filed on 5 May 2010 and was made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The applicant, as a registered organisation under the Act, seeks the authorisation of the Full Bench for the Registrar to register an alteration to its qualification for membership rule.

2 The alterations the applicant proposes are to r 3 and r 4 of the rules of the applicant. These are as follows:

(Proposed alterations are indicated in bold print and underlined)

3 – QUALIFICATION FOR MEMBERSHIP

Membership shall be open to any person who is either an Electrical Contractor or a Communications Contractor and whose is substantially engaged in the work usually performed by either an Electrical Contractor or a Communications Contractor.

For the purposes of this clause:

a) Electrical Contractor means a person who holds an Electrical Contractors Licence and who ~~either is, or who~~ employs at least one person **(which may include themselves)** who is, a person who holds an Electrical Worker's Licence issued under the provisions of the Electricity (Licensing) Regulations 1991 (WA); and

b) Communications Contractor means a person ~~is either performs, or~~ who employs a person **(which may include themselves)** or persons who perform, work which is regulated by the Australian Communications **& Media** Authority under the provisions of the Telecommunications Act 1997 (Cth).

4 – ELECTION OF MEMBERS

(a) Any person, firm or company eligible for membership as aforesaid who desires to become a member of the Association, must be nominated by two members of the Association on the form provided by the Secretary and shall be balloted for at the next meeting of the Management Committee. Election to membership shall be by simple majority. The completed nomination form shall be accompanied by the required subscription under the provision of Rule 5.

b) The Management Committee shall have the power to receive and accept nominations for membership from those who are unable to provide members' signatures on their application forms. The election of those nominated must be by a two third majority of the Management Committee members present.

c) i) The Management Committee shall have the power to admit to provisional membership for the Association, for a period not exceeding one calendar year, companies licensed as Electrical Contractors within one year of such license being granted by the Electrical Contractors Licensing Board or its successor.

ii) Provisional members shall be exempt from the provisions of Rule 5 – Subscriptions.

iii) Provisional members shall not be empowered to vote at any meeting of the Association held pursuant to Rule 20 – General Meetings of the Association and shall not be eligible to hold any Office or position.

d) i) The ~~Management Committee~~ **Association** may ~~at its absolute discretion~~ accept ~~an application for~~ Associate ~~membership.~~ **members in the following circumstances;**

A) The organisation is one which performs a similar role to the Association in a similar or different industry grouping or:

B) Approval of the President has been given.

ii) Associate members shall be bound by Rule- 5 Subscriptions.

iii) Associate members shall not be empowered to vote at any meeting of the Association held pursuant to Rule 20 – General Meetings of the Association and shall not be eligible to hold any Office or position.

3 In written submissions filed on behalf of the applicant, the applicant stated the main objective of the proposed change to r 3 is to make it clear that self-employed electrical and communications contractors are entitled to join the Electrical and Communications Association of Western Australia (Union of Employers). Rule 3 currently provides that a member must 'employ at least one person'. As at 1 June 2010, 189 of the applicant's 643 members were self-employed. The applicant informed the Full Bench that the Australian Taxation Office (the ATO) advised the applicant in a private ruling in 2006 that as it was comprised of so many self-employed, it was not entitled to claim an exemption under s 50-15 of the *Income Tax Assessment Act 1997* (Cth) (the ITAA) from 'company tax' because such persons could not be said to be employers. Although the applicant's written submissions state the exemption sought is from company tax, s 50-15 of the ITAA provides an exemption from the payment of income tax to registered employer and employee associations. The applicant says it has accessed this provision since its registration by the Commission, as do all other registered organisations. Whilst the private ruling was later withdrawn by the ATO and the applicant has continued to claim an exemption pursuant to s 50-15 of the ITAA, the ATO has not formally declared the applicant to be exempt from the payment of company tax. The applicant and its members therefore seek to vary r 3 to clarify this matter and to make it clear that self-employed persons are entitled to enrol as members.

4 The applicant points out that s 7 of the Act defines an 'employer' as:

(a) persons, firms, companies and corporations; and

(b) the Crown and any Minister of the Crown, or any public authority,

employing one or more employees and also includes a labour hire agency or group training organisation that arranges for an employee (being a person who is a party to a contract of service with the agency or organisation) to do work for another person, even though the employee is working for the other person under an arrangement between the agency or organisation and the other person;

5 The applicant says that this definition does not appear to clearly state whether an 'employer' includes the self-employed. Therefore, it contends that the Full Bench should have regard to the fact that other Western Australian employer organisations registered under the Act are authorised by provisions in their rules to enrol self-employed persons. In particular the applicant says the Full Bench should have regard to the rules of the Baking Industry Employers' Association of Western Australia, The Master Plumbers and Gasfitters Association of Western Australia (Union of Employers) and The Master Painters, Decorators and Signwriters' Association of Western Australia (Union of Employers) which all contain provisions which enable self-employed persons to be enrolled as members.

6 The rules of the Baking Industry Employers' Association of Western Australia define its membership rule as follows:

> Any person (as defined) who manufactures and distributes bakery products within the State of Western Australia shall be eligible for membership of the Association.

7 The rules of The Master Plumbers and Gasfitters Association of Western Australia (Union of Employers) prescribes the classes of persons eligible to be members under r 6.1 - Eligibility as:

> Any person, firm, company or corporation who, or which, is or is usually an employer within the meaning of the Act, or a sole trader working in, or in connection with all or any facet of the Plumbing Industry described in Rule 4 of this Constitution, will be eligible for membership.

8 The applicant points out that the eligibility rules of The Master Painters, Decorators and Signwriters' Association of Western Australia (Union of Employers) contain similar terms to the provisions of the rules of The Master Plumbers and Gasfitters Association of Western Australia (Union of Employers).

9 The applicant says it follows therefore that self-employment has always been consistent with the scheme of the Act and the rule change should be approved accordingly.

10 The other change sought to r 3 is the addition of the word 'Media' to the present name of the 'Australian Communications Authority'. The Australian Communications Authority changed its name to the Australian Communications and Media Authority on 1 July 2005. Consequently this amendment is designed to update the terminology. The applicant makes no submission about the variation sought to r 4.

11 The application was unopposed. At the conclusion of oral submissions made on behalf of the applicant on 28 June 2010, the Full Bench informed the applicant that the application would be granted. On 28 June 2010, an order was made that the Registrar be authorised to register the alteration to the rules of the applicant as published in the Industrial Gazette on 26 May 2010 ((2010) 90 WAIG 456). The reasons for granting the order are as follows.

The Applicant's Rules about Alterations

12 Pursuant to s 64(2) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to alter the eligibility rules of an organisation. Section 55(4) of the Act provides that the Full Bench shall refuse an application by an organisation under this section unless it is satisfied that:

(a) the application has been authorised in accordance with the rules of the organisation;

(b) reasonable steps have been taken to adequately inform the members —

(i) of the intention of the organisation to apply for registration;

(ii) of the proposed rules of the organisation; and

(iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,

and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;

(c) in relation to the members of the organisation —

(i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or

(ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;

(d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and

(e) rules of the organisation relating to elections for office —

(i) provide that the election shall be by secret ballot; and

(ii) conform with the requirements of section 56(1),

and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

13 The first requirement pursuant s 55(4)(a) of the Act, is that the Full Bench is required to refuse the rule alteration application unless it has been authorised by the organisation in accordance with its rules. At the time the management committee of the applicant and its members considered the proposed variations to r 3 and r 4 they also considered a large number of other proposed variations which were sought to modernise the requirements of the rules. The authority to alter the rules of the applicant is found in r 28. At the time the applicant's members considered the proposed change to r 3 and r 4, r 28 of the rules of the applicant provided:

> Subject to the provisions of this Rule, the Rules may be amended by a resolution passed at a general meeting of the members of the Association.
>
> No amendment of the Rules shall be made unless:
>
> a. Notice of the meeting is given to all members at least one month prior to the date upon which the meeting is held;

b. That notice sets out the proposed amendment of the Rules and the reasons for the amendment;

c. The notice of meeting explains that, notwithstanding the fact that the resolution may be passed at the meeting, any member may object to the proposed amendment by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach him no later than 21 days after the date of the meeting; and

d. The resolution is passed by at least two thirds of those members attending the meeting, either in person or by proxy, who are eligible to vote.

14 Rule 21 of the rules required a quorum for any ordinary or special general meeting of 15.

The Evidence

15 The facts supporting the applicant's submission that it has complied with r 28 and the statutory requirements of the Act, are set out in a statutory declaration dated 3 May 2010 made by Kyle Jay Kutasi, the Secretary of the applicant. The evidence of Mr Kutasi in his statutory declaration and attached documents establish the following relevant matters:

(a) On 17 March 2009, the management committee of the applicant authorised a special general meeting of the applicant to be conducted in accordance with its rules on 19 May 2009. The minutes of the meeting of the management committee held on 17 March 2009 record that proposed amendments to the Constitution of the applicant were put forward to the committee and were sought to bring the rules into alignment with the modern practices of the applicant. The minutes also record that it 'was resolved that the amendments to the Constitutions [sic] be agreed to and sent to the members for approval at a special general meeting on 19 May 2009' (Annexure A to the statutory declaration, item 12).

(b) On or about 24 March 2009, Mr Kutasi arranged for a special general meeting of the applicant to take place at the City West Function Centre at 45 Plaistowe Mews, West Perth on 19 May 2009. A notice of special general meeting together with a copy of proposed amendments to the rules and Constitution and explanatory memoranda were distributed to all members of the applicant by ordinary post on or about 14 April 2009 (Annexure B, Annexure C and Annexure D to the statutory declaration). The proposed amendments contained not only amendments to r 3 and r 4 but contained all of the proposed amendments to the rules of the applicant. In addition, the notice of the meeting also included a statement advising the members as follows:

> Notwithstanding the fact that a resolution may be passed at the meeting approving the amendments, any member may object to the proposed amendment by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach him no later than 21 days after the date of the meeting.

It is notable that at the time the notice was sent to the members that r 28(c) of the rules of the applicant required that the objections to the Registrar to reach the Registrar no later than 21 days after the date of the meeting. Rule 28(c) has subsequently been amended to provide for objections to be given to the Registrar no later than 14 days after the date of the meeting. This was one of the amendments considered by the special general meeting.

(c) The special general meeting of the applicant was held at the City West Function Centre on 19 May 2009. Mr Kutasi states in his statutory declaration that a quorum of 15 attendees was in place at the time the resolution to amend the rules was considered. However, the minutes of the special general meeting record that 22 members of the applicant were present. At the meeting, two resolutions were considered. Resolution 1 proposed that the rules and Constitution of the applicant be amended. Resolution 2 proposed that an application be placed before the Commission to alter the rules of applicant in accordance with the requirements outlined in Resolution 1 and that the application be made at the earliest opportunity. Resolutions 1 and 2 were passed by unanimous votes.

(d) The rule changes approved by the special general meeting except for the proposed changes to r 3 and r 4 (which are required to be authorised by the Full Bench) were registered by the Registrar on 22 February 2010.

16 After having regard to this evidence we were satisfied that the application had been authorised in accordance with the rules of the applicant. We were also satisfied that:

(a) reasonable steps had been taken to accurately inform the members of the intention of the organisation to apply for registration of the proposed amendments to the rules;

(b) each member had been provided with a notice that set out the proposed amendments of the rules and the reasons for the amendments; and

(c) each member had been given notice that they could object to the alteration of the rules by forwarding a written objection to the Registrar within the time specified by the rules. We are also satisfied that the members have been afforded a reasonable opportunity to make such an objection. We note that no member of the applicant has objected to the making of this application or to the proposed variation of r 3 and r 4.

17 For these reasons we are satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act have been complied with. As to the reasons why the alterations to r 3 are sought, the Full Bench is of the opinion that these alterations should be registered as the provisions of the Act do not exclude the registration of an organisation of employers whose qualification of persons for membership rules, include members who are self-employed.

18 Section 55(4)(e) and s 56(1) of the Act relate to procedural rules for election for office, including secret ballots. The applicant's rules currently provide for the procedures required by these provision of the Act and the alterations sought to r 3 and r 4 do not deal with the matters specified in these provisions of the Act. Consequently, we note that no issue arises in this matter in relation to the requirements of these provisions.

2010 WAIRC 00382

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE ELECTRICAL AND COMMUNICATIONS ASSOCIATION OF WESTERN AUSTRALIA (UNION OF EMPLOYERS)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 JUNE 2010
FILE NO/S	FBM 3 OF 2010
CITATION NO.	2010 WAIRC 00382

Result	Application granted
Appearances	
Applicant	Mr K Kutasi and Mr M Nazareth

Order

This matter having come on for hearing before the Full Bench on 28 June 2010, and having heard Mr K Kutasi on behalf of the applicant, the Full Bench orders that:—

The Registrar is hereby authorised to register the alterations to the rules of the applicant as published in the Western Australian Industrial Gazette on 26 May 2010.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Application for registration—

2010 WAIRC 00417

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2010 WAIRC 00417
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S M MAYMAN
HEARD	**:**	FRIDAY, 2 JULY 2010
DELIVERED	**:**	THURSDAY, 8 JULY 2010
FILE NO.	**:**	FBM 2 OF 2010
BETWEEN	**:**	WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION AND AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
		Applicants
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	:	Industrial law (WA) - Application pursuant to s 72 of the *Industrial Relations Act 1979* (WA) - Amalgamation of two registered employee organisations - New organisation registered.
		Industrial Relations Act 1979 (WA) s 27(1)(m), s 53, s 54, s 55(1), s 55(2), s 55(3), s 55(4), s 55(4)(d), s 55(4)(e), s 56, s 56(1), s 56(1)(a), s 56(1)(b), s 56(1)(c)(i), s 56(1)(d)(i), s 56(1)(d)(ii)(I), s 56(1)(d)(ii)(II), s 56(1)(d)(ii)(III), s 56(1)(d)(ii)(IV), s 56(1)(d)(ii)(V), s 56(1)(d)(ii)(VI), s 56(1)(d)(iii), s 56(1)(e), s 56(1)(f), s 56A, s 57, s 59, s 64D, s 66, s 69, s 71, s 71(5), s 72, s 72(1), s 72(2), s 72(3).
Result	:	Order made.

Representation:

Applicants	:	Mr D H Schapper (of counsel)

Reasons for Decision

THE FULL BENCH:

Introduction

1 This is an application by the Western Australian Railway Officers' Union (ROU) and the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch (ASU). The application seeks orders to amalgamate two employee organisations that are registered employee organisations under the *Industrial Relations Act 1979* (WA) (the Act). Each organisation makes application under Part II of Division 4 of the Act for registration of a new organisation pursuant to s 72 of the Act called the Western Australian Municipal, Administrative, Clerical and Services Union of Employees. At the time of hearing this matter the ROU had 218 members and the ASU had approximately 900 members.

2 The ROU and ASU have for many years acted on a 'de facto basis' as one organisation within the structure of the Federally registered body which is now known as the Australian Municipal, Administrative, Clerical and Services Union. The background to this application is in part set out in some detail in a recent decision made by the Acting President in an application under s 66 of the Act in *de Prazer v Western Australian Railway Officers' Union* [2010] WAIRC 00373. In the following passages the organisation referred to as the 'Union' is the ROU. At [9], [10] and [11] of the reasons for decision it is recorded:

> It appears from documents produced at the hearing of the application that the Union and the Federal registered body of the ASU effected a de facto amalgamation in 1992. On 15 October 1992 in a formal deed of agreement executed by the Australian Municipal, Transport, Energy, Water, Ports, Community and Information Services Union (the then Federal registered body of the ASU) and the Union, the parties to the deed agreed to amalgamate and admit all members of the Union as members of the Federal registered body of the ASU (Exhibit 1). Arrangements were also made in the deed, among other matters, for the Federal registered body of the ASU to employ staff of the Union, for the collection of subscriptions and the transfer of property from the Union to the ASU. It was also agreed in the deed that all current Branches of the Union would be established as Sub-Divisions of the Federal registered body of the ASU (clause 17, Exhibit 1). However, the Federal registered body of the ASU underwent restructuring and by June 1997 all Branches of the Union except the Administrative Branch in East Parade, East Perth ceased to exist.
>
> Part of the history of the move towards formalising the amalgamation is reflected in minutes of a meeting of the Branch Executive of the ASU on 17 June 1997 where the following report and recommendations were made (page 6, Exhibit 2):
>
> > *RECOMMENDATIONS:*
> >
> > *1 THAT THE WEST AUSTRALIAN RAILWAY OFFICERS UNION*
> >
> > *THE METROPOLITAN TRANSPORT TRUST OFFICERS ASSOCIATION*
> >
> > *THE FEDERATED CLERKS UNION (need to check full names)*
> >
> > *(a) AMALGAMATE WITH THE METROPOLITAN TRANSPORT OFFICERS ASSOCIATION AND THE FEDERATED CLERKS UNION*
> >
> > *(b) AMALGAMATE WITH THE WEST AUSTRALIAN RAILWAY OFFICERS UNION AND THE FEDERATED CLERKS UNION*
> >
> > *(c) AMALGAMATE WITH THE WEST AUSTRALIAN RAILWAY OFFICERS UNION AND THE METROPOLITAN TRANSPORT TRUST OFFICERS ASSOCIATION*
> >
> > *2. THE NEW AMALGAMATED UNION BE KNOWN AS THE AUSTRALIAN SERVICES UNION (WESTERN AUSTRALIA)*
> >
> > 3. *THAT A BALLOT OF MEMBERS BE CONDUCTED BY THE WA ELECTORAL COMMISSION*
> >
> > *4. THAT THE AMALGAMATION PROCESS BE FINALISED, IF POSSIBLE BY DECEMBER 1997*
> >
> > *The amalgamation of State Unions with the Federal ASU has been controlled on an administrative basis by the National Office of the ASU.*
> >
> > *The amalgamation of the WA Railway Officers Union and the MTT Salaried Officers Association was subject to a ballot of members conducted by the Electoral Commission. All members of the State Registered Unions are members of the Federal Union.*

Prior to the amalgamation ballot the amalgamating parties entered into a memorandum of agreement which dealt with such things as property, finances and method of operation.

In terms of the Federated Clerks Union, it is understood that the State Registered union had applied many years ago under Section 71 of the W.A. Industrial Relations Act to allow the State Union to operate under the Federal Unions rules. Section 71 allows the State Union to provide the information of the Federal Union to comply with the Act. The compliance is in terms of office bearers, numbers of members as at the 1st of January in each year and financial obligations.

No such request was made on behalf of the WA Railway Officers Union or the MTT Salaried Officers Union.

The breach has occurred in the financial reporting obligations of these two unions. The deputy registrar advises that the financial arrangements entered into at the time of amalgamation does not provide sufficient defence in not making a report. The MTTSOA and the WAROU by virtue of the memorandum of agreement have limited monies allocated to them to operate the specific needs of the State Registered Unions and although it was submitted to the Deputy Registrar that this reflects the arrangement made at amalgamation the two state registered unions are in breach of the act.

The other problem arises in the area of election of office bearers for the WAROU. Elections were called in September 1996 and the only position that was filled was the position of General President. Norm Pearson was elected unopposed to the position. The positions of General Vice President and General Treasurer were not filled.

A decision was made by the WAROU at the time of the redundancy of Tony Borger as General Secretary of the WAROU and the Assistant Secretary (Rail) of the Rail Industry Division not to fill the position of General Secretary but to delete that position as a paid position and amend the rules to reflect the position as honorary. The records show that Grant Whiteaker assumed the position of Honorary General Secretary until his resignation from the union earlier this year. Paul Burlinson has since been appointed as the Honorary General Secretary. The only problem is that the rules do not appear to have been amended to reflect this change.

The WAROU rules appear to be silent as to the filling of the Committee members representing the various Branches. Our records show that there has not recently been an election for the Committee members.

The Branch Committees for the State Unions need to resolve to take steps to ensure compliance with the State Act. The recommended path is for the state unions to resolve to amalgamate with each other and thereafter make application to the State Commission under s71(5) and subsequently s71(8).

The Deputy Registrar has been very helpful in assisting the Branch to sort out what could be potentially a difficult problem for the State Unions. The relevant Statutory Declarations have been made to the State Commission to the best of our knowledge. The Deputy Registrar is aware that we are not able to comply with the financial reporting obligations for the WAROU and the MTTSOA.

A copy of the Statutory Declarations is attached this report, along with a covering letter sent to the Commission.

I have advised the National Office of the difficulties the amalgamations have caused in ensuring compliance under the state Act. Their response is not yet available but will be forwarded to the Committees when received. It would not appear that the National Union will have a great deal of authority when it comes to the decision of the State Unions to amalgamate but as a courtesy they should be advised.

A copy of section s71(5) and s71(8) are attached to this report.

Despite the report being considered by the ASU in 1997, no formal steps were taken to effect and complete the amalgamation process at law until 2009, when the Union sought to take steps to comply with the provisions of the Act by calling an election. It is apparent, however, that from 1992 the Union had amalgamated with the Federal registered body of the ASU on a 'de facto' basis.

3 However, it was not until 2009 that steps to enable the amalgamation to be regularised were taken. In 2009, the following officers of the ROU were elected:

Warren de Prazer	General President
Doug Burrows	General Vice President
Mudji Nielsen	General Secretary
Margaret E Stuart	General Treasurer
Grace Perrozzi	Conference Delegate
Mark Madden	Council Delegate

4 However, not all officers of the ROU were able to be elected. Pursuant to r 33 of the rules of the ROU, 14 Branch Districts were established and from those Branches the rules required that Branch Conference delegates and Council delegates be elected from each Branch. However, for many years the affairs and business of the ROU were conducted on the basis that all members of the ROU were within one Branch. This occurred because the overwhelming majority of members of the ROU are employed by the Public Transport Authority in East Parade, East Perth and are members of the administrative branch of the ROU. This also came about because of the declining number of members of the ROU which was caused by the privatisation of the non-metropolitan services and restructuring within the organisation which was Westrail, now the Public Transport Authority. This resulted in 13 Branches of the ROU becoming defunct and only one Conference delegate and one Council delegate being elected in September 2009.

5 Part of the procedural and substantive requirements for amalgamation is that the governing bodies of each organisation must convene meetings to make particular resolutions and approve new rules for the new organisation. As part of that process, members of the Council and Delegate Conference of the ROU met on 31 March 2010 to consider and make a number of resolutions. Following the meeting an issue arose as to whether a quorum had been convened and whether the resolutions passed were valid.

6 To resolve this issue, an application was brought pursuant to s 66 of the Act seeking a declaration and orders to the effect that the meeting of the ROU officers held on 31 March 2010 was a valid meeting of the ROU Conference and Council and the resolutions passed at that meeting were valid or were deemed to be a valid. After hearing from the parties in *de Prazer v Western Australian Railway Officers' Union* [2010] WAIRC 00388 on 29 June 2010, it was declared that the true interpretation was that:

(i) rule 8(b) of the rules of the Union is that while the 14 Branches defined in r 33 of the rules of the Union remain unclosed by Council, to constitute a quorum of a meeting of Delegate Conference, representatives of 11 Branches must attend and participate in a meeting of Delegate Conference; and

(ii) rule 12(o) of the rules of the Union is that to constitute a quorum of a meeting of Council, exclusive of the members of the Executive, five ordinary members of Council or four ordinary members of Council and the Union member on the Railways Classification Board must attend and participate in a meeting of Council.

An order was also made that:

(i) the observance of r 8(b) of the rules of the Union and r 12(o) of the rules of the Union is waived;

(ii) that the attendance and participation of the members of the Executive and the Council Delegate constitute a quorum of Council and as constituted is deemed to have the authority to exercise all of the powers and functions of Council (except as varied and modified by this order) pursuant to the rules of the Union;

(iii) the meeting held on 31 March 2010 attended by the members of the Executive and the Council Delegate is deemed to be a valid meeting of Council and the resolutions passed at that meeting are deemed to be valid;

(iv) that the attendance and participation of the members of the Executive and the Conference Delegate constitute a quorum of Delegate Conference at which all are entitled to vote and as constituted is deemed to have the authority to exercise all the powers and functions of Delegate Conference (except as varied and modified by this order) pursuant to the rules of the Union; and

(v) the meeting held on 31 March 2010 attended by the members of the Executive and the Conference Delegate is deemed to be a valid meeting of Delegate Conference and the resolutions passed at that meeting are deemed to be valid.

7 Until recently the ASU also had not conducted elections for its officers. Until early 2010, the ASU had not carried out elections because it had held the view that it was exempt from doing so pursuant to a s 71(5) of the Act certificate issued on 24 June 1985 by the Registrar of the Commission. The certificate exempted the ASU from holding elections for offices under provisions of the Act. This certificate followed a declaration being made on 6 June 1985 by the Full Bench that the rules of the West 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 exist within the Branch were deemed for the purposes of s 71 of the Act, to be the same as the rules of the ASU relating to the corresponding subject matter.

8 However, by at least sometime in 2003 not all offices of the ASU corresponded in fact with the offices in the counterpart Federal body. This was brought to the attention of the ASU sometime in 2009 and as a result, the ASU formed the view that the certificate issued under s 71 of the Act was no longer operative and there were no validly elected officials of the ASU holding office.

9 The ASU faced a similar problem with compliance with its rules as the ROU. An election was unable to proceed in accordance with the requirements of the rules of the ASU as the rules required the election of officers of Branch Councillors from Sections of the ASU that had ceased to exist. An application was then made under s 66 of the Act for orders to enable the election of the offices of the ASU to proceed as if an election had been called in accordance with the provisions of the Act and the ASU rules. An order was made by the President under s 66 of the Act on 7 December 2009 that the election of the offices was to proceed as if a request in writing had been duly made to the Registrar under s 69 of the Act. The order also enabled a fixed number of Branch Councillors to be elected. The terms of the order made it clear that once elected, each Branch Councillor was to exercise all the powers and carry out all of the functions of office pursuant to the rules of the ASU as if each were elected from a Section of the Branch or by the whole of a membership pursuant to the rules of the ASU. The reason why this order was made was because the rules of the ASU required that Branch Councillors be elected from Sections which had over time ceased to exist. As discussed in reasons for decision given in *Beatts-Rattray v Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch* on 15 December 2009 (2009) 90 WAIG 9, to rectify this difficulty and enable the ASU 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 election of positions of Branch Councillors proceed and to enable a quorum for Branch Council to be convened.

10 After hearing the parties the following order was made on 7 December 2009:

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;

11 After the order was made the Registrar arranged for the conduct of the election and the officers of the ASU were elected at an election conducted by the Western Australian Electoral Commission in January 2010. The returning officer of the Western Australian Electoral Commission declared the following office and office holders to be elected on 27 January 2010:

William Beatts-Rattray	President
Leah Gorman	Vice President
Judith Hood	Treasurer
Rob Bates	Secretary
Steven Harris	Executive Councillor
Graham Sharpe	Executive Councillor
Paola Stobart	Executive Councillor
Sherrol Baskerville	Branch Councillors
Sally Butterworth	Branch Councillors
Patricia Clark	Branch Councillors
Linda Cole	Branch Councillors
Ben Feitz	Branch Councillors
Gerald McManus	Branch Councillors
Lesley Pracy	Branch Councillors
Robin Satur	Branch Councillors

Statutory Requirements for Amalgamation

12 Pursuant to s 72 of the Act two or more organisations registered under the Act may apply for the registration of a new organisation. Section 72 of the Act provides as follows:

(1) Where 2 or more organisations (in this section referred to as the amalgamating organisations) apply for the registration of a new organisation and the rules of the proposed new organisation are such that the only persons eligible for membership of the new organisation will be persons who, if the amalgamating organisations had remained in being, would have been eligible for membership of at least one of the amalgamating organisations, the new organisation may be registered by authority of the Full Bench.

(2) An application under this section shall be made under the respective seals of the amalgamating organisations and shall be signed by the secretary and principal executive officer of each of those organisations.

(3) The provisions of this Division applying to and in relation to the registration of organisations under section 53(1) or 54(1), other than section 55(5), shall apply with such modifications as are necessary, to and in relation to the registration of an organisation under this section.

(4) Subsection (1) does not prevent the alteration, pursuant to this Act, at any time after an organisation has been registered under this section, of the rules referred to in that subsection.

(5) On and from the date on which an organisation is registered under this section —

(a) the registration of each of the amalgamating organisations is cancelled;

(b) all the property, rights, duties, and obligations whatever held by, vested in, or imposed on each of those organisations shall be held by, vested in, or imposed on, as the case may be, the new organisation;

(c) actions and other proceedings already commenced by or against any of those organisations may be continued by or against the new organisation and the new organisation is substituted for each of those organisations as a party; and

(d) actions and other proceedings that could have been brought by or against any of those organisations may be brought by or against the new organisation.

13 The first requirement that must be satisfied under s 72 is that the rules of the proposed new organisation must be such that the only persons eligible for membership of the new organisation must be persons who, if each of the amalgamating organisations had remained in existence, would have been eligible for membership for at least one of the amalgamating organisations (s 72(1)). When regard is had to the rules of the proposed new organisation it is clear that s 72(1) of the Act is complied with. It is apparent that the proposed r 5 of the rules of the proposed new organisation replicates r 4(a) of the rules of the ROU and r 5 of the rules of the ASU.

14 The application complies with s 72(2) of the Act as the application is signed by the Presidents and Secretaries of both the ROU and the ASU and the common seals of both organisations are affixed to the application.

15 Turning to s 72(3) of the Act, s 53 relates to the qualifications for and basis of registration of organisations of employees and s 54 provides the criteria for the qualifications for and basis of registration of organisations of employers. It is clear, however, that s 53 and s 54 of the Act do not apply because the organisations applying for registration as a new organisation are already registered.

16 Other than s 55(5) of the Act, s 55 applies. Section 55(1), s 55(2), s 55(3) and s 55(4) of the Act provide:

> (1) An organisation seeking registration under section 53 or 54 shall lodge in the office of the Registrar —
>
> (a) a list of the officers of the organisation with their addresses;
>
> (b) 3 copies of the rules of the organisation; and
>
> (c) the prescribed form of application.
>
> (2) When the organisation has complied with the requirements of subsection (1) the Registrar shall publish in the required manner —
>
> (a) a notice of the application;
>
> (b) a copy of such rules of the organisation as relate to the qualification of persons for membership of the organisation and, without limiting the generality thereof, including any rule by which the area of the State within which the organisation operates, or intends to operate, is limited; and
>
> (c) notice that any person who objects to the registration of the organisation and who, having given notice of that objection within the time and in the manner prescribed, satisfies the Full Bench that he has a sufficient interest in the matter, may appear and be heard in objection to the application.
>
> (3) An application under this section shall not be listed for hearing before the Full Bench until after the expiration of 30 days from the day on which the matters referred to in subsection (2) are first published.
>
> (4) Notwithstanding that an organisation complies with section 53(1) or 54(1) or that the Full Bench is satisfied for the purposes of section 53(2) or 54(2), the Full Bench shall refuse an application by the organisation under this section unless it is satisfied that —
>
> (a) the application has been authorised in accordance with the rules of the organisation;
>
> (b) reasonable steps have been taken to adequately inform the members —
>
> (i) of the intention of the organisation to apply for registration;
>
> (ii) of the proposed rules of the organisation; and
>
> (iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,
>
> and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection;
>
> (c) in relation to the members of the organisation —
>
> (i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or
>
> (ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;
>
> (d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and
>
> (e) rules of the organisation relating to elections for office —
>
> (i) provide that the election shall be by secret ballot; and
>
> (ii) conform with the requirements of section 56(1),
>
> and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

17 In compliance with s 55(1) of the Act, the ROU and the ASU have made the application in the prescribed form, and have filed a list of officers of the new organisation with their addresses and three copies of the rules. Pursuant to s 55(2) of the Act, the Registrar has published in the Western Australian Industrial Gazette the notice of the application and a copy of the rules of the organisation as they relate to the qualification of persons for membership and a notice that any person who wishes to object should file a notice of objection. The notice was published in the gazette on 26 May 2010 ((2010) 90 WAIG 458).

18 The application was listed for hearing on 2 July 2010, which was the date notified in the gazette, and was therefore listed after the expiration of 30 days from the date on which the notice was published as required by s 55(3) of the Act.

19 In relation to the requirement in s 55(4)(a) of the Act that the application be authorised in accordance with the rules of both organisations, it was observed in *de Prazer v Western Australian Railway Officers' Union* in relation to the rules of the ROU that no procedure for the approval of the rules of a proposed amalgamated organisation is prescribed in the rules of the ROU. Nor is any specific procedure prescribed for the approval of a proposed amalgamation [18]. However, the ROU says it followed the procedure set down in its rules to amend, rescind and make rules prescribed in r 9(a) and r 10 of the rules of the ROU. The power to do so is vested in Delegate Conference which is the supreme governing body of the ROU (r 9(a)). The process of alteration of rules is prescribed in r 10 of the rules of the ROU. Rule 10 provides:

ALTERATION OF RULES

10. (a) (i) The Union shall have the right to makes Rules for its own use and guidance. Rules may be amended, add to, varied or repealed by notice of any proposed alteration to the Rules been given by any member to the Branch Secretary in writing. The same shall be forwarded to General Secretary and laid before the next meeting of the Council and before a Conference of the Union which may amend, add to, vary or rescind the Rules or any part of them in accordance with the proposal in the said notice of any reasonable amendment of same.

(b) (ii) No amendment, addition to, variation, repeal or substitution of these Rules shall be made unless a notice of the proposed alteration, and the reasons therefore is:

(a) sent to each work place for the attention of all members; or

(b) published in a Union publication which shall be distributed to all members.

(c) (iii) In the notice referred to in Sub rule (2) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Industrial Registrar to reach him no later than 21 days after the date of issue of the notice in (2) (a) above or 21 days after the date of issue of the publication as in (2) (b) above, as the case may be.

20 Pursuant to r 10 of the rules of the ROU, an amendment, addition to, variation or repeal of any rules are to be required to be laid before a meeting of Council. Council is not required to pass any resolution with respect to such changes as such changes to the rules can only be made by Delegate Conference. In any event, the affidavit of Mudji Nielsen establishes that on 31 March 2010, the Delegate Conference met and determined to proceed with the proposed amalgamation. Further, the proposed rules for the amalgamated organisation were approved by a meeting of Council and Delegate Conference on 31 March 2010. The affidavit of Mr Nielsen also establishes that all members of the ROU were sent a notice of the proposed amalgamation together with a copy of the proposed rules of the amalgamated organisation on 3 March 2010. They were also advised in the notice that they may object to the proposed amalgamation or to the proposed application to the Commission to register the proposed amalgamated organisation or to the proposed rules or any of them by forwarding the written objection to the Secretary of the ROU and/or to the Registrar of the Commission no later than 21 days after receipt of the notice. Members were also advised in the notice that the Council and Delegate conference of the ROU was to sit on 31 March 2010 to decide upon the proposal for the ROU to amalgamate with the ASU. The notice stated that the 'reason for proposed amalgamation is to, as far as possible, bring the arrangements of the union within the WA State jurisdiction into line with those that apply in the Federal jurisdiction and to increase efficiencies in the operation of the union'.

21 The affidavit of Mr Nielsen deposes that on 16 March 2010 a general meeting of the members of the ROU was held for the purpose of providing members with an opportunity to obtain information and provide their input into the proposed amalgamation. Approximately 10 to 15 members attended and an informal question and answer and information session was held. Mr Nielsen also states in his affidavit that no objections to the proposed amalgamation or the rules or the application to register the proposed amalgamation organisation had been received by the ROU.

22 There are also no specific procedure prescribed in the rules of the ASU for the approval of a proposed amalgamation. Nor is there any procedure prescribed for the approval of rules of a proposed amalgamated organisation. The Branch Council is the supreme governing body of the ASU. Pursuant to r 6.e of the rules of the ASU, 15 members of the Branch Council shall form a quorum. Like the ROU the ASU followed the procedure prescribed in the rules for the alteration of rules. Rule 43 of the rules of the ASU prescribes the procedure for the alteration of the rules of the ASU as follows:

43 - ALTERATION OF RULES

The Branch Council may add to, amend, alter or rescind these rules:

a. at any meeting of Branch Council; or

b. by decision of Branch Council made in accordance with the provisions of Rule 7d. of these Branch Rules.

c. Members shall be informed by notice, in writing, of any proposal to add to, amend, alter or rescind these rules, and of the reasons therefore and that the members, or any of them, may object to the proposed addition to, amendment, alteration or recision of these rules by forwarding a written objection to the Registrar of the Western Australian Industrial Relations Commission to reach the Registrar no later than 21 days after the date of the issue of the notice.

23 The evidence of the Secretary of the ASU, Robert George Bates in an affidavit annexed to the application and attached documents establishes that on 22 February 2010, the Branch Executive (who are the management committee of the ASU pursuant to r 9 of the rules of the ASU) resolved to convene a meeting of the Branch Council to be held on 9 March 2010.

24 Notice of the Branch Council meeting was sent to all Branch Councillors on 26 February 2010. Annexed to a copy of the affidavit of Mr Bates is a copy of the notice. A copy of the proposed rules of the proposed amalgamated organisation was also sent to each Branch Councillor with the notice.

25 The Branch Council met on 9 March 2010. Pursuant to r 7.d of the rules of the ASU, members of the Branch Council are not required to personally attend to vote on a motion if they are sent by letter or telegram questions that are to be considered at the meeting of Branch Council. Although r 7.d does not expressly state that members are required to provide to Branch Council their views as to whether those questions should be answered in the negative or positive such a requirement appears to be implied as r 7.d contemplates a decision of Council composed of votes taken in person and in writing. Rule 7.d provides:

> Questions may be submitted by the Branch Executive to the members of the Branch Council by letter or telegram, and the decision of the majority of the members of the Branch Council so taken shall be as valid and binding for all purposes as though taken at a duly assembled meeting of the Branch Council. Provided that if within a period of seven days from the dispatch of the letter or telegram the motion has not been determined in accordance with the foregoing provision the motion shall be determined in accordance with the majority of opinions expressed, and shall thereupon become a resolution of the Branch Council as though it has been passed at a duly constituted meeting.

26 The decision of the majority of the members of Branch Council so taken is deemed to be valid and binding for all purposes as though taken at a duly assembled meeting of the Branch Council. The minutes of the meeting of the Branch Council records on 9 March 2010 that a quorum was constituted by seven members providing their vote in writing prior to the meeting and the other eight members in person. The minutes record that it was resolved unanimously by all 15 members of Branch Council in accordance with r 7.d and r 43.c of the rules of the ASU that:

(a) notice of the proposed amalgamation with the ROU;

(b) the proposed rules for the amalgamated organisation; and

(c) the members' rights to object to the proposal by forwarding a written objection to the Industrial Registrar to reach him no later than 21 days after the date of issue of the above notice,

be communicated to all members as soon as practicable.

27 On 10 March 2010, notice of the proposed amalgamation and the proposed rules of the proposed amalgamated organisation were posted to each member of the ASU to their home address as shown on the records of the ASU. The notice informed the members that on 6 April 2010 the Branch Council of the ASU would consider and decide upon a proposal to amalgamate with the ROU. Attached to the notice was copy of the proposed rules of the proposed amalgamated organisation. The notice also contained the reason why the amalgamation was sought. Like the notice to the ROU sent to its members, the ASU notice stated 'the reason for the proposed amalgamation is to, as far as possible, bring the arrangements of the union within the WA State jurisdiction into line with those that apply in the Federal jurisdiction and to increase efficiencies in the operation of the union'. Members were also advised in the notice that they may object to the proposed amalgamation or to the proposed application to the Commission to register the proposed amalgamation or to the proposed rules or any of them by forwarding written objection to the Secretary of the ASU and/or to the Registrar of the Commission to reach either or both of them no later than 21 days after the receipt of the notice.

28 In accordance with the notice given to members of the ASU, the Branch Council of the ASU met on 6 April 2010. On that occasion 10 members of Branch Council provided their votes prior to the holding of the meeting in writing pursuant to r 7.d of the rules of the ASU and the other five members of the Branch Council attended and voted in person. The minutes record the following resolutions were made and declared unanimously:

(1) That the ASU amalgamate with the ROU;

(2) That the rules of the amalgamated union be circulated to members; and

(3) That an application to the Commission to register proposed amalgamated organisation be authorised.

29 In his affidavit, Mr Bates attests that the proposed rules of the proposed amalgamated organisation referred to in his affidavit and annexed to the application are the same as the rules which were adopted by the Branch Council meeting held on 6 April 2010. Mr Bates also states that no objections to the proposed amalgamation or to the rules or the application to register the proposed amalgamated organisation have been received by the ASU.

30 The Commission's records also reveal that no objections to the application to register the proposed amalgamated organisation or to the proposed rules of the amalgamated organisation have been received by the Registrar.

31 For these reasons, after careful consideration of the evidence and the orders made pursuant to s 66 of the Act, we are satisfied as required by s 55(4) of the Act that:

(a) the application has been authorised in accordance with the rules of both organisations;

(b) reasonable steps have been taken to adequately inform their members:

(i) of the intention of the organisation to apply for registration of the new organisation;

(ii) of the proposed rules of the organisation; and

(iii) the members or any of them may object to the making of the application or to those rules or to any of them by forwarding a written objection to the Registrar.

32 The Act also prescribes a number of matters that must be set out expressly in the rules of an organisation for an organisation to be registered. Firstly, s 55(4)(d) of the Act requires that the rules provide for reasonable notice of any proposed alteration and reasons therefore to be given to the members of the organisation and for reasonable opportunity for members to object to any such proposal. The procedure in compliance with this statutory requirement is set out in proposed r 29.d of the rules of the proposed amalgamated organisation.

33 There are also a number of provisions which must be complied with and procedures that must be provided for in the rules of an organisation that relate to elections. Section 55(4)(e) of the Act requires that the rules of an organisation must provide for elections to be by secret ballot and conform with the requirements of s 56(1) of the Act and are such to ensure, as far as practicable, that no irregularity can occur in connection with an election. In relation to the first requirement r 28.a of the proposed rules provides that the method of election of Executive Officers and Divisional Members to the committee of management shall be by secret postal ballot of all financial members entitled to vote in such elections.

34 Section 56 of the Act provides:

(1) The rules of an organisation —

(a) shall provide for the conduct of every election to an office within the organisation (including the acceptance or the rejection of nominations) by a returning officer, not being the holder of any other office in, and not being an employee of, the organisation;

(b) shall provide that, if the returning officer conducting such election finds a nomination to be defective, he shall before rejecting the nomination, notify the person concerned of the defect, and where it is practicable to do so, give him the opportunity of remedying the defect within such period as is applicable under the rules, which shall, where practicable, be not less than 7 days after his being so notified;

(c) shall provide for the election of the holder of each office within the organisation, such election to be either by —

(i) a direct voting system; or

(ii) a collegiate electoral system being, in the case of an office the duties of which are of a full-time nature, a one-tier collegiate electoral system;

(d) shall, in relation to any election for office —

(i) provide that the election shall be by secret ballot;

(ii) make provision for —

(I) absent voting;

(II) the manner in which persons may become candidates for election;

(III) the appointment, conduct and duties of returning officers;

(IV) the conduct of the ballot;

(V) the appointment, conduct, and duties of scrutineers to represent the candidates at the ballot; and

(VI) the declaration of the result of the ballot;

and

(iii) ensure, as far as practicable, that no irregularity can occur in connection with the election;

(e) shall not permit a person to be elected to hold an office within the organisation for a period exceeding 4 years without being re-elected; and

(f) shall not permit a person to be elected to fill a casual vacancy in an office for a period exceeding the unexpired portion of the term of the person who has vacated the office.

35 Counsel at the hearing of this matter took the members of the Full Bench to each of the rules that comply with the provisions in s 56 of the Act. These are as follows:

Section of the Act	Complying rule of the proposed amalgamated organisation
s 55(4)(d)	r 29
s 55(4)(e)	r 28.a
s 56(1)(a)	r 25.c, r 25.d and r 28.c.i
s 56(1)(b)	r 28.c.i
s 56(1)(c)(i)	r 28.c.i provides for a direct voting system
s 56(1)(d)(i)	r 28.a

s 56(1)(d)(ii)(I)	r 28.c.viii
s 56(1)(d)(ii)(II)	r 27
s 56(1)(d)(ii)(III)	r 25, r 27 and r 28
s 56(1)(d)(ii)(IV)	r 28
s 56(1)(d)(ii)(V)	r 28.c.iv
s 56(1)(d)(ii)(VI)	r 28.c.viii.5, r 28.c.xiii and r 28.d *
s 56(1)(d)(iii)	** All rules referred to in this table
s 56(1)(e)	r 25.a
s 56(1)(f)	r 19

* In relation to the requirement that the rules of an organisation shall in relation to election for any office make provision for the declaration of the result of the ballot as required by s 56(1)(d)(ii)(VI). Counsel for the applicants point out there is no express reference in relation to requiring the returning officer to declare the result of a ballot. However, it is apparent from the provisions of the rules that such a declaration would be required to be made. In particular r 28.d of the proposed rules provides that whenever any member has been declared elected to any office, the member declared to be elected to such office shall hold office notwithstanding anything else in these rules.

** Insofar as s 56(1)(d)(iii) requires that the rules shall ensure, as far as practicable, that no irregularity can occur in connection with the election, it is clear that when one has regard to the requirements of the proposed rules set out in the table, and in particular r 28 of the proposed rules, that the process for the procedure to be followed in all elections should as far as practicable ensure no irregularity can occur.

36 The proposed rules also comply with s 56A and s 57 of the Act. Section 57 of the Act requires that every election by a direct voting system be by secret postal ballot. This requirement is provided for in proposed r 28.a. Section 56A of the Act sets the terms by which casual vacancies are to be filled and r 19 contains the terms which are prescribed by that provision of the Act.

37 We are also satisfied that s 64D of the Act which requires that the rules of an organisation shall provide for the register of members to be purged on not less than four occasions in each year has been complied with as r 11.b of the proposed rules requires the Secretary of the proposed amalgamated organisation to carry out this task on not less than four occasions each year.

38 Finally, the name of the proposed organisation does not contravene s 59 of the Act as the name of the proposed amalgamated organisation does not resemble the name of any other registered organisation and the proposed registered name clearly indicates that the organisation is to be an organisation of employees.

39 For these reasons we are satisfied that the application ought to be granted. There is, however, one minor typographical error in r 26.a of the proposed rules. We are of the opinion that this error should be corrected pursuant to the power to correct in s 27(1)(m) of the Act, by inserting the letter 'e' after the letter 'b' in the second line, so that r 26.a reads 'Only members of the Union who are financial at the date on which nominations close, and have been continuously financial for twelve months immediately preceding that date, shall be eligible to be nominated for any Office within the Union. For the purposes of this rule, financial membership of an organisation whose members have, by means of an amalgamation, become members of the Union, shall be counted in the calculation of any period of membership.' We are also of the view that an order should be made that:

(a) The Registrar register the new organisation known as the 'Western Australian Municipal, Administrative, Clerical and Services Union of Employees', in accordance with s 72(1) of the Act, being the product of the amalgamation of the Western Australian Railway Officers' Union and the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch.

(b) The rules attached to the application filed herein on 19 April 2010, (subject to the amendment referred to above) are authorised pursuant to s 58(3) of he Act and hereby declared to be the rules of the 'Western Australian Municipal, Administrative, Clerical and Services Union of Employees'.

2010 WAIRC 00423

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION AND AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES, W.A. CLERICAL AND ADMINISTRATIVE BRANCH
	APPLICANTS
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 JULY 2010
FILE NO	FBM 2 OF 2010
CITATION NO.	2010 WAIRC 00423

Result	Order made
Appearances	
Applicants	Mr D H Schapper (of counsel)

Order

This matter having come on for hearing before the Full Bench on 2 July 2010, and having heard Mr D H Schapper (of counsel) on behalf of the applicants, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (the Act), hereby orders that —

1. The Registrar be and is hereby authorised to register a new organisation to be known as the 'Western Australian Municipal, Administrative, Clerical and Services Union of Employees', in accordance with s 72(1) of the Act, being the product of the amalgamation of the Western Australian Railway Officers' Union and the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch.
2. The rules attached to the application filed herein on 19 April 2010, subject to the amendments set out in the Schedule hereto, are authorised pursuant to s 58(3) of the Act, and hereby declared to be the rules of the 'Western Australian Municipal, Administrative, Clerical and Services Union of Employees'.

By the Full Bench

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

SCHEDULE

1. In r 26.a of the rules:
   (a) Insert the letter 'e' after the letter 'b' on the second line.

PRESIDENT—Unions—Matters dealt with under Section 66—

2010 WAIRC 00373

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2010 WAIRC 00373
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	FRIDAY, 18 JUNE 2010
DELIVERED	**:**	FRIDAY, 25 JUNE 2010
FILE NO.	**:**	PRES 3 OF 2010
BETWEEN	**:**	WARREN DE PRAZER
		Applicant

AND

WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION

Respondent

CatchWords	:	Industrial Law (WA) - Application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) - Construction of the rules of an organisation - Nature of jurisdiction and powers of President under s 66 - Scope of power to make an order or give directions relating to non-observance of rules - The effect of Branches of the Union ceasing practically to exist - Council and Delegate Conference unable to convene a quorum - Declaration of interpretation of rules made - Order made to rectify non-observance of rules to enable organisation to function - Turns on own facts. *Industrial Relations Act 1979* (WA) s 6(f), s 66, s 66(2), s 66(2)(d).
Result	:	Declaration and Order made
Representation:		
Applicant	:	Mr D H Schapper (of counsel)
Respondent	:	Ms P Byrne (as agent)

Reasons for Decision

THE ACTING PRESIDENT

1 This is an application by Warren de Prazer (the applicant) made pursuant to s 66 of the *Industrial Relations Act 1979* (WA) (the Act). The applicant is the General President of the Western Australian Railway Officers' Union (the Union), the respondent to this application. Pursuant to r 22(a) of the rules of the Union the General President is the recognised head of the Union.

2 The Union and the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch (State registered Branch of the ASU) made an application on 19 April 2010 to amalgamate and form a new organisation to be known as the 'Western Australian Municipal, Administrative, Clerical and Services Union of Employees'. The application is listed for hearing before a Full Bench on 2 July 2010 (FBM 2 of 2010). Part of the procedural and substantive requirements for amalgamation is that the governing bodies of each organisation must convene meetings to make particular resolutions and approve new rules for the new organisation. As part of that process members of the Council and Delegate Conference of the Union met on 31 March 2010 to consider and make a number of resolutions. Following the meeting an issue arose as to whether the meeting was validly held and whether the resolutions passed were valid. The issue of validity in this matter is whether the officers of the Union present at the meeting of Council and the Delegate Conference constituted a quorum as required by r 8(b) and r 12(o) of the rules of the Union. A quorum for Council is, notwithstanding any vacancy, no less than five members, exclusive of members of the Executive (r 12(o)). A quorum for Delegate Conference is the 'representatives of not less than 75 per cent of the Branches' (r 8(b)). Rule 33 of the rules of the Union provides for 14 Branch Districts until such time as Council otherwise determines (see also r 32(a)). Other than the Administrative Branch District, all Branch Districts ceased to exist some time prior to May 1997. However, the 'defunct' 13 Branches of the Union were not formally closed by Council pursuant to its power to form and close Branches of the Union under r 32(a). Although the Branches had not been formally closed, in 2009 when the last election of officers occurred it was only practically open to elect one Branch Conference Delegate and one Council Delegate.

3 The applicant seeks a declaration that the true interpretation of the rules of the Union pursuant to s 66(2)(e) of the Act that the words 'Branch' and 'Branches' in r 8 and r 11 be construed as a Branch or Branches that are as a matter of fact extant and not to all of the 14 Branch Districts referred to in r 33. The applicant contends that r 32 and r 33 cannot operate to continue Branches of the Union that as a matter of practicality have ceased to exist.

4 The application also seeks the following declarations and orders:

1. A declaration that the meeting of the Respondent's Officers held on 31 March 2010 was a valid meeting of the Respondent's Conference and Council and the resolutions passed at that meeting are valid.

2. Alternatively, the applicant seeks an order that the meeting of the Respondent's Officers held on 31 March 2010 be deemed to be a valid meeting of the Respondent's Conference and Council and the resolutions passed at that meeting are deemed to be valid.

5 Pursuant to the rules of the Union, officers of the Union hold office for a period of two years. Prior to 2009, office holders of the Union were last elected to office in 1996. The failure of the Union to comply with its rules and the provisions of the Act seems to have occurred as the Federal registered body of the ASU had coverage of railway officers and the 'business' of the Union has been largely conducted by the ASU under the provisions of the *Industrial Relations Act 1988* (Cth) and the *Industrial Relations Act 1996* (Cth) which later was renamed the *Workplace Relations Act 1996* (Cth).

6 The Union through its General Secretary filed a counter proposal stating it agrees with and consents to the claim. The agent for the Union, Ms Byrne, informed the Commission that the Union supports the application and submissions made by counsel on behalf of the applicant, Mr Schapper.

7 In an affidavit sworn by the applicant on 3 June 2010 the applicant deposes that elections for all offices within the Union were recently conducted by the WA Electoral Commission. Annexed to the affidavit and marked WDP1 is a train of correspondence showing the process of calling and conducting an election. On 6 August 2009, a request was made by the Union to the Registrar of this Commission for the conduct of an election under s 69 of the Act. In documents annexed as WDP1, evidence is produced that the current holders of office of the Union were declared to be duly elected unopposed by a Returning Officer of the Western Australian Electoral Commission on 16 September 2009. The positions elected were as follows:

General President

General Vice-President

General Secretary

General Treasurer

Conference Delegate

Council Delegate

8 At the request of the Union the election of a single Council Delegate and a single Conference Delegate was held. The Union currently only has 218 members. In the affidavit of the applicant he states that for many years the affairs and business of the Union have been conducted on the basis that all members of the Union are within one Branch. This has occurred because the overwhelming majority of members of the Union are employed by the Public Transport Authority Centre in East Parade, East Perth and the practice of treating all members as belonging to one Branch has evolved as the Union's membership evolved with changes in Westrail occurring over a period of years. These changes included privatisation of the non-metropolitan services and restructuring within the organisation which was Westrail, now the Public Transport Authority.

9 It appears from documents produced at the hearing of the application that the Union and the Federal registered body of the ASU effected a de facto amalgamation in 1992. On 15 October 1992 in a formal deed of agreement executed by the Australian Municipal, Transport, Energy, Water, Ports, Community and Information Services Union (the then Federal registered body of the ASU) and the Union, the parties to the deed agreed to amalgamate and admit all members of the Union as members of the Federal registered body of the ASU (Exhibit 1). Arrangements were also made in the deed, among other matters, for the Federal registered body of the ASU to employ staff of the Union, for the collection of subscriptions and the transfer of property from the Union to the ASU. It was also agreed in the deed that all current Branches of the Union would be established as Sub-Divisions of the Federal registered body of the ASU (clause 17, Exhibit 1). However, the Federal registered body of the ASU underwent restructuring and by June 1997 all Branches of the Union except the Administrative Branch in East Parade, East Perth ceased to exist.

10 Part of the history of the move towards formalising the amalgamation is reflected in minutes of a meeting of the Branch Executive of the ASU on 17 June 1997 where the following report and recommendations were made (page 6, Exhibit 2):

RECOMMENDATIONS:

1 THAT THE WESTAUSTRALIAN RAILWAY OFFICERS UNION

THE METROPOLITAN TRANSPORT TRUST OFFICERS ASSOCIATION

THE FEDERATED CLERKS UNION (need to check full names)

(a) AMALGAMATE WITH THE METROPOLITAN TRANSPORT OFFICERS ASSOCIATION AND THE FEDERATED CLERKS UNION

(b) AMALGAMATE WITH THE WEST AUSTRALIAN RAILWAY OFFICERS UNION AND THE FEDERATED CLERKS UNION

(c) AMALGAMATE WITH THE WEST AUSTRALIAN RAILWAY OFFICERS UNION AND THE METROPOLITAN TRANSPORT TRUST OFFICERS ASSOCIATION

2. THE NEW AMALGAMATED UNION BE KNOWN AS THE AUSTRALIAN SERVICES UNION (WESTERN AUSTRALIA)

3. *THAT A BALLOT OF MEMBERS BE CONDUCTED BY THE WA ELECTORAL COMMISSION*

4. THAT THE AMALGAMATION PROCESS BE FINALISED, IF POSSIBLE BY DECEMBER 1997

The amalgamation of State Unions with the Federal ASU has been controlled on an administrative basis by the National Office of the ASU.

The amalgamation of the WA Railway Officers Union and the MTT Salaried Officers Association was subject to a ballot of members conducted by the Electoral Commission. All members of the State Registered Unions are members of the Federal Union.

Prior to the amalgamation ballot the amalgamating parties entered into a memorandum of agreement which dealt with such things as property, finances and method of operation.

In terms of the Federated Clerks Union, it is understood that the State Registered union had applied many years ago under Section 71 of the W.A. Industrial Relations Act to allow the State Union to operate under the Federal Unions rules. Section 71 allows the State Union to provide the information of the Federal Union to comply with the Act. The compliance is in terms of office bearers, numbers of members as at the 1st of January in each year and financial obligations.

No such request was made on behalf of the WA Railway Officers Union or the MTT Salaried Officers Union.

The breach has occurred in the financial reporting obligations of these two unions. The deputy registrar advises that the financial arrangements entered into at the time of amalgamation does not provide sufficient defence in not making a report. The MTTSOA and the WAROU by virtue of the memorandum of agreement have limited monies allocated to them to operate the specific needs of the State Registered Unions and although it was submitted to the Deputy Registrar that this reflects the arrangement made at amalgamation the two state registered unions are in breach of the act.

The other problem arises in the area of election of office bearers for the WAROU. Elections were called in September 1996 and the only position that was filled was the position of General President. Norm Pearson was elected unopposed to the position. The positions of General Vice President and General Treasurer were not filled.

A decision was made by the WAROU at the time of the redundancy of Tony Borger as General Secretary of the WAROU and the Assistant Secretary (Rail) of the Rail Industry Division not to fill the position of General Secretary but to delete that position as a paid position and amend the rules to reflect the position as honorary. The records show that Grant Whiteaker assumed the position of Honorary General Secretary until his resignation from the union earlier this year. Paul Burlinson has since been appointed as the Honorary General Secretary. The only problem is that the rules do not appear to have been amended to reflect this change.

The WAROU rules appear to be silent as to the filling of the Committee members representing the various Branches. Our records show that there has not recently been an election for the Committee members.

The Branch Committees for the State Unions need to resolve to take steps to ensure compliance with the State Act. The recommended path is for the state unions to resolve to amalgamate with each other and thereafter make application to the State Commission under s71(5) and subsequently s71(8).

The Deputy Registrar has been very helpful in assisting the Branch to sort out what could be potentially a difficult problem for the State Unions. The relevant Statutory Declarations have been made to the State Commission to the best of our knowledge. The Deputy Registrar is aware that we are not able to comply with the financial reporting obligations for the WAROU and the MTTSOA.

A copy of the Statutory Declarations is attached this report, along with a covering letter sent to the Commission.

I have advised the National Office of the difficulties the amalgamations have caused in ensuring compliance under the state Act. Their response is not yet available but will be forwarded to the Committees when received. It would not appear that the National Union will have a great deal of authority when it comes to the decision of the State Unions to amalgamate but as a courtesy they should be advised.

A copy of section s71(5) and s71(8) are attached to this report.

11 Despite the report being considered by the ASU in 1997, no formal steps were taken to effect and complete the amalgamation process at law until 2009, when the Union sought to take steps to comply with the provisions of the Act by calling an election. It is apparent, however, that from 1992 the Union had amalgamated with the Federal registered body of the ASU on a 'de facto' basis.

12 After officers of the Union were elected in 2009, the Union took steps to complete the procedural steps necessary to regularise the amalgamation. On 3 March 2010, the General Secretary of the Union caused to have posted to every member of the Union at their home address a notice to members. The notice is annexed as WDP2 to the affidavit of the applicant. The notice informs members that a meeting of Council and Delegate Conference of the Union was to be called to consider and decide upon a proposal for the Union to amalgamate with the State registered Branch of the ASU. The notice states as follows:

WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION

NOTICE TO MEMBERS

PROPOSED AMALGAMATION WITH THE AUSTRALIAN MUNICIPAL,

ADMINISTRATIVE, CLERICAL AND SERVICES UNION OF EMPLOYEES,

W.A. CLERICAL AND ADMINISTRATIVE BRANCH

Take notice that on **31st March 2010** the Council and the delegate conference of the Western Australian Railway Officers' Union ('the Union") is to consider and decide upon a proposal for the Union to amalgamate with the Australian Municipal, Administrative, Clerical and Services Union of Employees, W.A. Clerical and Administrative Branch

The proposed name of the proposed amalgamated union is the Western Australian Municipal, Administrative, Clerical and Services Union of Employees.

The proposed rules of the proposed amalgamated union are attached.

The reason for the proposed amalgamation is to, as far as possible, bring the arrangements of the union within the WA State jurisdiction into line with those that apply in the Federal jurisdiction and to increase efficiencies in the operation of the union.

Members are advised that they may object to the proposed amalgamation or to the proposed application to the WA Industrial Relations Commission to register the proposed amalgamated union or to the proposed rules or any of them by forwarding a written objection to:

1. the Secretary of the Union at Kenafick House 102 East Parade East Perth; and/or
2. the Registrar of the WA Industrial Relations Commission at 111 St Georges Terrace Perth

to reach either or both of them no later than 21 days after receipt of this notice

13 In accordance with the notice to members, the elected members of Delegate Conference and Council met on 31 March 2010. At the meeting a number of resolutions were considered and carried. The minutes of the meeting of the Delegate Conference and Council are annexed to the affidavit of the applicant and marked WDP3. The minutes state as follows:

WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION

MEETING OF WAROU COUNCIL and WAROU DELEGATES' CONFERENCE.

Minutes of Council and Delegate Conference meeting held at 12.00pm, 31st March, 2010 at the PTA Building, West Parade, Perth.

ATTENDANCE: Warren De Prazer (General President), Mudji Nielsen (General Secretary), Doug Burrows (General Vice President,) Margaret Stuart (General Treasurer), Mark Madden (Council Delegate), Grace Perrozzi (Conference Delegate).

Pat Byrne from the ASUWA was also in attendance as an observer.

The Council Meeting/Delegate Conference opened at 12.00 with the General President in the chair.

1. PROPOSED AMALGAMATION:

i) That this union do amalgamate with the Australian Municipal, Administrative, Clerical and Services Union of Employees, WA Clerical and Administrative Branch.

(Burrows, Madden)

CARRIED UNANIMOUSLY.

ii) That the rules of the amalgamated union be those circulated to members and attached hereto.

(Burrows, Madden)

CARRIED UNANIMOUSLY.

iii) That an application to the WA Industrial Relations Commission to register the proposed amalgamated organisation be authorised.

(Burrows, Madden)

CARRIED UNANIMOUSLY.

The Delegate Conference closed at 12.20pm.

The Rules of the Union

14 Branches of the Union consist of all members of the Union as defined under Branch Districts in r 33 (r 32(b)). Pursuant to r 33, until Council otherwise determines, Branch districts are defined as:

Administrative:- All officers employed in the offices of the Secretary for Railways, Director Rail Operations, Chief Civil Engineer, Director Marketing, Chief Mechanical Engineer (excluding Artisan Officers), Communications and Signals Engineer, Manager Human Resources and Director Urban Rail Development.

Finance and Accounting:- All officers employed at Westrail Centre in the office of the Director Finance, Accounting and Supply.

C.M.E.; Supply:- All officers (not elsewhere provided for) attached to the Chief Mechanical Engineer, Finance, Accounting and Supply Directorate and C.C.E. Branches in the Midland area.

Mechanical:- All artisan officers attached to the Mechanical and Stores Branches, Metropolitan area and C.E. Branch, Midland area.

Forrestfield:- All officers stationed at Forrestfield and Artisan Officers employed at Kewdale.

Fremantle:- All officers employed at stations and depots Claremont (inc.) to Mundijong (exc.) via Fremantle.

Kewdale:- All Traffic and Marketing Director's officers employed at Freight Terminal Kewdale.

Perth:- All officers (except those elsewhere provided for), employed at stations and depots Subiaco to Moora (inc.) Perth to Pinjarra, Toodyay west to Miling and Road Service Depots, East Perth, and Union head office staff.

Northam:- All officers employed at stations and depots - Avon Yard to Hines Hill, and Mukinbudin, Goomalling to Dallwallinu and Kalannie. Great Southern line Avon Yard to York and Quairading.

Merredin:- All officers employed at stations and depots - Merredin to Southern Cross (inc.); Merredin to Narembeen (inc.); Merredin to Bruce Rock; Merredin to Trayning.

Kalgoorlie:- All officers employed at stations and depots - east of Southern Cross.

Narrogin:- All officers at stations and depots - Beverley to Albany including all branches except as shown in Bunbury and Merredin.

Bunbury:- All officers employed at stations and depots - Bunbury to Northcliffe; Boyanup to Busselton to Nannup: Donnybrook to Kojonup; and all officers employed at stations and depots - Pinjarra (exc.) to Collie via Brunswick Junction.

Geraldton:- All officers at stations and depots - Watheroo to Geraldton and Geraldton to Wubin (inc.).

Members transferred from within the limits of one Branch to within boundaries of another shall thereupon become members of latter Branch.

15 The formation and closing of Branches is entirely at the discretion of Council (r 32(a)).

16 Pursuant to the rules of the Union, the committee of management of the Union is the Council. The powers of the Council are contained in r 12 of the rules of the Union. The Council is constituted by the General Officers who are the Executive Officers of the Union (r 11). Executive Officers are the General President, General Vice-President and the General Treasurer. The ordinary members of Council are Delegates who are elected from each Branch of the Union (r 11(c)(i)) and the Union member on the Railways Classification Board (r 11(e)). It is common ground that as only one Branch of the Union exists in practice in 2010 that Council could not and cannot convene a quorum as r 12(o) requires that five members of Council be present in addition to the Executive Officers. As there is no elected and appointed member on the Railways Classification Board and only one Delegate to Council, a quorum of Council cannot be convened, as five ordinary members of Council or four ordinary members of Council and the member on the Railways Classification Board must attend to constitute a quorum.

17 Pursuant to r 8(a) of the rules of the Union, Delegate Conference is composed of a delegate from each Branch of the Union, together with the Executive Officers, and Union member on the Railways Classification Board. The Executive Officers and the Union member on the Railways Classification Board have no entitlement to vote at a meeting of Delegate Conference, except the General President, who has a casting vote (r 8(e)(iv)). A quorum of Delegate Conference is pursuant to r 8(b) not less than 75 per cent of the representatives of the Branches.

18 No procedure for the approval of rules of a proposed amalgamated organisation is prescribed by the rules of the Union. Nor is any specific procedure prescribed for the approval of a proposed amalgamation.

19 Delegate Conference is the supreme governing body of the Union whilst the Council is the committee of management of the Union. The whole arrangements of the business and control of the Union is vested in the Council under r 12. In addition, it also has specific powers in relation to specific matters in r 12(a) to r 12(n). Delegate Conference can exercise any of the powers of Council and among other matters, it has the power to amend, rescind and make rules (r 9(a) and r 10). However, the power to amend, rescind and make rules must be a power that relates to the rules of the Union and not the rules of a new organisation. In any event, the applicant says that the process for alteration of rules prescribed in r 10 was followed by the Union when Council and Delegate Conference considered the proposed amalgamation on 31 March 2010.

20 Rule 10 provides:

ALTERATION OF RULES

10. (a) (i) The Union shall have the right to makes Rules for its own use and guidance. Rules may be amended, add to, varied or repealed by notice of any proposed alteration to the Rules been given by any member to the Branch Secretary in writing. The same shall be forwarded to General Secretary and laid before the next meeting of the Council and before a Conference of the Union which may amend, add to, vary or rescind the Rules or any part of them in accordance with the proposal in the said notice of any reasonable amendment of same.

(b) (ii) No amendment, addition to, variation, repeal or substitution of these Rules shall be made unless a notice of the proposed alteration, and the reasons therefore is:

(a) sent to each work place for the attention of all members; or

(b) published in a Union publication which shall be distributed to all members.

(c) (iii) In the notice referred to in Sub rule (2) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Industrial Registrar to reach him no later than 21 days after the date of issue of the notice in (2) (a) above or 21 days after the date of issue of the publication as in (2) (b) above, as the case may be.

21 It is notable that r 10 only requires an amendment, addition to, variation or repeal of any rules to be laid before a meeting of Council. Council is not required to pass any resolutions in respect of such changes. Such changes to the rules can only be made by Delegate Conference.

Interpretation of rules – Whether the resolutions made on 31 March 2010 are valid or can be deemed valid

22 It is established at law that the rules of an organisation should not be interpreted strictly and literally but broadly. In *Hospital Salaried Officers Association of Western Australia (Union of Workers) v Minister for Health* (1981) 61 WAIG 616, Brinsden J said (618):

> The rules of a registered union of workers can only be changed in the manner prescribed by the statute, and the rules as registered from time to time are final and the only expression of them. That seems to me to be the only point in the case. It says nothing about the necessity to interpret the rules of a union strictly and literally but simply makes the point that the rules alone are to be looked at and not any collateral undertaking. Subsequent conduct of the parties may only be considered if such rules are in truth ambiguous and then only to resolve the ambiguity.
>
> Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any otherr [sic] document. It must be remembered however that union rules are not necessarily drafted by skilled draftsmen. It is therefore necessary I think in construing a union rule not to place too literal adherence to the strict technical meaning of words but to view the matter broadly in an endeavour to give it a meaning consistent with the intention of the draftsman of the rule. This approach has been endorsed in relation to awards: see Geo A. Bond & Co. Ltd. (In Liq.) v. McKenzie (1929) A.R. 499 at 503-4 referred to in Federal Industrial Law by Mills and Sorrell 5th Ed at p.522. I also said

much the same thing in the unreported decision of Bradley v. The Homes of Peace 1005/1978, judgment delivered 21st December, 1978 at p.13-14.

23 Although Brinsden J made these observations in 1981, the approach to the interpretation of rules of registered organisations has remained unchanged. In *Stacey v Civil Service Association of Western Australia (Inc)* (2007) 87 WAIG 1229, Ritter AP observed [92] – [93]:

> A similar approach has been adopted by the High Court in the construction of union eligibility rules. In *Re Anti-Cancer Council of Victoria; Ex Parte State Public Services Federation* (1992) 175 CLR 442 at 448, Mason CJ, Brennan and Gaudron JJ said it '*is well settled that union eligibility rules are to be interpreted liberally and according to their ordinary and popular meaning*'. Their Honours cited a number of decisions in support of this proposition including *The Queen v Isaac*; *Ex Parte Transport Workers' Union* (1985) 159 CLR 323 decision, where Wilson J at 340 said:-
>
> > '*In construing the eligibility clause in the constitution of an organization, it is necessary to bear in mind the nature of the instrument in which the words appear and the purposes that it is intended to serve. The rule now in question bears ample indication on its face that it has been prepared without the assistance of a skilled draftsman. It has been amended from time to time, probably in response to the exigencies attending the industrial affairs of the union and without regard to the effect of the amendment on the internal consistency of the clause as a whole. It follows that the words of the rule should be given a wide meaning and interpreted according to their ordinary or popular denotation rather than by reference to some narrow or formal construction: Reg. v Cohen; Ex parte Motor Accidents Insurance Board ; Reg. v McKenzie; Ex parte Actors and Announcers Equity. Nevertheless, notwithstanding this generosity of approach, the meaning of the words remains a legal question to be determined by the application of the ordinary rules which govern the construction of written documents: Reg. v Aird; Ex parte Australian Workers' Union; McKenzie.*' (Footnotes omitted)
>
> French J in *Re Election for Office in Transport Workers' Union of Australia, Western Australian Branch* (1992) 40 IR 245 at 253 said that the "*preferred approach to the construction of union rules which requires them to be construed not technically or narrowly but broadly and liberally and not "subjected to the same meticulous scrutiny as a deed carefully prepared by lawyers.*"". His Honour cited *R v Holmes*; *Ex Parte Public Service Association (NSW)* (1977) 140 CLR 63 per Gibbs J at 73 and *Re An Election in the Australian Collieries Staff Association (NSW Branch)* (1990) 26 FCR 499 per Lockhart J at 502. The reasons of French J were cited with approval by Mansfield J in *Thomas v Hanson* [2001] FCA 539 at [20]. Authorities cited by the applicant set out a similar method of approach. (*Delron Cleaning Pty Ltd T/A Delron Hospitality Management* (2004) 84 WAIG 2527 at [40] and *FMWU v GW Smith and KJ Rose* (1988) 68 WAIG 1010.

24 When interpreting rules of an organisation regard should be had to the rules in their entirety. The applicant contends that when considering whether Council and Delegate Conference had sufficient officers and representatives at the joint meeting of Council and Delegate Conference on 31 March 2010 to constitute a quorum, regard should be had to the fact that only one Council Delegate and Conference Delegate could attend as only one Branch of the Union exists in fact. He also says that when regard is had to this fact, it follows that the requirement of 75 per cent of representatives of the Branches be present to constitute a quorum of Delegate Conference was met as there is only one Branch and the representative of that Branch was present and voted at the meeting.

25 The difficulty with this argument that was ably put by counsel for the applicant is that this construction of r 8(b) would have the effect that the whole of the business of the supreme governing body of the Union is vested in one representative of the Union. The General President could have no casting vote where only one representative is only entitled to vote. Further this construction does not assist the functioning of Council as the Council can not itself convene a quorum. Further, vesting the decision making process of the Union in one sole officer is inconsistent with the principle of democratic control of an organisation registered under the Act. Importantly, the construction put forward by the applicant, would if accepted, be contrary to the express words of r 32 and r 33. The opening words of r 33 and the requirements of r 32(a) make it clear that there are 14 Branches of the Union which can only be closed by Council pursuant to r 32(a). One of the reasons why Council could decide to close a Branch is where a Branch no longer has a sufficient number of members or any members and for all practical purposes has ceased to exist. However, the Branches established under r 33 until closed by Council remain extant at law under the rules.

26 Therefore a true interpretation of:

(a) r 8(b) is that while the 14 Branches defined in r 33 remain unclosed by Council, to constitute a quorum of a meeting of Delegate Conference, representatives of 11 Branches must attend and participate in a meeting of Delegate Conference;

(b) r 12(o) is that to constitute a quorum of a meeting of Council, exclusive of the members of the Executive, five ordinary members of Council or four ordinary members of Council and the Union member on the Railways Classification Board must attend and participate in a meeting of Council.

27 It also follows that the resolutions made by Council and Delegate Conference were not validly made. However, the question that must now be resolved is whether it is open under s 66 of the Act to make an order that the resolutions made by Council and Delegate Conference are deemed to be valid.

28 In *Construction, Mining and Energy Workers' Union of Australia – Western Australian Branch v The United Furniture Trades Industrial Union of Workers WA* (1991) 71 WAIG 563 the Industrial Appeal Court considered whether a declaration made by the President of the Commission pursuant to s 66(2)(d) of the Act, in respect of the constitutional right of the Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers to enrol persons as members,

could be enforced under s 84A(1) of the Act. In determining this issue the majority of the Court considered the scope of the power of the President to make orders and directions under s 66(2) when a declaration is made under s 66(2)(d). Importantly Kennedy J observed at 565:

> Section 66 of the Act, with which this appeal is primarily concerned, confers power on the President to deal with complaints made against an organization by, *inter alia*, members of the organization, or by the Registrar. On an application pursuant to the section, the President is empowered by sub-s (2) to 'make such order or give such directions relating to the rules of the organization, their observance or non-observance, or the manner of their observance, either generally or in a particular case, as he considers to be appropriate'. Without limiting the generality of those powers, the subsection goes on specifically to authorise certain decisions on an application for an order or direction under s 66(1), including the declaration of the true interpretation of any rule (para (d)) and the declaration of any act done in connection with certain elections to be void (para (f)(iii)).
>
> What appears to me to be of significance in s 66(2) is the power which it expressly confers on the President, not only to make a declaration as to the true interpretation of a rule, which is what occurred in the present case, but also to give directions relating to the observance of the rules of the organization as he considers appropriate. The learned President, it would seem, could have directed the respondent in the earlier proceedings not to enrol ineligible persons as members; but no directions were given by him.

29 Justice Franklyn also said at 569-570:

> In my opinion the effect of s 66(1) and (2)(d) is that if for the purposes of an Application for an order or direction under the section it becomes necessary for the true interpretation of a rule to be determined, then (2)(d) empowers the President to declare that interpretation, thereby properly grounding any order he might make or direction he might give under his power to 'make such order or give such directions relating to the rules of the organization … etc'. It is also significant that the power conferred on him to make declarations is limited to those conferred by subparas (d) and (f)(iii). That conferred by subpara (d) would seem to be conferred to put it beyond argument, as a preliminary step to the making of an order or the giving of directions relating to the rules of an organization, that the President is authorised, on the application before him, to declare the true interpretation of that and any other rule of 'the organisation' having bearing on its interpretation or on the order and/or directions to be made, thereby avoiding a proliferation of proceedings. It also seems clear that in authorising him to make such orders and directions 'either generally or in the particular case as he considers appropriate' subpara (2) contemplates that, having declared the true interpretation of the rule or rules in question, he might make an order and/or give directions in relation thereto in such terms that it or they be either of general application and so of general enforceability under s 84A, or limited to the particular matters in the application being dealt with.

30 Consequently, the ambit of the power in s 66(2) to make an order or give such directions relating to the observance or non-observance, or the manner of observance, of rules of an organisation, either generally or in a particular case, must arise out of one of the particular powers of s 66(2). In this matter the power to make an order or give directions under s 66(2) arises out of s 66(2)(d).

31 This is an unusual matter. The Union has through its de facto amalgamation with the Federal registered body of the ASU ceased many years ago to function in accordance with its rules. It has also been placed in the unfortunate position of being unable to reinstate many, if not all, of its Branches bar one because of the restructuring of the main employer of members of the Union over time and the privatisation of the freight service and other services of the employer.

32 Because of these circumstances the Union is unable to observe the requirements of its rules to validly convene a meeting of Council and Delegate Conference to approve the steps necessary to formally effect the proposed amalgamation with the State registered Branch of the ASU. Nor can Council convene a quorum to abolish the defunct Branches. The Union is unable to function. In these circumstances the question arises whether following the making of a declaration is it open to the President under s 66(2) to make an order or give directions relating to the non-observance of the rules of the Union to:

(a) waive the observance of r 8(b) and r 12(o);

(b) deem that the attendance and participation of the members of the Executive and the Council Delegate constitute a quorum of Council and as constituted have the authority to exercise all of the powers and functions of Council (except as varied and modified by this order) pursuant to the rules of the Union;

(c) deem the meeting held on 31 March 2010 attended by the members of the Executive and the Council Delegate to be a valid meeting of Council and the resolutions passed at that meeting to be valid;

(d) deem that the attendance and participation of the members of the Executive and the Conference Delegate constitute a quorum of Delegate Conference at which all are entitled to vote and as constituted have the authority to exercise all the powers and functions of Delegate Conference (except as varied and modified by this order) pursuant to the rules of the Union; and

(e) deem the meeting held on 31 March 2010 attended by the members of the Executive and the Conference Delegate to be a valid meeting of Delegate Conference and the resolutions passed at that meeting to be valid.

33 It is my opinion that such an order can in the unusual circumstances of this case be made and should be made. Firstly, it can be said to be consistent with the object in s 6(f) of the Act which in part requires the Commission to encourage the democratic control of registered organisations. Secondly, as Ritter AP recently aptly observed in *Stacey* [273]:

> A significant touchstone of the general power under s66(2) is the concept of the '*observance*' of an organisation's rules. This demonstrates in my opinion that a key part of the s66 jurisdiction is, to put it colloquially, to keep an organisation '*on track*' – running in accordance with its rules. This also suggests some contemporary connection between a s66 application, any conduct said to give rise to it, and any orders or directions to be made. The parties named in s66(1) can

via s66(2) seek the assistance of the President to disallow/alter prohibited rules, to declare the interpretation of rules, inquire into election irregularities and make other orders to assist or require an organisation to observe its rules. The text and context suggests that any corrective orders are limited to those which have some present connection with the activities of the organisation and the observance of its rules.

34 Whilst most applications that have come before the President under s 66 of the Act which relate to the non-observance of the rules of an organisation, orders and directions to require actual compliance with the rules, it is part of the central duty and power of the President when acting under s 66 of the Act to rectify the consequences of non-observance of the rules of an organisation if it is necessary to do so to enable the organisation to move forward and function properly. In this matter an order is necessary to put the organisation back on track and enable it to observe its rules and the provisions of the Act that require compliance by the Union to properly complete the proposed amalgamation. Without such an order the Union can not function or regularise it activities.

35 For these reasons I will make a declaration declaring the true interpretation of r 8(b) and r 12(o) in the terms set out in paragraph [26] of these reasons. I will also make an order in the terms set out in paragraph [32] of these reasons.

2010 WAIRC 00388

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WARREN DE PRAZER
	APPLICANT
	-and-
	WESTERN AUSTRALIAN RAILWAY OFFICERS' UNION
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 29 JUNE 2010
FILE NO/S	PRES 3 OF 2010
CITATION NO.	2010 WAIRC 00388

Result	Declaration and Order made
Appearances	
Applicant	Mr D H Schapper (of counsel)
Respondent	Ms P Byrne (as agent)

Declaration and Order

This matter having come on for hearing before me on 18 June 2010, and having heard Mr Schapper of counsel on behalf of the applicant, and Ms Byrne as agent on behalf of the respondent, and reasons for decision having been delivered on 25 June 2010, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby —

1. DECLARES the true interpretation of —

   (a) rule 8(b) of the rules of the Union is that while the 14 Branches defined in r 33 of the rules of the Union remain unclosed by Council, to constitute a quorum of a meeting of Delegate Conference, representatives of 11 Branches must attend and participate in a meeting of Delegate Conference; and

   (b) rule 12(o) of the rules of the Union is that to constitute a quorum of a meeting of Council, exclusive of the members of the Executive, five ordinary members of Council or four ordinary members of Council and the Union member on the Railways Classification Board must attend and participate in a meeting of Council.

2. ORDERS that —

   (a) the observance of r 8(b) of the rules of the Union and r 12(o) of the rules of the Union is waived;

   (b) that the attendance and participation of the members of the Executive and the Council Delegate constitute a quorum of Council and as constituted is deemed to have the authority to exercise all of the powers and functions of Council (except as varied and modified by this order) pursuant to the rules of the Union;

   (c) the meeting held on 31 March 2010 attended by the members of the Executive and the Council Delegate is deemed to be a valid meeting of Council and the resolutions passed at that meeting are deemed to be valid;

(d) that the attendance and participation of the members of the Executive and the Conference Delegate constitute a quorum of Delegate Conference at which all are entitled to vote and as constituted is deemed to have the authority to exercise all the powers and functions of Delegate Conference (except as varied and modified by this order) pursuant to the rules of the Union; and

(e) the meeting held on 31 March 2010 attended by the members of the Executive and the Conference Delegate is deemed to be a valid meeting of Delegate Conference and the resolutions passed at that meeting are deemed to be valid.

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

AWARDS/AGREEMENTS—Application for—

2010 WAIRC 00335

EDUCATION ASSISTANTS (GOVERNMENT) GENERAL AGREEMENT 2010;

GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION, THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH); THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION DEPARTMENT OF COMMERCE; AND THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH)
	APPLICANTS
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
HEARD	MONDAY, 8 FEBRUARY 2010, MONDAY, 22 FEBRUARY 2010, WEDNESDAY, 10 MARCH 2010, THURSDAY, 11 MARCH 2010, FRIDAY, 12 MARCH 2010, MONDAY, 15 MARCH 2010, TUESDAY, 16 MARCH 2010, WEDNESDAY, 17 MARCH 2010, WEDNESDAY, 28 APRIL 2010, THURSDAY, 29 APRIL 2010
	WRITTEN SUBMISSIONS 25 MAY 2010, 27 MAY 2010
DELIVERED	FRIDAY, 11 JUNE 2010
FILE NO.	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00335

CatchWords	Industrial agreements – Applications to register – Agreement to arbitration of wage increases to be included upon registration – Work value – Government wages policy – Effect of State Wage Principles - Industrial Relations Act, 1979 s 26(1)(a), s 42G
Result	Annual wage increases ordered
Representation	
Joint Applicants	Mr R. Hooker (of Counsel) and with him Mr B. Owen on behalf of the Liquor, Hospitality and Miscellaneous Union.
	Mr H. Dixon (of Senior Counsel) and with him Mr R. Bathurst (of counsel) on behalf of the Executive Directors of the Department of Education and of the Labour Relations Division of the Department of Commerce

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Reasons for Decision

The Applications to the Commission

1 This is the unanimous decision of the Commission in Court Session. The Commission has before it applications to register two enterprise agreements pursuant to s 41 of the *Industrial Relations Act 1979* ("the Act"). The Education Assistants' (Government) General Agreement 2010 (which we refer to as "the 2010 EA Agreement") and the Government Services (Miscellaneous) General Agreement 2010 ("the 2010 Government Services Agreement") ("the 2010 Agreements") will replace the current 2007 Agreements of those names. The Liquor, Hospitality and Miscellaneous Union (LHMU) on the one part, and the Executive Directors of the Department of Education and of the Labour Relations Division of the Department of Commerce (on behalf of a number of Government departments) on the other part, have reached agreement on all matters other than the increases to be applied to the wage rates in the two agreements.

2 The parties have agreed to bring the applications to the Commission pursuant to s 42G of the Act, the relevant parts of which are now set out:

> **"42G. Parties may agree to Commission making orders as to terms of agreement**
>
> (1) This section applies where—
>
> (a) negotiating parties have reached agreement on some, but not all, of the provisions of a proposed agreement;
>
> (b) an application is made to the Commission for registration of the agreement as an industrial agreement, the agreement to include any further provisions specified by an order referred to in subsection (2); and
>
> (c) an application is made to the Commission by the negotiating parties for an order as to specified matters on which agreement has not been reached.
>
> (2) When registering the agreement, the Commission may order that the agreement include provisions specified by the Commission.
>
> (3) An order referred to in subsection (2) may only be made in relation to matters specified by the negotiating parties in an application referred to in subsection (1)(c).
>
> (4) In deciding the terms of an order the Commission may have regard to any matter it considers relevant.
>
> (5) When an order referred to in subsection (2) is made, the provisions specified by the Commission are, by force of this section, included in the agreement registered by the Commission.
>
> (6) Despite section 49, no appeal lies from an order referred to in subsection (2)."

3 Accompanying the applications to register these agreements is a separate Agreement for Arbitration made between the parties which contains the framework for the matter before us. Relevantly at this time, the two agreements to be registered will be in the same terms as the existing 2007 agreements with some exceptions; the terms of the agreements will in each case be for three years and the effective date for the first wage increase will be the first pay period on or after 1 January 2010 regardless of the hearing date or date of decision. The arbitration is to be only about the annual wage increases to be included in the 2010 Agreements and the parties have agreed that they will not argue any other matters.

4 In relation to the annual wage increases to be included in the 2010 Agreements, the respective positions of the parties are set out in Clause 2(a) of the Agreement for Arbitration which is as follows:

> "The LHMU will argue for wage increases of 7%, 6.5%, 6.5% and the Government respondents will argue for wage increases of 2.5%, 2.5% and 3%."

The Timing and Duration of the Hearing

5 The Agreement for Arbitration includes the following in Clause 6:

> "The parties will agree on the programming for arbitration and request the Commission to list the matter for 25 February 2010 onwards."

6 The hearing of this matter proceeded according to a programme which was agreed between the parties rather than one set down by the Commission. The parties advised that despite the terms of the Agreement for Arbitration, due to the availability of counsel, they requested that the matter be listed for a six day hearing commencing on 10 March 2010. This was accommodated by the Commission and the matter was listed as requested. The parties did not conclude their respective cases within their agreed time and subsequently agreed that the hearing should resume for a further three days on 28, 29 and 30 April 2010. Again, the Commission accommodated this request, although it could have accommodated an agreement to resume the hearing on an earlier date. The parties completed their respective cases on 29 April 2010. On 21 May 2010, after these Reasons were drafted but before they were able to be delivered, the LHMU sought and was granted leave to make supplementary submissions on the State Budget which was delivered on 20 May 2010. Those submissions were received on 25 May 2010. The Government departments' submissions in reply were received on 27 May 2010.

Overview of the Cases Presented

7 The LHMU and the Executive Directors of the Department of Education and of the Labour Relations Division of the Department of Commerce are joint applicants. The LHMU presented its case followed by the Government departments and each replied to the case presented by the other party. Both parties presented detailed and helpful written outlines of their opening and closing submissions.

8 All witness evidence was given initially by witness statements filed in the Commission and standing as the evidence-in-chief of that witness on the understanding that any witness would be available to be called to be cross-examined if requested. The LHMU presented witness statements from 21 persons, six of whom gave supplementary oral evidence in chief and were cross-examined; a further 10 were called at the request of the Government departments in order for them to be cross-examined. The Government departments presented witness statements from 10 persons, seven of whom were called and cross-examined. The Commission was also presented with a considerable amount of documentary material. Members of the LHMU negotiating committee attended the hearings, as well as officers from the Government departments. The Commission thinks it is appropriate that this occurred; it will lead to a greater understanding of this decision and of the process of the arbitration which was agreed between the parties to decide the issues over which they have been unable to agree.

9 It is not practicable to refer to all of the evidence and documentary material in these Reasons for Decision. What follows therefore is an outline only of the respective submissions and evidence. Where it is necessary for the purposes of these Reasons for Decision, detail will be given.

The LHMU Case

10 In summary, the LHMU submits that a central, if not the central, consideration to the exercise of the Commission's discretion will be what is fair and reasonable in the circumstances. It is a principal object of the Act to ensure that all agreements registered under the Act provide for fair terms and conditions of employment. The agreements to be registered concern the work of Education Assistants (EAs), school Cleaners, Gardeners and other general employees of the Government covered by the LHMU.

11 The LHMU submits that its case is based upon a combination of circumstances any or all of which justify its claim for a 20% wage increase over three years. The circumstances as described by the LHMU are the Premier's public comments about the "modest" nature of the Government's offer; the public comments of Ministers about the importance and difficulty of the work done by school support workers; the refusal of the Government to honour an agreed position that Cleaners and Gardeners in the Department of Education should be paid the same as Cleaners and Gardeners in the Department of Health; an existing entitlement for EAs to a defined percentage increase from 1 April 2010; that the Government offer if granted would materially disturb the 1998 relativities between Teachers and EAs; changes in work value; the "unfairness and illogicality" of the Government's Wages Policy especially compared with the wage agreements reached with Teachers, Public Servants, Police and other employees of or connected with the Government; the "systemic economic disadvantage" experienced by the employees covered by the agreements by nature of their predominantly female gender mix; and the low-paid nature of the work carried out by these employees and the disproportionate impact on them of cost of living increases.

12 The evidence called by the LHMU in support of its case came from two Cleaners: Ms Darby and Mr Milligan, a Cleaner-in-Charge: Mr Clements, three Gardeners: Mr Kitis, Mr Peters and Mr Spence, three EAs: Mr Hitt, Ms Jones and Mr New, four EA Special Needs: Ms Machin, Mr McDowell, Ms Prescott-Brown and Ms Williams, a Senior EA: Ms Parnell, a Tour Guide/Supervisor at the Fremantle Prison: Ms Usher and a Visitor Services Officer at the WA Museum: Ms Murray. In addition, the LHMU Secretary Mr Kelly gave evidence, as did Ms Gurrin, who is the Lead Organiser for the LHMU's members in the Department of Education, Ms Deveraux, who has 35 years' experience in education and children's services, Ms Cattalini, the Director, Social Policy of the WA Council of Social Services ("WACOSS") and Dr Flatau, who is a Senior Lecturer in Economics at Murdoch University.

The Government Departments' Case

13 In summary, the Government departments say that the offer of 8% over the life of the 2010 Agreements is fair and reasonable in all of the circumstances. It maintains the real value of wages presently payable, and awards an increase in real terms because the proposed increases of 2.5%, 2.5% and 3% are greater than the forecast increases of the Perth Consumer Price Index ("CPI") for the period, being of 2.25%, 2.5% and 2.75%. There are no new productivity measures to be made to justify a greater increase. All employees to be covered by the 2010 Agreements have had significant real wage increases over the past 12 years which well exceeded CPI for the same period.

14 Further, the offer takes proper account of the budgetary constraints facing the Government following the significant economic downturn in 2008-09 which decreased the State's own-source revenue, replaced budget surpluses with projected deficits in 2010-11 and caused the Government to introduce corrective measures to ensure the sustainability of the State's finances. Wage increases above the offer will need to be funded by additional borrowing, will place further pressure on the State's credit rating and will be inconsistent with the financial management principles of the *Government Financial Responsibility Act 2000*. There is a need to take account of the potential flow-on effect in other areas of the public sector of higher wage increases.

15 The Government departments also submit that there has been no material change in the nature of the work, skill and responsibility required, or in the conditions under which work is performed, to justify a wage increase based upon work value changes. In respect of EAs, the current wages payable and the offer both build on and reflect the work value adjustments from the 1998 work value case (*The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v. The Honourable Minister for Education* (1998) 79 WAIG 648, 658) (the "1998 EA case") which also addressed issues concerning gender pay inequity. In respect of Cleaners and Gardeners, substantial increases of 13% were awarded by the Commission in 1998 (*The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v. Education Department of Western Australia* (1998) 78 WAIG 1589) (the "1998 Cleaners and Gardeners case") and subsequent significant increases have been granted in agreements from 2001 to the current 2007 Agreement. The terms and conditions applicable to Cleaners and Gardeners are more generous than those applicable to Cleaners and Gardeners in the private sector.

16 The evidence called by the Government departments in support of their case came from the Deputy Under Treasurer, Mr Barnes and the Executive Director, Economic Business Unit, Mr Court, both from the WA Department of Treasury and Finance; the Acting Principal, Winthrop Primary School, Ms Beard; the Principal Consultant for Schools Plus, Ms Clark; the Principal Consultant Environmental Services, Mr Hastie; and the Acting Manager, Labour Relations Directorate, Ms McAdam, all from the Department of Education; the Executive Director Labour Relations Division, Mr Horstman and the Acting Manager, Labour Relations Directorate, from the Department of Commerce; the Chief Finance Officer of the Department of Health, Mr Leaf; the Principal, Sir David Brand School, Ms Lucas, and the Business Manager of Mount Lawley Senior High School, Ms Scott.

Consideration of the Issues

17 The LHMU described the case it presented in support of wage increases of 7%, 6.5% and 6.5% over the life of the 2010 Agreements as multifaceted. One of the LHMU's "essential grounds" for the wage increase it claims is "Changes in work value". The written submission groups together the employees to be covered by the 2010 Agreements as "school support workers" and says its witness evidence shows how their work has changed "in the last decade or so" (LHMU Final Written Submissions at 257). The Government departments brought evidence to counter the LHMU submission and in support of their own case. It is necessary to resolve the conflicts in the evidence before considering the parties' respective positions.

<u>School Gardeners</u>

18 In relation to School Gardeners, the LHMU refers to the evidence of Mr Spence that the job has become more demanding and complex. He described his role as to present a clean school, a tidy school, a safe environment for children, a safe working environment and a safe learning environment. Frequencies of jobs and expectations have changed over the years. Gardeners now have to be more environmentally aware and have to deal with the consequences that brings. Changes have occurred in the standards of presentation of schools. Principals want their school to look nice, and Gardeners are being asked to do more by School Principals. Some task frequencies have increased, for example edging and brush cutting was done once every three weeks which is 17 times per year, but under a 2009 formula this was changed to coincide with the lawn mowing which is done 22 times a year. Compressing the jobs and adding to the task makes it very difficult to keep up with what the Gardener is supposed to do.

19 Reliance was placed by the LHMU on the report of a Review of Gardener Staffing Allocations in August 2008 done by the Facilities Operations Branch of the Department of Education and Training (Statement of Mr Spence, Attachment A). This was a survey of 35 Government schools which noted that factors such as the age and size of the school, student population, environmental demands and special programmes affect the work done by Gardeners and the demands on them. The LHMU says there is, accordingly, a greater work value of what Gardeners perform than was previously the case. The LHMU also stated that the report of the Review of Gardener Staffing Allocations showed that there was a shortfall of 54 FTE Gardeners and that there should be a minimum staffing level depending on the type of school. Any school with staffing levels below that level meant there was no way the required standard of gardening or maintenance could be achieved. The workload formulae are important because the workload of Gardeners has increased dramatically in the past 10 years with more focus on student involvement through "learning gardens" and sustainability lessons, and even extra garden beds put in by P & Cs, while the time allocation has not changed.

20 The LHMU submits that the handyman duties also performed by Gardeners can be wide and varied. Gardeners can be asked to do jobs to save the cost of the school employing a Handyman to do them. The LHMU says demands on, and expectations of, the Gardener have changed since 2005 because of the demands of the handyman job and the added difficulties that arise during the three months of the year when there is no support from anyone at the school. The role of the Gardener Handyman is an integral part of the functioning of the school as a community education facility. They exercise a large degree of autonomy and responsibility given that neither the Registrar nor School Principal have detailed knowledge of the inherent requirements of the position, the technical expertise and general tradesperson functions provided. No relief staff are provided during the summer period and Gardeners who do take leave during that period face the threat of returning to unmanaged landscapes and increased workloads. In at least one case, the difficulties with being in a remote community together with these issues have left the Gardener with no choice but to search for alternative employment and relocate his family.

21 From the point of view of the Department of Education, the evidence of Mr Hastie is that it is his considered view that the roles of Gardeners employed by the Department have not changed materially since 1998. The Gardening Staff Allocation Formula has been applied to all schools throughout the State since December 1993 and is still in use today. There has been only one minor amendment to the Formula since 1998 when the automatic irrigation programme was introduced. There have been changes to the format of JDFs however the duties outlined in them have not changed. The classification levels of some gardening positions changed in 2007, however this did not reflect a change in the duties of Gardeners but rather resulted from all previous wage schedules being put into one schedule and the positions renumbered.

22 Mr Hastie stated that there are only limited differences between the duties set out in the two versions of the School Gardening Manual between 1998 and 2009. One of these goes to the format of the document and the other is that the duties are described in more detail; it clarifies or makes explicit the duties of Gardeners but does not amend them. School Gardeners are now to record bore meter readings monthly where bore meters are installed. Senior Gardeners are to undertake appropriate training although they have always been required to supervise the activities of other gardening staff. The Review of Gardener Staffing Allocations in August 2008 is not necessarily the view of the senior level of the Department and its recommendations are not necessarily endorsed. To the extent the Review has identified factors affecting the Gardening Formula workloads, the existing formula already caters for those types of factors. Policies have been introduced relating to physical security and personal safety.

23 In relation to those handyman duties which are performed, the only substantive difference between 1992 and 2006 is the removal of certain plumbing duties; otherwise there have been no substantive amendments to the guidelines for handyman duties since 1993. The basic equipment and materials that Gardeners now use have not changed substantively. The formula takes all site factors into account, therefore the use of automatic reticulation, artificial turf and extensive paving are taken into account when the staffing levels are set for each school. In relation to handyman duties, the *Gardeners (Government) 1986 Award* No. 16 of 1983 in Clause 6(8) provides that an employer may direct an employee to carry out such duties as are within the limits of the employee's skill, competence and training including work which is incidental or peripheral to the employee's main tasks or functions. There has been no material change to the task frequencies contained in the School Gardening Manuals. There has been an increase in the recommended task frequencies in respect of brush cutting, lawn edging and raking over the spring and summer months. Where extra garden beds have been put in, Departmental policy is that it requires approval by a District Education Office and upon completion, the gardening time allocated to the school is reviewed in accordance with the gardening formula and additional time is allocated if appropriate.

School Cleaners

24 In relation to the work of school Cleaners, the LHMU submits that there has been an increase in violence and inappropriate behaviour in schools since 2003. It says the evidence is that the current role of Cleaner requires more demanding work in that instead of disinfecting a toilet bowl, there is now a need to disinfect entire cubicles on a regular basis. Cleaners have to be extra vigilant in their efforts to clean and disinfect. The amount of chemicals that has to be used has escalated. There is increased pressure on Cleaners. In at least one school there is never enough relief staff to fill absent positions which creates an expectation that all Cleaners are to work harder and faster to complete the job in the same time. This places unrealistic demands on the Cleaners and they believe that the work being done is sub-standard and that they have no control over the situation.

25 The Department of Education states that there have been no changes to the staffing formula for day labour cleaning (the Cleaning Formula) since 1998 other than in 2001 when an internal productivity rate of 300m² per Cleaner per hour was introduced, which is less than the productivity rate the parties were required to consider implementing pursuant to the 1998 Cleaners and Gardeners case. There are more schools with security fencing and a greater use of glass in the design of modern schools, however there has always been discretion to allocate Cleaners additional time for the opening and closing of school gates and where excessive internal glass areas are identified. In Mr Hastie's view, since 1998 there have not been any changes to the productivity rates for external areas and gymnasiums or to the loadings which apply to areas such as toilets and vinyl floors. Changes in the JDFs since 1998 changed the way the duties of Cleaners were described but do not reflect a change in the duties actually carried out by Cleaners. Each of the duties set out in the 1998 JDFs is still required to be carried out today and there are no substantive differences in the duties of Cleaners set out in the 2001 and 2009 JDFs. There have been changes to the classification structures of Cleaners and there was a change in the Cleaner-in-Charge JDF to recognise responsibility based on internal floor area rather than the number of Cleaners supervised. Recent changes to the level of each cleaning position do not reflect a change in the duties of Cleaners. There have been some changes in the equipment used by Cleaners since 1998 and in some schools the introduction of waterless urinals, however these do not take additional time to clean.

26 The minimum hourly rates set out for Cleaning Contractors are less than the hourly rates fixed by the existing 2007 Agreement. Personal security and safety have always been issues addressed in the Department's policy documents and induction manuals for Cleaners and Gardeners. There appears to have been a decrease in graffiti-related incidents this financial year. Where there is graffiti at a school, Cleaners are only allowed to use the chemicals and procedures that are authorised for other general cleaning purposes; if the graffiti cannot be removed using these authorised chemicals and procedures, the graffiti is reported to Building Management and Works to be cleaned by external contractors.

Other General Classifications

27 The LHMU refers to the evidence of Ms Usher, the Tour Guide/Supervisor at the Fremantle Prison whose evidence is that during the last two years her position and responsibilities have changed and expectations have risen. Tour Guides are now required to give safety instructions on two occasions during the tour. The numbers of visitors through the prison have increased significantly requiring longer hours and extra shifts. Ms Murray, the Visitor Services Officer at the WA Museum Perth site gave evidence of her duties.

Conclusion of the Evidence Regarding School Gardeners, Cleaners and Other General Classifications

28 The starting point for the Commission's consideration is the 1998 Cleaners and Gardeners case which dealt with a claim for increased wages for Cleaners and Gardeners employed by the Hon. Minister for Education. The facts found by the Commission in 1998 are set out in considerable detail and are available to us now when we are asked to measure changes which have occurred to the work of Cleaners and Gardeners. The Commission observed at (1998) 78 WAIG 1589 at 1600 that Cleaners and Gardeners work as part of a team under the Principal's/Registrar's control. The Commission noted that the experience in structural efficiency reviews and enterprise bargaining negotiations shows that Cleaners and Gardeners have been considered together and that within the organisational structure of the Education Department they come within the one area of management. This has not changed, as is indicated by this application to register one agreement embracing Cleaners and Gardeners, and we consider them together for the purposes of this matter.

29 With respect to the duties of Gardeners in 1998, the Commission noted at 1597 the evidence before it of a greater involvement of Gardeners with the school community in developing budgets and programmes, in administering contractors' attendances and being part of technology projects where school grounds are considered an extension of the classroom, although not all Gardeners are involved to the same extent. The Commission also noted at that time at 1598-1599 changes in productivity with the implementation of the gardening formula and cleaning programme which are referred to in these proceedings, particularly in the evidence of Mr Hastie.

30 Changes in 1998 recorded in the decision also included the need to address additional outcomes arising from evolved responsibility that Gardeners have accepted, their contributions to school and community programmes and the environment created at schools with higher standards of gardening. For Cleaners there was the training and flexibility as members of units who can undertake all facets of cleaning duties within the school. The need for schools to compete to attract students and Teachers, and the role of cleaning and gardening services making an important contribution to an environment which projects the school community's values and the professionalism of the services it offers students, was also noted. Therefore, to the extent that Gardeners giving evidence in these matters have emphasised there are higher standards of presentation required given the need for schools to compete to attract students and Teachers or the need to deal with contractors, these are matters which are already recognised. Some task frequencies have increased and we accept the evidence that there is a need for School Gardeners now to be more environmentally aware and that one effect of the compression of some jobs under the 2009 Gardening Manual has, at least in some cases, made keeping up with jobs more difficult. We consider this demonstrates a modest increase in productivity.

31 In relation to the work of Cleaners, we agree that evidence of the need to disinfect entire cubicles on a regular basis is not widespread amongst schools and is work which should be compensated by the payment of a higher allowance rather than being evidence of a change in the value of the work of Cleaners generally. In relation to the security of Cleaners, we note the extent of the implementation of the Review of the Physical Safety of Cleaners in Western Australian Schools (Statement of Ms Gurrin, Attachment G and T323). We do not consider this issue can be satisfactorily dealt with as part of this multifaceted submission and it should be dealt with in co-operative, not adversarial, Commission proceedings. The issue is not a factor in the work value of Cleaners and is also to be considered in the context of an employer's general duty of care.

32 The Government departments also submit that reliance on work value changes for general wage movements across all classifications is not justified, and they list the classifications in the 2010 Government Services Agreement for which no evidence has been led. We recognise the force of this submission but, as we point out later in these Reasons, the LHMU and the Government departments have previously maintained internal relativities within the Agreement for classifications other than Cleaners and Gardeners.

33 We regard the work of Cleaners and of Gardeners to be critical to the efficient running of the school as was recognised in 1998. They have a professional pride in the work they perform, however we cannot confidently conclude that there has been a significant change in the value of the work of Cleaners since 1998 although we will have regard generally to the evidence of the work being performed by them. In relation to School Gardeners there has been some change, as we have noted above.

34 We now consider the evidence regarding the work of EAs.

Education Assistants

35 Both the LHMU and the Government departments referred to the 1998 EA case. It provides a yardstick from which to measure whether the evidence before us establishes that changes have occurred since 1998 which have increased the value of the EAs' work. We have considered the evidence of the witnesses of both the LHMU and the Department of Education in the context of the role and responsibilities described in the 1998 EA decisions and the JDFs. The Commission must also be mindful of whether any changes which may have occurred in the role and responsibilities have already been recognised in the wage increases paid to EA classifications in the previous 2002, 2004 and 2007 Agreements. Evidence that there has been a change to a classification structure will not necessarily mean that a change in the value of work has thereby been recognised. We have found it helpful to consider the evidence as it relates to the particular issues raised.

36 Increased Violence: Several of the LHMU witnesses spoke of students becoming violent and having to face assaults from more children than used to be the case, and of having to remove and individually supervise disruptive students. (We note that the violence being referred to is not the violence referred to in the evidence of Cleaners referred to earlier.) It is part of the JDF to provide appropriate physical constraint, however EAs are expected to restrain physically mature students who can be nearly double the EA's body weight; EAs have been attacked from behind, scratched, bitten and kicked. One EA has been attacked approximately 33 times since June 2007 and the assaults were principally from repeat incidents involving particular students. There is evidence that over the last three years there has been an increased level of violence and aggression from the students; over the last decade it has included four-year-old students in kindergarten. EAs are vulnerable to infections arising from these assaults where they have been scratched.

37 In relation to this, the corresponding evidence of the Department of Education is that the presence of challenging behaviour amongst students such as aggression is no more prevalent today than it was in 1998 and in relation to aggressive behaviour, EAs have had to work with students with challenging behaviour in the past. Ms McAdam's supplementary statement (Exhibit MINISTER 14) shows that the number of reported incidents involving violence in schools had decreased from a peak in 2005 and has remained largely steady in absolute terms; the number of students in schools has increased since 2005.

38 We note the Commission in 1998 did refer to behaviour management in the context of the duties of EAs and that the second question in part 6 of the Request for Level 3 Recognition Form (Schedule 3 to the 2007 EA Agreement) states that the EA may be required to physically restrain or remove a student. Both of these tend to support the evidence that EAs have had to work with students with challenging behaviour in the past. We conclude that dealing with violence or aggressive behaviour is not a change since 1998. Even if, regrettably, it is occurring more regularly, or occurring in four-year-old children now as well as five-year old children or older, it does not lead to the conclusion that the value of the work of EAs has increased or that there is a role or responsibility which has not been already recognised.

39 Involvement in drafting Individual Education Programmes (IEPs): For the LHMU, EAs gave evidence of their role in the drafting of IEPs, although it is the Teacher who does the drafting and it is acknowledged that the core element of the programmes has remained unchanged. The Department of Education's evidence is that since the introduction of IEPs in education support schools in the 1980s, EAs have been encouraged to have input into, and make suggestions about, the development and delivery of an IEP. IEPs are devised by the Teacher, and implemented by both the Teacher and the EA, under the Teacher's direction. The EA plays a role in implementing strategies and plans as part of their IEPs.

40 We consider the evidence shows that IEPs are not new, however EAs do need to understand the objectives and to have, to the degree that is required to implement the IEP, knowledge of the underlying principles. In implementing IEPs, strategies have changed and technologies have changed since 1998.

41 Greater Number of Special Needs Children: The LHMU's evidence is that a far greater number of special needs children are attending mainstream classes and the range of special needs has increased greatly. There are increased challenges for EAs as they are increasingly dealing with children who have serious ongoing illness and with children with behavioural or educational difficulties. There are a lot more children with specific problems now, whether they are behavioural or educational difficulties, and EAs have to make sure every individual student's programme is delivered and monitored. An EA may need to perform both mainstream and special needs roles until an EA Special Needs ("EA SN") is available.

42 For the Department of Education, evidence confirmed that in some circumstances, EAs now work with students with a different mix of disabilities than in 1998. The evidence was also that there have been changes in schools but the role of mainstream EAs has remained the same; preparing materials and aids for the teaching programme and under the direction of the Teacher performing certain activities with the children. The majority of students with disabilities had been fully integrated into mainstream schools by 1998 other than for students with intellectual disabilities. Since 1998 there has been an increase in the number of students with special needs across schools in the State. This had begun, but had not been completed by 1998. This is not something that is specific to mainstream schools: students with disabilities in rural and regional areas have always attended mainstream schools and the ratio of EAs to students with special needs in mainstream schools has not increased since 1998. It is possible for some students not to be diagnosed with a disability until after they have started school, however this is something that happens relatively rarely because in most instances disabilities become apparent at a very young age.

43 Counselling Students: The LHMU evidence suggested that EAs are counselling students, although not formally, and are liaising with parents and providing feedback about student performance. For the Department of Education, the evidence is that it is not the role of a mainstream EA to counsel students. It is not the role of EAs to counsel students in relation to any suspected abuse or any emotional issue. Level 2 and 3 EAs may be required in accordance with the JDF to counsel students on matters affecting their education. We note that the 1998 EA case recognised a role for counselling students on matters affecting a student's education (the 1998 EA case at 650) and do not consider the evidence shows a difference from that already recognised.

44 Out-of-Hours Class Activities and Excursions: The LHMU evidence suggested that assisting a Teacher in out-of-hours class activities and excursions is occurring and there is an expectation that EAs attend and work at out-of-hours functions even though it is not required. For the Department of Education the evidence is that EAs are not required to perform any tasks that are not set out in the JDFs; for example, attending meetings or performing work outside usual working hours, and that mainstream EAs have not had an increased involvement in out-of-school activities and school excursions over time. We consider the balance of the evidence is that assisting a Teacher in out-of-hours class activities and excursions is not itself a new role and accept the evidence that EAs who do so may want to do so and know they can decline to do so.

45 Assisting Students: There was also evidence of an EA walking students to a bus stop which is not assisting a Teacher as such. However, it is the case that the 2002 JDF recognises that EAs "Assists with arrival and departure of students travelling on buses". Similarly, there is evidence of EAs assisting students to undress and to bathe, however the 1998 EA case at 652 recognised the duty of EAs to attend to physical and emotional needs and work remotely from Teachers, for example in ablution facilities.

46 Increased Diversity of Students: There is evidence that there is an increased number of refugees from diverse nationalities and an increased need to understand indigenous culture, however the evidence of Ms Clark is that in 1998, schools still had a culturally and linguistically diverse population of students and the Commission in the 1998 EA case also made reference to EAs working in a school providing for the teaching of children of various ethnic backgrounds. We accept that the diversity of students from refugee backgrounds may have increased, however it does not lead to the conclusion that the value of the work of EAs has thereby increased or that there is a role or responsibility which has not been already recognised. Similarly too with the evidence that there is an increased number of children in foster care living in abusive and dangerous homes.

47 Assisting With Feeding: The LHMU gave evidence that "probably in the last four years" peg-feeding and catheterising of students is now included under the words "assist with feeding" but it is a medical procedure. The evidence from the Department of Education is that EAs were peg-feeding and catheterising students in 1998 and there has not been any significant change in the equipment being used by EAs since 1998. We accept the evidence that peg-feeding and catheterising students is not itself new even if the frequency of it has been increasing in recent years. It does not affect all EAs in that it requires an EA to be trained and an EA is able to refuse to be trained. It is not within the scope of this multifaceted claim to deal with this issue specifically. There is reference to it having been the subject of other proceedings in the Commission and that appears to us to be a more appropriate avenue for this issue to be addressed.

48 Yard Duty: The LHMU states that EAs are obliged to do yard duty yet this is not in the JDF; yard duty increases the duty of care. The Department of Education states that this has happened since 1991. Level 1 and 2 EAs must be within the eyesight of a Teacher and the Level 3 SN EA JDF says EAs can supervise students without a Teacher being present. EAs are to assist Teachers in out-of-class activities. There may be examples of EAs doing yard duty on their own but there are already emergency response plans, risk management plans, roles and responsibilities. In this context, we note from the 1998 EA case the reference then to EAs pointing out their responsibilities associated with the supervision of students placed in their care often in situations remote from the control of the Teacher, for example, in play time supervision in the pre-primary environment (the 1998 EA case at 663). We do not think the evidence shows significant change from that recognised in 1998.

49 Taking Students Out on Work Experience: The LHMU evidence is that since the 2007 EA Agreement, EAs now take students out on work experience and take them out on bus training, all of which used to be done by Social Trainers but in a lot of schools is now performed by EAs. This is countered by the evidence from the Department of Education that a Level 3 EA SN taking students out to workplaces was occurring prior to the introduction of the 2002 JDF. We consider the evidence does show that at least in some cases this task is being done by EAs, though perhaps not commonly being done by them.

50 Changes to the Education Programme: There is evidence before us from EAs that the education programme is now more structured and formal. Diagnostic testing for children at educational risk, both educational and behavioural, has improved and increased. The evidence of Ms Parnell, a Senior EA, is that it has required a great deal of "upskilling" for the classroom EA in the delivery of the educational programme. Ms Machin, an EA SN, said that there are more individual programmes, more facilities available and more areas to look at where things can be done for individual students, whereas before it used to be just one area. Mr New, an EA, stated that workload and documentation has changed in that there are now Risk Analysis forms and a formal interview process. The recent inclusion of a "collaborative approach" in writing behavioural programmes requires interviewing. Plans that historically were two pages long now run to seven or eight pages. For the Department of Education there was evidence that an increased focus on cooperative learning (encouraging children to work together, plan together and talk to each other as they learn) did not make the role of mainstream EAs any more difficult or add to their responsibilities. A Socio Psychological Education Resource ("SPER") or a Behaviour Centre EA will have a high level of input into the team that devises the behaviour management plan and the SPER EA Level 3 JDF provides for this. Ms McAdam's, Acting Manager, Labour Relations Directorate, Department of Education, evidence is that the role, responsibilities and duties of EAs set out in the 2002 EA SN JDF directly reflect the role and duties of EA SNs from the 1998 EA case and that three new categories of EA were added in 2007.

51 There is evidence that the amount of testing done with children has greatly increased over the last three years. All students are tested now for a greater variety of subjects. One-on-one time spent with children has led to increased expectation and demands. As a Teacher does one-on-one testing, the EA supervises, carries out set activities and maintains behaviour of the whole class. In Ms Parnell's case, she said she will be in charge of the 26 other children that are in the classroom, while making sure that they are carrying out activities that are set down in the programme and also maintaining behavioural management within the classroom. EAs are called upon to undertake at least some additional student assessment and accountability duties in order to free up the time that Teachers have available to spend with students. EAs are more frequently required to supervise, carry out set activities and maintain behaviour management with a whole class group while the Teacher conducts one-on-one testing. Over the past three years, as pressure on Teachers has increased, for example in areas of reporting, recording, accountability and assessment issues, the EA has become more involved with these important requirements. Ms Machin's evidence is that EAs are expected to take on a higher duty of care than previously.

52 Supervision by teaching staff has given way to a greater level of independence and autonomy so that work unsupervised can occupy the majority of a day; although working under the guidance of the Teacher, EAs have been left to work on their own with small groups and can and do supervise the education support class by themselves without a Teacher present. Ms Prescott-Brown, an EA SN, says in her evidence that EAs can be expected to take classes on a regular basis without Teacher supervision.

53 For the Department of Education, it is acknowledged that over the last 10 years there have been screening tests. There also has been testing as part of the Australian Early Development Index which requires Teachers, not EAs, to complete a checklist. Ms Clark states that there has been some change since 1998 in the increased testing of students. The introduction of Schools Plus in 2005 also meant that EAs fulfil a more generalised role in the classroom which has had the most impact in mainstream classes because it has allowed Teachers to spend more time with a student who has special needs and while the Teacher is doing that, the EA helps supervise the remainder of the class. This does not require EAs to do more than what they were doing in 1998. Further, the generalised role increases the quality of the experience for the EA, the quality of the experience for Teachers and the quality of the experience for students. It allows an EA to work with an increased number of students, which in turn allows the Teacher to spend more time with a student who has the highest needs.

54 The Department of Education's evidence emphasises that since 1998 there has not been any significant change in the nature of the work performed by EAs, the skill and responsibility required or the conditions under which the work is performed, other than changes that have been recognised by the Department, for example by changes in the classification structure for EAs. The role, responsibilities and duties of EAs have not changed over the last 12 years. Not all mainstream EAs embraced the

changing role of providing assistance directly to children; a number predominantly assist Teachers. The Department points out that the Level 3 EA SN JDF provides that EAs may be required to supervise students without the presence of a Teacher.

55 We note that the basis of the LHMU's claim in 1998 included an increase in responsibility in teaching/supervising small groups of students without direct supervision of a Teacher (the 1998 EA case at 651). The Commission recognised that EAs contribute to the teaching programme with feedback on individual students, that they assist with assessments of a student's needs and are involved in the full scope of the education process (the 1998 EA case at 652). We consider the balance of the evidence shows EAs are now more likely to work without direct supervision to a greater extent as the Teacher spends more time with an individual student. This conclusion applies to both EAs and EA SNs. Even though the Level 3 EA SN JDF provides that EAs may be required to supervise students without the presence of a Teacher, Ms Prescott-Brown's evidence shows that she, as a Level 3 EA SN, is "doing whole classes" and sometimes can "make up classes" as well. This has moved beyond the position found in the 1998 EA case where EAs take control of the classroom when the Teacher has to deal with a crisis (the 1998 EA case at 652). The expression used in the hearing of "getting more bang for your buck out of your resources" (T384) is to the point and we do not accept the evidence that this does not require EAs to do more than what they were doing in 1998.

56 We attach some weight to the evidence of Ms Deveraux on this issue given her knowledge of, and the evidence presented in, the 1998 EA case. We note her evidence that EAs are routinely being required to not only prepare and implement a Teacher's programme but are undertaking collaborative planning of lessons and then observing and reporting on the outcomes of that lesson. EAs are required to take a much greater role in implementing the discipline policies and individual behaviour management programmes within the school.

57 In relation to whether the JDF gives an accurate picture of the work actually done by EAs, there was evidence of an EA being solely responsible for the implementation and administration of a Withdrawal Support Programme (Oral Language) for three years and preparing and facilitating lessons for small groups. This programme was phased out at the end of 2009. Ms Parnell gave evidence about a Fundamental Movement Programme which has been introduced that requires an EA, not the Teacher, to assess students in the outdoor area, helping with their gross motor development, which in turn affects their educational development. We have not found the issue significant otherwise.

Parity

58 This aspect of the LHMU case applies to each of the 2010 Agreements although for different reasons. In the case of the 2010 EA Agreement the LHMU draws attention to clauses within the current 2007 EA Agreement and submits that weekly wage rates for EAs should be increased by 4% from 1 April 2010 irrespective of the outcome of the present proceedings. Relevantly, Clause 28.2 of the current 2007 EA Agreement states as follows:

> "28.2 In the event that a replacement agreement for the "Department of Education and Training Ministerial Officers General Agreement 2006" has an annual general wages component that is above 4.0% applied in 2009 then the percentage rate above 4.0% will be applied to this General Agreement from the date of application of the increase in the replacement agreement for the Department of Education and Training Ministerial Officers General Agreement 2006. The intention of the parties is to ensure that parity in terms of quantum and effective dates of general wage increases is maintained between this General Agreement and the replacement agreement for the Department of Education and Training Ministerial Officers General Agreement 2006."

59 The LHMU states that subclause 28.3(a) is directly applicable to the present circumstances. This subclause provides as follows:

> "28.3 The parties to the General Agreement agree that should a replacement General Agreement not be registered by 1 January 2010 then this General Agreement continues in force pursuant to section 41(6) of the *Industrial Relations Act 1979*, and the weekly wage rates of all employees increase as follows:
>
> (a) in the event that a replacement agreement for the "Department of Education and Training Ministerial Officers General Agreement 2006" provides for an annual general wage increase component in 2010 in excess of the State Wage Case outcome, that increase applies to employees covered by this General Agreement from the same effective date as the replacement Department of Education and Training Ministerial Officers General Agreement 2006;"

60 The LHMU says that the *Department of Education and Training Ministerial Officers General Agreement 2008* (2008) 89 WAIG 233 ("DETMOGA 2008") (which replaced the DETMOGA 2006 mentioned in subclause 28.3(a)) provides for increases from 3.5% to 4.9% from 1 April 2010, averaging 4%; accordingly, weekly wage rates for the current 2007 EAs should be increased by 4% from 1 April 2010 irrespective of the outcome of the present proceedings.

61 The Government departments oppose the Commission awarding any wage increase based upon Clauses 28.2 and 28.3. They submit that the general wage component referred to was not above 4% and, in any event, one would need to look at the Ministerial Officers which were comparable and are relevant. The DETMOGA 2008 provided a wage increase for Level 1 and 2 School Officers (whose wages are aligned to those of EAs) of 3.5% from the first pay period on or after 1 April 2010. However subclause 28.3(a) requires a comparison to be made between that wage increase and the 2010 State Wage Case outcome before any amount is paid; the 2010 State Wage Case outcome has not been handed down. As to the 3.5% wage increase for Level 1 and 2 School Officers in these proceedings, the Agreement for Arbitration provides for the effective date of the first wage increase to be the first pay period on or after 1 January 2010. In other words, three months earlier than 1 April 2010; a 3.5% increase paid on 1 April 2010 is equivalent to a 2.6% increase paid from 1 January 2010, which is effectively the Government departments' offer.

62 Our conclusion in relation to this part of the LHMU claim is as follows. The reference in Clause 28.2 to the DETMOGA 2006, together with the words "The intention of the parties is to ensure that parity in terms of quantum and effective dates of general wage increases is maintained between this General Agreement and the replacement agreement for the Department of Education and Training Ministerial Officers General Agreement 2006", is an expression of intent by both the LHMU and the Department of Education at that time to continue the link between the wage rates of EAs and the wage rates of School Officers which was established as a direct result of the 1998 EA case. That link is particularly illustrated by reference to the table set out in the decision in the 1998 EA case at 656. It shows the EA classifications fell within the span between Level 1 and 2.3 of *The Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983* No. 5 of 1983 ("the EDMOSAC Award"). School Officers are now covered by the DETMOGA together with the EDMOSAC Award.

63 We consider that subclause 28.2 points to a presumption that EAs would receive an increase based upon the increase payable from 1 April 2010 under that link. That is not to say there is an entitlement under Clause 28.2 of the current 2007 EA Agreement for a wage increase of 4% from the first pay period on or after 1 April 2010 – Clause 28 is to be read as a whole, and Clause 28.3 provides for the present situation, where a replacement for the 2007 EA Agreement has not been registered by 1 January 2010 by providing alternatives for determining the wage increases to apply in 2010. In subclause 28.3(a) the "general wage increase component" is to be compared to the outcome of the 2010 State Wage Case (which is not operative until 1 July 2010).

64 From the above, we consider two observations are valid. The first is that the 2007 EA Agreement shows the agreed intention of the LHMU and the Department of Education that in 2010 the wage increase to be applied to EAs in 2010 would be primarily determined by reference to the DETMOGA 2008 and not to be determined by reference to the wage increase for Teachers. The second observation is that there is nothing in Clause 28 which could support the LHMU claim of a 20% wage increase over three years.

65 We will take into account in our final conclusions the fact that the 2007 EA Agreement contains an expression of intent by both the LHMU and the Department of Education at that time to continue the link between the wage rates of EAs and the wage rates of School Officers which was established as a direct result of the 1998 EA case.

66 In relation to Cleaners and Gardeners, the LHMU points to Clauses 17.3 to 17.7 of the current 2007 Government Services Agreement which it says manifest a common intention for parity with Department of Health Support Workers. Clauses 17.3 to 17.7 are as follows:

> "17.3. In the event that a replacement agreement for the LHMU – Department of Health Support Workers Federal Agreement 2004 provides for an annual general wage increase component that is above 4.0% applied in 2009 then the percentage rate above 4.0% shall be applied to this agreement from the date of application of the increase in the replacement agreement for the LHMU - Department of Health Support Workers Federal Agreement 2004. The intention of the parties is to ensure parity in terms of quantum and effective dates of general wage increases is maintained between this agreement and the replacement agreement for the LHMU Department of Health Support Workers Agreement 2004.
>
> 17.4. If, after the nominal expiry date, this agreement continues in force pursuant to section 41(6) of the *Industrial Relations Act 1979*, the weekly wage rates, including allowances contained in this agreement that are increased by the same percentage as annual wage increases, of all employees shall increase as follows:
>
> (i) In the event that a replacement agreement for the LHMU department of Health Support Workers Agreement 2004 provides for an annual general wage increase component in 2010 in excess of the State Wage Order outcome, that increase shall apply to employees covered by this agreement from the same effective date as the replacement LHMU department of Health Support Workers Agreement 2007. Provided that in the event that a replacement agreement for the LHMU department of Health Support Workers Agreement 2004 does not occur, the provisions of sub-Clauses (ii) and (iii) of this Clause apply; or
>
> (ii) the weekly wage rates and allowances in this agreement that have been agreed to be increased by the same amount and at the same time as general wage increases of all employees covered by this agreement will increase at the same time and in the same amounts as provided to employees on the minimum award wage by subsequent Western Australian Industrial Relations Commission State Wage Orders; or
>
> (iii) In the event that the Western Australian Industrial Relations Commission State Wage Orders are discontinued, the weekly wage rates and allowances in this agreement that have been agreed to be increased by the same amount and at the same time as general wage increases of all employees covered by this agreement will increase on 1st pay period on or after January 1 in each subsequent year by 3.0% or the percentage increase in the Consumer Price Index for the 12 months to March in that year, whichever is the lesser amount.
>
> 17.5. Any increases arising out of this clause will be absorbed by future agreement increases.
>
> 17.6. Where the Catering Employees And Tea Attendants (Government) Award 1982 makes provision for service pay that provision shall have no application during the operation of this agreement.
>
> 17.7. The union agrees that any adjustment made in accordance with the provisions of this clause will not be used as a rationale to claim that relativities need to be adjusted or restored in subsequent agreements."

67 The LHMU submits that the issues generated by Clauses 17.3 and 17.4 can be addressed by "awarding an increase commensurate with that awarded to School Teachers in late 2008". It rejects any suggestion from the Government departments that it was not intended that an ongoing link be established with Health Support Workers.

68 The Government departments submit that agreement was reached in 2007 that there would be parity between employees (principally Cleaners and Gardeners) covered by the 2007 Government Services Agreement and employees with similar classifications under the *LHMU – Department of Health Support Workers Federal Agreement 2004*. Because of this, the employees received wage increases of between 13% and 41% (averaging 23%) over the life of the 2007 Government Services Agreement. As to Clause 17.3, the replacement of the Federal Agreement, the *WA Health – LHMU – Support Workers Industrial Agreement 2007* ((2007) 87 WAIG 2972), did not provide for an annual general wage increase component that is above 4% applied in 2009 so the clause never came into effect. On the plain wording of the clause there is no obligation on the Government to provide parity with Department of Health employees in 2010.

69 Further, they submit that it was not intended that an ongoing link be established with Health Support Workers because the parity adjustments were not based upon a full and proper work value assessment. They point particularly to Clause 17.7 to argue that these parity adjustments would not be relied upon in the future to achieve further wage increases.

70 We commence our consideration of this issue by noting there is no established link for the wages of school Cleaners and Gardeners comparable to the link established for EAs with School Officers. Rather, the decision of the Commission in the 1998 Cleaners and Gardeners case ordered a wage increase of 13% based upon an admitted productivity improvement since 1992-1993 of 30% and the Commission ordered the LHMU and the Department of Education to continue with a process of structural reform by considering a number of changes to working conditions and allowances (see (1998) 78 WAIG 1601 at 1602). Since that time, the wage increases in the 2002, 2004 and 2007 Agreements applying to the Cleaners and Gardeners have provided wage increases consistent with the headline wage increases granted to EAs, but this seems to be no more than a coincidence. The parity with Department of Health Cleaners and Gardeners agreed to in the 2007 Government Services Agreement shows that there was, and is now, no link between the wages of School Gardeners and Cleaners and EAs or School Officers. There is certainly no basis for the LHMU submission that "the issue should be addressed by awarding an increase to Cleaners and Gardeners and other ancillary government employees based upon the increase received by teachers".

71 In relation to the LHMU submission that there is an ongoing parity between the wages under the current 2007 Government Services Agreement and wages of Health Support Workers, Clause 17.3 comes into effect if the *WA Health – LHMU – Support Workers Industrial Agreement 2007* provides for an annual general wage increase component that is above 4% applied in 2009. In fact, it provided for an annual general wage increase from 1 August 2009 which is 4%. It is not above 4%. Accordingly Clause 17.3 does not come into effect.

72 Clause 17.4(i) of the 2007 Government Services Agreement shows the agreed intention of the LHMU and the Government departments in 2007 in the event that the 2007 Government Services Agreement continues in force pursuant to s 41(6) of the Act that in 2010 the wage increase to be applied in 2010 to the employees covered by the 2007 Government Services Agreement would be primarily determined by reference to Health Support Workers. Again, there is nothing in Clause 17 which could support the LHMU claim of a 20% wage increase over three years.

73 Clause 17.4(i) does not establish an ongoing link with Health Support Workers. This is because Clause 17.4 merely provides for a situation where the current 2007 Government Services Agreement continues without a new agreement being registered and Clause 17.7 makes it plain that the union agreed that any adjustment made in accordance with Clause 17 will not be used as a rationale to claim that relativities need to be adjusted or restored in subsequent agreements.

74 However, Clause 17.4(i) is not an irrelevant consideration in this matter because, in fact, a new agreement has not been registered even though we have before us an application to register a new agreement.

Relativities with Teachers

75 Another part of the case presented by the LHMU in support of wage increases of 7%, 6.5% and 6.5% over the life of the 2010 Agreements is its submission that the Government departments' offer materially disturbs the 1998 relativities between Teachers and EAs. The LHMU submitted a schedule of relativities showing the change between the wages of EAs and Teachers since 1998. It makes the point that while there have been some minor variations to the relativities over that time, the increases granted to Teachers in the *School Education Act Employees' (Teachers and Administrators) General Agreement 2008* ("the 2008 Teachers Agreement") ((2008) 89 WAIG 234) have markedly changed those relativities. The LHMU states that this is indicative of the Government's inequitable approach to the payment of its employees within the public sector. The LHMU submits that the Commission has previously recognised the merit of maintaining relativity between Teachers and EAs, and for this not to be corrected would not only be unjust and inequitable; it would substantially reduce and marginalise the relativities established between EAs and Teachers by the Commission in 1998.

76 The Government departments point out that the submission that there is a link between the wages paid to EAs and the salary of Teachers was first raised by the LHMU in its closing submissions and is inconsistent with the LHMU's original Outline of Submissions.

77 In relation to this submission, we turn to the first of two decisions in the 1998 EA case (15 April 1998, 79 WAIG 658 at 669). The Commission concluded:

> "It is clear to us that regard must be given to the internal relativities within the school environment this (*sic*) includes school assistants, technical staff, Registrars and teachers. The most appropriate relativity would appear to be that with the Teacher."

78 However, that conclusion was not the final word on the matter. At page 670 the Commission issued a Direction to the parties noting the obligations on them under the 1996 EA Agreement and directing them to take certain steps under that Agreement to facilitate the proper disposition of the matter. This was followed by the second decision (9 September 1998, 79 WAIG 648)

where the Commission noted that there had been no agreement on wage rates notwithstanding the first decision. The Commission in Court Session was therefore required in that second decision to determine the wage rates to be paid to EAs. At page 657 the Commission in Court Session noted:

> "The alignment of Education Assistants' rates with those of School Officers under the EDMOSAC scale as claimed by the applicant Union can be justified on the basis of evidence submitted to the Commission. …
>
> While the KMC rate at Level 2, 4th year has a relativity of 76% of the teachers' benchmark rate it is not inconsistent with the environment in which wage rates have been determined in schools to align the new classification structure with those set down for School Officers under the EDMOSAC Award. …
>
> Rates of pay determined in accordance with the EDMOSAC structure accommodate the provision of a single non professional wage structure along-side the professional salary stream for Teachers in schools."

79 Although the Commission noted that the EA Key Minimum Classification (KMC) rate at Level 2, fourth year has a relativity of 76% of the Teachers' benchmark rate, the rates of pay were determined in accordance with the EDMOSAC Award structure. In fact, the 1998 EA case did not itself lead to the Commission making an order: on 3 December 1998, the parties varied the *Education Department of Western Australia (Education Assistants – ALHMWU) Enterprise Bargaining Agreement 1996* ((1998) 78 WAIG 4868) introducing the new EA classification structure "reflecting the decision" of the Commission (Statement of Ms McAdam at [62]).

80 After 1998, the headline wage increases in the subsequent EA Agreements in 2002, 2004 and 2007 were not based upon salary increases to Teachers. The LHMU conceded, properly, that those subsequent EA Agreements in fact maintained the alignment with School Officers not with Teachers. The LHMU claim before us for parity based upon Clause 28.3 of the current 2007 EA Agreement, which refers to the DETMOGA 2008, illustrates this point.

81 In summary, even though in 1998 an EA classification was aligned at 76% of the Teachers' benchmark rate, there has been no reliance between 1998 and now in any of the wage increases received by EAs upon the subsequent variations to the Teacher benchmark level referred to in the LHMU Submissions at [31]. We do not say the relativity referred to in the 1998 EA case is no longer relevant. On a future occasion the LHMU might be able to show that it is; on this occasion the record shows the LHMU itself has not seen that alignment as relevant for adjusting the wages of EAs when Teachers' salaries have been increased. Further, on this occasion, the wage increase in the 2008 Teachers Agreement is not being put forward by the LHMU to justify a wage increase for EAs in the manner advanced in 1998 but as just one reason among many to justify a 20% wage increase for all classifications in the 2010 Agreements and in that context the wage increases in the 2008 Teachers Agreement can have little relevance.

The Low-Paid Nature of the Work of the Employees to be Covered by the 2010 Agreements

82 The LHMU witnesses who are to be covered by the 2010 Agreements gave evidence of their financial circumstances and their concern at the increases in Government utilities and charges. A schedule of increased utility charges is attached to the LHMU supplementary written submission. A Cleaner spoke of having two jobs yet struggling to meet all financial commitments given the cost of living has increased yet the wage has not increased. An EA spoke of not being able to live on one wage alone and that household bills have increased in the order of 20% in the last year. There was evidence of a family's cost of living having increased in "the last couple of years". Others spoke of significantly increased power and water bills, and increases in fuel and grocery prices.

83 One EA drew up and included in the evidence a "personal budget" determined by taking an average amount actually spent on items over the last two years from the receipts which had been kept. It showed a weekly shortfall of almost $100.00 per week. Another gave evidence of working at another job two nights a week to compensate for the low income received. Another EA spoke of being at the top of the level of pay in the existing 2007 Agreement but described it as "barely enough to live on let alone have a merry Christmas or pay the children's educational expenses". There is reference to the need to have a vehicle to go to work and yet the costs of petrol, insurance, registration and maintenance are increasing. Another EA spoke of being on medication for health issues which absorbs a large amount of income.

84 Evidence was given of restricting the use of heating in the middle of winter due to the cost of the electricity consumed. A Gardener is searching for alternative employment. Concern was commonly expressed that the wage increase proposed by the Government of 8% over three years does not produce a real wage rise particularly to compensate for the real increase in Government charges and price increases. Given the valuable contribution of EAs, school Cleaners and Gardeners in terms of ensuring the effective operation of the schools and education of children, the Government departments' offer undervalues their work, particularly when compared to the salaries of Teachers, Nurses and Police. A number of witnesses referred to the level of mortgage payments and that they are likely to increase; this can take over half the net wage of a person on the salary of an EA.

85 The evidence of the financial pressures felt by these employees was largely unchallenged and we accept it; in doing so we note the Government departments' criticism of the "personal budget". The evidence was supported by the evidence of the Director of Social Policy at WACOSS. WACOSS highlights that living expenses are steadily increasing and that increases in income do not always keep pace. WACOSS maintains that the CPI is an inadequate measure of true living costs for Western Australians living on low incomes. Although many wage earners earn above minimum wage levels, they are still subject to the cost of living increase pressures outlined in the WACOSS paper, even if their income is higher than the WACOSS hypothetical model.

Gender Equity

86 In its supplementary written submission, the LHMU submits that approximately 89% of the LHMU members the subject of this arbitration are female and the Commission can and ought to find that this is a significantly higher proportion of female employees than is present amongst such categories as Police, Public Servants, Fremantle Port Authority employees, Western

Power employees and School Teachers. School support workers, and the ancillary employees represented by the LHMU, exemplify one of the factors that has been identified as a major contributor to the gender pay gap in Australia. That is, a gender segregated labour market with women being concentrated in a narrow band of occupations and industries. The WA Government's "initial" and "modest" offer fails to match the increases granted to other, male dominated employee groups. It thereby exacerbates the gender pay gap both within the public sector and within the State of WA as a whole. Whilst on the one hand the WA Government has, most laudably, been a vocal advocate for the improvement of pay equity, it, on the other hand, has contradicted and undermined that goal by the inequity and unreasonableness of its present offer.

87 The Government departments point out that the LHMU did not provide any further details in its "Further and Better Particulars" as to how adherence to the Government Wages Policy was unfair and no reference was made to pay equity. Further, no submissions were made regarding the issue of pay equity during the opening of the LHMU case. There was no oral evidence led by the LHMU on pay equity or how adherence to the wages policy was allegedly unfair. They point out that the three main groups of employees the subject of the arbitration - Gardeners, Cleaners and EAs - have been offered the same pay rise and the Wages Policy has been applied equally to all three groups. Of those groups, Cleaners and EAs are predominantly female. There is no evidence led by the LHMU that the work of the employees the subject of the arbitration has been undervalued by reason of gender. Any historical inequity that may have been experienced by EAs by reason of their gender was redressed by the 1998 EA case. Therefore, the existence of a gender pay gap in WA does not mean that all employees in female dominated industries and areas are undervalued and underpaid and there is no evidence that the work of the employees the subject of this arbitration has been undervalued by reason of gender.

88 The Government departments' evidence from Mr Horstman, the Executive Director Labour Relations Division of the Department of Commerce, denied that the Government Wages Policy exacerbated the suppression of women's wages:

> "I think that the policy provides for a standard percentage increase based on whatever is the DTF-projected CPI at the start of negotiations, so there isn't any discrimination between one agreement and the other." (T344).

89 We consider that gender equity is an issue that may impact individual employees. More relevantly it may affect whole groups of employees based on their occupation, employment status, the industries in which they work and their gender. Work in Australia undertaken by men and women has been, and continues to be, markedly different. Gender segregation for example is but one issue that can impact on what is regarded and ultimately valued as women's work.

90 The employees to be covered by the 2010 Agreements contain a high proportion of females. However, we have had insufficient evidence brought before us to determine, on the basis of pay equity, whether male dominated employee groups have intensified a gender pay gap and undervalued the wages of women the subject of these applications. In order to make such a finding it may be necessary to compare and reflect on:

- an historical skill based assessment of the various classification(s), the subject of the applications; together with
- a skill based assessment of male dominated comparator classifications of similar skill, knowledge and competence;
- relevant industry features including indicators of undervaluation;
- relevant industrial qualities including limited access to bargaining;
- conditions under which work is performed; and
- any other consideration relevant to gender.

91 In any such claim the Commission must be able to ultimately determine whether the employees concerned are in receipt of equal remuneration for work of equal or comparable value and identify the barriers which might be preventing those persons from receiving equal remuneration. Similarly the Commission, within the scope of the claim and the Act, having regard to the objects of the Act and s 26 in particular, should remove those barriers so that the workplace is, on the basis of gender, fair and equitable.

92 The Commission does not exclude such findings being made in the future with respect to any or all of these classifications, nor does it suggest any such assessment ought preclude the period prior to 1998. On this occasion, the LHMU merely raised this issue in a general way as one part of what it sees as a multifaceted claim and it has not sought to produce the evidence necessary to show the employees to be covered by the 2010 Agreements are not in receipt of equal remuneration for work of equal or comparable value. It has merely asked for all classifications to receive a 20% wage increase.

Economic Issues

93 A significant element of the case presented by the Government departments to show the offer of 8% over three years is fair and reasonable in all of the circumstances related to the budgetary constraints facing the Government, following the significant economic downturn in 2008-09. We turn to consider this issue. The Government departments provided a report from Mr Court, the Executive Director of the Economic Business Unit from the Department of Treasury and Finance. In summary, the report states that although WA's economic outlook has improved over the past year, the State's economic recovery is expected to be gradual. The Global Financial Crisis did affect the State significantly with economic growth of only 0.7% recorded in 2008-09 down from 5.2% in 2007-08. The Department of Treasury and Finance expects WA's Gross State Product ("GSP") to grow by 2.75% in 2010-11, increasing to 4% in 2011-12 and 4.75% in 2012-13.

94 In a supplementary witness statement, Mr Court states that it is premature to conclude that the State's economy is expected to have already reverted to conditions similar to those that existed prior to the Global Financial Crisis.

95 Mr Barnes, Deputy Under Treasurer at the Department of Treasury and Finance produced a report to show that based on current projections, the Government does not have the financial capacity to pay wage increases beyond those prescribed in its Public Sector Wages Policy whilst maintaining sustainable State finances. The impact of initiatives taken to ensure that the

State's finances are sound and sustainable would be partially unwound if public sector wages are increased beyond the parameters of the Government Wages Policy.

96 The thrust of Mr Barnes' report is that there has been an improvement in the economic outlook compared to last year's budget which has not flowed through into the State's finances. The State's own-source revenue was impacted very significantly by the Global Financial Crisis and in some cases will take years to recover. Further, the Government is facing significant infrastructure and service delivery costs as a result of strong population growth.

97 Mr Barnes' report makes the point that notwithstanding the projected strengthening in economic growth, the long term outlook for revenue growth remains subdued, and a major factor detracting from growth is a continued decline in WA's share of GST revenue which has declined from 10% in 2006-07 to 8.1% in 2009-10 and will further decline to just 7.1% in 2010-11, representing a loss of $443 million in GST funding in 2010-11. The report also notes that higher salary costs would require higher debt to be incurred unless essential services or infrastructure investment are reduced or taxes increased by a corresponding amount. This would directly increase the net financial liabilities to revenue ratio, which in turn may impact upon the State's AAA credit rating. Salary expenses are the single largest component of general Government expenses, and movements in salary expenses play a significant role in expenses growth and the general Government net operating balance.

98 A slightly contrary view of the responsiveness of the State's economy was taken by Dr Flatau, Senior Lecturer in Economics at Murdoch University. In overview, he gave evidence that over the last year the State's economy has improved significantly above the projected outlook. The Government's mid-year financial projections released in December 2009 included significant upward revisions to State Product Growth, State Final Demand Growth and to forecasts for the WA labour market. Dr Flatau stated that forecasts for the Wage Price Index ("WPI") growth in the mid-year financial projections statement was to be 3.25% in each of 2009-10 and 2010-11 and the actual growth for 2008-9 was 5.2%. Growth in the WA public sector WPI for 2008-09 was 5.7% and to the December quarter 2009, year-on-year growth in the WA public sector WPI was 4.7%. The CPI for Perth rose by 2.1% for the year to the December quarter 2009. Since the release of the 2009-10 mid-year financial projections statement, economic data releases suggest that the WA economy and labour market have strengthened further and the significant revisions included in the 2009-10 mid-year financial projections statement understate the current position of the WA economy and labour market.

99 Dr Flatau also stated that the wages of EAs, school Cleaners and Gardeners are at the very low end of the spectrum of wages for labour in Australia. He concluded that the growth in the pay of Teachers is marginally ahead of general public sector growth but the pay of EAs, Gardeners and Cleaners is below public sector wage growth on the basis of WPI data. Increasing the wages of very low paid workers has not been found to have significant adverse employment consequences. The very low paid market is very much detached from the wider labour market resulting in little "flooding up" of any wage increases obtained at the low end. In response to questions from the Government departments, Dr Flatau said a degree of caution is always required when going into the future because it is unknown, but the balance is very much in favour of a positive view, and a more positive view than the mid-year forecast.

100 On a balancing of their evidence we consider it unarguable that the Global Financial Crisis had a severe impact upon the State's finances and indeed, in these proceedings, no-one really argued that it did not. The principal issue in this part of the evidence is the extent to which it might be able to be stated confidently that the State's economy has reverted, or will revert during the life of the 2010 Agreements, to conditions similar to those that existed prior to the Global Financial Crisis. We do not think that can be said.

101 Rather, we consider it far more likely that there will be a gradual recovery for the State's economy over the next three years. There is a lag between any improvement in the economic outlook flowing through into the State's finances. Even if there is some room for optimism in the longer term, we think Dr Flatau was quite correct with respect to saying that a degree of caution is always required when looking into the future. In this context we note that the 1 April 2010 decision of the WA Salaries and Allowances Tribunal which the LHMU tendered in evidence (Exhibit LHMU 38) also concluded that caution was appropriate in the current economic circumstances.

Supplementary Submissions – Effect of the State Budget 2010-11

102 The LHMU submits that it is of particular significance that the Government projects surpluses for the foreseeable financial year commencing 2010-11 of $286m, $652m and $807m; that the actual WPI growth estimated for the present financial year is 3.5% and for the 3 financial years commencing 2010-11 to be 3.75%, 4.0% and 4.5%; and that the estimated actual CPI growth for the present financial year is 2.25% and for the 3 financial years commencing 2010-11 to be 2.75%, 3.0% and 3.25%.

103 The LHMU says that a number of points flow from what it describes as "the very substantial revision" of the Government's estimates contained in the Budget relative to the mid-year review. These include that if it was ever tenable to assert that the Government lacked the financial capacity to pay the wage increases sought by the LHMU whilst maintaining sustainable State finances such an assertion is no longer tenable in light of the projected surpluses for 2010-11 and beyond. The State Government's spending choices explained in the Budget further illustrate the proposition developed in the LHMU's Closing Submissions that practically all of such spending reflects, at base, a determination of policy choices. There has been no indication from the Government that, in light of the revised economic figures contained in the State Budget, there is to be any increased recognition of the worth to the State school system of educations assistants, cleaners and gardeners.

104 The Government departments reply that the LHMU wrongly seeks to recast the Government's case, over-emphasise the monetary effects of the Budget and overlook the important role of the Government Wages Policy. They list a number of matters of relevance to the issues raised in these proceedings and submit that despite the improved budgetary position, on all of the evidence before the Commission, the Government's offer of an 8% pay rise over three years is fair and reasonable. Further, notwithstanding the improved general Government sector net operating balance position, the Government does not have the capacity to pay wage increases beyond those prescribed in the Government Wages Policy while maintaining sustainable State finances given the improved operating balance is already being used to fund a significant increase in the State's Asset

Investment Program. Reflecting this, the State's financial capacity is largely unchanged since the mid-year review. The Government Wages Policy remains a cornerstone of the Government's responsible economic management of wage negotiations and increases. Nothing in the Budget and the broader economic circumstances referred to above, have justified a departure from the Policy.

Other Industrial Agreements

105 We have not found the Agreements to which the LHMU point for comparison to be helpful. In relation to those directly involving the Government as the employer, each has had at least a part of their respective wage increases based upon improving efficiency or changed work practices.

- In relation to the *Western Australia Police Industrial Agreement 2009* the Government departments informed the Commission that the Agreement required re-negotiation to comply as far as practicable with the Government Wages Policy and was consistent with it. The wage increase within that Agreement totalling 8% over two years was based upon the projected WA WPI growth of 8% over two years as set out in the 2008-09 mid-year financial projections. Efficiencies were also provided.
- In relation to the 2008 Teachers Agreement the negotiations for this Agreement commenced in September 2007 as the 2006 Teachers Agreement expired on 1 March 2008. Agreement was eventually reached in late 2008, seven months prior to the commencement of the current Government Wages Policy. Further, the negotiations were conducted in the context of a Teacher shortage and where the CPI for the 12 months to September 2008 was 4.9% and the WPI was 5%. The salaries and conditions within the 2008 Teachers Agreement were designed to ameliorate the effects of the Teacher shortage, for example improved allowances for country and remote schools, and improved salaries to attract and retain Teachers. The 2008 Teachers Agreement also contained efficiencies such as the removal of some 42 working parties and the inclusion of new flexibility provisions allowing flexibility in the delivery of education programmes and some classes to be outside of the existing school day.
- In relation to the *Public Service General Agreement 2008* which provides headline wage increases of 4.5%, 4% and 4%, the Government departments informed the Commission these yearly wage increases were the same as the yearly wage increases under the current 2007 Agreements which had been negotiated approximately 14 months earlier.

106 In relation to the other Agreements referred to, we do not regard them as helpful given the lack of any direct Government involvement.

Lawfulness of the Government Wages Policy

107 The LHMU contends in its submissions that "(t)here are real issues in this arbitration as to whether the Policy relied upon by the Government as tying its hands to offer any more to school support workers is lawful and has fettered a proper exercise of its administrative decision-making power" (LHMU Final Written Submissions at [324]).

108 In particular, the LHMU contends that the Government Wages Policy must be lawful *vis-à-vis* enabling legislation: *Green v. Daniels* (1977) 51 ALJR 463. Further that administrative decision-makers are not able to fetter their discretion by the application of a policy: *Minister for Immigration v. Gray* (1994) 50 FCR 189; *Drake v. Minister for Immigration* (1979) 46 FLR 409. Finally it has submitted that decision makers cannot inflexibly apply a policy or rule to the exclusion of the individual merits of a case: *Yang v. Minister for Immigration* (2003) 132 FCR 571; *Minister for Immigration v. Tagle* (1983) 67 FLR 164; *Neat Domestic Trading Pty Ltd v. AWB Limited* (2003) 216 CLR 277.

109 The Government departments contend in their written submissions that the submissions of the LHMU in relation to this matter are misconceived and that the Government Wages Policy, the subject of consideration in this case, has not been formulated to assist in the exercise of a statutory discretion, as is the case in the authorities referred to by the LHMU.

110 We conclude that the issue that arises in this matter is whether the Government Wages Policy and its application attracts the principles as discussed in the authorities above and if so, whether its application by the Government to the LHMU claim is unlawful.

111 The Government Wages Policy, on the material before us, was not made in accordance with any statutory provision or other legislative instrument to which we have been referred. It seems that the Government Wages Policy has been developed as an exercise of managerial discretion by the Executive to assist in its negotiation of wages and conditions for public sector employees. Wages policies as such are not new; they have existed in various forms as promulgated by successive State Governments.

112 On the unchallenged evidence before us, the Government Wages Policy was developed in response to a perceived need to constrain wages growth in the public sector whilst also ensuring that the real value of wages is maintained.

113 In *Green*, the matter in issue was a decision of the Director-General of the Department of Social Security in relation to qualifications for unemployment benefits under the *Social Services Act 1947* (Cth). Specifically, the application of a policy developed by the Department to apply the statutory criteria for eligibility.

114 *Gray* concerned the deportation of a person considered a "non-citizen" under s 55 of the *Migration Act 1958* (Cth) and the application of a policy formulated for those purposes. In that case, the Full Court of the Federal Court of Australia considered the role of the Administrative Appeal Tribunal "as part of a continuum of administrative decision-making, is not bound by governmental policy although it may take such policy into account" (at [205]).

115 In *Drake*, the matter before the Court concerned a decision taken by a Government department to deport an alien under the *Migration Act 1958* (Cth) and the application of a policy which was developed to assist Government decision makers in the

exercise of a discretion in relation to that decision. In *Yang*, the issue was a decision made by a delegate of a Minister under the *Migration Regulations 1994* (Cth) to decline an application by a student for a student visa.

116 Furthermore, in *Tagle*, the issue arising was a decision by a Government department, in applying a policy, to deport an immigrant under the *Migration Act 1958* (Cth) and the terms of the relevant policy relied on by the decision maker.

117 Finally, in *Neat*, the issue arising was the refusal by a company to consent to the grant of a licence. The majority judgment of the High Court concluded that the relevant decision was not an administrative decision for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The decision was thus not amenable to judicial review.

118 The circumstances before us are, in our view, distinguishable from those considered in the cases relied on by the LHMU. These applications do not involve the application of statutory criteria to a decision of an administrative nature, or a policy formulated to assist in the application of a statute or other legislative instrument. Counsel for the LHMU was not able to assist us with any authority directly on point.

119 In these applications, the Government has developed a Government Wages Policy to guide Departments and Agencies in the negotiation of industrial agreements with public sector unions and employees. In our view, the cases relied on by the LHMU do not assist in the circumstances before us. There is no basis to conclude, even assuming that the Commission has jurisdiction to do so, that the Government Wages Policy, or the Government decision-making in reliance on it, is unlawful.

120 There can be no issue with the fairness of the Wages Policy *per se* that the Commission can concern itself with. The fairness of a Government policy is not an industrial matter: *Commissioner, Public Service Commissioner and Ors v the Civil Service Association of Western Australia Inc and Ors* (1998) 78 WAIG 3629. However, the fairness of the application of Government policy such as the Wages Policy as it applies to the terms and conditions of employment of the employees to be covered by the 2010 Agreements is an industrial matter and is amenable to the Commission's jurisdiction under s 23(1) of the Act.

Scope of section 42G of the Act

121 Section 42G of the Act is within Division 2B of Part II dealing with industrial agreements and is be interpreted in the context of Part II and the Act as a whole. In particular, provisions such as the objects of the Act in s 6(ae) in relation to industrial agreements containing fair terms and conditions of employment; s 6(ag) as to efficiency and the needs of industry and enterprises; s 6(ca) regarding a system of fair wages and conditions of employment; and s 26(l)(a), (c), and (d) appear to be relevant (see also *Fire and Emergency Services Authority of Western Australia and United Firefighters Union Australia West Australian Branch v. n/a* (2007) 87 WAIG 1283 per Harrison C).

122 By s 42G of the Act, the Commission is empowered to make an order as to matters specified by the parties to a proposed industrial agreement where the parties have been unable to reach agreement as to those matters. An order is to be made under s 42G(2) of the Act.

123 Three conditions are to be met prior to the Commission exercising powers under s 42G(2) to make an order. First, by s 42G(l)(a) the parties are required to reach agreement on some, but not all, matters for inclusion in an industrial agreement. Second, by s 42G(1)(b), the parties are required to make an application to the Commission for the registration of the industrial agreement. Third, by s 42G(1)(c), the parties are required to make an application to the Commission for an order under s 42G(2) "as to specified matters" on which agreement has not been reached.

124 On the application being made by the parties under s 42G(l), the Commission is empowered to make an order under s 42G(2) *on the registration of the agreement*. An order made by the Commission under s 42G(2) can *only* be made *in relation to* the *matters specified* by the parties in the application under s 42G(l)(c) of the Act.

125 For the purposes of the exercise of powers under s 42G(2), the Commission is able to have regard to "any matter it considers relevant": s 42G(4) of the Act. Once an order under s 42G(2) is made, by the force of s 42G(5), the order is included in any industrial agreement registered by the Commission under s 41 of the Act, as long as it is otherwise compliant with s 41A of the Act.

126 The jurisdictional requirement on the Commission for the purposes of s 41 of the Act is that the proposed industrial agreement be "an agreement *with respect to* any industrial matter": s 41(1) of the Act. (emphasis added). Upon an application for registration of an industrial agreement under s 41(1) of the Act, by s 41(2), and subject to ss 41(3), 41A and 49N, the Commission must register the industrial agreement. For the purposes of s 41 of the Act, there is no requirement that all provisions of the proposed industrial agreement relate to "industrial matters": *Hanssen Pty Ltd v. Construction, Forestry, Mining and Energy Union (Western Australian Branch)* (2004) 84 WAIG 694.

127 It is reasonably plain that the Commission's jurisdiction under s 42G(2) of the Act is not at large. The parameters of the Commission's powers are limited to those matters "specified" by the parties to the proposed industrial agreement and in respect of which no agreement has been reached as a result of bargaining for an industrial agreement. This is emphasised by the use of the word "only" in s 42G(3) of the Act, which suggests an intention by the Parliament that the powers of the Commission be confined to the "matters specified" by the parties in the s 42G(1)(c) application.

128 For the purposes of s 42G(3), the Commission may make an order "in relation to" the matters specified by the parties in the application under s 42G(1)(c) of the Act. The phrase "in relation to" is one of considerable breadth: *Oceanic Life Ltd and Anor v. Chief Commissioner of Stamp Duties* (1999) 168 ALR 211. There needs to be some connection between the order and the subject matter of the specific matters referred.

129 In these applications, the "specified matters" referred to the Commission in the Agreement for Arbitration are the rates of pay for EAs, school Cleaners and Gardeners and other general classifications to be covered by the 2010 Agreements. The Commission is thus not limited to the "claims" made by the parties in terms, as long as an order arising from s 42G(3) concerns the wages to be paid to the affected employees. For the purposes of making a s 42G(3) order, the Commission may

have regard to "any matter it considers relevant": s 42G(4) of the Act. This is subject to s 26(1), which specifies to what the Commission must have regard in making an order.

130 It is also the case, as was agreed by counsel for the parties, that the terms of s 42G contemplate that an order could be made by the Commission that provides for disparate outcomes for the various classifications the subject of these proceedings.

Conclusions

131 The Commission is to decide the yearly wage increases to be included in the 2010 Agreements in accordance with equity, good conscience and the substantial merits of the case (s 26(1)(a) of the Act). The Government departments draw attention to the Commission's State Wage Principles (*2009 State Wage Order* (2009) 89 WAIG 747 at 761) to submit that the strict test for an alteration in wage rates due to changes in work value is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or an upgrading to a higher classification. The Government departments submit that the State Wage Principles are clearly a relevant consideration in the present matter. However, the obligation on the Commission under s 26(1)(a) of the Act is not displaced by the tests and limitations of the State Wage Principles. That does not mean the Principles are irrelevant but as the Commission in the 1998 EA case observed at 668:

> "As a general proposition, if the parties enter into an Enterprise Agreement which itself is not subject to the Principles and make provision for arbitration under terms acceptable to them, why should matters which they have recognised may be arbitrated be caught by Principles that otherwise have no application?"
>
> (See too the 1998 Cleaners and Gardeners case at 1596)

132 Enterprise Agreements, unlike Awards, are not vehicles of broad or general application. They are restricted in their application to the parties to the Agreements. This application under s 42G therefore calls for a close consideration within the broader or general issues particular to the employers and employees to be covered by the 2010 Agreements and cannot have wider application.

133 The Agreement for Arbitration when read with s 42G(4) of the Act limits the Commission to making orders in relation to rates of pay within the current classification structure and conditions of employment. It is not part of the Agreement for Arbitration that the Commission make orders in relation to reclassifying employees or groups of employees, nor make orders in relation to improving efficiency or changing work practices, both of which have been part of the previous 2002, 2004 and 2007 Agreements between the LHMU and the Government departments. The quite narrow terms of the Agreement to Arbitrate will therefore result, for the first time in recent years, in three-year agreements with no changes to work practices. The parties retain the capacity to reach agreement on matters set out in Schedule A to the Agreement for Arbitration, however neither party referred to these matters in the context of efficiencies or changes in work practices.

134 The absence of any productivity or efficiency changes in either of the 2010 Agreements, means that the wage increases in those comparison Agreements which do have those changes are not directly applicable to our consideration of the wages increases to be inserted into the 2010 Agreements. Although the LHMU wished to admit evidence of attempts which may have been made by it during the negotiations to discuss changes to work practices, we do not consider that evidence to be relevant. What efforts were made by either party to offer, or require, efficiencies or changes to work practices is not a matter which can influence the limited orders which the LHMU and the Government departments agreed the Commission may make.

135 For similar reasons, we refused to admit into evidence matters supporting a submission the LHMU wished to make that the Government departments had not bargained in good faith. In our ruling (T222) we considered that it is not necessary for the Commission to do more than note that the LHMU and the Government departments had failed to reach an agreement and that each may be critical of the other's position in negotiations. We did so in part because, as correctly noted by the Government departments, this issue only arose part-way through the hearing and the LHMU had given no notice in its Further and Better Particulars nor in its Outline of Submissions that it intended to argue that the Government departments had not bargained in good faith. We accept that the Government departments' evidence had not been prepared with that issue in mind and in fairness we did not permit the submission to be made.

136 Further, we were aware that in the 1998 Cleaners and Gardeners case the LHMU had argued that the then Government had not bargained in good faith and the Commission on that occasion had been obliged to spend time dealing with that issue. Its conclusion, amongst other things, was that a finding that a claim has merit does not depend upon a finding that a party negotiated in bad faith (the 1998 Cleaners and Gardeners Case at 1599). In this case, given the quite limited nature of any orders we can make under s 42G(4), we concluded that the merit of the LHMU claim would not be affected by whether the Government departments had not bargained in good faith.

137 The Agreement for Arbitration suggests that both the LHMU and the Government departments seek the same wage increase for all classifications in both the 2010 Agreements. To a considerable extent, this can be justified because although the 2010 Agreements have their origins in separate decisions, the LHMU and the Government parties have agreed in the past to the same headline wage increases for all classifications in both sets of Agreements at the same time, as we now set out in the following table:

Year	Headline Wage Increase
2007 EA Agreement	4.5%, 4%, 4%[7]
2007 Government Services Agreement	4.5%, 4%, 4%

[7] T302 and also the Statements of Ms McAdam [41], Mr Horstman [54].

2004 EA Agreement	$28.60 or 3.4%, 3.5% and 3.5%[8]
2004 Government Services Agreement	$28.60 or 3.4%, 3.5% and 3.5%
2002 EA Agreement	3% and 4.5%[9]
2002 Gardeners Agreement	3% and (1.5+3%)= 4.5%

138 Both the LHMU and the Government departments have also been prepared to maintain the internal relativities of the Agreements. Even though the agreement reached in 2007 (that there would be parity between employees covered by the 2007 Government Services Agreement and employees with similar classifications under the *LHMU – Department of Health Support Workers Federal Agreement 2004*), applied principally to Cleaners and Gardeners, to maintain internal relativities within the Agreement classifications other than Cleaners and Gardeners were also adjusted.

139 However, some parts of the multifaceted claim advanced by the LHMU can only lead to differing outcomes for the two 2010 Agreements, for example, that part of the LHMU claim that there is an agreed parity between EAs and School Officers in Clause 28.3 of the 2007 EA Agreement but a different parity between Cleaners and Gardeners and their similar classifications in the Department of Health in Clause 17.3 of the 2007 Government Services Agreement. The application of those different parities is likely to result in differing wage increases. Also, they clearly show the LHMU and the Government departments themselves saw no common link between the wages of EAs and the wages increases of school Cleaners and Gardeners and other general employees of the Government.

140 The LHMU has grouped together the employees to be covered by the 2010 Agreements as "school support workers", however this overlooks the fact that the wages of EAs and of Cleaners and Gardeners are not linked. Even in 1998, the LHMU did not link its claims in respect of a work value increase for Cleaners and Gardeners to the wage increases which had been gained for EAs in the 1998 EA case. Additionally, the recent history shows that the LHMU has pursued past wage increases for EAs and for School Gardeners from two different sources: School Officers, and Gardeners in the Department of Health, respectively.

141 Moreover, at least since the 2007 Government Services Agreement, the inclusion of employees of at least the Departments of Children's Services and Justice means the 2010 Government Services Agreement will cover employees who have no link whatsoever to school employees. We cannot accept the LHMU submission that all employees to be covered by the 2010 Agreements comprise one group of "school support workers" and that we should therefore give all classifications in the 2010 Government Services Agreement the same wage increase as that awarded to Teachers (LHMU Outline of Submissions at [15]).

142 The LHMU claim also does not sufficiently recognise the quite different economic environment from that prevailing prior to the global financial crisis. Even with the State's improved budgetary position evident from the 2010 Budget we are conscious of the cost implications of ordering yearly wage increases to be included in the 2010 Agreements which total more than 8%. Notwithstanding the improved budgetary position the economy of the State has not returned to its pre-2009 levels and there are still risks to its full recovery. In relation particularly to the Department of Education, the evidence of Mr Leaf, the Acting Deputy Director General, Finance and Administration at the Department of Education is that despite exhaustive efforts by the Department, the 2009-10 Budget is proving extremely difficult to meet. He also said that negotiations are ongoing with the Department of Treasury and Finance for supplementary funding so that its existing commitments to meet wages and salary payments can be met, and payments to suppliers can be made on the due dates.

143 We take into account the likely wages outcome generally across the Government by virtue of the application of the Government Wages Policy which, we are informed, applies throughout the public sector without exception. We are informed that wage increases in relation to the Main Roads Department; Fire and Emergency Services Authority of WA fleet and equipment maintenance services; the Metropolitan Cemeteries Board and the operations of the Kings Park Botanic Gardens and Park Authority are as a result of the application of this Policy. Although the LHMU states the numbers of employees covered by those Agreements is relatively small, this does not alter the fact of the wages increases within them.

144 We are aware that the costing of the Government's offer to the LHMU would represent an additional $53 million to relevant agency budgets; an increase equivalent to the estimated rise in the WPI (3%, 2.75% and 3.25%) would represent an additional $60.8 million to relevant agencies' budgets. If WPI forecasts of 3.25%, 3.25% and 3.5% were to be used, this figure would be higher, representing an additional $71.5 million to relevant agencies' budgets or an $18.5 million increase over and above the CPI increase which has not been factored into the latest financial estimates of agencies because it is a requirement that it would be funded through productivity improvements.

145 We note however it is not the submission of the Government departments that the Government Wages Policy stands as "an absolute bar" to awarding a wage increase (T510) providing that the increases are soundly based. Further, the 2007 Agreements now regulate the relationship between the LHMU and the Government departments and each contains a reference to School Officers and to Health Support Workers respectively which is directed to the first of the annual wage increases in the 2010 Agreements.

146 The balancing of all of the above considerations in the context of the evidence before us in order to reach a decision which is both fair to the employees to be covered by the 2010 Agreements and fair to the Government departments is a matter of judgment according to equity, good conscience and the substantial merits of the case. In relation to EAs we have found that their productivity has increased. In the context of the quite narrow terms of the Agreement to Arbitrate and s 42G(3) of the Act, together with the past approach of the LHMU and the Government departments to internal relativities, we consider fairness warrants the benefit to be reflected in the wages of all EAs to be covered by the 2010 EA Agreement. To order a first

[8] Statements of Ms McAdam [55], Mr Horstman [51] (noting that the Government Services Agreement replaced the previous Government Services Agreement and the Children's Services and the Dept. of Justice Misc. Employees Agreements).
[9] Statements of Ms McAdam [57], Mr Horstman [49].

annual wage increase of 3.5% in recognition of the wage increase received by the relevant School Officers on 1 April 2010 would not include an amount in recognition of the change to the value of the work of EAs which we have found has already occurred and is happening now. However, to order an additional amount in full recognition of the increase in the value of their work in the first annual wage increase would be to ignore the economic evidence before us. We consider a first annual wage increase of 3.75% is fair and reasonable and that any further wage increase based upon the change to the value of the work of EAs should occur over the life of the Agreement. Accordingly, we find annual wages increases of 3.75%, 3.75% and 3.5% over three years to be fair and reasonable to both parties. These increases are not intended by us to affect in the future the relationship between the wages of School Officers and the wages of EAs which the parties established in 1999 and have since maintained.

147 In relation to the 2010 Government Services Agreement we have found an increased productivity of School Gardeners. We also give some weight to the reference to Health Support Workers in Clause 17.4(i) and the difference in 2010 between the wages of support staff in Education and in Health illustrated in Table 4 of Mr Horstman's Statement and in the Statement of Ms Gurrin, Attachment H which shows an average monetary difference of 2.3% with the hospital allowance deducted. We have regard too to the evidence generally of the work performed by School Cleaners, and that both the LHMU and the Government departments have previously preferred to maintain the internal relativities in the Agreement we consider that a first annual wage increase of 3.0% is fair and reasonable. In relation to the second and third increases we have regard to the forecast movements in the CPI for Perth. We do not say that the CPI for Perth is a perfect measure of the costs incurred; we do say however that it is a measure, amongst others, consistently referred to by the Commission for this purpose in successive State Wage cases. We consider in the context of all of the evidence before us that the second and third annual wage increases will be 2.75% and 3% over three years.

148 The decision we have reached is based upon a close consideration of the circumstances of the 2007 Agreements and the work performed by the employees to be covered by the 2010 Agreements. Our decision is not a justification for wage increases in other agreements.

149 We have given consideration to the order to issue. The only applications before us are those to register the 2010 Agreements. The parties did not make a separate application under s 42G(1)(c) and this matter has proceeded on the agreed basis contained in the Agreement to Arbitrate. In the absence of such a separate application, we propose that an order as prescribed in s 42G(2) now issue in the applications before us. The order will be that the 2010 Agreements include the annual wage increases we have determined and also that the applications be re-listed for the purpose of registering the 2010 Agreements once the parties supply schedules of the wages clauses giving effect to those annual wage increases.

150 A minute of proposed order to that effect now issues. The Commission requests that the parties notify the Commission and each other within 48 hours of the delivery of the Reasons whether a speaking to the minutes is requested. If there is no request, the order will issue in the terms of the minute. If a request is received, the parties should make their submissions in writing to the Commission by Friday, 18 June 2010. The parties are advised that after the order issues, the applications will be re-allocated to Kenner C for the purposes of re-listing in accordance with the order.

2010 WAIRC 00358

EDUCATION ASSISTANTS (GOVERNMENT) GENERAL AGREEMENT 2010; GOVERNMENT SERVICES (MISCELLANEOUS) GENERAL AGREEMENT 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE EXECUTIVE DIRECTOR DEPARTMENT OF EDUCATION, THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH); THE EXECUTIVE DIRECTOR LABOUR RELATIONS DIVISION DEPARTMENT OF COMMERCE; AND THE LIQUOR, HOSPITALITY AND MISCELLANEOUS UNION (WA BRANCH)
	APPLICANTS
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 17 JUNE 2010
FILE NO/S	AG 1 OF 2010, AG 3 OF 2010
CITATION NO.	2010 WAIRC 00358

Result	Order issued specifying matters to be included in Agreements and relisting applications
Representation	

Joint Applicants	Mr R. Hooker (of Counsel) and with him Mr B. Owen (of Counsel) on behalf of the Liquor, Hospitality and Miscellaneous Union.
	Mr H. Dixon (of Senior Counsel) and with him Mr R. Bathurst (of Counsel) on behalf of the Executive Directors of the Department of Education and of the Labour Relations Division of the Department of Commerce

Order

HAVING HEARD Mr R. Hooker (of Counsel) and with him Mr B. Owen (of Counsel) on behalf of the Liquor, Hospitality and Miscellaneous Union and Mr H. Dixon (of Senior Counsel) and with him Mr R. Bathurst (of Counsel) on behalf of the Executive Directors of the Department of Education and of the Labour Relations Division of the Department of Commerce, the Commission in Court Session pursuant to s 42G(2) makes the following orders:

1. THAT the annual wage increases to be included in the Education Assistants' (Government) General Agreement 2010 be 3.75%, 3.75% and 3.5%.
2. THAT the annual wage increases to be included in the Government Services (Miscellaneous) General Agreement 2010 be 3.0%, 2.75% and 3.0%.
3. THAT the applications for registration of the above Agreements be re-listed on a date to be fixed upon the Liquor, Hospitality and Miscellaneous Union and the Executive Directors of the Department of Education and of the Labour Relations Division of the Department of Commerce filing schedules containing the respective wages clauses of the Agreements giving effect to orders 1 and 2 hereof.

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

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2010 WAIRC 00374

GOVERNMENT OFFICERS SALARIES, ALLOWANCES AND CONDITIONS AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANIMAL RESOURCES AUTHORITY , BOTANIC GARDENS AND PARKS AUTHORITY, BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA
	APPLICANTS
	-v-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 JUNE 2010
FILE NO	P 16 OF 2010
CITATION NO.	2010 WAIRC 00374

Result	Award varied
Representation	
Applicants	Mr S Barrett and with him Ms M Gillam
Respondent	Ms S Bhar

Order

HAVING heard Mr S Barrett and with him Ms M Gillam on behalf of applicants and Ms S Bhar for the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the Government Officers Salaries, Allowances and Conditions Award 1989 be varied to include the Commissioner of Main Roads Western Australia as a respondent in Schedule A of the award in accordance with the following Schedule and that such variation shall have effect on and from 28 June 2010.

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

SCHEDULE

1. Schedule A. – List of respondents: Insert the following respondent immediately after Burswood Park Board:

Commissioner of Main Roads Western Australia

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2010 WAIRC 00365

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR WORKS AND OTHERS
	APPLICANT
	-v-
	COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL, PLUMBING AND ALLIED WORKERS UNION OF AUSTRALIA, ENGINEERING AND ELECTRICAL DIVISION, WA BRANCH
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 22 JUNE 2010
FILE NO/S	APPLB 61 OF 2009
CITATION NO.	2010 WAIRC 00365

Result	Application discontinued
Representation	
Applicant	Mr A Harper
Respondent	Ms N Ireland

Order

WHEREAS this is an application to vary the Engineering Trades (Government) Award, 1967;

AND WHEREAS on 8 June 2010 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.

2010 WAIRC 00410

JOURNALISTS' (SUBURBAN AND FREE NEWSPAPERS) AWARD, 1984

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 7 JULY 2010
FILE NO/S	APPL 9 OF 2009
CITATION NO.	2010 WAIRC 00410

Result	Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 10 February 2009 to vary the Journalists' (Suburban and Free Newspapers) Award, 1984 ("the Award");

AND WHEREAS on 18 June 2010 the Commission cancelled the Award in order [2010] WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00392

MINERAL SANDS MINING AND PROCESSING INDUSTRY AWARD, 1981

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN WORKERS' UNION, WESTERN AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	FK KANNY AND SONS, WESTRALIAN SANDS LIMITED, CABLE SANDS (WA) PTY LTD AND OTHERS
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 2 JULY 2010
FILE NO/S	APPL 203 OF 2005
CITATION NO.	2010 WAIRC 00392

Result Award cancelled

Order

WHEREAS this is an application made on 23 February 2005 to vary the Mineral Sands Mining and Processing Industry Award, 1981 ("the Award") in order to increase wages and allowances;

AND WHEREAS a conference was held on 23 June 2005 but nothing further was heard from the parties after that time;

AND WHEREAS on 28 June 2010 the Commission cancelled the Award and there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

2010 WAIRC 00411

WESTERN AUSTRALIAN MINT AWARD 2005

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 7 JULY 2010
FILE NO/S	APPL 16 OF 2009
CITATION NO.	2010 WAIRC 00411

Result Application discontinued

Order

WHEREAS this is an application made pursuant to s 40B on 10 February 2009 to vary the Western Australian Mint Award 2005 ("the Award");

AND WHEREAS on 18 June 2010 the Commission cancelled the Award in order [2010] WAIRC 00287;

AND WHEREAS there is now no award to which this application relates;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(a)(iv) of the *Industrial Relations Act 1979*, hereby order -

THAT this application be, and is hereby discontinued.

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

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2010 WAIRC 00448

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY

RESPONDENT

CORAM COMMISSIONER S J KENNER

DATE WEDNESDAY, 14 JULY 2010

FILE NO/S APPL 118 OF 2010

CITATION NO. 2010 WAIRC 00448

Result Application discontinued by leave

Representation

Applicant Mr G Ferguson

Respondent Mr R Farrell

Order

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

THAT the application be and is hereby discontinued by leave.

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

CANCELLATION OF—Awards/Agreements/Respondents—

2010 WAIRC 00357

MALTING INDUSTRY AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION

CORAM CHIEF COMMISSIONER A R BEECH

DATE THURSDAY, 17 JUNE 2010

FILE NO/S APPL 78 OF 2010

CITATION NO. 2010 WAIRC 00357

Result	Award cancelled
Representation	Mr R Murphy, The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia (by written submission)

Order

WHEREAS on 24 February 2010, this application was created on the Commission's own motion pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act") to cancel the Malting Industry Award 1993 ("the Award") on the basis that there is no employee to whom the Award applies given the operation of the *Fair Work Act 2009* (Cth);

AND WHEREAS this application was listed for hearing for 5 May 2010;

AND WHEREAS on 30 April 2010, the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia ("the Union") requested additional time in which to consider its position in relation to the cancellation;

AND WHEREAS the hearing for 5 May 2010 was vacated for the above reason;

AND WHEREAS on 4 June 2010, the Union advised that it had considered its position and did not intend to oppose the cancellation of the Award;

AND WHEREAS, the Commission is of the view for the reasons set out in the Reasons for Decision of 18 May 2010 ([2010] WAIRC 00289) that there is no employee to whom the Award applies and there is no practical purpose in maintaining the Award in existence;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred by s 47(1) of the Act, do hereby order -

THAT the Malting Industry Award 1993 be cancelled.

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

2010 WAIRC 00354

MATILDA BAY BREWING COMPANY LIMITED ENTERPRISE AWARD 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 17 JUNE 2010
FILE NO/S	APPL 82 OF 2010
CITATION NO.	2010 WAIRC 00354

Result	Award cancelled
Representation	Mr R Murphy, The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia (by written submission)
	Mr B Richardson, Foster's Group (by written submission)

Order

WHEREAS on 24 February 2010, this application was created on the Commission's own motion pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act") to cancel the Matilda Bay Brewing Company Limited Enterprise Award 1994 ("the Award") on the basis that there is no employee to whom the Award applies given the operation of the *Fair Work Act 2009* (Cth);

AND WHEREAS this application was listed for hearing for 5 May 2010;

AND WHEREAS on 15 April 2010, the employer party advised that it did not object to the cancellation of the Award;

AND WHEREAS on 30 April 2010, the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia ("the Union") requested additional time in which to consider its position in relation to the cancellation;

AND WHEREAS the hearing for 5 May 2010 was vacated for the above reason;

AND WHEREAS on 4 June 2010, the Union advised that it had considered its position and did not intend to oppose the cancellation of the Award;

AND WHEREAS, the Commission is of the view for the reasons set out in the Reasons for Decision of 18 May 2010 ([2010] WAIRC 00289) that there is no employee to whom the Award applies and there is no practical purpose in maintaining the Award in existence;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred by s 47(1) of the Act, do hereby order -

THAT the Matilda Bay Brewing Company Limited Enterprise Award 1994 be cancelled.

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

2010 WAIRC 00356

THE BREWERY LABORATORY EMPLOYEES AWARD 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 17 JUNE 2010
FILE NO/S	APPL 97 OF 2010
CITATION NO.	2010 WAIRC 00356

Result	Award cancelled
Representation	Mr R Murphy, The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia (by written submission)

Order

WHEREAS on 24 February 2010, this application was created on the Commission's own motion pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act") to cancel The Brewery Laboratory Employees Award 1983 ("the Award") on the basis that there is no employee to whom the Award applies given the operation of the *Fair Work Act 2009* (Cth);

AND WHEREAS this application was listed for hearing for 5 May 2010;

AND WHEREAS on 30 April 2010, the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia ("the Union") requested additional time in which to consider its position in relation to the cancellation;

AND WHEREAS the hearing for 5 May 2010 was vacated for the above reason;

AND WHEREAS on 4 June 2010, the Union advised that it had considered its position and did not intend to oppose the cancellation of the Award;

AND WHEREAS, the Commission is of the view for the reasons set out in the Reasons for Decision of 18 May 2010 ([2010] WAIRC 00289) that there is no employee to whom the Award applies and there is no practical purpose in maintaining the Award in existence;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred by s 47(1) of the Act, do hereby order -

THAT the Brewery Laboratory Employees Award 1983 be cancelled.

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

2010 WAIRC 00355

BREWING INDUSTRY AWARD 1993

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 17 JUNE 2010
FILE NO/S	APPL 98 OF 2010
CITATION NO.	2010 WAIRC 00355

Result	Award cancelled
Representation	Mr R Murphy, The Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia (by written submission)

Order

WHEREAS on 24 February 2010, this application was created on the Commission's own motion pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act") to cancel the Brewing Industry Award 1993 ("the Award") on the basis that there is no employee to whom the Award applies given the operation of the *Fair Work Act 2009* (Cth);

AND WHEREAS this application was listed for hearing for 5 May 2010;

AND WHEREAS on 30 April 2010, the Breweries and Bottleyards Employees' Industrial Union of Workers of Western Australia ("the Union") requested additional time in which to consider its position in relation to the cancellation;

AND WHEREAS the hearing for 5 May 2010 was vacated for the above reason;

AND WHEREAS on 4 June 2010, the Union advised that it had considered its position and did not intend to oppose the cancellation of the Award;

AND WHEREAS the Commission is of the view for the reasons set out in the Reasons for Decision of 18 May 2010 ([2010] WAIRC 00289) that there is no employee to whom the Award applies and there is no practical purpose in maintaining the Award in existence;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred by s 47(1) of the Act, do hereby order -

THAT the Brewing Industry Award 1993 be cancelled.

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

2010 WAIRC 00386

VARIOUS AWARDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
HEARD	WEDNESDAY, 5 MAY 2010, THURSDAY, 24 JUNE 2010
DELIVERED	MONDAY, 28 JUNE 2010
FILE NO.	APPL 13, 25, 27, 68, 84, 85, 87, 89 AND 107 OF 2010
CITATION NO.	2010 WAIRC 00386

CatchWords	Award – Awards applying to constitutional corporations – Effect of "Work Choices" and Fair Work Act 2009 on awards - Whether there is an employee to whom the awards apply – Whether there is good reason not to cancel awards – Awards cancelled – Industrial Relations Act 1979 (WA) s 47(1)
Result	Awards cancelled
Representation	Mr S Banovich, of counsel, for The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

Reasons for Decision

1 In the decision which issued in these matters on 18 May 2010 ((2010) 90 WAIG 518; [2010] WAIRC 00289) it was decided that consideration of the cancellation of some awards would be deferred. These Reasons for Decision concern awards where the Australian Workers' Union, West Australian Branch, Industrial Union of Workers ("AWU") objected to their cancellation.

2 In the decision of 18 May 2010 at [7] the following was said:

> [7] In respect of the following awards:
>
> - *Cargill Australia Limited - Salt Production and Processing Award 1988*
> - *Cockburn Cement Limited Award 1991*
> - *Fibre Cement Workers Award*
> - *Gold Mining Consolidated Award, 1980*
> - *Mineral Earths Employees' Award*
> - *Mineral Sands Industry Award 1991*
> - *Mineral Sands Mining and Processing Industry Award, 1981*
> - *Nickel Mining and Processing Award, 1975*, and
> - *Tin and Associated Minerals Mining and Processing Industry Award No. 14 of 1971*,

the Australian Workers' Union, West Australian Branch, Industrial Union of Workers ("AWU") objected to the cancellations because it believes it has members on statutory individual contracts which refer to, or incorporate, one of those awards in the contract. The union is concerned that cancelling those awards would affect those members to their detriment. The AWU undertook to provide further written submissions within 21 days of the hearing.

3 No further written submissions were received within 21 days of the hearing and the applications to cancel the awards listed above were re-listed on 24 June 2010. On that occasion, the AWU maintained its objection in principle to the cancellation of these awards. However, it conceded that the union has not been able to identify any members who are on individual statutory contracts which refer to, or incorporate, one of these awards in the contract. The union did not ask for more time to do so. (As noted in the Reasons of 18 May 2010 at [8] the cancellation of the Minerals Sands Industry Award 1991 is also objected to by another union. Therefore, the Reasons to follow do not include that award.)

4 In my view, the absence of any information showing that there are indeed individual statutory contracts which refer to, or incorporate, one of these awards in the contract, notwithstanding the efforts made by the union to find out that information, is telling. I consider it is quite unlikely that there are such contracts, particularly contracts incorporating a State award listed above as it continues in existence after 27 March 2006. This is because an examination of the history of award amendments to each of the awards listed above shows that in each case, with one or two minor exceptions, they have not been substantively amended by the union or unions party to the awards for, in most cases, over 10 years. The amendments which have been made in each award within the last 10 years have been principally made by virtue of the operation of the annual State Wage General Orders which amend all awards of the Commission for minimum wage purposes. Put simply, the wages and conditions of employment within the awards listed above do not reflect or prescribe current wages or conditions of employment in the industries to which they apply. It therefore seems quite unlikely that in 2010 there are employees on statutory individual contracts which refer to, or incorporate, one of those awards in the contract.

5 There is no other submission why there is good reason for the awards listed above not to be cancelled. The issues involved in the decision whether or not to cancel these awards have been examined in some detail now both in the Reasons for Decision in these matters of 18 May 2010 and in the decision of the Commission in Court Session of 12 April 2010 in the application to cancel the *Jenny Craig Employees Award, 1995* ((2010) 90 WAIG 272; [2010] WAIRC 00200). There is no submission that these decisions should be revisited or distinguished in the case of the awards listed above.

6 In the Reasons for Decision in these matters of 18 May 2010 the Commission concluded that the requirements of s 47 have been complied with and there is no practical purpose in maintaining the awards in existence. Moreover there may be the perception that while they continue in existence, they do have some practical relevance or application when such is not the case. In the context of the position taken by the AWU, if one of the awards listed above did in fact underpin a statutory individual contract then there would be a relevant practical purpose in maintaining that award at least for the remainder of the term of that statutory individual contract. That has not been shown to be the case, or even that it is likely to be the case, in relation to any of the awards listed above. Accordingly, for the reasons given on 18 May 2010 there is no practical purpose in maintaining the awards in existence and an order will issue which cancels them.

2010 WAIRC 00387

VARIOUS AWARDS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	MONDAY, 28 JUNE 2010
FILE NO/S	APPL 13, 25, 27, 68, 84, 87, 89 AND 107 OF 2010
CITATION NO.	2010 WAIRC 00387
Result	Awards cancelled
Representation	Mr S Banovich, of counsel, for The Australian Workers' Union, West Australian Branch, Industrial Union of Workers

Order

HAVING HEARD Mr S Banovich, of counsel, on behalf of The Australian Workers' Union, West Australian Branch, Industrial Union of Workers,

NOW THEREFORE I, pursuant to the powers conferred by s 27(1)(s) and s 47(1) of the *Industrial Relations Act 1979* , do hereby order:

1. THAT applications 13, 25, 27, 68, 84, 87, 89 and 107 of 2010 be consolidated.
2. THAT the following awards be cancelled:

   Cockburn Cement Limited Award 1991

   Fibre Cement Workers Award

Gold Mining Consolidated Award, 1980

Tin and Associated Minerals Mining and Processing Industry Award No. 14 of 1971

Mineral Earths Employees' Award

Mineral Sands Mining and Processing Industry Award

Nickel Mining and Processing Award, 1975

Cargill Australia Limited - Salt Production and Processing Award 1988

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

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2010 WAIRC 00408

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHARIS LOUISE COLANIS
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
HEARD	WEDNESDAY, 30 JUNE 2010
DELIVERED	WEDNESDAY, 7 JULY 2010
FILE NO.	APPL 123 OF 2010
CITATION NO.	2010 WAIRC 00408

CatchWords	Appeal by Police Officer against removal - Competence of appeal - whether officer was removed for loss of confidence - Requirements for removal for loss of confidence - Powers of WAIRC to strike out incompetent appeal - Police Act 1892 (WA) s 33L, s 33P(1), Industrial Relations Act 1979 (WA) s 27(1)(a)(iv)
Result	Appeal struck out as incompetent
Representation	
Appellant	Ms KL Colanis, in person
Respondent	Ms L Blakeney, of counsel

Reasons for Decision

1 This is our unanimous decision. On 21 May 2010 a Notice of Appeal against a decision of the Commissioner of Police to take removal action was filed in the WAIRC. This Notice of Appeal was made using Form 31 as prescribed in the *Industrial Relations Commission Regulations 2005* (the Regulations) to which is attached a copy of a letter from the appellant, Ms Colanis and also a copy of a letter from the Commissioner of Police.

2 In response to the filing of the Notice of Appeal, on 14 June 2010 the Commissioner of Police wrote to the WAIRC to advise that Ms Colanis has not been the subject of any removal action by the Commissioner of Police but that she resigned from her position as a police officer on 25 March 2010. The Commissioner of Police states that in the circumstances, no appeal lies to the WAIRC under s 33P of the Police Act and the Commissioner of Police does not intend to file a response in accordance with r 91 of the Regulations.

3 Accordingly, the WAIRC listed this matter For Mention Only on 30 June 2010 in order to hear from both Ms Colanis and the Commissioner of Police as to whether the appeal has been validly made.

4 Ms Colanis acknowledges that the circumstances of the cessation of her being a member of the WA Police is as set out in the letters from her to the Commissioner of Police dated 25 March 2010 and from the Commissioner of Police to Ms Colanis dated 25 March 2010 which are attached to the Notice of Appeal. Relevantly, paragraph 43 of Ms Colanis' letter states:

> "I verily believe that I have been forced to tender my resignation forthwith. My health and the safety of my children is far more important and I further vehemently believe that WA Police does not in any fashion foster a fair, equitable or equal workplace."

5 Paragraph 45 of that letter states:

> "I wish for it to be noted, and receipted as such, that my resignation is wholly and solely due to the inability of WA Police to assist in my circumstances."

6 The letter from the Commissioner of Police dated 25 March 2010 states:

> "I note that it has taken you over two weeks to consider my correspondence of 9 March 2010 and that your letter of resignation contains a lengthy response to the matters set out in my correspondence. On this basis, I am satisfied that you have carefully considered your options and had ample opportunity to seek independent advice prior to submitting your resignation.
>
> …
>
> In these circumstances, I advise you that your resignation from WA Police is accepted as being effective immediately. You will be paid one (1) month's salary in lieu of you having to attend work. The effective date of the termination of your employment is 25 April 2010."

The Right to Appeal

7 The right of a member of the WA Police to appeal to the WAIRC is a right created by s 33P(1) of the *Police Act 1892* (WA) (the Police Act). In other words, the only right Ms Colanis has to appeal to the WAIRC is if her circumstances are those contained within s 33P(1). This is as follows:

> "33P(1): A member who has been removed from office by or as a result of removal action taken in accordance with section 33L may appeal to the WAIRC on the ground that the decision of the Commissioner of Police to take removal action relating to the member was harsh, oppressive or unfair."

8 It is therefore apparent that the member must be removed from office by, or as a result of, removal action taken in accordance with s 33L. The words "removal action" are defined in s 33K of the Police Act as follows:

> (a) a recommendation by the Commissioner of Police that the Minister advise the Governor to remove a commissioned officer under section 8;
>
> (b) a recommendation by the Commissioner of Police that the Minister approve the removal of a non-commissioned officer or constable under section 8;
>
> (c) the cancellation of the appointment of an Aboriginal police liaison officer under section 38B(4).

9 The Police Act also defines "removal from office" as follows:

> (a) a removal under section 8; or
>
> (b) the cancellation of the appointment of an Aboriginal police liaison officer under section 38B(4);
>
> (c) the cancellation of the appointment of a police auxiliary officer under section 38G(4).

10 Ms Colanis was not an Aboriginal police liaison officer under s 38B(4) or a police auxiliary officer under s 38G(4) of the Police Act. Accordingly, for Ms Colanis to be able to validly institute an appeal to this Commission she will need to show that she has been removed under s 8 of that Act.

The Submissions of Ms Colanis

11 Ms Colanis submits that a proper interpretation of the events set out in the letters attached to her Notice of Appeal, as illustrated by two further letters she tendered, which became Exhibit 1 and Exhibit 2, was that she did not resign from the WA Police. This is because she believes that the process of resignation involves a different step and she had not yet undertaken this step. Rather, the Commissioner of Police acted upon the words in her letter and she was removed as a result of the Commissioner of Police's acceptance of a resignation which did not occur. As Ms Colanis described the position, what occurred was not a "complete resignation" and it fits under s 33P of the Police Act because, in Ms Colanis' view, the Commissioner of Police did not want to help or assist her.

The Submissions of the Commissioner of Police

12 The submissions of the Commissioner of Police confirm that no loss of confidence proceedings were taken against Ms Colanis by the Commissioner of Police. There was no loss of confidence in Ms Colanis by the Commissioner of Police and no proceedings were taken to remove Ms Colanis as part of a loss of confidence removal. Such a process requires the issuing of a specific notice on a prescribed form, and the correspondence on the record with respect to this matter shows that no such process has been undertaken. As there was no removal process under s 33L of the Police Act, Ms Colanis has no right of appeal under s 33P of that Act.

Consideration

13 In order for her appeal to be validly instituted under s 33P(1) of the Police Act, Ms Colanis will need to have been removed under s 8 of that Act. The fact is that this did not occur. No removal action under s 33L of that Act was taken against Ms Colanis. Section 33L(1) of the Police Act provides that Ms Colanis would have to have been given a written notice setting out the grounds on which the Commissioner of Police does not have confidence in the member's suitability to continue as a member. The form of the notice is set out in r 6A05 of the *Police Force Regulations 1979*. It is a notice which sets out the particular conduct or behaviour on which the Commissioner of Police's loss of confidence is based. In our view, such a notice

would be clearly recognisable as such. Ms Colanis did not receive such a notice and, with all due respect to her submission, the correspondence attached to her Notice of Appeal and in Exhibit 1 cannot be seen to constitute such a notice.

14 Further, Ms Colanis was not subject to a recommendation by the Commissioner of Police that the Minister advise the Governor to remove her under s 8 of the Police Act and she has not been removed under s 8 of that Act. Accordingly, she has no right of appeal under s 33P(1) of the Police Act and the Notice of Appeal filed on 21 May 2010 is incompetent.

15 The Police Act does not give the WAIRC a specific power to strike out an incompetent appeal. If this was a matter arising under the *Industrial Relations Act, 1979* (the IR Act) the powers given to the WAIRC under s 27(1)(a)(iv) of the IR Act would allow an order to issue dismissing the appeal as being incompetent; however that power is not imported into the Police Act by s 33S. There is some authority that the WAIRC does, however, have powers which are incidental and necessary to the exercise of the jurisdiction or the powers conferred on it (see *Robe River Iron Associates v. the Association of Draughting, Supervisory and Technical Employees of WA* (1987) 68 WAIG 11 at 17). In this case, the Police Act confers on the WAIRC the jurisdiction and power to hear an appeal by a police officer against his or her removal. We consider it is incidental and necessary to that jurisdiction and power to be able to dismiss such an appeal that is incompetent. In *Grassby v. The Queen* (1989) 168 CLR 1 at 16, Dawson J stated that:

> "However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise…"

16 We also consider that it is necessary for the exercise of the jurisdiction conferred on the WAIRC to hear an appeal by a police officer against his or her removal that the appeal be competent and that we would be able to properly remove from the registry an appeal that is not competent. Accordingly, we now order that the appeal be struck out as incompetent.

2010 WAIRC 00409

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHARIS LOUISE COLANIS
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 7 JULY 2010
FILE NO/S	APPL 123 OF 2010
CITATION NO.	2010 WAIRC 00409

Result	Appeal struck out as incompetent
Representation	
Appellant	Ms KL Colanis
Respondent	Ms L Blakeney, of counsel

Order

HAVING HEARD Ms KL Colanis on her own behalf and Ms L Blakeney, of counsel on behalf of the Commissioner of Police, the WAIRC hereby orders:

THAT the appeal is hereby struck out as incompetent.

(Sgd.) A R BEECH,
Chief Commissioner,

[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

2010 WAIRC 00393

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD JOHN EATON
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	MONDAY, 5 JULY 2010
FILE NO/S	APPL 124 OF 2010
CITATION NO.	2010 WAIRC 00393

Result	Appeal adjourned
Representation	
Appellant	Ms C Adams, of counsel – by written correspondence
Respondent	Ms D Scaddan, of counsel – by oral advice

Order

WHEREAS on 1 June 2010 Richard John Eaton lodged appeal pursuant to s 33P of the *Police Act 1892* ("Police Act") against his removal from the WA Police on 5 May 2010;

AND WHEREAS point 1 of the relief sought in his Notice of Appeal is for an interim order that his appeal be stayed pending the outcome of his criminal charge to be heard before the Albany Magistrates Court on 4 June 2010;

AND WHEREAS on 24 June 2010 the WAIRC listed this appeal For Mention for Tuesday, 6 July 2010;

AND WHEREAS on 5 July 2010 the appellant requested by email that pursuant to s 33T(1) of the Police Act the hearing of the appeal be adjourned until after the hearing of his criminal charge on 28 October 2010;

AND WHEREAS the Commissioner of Police does not object to the appellant's request;

AND WHEREAS the WAIRC is prepared to accept the request by email as an application made by the appellant pursuant to s 33T(1) of the Police Act;

NOW THEREFORE, the WAIRC, pursuant to the powers conferred on it under s 33T(3) of the Police Act, hereby orders -

1. THAT the For Mention hearing for Tuesday, 6 July 2010 be adjourned to Friday, 5 November 2010.
2. THAT compliance with regulation 91 of the *Industrial Relations Commission Regulations 2005* by the Commissioner of Police need not occur until further order.
3. THAT either party may apply to vary the terms of this order.

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

2010 WAIRC 00334

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALISTAIR LINDSAY GORDON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT

CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
HEARD	FRIDAY, 23 APRIL 2010
DELIVERED	THURSDAY, 10 JUNE 2010
FILE NO.	APPL 38 OF 2009
CITATION NO.	2010 WAIRC 00334

CatchWords	Removal of Police Officer – Loss of confidence by Commissioner of Police – What constitutes a further grounds of appeal – Distinction between submissions and grounds of appeal – Power to amend grounds of appeal – application to tender new evidence - Police Act 1892 (WA) s 33P(3), s 33R, s 33R(3), (4), s 33S - Industrial Relations Act 1979 (WA) s 27(1)(l)
Result	Application for leave to tender new evidence granted
	Application to amend grounds of appeal granted
Representation	
Appellant	Ms KA Vernon (of Counsel)
Respondent	Ms D Scaddan (of Counsel)

Reasons for Decision –

Application for leave to tender new evidence and to amend grounds of appeal

BEECH CC:

1 The Notice of Appeal in this matter was filed on 25 May 2009 and is against the decision of the Commissioner of Police to remove Mr Gordon from office on 29 April 2009. It may be helpful to now set out the reasons why Mr Gordon claims his removal was harsh, oppressive or unfair which are attached to the Notice of Appeal:

> "1. Between 19th October and 18th November 2007, while on duty the Appellant inappropriately visited a female on two occasions for non-work purposes. Following an investigation of this matter the Appellant was served with a Management Action Plan.
>
> 2. On the 10th May 2008 the Appellant was involved in an altercation with a woman and her daughter at the Midland Gate Shopping Centre. The altercation occurred whilst the woman was looking for a car park. As a result of that altercation, the Appellant was charged with two counts of Aggravated Common Assault.
>
> 3. On the 1st October 2008 the Respondent served a Notice of Intention to Remove the Appellant from the Police Force of Western Australia ("Notice"), citing the altercation at the Shopping Centre as well as the incident outlined in paragraph 1.
>
> 4. It was also alleged in the Notice that the Appellant was untruthful to investigators in relation to the incident outlined in paragraph 1 above.
>
> 5. On the 19th March 2009 the Appellant was convicted of the two charges arising from the altercation at the Midland Gate Shopping Centre and fined $750 with $1,000 court costs.
>
> 6. The Appellant, through his solicitor Jeremy Nobel Barrister & Solicitors, lodged an appeal against the convictions to the Court of Criminal Appeal.
>
> 7. The Appellant through his solicitors informed the Respondent that an Appeal against conviction had been filed.
>
> 8. Notwithstanding that an Appeal against conviction had been filed, the Respondent proceeded to recommend the Appellant's removal to the Minister for Police with the Appellant being removed by way of Notice of Removal on 29th April 2009.
>
> 9. Having regard to the fact that the disposition of the criminal charges preferred against the Appellant has not been determined by the Appeal Court, the decision of the Commissioner in removing the Appellant from the Police Force is harsh, oppressive or unfair.
>
> 10. By virtue of the Appellant's being a member of the Government Employees Superannuation Board "pension scheme", the removal of the Appellant prior to his retirement age of 60 years, has seen the pension he is entitled to significantly reduced and therefore inflicting further harshness on the Appellant and his family."

2 On 3 June 2009 the Commissioner of Police requested that the hearing of the appeal be adjourned pursuant to s 33T(2) of the *Police Act, 1892* ("the Police Act") because the grounds of appeal contained in Schedule 1 of the Notice of Appeal include that Mr Gordon's criminal charge has not been finally disposed of as he has lodged an appeal against his conviction in the Court of Criminal Appeal. There was no objection to the adjournment of the appeal and on 8 June 2009, the WAIRC adjourned the appeal for a period not exceeding 12 months ((2009) 89 WAIG 656; [2009] WAIRC 00358). There the matter rested until 11 January 2010 when programming directions were made.

3 On 24 March 2010 Mr Gordon filed an application for leave to tender new evidence and to amend the grounds of appeal. The Commissioner of Police objected to both applications. Mr Gordon's application seeks firstly that the following be tendered as new evidence pursuant to s 33R of the Police Act:

1. The decision of *Gordon v. Barry* [2009] WASC 280;
2. A certified copy of the Prosecution Notice dismissing criminal charges on 2 March 2010.

4 Mr Gordon's application also seeks to amend the grounds of appeal in the following terms:

"1. The Notice of Removal dated 29 April 2009 ("Removal") failed to give any reasons for the decision to remove the Appellant contrary to section 33L(5)(a) of the *Police Act 1892* (WA).

2. If the reason for the Removal (whether in whole or in part) was the Appellant's criminal conviction on 19 March 2009, when the Supreme Court allowed the Appellant's appeal against his conviction, quashed the conviction and ordered a retrial on 3 September 2009, and the criminal charges were subsequently dismissed on 2 March 2010, then such reason for Removal became invalid.

3. Further or in the alternative to ground 2 above, if the reason for the Removal (whether in whole or in part) was based upon the Respondent's conclusion that the Appellant's behaviour whilst off duty that led to his criminal conviction was inappropriate or not the conduct expected of a police officer, by reason of the Appellant's successful appeal and subsequent dismissal of the criminal charges on 2 March 2010, then such reason for Removal became invalid.

4. If the reason for the Removal (whether in whole or in part) was the Appellant's conduct towards Ms Church between 19 October and 18 November 2007, when the Respondent served the Appellant with a 12 month Management Action Plan operative from 28 November 2007 in response to such conduct ("the MAP"), then such reason for Removal was invalid because by imposing the MAP, the Respondent had already determined that the Appellant's conduct between 19 October and 18 November 2007 did not constitute a loss of confidence in the Appellant's suitability to continue as a member.

5. If the reason for the Removal (whether in whole or in part) was the Appellant's conduct on 27 November 2007 during an internal affairs interview about the events between 19 October and 18 November 2007 ("the IAU interview"), when the Respondent served the Appellant with the MAP, then such reason for Removal was invalid because the Respondent had already determined that the Appellant's conduct between 19 October and 18 November 2007 and on 27 November 2007 did not constitute a loss of confidence in the Appellant's suitability to continue as a member.

6. Further or in the alternative to ground 5 above, if the reason for the Removal (whether in whole or in part) was the Appellant's conduct during the IAU interview, then such reason for Removal is trivial and insufficient to constitute a loss of confidence in the Appellant's suitability to continue as a member because the Appellant took steps during the interview to correct any untruthfulness alleged to have arisen."

Submissions of Mr Gordon

5 Mr Gordon relies on s 27(1)(l) of the *Industrial Relations Act, 1979* ("the IR Act") which is applied to this appeal by s 33S of the Police Act. He submits that s 27(1)(l) gives the WAIRC the power to grant the amendment sought so as to identify and deal with the real issues between the parties, referring to *O'Brien v. Perth Metal Work Co Pty Ltd* (2002) 82 WAIG 3209 at [35]; [2002] WAIRC 07045. Mr Gordon submits that granting the application to amend the grounds of appeal does not introduce any new causes of action. Rather, the reasons attached to the Notice of Appeal of 25 May 2009 were drafted in "layman's terms" and are not really grounds of appeal. Each of the paragraphs relates to or merely reformulates the reasons for the removal being harsh, oppressive or unfair.

6 In relation to the application to tender new evidence, Mr Gordon submits that the evidence sought to be tendered flows from the statement in paragraph 9 that the disposition of the criminal charges preferred against Mr Gordon has not been determined by the Appeal Court. The fact that the charges were quashed and a retrial ordered, followed by a decision not to retry Mr Gordon, therefore flows from that existing reason why the removal of Mr Gordon was harsh, oppressive or unfair.

Submissions of the Commissioner of Police

7 The Commissioner of Police's submissions, in summary and hopefully without doing an injustice to the detail of the submissions, point to the requirement in s 33P(3) of the Police Act that an appeal shall not be instituted later than 28 days after the day on which the member was removed from office. The Commissioner of Police submits that the language of s 33P(3) leads to the conclusion that there is no power in the WAIRC to extend the time for filing an appeal. Correspondingly, although the WAIRC has the power in s 27(1)(l) of the IR Act to amend the grounds of appeal, it cannot do so if the amendments sought introduce new grounds of appeal or if to do so would create a new appeal, thereby effectively lodging an appeal out of time when there is no express power in the WAIRC to extend the time limit under s 33P(3) of the Police Act.

8 The submission of the Commissioner of Police is that in this case Mr Gordon is effectively abandoning his entire Notice of Appeal of 25 May 2009 by abandoning paragraphs 9 and 10. Mr Gordon is instead endeavouring to recast statements of fact as if they are amendments to the grounds of appeal attached to the Notice of Appeal. Granting amendments of this type would effectively sanction the lodging of an appeal out of time in circumstances when neither the IR Act, nor the Police Act, provide any statutory basis for this to occur.

9 In relation to the application to tender new evidence, the Commissioner of Police points to the decision of the WAIRC in *AM v. Commissioner of Police* ((2009) 90 WAIG 276; [2009] WAIRC 01285) to submit that the new evidence sought to be tendered by Mr Gordon is not relevant to any of the grounds set out in the Notice of Appeal. If the amendments sought to be

made are granted by the WAIRC then the WAIRC does have a discretion whether to admit the new evidence. However, the WAIRC should not exercise that discretion without taking into account the delay which has occurred between now and the lodging of the appeal, and any prejudice which is caused to the Commissioner of Police in this no–costs jurisdiction. The fact that the Commissioner of Police requested the adjournment of the appeal does not relieve the obligation on Mr Gordon to clearly articulate the grounds of his appeal.

Consideration

10 The appeal in this matter is within time, having been filed within 28 days after the day upon which Mr Gordon was removed from office. I consider that s 27(1)(l) of the IR Act does permit the amendment of grounds of appeal. The WAIRC has held so on a previous occasion: *Laurent v. Commissioner of Police* ((2009) 89 WAIG 934 at 939; [2009] WAIRC 00515 at [56]). On that occasion, the WAIRC stated it was questionable whether the power in s 27(1)(l) would permit the substitution of completely new appeal grounds if to do so would create a new appeal, thereby effectively lodging an appeal out of time.

11 On this occasion, Mr Gordon's submissions are that the grounds of appeal which are to be substituted do nothing more than re-state the matters contained within the original Notice of Appeal. I consider there is some force in this submission, subject to what follows. I do not cavil with the submission of the Commissioner of Police that paragraphs 1 to 8 of the Notice of Appeal are merely statements of fact and do not constitute grounds consistent with s 33(P)(2) of the Police Act. That submission goes to the language in which the paragraphs are expressed. Nevertheless, in each case the paragraphs refer to particular incidents. The Proposed Amended Grounds of Appeal, with the exception of Proposed Amended Ground 1, do not depart from those facts, but rather state that the removal of Mr Gordon would be harsh, oppressive or unfair if the decision of the Commissioner of Police to remove Mr Gordon was based upon the facts as stated.

12 By way of illustration, paragraph 1 states the fact that between 19 October and 18 November 2007, Mr Gordon inappropriately visited a female on two occasions for non-work purposes and following an investigation was served with a Management Action Plan. The appeal ground sought to be amended that is of relevance to that statement is Proposed Ground 4. That is, if the reason for Mr Gordon's removal, whether in whole or in part, was Mr Gordon's conduct between 19 October and 18 November 2007, the reason for removal was invalid because by imposing the Management Action Plan the Commissioner of Police had already determined that Mr Gordon's conduct between those dates did not constitute a loss of confidence in Mr Gordon's suitability to continue as a member.

13 The Commissioner of Police argues that that constitutes a new ground of appeal and, by implication, creates a new appeal thereby effectively lodging an appeal out of time. With respect to the Commissioner of Police, I disagree. While the Proposed Appeal Ground 4 uses different language, it refers to an event that is already part of Mr Gordon's appeal. While it might state a ground of appeal where none was articulated previously, it particularises the issue raised in the original Notice of Appeal. To some extent, it gives a purpose to the first paragraph of the reasons why Mr Gordon submits that his removal was harsh, oppressive or unfair. The Notice of Appeal is to set out the reasons why the removal of Mr Gordon is seen by him to have been harsh, oppressive or unfair. I am of the view that paragraph 1 attempted to do so although somewhat unhelpfully. I do not consider the granting of that amendment could be held to be the creation of a new appeal, thereby lodging an appeal out of time.

14 I consider that paragraphs 2, 3 and 5 similarly provide the foundation for Proposed Appeal Grounds 2 and 3. Paragraph 4 similarly allows the Proposed Grounds 5 and 6 not to be held to be introducing a new ground of appeal.

15 In relation to the Proposed Appeal Ground 1, that is that the Notice of Removal dated 29 April 2009 failed to give any reasons for the decision to remove the appellant, contrary to s 33L(5)(a) of the Police Act, I have read in advance the draft reasons of Scott ASC and Kenner C in relation to this ground and respectfully agree, for the reasons they give, that the amendment should be allowed.

New Evidence

16 I consider that the decision in *Gordon v. Barry* referred to, and the certified copy of the Prosecution Notice dismissing the criminal charges, are new evidence for the purposes of s 33R of the Police Act. Section 33R(11) sets out the definition of new evidence. The two documents referred to are not contained within paragraphs (a) to (e) in s 33(11); accordingly, the documents are new evidence.

17 The WAIRC may grant Mr Gordon leave to tender new evidence pursuant to s 33R(3) of the Police Act. In the absence of the Commissioner of Police consenting to the tendering of new evidence, s 33R(3)(b) obliges the WAIRC to be satisfied that Mr Gordon is likely to be able to show that the Commissioner of Police has acted upon wrong or mistaken information, that the new evidence might materially have affected the Commissioner of Police's decision to take removal action or that it is in the interests of justice to do so. By s 33R(4), in the exercise of its discretion, the WAIRC is to have regard to whether or not Mr Gordon was aware of the substance of the new evidence, and whether or not the substance of the new evidence was contained in a document to which he had reasonable access, before his removal from office.

18 I note from the record that Mr Gordon was served with a Notice of Intention to Remove on 1 October 2008. His removal occurred on 29 April 2009. Mr Gordon's conviction on the two charges arising from an altercation at the Midland Gate Shopping Centre was on 19 March 2009. We tentatively observe that it is likely that the conviction of Mr Gordon was a factor, at least, in the Commissioner of Police deciding to remove Mr Gordon. I consider that evidence showing that the conviction was quashed, and a new trial ordered, might materially have affected the Commissioner of Police's decision to take removal action. Mr Gordon could not have been aware of the substance of the new evidence, and it was not contained in a document to which he had reasonable access, before his removal from office. I therefore grant leave to tender the new evidence.

19 I propose to order that:

(1) Mr Gordon be granted leave to amend the grounds of appeal in the terms of the Minute of Proposed Amended Grounds of Appeal dated 24 March 2010.

(2) Mr Gordon be granted leave to tender the following new evidence:

(a) The decision of *Gordon v. Barry* [2009] WASC 280;

(b) A certified copy of the Prosecution Notice dismissing criminal charges on 2 March 2010.

20 In the WAIRC's letter to the parties of 12 January 2010 it was indicated that if the WAIRC decides to grant leave to amend the grounds of appeal and to tender new evidence, the Order to issue is likely to also amend the Order dated 8 June 2009 ((2009) 89 WAIG 656; [2009] WAIRC 00358) by prescribing the date by which the Commissioner of Police is to both respond to the Notice of Appeal and give Notice of Reformulated Reasons under s 33R(10)(a). It would also provide that the response to the Notice of Appeal and the Notice of Reformulated Reasons may be combined in one document. This is not a matter raised with the parties during the hearing and accordingly they are asked to advise the WAIRC whether or not they agree to the Order to issue in these proceedings incorporating these matters. The WAIRC will also seek the view of the Commissioner of Police regarding the date by which the document is to be filed. If there is no agreement, the Order will issue as proposed in the Minute but without these additional matters and the appeal will subsequently be re-listed to deal with them.

21 A Minute of Proposed Order now issues.

SCOTT ASC:

22 The background to this matter is set out in the reasons for decision of the Chief Commissioner. With respect, I agree with him that the application to amend the grounds of appeal should be allowed. I wish to add some comments.

23 The WAIRC has power to amend the grounds of appeal (s 27(1) of the IR Act) as imported into the Police Act.

24 The current grounds of appeal are set out in Schedule 1 to the Notice of Appeal and detail a series of incidents involving the appellant. Except in respect of Proposed Appeal Ground 1, the proposed amended grounds re-articulate the current grounds by describing them more appropriately as grounds of appeal rather than as part of the narrative. In that context it is appropriate to amend those grounds as proposed by the appellant.

25 Proposed Appeal Ground 1 is that the respondent's decision to remove the appellant on 29 April 2009 is harsh, oppressive or unfair because "[t]he Notice of Removal dated 29 April 2009 ("Removal") failed to give any reasons for the decision to remove the appellant contrary to section 33L(5)(a) of the *Police Act 1892 (WA)*". The issue which arises from this is that this was not part of the existing grounds. In that regard, Proposed Appeal Ground 1 is a new ground of appeal. It is sought to be raised outside the 28 day time limit prescribed by s 33P of the Police Act for the filing of an appeal, and therefore the statute barred.

26 In *Aon Risk Services Australia Ltd v. Australian National University* [2009] HCA 27, the High Court dealt with the issue of applications to amend and the raising of new claims. Although it dealt with the circumstances of a court where rules regarding pleadings and amendments apply, the joint judgment of the majority sets out issues to be considered by a court deciding whether to allow amendment including that such a decision is a matter of discretion. The issues for consideration in exercising that discretion include:

1. The court has a duty to allow an amendment for the purpose of deciding the real issues in, and avoiding multiplicity of, proceedings;
2. The nature and importance of the amendment to the party applying;
3. The extent of delay and costs associated with the amendment;
4. Where the inconvenience or cost to the other party of the amendment being granted can be overcome by an arrangement for costs, then amendment ought to be granted;
5. The prejudice to the other party;
6. The point the litigation has reached relative to a trial when the application to amend is made;
7. Non-compensable inconvenience and stress on parties, whether individuals, business corporations or commercial persons;
8. The party applying to amend should explain the delay in applying to amend, including that the application is brought in good faith, and the circumstances giving rise to the amendment;
9. The rules are to be applied to the objective of the court arriving at a just resolution;
10. Case management principles are a tool, not an end in themselves; and
11. "The conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruption in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard" per Toohey J in *Sali v. SPC Ltd* (1993) 67 ALJR 841 at 849.

27 The proposed new ground arises from the same, or substantially the same, facts as the other grounds. It goes to the fairness and lawfulness of the removal. In those circumstances, while it is a new ground, it does not raise an issue which is so distinguishable from the other grounds that it ought not be allowed. I would distinguish this situation from the rule in *Weldon v. Neal* ((1887) 19 QBD 394).

28 I also note that it is a matter of importance to the appellant's case in that the failure to give reasons for removal would constitute a significant issue of fairness as well as a question of compliance with the lawful requirements of the removal process set out in the Police Act.

29 Other considerations include that the process of hearing of the appeal is not yet passed its preliminary stages. The granting of the application in respect of the other grounds of appeal will enable the respondent to reformulate his reasons for removal (s 33R(8) of the Police Act). Therefore there is no real prejudice to the respondent in a new ground being added at this stage. It will not create further delay or inconvenience. The other grounds are associated with Proposed Appeal Ground 1 in that they flow from it. Therefore, there is limited, if any, prejudice, inconvenience or cost to the respondent in granting the amendment.

30 In those circumstances, I am of the view that it is appropriate to allow the amendment to the grounds of appeal including the Proposed Appeal Ground 1.

KENNER C:

31 These proceedings are an appeal under s 33P of the Police Act against a decision taken by the respondent under s 33L of the Police Act to remove the appellant from office as a police officer effective from 29 April 2009.

32 By an order of the Commission of 8 June 2009, the appeal was adjourned under s 33T(2) of the Police Act by reason of an appeal brought by the appellant against his conviction on criminal charges in the Court of Appeal. The appellant's appeal against his conviction in the Court of Appeal was upheld on 3 September 2009. The appellant is not to be retried.

33 The terms of the appellant's application for leave to tender new evidence under s 33R of the Police Act and to amend his grounds of appeal, along with an outline of the submissions advanced by the appellant and the respondent in connection with the application, are set out in the reasons of Beech CC. I need not repeat them on this occasion.

Power to amend grounds of appeal

34 The Commission undoubtedly has the power under s 27(1)(l) of the IR Act, as applied by s 33S of the Police Act, to amend grounds of appeal filed under s 33P of the Police Act. So much so was recently determined by the Commission in *Gerald Jean-Noel Laurent v. Commissioner of Police* (2009) 89 WAIG 934. In that matter, reference was made to a decision of the Full Bench of the Commission in *The Attorney General in and for the State of WA v. Cockburn Cement Limited and Others* (1982) 63 WAIG 6. Furthermore, the power to amend grounds of appeal in proceedings before the Full Bench under s 49 of the IR Act was referred to and endorsed in *Steven James O'Brien v Perth Metalwork Co Pty Ltd* (2002) 82 WAIG 3209.

35 The power to amend is a discretionary power and it is to be exercised consistent with s 26(1) of the IR Act. As was said in *Cockburn Cement* a purpose for which an amendment to proceedings under s 27(1)(l) of the IR Act can be made is to "do what is necessary to enable the expeditious hearing and determination of all the relevant issues…"

Amendment to grounds of appeal

36 I consider that the submissions of counsel for the appellant, Ms Vernon, that in effect, the proposed amendments to the grounds of appeal originally filed, seek to better express and reflect the contentions advanced by the appellant in Schedule 1 to the Notice of Appeal, as to the reasons why the appellant says the decision of the respondent was harsh, oppressive or unfair, have force.

37 Schedule 1 to the Notice of Appeal essentially raises three incidents that led to the removal decision taken by the respondent. The first relates to conduct of the appellant between 19 October and 18 November 2007 whilst on duty in relation to a female person. The second refers to an incident on 10 May 2008 involving the appellant and a woman and her daughter at the Midland Gate Shopping Centre which was ultimately the subject of the criminal proceedings commenced against the appellant. The third issue is an allegation by the respondent that he was untruthful to investigators during the course of an investigation by the respondent into the incident which occurred between 19 October and 18 November 2007.

38 When taken as a whole, pars 1 to 8 of Schedule 1 to the Notice of Appeal, read more in the nature of a narration as to the factual circumstances said to constitute unfairness in the appellant's removal by the respondent. What the proposed amended grounds of appeal do, in pars 2 to 6 inclusive, is to rearticulate those reasons in a form which was described by Ms Vernon as "more legalistic" but to not otherwise change the substance of the appeal brought against the respondent.

39 It was accepted by counsel for the appellant that Proposed Appeal Ground 1, referring to a failure by the respondent to give any reasons for removal contrary to s 33L(5)(a) of the Police Act, was not in Schedule 1 to the Notice of Appeal as filed, is a new ground of appeal. It was submitted however, that there can be no bar to the appellant raising this as an amendment to the grounds of appeal given that the substantive appeal was instituted within the 28 day time limit prescribed by s 33P(3) of the Police Act.

40 I adhere to without repeating, what I said in *Wall v. The Commissioner of Police* (2009) 89 WAIG 941 at 944, that the terms of s 33P(3) of the Police Act prescribing a 28 day time limit for the bringing of an appeal against removal action, is an essential condition to the exercise of the right of appeal and cannot be extended. In *Laurent* the Commission expressed the tentative view, by way of obiter, that there may be some doubt whether s 27(1)(l) of the IR Act could be relied upon to amend grounds of appeal under s 33P of the Police Act which, in effect, institutes a new appeal outside the strict 28 day time limit. On further consideration, I have some reservations as to whether this view should ultimately be held to be correct. In any event, in this case, I am not persuaded that this circumstance arises.

41 On the exercise of a power of amendment, as in s 27(1)(l) of the IR Act, the relation back principle applies such that the amendment operates from the original date of the document. In this case, the proposed amendment will operate from the date of the filing of the application on 25 May 2009. This is subject to the Commission ordering the whole or any part of an amendment to operate from a later date.

42 The respondent submitted that applying the principles in *Weldon v Neal* (1887) 19 QBD 394, an amendment to introduce a new ground of appeal outside of the 28 day time limit prescribed by s 33P of the Police Act, would be tantamount to an amendment to introduce a statute-barred cause of action.

43 The principles in *Weldon* refer to a court's discretion to refuse an amendment to a writ of summons that has the effect of adding a new cause of action that is otherwise statute-barred by a relevant limitation period. The rationale for this principle being that a plaintiff should not be able to take advantage of a writ to bring a statute-barred claim to the detriment of the opposing party.

44 Whilst the principle in *Weldon* has been reflected in rules of court in Australian courts, it has not been applied rigidly in all cases. For example, in New South Wales, the Court of Appeal has held that an amendment of a claim to bring in a new cause of action could be allowed if the interests of justice required it: *Air Link Pty Ltd v. Paterson (No 2)* [2003] 58 NSWLR 388; *Proctor v. Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166; *McGee v. Yeomans* [1977] 1 NSWLR 273.

45 A different approach has been adopted by the Supreme Court in Western Australia. It has been held that only an amendment that falls within the terms of the specific rule allowing it can be made. The general power of amendment cannot be relied on: *Dye v Griffin Coal Mining Pty Ltd* (1998) 19 WAR 431; *Morgan v. Banning* (1999) 20 WAR 474.

46 Furthermore, the general principles in relation to amendments are such that an amendment to a proceeding should be allowed if it will enable the real controversy between the parties to be decided. This is subject to other factors such as any demonstrated prejudice to the other party to the proceedings, the lateness of the application to amend, etc: *Kellerman v. Hansel Properties Ltd* [1987] AC 189.

47 In this matter there has been no prejudice demonstrated by the respondent, and the lateness of the application is not an issue as the appeal is yet to be heard by the Commission.

48 The issue raised in Proposed Appeal Ground 1 is that there was a failure by the respondent to comply with the requirement in s 33L(5)(a) of the Police Act to give the appellant reasons for his removal in the removal notice issued by the respondent. This may be a matter going to the fairness of the respondent's removal of the appellant from the Police Service, despite the terms of s 33X of the Police Act. If it is to be contended that the failure to comply, if established, is a substantive failure to comply with the relevant procedures in Division 2 of the Police Act, in terms of the lawfulness of the removal action, then this may also go to the fairness of the removal action and be a part of the real issues in controversy between the parties. I note however, that the other application by the appellant to tender new evidence, if granted, will enable the respondent to reformulate his reasons for removal under s 33R(8) of the Police Act in any event.

49 This is not a case where an application is sought to be amended to bring in a fresh proceeding for the first time; that is subject to a time limit that cannot be extended: *Mahfoud v. Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 217; 115 ALR 603. The appeal in this case was commenced within time. In my view the principles in *Weldon* and the authorities applying it, do not have application to the present circumstances. The Commission has a general power of amendment under s 27(1)(l) of the Act that may be exercised according to equity, good conscience and the substantial merits and on terms the Commission sees fit to impose. That general power of amendment applies to the present proceedings no less than any other proceeding otherwise properly before the Commission.

50 Various grounds were advanced in the appeal as filed as reasons why the removal of the appellant is said to be harsh, oppressive and unfair. The appellant has sought to recast those reasons and to add a further reason in proposed amended ground 1. In my view the proposed amendments do not alter the issue in controversy between the parties, that being whether the removal of the appellant by the respondent was unfair. There is not proposed by the amendments sought an entirely new case. To the extent that Proposed Appeal Ground 1 adds a further reason, then consistent with the principle in relation to amendments generally, that being that an amendment should be made to enable all of the real issues in controversy to be raised, it can and should be included.

51 In my opinion, in accordance with equity, good conscience and the substantial merits, the proposed amendments should be made.

Application to tender new evidence

52 In relation to the appellant's application to seek leave to tender new evidence under s 33R of the Police Act I would also grant that application. The granting of the application to tender new evidence logically follows from the granting of the application to amend the grounds of appeal and s 33R(4) of the Police Act does not arise on this occasion.

53 I agree with the orders as proposed.

2010 WAIRC 00368

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ALISTAIR LINDSAY GORDON

APPELLANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM	CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S J KENNER
DATE	WEDNESDAY, 23 JUNE 2010
FILE NO/S	APPL 38 OF 2009
CITATION NO.	2010 WAIRC 00368

Result	Application for leave to tender new evidence granted; Application for leave to amend grounds of appeal granted; Order varied
Representation	
Appellant	Ms KA Vernon (of counsel)
Respondent	Ms D Scaddan (of counsel)

Order

THE WAIRC, pursuant to the powers conferred on it under s 33S of the *Police Act, 1892* ("the Police Act"), hereby orders –

1. THAT Mr Gordon be granted leave to amend the grounds of appeal in the terms of the Minute of Proposed Amended Grounds of Appeal dated 24 March 2010.
2. THAT Mr Gordon has leave to tender the following new evidence:
   (a) The decision of *Gordon v. Barry* [2009] WASC 280;
   (b) A certified copy of the Prosecution Notice dismissing criminal charges on 2 March 2010.
3. THAT the Commissioner of Police's response to the amended Notice of Appeal and Notice of Reformulated Reasons under s 33R(10)(a) of the Police Act may be combined in one document.
4. THAT order 2 of the Order dated 8 June 2009 ((2009) 89 WAIG 656; [2009] WAIRC 00358) be deleted.
5. THAT regulation 91 of the *Industrial Relations Commission Regulations 2005* be complied with by Wednesday, 28 July 2010.

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

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2010 WAIRC 00439

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNA ARRAS **APPLICANT** **-v-** LOWER GREAT SOUTHERN COMMUNITY LIVING ASS. **RESPONDENT**
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 13 JULY 2010
FILE NO/S	U 48 OF 2010
CITATION NO.	2010 WAIRC 00439

Result	Application discontinued
Representation	
Applicant	Ms D L Arras
Respondent	Ms M Ivanovski (as agent)

Order

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

AND WHEREAS on 13 May 2010 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 2 July 2010 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.

2010 WAIRC 00336

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JONATHAN LEE BELL
	APPLICANT
	-v-
	SUPER PROGRESSIVE IGA (DIANELLA)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 11 JUNE 2010
FILE NO/S	U 12 OF 2010
CITATION NO.	2010 WAIRC 00336

Result	Dismissed
Representation	
Applicant	Mr J Bell on his own behalf
Respondent	Ms D Chin

Order

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

WHEREAS on 11 March 2010 the Commission convened a conference to deal with scheduling issues relating to the issue of jurisdiction raised by the respondent in its Notice of Answer and Counter-proposal lodged in the Commission on 22 January 2010; and

WHEREAS on 18 March 2010 the Commission wrote to the parties advising timeframes for filing and serving submissions with respect to the issue of jurisdiction raised by the respondent; and

WHEREAS on 30 March 2010 the respondent filed its submissions; and

WHEREAS as the applicant did not file his submissions by the due date the Commission attempted to contact the applicant on a number of occasions by telephone and email however, there was no response; and

WHEREAS on 12 May 2010 the Commission wrote to the applicant to advise him that if he did not contact the Commission by the close of business on 19 May 2010 to provide advice as to his intentions with respect to the application the matter would be listed for a show cause hearing as to why the matter should not be dismissed pursuant to s 27(1) of the *Industrial Relations Act 1979*; and

WHEREAS as the applicant did not contact the Commission by the due date the matter was listed for a show cause hearing on 10 June 2010 and the applicant was advised that non-attendance by the applicant at these proceedings will 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 10 June 2010 nor did he advise the Commission beforehand as to any reason why he was unable to attend the 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 dismissed.

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

2010 WAIRC 00424

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER EDWARD JOHN BROUGH
	APPLICANT
	-v-
	CITY OF PERTH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 12 JULY 2010
FILE NO/S	U 99 OF 2009
CITATION NO.	2010 WAIRC 00424

Result Discontinued

Order

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

WHEREAS on 6 July 2009 the Commission convened a conference to deal with programming matters in relation to the issue of jurisdiction raised by the respondent in its Notice of Answer and Counter-proposal lodged in the Commission on 15 June 2009 and a Notice of Objection lodged in the Commission by the respondent on 15 June 2009; and

WHEREAS at the conference the applicant's representative requested that the matter be adjourned pending a decision issuing in another proceeding in the Commission which may assist the applicant to decide how this application should proceed; and

WHEREAS given the consent of the respondent the application was adjourned; and

WHEREAS the Commission contacted the applicant on several occasions about his intentions with respect to this matter; and

WHEREAS on 16 February 2010 the Commission was advised that the applicant wished to proceed with the matter and the parties were contacted about setting down a further conference; and

WHEREAS on 24 February 2010 the respondent's representative requested further time to obtain instructions from its client about the conference; and

WHEREAS on 19 March 2010 the Commission convened a programming conference; and

WHEREAS at the end of that conference the parties were given further time to see if the matter could be resolved; and

WHEREAS on 26 March 2010 the applicant's representative advised the Commission that the matter had not been resolved; and

WHEREAS on 29 March 2010 the Commission wrote to the parties about listing the matter for hearing; and

WHEREAS as there was no response from the applicant about listing the matter for hearing, the Commission contacted the applicant's representative on a number of occasions about the applicant's intentions with respect to this matter and was advised that he was awaiting instructions with respect to the matter; and

WHEREAS on 21 May 2010 the Commission left a message for the applicant's representative requesting that he advise the Commission by the close of business on 24 May 2010 of the applicant's intentions however, this did not occur; and

WHEREAS the Commission set down a status conference on 4 June 2010; and

WHEREAS on 1 June 2010 the applicant filed a Notice of Discontinuance in respect of the application and the conference was vacated; and

WHEREAS on 1 June 2010 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,
Commissioner.

[L.S.]

2010 WAIRC 00378

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CRAIG KENNETH DOYLE
	APPLICANT
	-v-
	THE PERFORMANCE SHOPPE
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 JUNE 2010
FILE NO/S	U 90 OF 2010
CITATION NO.	2010 WAIRC 00378

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 16 June 2010 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.

2010 WAIRC 00032

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD HARGROVE
	APPLICANT
	-v-
	SEVENTH DAY ADVENTIST CHURCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 29 JANUARY 2010
FILE NO/S	B 264 OF 2009
CITATION NO.	2010 WAIRC 00032

Result	Order issued
Representation	
Applicant	Mr Patrick Mullaly, as agent
Respondent	Ms Jayne McCubbin, of counsel

Order

WHEREAS the herein application was filed on 17 December 2009 and seeks relief against the respondent arising from an alleged denied contractual benefit;

AND WHEREAS on 22 January 2010 the respondent requested an extension of time for filing a Notice of Answer to the herein claim to 27 January 2010 by reason of the absences of responsible officers of the respondent over the Christmas/New Year holiday period;

AND WHEREAS the Commission, having considered the application for an extension of time is satisfied that the circumstances warrant grant of the application in the present case;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 27(1)(n) of the Industrial Relations Act 1979, hereby orders –

THAT the respondent file a Notice of Answer in respect of the herein application by no later than 28 January 2010.

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

2010 WAIRC 00069

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD HARGROVE
	APPLICANT
	-v-
	SEVENTH DAY ADVENTIST CHURCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 17 FEBRUARY 2010
FILE NO.	B 264 OF 2009
CITATION NO.	2010 WAIRC 00069

Result	Directions issued
Representation	
Applicant	Mr P Mullally as agent
Respondent	Ms J McCubbin of counsel

Direction

HAVING heard Mr P Mullally as agent on behalf of the applicant and Ms J McCubbin of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT each party shall give an informal discovery by serving its list of documents by Wednesday, 3 March 2010.

(2) THAT inspection of documents shall be completed by Wednesday, 10 March 2010.

(3) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.

(4) THAT the parties file and serve upon one another any signed witness statements upon which they intend to rely no later than 7 days prior to the date of hearing.

(5) THAT the applicant and respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely no later than 3 days prior to the date of hearing.

(6) THAT the parties have liberty to apply on short notice.

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

2010 WAIRC 00371

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD HARGROVE
	APPLICANT
	-v-
	SEVENTH DAY ADVENTIST CHURCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	WEDNESDAY, 17 FEBRUARY 2010, MONDAY, 19 APRIL 2010
DELIVERED	THURSDAY, 24 JUNE 2010
FILE NO.	B 264 OF 2009
CITATION NO.	2010 WAIRC 00371

CatchWords	Industrial Law (WA) – Contractual Benefits Claim – Jurisdiction of Commission to hear application – Contract of employment entered into, administered and performed outside of Western Australia – Insufficient connection to Western Australia to ground jurisdiction – Application dismissed – Industrial Relations Act 1979 s 7, s 29(1)(b)(ii) – Service and Execution of Process Act 1992 (Cth) s51
Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr R A Millar of counsel

Reasons for Decision

Application

1 This application is made pursuant to s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"). The applicant claims he was denied contractual benefits comprising salary, benefits and entitlements in the sum of $344,849.50 following the termination of his contract of employment with the respondent said to have been on or about 31 December 2004.

2 The applicant claims that he was entitled to the benefits of his contract of employment until in or about December 2007 and that it was unlawfully terminated by the respondent.

3 The respondent contests the applicant's claim. Moreover, it asserts that the contract between it and the applicant is not enforceable in this jurisdiction as the contract was governed by the laws of Fiji or alternatively New South Wales, as being the locations where the contract was performed and from which it was administered respectively. The respondent contended that the applicant's employment had no nexus with Western Australia, sufficient to ground jurisdiction in this Commission in relation to the applicant's claim.

4 The application was commenced against the named respondent and nominated '148 Fox Valley Road Wahroonga NSW' as the respondent's address for service.

5 By a declaration of service filed on 20 January 2010, the application was purportedly served on the respondent at the above address.

6 By an application filed on 22 January 2010 the respondent sought and was granted by the Commission, an extension of time to file a notice of answer through its solicitors. A notice of answer was subsequently filed on 25 January 2010. In so doing, the respondent conditionally submitted to the jurisdiction of the Commission, subject to its stated objections as particularised.

7 In the absence of the notice of answer as filed by the respondent, it is doubtful that the service of the application could be regarded as legally effective. Effective service of the application can only be made within the territorial limits of the Commission, in this case the State of Western Australia, unless permitted by rules of court or other legislation.

8 By reg 24(4) of the Industrial Relations Commission Regulations 2005, it is provided that service of any document outside of Western Australia must be made in accordance with s 51 of the Service and Execution of Process Act 1992 (Cth). This was not done in this case. Had the respondent not conditionally submitted to the jurisdiction of the Commission, there are strong arguments that the Commission would not have been seized of jurisdiction to hear the present matter: *Sherrington v Sportsplay Television Systems Pty Ltd* (1988) 68 WAIG 1291.

Factual Background

9 There is considerable common ground on the facts.

10 The applicant is a qualified teacher and began working for the South Pacific Division of the respondent in 1992 at Fulton Adventist College in Fiji. He was employed as a teacher and remained in that position until 1996, when he transferred to the Aore Adventist Academy in Vanuatu for six years as Deputy Principal and a teacher. In January 2001 the applicant was appointed Deputy Principal and as a teacher at Suva Adventist High School in Fiji and the applicant asserted he was to remain in that position for a period of four years until the end of 2005.

11 According to the evidence of Mr Potter, the Associate Chief Financial Officer (Expatriates' Finance) of the Seventh-Day Adventist Church (Pacific) Limited, who gave evidence on behalf of the respondent, all salary and administrative arrangements concerning expatriate employees, such as the applicant, was dealt with through the respondent's head office at Wahroonga, New South Wales. On this basis, the applicant's salary and entitlements were administered and paid for by the respondent. As a consequence, all pay advices and annual group certificates were also issued by the respondent.

12 It was also common ground that despite these arrangements, the day to day direction and control of expatriate employees, such as the applicant, fell within the responsibility of the relevant local Church Missions and their educational institutions in Fiji, where the employees were engaged. In the case of the applicant, he was under the direct control and responsibility of the relevant local Missions in Fiji and Vanuatu who were administering the educational institutions where he worked.

13 It was also Mr Potter's testimony that in about early 2004, because of financial constraints, the respondent was required to reduce its expenditure on expatriate employees, one of whom was the applicant.

14 Consistent with this decision, the applicant testified that in about May 2004 a Mr Roberts from the respondent came to visit him in Fiji. Mr Roberts brought with him the news that because of the financial restraints, the respondent could not fund his employment beyond the end of 2004. The applicant asserted in his testimony, that accordingly, he was only given three years of a four year contract as initially agreed.

15 Subsequent to hearing this news, the applicant testified that he wrote to the President of the respondent in Sydney on 14 June 2004, complaining about his circumstances and the welfare of himself and his family. In about July 2004, the applicant said that a meeting took place with again Mr Roberts and others, where it was affirmed that the applicant's employment would not continue beyond 31 December 2004.

16 In light of these events, the applicant testified that he commenced looking for new employment straight away. Because of the circumstances, Mr Potter testified that the respondent provided assistance to the applicant in obtaining alternative employment. This included making contact with entities related to the respondent in the South Pacific region. As a result of the applicant's and respondent's endeavours, the applicant obtained a new teaching position at the Karalundi Aboriginal Education Centre in Meekatharra in Western Australia ("Karalundi"). The applicant moved with his wife and children to Meekatharra in November 2004. This was the first time that the applicant had been to Western Australia. The applicant is an American national and all of his employment with the respondent was in Fiji and Vanuatu in the South Pacific.

17 Karalundi is, from the evidence before the Commission, an incorporated body which on Mr Potter's testimony is a separate legal entity to the respondent. However, it was common ground that Karalundi is an affiliated educational facility in that it operates and subscribes to the respondent's religious principles. According to Mr Potter, the respondent does not exercise any administrative authority over Karalundi and nor does it fund its activities.

18 On the evidence before the Commission, through Mr Potter's testimony and from exhibit A8, an extract of the respondent's website, the only educational institution in Western Australia owned and operated by the respondent is the Carmel Adventist College. This school is operated by Seventh-Day Adventist Schools (Western Australia) Limited. This is not and was not the respondent at the material times for the purposes of this claim.

19 Following the obtaining of the position at Karalundi, the applicant sought and was granted by the respondent, an immediate release from his teaching duties in Fiji. The applicant returned to Sydney in early November 2004 which was his nominated place of repatriation with the respondent. He then transferred to Meekatharra in Western Australia with his family and according to his testimony, started at Karalundi in November 2004. Despite this, it appears on the evidence, that he was not going to be formally placed on Karalundi's payroll until January 2005.

20 This meant, according to the applicant, that there would be a gap in income between the cessation of his work in Fiji, and the commencement of his new position at Karalundi. Correspondence passed between the applicant and the respondent about this, copies of which were tendered as exhibits R1 to R4. These comprise various emails between the applicant and senior representatives of the respondent, regarding the costs to be incurred by the applicant in relocating himself and his family from Sydney to Perth. Additionally, was the aforementioned issue of non payment of salary and whether the respondent would agree to continue paying him until he received his first salary payments from Karalundi.

21 As a result of this correspondence and its seems, various telephone discussions, the respondent agreed to pay for the applicant's relocation costs to Western Australia and also, according to Mr Potter, the applicant was paid various allowances and benefits as a returning expatriate employee, in addition to what was described as his 'permanent return salary' being some five weeks' salary, in about November 2004. Further, Mr Potter testified that in addition to these payments, a further three weeks' salary were paid to the applicant in about January 2005, as a gesture of goodwill because the respondent understood that the applicant would not have accrued sufficient annual leave to ensure he was paid over the Christmas holiday period until he started receiving income from Karalundi. Various other leave entitlements were paid out to the applicant progressively it seems up until about mid July 2005.

22 The various payments made to the applicant at least up until the end of 2004, were reflected in salary advices and a group certificate tendered as exhibits A3 to A6.

23 The applicant's employment arrangements with Karalundi were reduced to writing by way of a formalised employment agreement a copy of which was tendered as exhibit R6. Curiously, the agreement refers to the applicant commencing at Karalundi as a teacher in January 2006 and not January 2005 as the applicant testified. It seems that given the applicant's evidence that he was not aware of any other written employment agreements between himself and Karalundi subsequently, that the date of 2006 may have been an error and the intended date was 2005. Ultimately however, little turns on this in my view.

24 Whilst in Mr Potter's evidence reference was made to Karalundi as a separate entity to the respondent and the applicant's engagement by Karalundi was new employment, Mr Potter did say that it was a policy of the respondent that employees who work for other organisations which are affiliated to the respondent by religious denomination, are given recognition for that service if they subsequently return to the respondent's employment.

25 In that connection, tendered as exhibit A7, was a copy of a 'call', of the South Pacific Division Administrative Committee of the respondent dated 24 August 2004, referring to the applicant's return as a teacher from Fiji and his subsequent appointment as a teacher at Karalundi. Additionally, exhibit A2, is the personnel service record for the applicant, which includes his denominational service record from 1992 commencing at Fulton College in Fiji. That record also includes reference to the applicant's employment at Karalundi between 17 January 2005 and 25 August 2006.

Contentions of the Parties

26 The agent for the applicant submitted that the applicant's claim was clearly an industrial matter. Furthermore, he submitted that the claim was an industrial matter in relation to an industry as defined in s 7 of the Act. Submissions were made about the operation of s 3 of the Act, dealing with the offshore application of the legislation and reference was made to various authorities including the decision of the Industrial Appeal Court in *Parker v Tranfield* (2001) 81 WAIG 2505.

27 It was contended by the agent for the applicant that part of the applicant's work was performed for the respondent in Western Australia. It was said that Karalundi, where the applicant was engaged as a teacher from October 2004, is evidence of the respondent's presence in this jurisdiction and the payment of salary to the applicant after he left Fiji, is evidence of the continuation of his contract of employment until December 2004, when it was unlawfully terminated.

28 It was thus said that a part of the applicant's work was performed in Western Australia, and the contract was breached when he was in Western Australia. Combined with the activities of the respondent as being in an industry to which s 7 of the Act applies, the submission was the applicant's claim is sufficiently grounded in this jurisdiction.

29 Counsel for the respondent on the other hand, argued that there was no nexus between the applicant's employment by the respondent and this jurisdiction to ground his claim. In this respect, the respondent submitted that the applicant's contract of employment was formed in Fiji; it was performed in Fiji (and Vanuatu); the alleged promise of employment until the end of 2005 was made in Fiji and the employment relationship ended there.

30 Furthermore, it was contended by the respondent that the only linkage between the applicant and Australia, was the respondent's administrative headquarters based in Sydney, New South Wales. On the correct view of the evidence according to the respondent's submissions, the proper law of contract in this matter would be that of Fiji, or alternatively New South Wales, but certainly not Western Australia.

31 The contention was advanced that the only link with Western Australia was the applicant's subsequent employment at Karalundi after the employment relationship between the applicant and the respondent in the Pacific Islands had come to an end. It was submitted that there was no continuation of the applicant's employment with the respondent beyond October 2004. It is inconsistent, as the submission went, for the applicant to argue that the applicant's contract of employment was unlawfully terminated in Fiji, but it then continued on in Western Australia to ground jurisdiction for his claims.

Consideration

32 It is trite to observe that the Parliament of Western Australia may enact laws for the peace, order and good government of the State and in doing so, State legislation may have extra-territorial operation: *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. However, as a canon of statutory interpretation, it is presumed that legislation is not intended to have extra-territorial effect: *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309.

33 The most recent authoritative restatement of the law in this jurisdiction in relation to the extra-territorial operation of the Act is found in *Parker*. This matter involved an unfair dismissal claim under s 29(1)(b)(ii) of the Act by an employee who, although he resided in Western Australia, and whose employer's head office was based in Western Australia, performed all of his employment in Singapore and France. The employee's salary and entitlements were administered from Western Australia as were the principal managerial functions of the employer's business. Additionally, the employee was dismissed in Western Australia.

34 It was held that there was a sufficient connection with the State to bring the applicant's claim within the Commission's jurisdiction under the Act.

35 The Industrial Appeal Court considered the extent of the extra-territorial application of the Act in this jurisdiction. After reciting the factual controversy and the history of the proceedings, McKechnie J said at [17] – [20] as follows:

> "In ***Pearce v Florenca*** (1975-76) 135 CLR 507 the High Court considered the validity of the Western Australian *Fisheries Act.*
>
> After discussing the rule requiring a relevant connection between the personal circumstances on which the legislation operates and the State, Gibbs J said:
>
> > 'For that reason it is obviously in the public interest that the test should be liberally applied, and that legislation should be held valid if there is any real connexion - even a remote or general connexion - between the subject matter of the legislation and the State. And it has been established by a series of well-known decisions, which are collected in *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, at pp 154-156, that within their limits the legislatures of the States have powers 'as plenary and as ample' as those of the Imperial Legislature itself. It would seem anomalous and unfitting that the enactments of such a legislature should be held invalid on narrow or technical grounds.'
>
> This test was followed by the High Court in the ***Union Steamship Co of Australia Pty Ltd v King*** (1988) 166 CLR 1 by the Court at 14.
>
> The cases are not precisely analogous in that the appellant does not dispute that the *Industrial Relations Act 1979* might have extra-territorial effect in a proper case. Instead it is contended that the particular facts have no sufficient connection with the State. However, I consider the principles expressed in ***Pearce v Florenca*** and confirmed in ***Union Steamship v King*** are generally applicable to resolve factual questions about the extra-territorial effect of the *Industrial Relations Act* in particular circumstances.
>
> As a result it may be that the nexus between the factual circumstances and Western Australia may not be so substantial as the Commission considered necessary to ground jurisdiction. A real, even though a remote, or general connection with Western Australia is sufficient."

36 Hasluck J also considered the relevant principles. Although somewhat lengthy, I set out his Honour's observations at [61] – [74] in full as follows:

> "In ***Union Steamship Co of Australia Pty Ltd v King*** (1988) 166 CLR 1, the High Court recognised that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself; that is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony.

When it came to legislation having an extra-territorial operation, it was thought initially that colonial legislatures were incompetent to enact such legislation. However, as the High Court noted in the ***Union Steamship*** case at 12, it was eventually accepted beyond any question that colonial legislatures had powers to make laws which operate extra-territorially, and this view applied with equal force to the parliaments of the Australian States, including the State of Western Australia.

The High Court went on to say, however, that the 19th century decisions did not deny that the words "peace, order and good government" might be a source of territorial limitation. As each State parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent constitutional rearrangements for Australia effected by the *Australia Act 1986 (Cth)* whereby State parliaments have power to enact laws having an extra-territorial operation.

The High Court said further at 14:

> 'The new dispensation is, of course, subject to the provisions of the Constitution (see s 5(a) of each Act) and cannot affect territorial limitations of State legislative powers *inter se* which are expressed or implied in the Constitution. That being so, the new dispensation may do no more than recognize what has already been achieved in the course of judicial decisions. Be that as it may, it is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce* where his Honour stated that the requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connexion between the subject matter of the legislation and the State will suffice.'

This approach is reflected in the reasoning of various members of the High Court in an earlier case, namely, ***R v Foster; Ex parte Eastern and Australian Steamship Co Ltd*** (1959) 103 CLR 256. Dixon CJ said this at 275:

> 'It does not follow from the adoption of the Statute of Westminster that Commonwealth legislation should be construed as if there were no territorial considerations affecting its interpretation. Indeed it may be fairly said that when the consequence of invalidity is removed from extra-territorial legislation it becomes more important to give effect to the presumption governing the interpretation of English legislation. That is a presumption which assumes that the legislature is expressing itself only with respect to things which internationally considered are subject to its own sovereign powers.'

In the same case, Windeyer J said this at 311:

> 'It is, however, one thing to say that the Commonwealth Parliament has a constitutional power to make a law having a wide extra-territorial operation. It is quite another thing to say that it has confided the exercise of such a power to a subordinate law-making authority. The Parliament might, as a matter of law, exercise its powers in defiance of international comity and heedless of whether or not its laws could be enforced. It does not follow that it has authorised its industrial tribunals to do so. *Prima facie* Commonwealth statutes ought not to be so construed as authorizing any subordinate law-making body to deal with matters which have no real and substantial connexion with Australia or to make any rules except such as can be directly or indirectly enforced by the authority of Australian courts.'

One of the clearest statements that legislation is presumed not to have extra-territorial effect appears in ***Jumbunna Coal Mine NL v Victorian Coal Miners' Association*** (1908) 6 CLR 309 at 363. O'Connor J said:

> 'In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law.'

Nonetheless, it is now apparent from the reasoning of the High Court in the ***Union Steamship*** case, that it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person of rights and obligations. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.

The appellant submits, as I have already noted, that s 3 of the *Industrial Relations Act* concerning the application of the Act to offshore areas should be regarded as an indication by the legislature that the Act is not to have an extra-territorial operation save for its application to the specially designated offshore areas. Section 3 of the Act and, in particular, s 3(2)(d) would be otiose, the appellant contends, if the Act was intended to apply to any employee anywhere in the world simply because of some slight connection to the State of Western Australia, such as the employer having a place of business within the State.

It is important to note, however, that the application of the Act to the specially designated offshore areas under and by virtue of s 3 is expressly made subject to subs (6) which reads as follows:

> 'Effect shall be given to subsections (1), (2) and (3) only where this Act or any provision of this Act would not otherwise apply as a law of the State, or be applied as a law of the Commonwealth, to or in relation to any person, circumstance, thing, or place.'

In my view, the effect of s 3(6) is to affirm the general precept reflected in the previously decided cases that the State legislature has power to enact legislation having an extra-territorial operation. The precept is qualified by the rule of interpretation that legislation is presumed not to have extra-territorial effect. There must be a real and substantial connection between the circumstances on which the legislation operates and the State of Western Australia. It follows from the ***Union Steamship*** case, however, that this requirement will be liberally applied with the result that in certain circumstances activities taking place outside the State may be subject to the provisions of the *Industrial Relations Act*.

On this view of the legislation, s 3 has been introduced as a precautionary measure in order to remove any ambiguity that might arise concerning the application of the statute in the offshore areas. In the words of s 3(6), effect shall be given to the special rules concerning offshore areas only where the Act "would not otherwise apply as a law of the State". A provision formulated in this way clearly contemplates that activities taking place outside the State, in the offshore areas or in other areas outside the State, may be affected by the *Industrial Relations Act*. In a case of doubt, however, as to whether an industry being conducted wholly or partly in the offshore areas can be regarded as having a sufficient connection with the State, the relevant criteria for resolving that issue are set out explicitly.

Put shortly, there would be no need for subpar (6) of s 3 if the operation of the Act was limited to activities taking place within the State, but with special provision being made for the operation of the Act to be extended to the offshore areas. The presence of subpar (6) suggests that the Act generally has the potential to apply to activities outside the State (provided there is a real and substantial connection with the State) with the result that subpars (1) to (4) will only be brought into play in exceptional circumstances where the Act would not "otherwise" apply. Proper weight must be given to the word "otherwise".

In the present case, the subject matter of the respondent employee's application for relief had to satisfy the requirement prescribed by s 23(1) of the Act; that is to say, that it be an "industrial matter". The jurisdiction of the Commission is confined to matters of that kind. An industrial matter could only arise in respect of an "industry" as that term is defined in the Act. One must keep in mind that the term in question includes reference not only to the calling or employment of employees, but embraces any business or calling of employers. Put shortly, the nature of the business in the present case is not to be determined exclusively by reference to the physical activities of the employee. One must take account of the administrative and financial functions being performed by the employer."

37 Thus from the judgment of the Court in *Parker*, as restating the applicable High Court jurisprudence, there must be a real and substantial connection between the circumstances on which the Act operates and the State of Western Australia. However the test will be liberally applied and a real, albeit remote or general connection will suffice.

38 It is unnecessary for me to consider in any detail other authorities referred to by the parties in light of the decision in *Parker* which is binding on the Commission.

39 On all of the evidence adduced in this matter, I am satisfied and I find that:

(a) The respondent's principal place of operation is and was at the material times, New South Wales;

(b) The applicant and the respondent entered into a contract of employment upon which the applicant now relies, in New South Wales;

(c) The applicant was not resident in Western Australia at the time of the formation of the contract of employment with the respondent and indeed, had not been to the State prior to November 2004;

(d) The applicant's contract of employment with the respondent was performed entirely in the South Pacific Islands of Fiji and Vanuatu from 1992 to about mid 2004 in schools within the respondent's operations;

(e) The applicant's contract of employment with the respondent was administered by the respondent from New South Wales;

(f) All the dealings that the applicant had in relation to his employment and its termination were with the respondent's personnel who were largely based in New South Wales;

(g) The applicant's nominated point of repatriation as an expatriate employee of the respondent was Sydney, New South Wales;

(h) The respondent has affiliated schools in Western Australia but only one, that being the Carmel Adventist College, is owned and operated by the respondent;

(i) The applicant's claim arises from the early termination of his contract of employment by the respondent whilst he was in Fiji;

(j) The discussions between the applicant and the respondent in relation to the early termination of his contract of employment and subsequent arrangements, took place in Fiji and/or New South Wales;

(k) The only connection with Western Australia arising on the evidence is that the respondent assisted the applicant in finding new employment for him and he obtained a teaching position at Karalundi under a new contract of employment which was to commence in January 2005;

(l) As a part of the applicant's relocation to Western Australia the applicant requested, and the respondent agreed, to an early release from his duties in Fiji to take up the new position at Karalundi;

(m) The applicant also sought and was granted financial assistance by the respondent in the period October to December 2004 as he was not going to receive remuneration from Karalundi until January 2005;

(n) There was no work performed by the applicant for the respondent in terms of teaching duties in the South Pacific Islands under his contract of employment after about October 2004; and

(o) The applicant entered into a new contract of employment with Karalundi, as his new employer, which governed his employment as a teacher with that organisation.

40 On the basis of Mr Potter's evidence and the terms of exhibit R6, it is reasonably clear that Karalundi is a separate legal entity as an incorporated body operating as a Christian boarding school for Aboriginal children. It is not owned or operated by the respondent and as noted above, it seems that the only school to be owned and operated by the respondent on the evidence, is the Carmel Adventist College listed on exhibit A8 as being operated by Seventh-Day Adventist School (Western Australia) Limited, Gosnells WA.

41 It is also clear on the evidence, and it is not controversial, that the employment relationship between the applicant and the respondent came to an end in Fiji. This is so even if, at least notionally, the contract of employment remained on foot until the end of December 2004, after the applicant's arrival at Karalundi in Western Australia.

42 Even if it could be held that the applicant's contract of employment came to an end in Western Australia, then that would not of itself render the applicant's claims as being within the Commission's jurisdiction, as sufficient to constitute the applicant's engagement in an industry in Western Australia for the purposes of s 7 of the Act: *Fitzgerald v Oil Drilling and Exploration (International) Pty Ltd* (2000) 80 WAIG 4981 at [59].

43 On the application of the relevant legal principles, in my opinion, it cannot be said that the work performed by the applicant for the respondent, constituted work in an industry with a real and substantial connection to Western Australia so as to ground jurisdiction in the applicant's claim. It is clear that the only connection with Western Australia on the evidence, is the applicant's move to this State to take up employment with a new employer, an entity not legally related to the respondent, albeit one which operates according to the respondent's religious tenants. In my opinion, that connection, if it can be properly so described, even in conjunction with the alleged termination of the applicant's contract, is too tenuous within the factual matrix of this case as a whole, to ground jurisdiction.

44 For all of the foregoing reasons, the application is dismissed.

2010 WAIRC 00370

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICHARD HARGROVE
	APPLICANT
	-v-
	SEVENTH DAY ADVENTIST CHURCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 24 JUNE 2010
FILE NO/S	B 264 OF 2009
CITATION NO.	2010 WAIRC 00370

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr R A Millar of counsel

Order

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr R A Millar of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2010 WAIRC 00380

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LANCE HART
	APPLICANT
	-v-
	RIC AND SUE JACKSON
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 JUNE 2010
FILE NO/S	U 53 OF 2010
CITATION NO.	2010 WAIRC 00380

Result	Application discontinued
Representation	
Applicant	Mr L Hart
Respondent	Mr R Jackson and Mrs S Jackson

Order

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

AND WHEREAS on 12 May 2010 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 16 June 2010 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.

2010 WAIRC 00381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELEN LOUISE HOLLAND
	APPLICANT
	-v-
	SANDVIK MATERIALS HANDLING PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 JUNE 2010
FILE NO/S	B 265 OF 2009
CITATION NO.	2010 WAIRC 00381

Result	Application discontinued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Ms B Robinson and Mr G McCann (both of counsel) and Mr M Jones

Order

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

AND WHEREAS on 18 February 2010 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 11 June 2010 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.

2010 WAIRC 00379

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RICKY DARREN JURY
	APPLICANT
	-v-
	STONEMASTERS WA PTY LTD
	T/A ALBANY MITRE 10
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 JUNE 2010
FILE NO/S	U 46 OF 2010
CITATION NO.	2010 WAIRC 00379

Result	Application discontinued
Representation	
Applicant	Mr R D Jury
Respondent	Mr A Masters and Mr P Stone

Order

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

AND WHEREAS on 13 May 2010 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 17 June 2010 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.

2010 WAIRC 00413

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYM RUTH KENNY
	APPLICANT
	-v-
	FUSION AUSTRALIA LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	MONDAY, 5 JULY 2010
DELIVERED	THURSDAY, 8 JULY 2010
FILE NO.	B 231 OF 2009
CITATION NO.	2010 WAIRC 00413

CatchWords	Industrial Law (WA) - Contractual benefits claim - Applicant responsible for conduct of own case - Evidence before Commmission insufficient to meet burden of proof - Application dismissed - Industrial Relations Act 1979 s29(1)(b)(ii), s27(1)(m)
Result	Application dismissed
Representation	
Applicant	In person

Respondent Mr A Braun

Reasons for Decision

1 This is an application under s 29(1)(b)(ii) of the Industrial Relations Act 1979 ("the Act"). The applicant claims the sum of $9,755.82 as contractual benefits allegedly denied to her during the course of her employment between 22 December 2007 and 26 April 2009.

2 The applicant was engaged as a weekend worker, case manager, and in support and recovery work for the respondent. The respondent is engaged in the community care industry.

3 At the outset it is plain that the applicant has not correctly named the respondent. The applicant has named the respondent's state director Mr Braun. She was employed by Fusion Australia Ltd as is clear from the contracts of employment that the applicant tendered as exhibit A 2. Given that it is important that parties be properly named in proceedings before the Commission, pursuant to s 27(1)(m) of the Act and consistent with the decision of the Full Bench in *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375, the name of the respondent will be amended to properly reflect the identity of the applicant's employer.

4 At the hearing of this matter, both parties were unrepresented. The Commission informed the parties of the procedure to be adopted on the hearing of the applicant's claim. It was emphasised with the applicant that the conduct of her case was a matter for her and she bore the onus of establishing her claim on the balance of probabilities. No admissions were made by the respondent.

5 As far as the Commission can ascertain, the applicant claims various sums, as modified by exhibit A 1 which is, in effect, an amended particulars of claim, over various pay periods from 23 April 2008 up to and including 10 March 2009. Those claims relate to alleged underpayments of wages, meal allowances, payment for some annual leave and seemingly, overtime. The amended quantum of the applicant's claim is $8,646.38.

6 The applicant made some generalised submissions from the bar table in support of her claim. Despite being invited by the Commission to do so on several occasions, the applicant elected to call no evidence, either through her or by the calling of other witnesses. No documentary evidence was adduced, apart from the applicant's original letters of employment already referred to.

7 There was no evidence before the Commission, either oral or documentary, for example time and wages records readily obtainable from the respondent, as to the hours and periods of work engaged in by the applicant over the material times. There was no evidence before the Commission in relation to the wages actually paid to the applicant, by way of, for example, payroll advices and payslips, and nor was there any correlation by way of evidence, as to what the applicant ought to have been paid, compared to what she was paid over the relevant period.

8 As noted, despite the Commission raising the issue of evidence to be led on several occasions, there is simply no cogent evidence before the Commission in support of the applicant's claim. Submissions from the bar table, where there are no formal admissions by the opposing party, are not a substitute for cogent evidence in adversarial proceedings.

9 As the Commission made clear at the outset of the hearing, it was for the parties to conduct their respective cases and the Commission could not, in effect, elucidate the applicant's case for her. To do so is inappropriate, as it would constitute the Commission descending into the arena and creating the impression in the mind of a reasonable observer, of bias in favour of one party to the proceedings. Even making allowances for unrepresented persons, such a course is clearly not appropriate or permissible.

10 It must be emphasised in proceedings such as the present, that orders from the Commission cannot be made simply by asking for them. Applicants are obliged to conduct their cases and to discharge the burden upon them to persuade the Commission to the civil standard of proof, that being the balance of probabilities, that their claim should succeed and orders should be made in their favour. That was not done in this case.

11 Whilst the applicant informed me that she had taken some legal advice, I can only infer that either the advice did not extend to what the applicant would be required to establish based upon cogent evidence in these proceedings or if she was given such advice, she chose not to follow it.

12 It seems that there were without prejudice negotiations prior to the hearing in an endeavour to resolve the matter. I was informed that a substantial offer had been made by the respondent to the applicant to settle her claim which she rejected. With the benefit of hindsight, that is perhaps unfortunate. However, if there is any reservoir of goodwill remaining between the parties, then perhaps it is the case that those discussions can be reinstituted.

13 For the foregoing reasons, the only avenue open to the Commission on what is before it is an order that the application be dismissed.

2010 WAIRC 00414

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYM RUTH KENNY
	APPLICANT
	-v-
	ANDREW BRAUN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 8 JULY 2010
FILE NO/S	B 231 OF 2009
CITATION NO.	2010 WAIRC 00414

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr A Braun

Order

HAVING heard Ms K R Kenny in person and Mr A Braun on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the notice of application be amended by deleting the named respondent "Andrew Braun" and inserting in lieu thereof "Fusion Australia Ltd".

(2) THAT the application be and is hereby dismissed.

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

2010 WAIRC 00026

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH MILLS
	APPLICANT
	-v-
	SHIRE OF BROOME
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 JANUARY 2010
FILE NO/S	U 8 OF 2010
CITATION NO.	2010 WAIRC 00026

Result	Extension of time granted
Representation	
Applicant	Mr M Aulfrey (of counsel)
Respondent	Mr S White (as agent)

Order

HAVING heard Mr M Aulfrey of counsel on behalf of the applicant and Mr S White as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979*, hereby orders:

THAT application U 8 of 2010 be and is hereby accepted out of time.

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

2010 WAIRC 00389

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH MILLS
	APPLICANT
	-v-
	SHIRE OF BROOME
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
HEARD	TUESDAY, 9 FEBRUARY 2010, WEDNESDAY, 10 FEBRUARY 2010, THURSDAY, 11 FEBRUARY 2010, THURSDAY 18 MARCH 2010, FRIDAY 19 MARCH 2010
DELIVERED	WEDNESDAY, 30 JUNE 2010
FILE NO.	U 8 OF 2010
CITATION NO.	2010 WAIRC 00389

Catchwords	Termination of employment - Harsh, oppressive or unfair dismissal - Summary dismissal – Lack of procedural fairness – Applicant unfairly dismissed – Application upheld – Compensation ordered - *Industrial Relations Act 1979* s 29(1)(b)(i)
Result	Upheld and Order Issued
Representation	
Applicant	Mr M Aulfrey (of Counsel)
Respondent	Mr S White (as Agent)

Reasons for Decision

1 On 12 January 2010 Deborah Mills ("the applicant") lodged an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* ("the Act") against the Shire of Broome ("the respondent") claiming that she was harshly, oppressively or unfairly dismissed in a summary manner on 23 October 2009. The respondent denies that the applicant was unfairly dismissed and also maintains that the applicant was not summarily terminated as she was given a payment in lieu of notice some weeks after her termination.

Background

2 It was common ground that the applicant was employed by the respondent as the Centre Manager of the respondent's Broome Recreation and Aquatic Centre ("BRAC"), she commenced employment with the respondent in this position on 15 December 2008 and she was terminated on 23 October 2009. Throughout her employment with the respondent the applicant's terms and conditions of employment were governed by the *Shire of Broome Inside Staff Union Collective Workplace Agreement 2007* ("the 2007 Agreement").

Extension of Time

3 As this application was lodged out of time a hearing was held on 21 January 2010 in relation to whether or not the matter should be accepted and at the end of the hearing the parties were advised that the application would be accepted out of time and reasons would issue at a later date. Following are my reasons for accepting this application out of time.

4 Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated. As this application was lodged on 12 January 2010 it is 53 days out of the required timeframe for lodging a claim of this nature.

5 The matter was listed for hearing to allow the parties to put submissions and give evidence as to whether or not this application should be accepted under s 29(3) of the Act. Section 29(3) of the Act reads as follows:

> "(3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so."

6 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the relevant factors outlined in the Industrial Appeal Court decision in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683 at 686, as follows:

> ""1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
>
> 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.

3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.

4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.

6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion."”

7 When considering the issue of fairness, Heenan J further observed in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (op cit) at 692 the following:

> “I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims.”

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

Applicant’s evidence

9 The applicant gave evidence that she was denied procedural fairness given the manner of her termination, she maintained that the respondent did not follow the disciplinary procedure set out in the 2007 Agreement when terminating her and the applicant maintained that the respondent did not have a valid reason for terminating her. The applicant also claims that she was terminated for undertaking her normal duties. The applicant stated that she approached the Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (“the Union”) about her termination on 23 October 2009 and as she was unaware how quickly the Union would deal with her termination she sought advice from the Fair Work Ombudsman in Broome. The applicant then lodged an application under the *Fair Work Act 2009* (“the FW Act”) on 4 November 2009. The applicant gave evidence that a conciliation conference was held at Fair Work Australia (“FWA”) on 27 November 2009 however the matter was not resolved. The applicant stated that she was then contacted by the Union on 4 December 2009 and was advised that it had lodged an application in the Commission.

10 Mr Manuel Nascimento gave evidence that he is employed by the Union. After the applicant contacted the Union on 22 October 2009 Mr Nascimento handled the applicant’s unfair dismissal and unpaid entitlements claim. Mr Nascimento stated that he was unaware that the applicant had lodged an application alleging unfair dismissal in FWA until January 2010. Mr Nascimento confirmed that in November 2009 he liaised with the Union’s Prosecutions Officer, Mr Michael Aulfrey about pursing the applicant’s claim in the Commission.

Respondent’s evidence

11 The respondent did not call any witnesses to give evidence, nor did it cross-examine the applicant or Mr Nascimento.

Applicant’s submissions

12 The applicant maintains that when she applied to FWA for relief for her unfair dismissal on 4 November 2009, she did not advise the Union at the time that she would make this application (application U 2009/9956). The applicant argues that ss 725 and 732 of the FW Act explicitly prohibits the making of an unfair dismissal application elsewhere if a claim is before FWA and even if the Commission was the correct place to lodge an application claiming unfair termination she was unable to lodge an application of this nature in the Commission given that these sections of the FW Act precluded her from doing so.

13 The applicant argues that the delay within the Union office with respect to dealing with the applicant’s dismissal was due to relevant material, which was extensive, being located in Broome as well as the applicant residing in Broome.

14 The applicant recounted the history leading up to the lodgement of this application. After the Union filed s 44 proceedings in the Commission on 3 December 2009 with respect to the applicant’s unfair dismissal and underpayments owing to the applicant a conciliation conference took place on 10 December 2009 and as the dispute remained unresolved the matter was set down for hearing in Broome in February 2010 (C 41 of 2009). At this conference the issue of the Union’s eligibility to represent the applicant was raised by the respondent and the Commission directed that if the respondent had any issue with the Union’s capacity to represent the applicant under application C 41 of 2009 it could seek a further conference. When the respondent’s representative objected to the Union’s capacity to represent the applicant under application C 41 of 2009 on 6 January 2010, on 7 January 2010 the applicant applied to amend the application to alter the applicant’s name to Ms Mills and the s 44 application be deemed to have been received as an application under s 29 of the Act. After the Commission refused this request the applicant filed this application under s 29 of the Act on 12 January 2010.

15 The applicant argues that she has continued to prosecute her case for unfair dismissal since her termination and the respondent has been aware of this. The applicant has also continued to prepare for the hearing in relation to this matter, including the notification of additional documents required by the applicant from the respondent, she has given her witness names to the respondent and the respondent has also continued to prepare for the hearing as it has produced a list of witnesses it proposes to call.

16 The applicant maintains that the expiry date for an application being made pursuant to s 29 of the Act passed during the period when she was prevented by the FW Act from making an unfair dismissal claim in the Commission.

17 As the respondent does not object to this application being accepted by the Commission the applicant argues that there can be little if any prejudice to the respondent in this matter proceeding if the respondent does not raise any such prejudice. The

applicant maintains that there is considerable prejudice to her should her application be disallowed due to it being out of time. The applicant is preparing for the hearing and all of this work will be lost and the applicant's right to try her matter before the Commission lost completely if the Commission deems the application to be out of time.

18 The applicant believes that her claim for unfair dismissal has merit and the respondent's repeated departures from the disciplinary procedure as set out in the 2007 Agreement would itself justify the setting aside of the decision to dismiss (see *Shire of Esperance v Mouritz* [1991] 71 WAIG 891). Additionally, the respondent's decision to dismiss the applicant was harsh and was characterised by bias, she was dismissed even though she was performing her normal duties and the applicant has documentation and witness evidence to support her claims.

19 The applicant submits that it would be a travesty for the applicant's case not to be heard at this stage with hearing dates set and the likelihood of placing the matter in an alternative forum extremely low. It is also highly unlikely that her FWA application, now discontinued, would be permitted to be resumed or reopened should the Commission refuse to hear this application, given the requirements under the FWA that extremely exceptional circumstances are required to lodge an unfair dismissal outside the 14 day time limit.

Respondent's submissions

20 The respondent does not oppose the Commission accepting this application which has been lodged outside of the required timeframe.

Findings and conclusions

21 On the issue of merit I find that on the evidence currently before me and in the absence of any evidence from the respondent to the contrary there may be substance to the applicant's claim that the respondent did not have good reason to terminate her and that the respondent did not follow the proper procedures set down in the 2007 Agreement when effecting her termination. Whilst I have not reached any conclusions about the issue of merit with respect to the applicant's termination on the information currently before me it appears that the applicant has an arguable case.

22 This application has been lodged 53 days outside of the required timeframe which is a substantial length of time outside of the timeframe for lodging a claim of this nature. I accept the applicant's evidence that there was confusion as to the correct jurisdiction where she should lodge her application and this led to her lodging an application in FWA within the 14 day timeframe for doing so. I accept that the Union was unaware that the applicant had lodged an application in FWA and it is also the case that under ss 725 and 732 of the FW Act an employee is prohibited from making an unfair dismissal application under another law including the Act when a similar claim is before FWA and I note that this application was not discontinued until 20 January 2010. I find that once the issue of the Union's capacity to represent the applicant under s 44 of the Act via the application lodged in the Commission on 3 December 2009 was raised by the respondent and subsequent to the respondent maintaining that this was an issue that required determination this application was lodged in a timely manner. In the circumstances I find that the applicant has an acceptable reason for the delay in lodging this application.

23 I find that the prejudice suffered by the applicant would be greater than that suffered by the respondent if this application was not accepted by the Commission given the efforts made to date by the applicant to deal with her claim for unfair dismissal and the applicant would not have the opportunity to prosecute her claim, which I have found to be an arguable case. No disadvantage was highlighted by the respondent in meeting this application because of the delay and I accept that there is no additional prejudice to the respondent given the delay in lodging this application as the respondent has been aware that the applicant would be contesting her termination since early November 2009 when she lodged an application in FWA.

24 When balancing the above findings and taking into account all of the relevant factors to consider in an application of this nature and when taking into account the issue of fairness to both parties I find that it would be unfair not to accept this application. In reaching this view I take into account that there was an acceptable reason for the delay in lodging this application and I have found that the respondent would not be prejudiced any more than usual in allowing this application given that the respondent was aware very soon after her termination that the applicant would be contesting her termination. I therefore find that in all of the circumstances it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file this application and for these reasons an extension of time in order to lodge this application is granted.

25 An order to this effect issued on 22 January 2010.

Claim alleging unfair dismissal

Applicant's evidence

26 The applicant gave evidence by way of a witness statement (Exhibit A1). The applicant was employed by the respondent as the Centre Manager of BRAC from 15 December 2008 until 23 October 2009.

27 The applicant has worked in the leisure industry for 28 years. In 1995 she completed an Advanced Certificate in Human Resource Management and the following year an Associate Diploma in Applied Science (Local Government). The applicant then worked at a number of recreational facilities. After completing a Bachelor of Business Marketing and Human Resource Management the applicant worked at the Town of Vincent for approximately two years and the applicant was employed by the City of Stirling at the Terry Tyzack Aquatic Facility before commencing employment with the respondent.

28 The applicant describes BRAC as a recreational facility which includes a pool, indoor stadium, function room, squash courts, outdoor tennis courts, outdoor basketball/netball courts, a skate park and two reserves. It has an administration block, a small kiosk and a licensed venue and when BRAC was expanded into a recreational hub several community sporting groups relocated to BRAC.

29 The applicant stated that BRAC is not conducted on a profit making basis however it was her view that the cost to ratepayers of running BRAC should be minimised and the applicant maintained that this characterised the way in which she managed BRAC.

30 The applicant was initially managed by the respondent's Manager of Recreational Services Mr Rod McGrath and he reported to the respondent's Director of Community Development. BRAC's Operations Supervisor reported to the applicant and duty managers reported to the Operations Supervisor and at least one duty manager had to be present for BRAC's pool to operate. The applicant gave evidence that in order to streamline BRAC's management structure she centralised the administrative duties undertaken by duty managers under the responsibility of the Customer Services Supervisor and she employed a casual duty manager to oversee bookings and this freed up duty managers to attend to direct customer queries and to be 'on the floor'. The applicant stated that this change may have caused friction between her and some duty managers.

31 The applicant gave evidence that throughout her three month probationary period no formal complaints were made about her performance, nor was she the subject of any disciplinary processes. The applicant's probationary assessment should have taken place on 15 March 2009 however, this did not occur and her probationary assessment was completed at the end of May 2009.

32 The applicant gave detailed evidence about the specifics of what took place during her probationary review and some of the comments made by Mr McGrath and the respondent's Manager of Human Resources, Ms Rebecca Irving about her performance. When the applicant attended a meeting on 29 May 2009 with Ms Irving and Mr McGrath to discuss the probationary form filled out by her and Mr McGrath she raised a number of issues including the limited induction she was given when she commenced employment with the respondent and Mr McGrath's lack of familiarity with BRAC's operations and reporting mechanisms and the applicant claimed that feedback he gave her was confusing and reactive. The applicant maintained that she was being micro managed, most of her ideas were not being implemented and she was only given autonomy when Mr McGrath was struggling to meet commitments he had made to BRAC's user groups. The applicant had concerns about the veracity of statements Mr McGrath made to senior management about her performance which were contrary to his suggestion that she was "doing a good job" and the applicant also claimed that BRAC policies were being formed on the run and this had led to public criticism and issues were being raised with her with little or no notice and solutions were expected promptly. The applicant stated that Mr McGrath acknowledged that concerns about her performance related to a lack of understanding of how BRAC operated and its interaction with customers and he agreed that some of BRAC's user groups were uncooperative and that she was expected to bring them into line. The applicant stated that she did not sign her probation assessment form as the report contained errors of fact and her probation period had expired two months prior to this meeting. The applicant stated that she received notification on 22 June 2009 that her probationary period had been completed and that she was now a permanent staff member.

33 The applicant maintained that she had ongoing problems with Mr McGrath and even though she made complaints about him during her probationary assessment she claimed that he was not encouraged to 'change his habits'. The applicant stated that she distrusted him because on many occasions he portrayed himself as being uninvolved in an issue when this was not the case.

34 The applicant stated that some of the staff she managed who had been impacted by changes she had made avoided discussing issues with her or pressured her by complaining about her to the Shire President or the Director of Community Development, Ms Denisa Konecny. The applicant maintained that as a result she was subjected to frequent interference and micro management on a continuing basis by Ms Konecny. The applicant also claimed that Ms Konecny harassed her when discussing matters with her, she stated that she endured frequent repetitive emails from her on the same issue on a daily basis, Ms Konecny spoke 'sharply' to her and if she tried to protest her innocence about an issue she was met with a dismissive response.

35 The applicant gave evidence that two months after she successfully completed her probation she unexpectedly received the following letter from Mr McGrath on 23 July 2009 (formal parts omitted):

> "Following complaints from staff, a meeting is requested with you on Thursday 30 July 2009 at 10am at the Shire's admin offices in relation to the following issues:
>
> - communication approach with staff at BRAC
> - communication approach with other staff within the Shire
> - treatment of some staff at BRAC resulting in them feeling the working environment is unpleasant
> - speaking disparaging comments about present and former staff
> - allegations of lying and manipulation
> - failure to negotiate a suitable amicable roster for staff
> - operational matters not being resolved
>
> In the mediation report written earlier this year involving a staff member and yourself, the mediator recommended the consideration of the professional development of management staff at BRAC by "the undertaking of management courses to allow further knowledge and development in relation to management/supervision styles, communication styles etc".
>
> The issues raised above refer to a management, supervision and communication style that is inappropriate for both the working environment and staff relations.
>
> What the Shire requires from you is:
>
> 1. a reduction in complaints received about you from Shire staff, customers and BRAC user groups
> 2. a harmonious staff team at BRAC

3. an improvement in communication with staff at BRAC through regular, minuted staff meetings
4. regular BRAC user group meetings
5. ceasing disparaging comments about either former or present Shire staff
6. putting in place appropriate programming and marketing to address the needs of the community
7. an improvement in professional conduct as required of a staff member of the Shire at managerial level.

It would be expected that professional working relationships are maintained at all times with Shire staff members

You are required to keep the matters confidential that are raised in this letter and you are not to discuss these matters with your staff members. You may only discuss these matters with a representative should you wish to bring them to the meeting next week."

(Exhibit A4.1 document 28)

36 The applicant stated that she was shocked when she received this letter as she had worked extremely hard at BRAC, she had worked irregular hours dealing with user groups, she had cleaned up problems caused by other staff members and she had juggled rosters with a skeleton staff due to a number of staff frequently taking leave and at the same time she was being harassed by Ms Konecny. As a result of the accusations made against her in this letter the applicant took leave on 24 July 2009 due to work related stress.

37 When the applicant felt better she contacted Ms Konecny on 28 July 2009 and complained about the contents of the letter dated 23 July 2009, in particular the presumption of guilt on her part, the lack of detail included in the letter, the vagueness of the outcomes being sought and she also claimed that the disciplinary process contained in the 2007 Agreement was not being followed.

38 The applicant stated that when she returned to work on the morning of 3 August 2009 Ms Konecny handed her another letter withdrawing some of the allegations and new ones were included. This letter reads as follows (formal parts omitted):

"**Re: Staff Complaints and Grievances at BRAC**

Following complaints from Staff, a meeting is requested with you on Tuesday 3rd August 2009 at 10am at the Shire Administration Offices in relation to the following issues:

- Communication approach with Staff at BRAC
- Poor work-environment due to unsatisfactory leadership and communication at Centre Management Level
- Disparaging comments regarding present and former staff
- Staff concerns relating to allegations of lying and manipulation
- Failure to negotiate a suitable transparent roster for staff
- Operational matters not being resolved in a timely manner

In addition to the above I would like to discuss the tentative resignation of Kim Logue.

Shire of Broome requires that you address these serious matters and make a 'right of reply'.

You are entitled to bring a colleague or be accompanied by a representative or another staff member of your choosing to discuss these issues relating to the above."

(Exhibit A4.1 document 34)

39 In response the applicant sent an email to Ms Konecny on 4 August 2009 raising concerns about the documentation she had been sent and about meeting on 7 August 2009. Ms Konecny responded with the following email dated 4 August 2009 (formal parts omitted):

"Thank you for confirmation of meeting this Friday 4:30pm, 7th August at Shire Administration Centre, 27 Weld Street.

I have discussed the matter with the CEO and wish to advise you that he will not be attending.

Please be assured that the Shire of Broome is strongly committed to adhering to due process. To clarify, the letter which you received yesterday requests a face to face interview with you (and chosen representative) to together undertake an initial exploration and interpretation process in relation to complaints received.

Written statements will be provided to you at Friday's meeting and not prior - this is due to concerns raised by staff involved in the grievance process about potential repercussions. Also, some issues raised are open to interpretation and this will be clarified at Friday's meeting.

Importantly, following our meeting on Friday, we will then schedule a mutually suitable time (within 3 working days) for you (and your representative as required) to present your right of reply - thus giving you adequate opportunity to address specific issues and prepare your response.

Please do not hesitate to contact me should you require any further information."

(Exhibit A4.3 document 41)

40 The applicant maintained that because she had not seen statements containing information relevant to the allegations at this point and as the allegations against her were vague she could not reply to them and on this basis was unable to prepare for the meeting.

41 The applicant gave evidence that at the meeting held on 7 August 2009 attended by herself and her support person Mr Thomas Allen, Ms Irving and Ms Konecny she was given copies of three complaints. These complaints, made by Mr Kim Logue, Ms Sara Hennessy and Ms Vanessa McDougall respectively, read verbatim as follows:

"On Saturday Rod asked for a copy of the roster to be e-mailed to him. I mentioned this to Deb when she called later that day, after telling me that I should not even be talking to Rod. Deb went on to say that on a Saturday Rod had no more authority to ask for any rosters than any of the public.

The following week Deb was off work for medical reasons, I was left as acting centre manager.

On Monday I was speaking to Deb when Rod asking for the roster came up again. Deb was worried that Rod was asking for a copy of the roster so he could "micro manager". Deb also stated by Rod asking for a copy of the roster he was siding with other staff that had made complaints. So not whanting to get involved in the issue I said I would try to put off giving the roster to Rod untill the following Monday that way the issue would be for deb to deal with.

On Tuesday arvo Rod came through the center on other business, But asked again for the roster.

Wednesday.

I thought that Rod being Deb's boss would have the right to ask for a copy of the roster. So just to make sure I rang Denisa to ensure giving Rod the roster was the right thing to do. Being unable to contact Denisa I sent a coppy of the roster to Rod.

Later Denisa called back and I had a conversation with her. I told Denisa that Rod had asked for a roster and Deb was not keen on him having one but that I had sent him a copy anyhow.

Wednesday evening I got a call from Deb saying she had been told I had been calling Denisa every 5 minutes and I said to Denisa that Deb told me not to give the roster to Rod I tried to explain what I had said to Denisa but Deb said to me that contacting Denisa did not look good for me. Deb was prety irate during the phone call. I was sic of being interogated over every conversation I had with Rod or Denisa. I felt other coments Deb made during the call such as "I thought I could trust you" baisicly calling me disloyal to her were un warented. By the end of the call I was so fed up with the treatment I was receiving I told Deb I didn't want the job and I wouldn't be back at work I no longer would be working for BRAC.

Ever since working at BRAC I had been awear of diferences between Deb and Rod. Every time Deb found out I had a conversation with Rod I would be interogated by Deb as to what I had said and wat we talked about. So I was awear that accepting the position of acting manager would be a difficult one. However after reciving the abusive phone call Wednesday night I thought nobody should have to put up with this hence the reason I resighned."

(Exhibit A4.1 document 31)

"Thank you for making time in your schedule on the 17th July to hear my concerns regarding Broome Recreation and Aquatic Centre manager, Deb Mills. As per your request, following is a brief written description of the specific issues (in dot point) involving Ms Mills which I believe are contributing to the poor management of the centre.

- Concerned about DM's inability to communicate basic information with staff and patrons at the Rec Centre –

  >Participants and instructors were not told about class cancellations until just before the event

  >On at least two occasions Aqua instructors (myself & Sue) have arrived to instruct a class to find that the music system and mic had been sent away to be fixed. Nothing was organized to replace the system and there was no communication to tell us that this was happening so that we may prepare ourselves.

  >Staff had not been properly informed as to correct price structures for classes and as a result had been charging the wrong price for some classes

- Blames staff for things that are not being done correctly. I was very offended when while in a meeting with Deb Mills she blamed certain staff for things that were not being done, however the staff member did not know that it was his task to do.

- Would not let me provide an alternate class when aqua could not be conducted due to swimming carnivals etc.. stated that it would be a conflict of interest if I did the class as it would take away from the aqua class – but as we were not able to provide the class then I couldn't see how there could be a conflict.

- Does not follow through with things that she says that she will do
  - said that she would purchase additional aqua equipment before end of financial year – this did not happen
  - said that crèche ladies could purchase new crèche equipment, the girls indicated in a catalogue what they would like – this did not happen
  - said that she was organizing aqua instructors uniforms (I even forwarded to her a couple of suggestions of sun safe rashies from the web) – still no uniforms
  - stated that she was going to get a big banner made for the front of the property to advertise what programs were available – this has not occurred – actually I don't believe that there has been any marketing of the centre at all this year.

- Deb Mills sent me an email stating that from Easter she would be taking over writing the monthly roster for the Aqua instructors (which I had previously been doing each month) – since Easter, there has not been any roster written. This concerns me as on duty staff do not know who should be instructing the class or who to contact if an instructor doesn't show up.

- Microphone issue – the aqua mic & music system has not operated correctly for a long time, we have repeatedly requested that it be fixed, the excessive time it took for this issue to be delt with was totally unacceptable. I told Deb what I believed to be the issue with the system, however it does not appear that she passed the info onto the company engaged to fix it as they repaired the head sets (which were not broken) with metal connections – which now means our water resistant head sets are now not water resistant.
- Fit ball issue – Has not let the fit ball program commence this year, which for the last 5 years has been successfully run during the dry season. Her reasonings were that she was not going to start a program that could only run part of the year and also that she was not going to run a program that she didn't know was going to cover costs. At the moment there is a heap of equipment not being utilized.
- Survey – As a result of not believing that fit ball has been a successful program in the past and that that is what people wanted to participate in during the dry season, I conducted a survey of aqua participants in early April. 50-60 people completed the survey in which the overwhelming majority of people ticked the box indicating that they would like a mix of both aqua and fit ball available during the dry season. All these surveys were given to Deb Mills.
- Circuit classes?? Has started this class once a week without adequate advertising
- Staff scared of the repercussions if they speak out. On at least 2 occasions staff have told me that they had had a confrontation with Deb and from then on they have been rostered on opposite times to her, most of their shifts being only night shifts where previously they had a reasonably even mix on night and day.
- On numerous occasions has manipulated the truth
  - she has stated that she has asked to be told what additional equipment Aqua needs and this info has not been provided – this is untrue both Sue, Claire and myself have verbally told her what we need.
  - I had a meeting with Deb in March where I discussed the fitness programs that were run at the centre – any indication by Deb Mills that she was unaware of what had previously occurred is untrue – she was given the full run down. She was also informed that class number records had been collected for every class over the two years, I would presume that this information would have been filed on site somewhere.

There are many more incidences I have been told about that support my belief that Deb Mills has not been administrating the centre efficiently and more to the point doing only what "she" wants and not providing for the wants and needs of the community that utilize the centre."

(Exhibit A4.1 document 32)

"Incidents occurring at BRAC with Centre Manager between April – July 2009. Documented in the following is a follow up to meeting with Denisa and Rod Thursday 16th July 2009.

April: I met with Deb Mills to discuss taking on Program Development Officer Role in Ian Chester's 6 month absence. DM stated that she would guide me in the role, talking me through the budget for the area and programming various dry side programs. My concern was I didn't have any experience in the dry side programming or marketing etc. DM stated again that she would assist with this. I was to be paid higher duties from April to October.

May: I coordinated the School holiday Program 14th – 24th April and finished up the mixed netball season, under Ian's instructions, having met with him before he left.

Glenn Paddock resigned, resulting in roster changing to accommodate the centre's operational needs. In some cases 2 days off in a row wasn't possible. Staffs were spread thin and I was also assisting Carrie Selten who had taken my role as Swim School Coordinator in her new role.

We had a staff meeting when Kim Logue commenced work with us, Carrie, Debbie Taylor, Kim, Deb M & I. It was Friday and DM informed me in the meeting that instead of having Sunday/Monday off I was to have Sat/Sun off. I had already made plans to go away and couldn't change it this time. I explained that DM had done the same thing to me Easter weekend at the last minute and I had to change accommodation plans for her roster change, I explained I couldn't do it this time. DM told me that I had an attitude problem. Carrie Selten assisted in a roster suggestion for the weekend and all was sorted out.

May 26th & 28th: The following emails are saved if needed for viewing. I emailed DM and Debbie Taylor with a message from Royal Life Saving saying that a Jacquie hadn't heard back from DM in regards to the confirmation of a date change to her booking, please call her. I received a reply the next day saying that I shouldn't assume that this person hadn't been called. The reply was a group email. I felt accused of doing something that I didn't, I asked Debbie T what she thought of the reply from DM and she agreed with me that it was an unnecessary comment. I replied to DM stating that I was simply passing on a message and that I didn't assume anything. Within a few minutes an email came through that my leave had been declined due to the centre's operational needs and previous leave having been approved. A few emails went back and forth and when speaking with DM in the car park later that evening, she explained that she had been directed by the Shire to decline all leave and that the Shire were also making it difficult for her to employ another Duty Manager with the Pool Operations qualification. In the emails that went back and forth, I did question DM on her

expressing, (bad mouthing) her thoughts of me to others, work colleagues as well as a mutual friend. DM did not respond to this.

May/June: I requested on a number of occasions by email for DM to go through the budget and programming with me. I wanted to know how much money we had allocated for staffing after school programs etc. I received email stating that the duties in Ian's role while he was away had been divided up between staff and my two portfolios were School Holiday Program and Duty Manager Shifts.

I would much rather talk face to face to DM about any issues, as I have been put on night shifts for the past 10 weeks, emailing has been the only form of communication. I have tried to communicate with DM but on both occasions recently DM has hung up on me and the other time, I got told that there was nothing to be discussed and that I was being childish and the DM's office door was then closed.

Patrons had been requesting Fitball classes in April, which for the past 3 years we have changed from Aqua classes to Fitball classes held in the stadium over the dry season. We also have pool blankets and an operating Solar System now which allows us to run Aqua classes throughout the winter months; however the water temp is still too low for some participants therefore the Fitball option over the winter months is popular. DM was informed of this and refused to run the Fitball classes for unknown reasons. Sally from admin has been taking a circuit class on Monday evenings in the stadium for the past 3 weeks, which is becoming popular even with Aqua class running at the same time. I think it is really worth while offering both types of classes to the public.

July: DM was on leave Monday 6th July, so when Debbie Taylor required the work ute in the morning she called Rod to express her concerns on how much we need the ute in the school holidays as DM refused us (BRAC staff) the work ute during her week of leave in April School holidays. Tuesday **7**th July DT & myself were called into DM's office and were spoken down to that we never ever were to go over her head again in calling Rod. DT & myself remained calm and tried to explain that we didn't know DM was on leave that day, DM refused to listen to anything we had to say. DM insisted that we were aware of her leave for that day. DM told us that we were putting obstacles in front of ourselves.

Kim Logue unfortunately resigned 30.7.09, I was aware that Kim wasn't happy in his role and the way he was treated by DM. I was actually home with the flu on the 29.7.09, when an incident occurred, I am unaware of what happened. I was extremely disappointed when I heard of his resignation. I felt Kim was a really great Duty Manager to have at BRAC. It is now Stewart and I as the only two Duty Managers with the pool ops qualification.

On returning back from holidays I emailed the Duty Managers and DM to touch base on why the solar heating pump wasn't operational and few other things I had noticed were different since being back from leave. Carrie replied saying she also felt a bit out of the loop and suggested we have a meeting. This was forwarded onto DM; I sent another email after nobody responded to me. Stewart then addressed all of my concerns as he previously thought DM would have addressed my concerns. A staff meeting was held on the 23.7.09 while I was down in Albany. On two occasions I asked DM via email what the centre's opening hours were going to be Sat 8th (Broome Cup) previously we have closed at 12noon. I also asked about Ladies Day, can we work amongst ourselves and swap shifts with the guys, this we have previously done. DM never responded to this and yet I did see a leave form for herself to have Ladies Day off. I would've thought it completely acceptable if I was informed to apply for leave if I wanted a day off. DM chose not to inform of this and as it is I have not worked a Saturday shift in 4 months and have now ended up working Cup day all day and Ladies Day 1200 – 2130. I have chose not to raise this issue with DM, as there is no reasoning with her whatsoever. I am happy to help out and work these days as I know we are short staffed at the moment with Kim's resignation.

I am sensing a pattern that when a staff member stands up for themselves or has a specific issue with DM and tries to address it personally in a calm manner, DM does not want to listen or discuss, then that staff member gets treated with disrespect.

I am aware that Pearla, our part-time kiosk attendant is having a stress test on Wednesday morning. Pearla is one the hardest working employees here at Brac and she has voiced her unhappiness with work recently.

Any emails that are required for viewing, please call me [telephone number]."

(Exhibit A4.1 document 33)

42 At the meeting held on 7 August 2009 the applicant was given until 11 August 2009 to respond to these complaints and the applicant claimed that during this meeting Ms Konecny told her that her attitude needed to change. The applicant believed that Ms Konecny and Ms Irving were not being objective and were arguing on behalf of the complainants and the applicant believed that even at that early stage she would not receive a fair hearing.

43 The applicant prepared written responses to two of the complaints made against her but she did not have sufficient time to prepare a written response to the complaint made by Ms McDougall. The applicant's response to the complaints made by Ms Hennessy and Mr Logue is as follows (formal parts omitted):

"**Response to statements presented to me on 7 August 2009**

I thank the Shire of Broome for allowing me to respond to statements made by three of my colleagues. I acknowledge the seriousness of this situation and am fully committed to achieving an appropriate outcome. Although I am distressed about the allegations made against me, I understand that the Shire must follow certain processes, and I am regretful for being overly defensive towards the Shire staff handling this process.

I would like to briefly outline my understanding of the BRAC workplace to provide a context to my actions and style of management. I will then address each of the statements made against me in as much detail as possible.

I was attracted to the BRAC Centre Manager position because I am passionate about delivering high quality aquatic and leisure services to the community. I was previously employed as the Operations Manager at the award winning aquatic centre, Terry Tyzack Leisure Centre - City of Stirling, and I saw an opportunity to assist in the development of the underperforming BRAC.

The questions directed at me during interviews for this position were specific to change management practice and staff cultural leadership. I believe that I was employed in part for my experience in these matters. I know that change management has the potential for staff and customer backlash, and I acknowledge that this has occurred at BRAC. I am committed to working through these issues, and pulling back where the situation dictates.

I am aware of many instances where colleagues have lost autonomy and assumed benefits due to my implementation of Shire directives, operational needs and accountable workplace practices. I am sympathetic to their situation and I understand that certain colleagues have suffered the loss of overtime, additional classes, budgetary autonomy and discounts to the kiosk and other BRAC services. While I don't believe that this has motivated staff to make these statements, I am aware of the sentiment that it may create amongst them. I find it challenging as a manager to balance the expectations of my colleagues with the governance requirements of a public facility.

I further acknowledge that change management has the potential to upset the existing customer base. This is a situation that I constantly monitor, and welcome the feedback of all colleagues and users of the BRAC facilities. I advocate this feedback and response process and am happy to discuss this with senior management.

Finally I believe that effective communication is paramount to ensuring that BRAC remains accountable to the public, while remaining a healthy place to work. I am committed to addressing the statements presented to me and ensuring that any concerns are dealt with appropriately.

Statement of Sarah (sic) Hennessy

Sarah (sic) is a valuable member of our BRAC team and I am aware of several grievances she has in relation to the facility. She raised these in point form in her statement made on 2 August 2009. I wish to respond to these points in turn;

1. Aerobics Class Cancellations

   A detailed draft response to this customer complaint was forwarded to the Director - Community Development for review within a week of receipt. The matter was resolved and I now (sic) a strong relationship with Aqua customers.

2. Repairs to PA Equipment

   The PA equipment was sent for repair on 6 separate occasions following notification of faults by staff members. This allowed a one day turnaround to have equipment back for the next class. This equipment has twice been returned without being fixed, and this was communicated to staff via appropriate channels. On another occasions (sic), parts had to be ordered from Perth. In lieu of these parts I hired a hand held microphone, and also purchased a back up set. This is now used as a second set. Additionally, I asked Kim Logue to contact Challenge Stadium and Terry Tyzack Aquatic Centre to inquire into their preferred suppliers to upgrade our unreliable equipment. I have records of this request. Following Kim's resignation, I have asked another Duty Manger to oversee this project and report back to me.

3. Pricing

   BRAC obtained a one-off DSR grant to subsidise the 8.10 am 'Lite Paced' class for holders of seniors' cards. Upon expiry, BRAC management continued to offer a subsided price for the class. However, seniors were not entitled to a discount for any other class - as per the Council sanctioned BRAC fees and charges schedule. During July 2009 I covered the reception post and discovered that staff had offered this seniors discount too ALL classes. I clarified that this was incorrect (fees and charges / brochure information) and the following day I notified all customers that this subsidy only applied to the 8.10 am class. Staff were immediately notified of this clarification. This created some tension amongst customers. I have subsequently submitted to the Council for an across the board $1 discount for senior's card holders, and a $5.00 fee for the 8.10 class. Attendance at this class has increased as a result and regularly exceeds 30 customers.

4. Blame Staff

   Due to the unspecified nature of this complaint I cannot respond to Sara's concern. I would be happy to respond if the event can be detailed. I am happy for her to approach me personally in regards to any concerns.

5. Alternate Dry Class

   At late notice I received a booking request for School Swim Carnivals (approximately 7 days prior to the event). This is an annual event, however being new to Broome I was unaware of the carnival timetable. There was no visual history and staff did note that Carnivals occurred in March. Sara had scheduled the Aqua class to continue throughout March. I attempted to resolve this dilemma by switching Friday's aqua class to Thursday. Sarah (sic) informed me that this wouldn't suit BRAC users. My reasoning to not offer alternative 'land-based' classes was strategic and based on a promoting aqua classes, and increasing class enrolments. This has seen class sizes grow from +/- 20 per session to +/- 40. Additionally, classes are now being run throughout the year, whereas they were previously seasonal. Regrettably, I believe that this situation was partly due to contracted service providers controlling BRAC programming. I realise that the loss of this autonomy contributes to her grievance and I am willing to work with her to achieve an appropriate outcome.

6. Purchase of equipment

At the end of the previous financial year BRAC had excess funds to purchase equipment for the centre. Following consultations with staff, I asked Kim Logue to contact a nominated supplier to price equipment identified by other colleagues. Kim chose to contact a local alternate supplier, his enquire (sic) lead him back to the suggested company who were wholesalers for the local company. Kim has not provided me with quotes from any suppliers and following his resignation, this task now rests in my in-tray. I have informed staff of this delay and apologise for not already purchasing this equipment.

7. Crèche Equipment

I approved an initial purchase order for crèche toys - and toys were subsequently purchased. Debbie Taylor presented me with an additional purchase order for more toys, which I did not sign. The reason for this was that in my assessment the centre had sufficient toys as well as a new TV/DVD. At no time was I presented with a catalogue or did I indicate to the crèche ladies that I would purchase additional toys.

8. Uniforms

I suggested the purchase of uniform to the group fitness staff approximately two months ago. To the best of my knowledge Aqua staff had never been issued with uniforms in the past. I have investigated uniforms from two local suppliers without success. Sportspower has since emailed me a brochure *(running bare)* which I have placed in the communications diary for staff comment. This was done approximately 2 weeks ago. The embroiderer has since been contacted, and staff sizes have been obtained. I will proceed to purchase these uniforms in the immediate future. This initiative was designed to assist contracted staff to feel like part of the BRAC team and to assist with the re-branding of the programme.

9. Advertising Banner

Banners have been ordered and invoiced. BRAC is meeting with the Shire Marketing & PR Officer (Jo) to discuss appropriate artwork and signage on Thursday. Staff have been informed of this purchase and will continue to be updated. There has been extensive in-house marketing, and class sizes have increased over the last 6 months. The BRAC marketing plan (currently being developed) is an extensive document and will be released shortly.

10. Rostering

As mentioned in 'Alternate Dry Class' I am sympathetic to Sara for her loss of autonomy regarding BRAC programming. I have maintained a fixed roster since Easter 2009 and classes have been running to this schedule with increased customer numbers and satisfaction levels, a (sic) fewer class cancellations. I am aware that aqua staff have altered these rosters independently of me (issues involve child care and availability). I have made a conscious decision not to intervene in this situation to ensure that classes are not cancelled. Although it is difficult to get everyone together, I have an upcoming meeting with aqua staff at which this will be addressed if it is raised.

11. Microphone

Please refer to 'Repairs to PA equipment'. I have a substantial amount of documentation regarding the purchase / repair of PA equipment.

12. Survey and Fit-Ball

I am now aware that Sara surveyed BRAC users (without prior consultation) regarding their preference for classes. As previously indicated, I am uncomfortable with her level of involvement with BRAC programming and managerial decision making. However, my analysis of her survey indicated that 2 classes would be detrimental to the centre as it would split class sizes and increase costs. It also surfaced the underlying issue that the pool was too cold during the dry season. Using this information, I made several strategic judgement calls including program changes, using the 'pool blanket' and repairing the solar pump. This has resulted in maintaining costs while increasing class sizes and customer satisfaction. I remain unconvinced as to the need for fit-ball classes, but I am prepared to review this at any time.

13. Circuit Classes

This new class has seen weekly increases in participation and is being marketing (sic) in several areas. I am not aware of Sara's concern in this class. She has not raised this matter with me at any time.

14. Repercussions

I maintain that I have never disadvantaged staff as a result of a complaint made against me. Sara's dot point does not reference any specific example, so I'm unable to respond to this further. Sara is an independent contractor and I am concerned that her comments about internal rostering obscure her real motives. I am aware that staff rostering is an ongoing issue, however all rosters are created in line with BRAC operational needs and the current Enterprise Bargaining Agreement.

15. Manipulation

As previously stated in 'Purchase of equipment' I acknowledge that I asked for staff input in purchasing additional aqua equipment. I agree that this feedback was received (approximately 3 weeks later). Since this feedback was received I have actively pursued purchasing this requested equipment through my duty manager Kim Logue.

16. Prior records

I remember meeting informally with Sarah (sic) and other staff around March 2009. These meetings related to programming and delivery of future BRAC classes, and encouraged staff input. Without Sara referring to a specific meeting, I am not sure of the relationship between these meetings and staff manipulation.

17. Other incidents

I refuse to comment on unspecified incidents. However, I wish to work with Sara in addressing any of her concerns for the betterment of BRAC users and other staff members.

Statement of Kim Logue

I recruited Kim Logue from the position of lifeguard to the Duty Manager -BRAC. I am supportive of his career development and I have been impressed by his loyalty and wiliness (sic) to impress colleagues. Kim's intentions were to work during winter in Broome, however only 4 weeks ago Kim advised me that he was enjoying working with me and the BRAC team and that he no longer wanted to leave Broome.

I have been presented with Kim's statement which details a sequence of events alleging that I instructed him to withhold information from a senior manager. I am devastated that Kim has made this statement, and I am still at a loss to understand his actions.

I wish to present my recollection of this sequence of events and then address Kim's version as contained in his statement.

My recollection of the sequence of events

On the morning of Monday 22 July 2009 I was made aware that Rod McGrath had encouraged colleagues to discuss my management style with him while he attended basketball at BRAC. I asked Kim Logue if this was correct and he stated that it was, however he felt compromised by the situation. Kim then stated to me that 'we all know that Rod McGrath is trying to make you paranoid'. On the (sic) 25 July Kim had a further conversation with another colleague stating that he was convinced that Rod McGrath was "out to do Deb's head in". I have a statement supporting that this event took place.

The Director - Community Services instructed me to appoint a replacement while I took one week (sic) leave, commencing Saturday 25 July 2009. I appointed Kim Logue in this position and notified him at approximately 1.00 pm on Friday 24 July 2009. I appointed Kim because of his pool qualifications and the minimal disruption this would have to the current duty manager roster.

At approximately 5.00 pm Friday 24 July 2009 Kim Logue called me on my mobile informing me that Rod McGrath had requested the BRAC staff-roster for the upcoming period. Kim stated to me that he thought it was inappropriate that Rod would ask for these rosters, and that he told Rod that they weren't finished in any event. He stated that he had 'stalled' Rod from getting the rosters. I responded by saying that he must give Rod the roster if requested, though I too felt that it was inappropriate for Rod to request the rosters given the impending inquiry, and his previous conversations about my management style.

On Monday 27 July 2009 Kim called me on my mobile and said that Rod was demanding to see the rosters. I reiterated what I said to him on Friday including my advice for him to give the roster to Rod as his senior manager. Kim then stated that he would further stall giving Rod the rosters, and that he would control Rod by doing so. At no time did I encourage him to do so. This conversation was witnessed by another colleague who has indicated that she is willing to provide a statement to this effect.

On Wednesday 29 July 2009 Kim called me on my mobile to tell me to expect an email from Rod stating that I should not be in the building while on leave. Kim informed me that on Rod's request he had emailed other BRAC staff this information.

This was the extent of my involvement in the submission of the roster in question. At no time did I suggest for Kim to withhold the roster from his senior managers.

Kim's Statement (by reference to paragraphs)

1. I confirm that Kim called me to speak about Rod's demand for the roster.

   I deny that during this phone conversation I questioned Rod's authority to make this demand of Kim.

2. I confirm that Kim called me to say that Rod made a further request for the rosters.

   I confirm that I said that I felt it was an inappropriate request, due to the pending inquiry.

   I confirm that I instructed Kim to hand the roster to Rod if requested.

   I deny mentioning 'micro-management' and siding with staff over this issue.

   I confirm that Kim instigated delaying handing the roster to Rod.

   I believe another staff member was present during this conversation.

3. I confirm that on at least two previous occasions I instructed Kim to provide the roster to Rod if requested if requested (sic), and that one of these occasions was witnessed by another staff member.

4. Kim contradicts his previous paragraphs by indicating that I had advised him to provide a copy of the roster to Rod upon his request.

   I confirm that I expressed that I felt it was an inappropriate request.

5. I confirm that I telephoned Kim to ask why he stated to other staff members that I told him to withhold the roster.

   I confirm that Kim indicated that he intended to resign.

   I deny ever instructing Kim to withhold the roster from Rod.

6. I deny ever interrogating Kim in relation to Rod.

7. On 7 August 2009 Denisa Konency (sic) informed me of a further alleged conversation between myself and Kim. I deny this conversation took place."

(Exhibit A4.1 document 37)

In addition to the above written responses the applicant provided a statement from Ms Fiona Tannock-Jones which she said supported her recollection of events in relation to a conversation she had with Mr Logue.

44 At a second meeting held on 11 August 2009 attended by the applicant, Mr Allen, Ms Konecny and Ms Irving the applicant maintained that both Ms Konecny and Ms Irving were not composed or objective and were dismissive of the applicant's written responses to the complaints made by Ms Hennessy and Mr Logue as well as Ms Tannock-Jones' written statement. The applicant stated that she verbally responded to Ms McDougall's complaint by pointing out that her statement was vague and hard to respond to and she stated that Ms Konecny conceded this and took the applicant to sections of her complaints and the applicant responded as best she could given the time limits imposed. The applicant stated that a discussion about the applicant's management style then ensued and at the end of the meeting Ms Konecny and Ms Irving said they would consider the issues raised.

45 The applicant stated that up to this point she was a friend of Ms Irving but this changed following her aggressive treatment of her in the two disciplinary meetings and as a result of a Short Message Service ("SMS") text message she received from Ms Irving after she sent a SMS text message to Ms Irving subsequent to the meeting complaining that Ms Konecny seemed to be pursuing an agenda against her and that the process followed was flawed. Ms Irving's response is as follows:

> "Deb just got yr message now. Im sorry but its not jvst denisa, im part of it too. U don't listen, u think your perfect, yr inflexable, no reflection on your behaviour. Im disappointed really r"

(Exhibit A4.1 document 38)

The applicant maintained that this confirmed that she would not be receiving a proper consideration of her case and it appeared that Ms Irving was now operating against her as well as Ms Konecny.

46 By 12 August 2009 the applicant stated that she was under enormous stress given the disciplinary proceedings against her and as a result she went on sick leave. The applicant stated that when she attended a further meeting on 19 August 2009 with Mr Allen, Ms Konecny and Ms Irving she was advised that she would be subject to a performance management process and she was told that her reporting structure would change and she would no longer report directly to Mr McGrath or Ms Konecny but to Ms Anne Jennings. The applicant was also advised that she would need to meet weekly with Ms Jennings and formulate agreed Key Performance Indicators ("KPIs") and the applicant was also given a letter of warning (Exhibit A4.1 document 44). The applicant gave evidence that she was so upset at this meeting that she did not talk. The applicant stated that there was no indication that the complaints made against her were found to have substance and that no timeframe was put on the performance management process.

47 The applicant maintained that her harassing and bullying a staff member had never been part of the allegations given to her to respond to nor was her management style the subject of the disciplinary proceedings against her and the only discussion about this issue took place at the second meeting held on 11 August 2009. The applicant stated that as the complaints made by Ms Hennessy and Ms McDougall were not referred to by the respondent in the letter handed to her on 19 August 2009 she presumed they had not been proven. Additionally, there was no indication that a formal warning was going to be issued to her or was being considered by the respondent so she did not understand why a formal warning was given to her. The applicant also could not understand why her performance was unsatisfactory given that she had refuted the complaints against her, in particular Mr Logue's complaint, and she had provided the respondent with an independent account of her interactions with Mr Logue from Ms Tannock-Jones, which was consistent with her account.

48 The applicant gave evidence that Ms Jennings did not raise the issue of KPIs with her nor did she initiate any conversation about setting KPIs. Even though she met weekly with Ms Jennings the applicant maintained that these were not performance management meetings and were only discussions about operational matters. No minutes of these meetings were given to her and she was not asked to sign any documentation relating to the meetings as required in the 2007 Agreement. The applicant believed that as the warning given to her was not valid she spoke to Ms Jennings about her responses to the complaints and the applicant maintained that during these discussions Ms Jennings told the applicant that she was there to support and assist her to prevent staff from making further false allegations against her. The applicant also claimed that Ms Jennings acknowledged that some staff had acted inappropriately at BRAC but she did nothing about this. The applicant stated that without KPIs to work from and with no actual performance management process in place she worked as best she could on the instructions she was given. The applicant also maintained that her concerns about BRAC's procedures and policies were not being communicated to staff nor dealt with by the respondent. The applicant stated that inappropriate behaviour towards her by staff increased and on several occasions she raised these behaviours with Ms Jennings for her to deal with but her complaints were ignored and not acted upon and she was unaware if the issues she had raised with Ms Jennings were addressed. In contrast if a staff member had a problem with her, the complaint went directly to Ms Konecny and was then passed back to Ms Jennings.

49 The applicant felt she was being discriminated against because staff had not been told that she was following an agenda that she had been hired to fulfil and the applicant maintained that she had been required to deal with several unreasonable decisions made by management which could be seen as promoting an agenda to sideline her from her position. The applicant gave by way of example how she was treated when she applied for annual leave in early September 2009. The applicant stated that she

was required to find staff to fill all vacant duty manager positions as well as finding a suitable replacement to cover her shifts and the applicant did this by arranging for Mr Stewart Winfield who was based in Perth to cover both the duty manager and Centre Manager shifts because of a lack of willing or available local qualified staff to undertake these roles. However just before commencing leave on 2 October 2009 Ms Jennings determined that she would be the acting Centre Manager even though Mr Winfield had arrived from Perth to undertake this role and Mr Winfield then agreed to work as the duty manager on a reduced salary.

50 The applicant gave evidence that she was shocked when she received Mr Logue's employment application form in September 2009 when he applied to work at BRAC in the same position he had undertaken prior to resigning from the respondent because of his alleged treatment by the applicant. The applicant maintained that it was irrational for a former employee who had resigned due to a conflict with his manager to want to be re-employed under the same manager. The applicant gave evidence that she had a brief discussion with Ms Jennings and Ms Konecny about this issue on 21 October 2009 and told them that it was risky for the respondent to re-employ Mr Logue because of duty of care issues and because Mr Logue had been dishonest with respect to his complaint about her. The applicant claimed that her concerns were ignored and Ms Konecny instructed Ms Jennings on 22 October 2009 to re-employ Mr Logue. The following day the applicant emailed Ms Jennings seeking resolution of the duty of care issues with Mr Logue before he was to be re-employed and she told Ms Jennings that an alternative applicant with appropriate qualifications was available to undertake casual duty manager work. The applicant maintains that an inference that can be drawn from Mr Logue applying for a position with the respondent directly under the applicant was that Mr Logue was aware that she would not be employed after 23 October 2009 and that a decision had already been taken by the respondent to terminate her.

51 The applicant gave evidence that she was subjected to ongoing harassment by Ms Konecny. The applicant gave by way of example an incident concerning a project which involved the local power provider using the respondent's generator during peak periods and the respondent being paid a retainer and usage fee. The applicant prepared some of the material required for an agenda item to be submitted to Council on this issue and when she went on holidays she asked Mr Winfield to finish collecting data and finalise the agenda item. After doing some of the paper work whilst on holidays in mid October 2009 she struggled to complete the required paperwork and it was also the first agenda item she had ever prepared. Under Ms Jennings' instruction she submitted the agenda item to the Council's secretary and Ms Jennings then emailed her stating that the item had been rejected citing reasons for this occurring. The applicant responded to her stating that the issues raised by Ms Jennings were covered in the report and the applicant gave evidence that as she was determined to have the project approved she organised a meeting with the respondent's Chief Executive Officer ("CEO") Mr Kenn Donohoe at 3.00pm on 22 October 2009 to have the matter put before Council. Just prior to her meeting with the CEO Ms Konecny contacted her telling her that she was angry that the applicant had gone over her head with respect to this issue and the applicant protested saying that she had exhausted all avenues through her supervisor. Ms Konecny advised the applicant that the meeting with the CEO had been cancelled, she accused the applicant of not following due process and she was required to meet Ms Konecny that afternoon at 3.00pm. When the applicant attended this meeting she maintained that the meeting was not private and approximately five people in the office area immediately outside Ms Konecny's office were aware that the meeting was taking place and could see Ms Konecny interacting with the applicant. The applicant maintained that Ms Konecny lectured her about going over her head and not forwarding the documentation to her line manager prior to sending it through to the Council's secretary and when the applicant indicated that Ms Jennings had given her the authority to send the agenda item directly to the Council secretary Ms Konecny only accepted this after Ms Jennings was called in to confirm that she had given her the authority to do so. The applicant stated that she felt intimidated and upset during this meeting.

52 The applicant gave evidence about her dismissal on 23 October 2009. The applicant maintained that she believed things were out of the ordinary when Ms Jennings requested that she attend the regular staff meeting scheduled for 12.30pm that day. Additionally, just prior to the meeting she had received an email from Ms Konecny asking her to outline the duty of care issues she had with Mr Logue returning to work with the respondent.

53 The applicant stated that Ms Jennings, Ms Konecny, Ms Tannock-Jones, Ms Debbie Taylor, Mr Ian Chester and Ms McDougall were present at the staff meeting. The applicant maintained that whilst most of the staff were pleasant and neutral Ms Konecny and Ms Jennings were sombre and she felt intimidated by their presence. The applicant believed that she conducted the meeting in a calm and professional manner and staff were conversing appropriately. Approximately 25 minutes into the meeting Ms Konecny left the meeting and returned shortly thereafter and the applicant stated that several times during the meeting Ms Jennings and Ms Konecny had private conversations. At some point both Ms Konecny and Ms Jennings left the room without excusing themselves and approximately five minutes later returned. After Mr Chester made a suggestion about changing BRAC'S phone system Ms Konecny stood up and announced that she was suspending the meeting and asked staff to wait outside. Ms Jennings and Ms Konecny remained in the room with the applicant and the applicant maintained that she said words to the effect that "I was expecting this; I was surprised it took you so long". In saying this, the applicant thought that Ms Konecny and Ms Jennings had planned to undermine her in front of her staff. Ms Konecny then told the applicant to hand over her keys, car keys and phone and told her that she was terminating her employment as of now and that Ms Jennings would drive her home. The applicant maintained that she had not done anything wrong and that they could not terminate her as the CEO dismissed staff not the Director of Community Services. Ms Konecny responded saying that she could terminate her, that the applicant was being performance managed and that her staff were clearly unhappy with her and nothing had changed. After the applicant protested she was again told to hand over her keys and phone. The applicant left the room to contact the CEO and as she did so Ms Konecny pursued her saying that her actions in remaining on the property were "criminal" and that she would "call the police on me".

54 The applicant gave evidence that she had a meeting with the CEO at 2.30pm on 23 October 2009 and her support person Mr Stephen Farmer and Ms Irving also attended the meeting. During this meeting the CEO stated that he was unaware that the applicant had been terminated and he then asked her to give her version of the events about her dismissal. The applicant referred to the warning letter given to her and Ms Konecny's failure to apply appropriate processes either under the 2007

Agreement or of adopting basic managerial standards during her performance management process. The applicant told Mr Donohoe that BRAC was now performing financially better than the past four years and she reiterated that she had been wrongly terminated. In response Mr Donohoe told the applicant that if due process had not been followed with respect to her termination she would be reinstated with a full apology. After a short adjournment that Mr Donohoe requested to confer with Ms Irving, Mr Donohoe then informed the applicant that he would arrange for a termination letter to be provided to her and he gave the applicant an opportunity to put her concerns about non-compliance with due process in writing but he told the applicant that he had been assured that due process had been followed with respect to her termination. The applicant stated that she forwarded a statement regarding the lack of due process to Mr Donohoe the following Tuesday however he never acknowledged receiving this email nor did he respond to it.

55 The applicant maintained that her termination was unfair and unjust and she had not committed any misconduct for which either dismissal or summary dismissal was appropriate.

56 The applicant detailed a number of issues she dealt with as Centre Manager of BRAC which she believed contributed to her termination on the basis that resolving these issues may have caused some staff members to dislike her. These issues are as follows:

- when taking on her role she inherited an administrative, organisational and financial mess and even though she raised issues with Mr McGrath, Ms Konecny or Ms Jennings key staff were unwilling to support the way in which she wanted to move forward and some staff were vocal about their resentment;
- some staff were seeking maximum remuneration and lifestyle additions at the expense of the respondent;
- staff had developed their own policies and procedures for running BRAC which were not sanctioned by the respondent and the respondent did not have basic policies and procedures in place, for example, opening and closing times for BRAC and this led to conflict with user groups;
- some staff were offering to hire BRAC facilities for free and were discounting fees and charges without authorisation;
- some user groups were not invoiced when they used BRAC;
- the function room was let out at a reduced rate or free;
- staff and user groups obtained free products from the kiosk;
- staff were given discounts at below cost for many kiosk items which was not sanctioned by the respondent;
- staff had free access to the Coke machine takings and stock;
- excessive over time and higher duty payments were made to staff and staff took leave without consultation;
- user groups, for example the tennis club, were allowed to remain in the building after closing time and this led to overtime rates having to be paid;
- BRAC property was being removed from the facility for home use and there was no policy to deal with this;
- BRAC property was missing and there was no assets register;
- BRAC booking procedures were ad hoc;
- customer service was in a bad state;
- BRAC's daily takings were loosely controlled, there were limited investigations of inconsistencies in till takings and BRAC banking practices were identified as high risk by the respondent's auditor;
- staff recruitment was uncontrolled;
- unauthorised staff were accessing and authorising purchase orders and budget accounts;
- roster changes were being negotiated between duty managers to obtain extended leave or early finishes;
- staff dictated BRAC's opening and closing hours; and
- staff dictated annual leave.

In summary the applicant maintained that some staff dictated operational processes which were contrary to the respondent's policy.

57 The applicant claimed that changes she made to address these issues resulted in a loss of autonomy, presumed benefits, overtime, additional classes for some contractors, discounts at the kiosk and BRAC services, access to non-work related computer programmes and independently setting leave. The applicant stated that she had been hired to deal with these issues and she pointed out to the respondent that changes in these areas were likely to cause discontent with some staff.

58 The applicant gave evidence about ongoing issues with the tennis club, a user group of BRAC, however as this was not a ground that the respondent relied upon to terminate the applicant it is unnecessary to detail this evidence. The applicant also gave evidence about a staff member Mr Glenn Paddick who was terminated after his probationary period was extended but as this issue was not relied upon by the respondent when terminating the applicant it is unnecessary to detail that evidence. The applicant's evidence about her dealings with Ms Taylor falls into the same category.

59 The applicant maintained that Mr Michael Doyle undermined her position at BRAC and she was never disciplined about any of the complaints raised by him in his witness statement about the applicant.

60 Under cross-examination the applicant agreed that she did not prepare a business case for a streamlined management structure but she claimed that she was busy and the respondent lacked interest in the structure being changed. The applicant disagreed that the respondent had not given her a mandate for change and she stated that Mr McGrath in particular had given her this mandate as he was concerned about user groups having too much control over BRAC's assets.

61 The applicant re-iterated that Mr McGrath, Ms Jennings and Ms Konecny bullied and harassed her and she claimed that she could have done her job better if they had given her support.

62 The applicant stated that she did not accept the performance review conducted by Ms Jennings as it was not in accord with the 2007 Agreement. The applicant also gave evidence that at times the actions of her managers proved that they did not have a great deal of knowledge about managing a recreation centre.

63 The applicant stated that she was aware that Ms Konecny had investigated the circumstances of Mr Logue's termination however she was unaware of the outcome of this investigation until the meeting held on 19 August 2009 took place. The applicant rejected the respondent's claim that she had bullied Mr Logue and treated him unfairly and the applicant stated that she did not respond to Ms Konecny's email asking her for clarification of the duty of care issues she had with Mr Logue because she received this email at midday on the day of her termination. The applicant also stated that she requested a meeting with Ms Konecny about this issue but she ignored her request.

64 The applicant maintained that the complaints raised with her at the meeting with Ms Irving and Ms Konecny held on 7 August 2009 did not relate to her management style. The applicant denied that swimming lessons for a local school did not go ahead because she refused to negotiate on the price she quoted to the school. The applicant rejected the proposition that the rosters she put in place for staff were punitive and she maintained that she did not have a "them and us" attitude with BRAC's staff and she believed that all staff were working together for the same purpose. The applicant claimed that she had a history of working well with employees and she endeavoured to do the same with BRAC's employees. The applicant maintained that she did not force any changes on staff.

65 The applicant stated that Ms Konecny rejected the draft KPIs she had presented to her in October 2009 and she maintained that she was working on finalising them when she was terminated. The applicant maintained that she did not give Ms Taylor an unreasonable work load and the applicant claimed that when more than ten children were at the crèche on one occasion this was an error made by a receptionist at BRAC.

66 The applicant stated that staff were not uncomfortable during the staff meeting held on 23 October 2009 and she stated that there was no screaming or aggression on her part during this meeting. The applicant maintained that at this meeting she made positive comments to Ms McDougall and when Mr Chester raised an issue she told him to speak to her about it after the meeting. The applicant rejected the claim that her relationship with the respondent had broken down as at 23 October 2009 and she maintained that her termination was a surprise.

67 The applicant rejected the proposition that her relationship with staff was dysfunctional and the applicant conceded that Ms Konecny had a responsibility to investigate complaints made against her but the applicant maintained that BRAC had previously been run poorly and the respondent's managers had been too busy to assist the then manager. The applicant agreed that subsequent to her termination it took some time for the respondent to deal with her long service leave, annual leave and time in lieu claims and the applicant confirmed that as at 9 November 2009 she was aware that she was to be given a payment in lieu of notice which was made to her on or around 3 December 2009.

68 Under re-examination the applicant maintained that she did not slam her door on any employees or refuse to speak to Mr Chester. The applicant stated that it was not unusual for Ms Konecny to approach her directly about issues and complaints raised by community groups with the Council and bypass her line manager Mr McGrath. The applicant stated that during her time as Centre Manager of BRAC on three occasions Ms McDougall applied for and was granted leave and on each occasion she asked for an extra day's leave at short notice which gave the applicant little time to cover these days. The applicant maintained that Mr McGrath was inexperienced, she stated that he was reactive and rarely completed work on time and she claimed that it was inappropriate for Mr McGrath to review staff rosters as he had never asked for the rosters previously and in any event the rosters were pinned on the notice board. In relation to rostering staff on undesirable shifts, the applicant stated that she received an email from Ms McDougall saying that she did not mind working the late shift and it was her view that shifts should be shared around. The applicant then stated that it was appropriate to put Ms McDougall on evening shifts because she was the only full-time senior person available to work this shift and she received a loading to undertake these evening shifts. The applicant re-iterated that KPIs were never formulated for her as part of the performance management process.

69 The applicant has made a number of efforts to obtain alternative employment but to date she has not been successful and therefore she has received no income since her termination. The applicant stated that she has worked on a voluntary basis for the Carl Andrews Foundation, she has picked mangoes and she has applied for a position as a community development officer in Karratha and the applicant is registered with two recruitment agencies. The applicant stated that as it was the wet season when she was terminated it was difficult to obtain alternative employment. Furthermore the local government industry, specifically recreation, was a small industry and people are aware of her dismissal. The applicant stated that she is commencing employment on 12 February 2010 detailing rental cars.

70 Mr Farmer gave evidence by way of a witness statement (see Exhibit A5). Mr Farmer was contacted by the applicant on 23 October 2009 to attend a meeting with the respondent's CEO about her termination. Mr Farmer stated that at this meeting Ms Irving's attitude was unprofessional and her behaviour towards the applicant was intimidatory. Mr Farmer stated that Ms Irving "leapt on" statements made by the applicant to contradict her without hearing her out and she was dismissive of what the applicant said about the allegations against her. Mr Farmer also believed that the CEO's attitude was equally dismissive as he did nothing to stop Ms Irving's behaviour towards the applicant and it appeared he was there to support Ms Irving rather than provide an impartial hearing to the applicant. Mr Farmer also formed the impression that the respondent

was not interested in hearing the applicant's account of what had happened. Mr Farmer stated that the applicant was accused of failing to comply with "performance management" and Mr Donohoe said that he would review the applicant's termination if proper processes had not been followed with respect to the applicant's termination. Mr Farmer believed that the applicant was not given a proper opportunity at this meeting to respond to the allegations put to her.

71 Mr Winfield gave evidence by way of a witness statement (see Exhibit A6). Mr Winfield was a duty manager with BRAC from 10 June 2009 to 15 September 2009 and prior to this he worked at other leisure facilities. During his employment at BRAC whilst under the authority of the applicant Mr Winfield had no difficulty with the applicant personally or with the way she managed BRAC. Mr Winfield described the applicant's management style as different to others, she was direct and focused, she was not overbearing or aggressive to any of the staff she managed and her requests to staff were not demanding or inappropriate. Mr Winfield stated that the applicant told him when he commenced at BRAC she had been appointed with a specific mandate of "tightening the reins" to cut costs and bring staff and user groups into line. Mr Winfield stated that the applicant explained to staff what she was doing however some staff took umbrage because it was different to how things had previously operated at BRAC. Mr Winfield stated that he did not get involved in clashes between the applicant and other staff members, in particular Ms McDougall, who he claimed constantly seemed to be questioning the applicant's management style and the way in which things were being done. Mr Winfield described Ms McDougall as "white anting" the applicant and he claimed that she made complaints to senior management about small issues that no reasonable employee would be questioning. Mr Winfield stated that on the one hand she appeared to be cooperative with some decisions such as roster changes but then would tell other people that she did not support change and when the applicant was not present she would make remarks against her.

72 Mr Winfield confirmed that the applicant had issues with the tennis club and she had also stopped other programs running and he stated that in her position he believed he would have done the same. Mr Winfield also cited problems the applicant had with the local netball club which were resolved. Mr Winfield stated that BRAC staffing levels were low and even though he was a casual employee he ended up working full time hours. Mr Winfield stated that one day Ms Hennessy made verbal complaints against the way BRAC was being run over the public address system when the applicant was on leave and she stated that if anyone had issues with the way BRAC was operated they could complain to Ms Jennings.

73 Mr Warren Wallace gave evidence by way of a witness statement (see Exhibit A10). He is a neighbour and friend of the applicant. None of his evidence went to the issues relevant to the applicant's termination.

74 Mr Allen gave evidence by way of a witness statement (see Exhibit A8). Mr Allen is a solicitor with the Broome Family Violence Prevention Legal Service and the applicant asked him to be her support person at meetings she had with the respondent in August 2009. Mr Allen gave evidence that at the meeting held on 7 August 2009 with Ms Konecny and Ms Irving the applicant was presented with written complaints made by Ms Hennessy, Ms McDougall and Mr Logue and she was instructed to provide a response to these complaints the following day. After some discussion this deadline was extended to 11 August 2009, a period which Mr Allen thought was unreasonably short. Mr Allen stated that during this meeting voices were raised and there was aggressive body language between Ms Konecny, Ms Irving and the applicant. Mr Allen stated that it was his impression that the behaviour of Ms Konecny and Ms Irving was partisan towards the complainants.

75 Mr Allen stated that he assisted the applicant to respond to the complaints but given the short timeframe only two of the complaints were able to be responded to in writing. Mr Allen also stated that it was difficult to respond to the complaints because of the way in which they were framed and it was unclear what the nature of the specific complaints were. Mr Allen attended a further meeting on 11 August 2009 as a support person for the applicant and he stated that the written responses to two of the complaints were provided by the applicant as well as an oral response to the third complaint and the applicant presented a statement from a third party supporting her responses. No adjournment was made to consider the applicant's responses and it was not made clear what, if any, investigation was made into the complaints. Mr Allen stated that the focus of the meeting then changed from investigating and resolving complaints against the applicant to Ms Konecny and Ms Irving referring to contrasting management styles of the applicant and them. Mr Allen maintained that the applicant's responses were consistently dismissed by Ms Konecny and Ms Irving and Mr Allen gave evidence that everyone at the meeting, including the applicant, acknowledged that the respondent required the applicant to modify her approach to managing BRAC. Mr Allen stated that the meeting ended without reference to how the complaints against the applicant would be handled.

76 Mr Allen attended a third meeting with the applicant, Ms Konecny and Ms Irving on 19 August 2009 when the applicant was advised that she was to be placed under performance management and she would no longer report directly to Ms Konecny. The applicant was also instructed to work with Ms Jennings to address management concerns and to set and monitor performance measures. Mr Allen could not recall the applicant being issued with a formal warning at this meeting and no reference was made to the complaints against the applicant or any investigation that had been conducted with respect to them. Mr Allen stated that he was concerned that the complaints made against the applicant did not appear to have been resolved and Mr Allen believed that the applicant had no real opportunity to respond to the allegations made against her. He also believed that the process used by the respondent lacked impartiality.

77 Ms Tannock-Jones gave evidence by way of a witness statement (see Exhibit A11). Ms Tannock-Jones is currently the acting Administration Supervisor at BRAC and she commenced at BRAC in April 2009 on a casual basis and then worked on a part-time basis to cover a staff member on leave. Ms Tannock-Jones confirmed that she was employed by the applicant who she described as a directed and focused manager who sought to improve the way in which BRAC operated. Ms Tannock-Jones stated that this led to some staff duties being reorganised for better efficiency which rubbed a number of duty managers at BRAC the wrong way. Ms Tannock-Jones described the applicant as being "too city, too fast, too corporate for the current directorate, that's not to say that Broome doesn't need it".

78 Ms Tannock-Jones stated that from her perspective the applicant did not have a lot of support from management and her managers seemed to encourage people to undermine her. She cited by way of example some staff members who had an issue with a directive issued by the applicant would not raise their concerns with the applicant as they were supposed to, but would go directly to Ms Konecny. Ms Tannock-Jones said some of the banking practices at BRAC were loose and she was aware that prior to the applicant commencing employment with the respondent a large number of groups which used BRAC's facilities were not charged.

79 Ms Tannock-Jones stated that at the staff meeting held on 23 October 2009 it was unprecedented that both Ms Konecny and Ms Jennings attended this meeting. Ms Tannock-Jones said nothing out of the ordinary took place at the meeting and she stated that the applicant was not disrespectful in any way or dismissive of any staff members. Ms Tannock-Jones said at this staff meeting tensions only arose when Ms Konecny returned to the meeting and asked employees to leave. Ms Tannock-Jones said that the applicant was stressed after she was terminated.

80 Under cross-examination Ms Tannock-Jones stated that she knew the applicant socially before she commenced employment at BRAC and she confirmed that when the applicant asked her to prepare statements in relation to the applicant's interactions with Mr Logue she was unaware that the applicant was subject to disciplinary proceedings at the time.

81 Mr Christopher Jackson gave evidence by way of a witness statement (see Exhibit A7). Mr Jackson was the Director of Community Services, including BRAC, when the applicant was first employed by the respondent and Ms Konecny took over his position when he resigned. Mr Jackson was not employed by the respondent during the applicant's employment with the respondent but he was was involved in the process for selecting candidates for the Centre Manager position when the previous manager resigned and the applicant was the successful candidate. Mr Jackson stated that when the applicant was employed as the Centre Manager of BRAC her brief was to improve BRAC's operations in a financial, organisational and logistical way and he stated that she appeared to be eminently suited to that role. Mr Jackson also stated that she had a reputation for being assertive.

82 Mr Jacob Lewis gave evidence by way of a witness statement (see Exhibit A9). Mr Lewis commenced employment with the respondent on or about February 2009 as a receptionist. Mr Lewis described the applicant as professional and business like, direct and focused and she did not believe in messing about. Mr Lewis maintained that it was wrong to describe the applicant as aggressive and difficult and he stated that there was a big difference between assertiveness and aggressiveness. Mr Lewis was aware that some duty managers did not like the applicant's management style. Mr Lewis stated that he would not characterise the applicant's behaviour as bullying, harassing, aggressive, manipulative or unwilling to compromise.

Respondent's evidence

83 Ms Irving gave evidence by way of a witness statement (see Exhibits R1.1 and R1.2). Ms Irving was employed as the respondent's Human Resources Manager for 12 months from January 2009. Ms Irving stated that she coached and counselled the applicant on a number of occasions both as a friend and in a professional capacity and Ms Irving stated that she gave the applicant informal advice that she needed to accept some of the blame for the problems occurring at BRAC but she refused to accept that she needed to change her management style. Ms Irving stated that the applicant did not take her advice even when it was clear that her job was on the line.

84 Ms Irving stated that the applicant would escalate a situation and include other people in issues and Ms Irving claimed that she did not trust the applicant. Ms Irving stated that on one occasion when she and the applicant were chatting informally about work issues the applicant accused her of bullying and harassing her.

85 Ms Irving gave evidence that when Mr Logue spoke to her on the day he resigned he told her he was resigning because the applicant was heavy handed and threatening and he said he did not want to know about the ugly dynamics between staff and management yet the applicant chose to discuss this with him and other staff members and he felt he was being drawn in to a situation which he did not like.

86 Ms Irving stated that as part of her role as the respondent's Human Resources Manager she was involved in the investigation process following complaints made by staff about the applicant.

87 Ms Irving understood that Ms Konecny and Ms Jennings attended the staff meeting held on 23 October 2009 as a number of staff members were tense.

88 Ms Irving stated that she was aware of the applicant's concerns that staff had been difficult and rude to her and that staff needed to improve their behaviour as much as the applicant needed to improve her behaviour and she stated that she raised this issue with Ms Konecny and Ms Jennings. At the time she told them that a formal process should be considered whereby at the start of the staff meeting held on 23 October 2009 they should raise the respondent's Code of Conduct with employees however she understood this did not occur.

89 Ms Irving stated that she contacted Ms Konecny during the staff meeting held on 23 October 2009 to relay advice she had received from the Western Australian Local Government Association about the applicant's termination.

90 Ms Irving stated that by October 2009 Ms Konecny felt that the respondent had no option but to remove the applicant from her position given the increasing damage being done to BRAC's customers notwithstanding additional management support being given to the applicant which included her line manager being changed three times. After a series of complaints were made about the applicant by staff and customers and because there was a deterioration in the applicant's working relationship with Ms Jennings, Ms Irving stated that she and Ms Konecny discussed standing the applicant down on full pay pending an investigation. Ms Irving stated that she and Ms Konecny agreed that support had been given to the applicant but as a result of a lack of change on the part of the applicant her termination appeared inevitable.

91 Ms Irving stated that she attended a meeting with Mr Donohoe, the applicant and her support person after the applicant was terminated and the applicant was told at this meeting that a letter of termination would be delivered to her that day.

92 Ms Irving stated that it would be inappropriate for the applicant to be reinstated as there were bad feelings between the applicant, staff and customers and the community. Ms Irving maintained that capable employees like Mr Logue and Mr Smith found it impossible to work with the applicant and as these employees were not aggressive nor agitators this concerned her. Ms Irving was also aware of community groups which found the applicant intolerable to work with.

93 Ms Irving maintained that the applicant did not accept Mr McGrath raising performance issues with her and she persisted in name calling and making slurs about him constantly both to him personally and out of earshot. Ms Irving also claimed that Mr McGrath's early support of the applicant was unappreciated by her and the applicant bad mouthed him both professionally and personally. Ms Irving stated that on a number of occasions she counselled the applicant insisting that she needed to inculcate good working relationships with staff and community members and she reinforced the need to have positive working relationships with them regardless of whether she liked them or believed they were worthy. Ms Irving maintained that the applicant had a history of poor relationships with staff and community groups from March 2009 onwards. As complaints arose about the applicant, which were becoming more detailed and explicit Ms Irving spoke to the applicant on many occasions both personally, privately and professionally to remind her that she needed to improve her operational style.

94 Ms Irving disputed the applicant's claims that Ms Konecny harassed her. Ms Irving stated that the applicant was supported by all senior staff including Ms Konecny who had an open door policy. Ms Irving was aware that Ms Konecny had a number of meetings with the applicant and she maintained that Ms Konecny was interested in all departments under her directorate including BRAC.

95 Ms Irving stated that the complaints made about the applicant in July and early August 2009 were not presented to the applicant before the meeting held on 7 August 2009 because the respondent was concerned that she may make comments to these staff before the meeting. Ms Irving stated that this meeting was not intended to trap the applicant and Ms Irving stated that it was inappropriate for Mr Donohoe to attend this meeting because it was held to explore issues and table concerns raised by some staff. Ms Irving stated that at this meeting the applicant would not accept ownership of issues raised with her and Ms Irving stated that she was unaware of the statement the applicant says she provided from Ms Tannock-Jones that she says conflicts with part of Mr Logue's statement.

96 Ms Irving gave evidence that at the end of the respondent's investigation in August 2009 and after the applicant had been given a right of reply a formal warning was issued to the applicant which was documented and discussed with the applicant. A copy of this warning was also given to her and placed on her personnel file.

97 Ms Irving maintained that senior staff were keen to ensure that the applicant was successful in her role and went to great lengths to work with her to ensure that this occurred. Ms Irving stated that the applicant was stubborn and arrogant and would not accept any responsibility for her performance problems.

98 Ms Irving stated under cross-examination that she carefully considered and investigated the complaints made against the applicant by Mr Logue and Ms McDougall and Ms Irving understood that Ms Konecny also undertook a formal investigation of the complaints made against the applicant.

99 Ms Irving stated that at the meetings held with the applicant in August 2009 grievances lodged against the applicant were dismissed by her and Ms Irving stated that she did not agree with the applicant's responses to the complaints and she denied she was aggressive and abrupt in her approach to the applicant. Ms Irving denied that her conduct during these meetings was inflammatory but she agreed that she was exasperated with the applicant because she would not recognise she was part of the problem nor did she agree to modify her behaviour.

100 Ms Irving stated that it was not until 23 October 2009 that a decision was made to terminate the applicant in preference to standing her down on full pay. Ms Irving stated that she initially did not believe it appropriate to terminate the applicant but after the applicant would not accept any ownership of the problems caused by her and as she was being inflexible, she changed her mind. Ms Irving stated that the final catalyst for deciding that the applicant should be terminated was ongoing staff and community complaints despite the applicant receiving coaching and counselling and no change in the applicant's behaviour nor did the applicant take ownership of the problems at BRAC.

101 Ms Konecny gave evidence by way of a witness statement primarily based on file notes made at the time of meetings or incidents or shortly thereafter (see Exhibits R2.1 and R2.2). Ms Konecny is the respondent's Director Community Services and she has held this position since 10 December 2008. Ms Konecny has been in senior management for 12 years.

102 Ms Konecny stated that within weeks of the applicant's appointment a number of customer complaints were made about her conduct and performance. Ms Konecny stated that early on she realised that the applicant was struggling. Ms Konecny stated that the applicant maintained that the complaints made against her were as a result of her change management efforts which were being met with resistance from both staff and customers. Ms Konecny stated that given the emerging trends about the applicant's management style and complaints being made against the applicant, the applicant was supported and actively encouraged to reflect on and adjust her communication and management styles to enable her to effectively carry out her role. Ms Konecny stated that Mr McGrath's attempts to support and manage the applicant were increasingly being met with resistance by the applicant and the applicant tended to escalate a situation to a more senior level. On several occasions the applicant told her that Mr McGrath was 'a useless manager'. Ms Konecny stated that Mr McGrath told her that the applicant was unmanageable, she disregarded his requests for feedback and his authority and she manipulated facts and refused to adjust her management, supervision and communication styles. As a result Ms Konecny had weekly meetings with him to provide additional support to deal with the applicant and to assist him to performance manage the applicant and Ms Konecny stated that two mediation meetings were held between the applicant and Mr McGrath to improve their working relationship and as a result they agreed to work more positively together. When Mr McGrath went on leave in late May/early June Ms Konecny then managed the applicant.

103 Ms Konecny stated that during July 2009 she spoke to the applicant about the importance of community consultation and obtaining information directly from BRAC's users as the applicant was making decisions based on her own views. Ms Konecny stated that between 16 July 2009 and 30 July 2009 several complaints were made by staff at BRAC about the applicant's management and communication styles and they were investigated under the respondent's dispute resolution process. This resulted in Mr McGrath sending a letter to the applicant dated 24 July 2009 requesting a meeting with her on 30 July 2009 to discuss these complaints. Ms Konecny stated that the relationship between Mr McGrath and the applicant had significantly deteriorated by this time and the applicant was raising issues with Mr McGrath's managers and the CEO. Ms Konecny also acknowledged that the applicant was unwell at the time and took sick leave between 24 July and 2 August 2009.

104 Ms Konecny stated that she had a meeting with Mr McGrath late in the afternoon on 24 July 2009 to discuss staffing at BRAC and operational needs to ensure that adequate resources and staff coverage was in place during the applicant's absence and to this end she requested that he obtain a copy of the staff roster. Ms Konecny stated that on 29 July 2009 she received a telephone call from Mr Logue who had received contradictory information from the applicant and Mr McGrath about supplying a copy of the staff roster to Mr McGrath and she told him that Mr McGrath's request was valid. As Ms Konecny was concerned about the applicant's inappropriate and escalating behaviour and her interference with BRAC's operations during a period that she was on sick leave she asked Mr McGrath to contact the applicant to ask her to cease issuing instructions to staff whilst on leave and focus instead on getting well and Mr McGrath advised her that he had already emailed the applicant to this effect on 28 July 2009. Ms Konecny gave evidence that late on 29 July 2009 Mr Logue complained to her that the applicant had abused him on the phone and he felt he had no option but to resign and Mr Logue told her that this related to Mr McGrath requesting a copy of staff rosters to be given to him and the applicant telling Mr Logue not to release this information to senior management.

105 Ms Konecny stated that the applicant did not accept constructive feedback from anyone in a position of authority.

106 Ms Konecny stated that on 3 August 2009 she received written complaints about the applicant from Ms Hennessy, Ms McDougall and Mr Logue which covered a range of concerns and incidents and the applicant's poor management skills was the recurrent theme. Ms Konecny stated that a letter was delivered to the applicant on 3 August 2009 requesting a meeting with her and the letter outlined general issues to be discussed at the meeting. The written complaints made by employees were not attached to this letter given staff concerns about possible retribution by the applicant and in light of her alleged abusive behaviour towards Mr Logue and other staff members.

107 Following is Ms Konecny's summary of the three meetings held with the applicant about the complaints made against her:

"*Meeting 1*: 7 August 2009, 4:30am at Shire Administration building

Present: Deb Mills, Tom Allen. (representative), I and Rebecca Irving

Agenda: Exploration and clarification of complaints:

- written complaints were presented to Deb Mills and clarified where required
- Deb Mills advised that management were commencing a disciplinary investigation and she was now on performance management
- directive issued not to discuss complaints with any staff member of complainant
- purpose of next meeting – Deb Mills Right of Reply – was clarified

Deb Mills given statements and a few days to respond. She had an appearance of being intimidated and petrified.

Meeting 2: 11 August 2009, 4:30am at Shire Administration building. Document 48.

Present: Deb Mills, Tom Allen. (representative), I and Rebecca Irving

Agenda: Deb Mills Right of Reply:

- Deb Mills provided responses to complaints
- In summary, vast majority of claims were rejected despite various evidence

I believe Deb Mills twisted words in alleging that I had already decided she was guilty. In relation to some matters, she said she did not want to respond to them. She just said everything was not true.

Meeting 3: 14 August 2009, 12:30am at Shire Administration building ***(cancelled by Deb Mills)***

(N.B. following reports by Rebecca Irving that Deb Mills was unwell and would not be attending the meeting, I contacted her on Friday 14 July (sic) by phone at 10:10am and:

- Asked is (sic) Deb Mills was coping / again offered EAP support – Deb Mills responded that she was OK and was at work now.
- I suggested that, as I understood (via HR Manager) that Deb Mills would not be attending today's meeting, it be rescheduled – Deb Mills nominated Tuesday 18 August at 4.00pm.
- To alleviate Deb Mills stress and counteract Deb Mills assumptions that she was being terminated, I advised that the outcome of the investigation would likely be:
  - Performance management in identified areas of concern
  - New line manager (Anne Jennings, Manager Community Development)

I asked if Deb Mills was willing to work with management to address areas of concern and improve performance, Deb Mills replied "Yes".

Meeting 3: 18 August 2009, 4:30pm at Shire Administration building (cancelled by Deb Mills)

Meeting 3: 19 August 2009, 4:30pm

Present: Deb Mills, Tom Allen (representative), I and Rebecca Irving

Agenda: Shire management response to Deb Mills statements from meeting 2:

- Deb Mills was issued a letter of warning as a result of the investigation into staff complaints and grievances at BRAC. Document40
- Deb Mills indicated that she was pleased to have an experienced new line manager, was willing to work with Anne Jennings and participate in performance management"

(Exhibit R2.1 paragraphs 52 to 56)

108 Ms Konecny stated that Ms Jennings became the applicant's line manager on 19 August 2009 to provide the applicant with intensive training and mentoring to facilitate an improvement in her performance and she stated that as a result of this restructure other projects were put on hold while Ms Jennings concentrated on supporting the applicant.

109 Ms Konecny stated that in the week commencing 19 October 2009 complaints about the applicant's conduct were made by the respondent's Club Development Officer Mr Doyle, Mr James Vincent who was the newly appointed Events and Sponsorship Coordinator and complaints from customer about the applicant were also made to Ms Jennings.

110 Ms Konecny gave evidence that on 20 October 2009 the applicant contacted the CEO requesting a meeting with him about a Council agenda item titled 'Energy Efficiency' being withdrawn by Ms Jennings due to it being incomplete and the applicant's claim that Ms Jennings withdrew this item with no justification and as a result the respondent had lost a significant income opportunity. After the CEO referred this issue to Ms Konecny for investigation she contacted the applicant and reiterated that she should have raised this issue with her before contacting Mr Donohoe. The applicant maintained that because Ms Konecny had been copied into her email to the CEO she believed that the line management process had been followed. At a meeting Ms Konecny had with the applicant on 21 October 2009 about this issue the applicant agreed that the agenda item was incomplete and understood why Ms Jennings had withdrawn it.

111 Ms Konecny stated that Ms Jennings kept her informed about issues at BRAC and her relationship with the applicant and Ms Jennings told her that the applicant was continuing to be very negative and she believed their relationship was breaking down.

112 Ms Konecny stated that in the week prior to 23 October 2009 several new complaints were made to Ms Jennings from employees and BRAC's customers about the applicant and Ms Konecny stated that there were reports of significant and growing unrest amongst BRAC staff as a result of the applicant's poor management. These concerns included:

- poor and inappropriate communication approach with BRAC staff;
- a poor and increasingly deteriorating work environment at BRAC due to unsatisfactory leadership and communication at centre management level;
- disparaging comments made by the applicant about customers, staff and management;
- failure to negotiate a suitable and transparent staffing structure at BRAC; and
- operational matters not being resolved by the applicant in an appropriate, transparent and timely manner.

113 Given the long and escalating history of staff and customer complaints about the applicant's conduct which culminated in August 2009 in an internal investigation and the implementation of the performance management process, Ms Jennings and Ms Konecny considered it was necessary to attend the staff meeting on 23 October 2009 to monitor the situation. Ms Konecny maintained that at this meeting a majority of staff present were highly uncomfortable with the applicant's method of delivery which she described as overly autocratic and directive and when staff unsuccessfully tried to interject on several occasions the applicant actively discouraged feedback. Ms Konecny stated that the atmosphere of the meeting was deteriorating to one of overt hostility to the applicant's communication style and the content of her delivery. Ms Konecny stated that she originally had no intention of closing the meeting but the applicant's conduct at the meeting was inappropriate and she had concerns about the applicant's communication style as a meeting facilitator and her blocking attempts at clarification and feedback by staff. Ms Konecny stated that she had asked Ms Irving earlier that day to obtain advice about the applicant's conduct and after Ms Konecny received a telephone call from Ms Irving she left the room and during a discussion with Ms Irving they agreed that terminating the applicant was appropriate. They reached this conclusion based on the comprehensive process taken to date with respect to assisting the applicant to improve her performance, the lack of improvement in the applicant's behaviour since the commencement of the performance management process, the respondent's duty of care to BRAC's staff and customers in light of the escalating issues and complaints, staff morale deteriorating to the point of a crisis and escalating customer complaints. Ms Konecny decided to close the staff meeting and a meeting was held with the applicant whereby she was terminated on the basis of continuing and escalating unsatisfactory conduct and performance on her part. The applicant then stated that she wanted to see Mr Donohoe which occurred later that afternoon.

114 Ms Konecny stated that the decision to dismiss the applicant resulted from a culmination of a range of factors including the applicant not being willing or able to do the job expected of her, and stakeholder and staff relationships going from bad to worse. Ms Konecny stated that she had spoken many times to the applicant about these issues, staff were leaving and the applicant was getting more and more unpredictable.

115 Ms Konecny believed that the applicant's reinstatement was untenable. Staff retention and the safe and effective running of BRAC would be at risk and the applicant had also denigrated the respondent through the local newspaper. Progress has been made at BRAC since the applicant's departure and the effective performance of the current manager demonstrates that the applicant was unsuitable for the role of Centre Manager of BRAC.

116 Ms Konecny disputed the applicant's claim that she was not the subject of a number of complaints and Ms Konecny maintained that the majority of complaints received at BRAC were about the applicant's conduct. Ms Konecny denied that she harassed the applicant, spoke sharply to her or treated her dismissively and she stated that the applicant was provided with ongoing support and feedback to assist her in changing her management style.

117 Ms Konecny stated that as the applicant was accused of abusing staff and had bullied Mr Logue to the point of resignation she did not believe it appropriate to provide the written complaints made to the respondent to the applicant prior to meeting with her on 7 August 2009 and Ms Konecny disputed that she shouted at or intimidated the applicant during the disciplinary meetings held in August 2009. Ms Konecny disputed that a statement from Ms Tannock-Jones was ever provided by the applicant during the disciplinary process and she denied dismissing the applicant's responses to the complaints made against her. In response to the applicant's claim that she had not been advised that her management style was wanting Ms Konecny stated that the applicant had been given ongoing feedback over a period of ten months in relation to the inappropriateness of her management style. Ms Konecny disputed that the applicant had been employed to "go in hard" and she told the applicant on several occasions to reflect on her management style to no avail and she maintained that as the applicant continued to behave in an unprofessional and unacceptable manner complaints against her escalated. Ms Konecny also stated that Ms Jennings regularly briefed her about the applicant's performance management and the setting of KPIs.

118 Ms Konecny stated that an internal investigation undertaken by the respondent found that Mr Logue was unfairly and harshly treated by the applicant. Ms Konecny described Mr Logue as a good worker and valuable team member and it was therefore appropriate to re-employ him and this was explained to the applicant.

119 Ms Konecny stated that as a result of the applicant's deteriorating conduct over a period of ten months and given the poor relationship between the applicant and staff at BRAC Ms Jennings asked that she attend the staff meeting held on 23 October 2009.

120 Ms Konecny claimed that the applicant was aware of how serious her situation was at BRAC as it had been discussed with her on numerous occasions. Ms Konecny also stated that the respondent's CEO was fully aware of the gravity of the applicant's situation and she stated that she had been delegated by him to terminate the applicant if her conduct failed to improve. Ms Konecny maintained that personal dislike was not a factor in deciding to terminate the applicant and all previous attempts to assist the applicant had failed due to her refusal to accept responsibility for her actions. Escalating damage to BRAC's staff and customers was also a key factor underlying her termination.

121 Ms Konecny stated that Ms Jenny Gray from a local Parents and Citizens Association contacted her in September 2009 to complain about difficulties organising swimming lessons at BRAC. Ms Gray told her that the applicant had refused to accept any other price than $90 per child for lessons and the lessons therefore did not go ahead. Ms Konecny gave evidence that the current Centre Manager is in the process of arranging for these lessons to be conducted.

122 Under cross-examination Ms Konecny stated that the payment of two weeks' pay in lieu of notice took some time to be made to the applicant because of a lengthy dispute over the quantum of the payout due to the applicant and she was unaware of why the applicant had not been paid the two weeks' pay in lieu of notice due to her when she was terminated or soon thereafter.

123 Ms Konecny stated that she was aware of the unsatisfactory performance management process contained in the 2007 Agreement and she agreed that the applicant should have signed the documents generated in relation to this process but she noted that the applicant refused to sign her probationary assessment. Ms Konecny stated that she supported the applicant when she commenced employment with the respondent and mentored her on many occasions but in May/June 2009 their relationship deteriorated. Ms Konecny stated that in February and March 2009 complaints were made against the applicant by the tennis club and complaints were made about the replacement of shade sails, Aqua Lite classes for seniors, netball and football issues. A number of informal staff complaints were also made about the applicant.

124 Ms Konecny maintained that BRAC's previous manager Ms Barton was good at her job and she claimed that BRAC was not in a mess when she ceased employment with the respondent. Ms Konecny stated that Mr McGrath was not experienced enough to deal with the applicant and Ms Konecny denied that nothing was done in relation to his relationship with the applicant until June 2009 as she had regular meetings with Mr McGrath to assist him to deal with the applicant.

125 Ms Konecny agreed that she supported the applicant over the tennis club incident in February 2009 but she stated that it was evident at the time that the applicant's approach to dealing with this matter had made it difficult to resolve the issue in dispute. Ms Konecny stated that during this early period of her employment with the respondent the applicant was counselled and coached about complaints made about her but was not formally disciplined. Ms Konecny disputed that the applicant was being micro managed and she stated that she only became involved in issues concerning the applicant's performance from time to time. Ms Konecny maintained that she took the applicant's responses to complaints against her seriously.

126 Ms Konecny stated that if she had been aware of the statement made by Ms Tannock-Jones' about Mr Logue she would have investigated her comments.

127 Ms Konecny summarised the reasons why the applicant was terminated. Ms Konecny claimed that the applicant bullied and intimidated Mr Logue to such an extent that he resigned and was distressed, the poor treatment of staff including Ms Hennessy, staff complaints made to Ms Jennings including complaints made by Mr Doyle, Ms McDougall, Mr McGrath, Mr Vincent and Mr Chester, user group complaints from the following clubs - boot scooting, netball, soccer, Aqua Lite, squash and basketball, an incident involving children escaping from BRAC's crèche, complaints about swimming lessons, complaints made by the Broome Sports Association about poor access to BRAC as a result of the applicant's management, the applicant's lack of

acknowledgement about changing her style and taking responsibility for her poor management style and the applicant blaming others for her predicament. Ms Konecny also maintained that the applicant's conduct deteriorated after she was issued with a letter of warning. Ms Konecny conceded that complaints made by Mr Doyle and Mr Vincent about the applicant were not raised with her but Ms Konecny stated that she understood the other issues were raised with the applicant prior to her termination. Ms Konecny believed that Ms Jennings raised a complaint made by the boot scooting organisation with the applicant and Ms Konecny stated that Ms Jennings raised the issue of the netball association being able to access courts after not being able to reach agreement with the applicant. Ms Konecny also understood that Ms Jennings discussed the problems the soccer association had with booking venues and a breakdown in communication with the applicant and Ms Konecny stated that the issue of swimming lessons being conducted at BRAC was raised by Ms Jennings with the applicant. Ms Konecny stated that the issues raised by the basketball association and the Broome Sports Association were raised with the applicant by Ms Jennings and Ms Konecny maintained that the themes of these complaints were recurring ones.

128 Ms Konecny stated that a decision had not been made prior to the meeting held on 23 October 2009 to terminate the applicant however given the applicant's conduct at this meeting and legal advice received about terminating the applicant during the meeting this led to the respondent deciding to terminate the applicant that day. Ms Konecny stated that prior to the applicant being terminated she determined that the applicant would be stood down and an investigation into her conduct would take place but as the issues being raised about the applicant were 'extreme' and given that the applicant would not change her behaviour and as BRAC was 'falling apart' it was appropriate to stop the staff meeting on 23 October 2009 and terminate the applicant that day. Ms Konecny stated that she did not anticipate that the meeting that the applicant had on 23 October 2009 with staff would be as acrimonious as it was and that the applicant would conduct herself in an unacceptable and unprofessional manner during this meeting.

129 Ms Jennings gave evidence by way of a witness statement (see Exhibits R4.1 and R4.2). Ms Jennings is the respondent's Manager Community Development and she has held this position since 18 August 2009. In this role she was the applicant's direct line manager and she also performance managed the applicant. Once this task was completed the applicant would have been managed by the Manager Recreation Services.

130 Ms Jennings had seven meetings with the applicant between 13 August 2009 and 23 October 2009 and during these meetings discussions took place about the management of BRAC and support was given to the applicant. Ms Jennings also had a number of additional contacts with the applicant by telephone and email.

131 Ms Jennings gave the following evidence about what transpired at the performance management meetings she had with the applicant from 13 August 2009 onwards based on notes she made around the time of her discussions with the applicant. On 26 August 2009 Ms Jennings had a meeting with the applicant and they discussed the performance management process. When the applicant was asked to provide details of who would replace her when she was on leave commencing 1 October 2009 the applicant complained that she should not have to "replace herself". The applicant was asked to prepare a proposal for the next meeting on 3 September 2009 about expenditure on playground equipment which had been funded by the relocation of a mobile phone tower however this was completed three weeks late, the applicant's proposal for a staffing policy was discussed and she was asked to prepare a draft to begin this process however this was not done and the applicant complained to Ms Jennings on three occasions about why this needed to be completed. The applicant was asked to arrange a focus group meeting about the use of the football ovals for next season and to look at training issues with respect to BRAC's Information Technology ("IT") programme but she did not complete these tasks. The applicant did not supply relevant information about the Horizon Power proposal to Ms Jennings prior to a meeting with Horizon Power on 14 September 2009 and when the applicant suggested that the Manager of Recreation Services may have this information it was discovered that he did not. Even though the applicant claimed that she had completed three quarters of BRAC's marketing plan no evidence was provided that this plan had been commenced.

132 Ms Jennings gave evidence that at the meeting held on 3 September 2009 the issue of BRAC's IT program was raised again however, this task was not completed by the applicant as at 23 October 2009, the issue of organising a meeting with the football codes was again raised and the applicant was told that it needed to occur prior to the end of September 2009 but this still had not happened as at the applicant's termination. At this meeting the applicant also told her that her management decisions were being questioned by staff and Ms Jennings told her that this issue could be approached in the staffing policy the applicant was preparing.

133 Ms Jennings stated that at the meeting held on 10 September 2009 she again requested information about a proposed playground grant raised at the meeting held on 26 August 2009 but this was not supplied by the applicant. KPIs for the applicant were discussed and the applicant was given the opportunity to prepare them and she agreed to have them ready for the next meeting however these were not presented until three weeks later. The marketing plan was again raised and the applicant re-iterated that it was three quarters completed however it was never received by Ms Jennings. Ms Jennings stated that the applicant was asked to forward to her monthly reports of BRAC's activities however she never received these reports. Even though the applicant was instructed to conduct focus group meetings with stake holders, and she undertook to do so, this did not occur and a training programme the applicant was required to complete in order to ensure budget allocation for the training was also not finished. BRAC's IT program was again raised with the applicant and she did not arrange to complete a performance appraisal of a BRAC employee.

134 Ms Jennings gave evidence that after a meeting held on 14 September 2009 the applicant undertook to prepare a Council agenda item which was due on 15 October 2009 for the Horizon Energy proposal and even though this item was completed by the applicant it was inadequate and as a result a decision was made by Ms Jennings to withdraw this item from the Council's agenda which resulted in the applicant seeking a meeting with the CEO. Subsequently the applicant agreed that the item should have been withdrawn from the agenda. Ms Jennings stated that after additional information was provided by her the agenda item went to Council and was adopted.

135 Ms Jennings stated that at a meeting held on 30 September 2009 Ms Irving and Ms Jennings had a discussion with the applicant about staffing. Ms Jennings stated that one acting duty manager was considering leaving because of inadequate pay when she could have been offered penalty rates by working weekends and it was noted at the meeting that the applicant was regularly placing herself on the roster at weekends and receiving a higher penalty payment and not offering other staff this opportunity. The applicant was also engaging external staff and not offering acting positions to current staff and she had not advertised a duty manager's position.

136 Ms Jennings gave evidence that at the meeting held on 1 October 2009 with the applicant a discussion took place about a crèche incident when two children of two or three years of age had escaped from the crèche and were leaving BRAC when spotted by a parent. Ms Jennings stated that this was a serious occupational health and safety issue that needed investigation and corrective actions put into place however the applicant did not see this issue as being important and she did not see it as an occupational health and safety issue. The applicant was upset that Ms Hennessy had emailed her about the incident and she saw this as a direct challenge to her personally and made this the main issue not the incident. Ms Jennings requested that an account of the incident be prepared by all staff involved and after the applicant said that staff would not do so, Ms Jennings re-emphasised the importance of the incident and the applicant reluctantly agreed to prepare an incident report and seek reports from staff. At this meeting the applicant complained about being given time in lieu and not receiving payment for overtime.

137 Ms Jennings gave evidence that at a meeting held at the request of Ms Hennessy on 7 October 2009, Ms Hennessy expressed her dissatisfaction about the crèche incident and how upset she was as she encouraged parents to use the crèche. Ms Hennessy also raised a previous complaint about the applicant not allowing fit ball classes to be run during the dry season. Ms Jennings met with Ms Georgie Barnes, a BRAC customer on this date and she raised issues about the poor management of BRAC in particular the lack of staff to serve customers. Ms Jennings had a meeting with Ms Rocinda Thomas, a casual vacation swimming instructor who told Ms Jennings that the applicant had told her that the crèche facility would not continue as it was a waste of money and she also raised concerns about the crèche being full or cancelled without notice and about fit ball classes not being run.

138 Ms Jennings stated that when she reviewed the staff reports about the crèche incident it appeared that the crèche worker had not received an appropriate induction.

139 Ms Jennings stated that on 8 October 2009 she met Mr Juan Johnson who raised numerous issues about netball bookings which included, access to courts, maintenance, the need for more courts, conflicts with bookings and basketball, lack of discussion from BRAC about bookings and he stated that when he spoke to the applicant she raised internal problems which he did not want to hear about.

140 On 9 October 2009 Ms Jennings met with BRAC's Customer Services Supervisor Ms Taylor who raised an issue of the applicant knowing about swimming club and water polo bookings clashing in September and Ms Taylor had only recently became aware of this issue. Ms Taylor said that she could not work at BRAC much longer as she claimed that staff were being bullied by the applicant, the applicant was rude to staff and yelled at them, the applicant had not replaced the person working in the kiosk so other staff had to fill in, restrictions were placed on stock replacement and it was difficult for Ms Taylor to undertake banking given the roster that she had and BRAC's work vehicle was not available at times to undertake the banking.

141 When Ms Jennings met with the applicant on 15 October 2009 she asked her why the Horizon Power Council agenda item had not been completed as it was due that day and Ms Jennings gave evidence that this item was submitted later that day however she withdrew it from the agenda as it was totally inadequate. Ms Jennings stated that the crèche was still turning away children as there was only one attendant and she asked the applicant to prepare a Child Care policy for the November Council meeting however this did not occur. Updates were needed for staff job descriptions and the applicant was asked to document the business reasons for restructuring aqua aerobics but did not do so. Even though the applicant provided KPIs to Ms Jennings no time lines were included as originally discussed.

142 On 19 October 2009 Mr Smith, a lifeguard and acting duty manager at BRAC met with Ms Jennings and he told her that even though he requested duty manager weekend shifts the applicant had undertaken these shifts since July 2009. Mr Smith maintained that the applicant verbally offered him employment as a lifeguard and duty manager however this did not eventuate and he claimed that the applicant was argumentative and would not listen to his concerns about health and safety issues. Mr Smith also believed that staff were not receiving enough training.

143 On 19 October 2009 Ms Jennings had a meeting with the Broome Sports Association and she was advised that it had been formed because of problems sporting clubs were having with the applicant. Issues included the booking of ovals and clubs having had booking requests in for three months for the next season but not getting a response about these bookings from the applicant.

144 At a meeting held on 21 October 2009 Ms Jennings discussed the applicant's proposal to re-write job descriptions of staff at BRAC and she asked the applicant to provide copies of staff contracts and to ask them to write a draft of their job descriptions but the applicant told Ms Jennings it was up to her to decide on the content of staff job descriptions. Ms Jennings stated that at this meeting the applicant talked about getting rid of old staff.

145 On 22 October 2009 Ms Jennings received a complaint from the boot scooters association which was upset at the way in which it was being treated by the applicant and new requirements put on them to book and pay for a room to use and the necessity to gain their own insurance and the association claimed that there was no opportunity to negotiate with the applicant over this issue.

146 Between 20 October 2009 and 23 October 2009 Ms Jennings received written complaints about the applicant from Mr Doyle, Mr Vincent, the respondent's Administration and Project Officer Ms Sally Reynolds who passed on the boot scooting complaint and BRAC's Program Development Officer, Mr Chester. Mr Chester complained that the applicant would not discuss programs and he said that she was making the workplace difficult to work in, morale amongst staff was low and staff

were not being included in decision making. He also stated that the running of BRAC seemed disorganised and this was resulting in stressed staff and unhappy customers.

147 Ms Jennings stated that staff performance reviews during the period January 2009 to October 2009 for 16 employees which were to be undertaken by the applicant were overdue and Ms Jennings maintained that she responded to the applicant's concerns about staff by deciding to conduct a training course for BRAC's staff based on the respondent's code of conduct.

148 Ms Jennings gave evidence that at the staff meeting conducted by the applicant on 23 October 2009 which she attended, staff were very agitated and the applicant was abrupt and staff members "appeared ready to explode or walk out". Ms Jennings believed that it should not have been a surprise to the applicant that she attended the staff meeting on 23 October 2009 as Ms Tannock-Jones was aware that she and Ms Konecny were to attend this meeting. Ms Jennings denied that she made any phone calls during this meeting.

149 Ms Jennings denied that she initiated conversations about the applicant's management of BRAC and maintained that staff and customers contacted her to complain about the applicant. Ms Jennings stated that after the applicant complained to Ms Jennings that she did not receive any support from the respondent she pointed to her involvement and support however the applicant accused her of micromanaging her. Ms Jennings maintained that during some conversations she had with the applicant they discussed targeted strategic approaches to ensuring that BRAC worked effectively.

150 Ms Jennings gave evidence that when she became the applicant's line manger the applicant was given the opportunity to prepare a first draft of her KPIs and she stated that the applicant provided this draft two weeks late. Ms Jennings stated that she was working on this document when the applicant was terminated. Ms Jennings maintained that she withdrew the Horizon Power Council agenda item not Ms Konecny as the quality of the information contained in the item was poor. Ms Jennings denied that she ever demanded that the applicant employ Mr Logue "without question" and maintained that she suggested to the applicant that she look at employing Mr Logue.

151 Ms Jennings claimed that the applicant did not deal with a number of dangerous situations in her role as Centre Manager of BRAC, for example, she retained an old fridge which shorted out on a couple of occasions and she claimed that the applicant did not approve repairs and maintenance requests so it looked like she was saving on the budget, to the detriment of BRAC.

152 Ms Jennings stated that since the applicant had ceased employment with the respondent both customers and staff have told her that the atmosphere at BRAC is more friendly and staff are working effectively as a team. An extra crèche employee has been employed given the demand and negotiations are now in place to recommence swimming lessons at BRAC for primary school students.

153 Under cross-examination Ms Jennings stated that a report about the crèche incident completed by the applicant was only generated after she requested her to do so and Ms Jennings reiterated that she believed that the applicant did not take this issue seriously until Ms Jennings asked the applicant for information about the incident. Ms Jennings agreed that the crèche was not located in a purpose built centre.

154 Ms Jennings conceded that she did not raise a number of the complaints made to her about the applicant with her and Ms Jennings stated that the issues raised by Mr Smith, Ms Thomas and Ms Taylor were not raised with the applicant because these employees had asked that their complaints be kept confidential. Ms Jennings recalled that she spoke to the applicant about the issues raised by Mr Johnson but she did not indicate this in her notes and Ms Jennings stated that she anticipated that she would be dealing with all of the complaints raised with her with the applicant after staff had received training in the respondent's code of conduct. Ms Jennings could not recall if she discussed the concerns raised with her by Ms Barnes with the applicant and she agreed that she did not discuss the issues raised by Ms Hennessy at the meeting held on 7 October 2009 with the applicant.

155 Ms Jennings agreed that Mr Winfield told her that Ms Hennessy had denigrated the applicant's management of BRAC over the PA system at the pool and she stated that she tried to contact Ms Hennessy twice over this incident however she was not on shift at the time. Ms Jennings considered this to be a serious issue.

156 Ms Jennings agreed that Mr Winfield was supposed to assist the applicant to complete the Horizon Power document whilst the applicant was on leave but did not do so but Ms Jennings said that it only took her three hours to complete the additional information required to submit the application.

157 Ms Jennings stated that she was unaware of the specifics of the issues between Mr Logue and the applicant which led to the cessation of his employment with the respondent and Ms Jennings understood that when Mr Logue re-applied for work at BRAC it was as a pool attendant and he therefore would not be working directly with the applicant.

158 Ms Jennings stated that she did not raise the boot scooters' complaint with the applicant because she had no time to investigate this complaint which was only raised with her the day before the applicant was terminated. Ms Jennings agreed that the complaint made by Mr Vincent was not raised with the applicant but Ms Jennings maintained that the complaint by the soccer club was raised with the applicant on a couple of occasions and she also discussed the booking of swimming lessons with the applicant as the applicant raised this issue with her. Ms Jennings stated that she received the complaints by the netball club via the applicant and she was unaware if these issues were resolved.

159 Ms Jennings stated that she gave information about the applicant to the respondent's directorate in the lead up to the respondent's decision to terminate the applicant and Ms Jennings stated that many issues were discussed with the applicant and others were not but she maintained that a number of issues concerning the applicant's performance were ongoing.

160 Mr McGrath gave evidence by way of a witness statement (see Exhibits R6.1 and R6.2). Mr McGrath was appointed as the respondent's Manager Recreation Services on 18 November 2008 and prior to that he was the respondent's first Sport and Recreation Development Club Officer when he commenced his position on 30 April 2007. Mr McGrath has been involved in the sport and recreation industry in both professional and voluntary positions for more than 30 years.

161 Mr McGrath ensured that the applicant settled in when she first arrived in Broome in the middle of December 2008. Mr McGrath gave evidence that he went through an induction process with the applicant which commenced on 15 December 2008 and continued into January 2009. Mr McGrath stated that he was the applicant's supervisor from when she commenced at BRAC until 30 July 2009 when he commenced a period of leave. Mr McGrath said during the period he supervised the applicant the main issues of concern related to her management and communication style and the way she interacted with staff members and users of the BRAC facility and he stated that a number of issues arose in relation to how she approached and liaised with staff members, her colleagues, supervisors and community users at BRAC.

162 Mr McGrath said that he was concerned about the applicant rostering late shifts as punishment to staff so he raised this issue with the applicant. Mr McGrath also spoke to the applicant about the budget impact of rostering herself on weekends instead of other staff and receiving higher overtime rates and Mr McGrath maintained that the applicant could have dealt with this issue by employing another staff member.

163 Mr McGrath gave evidence about an incident concerning the Broome Tennis Club but as this was not relied upon by the respondent with respect to its decision to terminate the applicant there is no need to go to this evidence.

164 Mr McGrath maintained that his relationship with the applicant deteriorated because she did not liked being questioned about the way in which she approached issues and he stated that when responding to him she reacted aggressively. Mr McGrath said he was very careful in the way in which he wrote to the applicant and he denied that he was harassing her. Mr McGrath stated that the applicant sometimes went above him by raising issues with his managers, for example when the applicant did not like his request to put a survey in a certain way she raised this issue with Ms Konecny.

165 Mr McGrath maintained that the reason the applicant received a warning on 23 July 2009 resulted from internal staff and external user dissatisfaction.

166 Mr McGrath gave evidence about his request for staff rosters from Mr Logue towards the end of July 2009 when the applicant was on sick leave. Mr McGrath stated that he wanted to ensure that sufficient staff were available on the roster and he understood that the applicant contacted Mr Logue and asked him not to give that information to him. Mr McGrath said that Mr Logue rang him on the night of Wednesday 29 July 2009 and told him that he had been abused by the applicant and he was resigning. When Mr McGrath returned from leave on 17 August 2009 he was informed that Ms Jennings was now managing the applicant.

167 Mr McGrath maintains that there would be difficulties if the applicant was reinstated. He stated that the staff culture and enthusiasm at BRAC is now different and he believes some staff members and user groups would be concerned if the applicant returned to BRAC. Mr McGrath stated that the applicant was vindictive if a staff member disagreed with her.

168 Under cross-examination Mr McGrath conceded that he had difficulties performance managing the applicant and he acknowledged that because his probation review of the applicant was late he was given a verbal warning. Mr McGrath maintained that the applicant was given an appropriate induction and he stated that he did not tell the applicant that it was her role to play 'good cop bad cop' with some of the user groups. Mr McGrath disagreed that BRAC's policies and procedures were made on the run and he stated that they were in place and had been developed over time.

169 In response to the applicant's claim that he met too frequently with her Mr McGrath stated that it was useful to do so initially to assist the applicant. Mr McGrath maintained that the applicant's and Mr Doyle's Job Description Forms were clear about their roles in relation to user groups and he denied that Mr Doyle was being approached by user groups instead of the applicant.

170 Ms McDougall gave evidence by way of a witness statement (see Exhibits R7.1 and R7.2). Ms McDougall is employed as a duty manager by the respondent and she has worked at BRAC since 2004. Ms McDougall stated that she found the applicant difficult to work with as she wanted things done her way, she was not willing to listen to how things previously operated at BRAC and changes made by the applicant were not discussed with staff. Ms McDougall also claimed that the applicant had slammed the door "in my face" and had hung up the telephone on her.

171 Ms McDougall stated that the applicant put in place a new roster which prevented her from working when school programs were running which affected her role as a swim school programmer. Ms McDougall claimed that she was put on permanent night shifts from 1.00 pm to 9.30 pm as a result of clashing with the applicant.

172 As Ms McDougall had ongoing concerns about the applicant she detailed them in a letter to Ms Konecny in August 2009 (see Exhibit R17 document 46 dated 3 August 2009).

173 Ms McDougall stated that at the staff meeting she attended on 23 October 2009 duty managers were unhappy by this time as everything staff did was being questioned by the applicant. Ms McDougall stated that during the meeting the applicant went through the staffing structure and was "a bit negative towards staff".

174 Ms McDougall gave evidence that since the applicant has left BRAC a number of members of the public have returned to using BRAC's facilities and complaints about BRAC have stopped. Ms McDougall maintained that staff at BRAC have bonded as a result and BRAC is running a lot more smoothly, a lot more is getting done and programs that the applicant had stopped were returning. Ms McDougall stated that even though she enjoyed working at BRAC she would resign if the applicant returned to work at BRAC.

175 Ms McDougall stated that from time to time she raised issues about the applicant with Ms Konecny because she could not discuss them with the applicant. Ms McDougall stated that she applied for leave in the normal manner and gave eight weeks' notice of her request.

176 Ms McDougall gave evidence that she was involved in the applicant's recruitment interview and she stated that she did not recall any discussion about the applicant being given a specific mandate for change.

177 Under cross-examination Ms McDougall stated that whilst she did not mind working the night shift she did not want to do so continuously. Ms McDougall gave evidence that she was not solicited to make a written complaint about the applicant and Ms McDougall stated that she went to see Ms Konecny after her leave application was refused by the applicant. Ms McDougall stated that at the time she was unaware that Mr McGrath was the applicant's line manager. Ms McDougall disputed that the running of BRAC was disorganised as at December 2008. Ms McDougall stated that boot scooters have now returned to use BRAC since the applicant left and she was unaware if the reason they left was because they had no public liability insurance.

178 Ms Ingrid Bishop gave evidence by way of a witness statement (see Exhibit R8). Ms Bishop is employed as the respondent's Director Corporate Services and she has been working for the respondent since May 2007. Ms Bishop stated that despite being asked on numerous occasions the applicant did not provide a marketing plan at any time prior to her termination. Ms Bishop stated that BRAC's financial reports during the period the applicant was employed did not indicate any improvement in BRAC's financial position and she stated that during this period there was a reduction in income and an increase in expenditure at BRAC.

179 Mr Logue gave evidence by way of a witness statement (see Exhibits R10.1 and 10.2). Mr Logue was employed as a casual duty manager by the respondent in May 2009 working 20 to 25 hours a week. Mr Logue stated that the applicant told him that Mr McGrath and Ms McDougall were causing trouble for her however he tried not to get involved. Mr Logue stated that the applicant told him to always roster Ms McDougall on the evening shift and he stated that this was the applicant's way of trying to get rid of someone. When the applicant took a week of sick leave in July 2009 Mr Logue was left to look after BRAC during this period and when Mr McGrath asked him for a copy of the staff roster for this period he raised this with the applicant when she contacted him. During this discussion the applicant accused Mr McGrath of micromanaging her and told Mr Logue that he should not be talking to him and Mr Logue said he was trying to keep the peace and not trying to take sides. Mr Logue later had a conversation with Ms Konecny and when the applicant found out about it she told him not to speak to other staff and she told him that if he kept contacting other staff it would not look good for him and she told him that people were out to get her and that he was being disloyal to her. Mr Logue told the applicant that he was not prepared to be caught in the middle and as he was fed up with his treatment he resigned. Subsequent to his resignation he wrote out a statement detailing the reasons for his resignation (see Exhibit R17 document 45 dated 31 July 2009).

180 Mr Logue stated that he returned to work with the respondent once the applicant left as he knew most of the issues would not be there any more and he said that if the applicant was reinstated there would be no staff left and he would not continue to work for the respondent. Mr Logue stated that when he applied to recommence employment with the respondent he applied for lifeguard duties, not a duty manager position, which involved little contact with the applicant.

181 Mr Chester gave evidence by way of a witness statement (see Exhibits R 11.1 and 11.2). Mr Chester is BRAC's Program Development Officer and he has worked in this role with the respondent for four years. The applicant was his direct manager. Mr Chester stated that when he returned from six months leave without pay, working at BRAC was becoming very stressful as tasks were moved from one person to another, his authority had been removed and the applicant was often not around. Mr Chester stated that the applicant was disorganised and "things were not getting done" and it was his view that BRAC was on the verge of falling apart as there were many complaints from staff and customers. Mr Chester maintained that under the applicant invoicing had fallen behind as BRAC was low on staff and he claimed that if a workable roster was put in place which allowed employees time to do the invoicing then this issue would not have arisen. Mr Chester also maintained that problems relating to customer service were related to high staff turnover.

182 Mr Chester stated that the conduct of the staff meeting held on 23 October 2009 by the applicant was offensive.

183 Mr Chester believed that his future at BRAC was limited as a result of the applicant being in charge.

184 Mr Chester stated that since the applicant has ceased working at BRAC it is working better and morale was high. The new manager was approachable and Mr Chester said that employees work better as a team and he feels that he can be a team player.

185 Mr Chester maintained that all banking discrepancies were reviewed and most of them resolved. Mr Chester claimed that BRAC's start and finish times had been in place for several years and if the applicant had taken the time to ask and listen this would not have been an issue. Mr Chester maintained that the applicant took little time to consider the needs of customers or staff members and she made the workplace a difficult place for hard working staff members as she refused to listen to staff members and showed little respect towards them.

186 Under cross-examination Mr Chester confirmed that as he was on leave from March 2009 to 5 October 2009 and also for a period of three weeks in January/February 2009 he was away for most of the time the applicant worked at BRAC. Mr Chester stated that at the staff meeting held on 23 October 2009 the applicant was not yelling at staff or swearing at them and he described her as being direct and he agreed that she was not being offensive to anyone directly.

187 Mr Doyle gave evidence by way of a witness statement (see Exhibit R12). Mr Doyle is employed by the respondent as the Sport and Recreation Club Development Officer and he has held this position for almost a year. In this role he assists sporting clubs with their development to help them remain sustainable and to ensure their volunteers are supported and he is a link between the clubs and the respondent at the grass roots level. As a result there is an important communication relationship between his position and BRAC's Centre Manager.

188 Mr Doyle stated that he would liaise with the applicant on issues relevant to BRAC but he stated that there was a reluctance on the applicant's part to accept offers put to her by him. Mr Doyle maintained that the applicant handled issues poorly for example the replacement of soccer goals in mid 2009 and the applicant was inflexible with respect to the timing of the women's soccer games in July 2009. Mr Doyle claimed that the applicant mishandled this issue but rather than admit she may have been wrong about how she handled this she made excuses and blamed others. As a result of the applicant's behaviour Mr Doyle used email communication to record his dealings with the applicant. Mr Doyle stated that it was difficult to obtain a

season schedule for clubs and the public to access information of what sports were on from the applicant and he stated that it was frustrating liaising with the applicant on these issues.

189 Mr Doyle stated that at a Broome Sports Association meeting he attended in September 2009 a number of issues were raised involving BRAC including a complaint the netball association had with the applicant's attitude. Mr Doyle stated that the applicant quickly developed a reputation in the sporting community for being confrontational however the applicant saw herself as being a victim and thought that everyone was against her and she refused to take responsibility for her actions. Mr Doyle said the sporting clubs had no trust in the applicant and even though he offered her assistance she would not take up this offer.

190 Mr Doyle gave evidence about a clash between the water polo and the swimming club because the applicant had booked the water polo club to use some of the swimming club's lanes. When Mr Doyle raised this issue with the applicant and asked if it was possible for him to be made aware of any club related issues the applicant refused to do this. Mr Doyle stated that on 16 October 2009 the applicant told him that he was getting too involved in matters involving clubs and Mr Doyle found this absurd given that his role was Club Development Officer and he was trying to resolve club related issues quickly and simply. Mr Doyle stated that since the applicant has left BRAC he has found it refreshing to deal with BRAC's new manager.

191 Under cross-examination Mr Doyle stated that towards the end of the applicant's employment with the respondent their roles had become blurred and this led to friction. Mr Doyle conceded that the applicant's emails to him were not offensive.

192 Mr Aaron Bell gave evidence by way of a witness statement (see Exhibits R13.1 and R13.2). Mr Bell is the president of the Broome Tennis Club and he maintained that the applicant had shown disrespect to the Broome Tennis Club as a user group of BRAC and he described the applicant as behaving unacceptably towards the Broome Tennis Club and that she lacked management skills. Mr Bell maintained that the Broome Tennis Club, on whose behalf he gave evidence, is relieved that the applicant is no longer involved with the management at BRAC.

193 Mr Vincent gave evidence by way of a witness statement (see Exhibit R14). Mr Vincent is the respondent's Events and Sponsorship Coordinator and he commenced employment in this role on 12 October 2009. Mr Vincent had a meeting with the applicant in the week after he commenced employment and he described her as being negative during this meeting. The applicant complained that she was not getting any support from her director or from the organisation, she stated that she did not know if the directorate knew what it was doing and she told him that the directorate did not have a clue about what is going on at BRAC and no clue about what it takes to run a recreation and aquatic centre. The applicant gave him examples about how she was trying to bring about change but was not getting support from management or the CEO. Mr Vincent gained the impression that she felt that everyone around her was incompetent and did not know what they were doing and Mr Vincent stated that he was surprised by what he described as a rant from the applicant. He stated that the applicant maintained that she did not have support from staff and she claimed that staff were actively working against her and undermining her and she believed that they were not performing their duties well deliberately so that it would look bad for her in front of her managers and the community. The applicant also stated that she had issues with user groups and she listed a number of groups which were regular problems and were undermining her to try and get rid of her including the swimming and aerobics clubs. When the conversation turned to the purpose of his meeting with the applicant and after Mr Vincent explained his role he said that he received a negative response from her about completing this role. Mr Vincent stated that the applicant was not supportive of a streamlined booking system which he wanted to implement and the applicant told him that he could not do this as there were different computer systems at BRAC and the Shire. Mr Vincent said that is the only time he met with the applicant. Mr Vincent said he sent an email to Ms Konecny about his meeting with the applicant as she and Ms Jennings had asked him to keep them updated about how his project was being received throughout the organisation (see Exhibit R17 document 64 dated 29 October 2009). Mr Vincent said he continues to deal with staff at BRAC but has not received anything like the reaction the applicant described he would receive in his meeting with her. Mr Vincent stated that if the applicant returned to work with the respondent it would be difficult to introduce new event systems, which is part of his role, and he stated that he would prefer not to work with someone with her oppositional and aggressive management style.

194 Ms Taylor gave evidence by way of a witness statement (see Exhibits R15.1 and R15.2). Ms Taylor was the BRAC Customer Services Supervisor for two years and she left her employment with the respondent in the middle of November 2009. Ms Taylor described the applicant as difficult to work with and that she made "everything hard and took all of the responsibility from people", she described the applicant as being disorganised, she took a long time to get things done and she had a habit of doing back flips and she would tell you to do something and then later tell you that was not what she said. Ms Taylor maintained that as everything had to go through the applicant and she was so disorganised a lot of things did not get done.

195 In October 2009, whilst the applicant was on leave, Ms Taylor raised the following issues with Ms Jennings:

- swimming club and water polo bookings clashing;
- workplace bullying by the applicant;
- the applicant not replacing a kiosk person so Ms Taylor was in the kiosk all week; and
- restrictions the applicant placed on ordering stock made a simple task extremely difficult.

196 Ms Taylor stated that she was concerned about how the applicant treated staff and she stated that she was rude and BRAC was not an enjoyable place to work and she maintained that she could not trust the applicant to tell the truth and that she would lie or stretch the truth to cover her back. Ms Taylor gave evidence that at the staff meeting held on 23 October 2009 the applicant seemed to be putting staff down and any question raised was ignored by her or brushed aside. Ms Taylor stated that her job at BRAC had changed a lot and it had been a difficult year for her and Ms Taylor stated that as a result of the additional work load given to her by the applicant and her removal from the front desk part-time staff were not given the support they required and customer service declined.

197 Mr Ben Holden gave evidence by way of a witness statement (see Exhibit R16). Mr Holden is currently the Acting Centre Manager of BRAC. Mr Holden stated that after he arrived he met BRAC staff and sporting clubs and he said it became evident from these meetings that there was a fair bit of 'bad blood' against BRAC and how it had been managed in the previous 12 months. Mr Holden gave evidence that he has changed the organisational structure at BRAC and staff numbers have been reduced. He has also made essential equipment purchases that had not been made.

198 Ms Hennessy gave evidence by way of a witness statement (see Exhibit R5.1 and R5.2). Ms Hennessy has worked for the respondent as an aqua aerobics instructor since the beginning of 2007. Ms Hennessy maintained that the applicant was disorganised and there was a lack of communication between herself and staff and she was not helpful with respect to operational matters. Ms Hennessy cited the applicant's failure to notify aqua instructors that she had sent the portable music/microphone system away to be repaired and did not organise a replacement. Ms Hennessy maintained that the applicant was inflexible and she gave by way of example when aqua classes were cancelled Ms Hennessy offered to undertake land based fit ball classes as an alternative but the applicant refused to allow these classes to be run.

199 Ms Hennessy stated that under the applicant's leadership staff morale was low, staff had responsibilities removed from them and the day to day running of BRAC was not working. Ms Hennessy stated that the applicant talked about making changes but she could not get the basics in place and staff were disillusioned. In July 2009 Ms Hennessy arranged to meet with Ms Konecny and Mr McGrath to discuss her concerns about the applicant as she did not want to put her concerns in writing but after this meeting she was asked to detail them in writing which she did (see Exhibit R17 document 47). Ms Konecny told her at the time that the respondent was working with the applicant to sort things out.

200 Ms Hennessy stated that she had recommended that mothers in her classes use BRAC's crèche and she was embarrassed by this when two children escaped from the crèche. Ms Hennessy maintained that she did not have a vendetta against the applicant but she was angry with her as a result of the crèche incident and the applicant taking so long to deal with this issue.

201 Ms Hennessy stated that since the applicant has ceased working at BRAC staff are happier, they have direction in their jobs and duty managers are now empowered and are involved in planning. Ms Hennessy stated that she would no longer work at BRAC if the applicant was reinstated. Ms Hennessy denied that she lodged a complaint as she was not able to undertake additional classes and she maintained that it was at the applicant's initiative that extra classes were put on.

202 Under cross-examination Ms Hennessy confirmed that she was not an employee of the respondent but a contractor. Ms Hennessy stated that she was unaware how many times the music system had been fixed and she stated that it was only partially fixed as at February 2010. When it was put to Ms Hennessy that she used BRAC's PA system to suggest people should complain to Ms Jennings about the applicant Ms Hennessy stated that she suggested to people that if they had any issues that they needed to direct them to BRAC management she could not recall a specific occasion that she used the PA system to do this but she said that it is possible that she did so as it would be in her nature to do something like this. Ms Hennessy maintained that she was not seeking to undertake additional classes and she had in fact reduced the number of classes she was taking after her second child was born in 2009.

Applicant's submissions

203 The applicant maintains that she was unfairly dismissed when she was terminated on 23 October 2009 (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 and *Shire of Esperance v Mouritz* [op cit]). The applicant also argues that she was summarily terminated as she was not given notice of her termination and she was not paid two weeks' pay in lieu of notice until two months after her termination (see *Thomas Howell v Barminco Pty Ltd* [2002] 82 WAIG 2528 at 2533; *Sanders v Snell [1998] HCA 64 at [16]*).

204 The applicant argues that when an employer summarily dismisses an employee it bears the burden of proof to establish that summary dismissal was warranted due to misconduct and the applicant claims that a dismissal for poor performance would not amount to a dismissal for misconduct. The applicant argues that as the respondent breached the terms of the 2007 Agreement with respect to the management of the applicant's alleged unsatisfactory performance this contributed to the unfairness of her termination. Specifically, the applicant argues that the respondent did not comply with a number of the provisions of Clause 17.6 – Management of Unsatisfactory Performance in the 2007 Agreement when conducting the applicant's performance management process. The applicant also rejects the respondent's claim that her actions warranted being subject to a performance management process but even when the respondent endeavoured to do this there was no end date to this process. The applicant argues that a proper performance management process never took place as the only issues Ms Jennings raised with her at meetings were operational matters and not complaints. Furthermore there were options available to the respondent apart from terminating the applicant which included standing the applicant down whilst an investigation into her performance took place or extending her performance management process. The applicant also argues that during the applicant's disciplinary process Ms Irving and Ms Konecny were biased against her as confirmed by the evidence of Mr Allen.

205 The applicant maintains that issues of significance to take into account with respect to her termination include when the complaints were made against her, the purpose for which she was hired, the resistance she encountered from user groups when putting that purpose into effect, the relationship between the applicant and the entirety of the user groups at BRAC and the culture in place at BRAC when the applicant arrived.

206 The applicant claims her dismissal was also unfair for the following reasons:

- the failure to accord the applicant procedural fairness during the disciplinary process;
- during the disciplinary process the applicant's case not being given proper weight;
- the lack of detail in the complaints made against the applicant;
- the applicant was employed because of her particular attitude and management style;

- the applicant was endeavouring to overcome numerous accountability and basic procedural issues with respect to BRAC's practices;
- the applicant was mismanaged by her immediate line manager who was inexperienced;
- the applicant's other line managers, Ms Konecny and Ms Jennings, were not experienced in or familiar with the running of a leisure facility;
- the applicant repeatedly sought assistance with respect to her role as Centre Manager of BRAC but received none;
- some alleged complaints occurred as a direct result of instructions given to the applicant by her line manager;
- Broome Tennis Club was the only user group submitting sustained complaints against the applicant and the respondent knew it had been causing trouble for BRAC for many years. Even though over 20 user groups used BRAC only two groups gave direct evidence about issues they had with the applicant and even though other organisations made complaints these only constituted a small minority of user groups. Furthermore, Mr McGrath did not give the applicant proper instructions on how to handle user groups;
- many of the complaints made against the applicant were either not raised with nor resolved with the applicant at the time;
- the applicant was the subject of hypocritical behaviour by her managers; on one hand the applicant was criticised for taking her concerns to persons higher than her immediate line managers and on the other hand, she was subjected to complaints from staff immediately below her which were not brought to her first;
- the applicant was subject to resistance and interference in her duties, to the extent of micromanagement from individuals who did not have that level of authority or who otherwise did not have the requisite experience to properly manage her;
- by the time of her dismissal the applicant was in fear of her line managers, in particular Ms Konecny;
- both Ms Konecny and Ms Irving had become aggressive towards the applicant through the course of the disciplinary proceedings against the applicant;
- Mr Donohoe had given an undertaking that if proper processes were not followed with respect to the applicant's termination he would reinstate the applicant with an apology and the investigation he promised to undertake did not occur;
- the applicant disputes the respondent's claim that she is the common denominator with respect to the complaints made about BRAC since she was employed by the respondent and her alleged poor performance was not raised as a reason for termination; and
- the applicant refutes the respondent's assertion that her probation formed the initial part of her performance management disciplinary review and the applicant disputes that the Broome Sports Association was set up to deal with complaints arising from the applicant's handling of BRAC.

207 The applicant maintains that she gave her evidence honestly, fairly and accurately, she confirmed she was not autocratic, she was employed to do a particular job and tried to do so to the best of her ability and in doing so she had no support from her managers and the applicant argues that much of the evidence given by the applicant is not disputed by the respondent. The applicant argues that the evidence she gave should be preferred to the evidence given by the respondent's witnesses where there is any inconsistency as the applicant's evidence was direct, she established facts, she provided clear justifications for her actions and her evidence was supported by documentation provided by her and the respondent. The applicant argues that witnesses who gave evidence on her behalf did not have any self interest and where relevant corroborated the applicant's evidence and their evidence was given honestly, it was not exaggerated and it was accurate. In particular the applicant argues that weight should be given to the evidence of Mr Allen who was unbiased and he made accurate observations on events outside his involvement, Mr Farmer was impartial and Mr Jackson was experienced and involved in the decision to hire the applicant. Ms Tannock-Jones remains as an employee at BRAC and is in a position to speak with some authority as to the issues relevant to the applicant's employment.

208 The applicant maintains there was no evidence that at the meeting the applicant held with staff members on the day she was terminated which was attended by Ms Jennings and Ms Konecny that she had bullied staff members as confirmed by the evidence of Mr Chester, Ms Taylor, Ms McDougall and Ms Tannock-Jones at the hearing. Additionally, nothing was put to Ms Tannock-Jones about her lying about the applicant's behaviour being inappropriate at this meeting (see *Brown v Dunn* [1893] 6 R 67). The applicant was under stress at the time of this meeting, the attendance of Ms Konecny and Ms Jennings was intimidatory and the applicant had been through months of performance meetings so it would be illogical for her to have behaved at the meeting in the manner claimed by the respondent. In the circumstances the applicant's evidence about this meeting as corroborated by Ms Tannock-Jones, should be accepted. The applicant also argues that the accounts of the meeting by Ms Konecny and Ms Jennings are exaggerated and lack credibility as they are contrary to the accounts given by other employees who attended the meeting.

209 The applicant argues that witnesses who gave evidence for the respondent including Ms Konecny, Ms Jennings and Ms Irving had an antipathy towards her, they were biased against her and they had an axe to grind against the applicant and did not like the way she treated them. Some of the evidence given by Ms McDougall was contrary to correspondence tendered during the hearing and evidence given by Mr Winfield. The applicant argues that Ms Irving was not objective and the breakdown of her personal relationship with the applicant had an impact on her responses during the disciplinary proceedings against the applicant. Ms Konecny had an animus against the applicant which was personal and she subverted the applicant by taking

complaints from staff against the applicant. Even though she says she had initial concerns about the applicant within a couple of weeks of commencing employment with the respondent she did not do anything about that until five months later. Additionally, the evidence she gave at the hearing was evasive and she did not provide direct answers to questions at the hearing until asked to do so.

210 The applicant argues that Ms Jennings was incompetent as a performance manager. For example, no KPIs were generated by Ms Jennings and even though Ms Jennings maintained she raised issues with the applicant these were not reflected in her notes and some issues she gave evidence about such as the undertaking of swimming lessons at BRAC was incorrect. Ms Jennings was also partisan against the applicant. Ms Hennessy was argumentative and confrontational and encouraged complaints to be made against the applicant and Mr Logue's evidence was unreliable and/or untruthful and the evidence he gave about returning to work at BRAC was inconsistent. Mr Chester gave evidence which was inconsistent with his witness statement and his evidence was unreliable and the witness statement made by Mr Doyle was inconsistent with the evidence he gave at the hearing.

211 The applicant claims she was dismissed because she attracted the ire of certain individuals and not for a justified complaint that was ever put to her and none of the complaints made against the applicant were proven.

212 The applicant argues that when she was summarily dismissed on 23 October 2009 and told to leave BRAC that day she was dismissed in humiliating circumstances as she was in the middle of a staff meeting and she was not given any right of reply to the basis upon which the respondent maintained she should be terminated. The applicant also argues that as she was summarily terminated on 23 October 2009 the events on that day plus those issues identified by Ms Konecny are the only events that the respondent can rely on as the reasons for her termination.

213 The applicant argues that the reasons for her termination were vague and lacked detail and none of the seven items relied upon by Ms Konecny at the hearing, which formed the basis for the respondent terminating the applicant, were raised with the applicant prior to her termination. The applicant also argues that the issues the respondent relied on to terminate her did not all arise on 23 October 2009 and therefore this is not a circumstance where the alleged misconduct was so serious or so pressing that it had to be acted on instantly.

214 The applicant argues that the respondent did not undertake a proper investigation into the allegations made against her and the respondent neglected to take into account the statement made by Ms Tannock-Jones about Mr Logue. Additionally, Ms Irving gave evidence that if she was aware of this account this may well have changed the way in which the respondent handled the complaints against the applicant. The applicant maintains that the complaints made by Ms McDougall were not relevant to her termination and the complaint made by Ms Taylor was not raised with the applicant and issues raised by Mr Chester are not helpful as he was only at BRAC for a short time during the time the applicant was employed by the respondent.

215 The applicant argues that even though the CEO gave the authority to Ms Konecny to terminate the applicant prior to 23 October 2009 he undertook not to follow through with the applicant's termination if proper processes were not followed at a meeting held after the staff meeting on 23 October 2009. However, despite this undertaking there appears to have been no investigation into the applicant's termination by the CEO and Mr Donohoe was not called to give evidence about any review he undertook into the applicant's termination. As the CEO did not give evidence at the hearing the applicant argues that an inference can be drawn that his evidence would have been unhelpful to the respondent (*Jones v Dunkel* [1959] 101 CLR 298).

216 The applicant is seeking reinstatement and recent changes to the respondent's organisation confirm that Ms Konecny, who was the main protagonist against the applicant, will no longer be employed by the respondent from 7 May 2010 and the position of Centre Manager has a more direct reporting scenario (see Exhibit A14). Reinstatement is therefore even more practicable now than at the time of the hearing. Additionally, Mr Holden who currently is the Centre Manager holds that position on a temporary basis.

Respondent's submissions

217 The respondent argues that it terminated the applicant on notice because of poor behaviour and poor performance. The respondent therefore maintains that the applicant was not summarily terminated however if the Commission finds that the applicant was terminated in this manner it concedes that it did not have sufficient reason to terminate the applicant in this manner.

218 The respondent maintains that as the applicant was given a payment in lieu of notice subsequent to her termination she was not summarily dismissed. Even though the payment took some time to be given to the applicant this was because the applicant disputed a range of entitlements she claimed she was owed and it was not until all issues were finalised with the applicant that the payment in lieu of notice was made to her. The respondent maintains that the applicant was removed from the workplace on the day of termination because it was Ms Konecny's view that the issues concerning the applicant's performance and behaviour had escalated to a point where it was no longer appropriate for the applicant to remain at work. Furthermore the applicant's behaviour on the afternoon of 23 October 2009 did not assist in enabling the applicant to remain at work.

219 The respondent argues that there were numerous disputes and complaints about the applicant throughout her employment with the respondent and she was the common denominator for almost all of the problems involving BRAC during 2009. The respondent also maintains that the applicant attempted to camouflage issues by relying on a range of peripheral issues and the applicant did not accept that her behaviour was the cause of most of the complaints made against her.

220 The respondent claims that the applicant was given the usual induction provided to a middle level manager and she was guided, counselled and then performance managed and disciplined by several levels of management. Mr McGrath gave evidence that the applicant was given support over and above that which is normally given to a new employee and furthermore the applicant was experienced in working in local government. The respondent does not dispute that areas of BRAC could have been run more effectively when the applicant was appointed however the respondent disputes the applicant's claim that she was given a mandate to force or bring about significant change by playing good cop bad cop. The respondent just wanted

the applicant to run BRAC efficiently and the applicant was told of this in her probation review meeting and at regular performance review and operational meetings.

221 The respondent argues that the applicant was unable to competently perform as the Centre Manager of BRAC and after receiving counselling the applicant was unwilling to improve or alter her communication and management style or address her performance deficiencies. The applicant did not recognise the history, climate and the Broome community as being legitimate and as she did not accept guidance she made her job a lot more difficult than it needed to be. The applicant displeased staff, sporting clubs, managers and the general community and she seemed to believe that upsetting people was part of her role. The applicant also regularly undermined her managers and would raise issues further if she did not initially obtain the answer she wanted.

222 The respondent attempted to performance manage the applicant to the required standard and on at least 25 occasions between February 2009 and October 2009 the applicant was counselled, coached and/or warned about performance concerns. This included weekly meetings involving variously Mr McGrath, Ms Jennings, Ms Irving, Ms Konecny and Mr Donohoe who were all involved in attempting to address concerns about the applicant's performance and behaviour.

223 Initially the applicant reacted positively when issues were raised with her but the applicant then rejected support given to her and proceeded to undermine her managers and the respondent claims that the applicant did not believe that her direct managers knew how to manage BRAC and she therefore did not accept their directions. Apart from one email sent by the applicant on 5 March 2009 to Mr McGrath the applicant did not recognise that there were issues and concerns regarding her behaviour. Ms Konecny acknowledged that Mr McGrath had allowed the applicant to delay, divert and disrupt his attempts to performance manage her however Ms Jennings was diverted away from her normal role to performance manage the applicant.

224 The respondent maintains that despite targets being set, frequent meetings and assistance being given to the applicant, numerous complaints were made against her over a period of 10 months in 2009. Some of these complaints were as follows:

- complaints by the Broome Tennis Club;
- a complaint about shade sails in February;
- Mr Doyle had an issue with the applicant relating to soccer goals and programming in July; and
- various staff complaints were made as follows:
  - Mr Logue in July 2009;
  - Ms McDougall in August 2009;
  - Ms Hennessy in August 2009;
  - Ms Thomas a casual Vacation Swimming Instructor in October 2009;
  - Mr Smith a Lifeguard in October 2009;
  - Mr Vincent in October 2009; and
  - Mr Chester in October 2009.

225 The respondent claims that the applicant was not undertaking the job that she was employed to do. The respondent argues that the applicant changed BRAC's operations to ensure that she controlled everything, she employed people who gave her their unquestioning support, she removed autonomy from staff and bullied those who disagreed with her including rostering them on the late shift as punishment, she refused to talk to some employees and the applicant did not deal appropriately with those in authority.

226 The respondent maintains that the applicant displayed hypocritical behaviour with respect to how she alienated staff, managers and stake holders. For example, the applicant undermined her manager and director but then accused her staff of undermining her, she claimed to be finding ways to cut expenditure then gave herself lucrative overtime shifts instead of other staff and she denigrated people working at BRAC for getting things done the way they wanted.

227 The applicant had the mistaken view that managers were out to get her. When BRAC's operations deteriorated staff openly acted against the applicant and they complained directly to the applicant's managers about her because staff had lost trust and respect in her.

228 The respondent argues that as at 23 October 2009 BRAC's operations were dysfunctional and evidence given by the respondent's witnesses demonstrates that there was a complete breakdown in the employment relationship between the applicant and the respondent both as a manager and as an employee. Ms Konecny had canvassed the option of the applicant's dismissal with Mr Donohoe prior to the staff meeting held on 23 October 2009 and she had the authority to terminate the applicant and the evidence demonstrates that this was an appropriate and reasonable decision to make.

229 The respondent acknowledges that the applicant's performance management process could have been conducted more effectively and that her probationary review was not carried out within the stipulated timeframe and the warnings given to the applicant were not descriptive about the performance problems. However, the respondent argues that it complied with the performance review process outlined in Clause 17.6 of the 2007 Agreement. The respondent argues that the applicant's probationary review was the first formal discussion about the applicant's performance concerns, Clause 17.6.2 led to the applicant being offered external assistance through the employee assistance programme and external mediation, Clause 17.6.3 was the meeting held on 29 May 2009 and subsequently a range of formal and informal meetings resulting in the applicant receiving a warning on 19 August 2009 which satisfied Clauses 17.6.3.1 and 17.6.3.2. Clause 17.6.4 resulted in weekly meetings held between the applicant and Ms Jennings where deadlines were set and issues raised for the applicant to deal with. The respondent conceded that the applicant was not given any further warning and pursuant to Clause 17.6.5 of the 2007 Agreement the applicant did not sign the warning she was given or her probation review was not countersigned however the

respondent argues this was not fatal to its process nor did the applicant raise this whilst employed by the respondent. The respondent also maintains that it complied with Clause 17.6.6 of the 2007 Agreement as the applicant was dismissed because she did not reach the required level of performance. The respondent acknowledges that there was no agreed period for the applicant's performance management process, but argues this is a minor breach of the 2007 Agreement requirements. Furthermore, even though Clause 17.6.6 of the 2007 Agreement provides that the CEO needs to be involved and make the decision that no further assistance can be provided to an employee the CEO does not need to make the decision to dismiss an employee or be the one to communicate it and the Director Community Services was delegated with this authority in this instance.

230 The respondent maintains that the applicant is incorrect in claiming that concerns were not raised with her as to the reasons for her termination and the respondent disputes the credibility of the evidence given by witnesses on behalf of the applicant at the hearing. The respondent argues that on the weight of evidence it is clear that the applicant was a common denominator with respect to a range of problems experienced at BRAC and even at the hearing the applicant continued not to take responsibility for problems raised with respect to the running of BRAC.

231 The respondent argues that there was ample evidence that the applicant had a poor relationship with many employees, for example on the issue of rostering. The respondent also argues that whenever the applicant attended a meeting about her behaviour and performance she claimed she was being bullied or harassed or her manager was being aggressive and this appeared to be an automatic defence used by the applicant whenever performance deficiencies were raised with her.

232 The respondent argues that notwithstanding internal and external support given to the applicant complaints continued to mount against her and many of these complaints were substantiated even though the applicant thought she was doing a good job. The respondent maintains that it was apparent that the applicant was not doing a good job given the applicant's antagonistic relationship with user groups, the applicant's poor comprehension of BRAC's finances which she claimed had improved when in fact it was the opposite and the applicant's failure to undertake a range of normal duties on time and in a satisfactory manner, for example the Energy Efficiency project submission. The respondent claims that as matters deteriorated the applicant gave herself favourable treatment by rostering herself for overtime. As a result of three complaints in particular the applicant was given a warning on 19 August 2009. The respondent maintains that the applicant was not denied natural justice with respect to this process as she was given a proper opportunity to respond to the issues raised with respect to her behaviour. Furthermore, the applicant was unable to substantiate her claim that the managers involved in this process were biased against her. Even though Ms Tannock-Jones made a statement that the applicant claims was tendered at the disciplinary meeting held on 11 August 2009 even if it had been tendered and investigated this would not have made a difference to the outcome of that meeting.

233 The respondent argues that by 23 October 2009 the applicant's relationship with her staff, some user groups and her managers had broken down, the running of BRAC was dysfunctional and events of the meeting held on 23 October 2009 was indicative that this was the case. The respondent relies on the evidence of Mr Chester, Ms McDougall and the other employees, apart from the applicant and Ms Tannock-Jones, about the events of this meeting. The respondent also maintains that Ms Tannock-Jones' recollection of the meeting held on 23 October 2009 is confused and should be given little weight as it was contrary to the recollection of other staff members who attended this meeting. As at this point the applicant was unable to perform her role it was reasonable that she be terminated and Ms Konecny had the authority to do so.

234 The respondent maintains that it is not practicable to reinstate the applicant. BRAC is now running smoothly under Mr Holden and if the applicant was to be reinstated it would have catastrophic consequences on staff, many of whom do not wish to work with the applicant. Furthermore, during the hearing the applicant showed no contrition as to her behaviour. The respondent argues that the primary reason for BRAC's turnaround today is the applicant's absence and if the applicant had remained at BRAC or was to return to BRAC this would have a significant detrimental outcome to BRAC's operations. A number of the respondent's witnesses also gave evidence that it is impracticable for the applicant to return to her former role with BRAC. The respondent maintains that in any event the applicant frustrated any prospect of re-establishing an employment relationship by airing her views in the Broome Advertiser on 5 November 2009. Even though there have been changes to the structure since the applicant was terminated these changes are not relevant to the applicant's reinstatement as the revised structure only provides for a different reporting mechanism.

235 The respondent maintains that the applicant is not entitled to any compensation because even if the applicant's termination was found to be unfair her employment with the respondent would not have remained for much longer than 23 October 2009 given problems with the applicant's performance and behaviour.

Findings and conclusions

Credibility

236 I listened carefully to the evidence given by each witness and closely observed each witness. In my view the applicant gave her evidence in a forthright and considered manner and her detailed evidence was supported by a substantial amount of documentation. Whilst I accept that the applicant gave her evidence to the best of her recollection I disagree with the applicant's claim that she interacted positively and in a professional manner with her managers and staff at all times given the tone of some of the correspondence generated by the applicant during her employment with the respondent. The weight of evidence given in these proceedings is also against the applicant with respect to this issue.

237 Examples of the applicant's poor communication skills as well as her confrontational attitude towards some of her colleagues are contained in the following exhibits:

- Exhibit A4.3 document 15 – Annual leave request - Ms McDougall – 27 May 2009;
- Exhibit A4.3 document 16 – Key result areas for CM BRAC – emails between applicant and Mr McGrath – 28 May 2009;

- Exhibit A4.3 document 19 – Additional hours – emails between applicant and Mr McGrath – 2 to 3 June 2009;
- Exhibit A4.3 document 30 – BRAC vehicle – emails between applicant and Mr McGrath - 15 July 2009;
- Exhibit A4.3 document 31 – Staff work attitudes at BRAC – email from Mr McGrath to applicant - 15 July 2009;
- Exhibit A4.3 document 44 – Deb Mills Staff Statements, Deb Mills Reply – email sent to Simon White by Ms Irving -12 August 2009;
- Exhibit A4.3 document 59 – Kim Logue – emails between applicant and Ms Jennings - 30 September 2009;
- Exhibit A4.3 document 80 – Community member concern – email from Ms Reynolds to Ms Jennings - 22 October 2009;
- Exhibit A4.3 document 81 – I have no idea what you are talking about Mike – emails between Mr Doyle, Ms Jennings and the applicant – 21 to 23 October 2009;
- Exhibit A4.3 document 82 – request for information – email from Ms Jennings to Mr Chester - 23 October 2009;
- Exhibit R17 document 29 – schedule of seasons – emails between Mr Doyle and the applicant – 30 June 2009 to 1 July 2009;
- Exhibit R17 document 32 – Next Sport & Rec Team meeting – emails between Mr McGrath, Ms Konecny, Mr Doyle and the applicant – 14 to 16 July 2009;
- Exhibit R17 document 38 – BRAC and Soccer – emails between Broome Soccer Association, Mr Doyle and the applicant – 21 to 24 July 2009; and
- Exhibit R17 document 52 – BRAC Crèche – emails between Ms Hennessy and the applicant – 25 September 2009.

238 I find that Mr Bell was not as forthcoming as he could have been about his interactions with the applicant on behalf of the Broome Tennis Club however nothing turns on his evidence as the applicant's relationship with the Broome Tennis Club did not contribute to her termination.

239 In my view all of the other witnesses who gave evidence in these proceedings gave their evidence honestly and to the best of their recollection and I therefore accept the evidence they gave. Even though there were some minor inconsistencies in the evidence given by some of the respondent's witnesses in my view nothing turns on this when taking into account the totality of the evidence given on behalf of the respondent. In particular, I found the evidence given by Ms Jennings to be very detailed and the evidence she gave about her interactions with the applicant after she was appointed to performance manage her in August 2009 to be credible as it was based on notes generated around the time of her meetings with the applicant. As a result it is my view that this gives added weight to the evidence given by Ms Jennings.

240 The applicant argues that the nature of her dismissal was summary and that the payment after her termination of a payment in lieu of notice does not alter the summary nature of her termination. The respondent submits that the applicant was not summarily terminated but it concedes that if the applicant is found to have been summarily terminated the respondent did not have sufficient grounds to terminate the applicant in such a manner.

241 It was not in dispute and I find that the applicant commenced employment as the Centre Manager of BRAC on 15 December 2008 and when she was terminated on 23 October 2009 she was required to cease working for the respondent on that date. It was also not in dispute and I find that when the applicant was terminated she was required to leave the respondent's premises with immediate effect and the applicant was paid two weeks' pay in lieu of notice on or about 3 December 2009 which was six weeks subsequent to the date of her termination. The issue of whether a dismissal of this nature constitutes a summary termination or a termination on notice was canvassed by Smith C (as she was then) in *Thomas Howell v Barminco Pty Ltd* (op cit) at 2533:

> "Mr Gifford on behalf of the Respondent contends that the onus of proof that the Applicant was harshly, oppressively or unfairly dismissed lies on the Applicant as the Applicant's employment was terminated by the payment by the Respondent of pay in lieu of notice. In support of its submissions the Respondent relies upon the decision of the Full Bench in *Newmont Australia Ltd v Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677. In that case the Full Bench of the Commission observed that where an employee's employment was terminated by summary dismissal there is an obligation upon the employer to show on balance that misconduct had in fact occurred. The Respondent contends that in this case the Applicant was not dismissed for misconduct but for poor performance so the nature of the termination was not summary. In *The Federated Miscellaneous Workers' Union of Australia, WA Branch v Cat Welfare Society Incorporated* (1991) 71 WAIG 2014 at 2019 Sharkey P and Gregor C observed—
>
> > "It seems to us that whether a dismissal has occurred in circumstances where pay in lieu of notice is made, that the question is one of mixed fact and law as to whether what occurred was a summary dismissal or not.
> >
> > One consideration is that it depends whether such payment is permissible. That in turn depends on the contract and its construction (see Macken J J, McCarry G and Sappideen C "The Law of Employment", 3rd Edition, pages 170-172). In some industries, also, it might be said to be a custom. If then, a payment in lieu of notice were not provided for in the contract, then proper notice has to be given or there is a summary dismissal. The same would apply if there were no custom or usage.
> >
> > It follows that a summary dismissal, as a matter of fact and law, cannot be altered in its nature by payment in lieu of notice."

> More recently in *Sanders v Snell* [1998] HCA 64 at [16]; (1998) 196 CLR 329 at 337 Gleeson CJ, Gaudron, Kirby and Hayne JJ held that where there is no condition in a contact of employment for payment in lieu of notice, the employer is in breach of the contract if the employer does not give the employee requisite notice of termination. In that case there was a written contract of employment which specified a period of notice to be given.
>
> It is apparent that the Applicant was not immediately paid pay in lieu of notice as he initially made a claim in his application for such a payment. Further, for the reasons set out below I am of the view that the Applicant's termination was sudden and unexpected. It is my view that the Applicant was summarily terminated and the onus of proving the circumstances justifying the termination rests upon the Respondent. …"

242 Given the manner and suddenness of the applicant's termination as well as the inordinate delay in paying the applicant in lieu of notice I find that the applicant was summarily terminated. Even though the applicant's contract of employment contemplates a payment in lieu of notice being made to an employee at termination the applicant was not given this payment until six weeks after her termination which is a significant period (see Clause 18 of the 2007 Agreement). The respondent argued that the payment of pay in lieu of notice to the applicant was delayed because of negotiations the respondent was having with the applicant about other entitlements being sought by her however no cogent reason was given by the respondent for not paying the applicant in lieu of notice at the time of her termination or soon after. Nor was any pressing reason given by the respondent as to why the applicant was required to leave BRAC on 23 October 2009 and not work out her period of notice apart from the respondent claiming that as at 23 October 2009 complaints against the applicant had become 'extreme' and a claim that issues concerning the applicant had escalated to a point where it was no longer appropriate for the applicant to remain at work, which in my view lacked substance. The respondent also relied on the applicant's poor behaviour on the afternoon of 23 October 2009 however I accept that the applicant was distressed and upset at the time given her unexpected termination and in any event by this point in time the applicant had been told to leave the respondent's premises on the basis that she had been terminated.

243 I find that as at 23 October 2009 the applicant was unaware that her termination was imminent and as a result her termination was sudden and without warning. The applicant's termination also occurred whilst the applicant was being performance managed by Ms Jennings and this process was ongoing as at the date of the applicant's termination. It was also not in dispute and I find that the applicant was terminated during a break in a staff meeting she was conducting with BRAC employees when she was undertaking her normal duties.

Legal Principles

244 The applicant was terminated because of her poor performance as BRAC's Centre Manager, her inability to effectively manage BRAC's staff and difficulties in her relationships with her managers and BRAC's user groups.

245 In *Robert Ashley James v Australian Integration Management Services Corporation Pty Ltd* (2003) 83 WAIG 1387 at 1393 Sharkey P stated the following with respect to summarily dismissing an employee for incompetence:

> "I now turn to questions of law relating to the competence of employees and right to summarily dismiss for incompetence.
>
> Of course, it is trite to observe that summary dismissal will only be justified if there is a sufficiently serious breach of contract or the misconduct is such as to indicate that the employee no longer intends to be bound by the contract of employment.
>
> Incompetence of an employee may certainly be sufficient justification for the exercise of the right of summary dismissal (see *WA Rewind Company v Skennerton* (1991) 71 WAIG 2045 (FB)).
>
> The failure to afford the requisite skill which had been expressly or impliedly promised by an employee is a breach of legal duty and therefore misconduct (see *Harmer v Cornelius* [1843-60] All ER 624). It should be observed, that such a requirement does not apply only to the restricted classes referred to in *Harmer v Cornelius* (op cit).
>
> The basis upon which the employer is entitled to summarily dismiss an employee for incompetence is twofold:-
>
> a) There must be an express or implied representation.
>
> b) There must be actual incompetence ((ie) if an employee possessing a particular skill fails to exercise it or if an employee holds himself out as possessing a particular skill which he does not himself possess) (see *Printing Employees Union of Australia v Jackson and O'Sullivan Pty Ltd* (1957) 1 FLR 175 (CIC)).
>
> The following principles which amplify what I have just said also apply:-
>
> (a) A representation of the requisite skills by an employee may be implied from the fact that an employee applies for employment in answer to an advertisement setting out the required skills.
>
> (b) An employee has the onus of ascertaining the skills required for the job for which the application is made.
>
> (c) Acceptance of employment will, unless there is evidence to the contrary, amount to an implied representation that the employee has the necessary skill.
>
> (d) There will be no representation where the employer knows that the employee does not possess the requisite skills (see *Printing Employees Union of Australia v Jackson* (op cit)) (see, generally, Macken, O'Grady, Sappideen and Warburton "*The Law of Employment*" (5th Edition), pages 201-204)."

246 In *Cheryl Johnson v Millswan Holdings Pty Ltd ACN 063 694 299 t/a Drivewest Car Rentals* (2003) 83 WAIG 348 at 353 Smith C (as she was then) stated the following with respect to an employee being terminated for incompetence:

> "In *Ishmael v Turk Ellis Pty Ltd of Elverston Nominees* (1990) 70 WAIG 3532, Mrs Ishmael was dismissed from her position as computer operator on grounds that she would not consistently follow instructions. Consequently, the employer found her work to be of an unsatisfactory standard. The Commission found that the manner of dismissal was an error of judgment and conceded as such by the employer. The Commission at first instance however, dismissed the Applicant's claim. The Full Bench found the Commission at first instance erred in not finding that the termination was unfair. At page 3533 the Full Bench observed—
>
> > "The question of competence is tested in matters of unfair dismissal in the following manner.
> >
> > Generally, there is no finding of unfair dismissal when the termination has been due to incompetence or unsatisfactory performance.
> >
> > The Industrial Appeal Court considered this matter in Industrial Inspector of *OIR v Holliday* 66 WAIG 477. In that case Olney J set out a number of considerations:-
> >
> > (1) Incompetence of an employee may be sufficient justification for the exercise of the right of summary dismissal.
> >
> > (2) This will arise where there has been an express or implied representation by the employee that he was competent to fulfil the job and has been shown to be incompetent.
> >
> > (3) A right of summary dismissal for inefficiency arises if an employee who possesses a particular skill fails or neglects to exercise that skill.
> >
> > (4) If there is no general or particular representation as to ability or skill the workman undertakes no responsibility.
> >
> > (5) His Honour also said at page 479:-
> >
> > > It is wholly unreasonable and lacking in logic that conduct which does not disentitle an employee to the normal period of notice or payment in lieu of notice upon termination of his services might nevertheless prevent him from becoming entitled to a *pro rata* annual leave payment.
> >
> > The Commission has usually modified the strict right of an employer to dismiss for incompetence by requiring that some warning be given to the employee that his or her work is not satisfactory before terminating the employment (see *Margio v Fremantle Arts Centre Press* 70 WAIG 2559)."
>
> Further, at 3535 in *Ishmael v Turk Ellis* the Full Bench held—
>
> > "In terms of incompetence, the employer is entitled to dismiss an employee if there was an express or implied representation by the employee of competence to fulfil a job, and secondly, actual incompetence [see *PIEU v Jackson and O'Sullivan Pty Ltd* (1957) 1 FLR 175].
> >
> > The Commission at first instance, having found that each was a truthful witness, thus found the onus on the applicant not discharged.
> >
> > The evidence really was, summarised, that Mrs Ishmael was not competent and failed to effect the necessary back-ups and other difficulties.
> >
> > It was Mrs Ishmael's evidence that she was competent. The law would appear to be that if an employee is dismissed without notice, but with money in lieu, what he/she received is, as a matter of law, damages for breach of contract.""

247 As confirmed in the above authority, an employee should be warned that his or her employment is in jeopardy and be given an adequate opportunity to improve his or her performance in the required areas prior to a termination being effected. In *Margio v Fremantle Arts Centre Press* (1990) 70 WAIG 2559 the Full Bench found that the Commission at first instance gave no or insufficient weight to a number of relevant issues including volume of work, staffing and to the inadequacy of warnings given to the appellant and the Full Bench held that insufficient warnings and no opportunity being given to an employee to improve his work if improvement was needed or justified amounted to an unfairness. The decision in *Margio v Fremantle Arts Centre Press* (op cit) was re-affirmed by the Full Bench of the Commission in *DVG Morley City Hyundai v Mauro Fabbri* (2002) 82 WAIG 3195 where Sharkey P with whom Wood C agreed held at 3202:

> "Nonetheless, I also want to make it clear that I do not consider it to be only procedurally unfair if an employee is dismissed without reprimand or warning that his position is in jeopardy, or without being given the chance to remedy defects in her or his performance.
>
> There was clear evidence in defining that he was dismissed in this manner (see paragraph 54-55). There may well be exceptions to this requirement in relation to a particularly serious matter (but this is not one of them).
>
> The failure to give such warnings or reprimands or an opportunity to improve a performance amounts in my opinion to substantive unfairness. In this case the failure, which the Commissioner found, amounted to both procedural and substantive unfairness.
>
> It was manifestly unfair that an employee who had received no reprimand, no chance to improve his performance, no written warning, no other warning and no indication that he was to be dismissed if he did not improve was dismissed."

248 When an employee is summarily terminated there is an evidential onus upon the employer to prove that the employee's summary dismissal was justified (see *Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* [1988] 68 WAIG 677 at 679). The question of whether a person is guilty of misconduct justifying summary dismissal is essentially a question of fact and degree (*Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors* (1995) 75 WAIG 813 at 819). In most cases the employee should be given an opportunity to defend allegations made against them. In *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 at page 229 the Full Bench of the South Australian Commission observed:

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

249 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in *Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch* (op cit). The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*see Shire of Esperance v Mouritz* [op cit] and *Byrne v Australian Airlines* (1995) 61 IR 32). In *Shire of Esperance v Mouritz* (op cit), Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

250 I have already concluded that the applicant was summarily terminated and the respondent conceded at the hearing that if the Commission found that the applicant was summarily terminated it did not have sufficient grounds to terminate the applicant in this manner. After reviewing the evidence given in these proceedings on the facts as I find them I am satisfied, at least on balance, that the respondent has not demonstrated that the applicant was guilty of misconduct or poor performance and/or incompetence sufficient to justify summary dismissal. I am also satisfied that the applicant was treated unfairly and harshly because she was not given sufficient opportunity to defend herself against the allegations relied upon to effect the termination nor was the applicant afforded procedural fairness during the events leading up to her termination. She was not afforded "a fair go all round" (see *Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* [op cit]).

251 The applicant's letter of termination dated 23 October 2009, which details the reasons for her termination and was received by the applicant on or about 28 October 2009, reads as follows (formal parts omitted):

> "This is to inform you that on behalf of Shire of Broome I am terminating your contract of employment effective immediately.
>
> This action is based on on-going performance issues as outlined over the period of your employment as Manager of Broome Recreation and Aquatic Centre (BRAC).
>
> As advised in our correspondence to you on 19th August 2009 the outcome of investigation in response to staff complaints and grievances at BRAC resulted in a 'Letter of Warning' stating that any further conduct by you that is in breach of the standards required by Shire of Broome may result in termination.
>
> Whilst under your performance management program implemented to assist in improving the identified performance areas and supervised by Anne Jennings, there have been further complaints both by BRAC customers and internal staff complaints.
>
> The Key performance areas of concern are:
>
> - Management style
> - Communication approach with BRAC staff
> - BRAC work environment
> - Lack of ability to take direction from line-manager
> - Operational matters including work-flow information, community consultation, programming and marketing
>
> All property is to be returned to HR immediately - should you require retrieving personal properties from BRAC you must liaise with Department of HR."
>
> (Exhibit 4.1 document 48)

252 I accept Ms Konecny's evidence and I find that the respondent terminated the applicant for the following reasons:

- the applicant bullied and intimidated Mr Logue to such an extent that he resigned;
- the applicant treated staff poorly including Ms Hennessy;
- staff complaints made to Ms Jennings about the applicant by Mr Doyle, Ms McDougall, Mr McGrath, Mr Vincent and Mr Chester;
- complaints about the applicant from user groups including boot scooting, netball, soccer, Aqua Lite, squash and basketball;
- an incident when children escaped from BRAC's crèche;
- a complaint about difficulties organising swimming lessons at BRAC;
- complaints made by the Broome Sports Association about poor access to BRAC as a result of the applicant's management;
- the applicant's lack of acknowledgement about changing her style and taking responsibility for her poor management style;
- the applicant blaming others for her predicament; and
- the applicant's conduct deteriorating after she was issued a letter of warning.

Ms Konecny also gave evidence, as corroborated by Ms Irving, that immediately prior to the applicant's termination the respondent contemplated standing the applicant down to investigate the complaints made against her but as complaints about the applicant had been escalating in the period immediately prior to her termination and as the respondent believed that the applicant would not change her behaviour and because BRAC was 'falling apart' the applicant was terminated and required to leave work on the day of her termination.

253 The applicant denied that she misconducted herself or performed her duties in such a way as to warrant summary termination or termination at all. The applicant maintained that the reasons the respondent relied on for her termination were vague and lacked detail, she was mismanaged by her line manager, her other line managers Ms Konecny and Ms Jennings were inexperienced and unfamiliar with running a leisure facility and both Ms Konecny and Ms Irving had become aggressive towards the applicant throughout the course of the disciplinary proceedings against the applicant in August 2009. The applicant claimed that she was micro managed and at the same time did not receive sufficient assistance from her managers and the applicant also maintained that only one user group, the Broome Tennis Club made sustained complaints against her. The applicant stated that her managers were hypocritical as she was criticised for raising concerns above them within the respondent's organisation and on the other hand she was subject to complaints made by her staff which were raised with and accepted by her managers. The applicant also maintained that by the time of her dismissal the applicant was in fear of her line managers, in particular Ms Konecny.

254 A significant amount of evidence was given by both parties in relation to events relevant to the applicant's employment with the respondent and a substantial amount of documentation was tendered during the proceedings.

255 Even though the applicant claimed that none of the concerns raised with her by the respondent in July and August 2009 about her interactions with Mr Logue, Ms McDougall and Ms Hennessy had substance I find that the applicant was aware that the respondent had concerns about her performance and the nature of her interactions with staff given the contents of the warning letter which the applicant received on or about 19 August 2009. This letter was given to the applicant after complaints made against the applicant in July 2009 by two employees of BRAC, Mr Logue and Ms McDougall and also Ms Hennessy who was a contractor to BRAC were investigated and reviewed by the respondent and after the applicant responded to these complaints. Following is the letter given to the applicant (formal parts omitted):

> "**Re: Outcome of Investigation in response to staff Complaints and Grievances at BRAC – Letter of Warning**
>
> I refer to our meeting on 3rd August 2009 in relation to the outcomes of the recent investigation into complaints made against you by several BRAC staff. I have carefully reviewed these complaints based on written statements received, information obtained during the investigation and the feedback provided by you.
>
> I have concluded that there are unsatisfactory performance trends in the following areas:
>
> - Management Style
> - Communication approach with Staff at BRAC
> - BRAC work-environment
> - Operational matters including rosters, work-flow information, community consultation, programming and marketing
> - Harassment and Bullying.
>
> Specifically the incident as noted by Kim Logue, reported to me, is deemed to be Harassment and Bullying. This is in breach of the Shire of Broome Harassment and Bullying Policy. Your behaviour also breached the Shire of Broome Code of Conduct. These policies were re-issued to you on 3rd August 2009 and supplied to you on commencement as part of the induction process. As you are aware, all front-line, Managers and Executive Shire of Broome employees are expected to comply with Shire of Broome policies as (sic) all times during their employment.

> You are now formally warned that any further conduct by you which is in breach of the standards required by Shire of Broome as set out in the above policies may result in further disciplinary action against you, which could include termination of your employment with Shire of Broome. You are now on a performance management program and your line-manager will meet with you in the next week to formulate agreed Key Performance Indicators which will be monitored.
>
> This letter will be placed on your personal employment file, as a formal letter of Warning.
>
> In summary it is imperative that your performance and conduct improve in the above mentioned areas. To facilitate improvement, you will continue to receive targeted support and mentoring / coaching from your line manager, Anne Jennings.
>
> Do not hesitate to discuss any relevant issues with Anne that you may require further assistance with, to enable positive change to occur.
>
> Please be reminded that the investigation and the outcomes are **confidential** and I ask that you do not discuss this issue with any other employee."

(Exhibit A4.1 document 44)

256 I reject the applicant's claim that Ms Konecny and Ms Irving were biased against the applicant during the process which eventuated in the applicant receiving this warning letter. I accept the evidence of Ms Konecny and Ms Irving that they took into account the applicant's response to the allegations made against the applicant and after investigating the claims made against the applicant and her response they concluded that the applicant had not met the required performance standards expected of a manager with respect to dealing with staff and I also find that they did not reach this decision based on any ill feeling towards the applicant. I find that even if Ms Tannock-Jones' statement about Mr Logue's handing the staff rosters to Mr McGrath had been considered by Ms Konecny and Ms Irving during this process it would not have affected the respondent's decision to issue the applicant with a warning letter as this statement does not deal with the reasons for Mr Logue resigning.

257 It was also the case and I find that concerns were raised with the applicant about her interactions with staff at her probationary review in May 2009 however these issues were not serious enough to prevent the applicant from being confirmed as a permanent employee in June 2009. Feedback given by Mr McGrath to the applicant included a recommendation that she undertake a conflict resolution course, the applicant was reminded that when commenting about colleagues she should rely on evidence and not her opinions, the applicant was told not to blame others if 'things don't go the way intended' and the applicant was advised that she would enhance her skills if she took the advice of others (see Exhibit A4.1 document 21).

258 I find that after the applicant received the warning letter dated 19 August 2009 the respondent organised an open ended performance management process for the applicant whereby she had regular meetings with Ms Jennings which were aimed at assisting the applicant to effectively operate BRAC and to help her to interact more positively with staff and user groups. KPIs for the applicant to follow were also to be agreed between the applicant and Ms Jennings as part of this process however this did not occur prior to the applicant's termination.

259 I find that during the period that the applicant was being performance managed a number of issues arose and complaints were made about the applicant's performance and attitude to Ms Jennings and Ms Konecny by staff at BRAC and by some of its user groups. These complaints included concerns about the applicant being tardy in holding meetings with user groups, the applicant rostering herself on weekends when other employees were available to work these shifts, the applicant engaging external staff and not offering acting positions to current staff, the applicant not taking the 'crèche incident' when two children escaped seriously, the applicant's poor treatment of some staff, low staff morale and user groups experiencing problems making bookings. I find that as a result of these complaints it was clear that the applicant was experiencing difficulties undertaking her role notwithstanding the assistance and feedback given to her by Ms Jennings and I also find that because of these complaints and given the applicant's poor handling of the Council agenda item for the Horizon Power proposal whereby the applicant scheduled a meeting with the CEO about this issue that the respondent was losing confidence in the applicant's ability to adequately fulfil her role.

260 I find that the applicant worked hard during her employment with the respondent. I also accept the applicant's evidence and I find that she successfully fulfilled many of the requirements of her role, I find that the applicant was genuinely committed to succeeding as the Centre Manager at BRAC and I find that the applicant was working long hours to fulfil the duties required of her and was pursuing an agenda for BRAC which she believed was in the respondent's best interests. It was also the case that notwithstanding some concerns being raised with the applicant at her probationary review the respondent confirmed her as being a permanent employee by a letter dated 22 June 2009. I find that from late July 2009 onwards, the applicant was worried about her ongoing employment with the respondent and was therefore suffering health issues and the applicant was working in a regional environment which was a different context to her previous working environment which would have been an added complexity for the applicant to deal with when managing BRAC. I find that after the applicant received her letter of warning in August 2009 she became defensive in her dealings with Ms Konecny and Ms Jennings and her relationship with Ms Irving, who was previously a friend as well as a colleague, became fractured around this time because the applicant believed that she was undermining her, which I find on the evidence was not the case.

261 It is within this context that whilst I find that it was appropriate for the respondent to be concerned about the applicant's performance and her poor relationship with a number of staff members, managers and user groups given the number of complaints and issue of concern being lodged against the applicant I conclude that in all of the circumstances the applicant's performance and behaviour as at the end of October 2009 was not sufficiently poor or serious to warrant summary termination. Whilst the applicant was on occasions inflexible and confrontational in her dealings with some staff and user groups and she had a difficult relationship from time to time with her managers I find that the applicant was competently fulfilling a number

but not all of the requirements expected of her in her role as BRAC's Centre Manager. I am also of the view that many of the complaints about decisions made by the applicant and her inflexible attitude could have been dealt with via negotiations between the applicant and her managers and with the concerns raised about the applicant being reviewed by consultation between the applicant and the complainants, which did not occur. Furthermore, at the time the applicant was terminated the KPIs she was expected to achieve had not been agreed between the applicant and Ms Jennings which in my view put the applicant at a disadvantage in relation to the performance levels expected of her. The applicant was also not afforded the opportunity of re-training once deficiencies in her performance had been identified.

262 I find that the applicant was denied procedural fairness given the process adopted by the respondent when effecting the applicant's termination.

263 I find that the applicant was treated unfairly when Ms Konecny interrupted the BRAC staff meeting being conducted by the applicant on 23 October 2009 to terminate the applicant. I find on the evidence that the applicant's conduct during this meeting did not warrant Ms Konecny calling a halt to the meeting to terminate the applicant. Even though the respondent claimed that this meeting was tense and the applicant was behaving inappropriately towards some staff I accept the applicant's evidence as corroborated by Ms Tannock-Jones that that the applicant conducted this meeting in a professional manner. Ms Konecny stated that the applicant was autocratic and directive and staff were agitated and Ms Jennings gave evidence that staff were 'ready to explode' and the applicant was being abrupt however Ms McDougall gave evidence that the applicant was only being 'a bit negative towards staff' and Mr Chester stated in cross-examination that the applicant was not yelling or swearing and was not directly offensive to any person at the meeting. I also find that the presence of Ms Jennings and Ms Konecny put unnecessary stress on the applicant and I find that their attendance at this meeting heightened tensions. I also find that Ms Konecny acted in an inflammatory and uncalled for manner when she interrupted this meeting to terminate the applicant.

264 There was no evidence that the respondent completed detailed investigations into the complaints and issues it relied on to terminate the applicant subsequent to her receiving a warning letter nor were the complaints made against the applicant to Ms Jennings and Ms Konecny raised with the applicant in a formal way so that she had the opportunity to put her version of events with respect to the issues in dispute nor was the applicant directly put on notice that as a result of these specific complaints having been made against her this would result in her termination.

265 I find that the applicant was denied procedural fairness and was therefore treated unfairly given the manner of her termination. I find that on the day the applicant was terminated she was not given specific reasons as to why she was being terminated nor was she told why she had to leave the respondent's premises forthwith as the issues and complaints relied upon by the respondent to effect the applicant's termination were not discussed with her as no meeting was arranged to allow the applicant to respond to the respondent's concerns about her performance and behaviour prior to her termination. I accept that the applicant had a meeting with Mr Donohoe on the afternoon of her termination however this was not to enable the applicant to formally respond to the respondent's view that she be terminated.

266 I reject the respondent's claim that it satisfied the procedural requirements under Clause 17.6 – Management of Unsatisfactory Performance in the 2007 Agreement when managing the applicant's performance and effecting her termination. The steps required when disciplining an employee are contained in Clause 17.6. In my view the respondent did not adhere to a number of the requirements on it under this clause when dealing with issues relevant to the applicant's performance including Clauses 17.6.3, 17.6.3.2 and 17.6.4. Specifically, there was no agreement between the applicant and the respondent at an initial meeting about actions to be undertaken by the applicant under the process of performance management, no timeframe for the applicant to reach an acceptable standard of performance was agreed between the applicant and the respondent, the applicant was not given any opportunity to explain her failure to meet the required standards and the applicant's performance was not expressly monitored with respect to the specific performance improvements required of her.

267 The applicant's claim that an inference should be drawn that Mr Donohoe's evidence would be unhelpful to the respondent with respect to the applicant being denied procedural fairness given the way in which her performance and termination was managed as he was not called to give evidence is in my view of no effect given my finding that the applicant was denied procedural fairness given the manner of her termination.

268 In the circumstances I find that the respondent did not have good reason to summarily terminate the applicant and that the applicant was denied procedural fairness given the manner of her termination. I therefore find that the applicant was unfairly dismissed.

Reinstatement

269 The applicant is seeking reinstatement on the basis that she adequately fulfilled the requirements of her position and the only staff members who disagreed with the changes she made at BRAC were those employees who did not accept that these changes were necessary for the efficient and effective running of BRAC's operations and only one user group made ongoing complaints against her. The respondent opposes the applicant's reinstatement.

270 After carefully considering the evidence given in these proceedings as well as the evidence given with respect to this issue in particular and when taking into account the difficulties the applicant experienced in her role at BRAC and the complaints made by a number of staff and user groups at BRAC I find that if would be inappropriate to reinstate the applicant to her former position or re-employ the applicant as I am satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for reinstatement or re-employment is impracticable.

271 The onus is on the respondent to establish that reinstatement or re-employment is impracticable (*Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327; *Gilmore v Cecil Bros & Ors* (1996) 76 WAIG 4434 and (1998) 78 WAIG 1099). In my view the respondent has demonstrated that it would be inappropriate to reinstate or re-employ the applicant to her former position with the respondent. I have made this decision on the basis that I find that the weight of evidence is against the applicant with respect to this issue. A number of witnesses gave evidence in support of the respondent's claim that it would be

inappropriate for the applicant to be reinstated to her former position with the respondent and their evidence highlighted, which I accept, the difficulties BRAC would face if the applicant returned to her former position. The evidence was also clear and I find that the applicant had dysfunctional relationships with Mr McGrath, Ms McDougall, Mr Logue, Mr Chester, Mr Doyle and Mr Vincent and they variously gave evidence that they would not find it conducive working with the applicant again and some said they would resign if the applicant was reinstated. A number of witnesses also gave evidence, which I accept, that BRAC was functioning effectively in the applicant's absence and that BRAC was functioning smoothly and interacting more positively with user groups and the Broome community since the applicant's absence.

Compensation

272 I therefore now turn to the question of compensation. I apply the principles set out in *Bogunovich v Bayside Western Australia Pty Ltd* (1998) 78 WAIG 3635 and *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886. On the evidence, I am satisfied the applicant took reasonable steps to mitigate her loss.

273 I have found that the applicant was unfairly dismissed on the basis that the respondent did not have sufficient grounds to summarily terminate her and that she was denied procedural fairness given the manner of her termination. I have also found that the applicant was experiencing difficulties in fulfilling some of the requirements of her role and that she had a poor relationship over a number of months with some of her staff, managers and user groups.

274 I find as at 23 October 2009 that the respondent had sufficient concerns about the applicant's performance and conduct to put the applicant on notice that it was considering terminating her. In reaching this view I take into account that the applicant was advised in her warning letter dated 19 August 2009 that further breaches of the respondent's Harassment and Bullying Policy and the respondent's Code of Conduct may result in further disciplinary action against her including termination of her employment and that issues were raised about the applicant's performance and several complaints were made by staff and user groups about the applicant subsequent to the applicant receiving this letter.

275 After receiving further complaints about the applicant it is my view that the applicant should have been formally put on notice about the areas of her behaviour and performance which required improvement, to agree on KPIs, to undertake any relevant training and to effect the required changes. I find that as the applicant was on notice in August 2009 that the applicant's relationships with some of her staff and user groups was poor and she was advised of some of the areas in which she was required to improve at the time a timeframe of 16 weeks would be adequate in order for these processes to be undertaken. In reaching the view that this is a sufficient timeframe I also take into account that the applicant had already been given assistance and coaching by Ms Jennings to improve in the required areas after receiving a letter of warning on or about 19 August 2009.

276 It is my view that after the applicant would have had this opportunity to meet the performance and behavioural targets required of her during this period the applicant would not have met the required standard and the respondent would then have had the right to terminate the applicant on notice. I have reached this conclusion on the basis that the applicant did not concede that her performance and behaviour required improvement at any point during her employment with the respondent, except on one occasion in March 2009, the applicant did not at any time accept her shortcomings with respect to her performance and interactions with some of her staff, user groups and managers and nor did she accept that her attitude towards staff and user groups needed to be more positive. Furthermore, at the hearing the applicant was adamant that she was not at fault in relation to any concern raised with her nor did she concede that she contributed to any of the problems at BRAC with respect to staff treatment and user group complaints. In support of this conclusion, on the weight of evidence given in these proceedings and as corroborated by documentation tendered in these proceedings I also find that during the applicant's employment with the respondent the applicant was confrontational at times when dealing with user groups, her managers and some of the staff she managed and I find that complaints made about the applicant by staff and user groups at BRAC arose as a result of the applicant's poor management skills and the applicant's inflexible attitude at times when implementing changes. I find that on occasions the applicant undertook her role without consideration of the needs and requirements of some of her staff and the groups using BRAC's facilities and without acknowledging the specific requirements of the Broome community and I find that if the applicant was questioned by a staff member with respect to the way in which she handled a particular matter or questioned a decision made by the applicant then she regarded that employee as being against her and this resulted in some staff being singled out by the applicant and treated less favourably than others. By way of example I find that the application's relationship with Ms McDougall, who was a long standing staff member at BRAC, fell into this category and that as a result of difficulties between the applicant and Ms McDougall the applicant rostered Ms McDougall on permanent night shifts which had ramifications for Ms McDougall's ability to fulfil other duties.

277 I reject the applicant's claim that her managers were out to get her and that they had ill feelings towards her. It is clear that the applicant's relationship with Mr McGrath, Ms Konecny and Ms Irving was difficult and at times hostile however I find that each of them made every effort to ensure that the applicant was appropriately managed and gave her assistance in order for her to be successful in her in her role as the Centre Manager of BRAC. I also find that on a number of occasions Mr McGrath, Ms Konecny and Ms Jennings gave the applicant useful feedback however the applicant did not act on this feedback. Even though Mr McGrath experienced difficulties managing the applicant I find that he was undertaking his role to the best of his ability and I find that some of the difficulties he experienced with the applicant resulted from the applicant's uncompromising attitude and behaviour towards him at times arising out of the applicant's view that Mr McGrath was incapable of effectively managing her and lacked sufficient experience to undertake his role. The applicant maintained that the brief given to her by Mr McGrath was to play 'good cop, bad cop' and this resulted in conflict at times with some user groups and staff, however even if the applicant understood that this was the role she was expected to play she was expressly told at her probation review meeting held on 29 May 2009 that this role was not expected of her (see Exhibit A4.1 document 21).

278 I find that Ms Konecny's dealings with the applicant were in the main professional however it does appear that by early October 2009 Ms Konecny's relationship with the applicant had become fractured and there was a lack of trust between her and the applicant. I find that this poor relationship deteriorated further when Ms Konecny became aware that the applicant

raised the issue of the Horizon Power proposal with the CEO going above Ms Konecny on or about 20 October 2009 and Ms Konecny then disciplined the applicant about this issue with staff being able to observe their meeting, which in my view was an unfortunate and avoidable occurrence. Notwithstanding these findings, in my view the applicant's poor relationship with Ms Konecny did not alter the fact that there were a number of concerns about the applicant's performance in her role as the Centre Manager of BRAC, in particular from August 2009 until her termination.

279 In the circumstances I find that the applicant is entitled to be paid 16 weeks' remuneration as compensation for her unfair dismissal.

280 Prior to making an Order in relation to this application the parties are directed to confer and report to the Commission within seven (7) days as to an appropriate amount to be paid to the applicant, given these reasons for decision.

2010 WAIRC 00446

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DEBORAH MILLS
	APPLICANT
	-v-
	SHIRE OF BROOME
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 14 JULY 2010
FILE NO/S	U 8 OF 2010
CITATION NO.	2010 WAIRC 00446

Result	Upheld and Order Issued
Representation	
Applicant	Mr M Aulfrey (of Counsel)
Respondent	Mr S White (as Agent)

Order

WHEREAS on 30 June 2010 the Commission issued its Reasons for Decision in this matter in which it found that the applicant was unfairly dismissed from her employment with the respondent and that she is entitled to be paid 16 weeks' remuneration as compensation; and

WHEREAS the parties were required to confer within seven days of the date of the decision as to an appropriate amount to be paid to the applicant given the Reasons for Decision; and

WHEREAS on 9 July 2010 the parties advised the Commission in writing that the agreed amount is $25,909.61;

NOW HAVING HEARD Mr M Aulfrey of Counsel on behalf of the applicant and Mr S White as Agent on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1 DECLARES THAT the dismissal of Deborah Mills by the respondent was unfair and that reinstatement or re-employment is impracticable.

2 ORDERS THAT the respondent pay Deborah Mills 16 weeks' remuneration as compensation for her unfair dismissal in the sum of $25,909.61 gross within 14 days of the date of this order.

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

2010 WAIRC 00362

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HELENE MOLTONI
	APPLICANT
	-v-
	GRAEME EDWARD ROGERS
	PARDOO STATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 21 JUNE 2010
FILE NO/S	U 39 OF 2010
CITATION NO.	2010 WAIRC 00362

Result	Application discontinued
Representation	
Applicant	Ms H Moltoni
Respondent	Mr W Naseem (of counsel)

Order

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

AND WHEREAS on 13 April 2010 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 11 June 2010 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.

2010 WAIRC 00440

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KLAUS RENKEN
	APPLICANT
	-v-
	KAREN FLOYSAND
	DAVID BROWNER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 13 JULY 2010
FILE NO/S	U 78 OF 2010
CITATION NO.	2010 WAIRC 00440

Result	Application discontinued
Representation	
Applicant	Mr K Renken
Respondent	Mr D Browner, Ms K Floysand and Ms K Turner

Order

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

AND WHEREAS on 17 June 2010 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 29 June 2010 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.

2010 WAIRC 00441

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KLAUS RENKEN
	APPLICANT
	-v-
	DAVID BROWNER
	KAREN FLOYSAND
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 13 JULY 2010
FILE NO/S	B 78 OF 2010
CITATION NO.	2010 WAIRC 00441

Result	Application discontinued
Representation	
Applicant	Mr K Renken
Respondent	Mr D Browner, Ms Floysand and Ms K Turner

Order

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

AND WHEREAS on 17 June 2010 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 29 June 2010 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.

2010 WAIRC 00401

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES HENRY ROSENTHAL
	APPLICANT
	-v-
	JOHN PALERMO
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	31 AUGUST 2009, 1 SEPTEMBER 2009, 2 SEPTEMBER 2009, 20 OCTOBER 2009, 21 OCTOBER 2009, 5 MAY 2010, 6 MAY 2010, 7 MAY 2010, 13 MAY 2010, 14 MAY 2010
DELIVERED	TUESDAY 6 JULY 2010
FILE NO.	U 10 OF 2009, B 101 OF 2009
CITATION NO.	2010 WAIRC 00401

CatchWords	Unfair dismissal – contractual benefits – compensation – unsatisfactory work performance – *Industrial Relations Act 1979* s 23A(8), s 26, s 27(1)c, s 27(1)(ha), s 27(1)(l) – order limiting times for presentation of cases – application for leave to amend defence to allege theft – considerations in application to amend – failure to call significant witness – dismissal unfair – misconduct – compensation for loss – social security benefits – loss of remuneration – *Minimum Conditions of Employment Act 1993* s 7(c)

Result	Applications granted
Representation	
Applicant	Ms R Cosentino of counsel
Respondent	Mr T Palermo as Agent

Reasons for Decision

1 The applicant claims that he was harshly, oppressively or unfairly dismissed from his employment with the respondent and he seeks compensation, and he also seeks benefits arising from his contract of employment.

2 The Commission has heard evidence from the applicant; Chantelle Marie Rosenthal, the applicant's wife; Victor John Matthews; David Cabassi; and Fiona Logan, who lived on the Palermo farm for a period during the applicant's employment.

3 The respondent, John Palermo, was represented in the hearing by Mr Tony Palermo. The respondent owns and operates a cattle farm called Palermo Farms, at two locations around Pinjarra. For the purposes of the hearing one block in the Darling Escarpment was known as the hills block and the second, being the larger and more productive land, on the plain to the west of Pinjarra, was known as the Curtis Lane property.

4 The applicant's family has a cattle farm located in the Darling Escarpment off the same road as the respondent's hills block and the applicant lives on his family's farm. The applicant has many years' experience working in cattle farming both in his family's business, of which he was a partner and is now director, and on other farms.

5 In February 2006, the applicant commenced working for the respondent, under the manager Victor John Matthews, as a casual farmhand working 2-3 days per week. This was in addition to his work for the family farm.

6 Mr Matthews had been the farm manager since 1999, but was leaving the job due to his incapacity to do much physical work.

7 The job of farm manager was advertised and the applicant applied. He was interviewed by Mr Tony Palermo, was recommended by Mr Matthews, and was appointed to the position from 1 August 2006.

8 Due to the applicant's lack of experience in managing other people's farms, it was agreed that the applicant would be paid $40,000 per annum on commencement and his salary would be reviewed after six months and after a further 12 months. The salary was increased to $52,000 after six months, but was not subsequently reviewed. Therefore the applicant's salary at termination was $52,000 per annum.

9 The applicant's employment terminated on 23 December 2008 when the respondent summarily dismissed him for misconduct. Mr Matthews took over the running of the farm for a month until Mr David Cabassi, the new manager, could commence.

The Termination

10 The applicant says that when there was concern about his father's health in around June 2008, he foreshadowed to Mr Tony Palermo that he may have to resign, and accordingly, Mr Palermo should not let out the house on the farm in the event that a new farm manager may need to be engaged and may need to live in the house.

11 He says that within a couple of days of advising Mr Tony Palermo of this, his father's health situation was clarified and that he was not ill, and the applicant advised Mr Palermo of this. At no time did he resign.

12 On 20 August 2008 the applicant wrote to Mr Tony Palermo regarding the number of cattle deaths and suggesting remedial action for the herd. He also raised the issue of not being able to handle the requirements of the job in the time available. He said "(a) discussion of what to do would be appreciated as the farm is suffering." (Ex A5).

13 However, in around September 2008, the applicant heard that word had passed around the local farming community that the respondent was looking to replace him. The applicant telephoned Mr Tony Palermo to ask him about it and he says Mr Palermo denied that he was sourcing a new farm manager.

14 According to Mr Cabassi, he was contacted by Mr Tony Palermo in around September 2008 about taking on the farm management, saying that the applicant was leaving due to his father's ill health. In November 2008, he was asked if he could start work prior to 31 December 2008, and he said he could not because he needed to give notice in his existing job.

15 In late November 2008, the applicant wrote to Mr Tony Palermo (Ex A6) expressing a number of concerns, suggesting that he was not being provided with the resources necessary to properly manage the farm, and noting that the workload had increased over time. Mr Palermo telephoned the applicant on what appears to be 19 December 2008 regarding the hay not being carted. I accept the applicant's evidence that he was carting hay at the time he received the call and he says he could actually see Mr Palermo across the other side of Greenlands Road when he received the phone call.

16 On 23 December 2008, the applicant says he started work earlier than usual, doing some work at the hills property. He had started earlier because the family had some guests coming from Geraldton who would be there around mid-morning, and he wanted to return home to be there for their guests.

17 That morning, at around 7.30am while he was working, the applicant says he received a call from a Mr Mal Kentish who said he had heard that Mr David Cabassi of Alcoa Farmlands had handed in his notice and was taking over as Palermo Farm manager in January 2009. The applicant immediately rang Mr Tony Palermo and left a message on his voice mail saying he had heard he was being replaced by David Cabassi. About two hours later, when he had returned home, the applicant received a call from Mr Tony Palermo about what was happening, and he says that Mr Palermo told him that if he did not like it he could quit. The applicant said he would not quit to which Mr Palermo responded that he was fired, and that he would let him know when the ute and mobile phone would be collected.

18 The applicant went back to do some work, and collected some of his own property from the respondent's farm including a solar powered electric fence unit.

19 Mr Tony Palermo telephoned the applicant later that day and advised him that Mr Matthews would ring him to make arrangements for the ute and telephone to be collected. The applicant says he asked for a reason for being dismissed and Mr Palermo refused to give one.

20 According to the applicant, it was organised that on 24 December 2008, Mr Matthews would collect the ute at around 9.00am. This did not go according to plan as the applicant says Mr Matthews was early and the gate to the applicant's farm was locked, causing Mr Matthews to leave. The applicant then received a call from Mr Tony Palermo asking why he refused to hand over the ute to Mr Matthews. The applicant telephoned Mr Matthews who returned. The two of them met for what appears to have been a lengthy discussion about some aspects of the farm including the ordering of diesel fuel, and Mr Matthews left with the farm keys. The applicant refused to hand over what records he had relating to the management of the farm, including the diaries.

The Course of Proceedings

21 The course of proceedings in this matter is of some significance to a number of the issues which arose. The Notices of application for both applications were filed on 16 January 2009.

22 On 6 February 2009 the respondent filed a Notice of answer and counter proposal which in brief terms denies, disputes and rejects the application.

23 On 8 June 2009, the respondent provided particulars of its answer in accordance with an order of the Commission. Those particulars say that:

1. In February 2008 the applicant gave two weeks' notice, the reason being that his father had cancer and that he would manage the family farm;
2. Two weeks later he advised that his father's illness was in remission and that he would stay until Christmas at the latest but if someone else could be found in the meantime, he would be prepared to leave earlier;
3. By June 2008 the condition of the farm had been let go, that the applicant had not provided all the paperwork for the previous 12 months and cattle numbers could not be reconciled;
4. Repeated requests for the presentation of management documents were made to the applicant;
5. Between June and September 2008, Mr Tony Palermo had given the applicant various warnings about unsatisfactory work performance, the way the farm looked and the way he was managing it;
6. There was non-compliance by the applicant with legislative requirements regarding branding, stock numbers and declared weed control;
7. Issues were raised between October and November 2008 regarding a lack of reconciliation of cattle numbers;
8. The applicant was often at his family farm when Mr Tony Palermo called him, and was not undertaking his duties;
9. There were failures to tend to his duties including the storage of hay;
10. On 23 December 2008 the applicant was dismissed for serious misconduct being failing and refusing to attend to his duties, legislative requirements, animal welfare and other requirements of the cattle. There is said to have been intentional and deliberate, and substantial and significant damage resulting from the applicant's alleged failings in his management of the farm.

The Course of the Hearing

24 The hearing was listed for three days and commenced on Monday 31 August 2009, continuing on Tuesday 1 and Wednesday 2 September 2009. It then reconvened on Tuesday 20 October and Wednesday 21 October 2009. During those latter two days, a substantial amount of time was taken up by the parties being engaged in discussions with the Deputy Registrar in an unsuccessful attempt at resolution of the claims.

25 Due to the hearing taking a much longer time than originally anticipated, on 21 January 2010, I issued Orders pursuant to s 27(1)(ha) of the *Industrial Relations Act 1979* (*the Act*) to limit the times for the presentation of the parties' cases.

26 The hearing reconvened on Wednesday 5 May 2010, continuing on Thursday 6, Friday 7, Thursday 13 and Friday 14 May 2010.

27 Mr Rosenthal was under cross-examination almost all of 1 September 2009, half of the morning of 2 September 2009 and all of 20 October 2009. Chantelle Marie Rosenthal's evidence was interposed into the applicant's evidence. At the respondent's request the applicant's cross-examination was interrupted and Mr Matthews gave some of his evidence on 2 September 2009. The applicant continued under cross-examination on Wednesday 5, Thursday 6, and Friday 7 May 2010, and was re-examined on Friday 10 May 2010. Ms Fiona Logan and Mr David Cabassi gave all of their evidence on Thursday 13 May 2010. Mr Matthews continued his examination in chief and was cross-examined on Thursday 13 and Friday 14 May 2010, Mr Matthews was re-examined and the parties gave their closing submissions.

Applications to Amend Response

28 During the course of proceedings, the respondent made two applications to amend his grounds for defence, the first being to counterclaim for damages against the applicant, and the second being to claim that the grounds for dismissal included theft.

29 The Notice of answer and counter proposal filed by the respondent on 6 February 2009 and the particulars of answer filed by the respondent on 8 June 2009 make no reference to any allegations of theft by the applicant.

30 During the initial part of the hearing in August and September 2009, when the respondent sought to summons the applicant's parents and the Rosenthal family farm records, I raised with the respondent whether there was an allegation of theft, and Mr Tony Palermo denied it. (T10).

31 I referred to this in my Reasons for Decision of 15 January 2010 [2010 WAIRC 00006]. I noted that the respondent appeared to be using the hearing in 2009 "to gather information for purposes other than responding to the claim before the Commission, a matter clarified with Mr Palermo early in proceedings." (see [18]).

32 Mr Palermo also confirmed early in proceedings that he was not alleging theft against the applicant. On 1 September 2009, while cross-examining the applicant Mr Palermo said to the applicant "I'm not calling you a cattle thief and please accept that? … I have never accused you of being a cattle thief?" (T85).

33 During the course of responding to orders I proposed to issue relating to the time to be allowed for the presentation of the parties' cases, the respondent in a letter dated 7 December 2009, set out further detail of the defence and counter-claim and sought leave to amend the defence to have the right to set off and counter-claim for damages. At no point in this letter was it suggested that the reason for dismissal included theft.

34 On 5 May 2010, the respondent filed an application for leave to amend the defence with 'a right to have the ability to set - off and counterclaim for damages'.

35 At approximately 2.30pm on 5 May 2010, while continuing to cross-examine the applicant, the respondent commenced asking questions which clearly raised an issue of theft and then made an oral application to amend his grounds of dismissal to include theft.

36 At that time, the respondent indicated that until that day the issue of theft had not arisen (T 466). However, he said that "(a)fter taking a statement of evidence from Mr Matthews, it is now a question of theft and that's why we are putting that question." (T 465).

37 I asked him about what had changed and he said:

> "Mr T Palermo: Commissioner, if you look back through the records, I think you'll find that the … that I said there was no allegation of theft based on the information that we had to hand and we were trying to reconcile numbers, which we have spent many hours trying to do, and the reason why we couldn't reconcile numbers is because we didn't have the records and … and the diary records. The reason why these things are relevant … and I'm also getting sick and tired of being asked by whoever about the relevancy, and you're quite entitled to ask, or whoever is quite entitled to ask. This refers to farming records and the welfare and the … and the other matters regarding the cattle. That's an all encompassing clause that relates to cattle; cattle numbers, and I think I explained that to … to everybody last time. I don't know how else I can explain it other than to get an interpreter in here to actually explain it in a different way. This goes to the heart of the dismissal, one of the items that goes to the heart of the dismissal.
>
> Scott ASC: Until today there was not an issue of theft. That is what you have told me before.
>
> Mr T Palermo: That's correct." (T 465 + 466)

38 There is no evidence of when a statement of evidence was taken from Mr Matthews.

39 I considered the matter overnight and then refused to allow the amendment to the respondent's grounds at that point in the proceedings. The following are my reasons for doing so.

40 In *Aaron Dale Tasker v Sinogal Pty Ltd trading as Rockingham Auto Electrics & Mechanical Services* [2002] WAIRC 05513 (2002) 82 WAIG 957 at 963, the Full Bench of the Commission noted that:

> "It is the law, too, that an employer can justify a dismissal by reference to facts not known at the time of his dismissal but discovered subsequently, so long as these facts concern circumstances in existence when the decision is made. Whether the decision can be so justified will depend on all of the circumstances (see *RRIA* v *CMETSWU* (1995) WAIG 813 and see *Byrne and Frew v Australian Airlines Ltd* [1995] 185 CLR 410 at 430 per Brennan CJ, Dawson and Toohey JJ, and at page 467 per McHugh and Gummow JJ)."

41 The question arises as to whether it was appropriate at that stage of proceedings to allow the respondent to amend his position.

42 In *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27, the High Court dealt with the issue of applications to amend and raise new claims. Although it dealt with the circumstances of a court where rules regarding pleadings and amendments apply, the joint judgment of the majority sets out issues to be considered by a court deciding whether to allow an amendment. The decision to allow amendment is a matter of discretion. The issues for consideration in exercising that discretion include:

1. The court has a duty to allow an amendment for the purpose of deciding the real issues in, and avoiding multiplicity of, proceedings;
2. The nature and importance of the amendment to the party applying;
3. The extent of delay and costs associated with the amendment;
4. Where the inconvenience or cost to the other party of the amendment being granted can be overcome by an arrangement for costs, then amendment ought to be granted;
5. The prejudice to the other party;
6. The point the litigation has reached relative to a trial when the application to amend is made;

7. Non-compensable inconvenience and stress on parties, whether individuals, business corporations or commercial persons;

8. The party applying to amend should explain the delay in applying to amend, including that the application is brought in good faith, and the circumstances giving rise to the amendment;

9. The Rules are to be applied to the objective of the court arriving at a just resolution;

10. Case management principles are a tool, not an end in themselves; and

11. "The conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruption in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard", per Toohey J in *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849.

43 In deciding whether to allow the respondent to amend its defence at this stage I note that the Commission is not a court of pleadings and it is obliged to deal with matters before it according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (s 26 of *the Act*). It may allow the amendment of any proceedings on such terms as it sees fit (s 27(1)(l) of *the Act*).

44 The point at which the respondent sought to amend his grounds for the dismissal was:

1. 17 months after the dismissal;

2. 16 months after the Notice of application was filed;

3. Many months after the respondent had filed both a Notice of answer and counter proposal, particulars of his defence on 8 June 2009 and reiterated a number of those on 7 December 2009;

4. When the hearing of the matter had been proceeding for more than five and a half days, with a break in the middle of some six months;

5. The applicant had been under cross-examination for more than two full days in total;

6. The respondent had both foreshadowed and made an application to amend his Notice of answer and counter proposal and defence for the purpose of seeking a claim for damages against the applicant;

7. Chantelle Marie Rosenthal had concluded her evidence and Victor John Matthews was approximately halfway through his evidence in chief.

45 Other circumstances requiring consideration include that:

1. The applicant was represented by a legal practitioner and incurring costs;

2. The Commission has no power to award costs for the services of a legal practitioner (see s 27(1)(c) of *the Act*);

3. Putting an allegation of theft to the applicant for the first time at this point would have prolonged the cross-examination and required further re-examination. As noted in detail later, the person cross-examining him was Mr Tony Palermo, the person who had dismissed him and the cross-examination was difficult partly for that reason. The applicant expressed frustration and at times was clearly distressed during cross-examination, particularly where the cross-examination had become difficult and he believed the questions to be unfair. Any delay would have caused further distress and inconvenience to the applicant.

4. There was no explanation as to why there was a delay in applying to amend including the circumstances giving rise to the amendment. There was no suggestion that new information or evidence had come to hand, except that there was said to be a statement of evidence from Mr Matthews. There is no information as to when this was taken. It is important to note that Mr Matthews had commenced but did not finish his examination in chief on 2 September 2009, however, he was not called again until the conclusion of the applicant's cross-examination in May 2010.

   I note in passing that if Mr Matthews gave a statement of evidence, it ought to have been before he commenced examination in chief, not after it. During Mr Matthews' later evidence, in May 2010, he said that in the period since he last gave evidence Mr Tony Palermo had asked him to attempt to reconcile the cattle numbers and he had been unable to do so. I do not believe Mr Matthews' evidence has been tainted by this, however, it is quite improper for this to have occurred while he was in the middle of his evidence.

   Further, by 5 May 2010, Mr Matthews' evidence of trying to reconcile cattle numbers was not new evidence such as to justify the amendment. I note that when he did go on to conclude his evidence, Mr Matthews was asked "Is it possible that cattle may have disappeared?" … Mr Matthews said "I found no evidence of that at all, Tony, with the numbers you gave me." (T 658).

5. To grant the application would have resulted in further delays for both the parties and the Commission, and might have affected the listing of other matters and as a consequence, prejudice the interests of other litigants before the Commission.

6. Whilst there was an insinuation in the questions relating to the numbers of cattle being unable to be reconciled according to the respondent, and suggestions being made about cattle being taken to the applicant's family farm, when challenged as to whether or not there was an allegation of theft, the respondent had earlier denied this on a number of occasions.

7. The respondent had sought to summons the applicant's father and mother to deal with questions regarding the applicant's employment and the family farm which at the time appeared to suggest that there may have been an

allegation of theft. However when this was denied by the respondent, I ruled that it was inappropriate to summons the applicant's parents and I discharged the summonses against them.

8. In considering the importance of the amendment to the party applying, I note that the respondent has commented a number of times from the earliest stages of the hearing to the effect that he was using the hearing to investigate what happened to missing cattle. With the benefit of hindsight, it is now clear that Mr Tony Palermo was not being candid when he denied that theft was an issue. His questions about cattle numbers were always directed to that issue. That should then have been an important issue from the outset, not one to be made explicit after such a lengthy delay. In any event, the purpose of the hearing is to enable the Commission to determine the claim. It is not for the purpose of enabling an employer to investigate a matter which, if it had been in his mind prior to the termination, ought to have been investigated then. If it was so important, it should not have been left until the point I noted in para [35].

46 In all of the circumstances I decided against the respondent's application to amend his grounds to allege theft. However, even though I refused the respondent's application to raise the issue at that point, Mr Tony Palermo continued to ask questions of the applicant which alluded to theft, and made closing submissions in a similar vein.

47 As to the other amendment sought by the respondent, to have a right to set off and counter-claim for damages, the Commission has no power to award damages to an employer.

The Evidence

48 It is not my intention to set out all of the evidence in this matter. As to the credibility of the witnesses, I have no hesitation in accepting the evidence of Mr Matthews or Mr Cabassi. They were both straightforward and reliable, and unwavering in their evidence. Both gave the impression of being truthful, and of being competent farm managers who know what constitutes good farming practice.

49 I accept as truthful the evidence of Chantelle Rosenthal.

50 The applicant's cross-examination was difficult and problematic. On occasions he was argumentative and refused to answer questions. I am in no doubt that part of this was brought about by the fact that it was Mr Tony Palermo, the person to whom he had previously reported, who dismissed him and who he sees as having done him wrong, who cross-examined him. Mr Palermo was not skilled or experienced in cross-examination and the way in which he put some questions to the applicant was unclear, unhelpful and often repetitive. I also take into account that on occasion the applicant was difficult and provocative towards Mr Tony Palermo. The two of them took the questioning and answering very personally and were combative. I take this into account in assessing the credibility of the applicant's evidence.

51 Generally, where the applicant's evidence conflicts with that of Mr Matthews and Mr Cabassi, unless the applicant's evidence is corroborated by other evidence, I have no hesitation in accepting the evidence of Mr Matthews and Mr Cabassi.

The Failure to Call Tony Palermo

52 As noted at the outset, the respondent, John Palermo, was represented during the hearing by Mr Tony Palermo. The evidence indicates that the person to whom the manager reported, during Mr Matthews' time as manager and for the applicant and subsequently Mr Cabassi, was Mr Tony Palermo who conducts other business from Perth. The farm manager had day-to-day control of the farm and autonomy to make decisions about its operation. The manager would inform Mr Tony Palermo of issues and occasionally it was necessary to seek his approval in respect of matters going beyond day-to-day operations, often matters which required significant expenditure.

53 Mr Tony Palermo was the person with whom the applicant had most contact and who terminated his employment in a telephone conversation on 23 December 2008.

54 The difficulty for the respondent in the Commission examining the evidence is that Mr Tony Palermo did not give evidence. He had indicated an intention to do so when the Commission issued orders on 5 November 2009 for the parties to file and serve a list of the names of their witnesses and the estimate of the time necessary for examination in chief of each of those witnesses. The respondent's response indicated that Mr Tony Palermo would be a witness for the respondent and his evidence was to take between one and eight days.

55 As the hearing in May 2010 proceeded, Mr Tony Palermo sought an extension to the time allowed to cross-examine the applicant, and I expressed concerns regarding meeting the timeframes set out in the Order of 21 January 2010, [2010] WAIRC 00023. Mr Tony Palermo indicated that he had revised his case, would not be calling a number of witnesses, and indicated that he may not give evidence. I explained to him on two occasions on 6 May (T 508) and 14 May 2010 (T 689), when it was suggested that he may not give evidence, that in assessing the evidence, the Commission could give little weight to statements made from the bar table as against evidence given under oath by a witness subject to cross-examination.

56 Although the respondent submitted particulars of his case in writing and made submissions, the respondent's case relies heavily upon conversations between Mr Tony Palermo and the applicant including the applicant's alleged resignation, and instructions and warnings said to have been given to him. The only persons who could give evidence on those matters were the applicant and Mr Tony Palermo. Without Mr Tony Palermo's evidence, the only evidence before me on those matters is that of the applicant and some documents prepared by him and by Mr Palermo. For example, there is no evidence of why the respondent decided to terminate the applicant's employment, when that decision was made and what process the respondent says was applied to the dismissal.

57 The rule in *Jones v Dunkel* ((1959) 101 CLR 298) is that an unexplained failure by a party to call a particular witness may, in appropriate circumstances, lead to an inference that the uncalled witness would not have assisted the party. JD Heydon, in *Cross on Evidence* explains that a range of circumstances exist where the inference ought not to be drawn, and where there is a

reasonable explanation for the failure such as illness of the witness, or hostility of the witness, and says that "a belief by the defendant that the plaintiff's evidence is insufficient is not a satisfactory explanation." [1215].

58 Heydon notes that:

> "[t]he significance of the inference depends on the closeness of the relationship of the absent witness with the party who did not call the witness … Considerable significance may attach if the absent witness is either a party or a senior executive of a corporate party closely engaged in the transactions in question and present in court during the hearing." [1215].

59 Mr Tony Palermo explained his reasons for not giving evidence in closing submissions. He said:

> "Whether I decided to give evidence or not, that's up to me … but for the benefit of the Commission, one of the reasons why … one of the important reasons why that was the case is because the respondent and I formed the view that nothing that was provided or … or demonstrated by the applicant could in any way be deemed to be harsh, offensive and unfair and to add to the pain, it was considered not necessary." (T 725).

60 I take that explanation to mean that the respondent was of the opinion that the applicant had not discharged the onus of proof. According to Heydon, this is not a satisfactory explanation for the failure to call the witness who could provide evidence of key matters which fall to the respondent to prove.

61 In all of the circumstances, there is no reasonable explanation for Mr Tony Palermo not giving evidence, and I draw the inference that his evidence would not have assisted the respondent.

Findings and Conclusion

62 I have considered all of the evidence in this matter. I draw the following conclusions:

1. The applicant was a competent farm manager. During cross-examination of the applicant Mr Tony Palermo said to him that he acknowledged that the applicant is a competent farm manager (T 179). He was experienced in working on a farm and in being involved in the management of his family's farm. I accept Mr Matthews' evidence that he was capable of managing the farm if he wanted to. However, he was not experienced in running someone else's farm, where a higher degree of sophistication in the management and reporting might apply compared with that of a family operated farm.

2. When the applicant took over management from Mr Matthews, Mr Matthews showed the applicant what was his usual practice in terms of keeping records and making reports to Mr Tony Palermo. He did this by more than pointing to a filing cabinet where the records were kept, but by actually showing him the records.

4. There is no evidence that the applicant was told that his failure to provide monthly reports to Mr Tony Palermo was unsatisfactory, or that the reports he provided were inadequate. There is no evidence that he was counselled or warned about this issue.

3. The applicant's excuse for not providing more regular and detailed reports to Mr Palermo was that he was not provided with the means to do it. This is disingenuous. Nothing prevented him providing a handwritten report had one been required. In any event, he did provide annual reports, brief though they were.

5. Managing the farm was not a job involving clocking on and off, or of a set number of hours. There is no evidence of the applicant's contract of employment setting particular hours per day or per week, or of particular start and finish times. Mr Matthews worked approximately 40 to 70 hours per week depending on the needs and the season. The applicant worked at least 40 hours per week, sometimes more, and did so as required for dealing with animal welfare and safety. The diaries are not an exhaustive record of all work done and how long he worked each day. (T 96).

6. There is no evidence of any instruction or agreement that the applicant was precluded from spending some time working on his family's farm.

7. I am not satisfied that the applicant refused to attend for duty on 23 December 2008. His return to his home mid-morning to attend a social gathering is not unusual in such an environment. There are no time-clocks in farm management.

8. I find nothing improper in him having taken that time.

9. The applicant was able to engage assistance when required. He asserted that he was only able to offer the award rate, and that in the then prevailing labour market, he could not obtain labour, other than through friends. I do not accept that he was instructed by Mr Palermo to offer no more than the award rate. I conclude that he made an assumption and did not act to clarify the situation or to attempt to persuade Mr Palermo to allow a higher rate of pay to be offered. I believe that it was only while he was giving evidence that the applicant realised he had made an incorrect assumption regarding this limitation. Mr Matthews' and Mr Cabassi's evidence demonstrates that when they believed that something was necessary for the good of the management of the farm, they would advise Mr Tony Palermo and were generally able to obtain what was necessary. This included bringing in contractors to undertake planned fence replacement, and to pay higher rates than the award when appropriate.

10. I do not accept that Mr Tony Palermo instructed the applicant that the cattle and the farm should be kept going as long as they could on the bare essentials. The applicant suggested that Mr Tony Palermo indicated that cattle should be kept until they were very old and unproductive and that fences ought not to be replaced – that it was minimal care and maintenance only. This is contrary to the way in which both Mr Matthews and Mr Cabassi, his predecessor and successor, managed the farm. It is clear that they took and take pride in the farm and the cattle they produced.

11. I accept Mr Matthews' report (Ex R19) as to the state of the property within days of the applicant's dismissal. His purpose was not to provide a report which was a critique of the applicant's management, but to review the farm and set out what needed to be done for the future. However, it demonstrates that the farm was not at that point in a desirable condition. Mr Matthews' reaction to the state of affairs which he discovered was one of disappointment.

12. The size of the property to be managed increased over time, however that should not have been an impediment to proper management if adequate labour and resources were available. The applicant approached Mr Tony Palermo in a professional manner, seeking such resources. He did so twice in the last four months of his employment, firstly in his letter of 20 August 2008 (Ex A5) when he sought a discussion with Mr Tony Palermo and then in late November 2008 (Ex A6) when he wrote to Mr Tony Palermo again raising the issue of available resources to do the job. However, it appears that by August, Mr Tony Palermo had decided to replace the applicant.

13. There is no evidence that the applicant was aware that Fiona Logan was available and expected to assist him should he require it. She gave no evidence of his being aware of this arrangement.

14. Mr Matthews noted in his evidence that the cattle were in reasonable condition when he took over the property in the interim after the termination and before Mr Cabassi could commence. However, he was critical of the way they were managed in terms of the timing of the marking of calves, of cattle being able to run between paddocks and of bulls being with the cows for a longer period thus extending the calving season. I accept this was not best practice. However, I do not conclude that there was deliberate or intentional mismanagement. Nor was there incompetence to the degree necessary to conclude that there was misconduct or breach of contract. The applicant's methods were those of a person used to running the family farm under the guidance of his father, not of someone experienced as a manger of a farm where higher standards of performance and reporting would be expected.

15. All that can be found is that the applicant spent less time than Mr Matthews in his work. His methods were less controlled and his approach not as focussed. If this was unsatisfactory to the respondent, it ought to have been brought to his attention, and remedy required. As noted, there is no evidence of any counselling or warning.

16. The farm was not in a condition which Mr Palermo found satisfactory, but there is no basis for concluding that there was deliberate or intentional mismanagement, nor was there incompetence to the degree warranting dismissal for misconduct, being a breach of an essential condition, going to the heart of the contract.

17. A considerable amount of time was spent during the hearing on reconciling the supplies of diesel fuel on the property at the time of dismissal. It is clear that there is some conflict between the applicant's and Mr Matthews' evidence, however, given that there was hay carting and other work going on between the time of the last fuel delivery under the applicant's management and when Mr Matthews checked the supplies, I am unable to conclude that anything improper occurred regarding fuel usage by the applicant.

18. Mr Matthews clearly stated in cross-examination that he found no evidence of cattle disappearing, rather that he was unable to reconcile the cattle figures between his handing over to the applicant and taking the property back two and a half years later.

19. The only reliable evidence about the numbers of hay bales not carted by the time the applicant was dismissed is only that of the applicant. Mr Matthews' evidence is from information he received from his son a considerable time after the event and is hearsay. I accept that the hay carting was approximately one third complete at the time of the dismissal, and that this was not as much as Mr Matthews considered to be timely.

20. A bundle of photographs was put into evidence including one of a super spreader. (Ex R 30). Mr Matthews was asked if he would leave it in that condition and he said he hoped he would not. (T648-9). However, this photograph has little probative value as there was no evidence as to where, when and by whom the photograph was taken or who the spreader belongs to. There is nothing to support a conclusion that this was the state in which the applicant left the respondent's super spreader. Although Mr Palermo asked the applicant about cleaning the super spreader, he did not put the photograph to him. If the photograph was of the respondent's super spreader, it ought to have been put to the applicant for his response and was not (rule in *Browne v Dunn*). Having said this, I note Mr Matthews' report comments generally that "(t)ractors & machinery including the ute were very dirty and unkempt …" (Ex R19).

21. There was a lot of time and examination of witnesses spent on the question of identification of cattle via markings and tags. In the end, it demonstrated nothing of value to the determination of the matter.

22. A lot of time was spent in going through the records the applicant made in the diary. Neither the applicant nor Mr Matthews was able to give any real assistance in using those records to determine how much time the applicant spent in working each day and week. There was no suggestion that the record in the diaries was exhaustive of every job that was done each day, nor of how long any one task would take. It was very clear that the time necessary for checking cattle could be short, or very long depending on whether the checking revealed the need to take action and what that action might be. This evidence was of little assistance and of no real probative value. As noted earlier, the applicant's and Mr Matthews' evidence indicates that Mr Matthews worked longer hours than the applicant.

23. The fact that the respondent engaged and paid a cartage contractor to carry cattle on many occasions does not negate the applicant's evidence that he also carted the respondent's cattle.

24. There was no evidence of a refusal or failure to attend to duties.

25. Much was made of the discrepancy in stock numbers reported by the applicant in exhibit A4. However, Mr Matthews' evidence indicated that he too had made an error in his cattle figures report in June 2006. (Ex R10). I see nothing sinister or incompetent in either the applicant's or Mr Matthews' errors.

63 I conclude that the applicant's management of the farm was not to the standard previously set by Mr Matthews and Mr Tony Palermo was not happy with the applicant's performance. However, rather than deal with the issue, he grasped the applicant's advice that he may have to relinquish the job on account of a possible issue with his father's health. Even though the applicant soon advised that this was not an issue, Mr Palermo continued down the path of finding a replacement.

64 During the period when he was looking for a replacement, Mr Tony Palermo denied this was the case when challenged about it by the applicant. His intention to dismiss the applicant was clearly demonstrated by the fact that Mr Palermo had already arranged for Mr Cabassi to take over. The inference is that Mr Palermo intended to engineer a summary dismissal but was pre-empted when the applicant heard of Mr Cabassi's resignation from Alcoa Farmlands with the purpose of taking over his role at the end of January 2009, one month later.

65 The applicant was justifiably concerned. He rang Mr Palermo to verify the rumour he had heard. He left a message. Mr Palermo returned the call while the applicant was at home with his guests. To then rely on his being at home as part of the justification for dismissing the applicant was unfair.

66 The respondent also suggests that the applicant resigned when he advised Mr Palermo that his father may be ill and he might have to resign.

67 The applicant did not resign. His letters of 20 August and late November 2008 (Exhibits A5 and A6 respectively) give no indication of resignation, nor do they reflect that he was under a warning that his job was in jeopardy. There is no evidence of any warnings, formal or otherwise. This is in sharp contrast with the nine letters sent to the applicant in the week following the dismissal. (see exhibits A10 to A18 inclusive). It seems strange that if warnings were given that the respondent would not have put them in writing and tendered them in evidence, given Mr Tony Palermo's letters to the applicant after the termination.

68 While I find that the farm was not being managed to the standard previously set by Mr Matthews and expected by Mr Palermo, the applicant's conduct and performance did not amount to a demonstration of an intention to not be bound by an essential term of the contract. That is what is required to be demonstrated in the case of a dismissal purporting to be for misconduct.

69 The onus lies on an applicant to prove that a dismissal has been unfair; however, there is an evidentiary onus on the employer to show that misconduct has occurred. *Newmont Australia Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers* (1988) 68 WAIG 677 at 679.

70 The decision of the Full Bench in *Western Mining Corporation Limited v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers* (1997) 77 WAIG 1079 at 1084 deals with the requirements for procedural fairness in dismissal. The Full Bench said:

> "Failure to accord procedural fairness is one factor to take into account in deciding whether there has been an unfair dismissal (see *Shire of Esperance v Mourtiz* 71 WAIG 891 (IAC) per Kennedy J at page 895 where he said –
>
> > "In my opinion, any breach of the rules of natural justice was a relevant circumstance in the determination of the critical question as to whether the dismissal was harsh or unjust. Whether an employer, in bringing about a dismissal, adopted procedures which were fair to the employee is an element in determining whether the dismissal was harsh or unjust – see *The Law of Employment, Macken, McCarry & Sappideen, 3rd ed*, 277-278, and the authorities there cited. In some cases, this can be a most important circumstance. But in a case such as the present, no question of the invalidity of a decision, as such, falls for determination. The case does not turn simply upon the respective legal rights of the parties."
>
> Whether the dismissal is harsh or unfair will depend on all of the circumstances, including substantial and procedural unfairness."

71 The Full Bench in that matter referred to the decision of the Industrial Commission of South Australia in Full Commission in *Bi-Lo Pty Ltd v Hooper* [1992] 53 IR 224 at 229-230. The Commission said at page 229 –

> "Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable."

72 In *Byrne v Australian Airlines Ltd and Frew v Australian Airlines Ltd* 120 ALR 274 the Federal Court of Australia – General Division dealt with the question of substantial and procedural fairness in the following terms:

> … the respondents owed to the appellants an obligation to act with both substantial and procedural fairness. In the circumstances of this case, that obligation translated into a number of specific steps which the respondent was obliged to take. First, it was obliged to conduct a reasonable investigation, to ascertain what view it should take of any circumstance which it might take into account in deciding to dismiss the appellants. Second, it was required to formulate what it alleged the appellants had done or failed to do. Third, it was obliged to put the allegations of commission and omission to the appellants, and to give them a fair opportunity to be heard as to those allegations. Finally, it was obliged

to give to the appellants a fair opportunity to be heard on whether they should be dismissed, if they were to be regarded as guilty. The respondent was obliged to take into account matters not directly connected with the alleged offence which might mitigate the penalty."

73 In this case I find that the respondent has not discharged the evidentiary onus which falls to him to prove that he met the requirements for a summary dismissal for misconduct. Firstly while I find the applicant's performance as farm manager was not satisfactory to the respondent, there is no evidence that the applicant's performance constituted a breach of an essential term of his contract of employment (*North v Television Corp Ltd* (1976) 11 ALR 599 at 609; *Blyth Chemicals v Bushell* (1933) 49 CLR 66 at 81-82). Nor is there evidence of the respondent indicating to him that he fell short of the required standard in such a way that would justify termination on notice, let alone a summary dismissal.

74 There is no evidence that the respondent undertook any form of investigation into the circumstances which he took into account when the decision to dismiss was made. There is no evidence that before deciding to dismiss the applicant, the respondent gave the applicant every, or in this case, any, reasonable opportunity or sufficient time to answer the allegations he has subsequently made against him. There was no opportunity to respond to those allegations before the dismissal took place. There is no evidence that any mitigating circumstances were considered. In the circumstances, it was hardly surprising that the applicant was not co-operative in handing over to Mr Matthews or in responding to Mr Palermo's emails.

75 In all of those circumstances, I find that the dismissal was harsh and unfair. The respondent has added insult to injury by inferences and subsequently allegations of theft which he sought to investigate, not prior to the dismissal, but during the hearing. Allegations of cattle theft are perhaps the most serious one could make against a cattle farmer. To raise such allegations without any evidence was clearly and rightly viewed by the applicant as a grievous injury.

Remedy

76 Having observed the parties during the course of the hearing there is no doubt in my mind that reinstatement would be entirely impracticable. Therefore consideration of compensation arises.

Mitigation of Loss

77 I have considered the applicant's evidence about his attempts to mitigate his loss and taken account of the respondent's objections, that the applicant's desire to have work within an area such that he can remain at home with his family and that he performs work on the family farm mean that the applicant has not properly mitigated his loss.

78 The applicant has given evidence that after the termination of his employment he approached Alcoa Farmlands seeking work. As a consequence he was contacted by FlexiStaff which employed him on a casual basis at Alcoa Farmlands undertaking farm work from 27 January 2009. He was still employed on that basis at the conclusion of the hearing. His rate of pay has been $20.00 per hour and his hours of work have varied according to the casual nature of his employment.

79 The applicant's pay advice slips from FlexiStaff (Exhibit A22) cover the period from 27 January 2009 until 15 August 2009 and demonstrate that there have been some limited periods where he has not worked or received payment and others where he has worked between 20.5 hours and 48 hours per week. His wages during that period have been $17,710 gross. The applicant gave this evidence on 31 August 2009 and was not asked to provide any further evidence of wages he has received since then. However an average of his income over the entire period until the conclusion of the hearing can be derived from the evidence which has been provided.

80 As to his efforts to mitigate his loss, the applicant has applied for work in a range of capacities, including farm work, supervising a feed lot, refinery and mine site work. He says that he is prepared to undertake any sort of work including operating equipment and yard cleaning. He has applied to Alcoa at its farmlands, refinery and mine; to Charles Hull Contracting, True Blue Hire, Boddington Gold Mine, Worsley Alumina, Chandler McLeod Ready Workforce, Mitre 10 in Pinjarra, John Tuckey and Emmanuels.

81 In cross-examination the applicant said that he was not prepared to look for work in Bunbury because he wishes to stay relatively close to his home and to the family farm. He does not consider travelling one hour each way to Bunbury for work is reasonable saying that anything more than 50 kilometres away results in a heavy cost of fuel to be taken from his wages.

82 An applicant seeking to mitigate his loss is not required to take unreasonable steps to find alternative employment. In this case there was good reason for the applicant to remain at home and not incur the additional costs or inconvenience of travelling beyond that which he currently does from his home to Alcoa Farmlands in Wagerup which, of itself, is not a short distance.

83 In all of the circumstances, I am satisfied that he has attempted to mitigate his loss and there has been no evidence to the contrary. In the circumstances the applicant is entitled to compensation for the loss he has suffered as a result of the unfair dismissal.

What is the applicant's loss as a result of the dismissal?

84 The applicant's remuneration at the time of dismissal was a salary of $52,000 per annum plus superannuation of $1,181.25 per quarter which equals $4,725 per annum (Exhibit A21). Therefore the total remuneration was $56,725 per annum giving a weekly rate of $1,087.50.

85 The period over which the applicant suffered the loss was from 23 December 2008 to the last day of hearing, being 14 May 2010 which is 72.3 weeks. 72.3 weeks at $1,087.50 per week equals $78,626.25.

86 The applicant was employed by Flexi Staff from 27 January 2009 to 15 August 2009, being 28 weeks and 4 days. He received wages of $17,710 plus superannuation of $1,510.65 totalling $19,220.65. This brings an average remuneration over that 28 and a half week period of $676.78 per week.

87 There is no evidence that this situation, on average, changed after 15 August 2009. Therefore the applicant's weekly loss has been $1,087.50 less $676.78 being $410.72.

88 The period since termination has been 72.3 weeks, however the period of employment commenced approximately five weeks after the dismissal. Therefore the loss is:

1.	Five weeks at $1,087.50	$ 5,437.50
2.	67.3 weeks at $410.72	$27,641.45
	Total	$33,078.95

89 Therefore I find that the applicant's loss arising from the unfair dismissal is $33,078.95.

90 The amount of compensation to be awarded is not to exceed six months' remuneration (*Industrial Relations Act 1979*, s 23A(8)). Six months' remuneration would be $56,725 ÷ 2 which equals $28,362.50.

91 Amounts received by the applicant by way of social security benefits are not to be deducted from that calculation of loss of remuneration caused by the dismissal. (*Swan Yacht Club (Inc) v Leanne Bramwell* (FB) (1998) 78 WAIG 579 at 585.)

92 Accordingly I intend to order that the respondent pay to the applicant the amount of $28,362.50 by way of compensation for loss arising from the unfair dismissal.

Contractual Entitlements

93 The applicant seeks payment of unpaid wages for the period from 1 December 2008 until 23 December 2008 being date of termination. The evidence demonstrates that the applicant worked but was not paid for this period. This is 23 days or 3.25 weeks' pay at $1,087.50 per week, being $3,534.37. He ought to be paid this amount.

94 As to the accrued annual leave, there is no evidence as to any contractual entitlement to four weeks' annual leave. Therefore the entitlement would arise from the *Minimum Conditions of Employment Act 1993* and be implied into the contract according to that act. However, the enforcement of minimum conditions of employment implied into a contract of employment is for the Industrial Magistrate under s 83 of the *Industrial Relations Act 1979* (*Minimum Conditions of Employment Act 1993* s 7(c)).

95 The claim in respect of the loss of superannuation benefits has been dealt with on the basis that superannuation formed part of the remuneration for the purposes of the calculation of loss as a result of the unfair dismissal (*Capewell v Cadbury Schweppes Australia Ltd* (1998) 78 WAIG 299).

96 Accordingly, an order will issue for the payment to the applicant of compensation for the loss caused by the unfair dismissal, and for unpaid wages for December 2008.

2010 WAIRC 00445

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHARLES HENRY ROSENTHAL
	APPLICANT
	-v-
	JOHN PALERMO
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 13 JULY 2010
FILE NO/S	U 10 OF 2009, B 101 OF 2009
CITATION NO.	2010 WAIRC 00445

Result Applications granted

Order

Having heard Ms R Cosentino on behalf of the applicant and Mr T Palermo as agent for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby:

1. Declares that the applicant was harshly and unfairly dismissed from his employment by the respondent;

2. Declares that reinstatement is not practicable;

3. Orders that the respondent shall pay to the applicant the amount of:

   (a) $28,362.50 gross less any taxation payable to the Commissioner of Taxation as compensation for the loss arising from the dismissal; and

   (b) $3,534.37 gross less any taxation payable to the Commissioner of Taxation being salary for the period 1 December 2008 to 23 December 2008.

4. Orders that the amounts set out in Order 3 hereof are to be paid within seven days of the date hereof.

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

2010 WAIRC 00425

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GRACE RYAN
	APPLICANT
	-v-
	THE ORS GROUP
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 JULY 2010
FILE NO/S	U 223 OF 2009
CITATION NO.	2010 WAIRC 00425

Result	Application discontinued
Representation	
Applicant	Ms G Ryan
Respondent	Ms J Scott

Order

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

AND WHEREAS on 21 December 2009 and 13 January 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 13 January 2010 agreement was able to be reached between the parties;

AND WHEREAS on 21 April 2010 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.

2010 WAIRC 00419

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASWANT SINGH BRAR
	APPLICANT
	-v-
	PEEL COMMUNITY LEGAL SERVICES INC
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 9 JULY 2010
FILE NO/S	U 133 OF 2008
CITATION NO.	2010 WAIRC 00419

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 2008 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties had not reached agreement; and

WHEREAS on the 8th day of October 2009 the Commission convened a hearing for mention; and

WHEREAS during that hearing the applicant advised that the parties had reached an agreement in principle in relation to the application however a number of issues required implementation; and

WHEREAS on the 23rd day of June 2010 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.

2010 WAIRC 00339

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NADIA SUNDRAMPILLAI-SLY
	APPLICANT
	-v-
	VIDEO EZY BELMONT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 15 JUNE 2010
FILE NO/S	U 74 OF 2010
CITATION NO.	2010 WAIRC 00339

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 1 June 2010 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.

2010 WAIRC 00363

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JACOBUS VAN DEN AKKER
	APPLICANT
	-v-
	GRAEME EDWARD ROGERS TRADING AS PARDOO STATION STAY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 21 JUNE 2010
FILE NO/S	U 44 OF 2010
CITATION NO.	2010 WAIRC 00363

Result	Application discontinued
Representation	
Applicant	Mr J van den Akker
Respondent	Mr Naseem (of counsel)

Order

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

AND WHEREAS on 13 April 2010 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 11 June 2010 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.

2010 WAIRC 00426

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRADLEY THOMAS WHITCROFT
	APPLICANT
	-v-
	WIZARD ELECTRONICS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 12 JULY 2010
FILE NO/S	B 26 OF 2010
CITATION NO.	2010 WAIRC 00426

Result	Application discontinued
Representation	
Applicant	Mr B T Whitcroft
Respondent	Mr K McWhirter

Order

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

AND WHEREAS on 30 March 2010 and 27 April 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference held on 27 April 2010 no agreement was able to be reached between the parties;

AND WHEREAS on 28 June 2010 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.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Elana McCay	Gemmill homes Pty Ltd	B 76/2010	Commissioner J L Harrison	Consent Order Issued
Jessica Maree Cresey	Shire of Bridgetown-Greenbushes	U 208/2009	Chief Commissioner A R Beech	Discontinued
Margaret Brooking	Alex Anastasakis Director East Perth Medical Centre	U 61/2010	Commissioner J L Harrison	Consent Order Issued
Ms Annamarie Willett	The Principal Holy Spirit Catholic School	U 11/2010	Commissioner S J Kenner	Withdrawn

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 3/2010	25/01/2010 12/02/2010	Dispute in relation to salary packaging	Discontinued
The State School Teachers' Union of W.A. (Incorporated)	The Director General, Department of Education and Training	Harrison C	C 14/2009	24/04/2009 7/12/2009	Dispute re intimidation and coercion of two union members	Concluded
The State School Teachers' Union of W.A. (Incorporated)	Director General of the Department of Education and Training	Harrison C	C 40/2008	12/02/2009 31/03/2009 11/05/2009 17/06/2009	Dispute re employment status of union member	Referred
United Firefighters Union of Australia West Australian Branch	F.E.S.A.	Harrison C	C 16/2008	28/05/2008 30/06/2008 13/10/2008 22/10/2008 20/11/2008 6/02/2009 18/06/2009 31/08/2009 5/11/2009 9/04/2010 21/05/2010 25/06/2010	Dispute re impact of decommissioning of fire appliances	Discontinued

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Corruption and Crime Commission Industrial Agreement 2010 PSAAG 2/2010	(Not applicable)	Corruption and Crime Commission of Western Australia, Civil Service Association of Western Australia	(Not applicable)	Acting Senior Commissioner P E Scott	Agreement registered
Department of Fisheries Agency Specific Agreement 2010 PSAAG 5/2010	(Not applicable)	The Department of Fisheries	The Civil Service Association of Western Australia Incorporated	Acting Senior Commissioner P E Scott	Agreement Registered
Main Roads APEA Enterprise Bargaining Agreement 2010 PSAAG 4/2010	28/06/2010	Commissioner of Main Roads, Main Roads Western Australia	Association of Professional Engineers, Australia (Western Australian Branch)	Commissioner S M Mayman	Agreement registered
Main Roads AWU Enterprise Bargaining Agreement 2010 AG 9/2010	28/06/2010	Commissioner of Main Roads, Main Roads Western Australia	The Australian Workers' Union West Australian Branch	Commissioner S M Mayman	Agreement registered

Main Roads CSA Enterprise Bargaining Agreement 2010 PSAAG 3/2010	28/06/2010	Commissioner of Main Roads, Main Roads Western Australia	Civil Service Association of Western Australia Incorporated	Commissioner S M Mayman	Agreement Registered
State Law Publisher Agreement 2010 AG 7/2010	28/06/2010	The Director General of the Department of the Premier and Cabinet	The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers - Western Australian Branch	Commissioner S M Mayman	Agreement registered
VenuesWest General Agreement 2010 AG 13/2010	13/07/2010	Western Australian Sport Cente Trust (also known as Western Australian Sport Centre) trading as Venues West	Liquor, Hospitality and Miscellaneous Union, Western Australian Branch AND ANOTHER	Commissioner S M Mayman	Agreement registered

NOTICES—Appointments—

2010 WAIRC 00442

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the Industrial Relations Act 1979, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a further period of one year from the 26th day of June, 2010.

Dated the 22nd day of June, 2010.

CHIEF COMMISSIONER A.R. BEECH

PUBLIC SERVICE APPEAL BOARD—

2010 WAIRC 00420

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WENDY POWLES

APPELLANT

-v-

WORKCOVER WA

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD

ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN

MS B CONWAY - BOARD MEMBER

MR A PITTOCK - BOARD MEMBER

DATE FRIDAY, 9 JULY 2010

FILE NO PSAB 32 OF 2009

CITATION NO. 2010 WAIRC 00420

Result Appeal dismissed

Order

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

WHEREAS on the 24th day of June 2010 the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it 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.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00367

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES FRANIA SHARP

APPELLANT

-v-

WORKCOVER WA

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
MS B CONWAY - BOARD MEMBER
MR A PITTOCK - BOARD MEMBER

DATE MONDAY, 21 JUNE 2010

FILE NO PSAB 30 OF 2009

CITATION NO. 2010 WAIRC 00367

Result Appeal dismissed

Order

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

WHEREAS on the 18th day of June 2010 the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it 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.] On behalf of the Public Service Appeal Board.

2010 WAIRC 00403

APPEAL AGAINST THE DECISION MADE ON 1 SEPTEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES CATHERINE SMIT

APPELLANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR J ROSSI - BOARD MEMBER
DATE	WEDNESDAY, 7 JULY 2010
FILE NO	PSAB 26 OF 2009
CITATION NO.	2010 WAIRC 00403

Result	Appeal dismissed for want of jurisdiction

Order

HAVING heard the appellant on her own behalf and Ms C Lake on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

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

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

2010 WAIRC 00404

APPEAL AGAINST THE DECISION MADE ON 1 SEPTEMBER 2009 RELATING TO TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CATHERINE SMIT
	APPELLANT
	-v-
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR J ROSSI - BOARD MEMBER
HEARD	WEDNESDAY, 12 MAY 2010
DELIVERED	WEDNESDAY, 7 JULY 2010
FILE NO.	PSAB 26 OF 2009
CITATION NO.	2010 WAIRC 00404

CatchWords	Jurisdiction of Public Service Appeal Board – Remedies sought – Power to adjust employer's decision to dismiss *Industrial Relations Act 1979* (WA) s 80I(1)
Result	Appeal Dismissed
Representation	
Applicant	Ms C Smit on her own behalf
Respondent	Ms C Lake of counsel

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board (the Board).

2 Ms Smit lodged this appeal to the Board on 17 November 2009. The appeal was filed outside of the prescribed 21 day time limit, however the respondent consented to it being received out of time, and accordingly the Board issued an order that it be received out of time.

3 The remedies sought by Ms Smit are set out in an attachment to her Notice of appeal dated 9 November 2009. She says that she is seeking:

1) A full pay out of her contract of employment;
2) A letter of termination detailing why she was dismissed;
3) An "authorised" State Government endorsed performance report; and
4) An official outcome in writing to her harassment claim.

4 Ms Smit specifically notes that she is not seeking reinstatement as she would feel very uncomfortable working in the environment from which her employment terminated.

5 The respondent says that none of the remedies Ms Smit seeks are within the power of the Board and refers to the decision of the Industrial Appeal Court in *State Government Insurance Commission v Terence Hurley Johnson* (1997) 77 WAIG 2169.

Powers of the Board

6 The powers of the Board are set out in section 80I(1) of the *Industrial Relations Act 1979*. The power on hearing and determining appeals set out there is "to adjust such matters as are referred to in paragraph (a),(b),(c),(d) and (e)."

7 Anderson J, in *SGIC* v *Johnson* said:

> "The word "adjust" has various applications in common parlance and in any given case it obtains its precise meaning or sense from the context in which it is used. In this legislation, the context is provided by each of the paragraphs (a) to (e) of s80I(1) and in the case under consideration the context is provided by para (e). The only "matter" which is referred to in that paragraph is "a decision, determination or recommendation ... that the Government officer be dismissed". It is that, and only that, which may be "adjusted" in the exercise of this particular aspect of the Board's jurisdiction. The power to "adjust" a decision or determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is, by altering the period of notice. He made only a claim for monetary compensation on the ground that the decision of dismissal itself was unfair. Hence, the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus to adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss."

8 Accordingly the power of the Board is to adjust the employer's decision.

9 Ms Smit says that she was dismissed by the respondent before the expiration of her contract. She does not want to return to her employment. The adjustment of the decision of the employer to dismiss her, if that is what occurred (although there is some dispute as to what did occur) would be that the employer's decision is over turned. The consequence of that may be that she would be placed back in the position that she held prior to the dismissal as if the decision to dismiss had not been made.

10 None of the remedies sought by Ms Smit provide an adjustment to any decision of the respondent. As Anderson J noted in respect of Mr Johnson, the Board is not being asked to change the employer's decision in any way but is being asked to provide a number of remedies which do not relate directly to an adjustment of the employer's decision.

11 Accordingly, the Board has no jurisdiction to provide the remedies sought and the appeal must be dismissed.

2010 WAIRC 00366

APPEAL AGAINST DECISION MADE BY RESPONDENT RE STATUS OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SUSAN WARING
	WENDY POWLES
	JUDITH MARGARET WICKHAM
	SHANE MELVILLE
	JOHAN WILLERS
	APPELLANTS
	-v-
	WORKCOVER WA
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS B CONWAY - BOARD MEMBER
	MR A PITTOCK - BOARD MEMBER
DATE	WEDNESDAY, 23 JUNE 2010
FILE NO	PSAB 31 OF 2009, PSAB 32 OF 2009, PSAB 33 OF 2009, PSAB 34 OF 2009, PSAB 35 OF 2009
CITATION NO.	2010 WAIRC 00366

Result	Direction issued
Representation	
Appellants	Ms S Waring, Ms W Powles, Ms J Wickham, Mr S Melville and Mr J Willers
Respondent	Mr R Andretich of counsel

Direction

HAVING heard Ms S Waring, Ms W Powles, Ms J Wickham, Mr S Melville and Mr J Willers on their own behalf and Mr R Andretich (of counsel) on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements will only be adduced by leave of the Public Service Appeal Board. Copies of documents referred to in witness statements shall be annexed to the statement.
2. THAT the appellants file and serve upon the respondent any signed witness statements upon which they intend to rely no later than fourteen (14) days prior to the date of hearing.
3. THAT Directions 1 and 2 do not apply to the evidence of any witness to be called by any of the appellants from The Civil Service Association of Western Australia Incorporated
3. THAT the respondent file and serve upon the appellants any signed witness statements upon which it intends to rely no later than seven (7) days prior to the date of hearing.
4. THAT these appeals be listed for simultaneous hearing for a period of three (3) days at a time to be fixed.
5. THAT the parties have liberty to apply on short notice.

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

RECLASSIFICATION APPEALS—

2010 WAIRC 00359

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PHILLIP MURRAY GIBLETT
	APPLICANT
	-v-
	COMMISSIONER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 17 JUNE 2010
FILE NO	PSA 2 OF 2010
CITATION NO.	2010 WAIRC 00359

Result	Application dismissed

Order

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

WHEREAS on the 5th day of March 2010 the Public Service Arbitrator (the Arbitrator) convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant agreed to submit further information to the respondent; and

WHEREAS on the 28th day of May 2010 the Arbitrator convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 4th day of June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

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

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 119/2010	Request for mediation in relation to reinstatement of accrued leave entitlements	Kenner C	N/A	Withdrawn
APPL 9/2010	Request for mediation in relation to negotiation of contract	Beech CC	N/A	Withdrawn
APPL 8/2010	Request for mediation re classification dispute.	Beech CC	18/02/2010 9/03/2010	Recommendation Issued

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2010 WAIRC 00338

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES NICHOLAS DANIEL AND OTHERS

APPLICANTS

-v-

WESTERN CONSTRUCTION CO AND ANOTHER

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE TUESDAY, 15 JUNE 2010

FILE NO/S OSHT 122 OF 2010, OSHT 123 OF 2010, OSHT 124 OF 2010, OSHT 125 OF 2010, OSHT 126 OF 2010, OSHT 127 OF 2010, OSHT 128 OF 2010, OSHT 129 OF 2010, OSHT 130 OF 2010, OSHT 131 OF 2010, OSHT 132 OF 2010, OSHT 133 OF 2010

CITATION NO. 2010 WAIRC 00338

Result Interlocutory order issued

Representation

Applicants Mr M Swinbourn

Respondents Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS these are applications filed pursuant to s 28(2) of the *Occupational Safety and Health Act 1984* (the Act);

AND WHEREAS on 12 April 2010 the Occupational Safety and Health Tribunal (the Tribunal) conducted a conciliation conference between the parties, their agents and counsel;

AND WHEREAS on 7 May 2010 the Tribunal conducted inspections on site at the respondents' premises in Kwinana;

AND WHEREAS following the inspections the applicants and respondents advised the matters ought be listed for hearing and determination;

AND WHEREAS the applications were listed for a directions hearing on 3 June 2010;

AND WHEREAS at the directions hearing the Commissioner asked the parties to submit their views in writing by close of business 9 June 2010 as to whether the Tribunal ought, in relation to each of the applications, issue an order to:

s 27(1)(ha) determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceedings and require that the cases to be presented within the respective periods.

AND WHEREAS the respondents submitted that no such order ought issue limiting the time in which the parties will have to cross-examine witnesses and the applicants submitted that such an order ought issue limiting the period in which the parties have to cross-examine witnesses;

AND WHEREAS the Tribunal has considered each of the parties' submissions and considered at this stage it is not appropriate to issue such an order. However, the Tribunal will keep this matter under close review and undertakes to ask the parties' views particularly once witness statements are filed;

AND WHEREAS having heard Mr M Swinbourn on behalf of the applicants and Mr J Blackburn and Ms L Gibbs (both of counsel) on behalf of the respondents, the Tribunal, pursuant to the powers conferred on it under the Act hereby orders that:

1. The applicants file in the Tribunal and serve on the respondents, further and better particulars of the claim on or before 18 June 2010. The further and better particulars of claim shall in each case include particulars as to:
   (a) the area(s) in which each applicant refused to work;
   (b) the risk(s) to which each applicant believed that he would be exposed had the applicant continued to work in those areas;
   (c) the grounds for each applicant's belief that to continue to work would expose him to a risk of imminent and serious injury or imminent and serious harm to his health;
   (d) the means by which each applicant notified his employer of his refusal to work;
   (e) the area or areas in which the applicant was prepared to perform alternative work;
   (f) whether any applicant was asked to perform any alternative work and if so did any applicant refuse to perform that alternative work and why;
   (g) the time at which each applicant left the workplace and whether the applicants' departure was authorised and if so who authorised the departure; and
   (h) the period in respect of which each applicant is claiming payment and the amount claimed.
2. Each party provide a list of discoverable documents to the other party on or before 18 June 2010;
3. Parties can request in writing that they be provided with copies of documents referred to on the list. Requested documents will be provided within 5 days of a request being made;
4. The respondents file in the Tribunal and serve on the applicants a detailed notice of answer on or before 25 June 2010;
5. The applicants file in the Tribunal and serve on the respondents, any witness statements upon which they propose to rely on or before 5 July 2010;
6. The respondents file in the Tribunal and serve on the applicants, any witness statements upon which they propose to rely or on before 15 July 2010;
7. The parties file an agreed statement of facts on or before 19 July 2010;
8. If a party wishes to cross-examine a witness who has given a filed witness statement, the party must give notice to the party who filed the witness statement on or before 30 July 2010;
9. The applicants file in the Tribunal and serve on the respondents, an outline of submissions and copies of any authorities to be relied upon on or before 22 July 2010;
10. The respondents file in the Tribunal and serve on the applicants, an outline of submissions in reply and copies of any authorities to be relied upon on or before 29 July 2010;
11. All witness statements including expert reports filed and served in accordance with directions 5 and 6 (filed witness statements) may be tendered at the hearing as evidence in chief of the witness provided that:
    (a) if a party has given notice in accordance with direction 8, the witness is made available for cross-examination;
    (b) the tender is subject to rulings on any objections to the evidence; and
    (c) there be liberty to apply;
12. If a party wishes to object to any evidence contained in a filed witness statement, the party must give notice to the party who filed the witness statement of each such objection and the ground for each such objection on or before 22 July 2010;
13. The matters be fixed for hearing for 2 weeks commencing 2 August 2010;
14. There be liberty to apply.

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

2010 WAIRC 00396

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	DAVE HOPE
	APPLICANT
	-v-
	WESTERN CONSTRUCTION CO
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 6 JULY 2010
FILE NO/S	OSHT 125 OF 2010
CITATION NO.	2010 WAIRC 00396

Result	Applicantion discontinued
Representation	
Applicant	Mr M Swinbourn (as agent)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened a conference with respect to this and other related applications on 12 April 2010 for the purpose of conciliation between the parties;

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

AND WHEREAS the Tribunal conducted inspections on-site at the respondent's premises in Kwinana on 7 May 2010;

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

AND WHEREAS at the request of the parties the Tribunal listed the matter for a directions hearing on 3 June 2010;

AND WHEREAS following the directions hearing the Tribunal issued an order listing the matter for hearing to commence on 2 August 2010;

AND WHEREAS on 21 June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued

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

2010 WAIRC 00398

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MATHEW MCDONALD
	APPLICANT
	-v-
	ANDRECO HURRL REFRACTORY SERVICES PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 6 JULY 2010
FILE NO/S	OSHT 131 OF 2010
CITATION NO.	2010 WAIRC 00398

Result	Application discontinued
Representation	

Applicant Mr M Swinbourn (as agent)

Respondent Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened a conference with respect to this and other related applications on 12 April 2010 for the purpose of conciliation between the parties;

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

AND WHEREAS the Tribunal conducted inspections on-site at the respondent's premises in Kwinana on 7 May 2010;

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

AND WHEREAS at the request of the parties the Tribunal listed the matter for a directions hearing on 3 June 2010;

AND WHEREAS following the directions hearing the Tribunal issued an order listing the matter for hearing to commence on 2 August 2010;

AND WHEREAS on 21 June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued

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

2010 WAIRC 00399

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES PHILIP MORRELL

APPLICANT

-v-

WESTERN CONSTRUCTION CO

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE TUESDAY, 6 JULY 2010

FILE NO OSHT 132 OF 2010

CITATION NO. 2010 WAIRC 00399

Result Application discontinued

Representation

Applicant Mr M Swinbourn (as agent)

Respondent Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS at the request of the parties the Tribunal listed this and other related matters for a directions hearing on 3 June 2010;

AND WHEREAS following the directions hearing the Tribunal issued an order listing the matter for hearing to commence on 2 August 2010;

AND WHEREAS on 21 June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued

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

2010 WAIRC 00397

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	DAMIEN WESTCOTT
	APPLICANT
	-v-
	WESTERN CONSTRUCTION CO
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 6 JULY 2010
FILE NO/S	OSHT 127 OF 2010
CITATION NO.	2010 WAIRC 00397

Result	Application discontinued
Representation	
Applicant	Mr M Swinbourn (as agent)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened a conference with respect to this and other related applications on 12 April 2010 for the purpose of conciliation between the parties;

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

AND WHEREAS the Tribunal conducted inspections on-site at the respondent's premises in Kwinana on 7 May 2010;

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

AND WHEREAS at the request of the parties the Tribunal listed the matter for a directions hearing on 3 June 2010;

AND WHEREAS following the directions hearing the Tribunal issued an order listing the matter for hearing to commence on 2 August 2010;

AND WHEREAS on 21 June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued

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

2010 WAIRC 00395

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	PAUL DE FILIPPIS
	APPLICANT
	-v-
	WESTERN CONSTRUCTION CO
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 6 JULY 2010
FILE NO/S	OSHT 123 OF 2010
CITATION NO.	2010 WAIRC 00395

Result	Application discontinued
Representation	
Applicant	Mr M Swinbourn (as agent)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened a conference with respect to this and other related applications on 12 April 2010 for the purpose of conciliation between the parties;

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

AND WHEREAS the Tribunal conducted inspections on-site at the respondent's premises in Kwinana on 7 May 2010;

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

AND WHEREAS at the request of the parties the Tribunal listed the matter for a directions hearing on 3 June 2010;

AND WHEREAS following the directions hearing the Tribunal issued an order listing the matter for hearing to commence on 2 August 2010;

AND WHEREAS on 21 June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued

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

2010 WAIRC 00394

REFERRAL OF DISPUTE RE ENTITLEMENTS TO PAY AND OTHER BENEFITS

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	NICHOLAS DANIEL
	APPLICANT
	-v-
	WESTERN CONSTRUCTION CO
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 6 JULY 2010
FILE NO/S	OSHT 122 OF 2010
CITATION NO.	2010 WAIRC 00394

Result	Application discontinued
Representation	
Applicant	Mr M Swinbourn (as agent)
Respondent	Mr J Blackburn and Ms L Gibbs (both of counsel)

Order

WHEREAS this is an application pursuant to s 28(2) of the *Occupational Safety and Health Act 1984*;

AND WHEREAS the Tribunal convened a conference with respect to this and other related applications on 12 April 2010 for the purpose of conciliation between the parties;

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

AND WHEREAS the Tribunal conducted inspections on-site at the respondent's premises in Kwinana on 7 May 2010;

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

AND WHEREAS at the request of the parties the Tribunal listed the matter for a directions hearing on 3 June 2010;

AND WHEREAS following the directions hearing the Tribunal issued an order listing the matter for hearing to commence on 2 August 2010;

AND WHEREAS on 21 June 2010 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby discontinued

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2010 WAIRC 00346

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	NIGHTSTONE ENTERPRISES PTY LTD TRADING AS JEWLZ HAULAGE
	APPLICANT
	-v-
	FIVE MOVERS
	(GAVIN PETER KLANJSCEK)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
HEARD	FRIDAY, 28 MAY 2010
DELIVERED	WEDNESDAY, 16 JUNE 2010
FILE NO.	RFT 5 OF 2010
CITATION NO.	2010 WAIRC 00346

CatchWords	Owner-driver contract – Referral of dispute regarding payment of claim – Claim for interest on outstanding sum – Failure of Respondent to appear – Owner-Drivers (Contracts and Disputes) Act 2007 ss4, 5, 14, 38 and 44 – Industrial Relations Act 1979 s27(1)
Result	Application upheld. Order issued
Representation	
Applicant	Mr C Sparshatt-Potter
Respondent	No appearance

Reasons for Decision

The Application

1 The present matter is a claim pursuant to s 38 of the Owner-Drivers (Contracts and Disputes) Act 2007 ("the OD Act"). The applicant claims that the respondent is indebted to it in the sum of $38,106.19 arising from an owner-driver contract entered into between the parties.

2 Conciliation proceedings pursuant to s 44 of the OD Act did not resolve the matters in dispute. Accordingly, the applicant's claim was referred to the Tribunal for determination.

3 The matter was listed for hearing by the Tribunal on 28 May 2010. A notice of hearing, listing the application, was sent to the parties at their last known addresses for service on 6 May 2010.

4 Two days before the matter was heard by the Tribunal, contact was made with my Associate by the wife of Mr Klanjscek, the proprietor of the respondent, to advise that he had travelled away from Perth for work purposes. Mrs Klanjscek was informed by my Associate that if the respondent sought an adjournment of the proceedings then an application would need to be urgently made. Alternatively, an application to adjourn would need to be made on the morning of the hearing on 28 May 2010 and the Tribunal would determine the application. No such application was made.

5 On the day of the hearing the respondent failed to appear. There was no suggestion that the respondent had not be given due notice of the hearing. Indeed, the telephone contact with my Associate on 26 May 2010 makes it reasonably plain that the respondent had been duly served with notice of these proceedings.

6 Given that the proceedings have been on foot for some time, no application to adjourn the proceedings had been made, and the Tribunal being satisfied that the respondent had due notice of the proceedings, pursuant to s 27(1)(d) of the Industrial Relations Act 1979 ("the IR Act"), the Tribunal determined that it would proceed to hear and determine the matter in the absence of the respondent.

The Evidence

7 The only evidence in the proceedings was from the applicant through its proprietor Mr Sparshatt-Potter. He testified that he is the proprietor and director of the applicant conducting the haulage business trading as Jewlz Haulage. It became apparent from this testimony that the proper identity of the applicant is Nightstone Enterprises Pty Ltd trading as Jewlz Haulage. Pursuant to s 27(1)(l) of the IR Act the Tribunal amended the proceedings to reflect the proper identity of the applicant in accordance with the decision of the Full Bench of the Commission in *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375.

8 Mr Sparshatt-Potter gave evidence that the applicant business is engaged in road haulage and transports goods using a 90 tonne truck and trailer.

9 Mr Sparshatt-Potter said that he received a telephone call from Mr Klanjscek in relation to the supply and delivery of road base to a location in Forrestdale Western Australia. He said that he provided a quote for the works to the respondent at the rate of $22.20 per tonne plus GST.

10 Tendered as exhibit A1 is a written quotation from the applicant to the respondent dated 21 December 2009 (Quote No: 100120). The quotation details confirm the conversation between Mr Sparshatt-Potter and Mr Klanjscek that the applicant transport approximately 600m of 20 mm road base to Cartwright Road, Forrestdale at $22.20 per tonne plus GST. The quotation was accepted by the respondent. Tendered as a part of exhibit A1 is a copy of an email from the respondent to the applicant accepting the quotation, with works to commence on 23 December 2009.

11 In accordance with the agreement, the applicant commenced work on 24 December 2009 and on that day carted 242.95 tonnes of road base. On 29 December 2009 the application carted 266.10 tonnes of material. On 30 December 2009 the applicant carted a further 1,051.40 tonnes of road base being a total 1,560.45 tonnes at the agreed rate of $22.20 per tonne plus GST. This led to a total value of the haulage of $38,106.19 in accordance with the agreed price. These amounts are referred to in invoice from the applicant to the respondent dated 30 December 2009. The invoice tendered by the applicant refers to payment terms of 14 days.

12 The evidence of Mr Sparshatt-Potter was that despite demand, the respondent has not paid the amount claimed or any amount in relation to the work preformed by it over the period 24 to 30 December 2009.

13 Also tendered as a part of the bundle in exhibit A1 were materials delivery dockets in relation to the cost of the road base purchased by the applicant and supplied to the respondent. Additionally, by an email dated 2 February 2010, a copy of which was tendered as exhibit A2, Mr Sparshatt-Potter advised the respondent that the outstanding amount would attract interest at a daily rate under the terms of the OD Act.

Findings

14 In the absence of any evidence from the respondent, I am obliged to accept the applicant's evidence unless I find it to be inherently incredible. I do not. On the contrary, I found Mr Sparshatt-Potter to be a credible witness and accordingly I find in accordance with his evidence.

15 I am satisfied on the evidence that for the purposes of s 4 of the OD Act the applicant is an owner-driver in that it is a body corporate which carries on the business of transporting goods in one or more heavy vehicles, that being a vehicle with a gross vehicle mass of more than 4.5 tonnes. I am also satisfied on the evidence that the heavy vehicle used by the applicant is supplied by it and operated by Mr Sparshatt-Potter who is an officer of the applicant and whose principal occupation is the operation of that heavy vehicle. I am thus satisfied that the applicant is an owner-driver for the purposes of s 4(2) of the OD Act.

16 On the evidence I find that an owner-driver contract for the purposes of s 5 of the OD Act was entered into by the applicant as an owner-driver and the respondent. The terms of the owner-driver contract required the applicant to deliver approximately 600m of 20mm of road base to Forrestfield in Western Australia for the benefit of the respondent. Consideration for the delivery of the material by the applicant was payment by the respondent to the applicant of the sum of $22.20 per tonne of road base delivered plus GST.

17 I am also satisfied on the evidence that the present proceeding is a payment claim for the purposes of s 3 of the OD Act, that being a claim made under an owner-driver contract by the applicant against the respondent for payment of an amount in relation to the performance by the applicant of his obligations under the contract and the payment claim has not been satisfied.

18 I also find that the applicant incurred the costs of the purchase of the road base product as evidence by the raw materials delivery dockets tendered in evidence.

Conclusion

19 The applicant has established on the balance of probabilities that the respondent is indebted to it in the sum of $38,106.19. Furthermore, s 14 of the OD Act, in the absence of an express term in the owner-driver contract between the applicant and the respondent as to interest, the applicant is entitled to interest on the outstanding sum as claimed. By cl 2 of Schedule 1 -Implied provisions of the OD Act, the rate of interest is that prescribed by s 8(1)(a) of the Civil Judgements Enforcement Act 2004 which, by reg 4(1) of the Civil Judgements Enforcement Regulations 2005, is presently six percent.

20 The outstanding sum was due and payable by 14 January 2010. Pursuant to cl 2(2) of Schedule 1 of the OD Act, interest is to be paid for the period beginning on the day after the date on which the amount is due, in this case from 15 January 2010, and ending on and including the date on which the amount payable is paid. I will award interest from 15 January 2010 to the date of this decision. In this case, that is a period of 22 weeks at a weekly interest accrual of $43.97, giving a total interest accrual of $967.34. The total amount payable, being the debt due and owing plus interest is $39,073.53.

21 The Tribunal orders accordingly.

REFERRAL OF DISPUTE RE PAYMENT OF A CLAIM

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	NIGHTSTONE ENTERPRISES PTY LTD TRADING AS JEWLZ HAULAGE
	APPLICANT
	-v-
	FIVE MOVERS (GAVIN PETER KLANJSCEK)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 21 JUNE
FILE NO/S	RFT 5 OF 2010
CITATION NO.	2010 WAIRC 00361

Result	Order issued
Representation	
Applicant	Mr C Sparshatt-Potter
Respondent	No appearance

Order

HAVING heard Mr C Sparshatt-Potter on behalf of the applicant and there being no appearance on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby:

1. ORDERS that the name of the applicant be amended by the deletion of the name "Charles Sparshatt-Potter" and the insertion in lieu thereof the name "Nightstone Enterprises Pty Ltd trading as Jewlz Haulage"
2. DECLARES that the respondent is indebted to the applicant in the sum of $38,106.19.
3. ORDERS the respondent to pay to the applicant the debt due plus interest in the total sum of $39,073.53 within 14 days of the date of this order.

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

2010 WAIRC 00447

REFERRAL OF DISPUTE RE PAYMENT OF CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	ZENITH LOW LOADERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 14 JULY 2010
FILE NO/S	RFT 13 OF 2010
CITATION NO.	2010 WAIRC 00447

Result	Application discontinued by leave
Representation	
Applicant	Mr D Cain
Respondent	Mr M Southern

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Commission, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act, 2007 hereby orders –

THAT the application be and is hereby discontinued by leave.

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