Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 5 WEDNESDAY 24 AUGUST, 2011 Vol. 91—Part 2

THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

91 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

INDUSTRIAL APPEAL COURT—Appeals against decision of Commission under s.33S of the Police Act 1892—

[2011] WASCA 168

JURISDICTION	:	WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT
CITATION	:	GORDON -v- COMMISSIONER OF POLICE [2011] WASCA 168
CORAM	:	PULLIN J
		BUSS J
		LE MIERE J
HEARD	:	8 APRIL 2011
DELIVERED	:	8 AUGUST 2011
FILE NO/S	:	IAC 3 of 2010
BETWEEN	:	ALISTAIR LINDSAY GORDON
		Appellant
		AND
		COMMISSIONER OF POLICE
		Respondent

ON APPEAL FROM:

Jurisdiction	:	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Coram	:	BEECH CC
		SCOTT ASC
		MAYMAN C
Citation	:	GORDON v COMMISSIONER OF POLICE [2010] WAIRC 00937
File No	:	APPL 38 of 2009

Catchwords:

Industrial Appeal Court - Application to amend grounds of appeal - Application to adduce further evidence - Whether court has jurisdiction to hear appeal - Whether Industrial Relations Commission erred in its construction and interpretation of *Police Act 1892* (WA)

Legislation:

Industrial Relations Act 1979 (WA), s 90(1), s 90(3a)

Labour Relations Reform Act 2002 (WA), s 126

Police Act 1892 (WA), s 8, s 33P, s 33Q, s 33S, s 33U

Police Amendment Act 2003 (WA)

Result:

Leave to adduce further evidence refused

Leave to amend grounds of appeal refused

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr G M Cridland
Respondent	:	Ms D P Scaddan

Solicitors:

Appellant	:	Hammond Legal
Respondent	:	Western Australian Police Service

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

R v Bolton; Ex Parte Beane (1987) 162 CLR 514

Re Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

1 **PULLIN J**: I agree with Le Miere J.

2 **BUSS J**: I agree with Le Miere J.

3 **LE MIERE J**: The appellant was formerly a member of the police force. The Commissioner of Police (Commissioner) removed the appellant under s 8 of the *Police Act 1892* (WA) (Police Act). The appellant appealed to the Western Australian Industrial Relations Commission (Commission) under s 33P of the Police Act under which a member may appeal on the ground that the decision of the Commissioner to take removal action was harsh, oppressive or unfair. The Commission dismissed the appeal. The appellant now appeals to this court principally on the ground that the Commission erred in law in construing s 33P(1) of the Police Act by having no or insufficient regard to whether the decision to remove the appellant was fair.

Application to amend and adduce new evidence

4 At the hearing of the appeal the appellant moved to amend his grounds of appeal and for leave to adduce further evidence. The court reserved its decision on those applications and proceeded with the hearing of the appeal.

5 The proposed new ground of appeal is:

> The appellant has been denied the right to be heard by the Commissioner.

The further evidence sought to be adduced is a letter dated 15 October 2010 from the Minister for Police, the Hon Rob Johnson MLA, to the appellant's wife. The letter states:

> Thank you for your recent correspondence regarding your husband's previous employment within the Western Australia Police and the subsequent loss of confidence finding by the Commissioner.
>
> Although I am unaware of the circumstances relating to the Commissioner's decision, the decision was reviewed and supported by the former Minister for Police, Hon John Kobelke.
>
> Unfortunately I am unable to offer any assistance beyond my suggestion to you, in correspondence of 13 May 2009, that you contact the Western Australia Police Union of Workers or obtain independent legal advice.

6 The significance of the letter arises from the chronology of events leading to the appellant's removal. On 1 October 2008 the Commissioner served the appellant with a notice to show cause why he should not be removed from the police force. On 22 October 2008 the appellant made written submissions to the Commissioner why he should not be removed. On 20 April 2009 the Commissioner gave notice to the appellant that he had lost confidence in the appellant's suitability to continue as a member of the Police Force of Western Australian (WA Police) and had

recommended to the Minister for Police that he approve the appellant's removal from the WA Police. On 29 April 2009 the Commissioner gave notice to the appellant that on 22 April 2009 the Minister for Police had approved his removal from the police force and that the appellant's removal would be effective from the date of service of the notice. The Hon Rob Johnson was appointed Minister for Police on 23 September 2008. The appellant submitted that it should be inferred from the contents of the Minister's letter that the Commissioner's decision to remove the appellant, and the Minister's approval of the removal, occurred before 23 September 2008 and therefore before the appellant was informed of the Commissioner's intention to remove the appellant and before the appellant was given an opportunity to show cause why he should not be removed.

7 The application to amend the grounds of appeal should be refused because the proposed ground of appeal has no prospect of success for the following reasons.

8 First, the court does not have jurisdiction to hear an appeal on that ground. The right of a member who has been removed from the police force to appeal to the Commission or to this court is conferred by pt IIB of the Police Act. Section 33S of the Police Act provides that the provisions of the *Industrial Relations Act 1979* (WA) (the Industrial Relations Act) listed in the Table apply, subject to that part, any necessary modifications, and any specific modifications set out in the Table, to and in relation to an appeal and a determination of an appeal instituted under pt IIB. The table consists of two columns. The first column lists provisions of the Industrial Relations Act. The second column sets out any specific modifications in relation to those provisions. The provisions of the Industrial Relations Act listed in the Table include s 90. The following specific modifications are set out in relation to s 90:

> A reference in subsection (1) to 'any decision of the President, the Full Bench, or the Commission in Court Session' is to be read as if it were a reference to 'a decision of the Commission under s 33U of the Police Act 1892'.

The effect of s 33S of the Police Act is that s 90 of the Industrial Relations Act applies to an appeal and a determination of an appeal instituted under pt IIB of the Police Act as if it read:

> (i) Subject to this section, an appeal lies to the Court in the manner prescribed from a decision of the Commission under s 33U of the Police Act 1892 -
>
> (a) on the ground that the decision is in excess of jurisdiction in that the matter the subject of the decision is not an industrial matter;
>
> (b) on the ground that the decision is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against; or
>
> (c) on the ground that the appellant has been denied the right to be heard,
>
> but upon no other ground.

9 The appellant relies upon s 90(1)(c) of the Industrial Relations Act, as modified and applied by s 33S of the Police Act. The ordinary and grammatical meaning of s 90(1)(c) so modified is that the appellant has been denied the right to be heard by the decision-maker that made the decision from which the appeal lies, that is the Commission. That is the ordinary grammatical meaning of s 90(1)(c) without regard to (a) and (b). Paragraphs (a) and (b) specify grounds of appeal with respect to errors in the decision of the decision-maker appealed from. It is unlikely that the Parliament intended to adopt a different approach in relation to s 90(1)(c).

10 That construction is confirmed by the history of Industrial Relations Act s 90(1). Section 90(1) before its amendment provided:

> Subject to this section, an appeal lies to the Court in the manner prescribed from any decision of the President, the Full Bench, or the Commission in Court Session on the ground that the decision is erroneous in law or is in excess of jurisdiction but upon no other ground.

It is clear that the grounds of appeal were then limited to errors or excess of jurisdiction in the decision of the decision-maker being appealed from. The section was amended by *Labour Relations Reform Act 2002* (WA) s 126. The amendment further restricted rather than expanded the grounds of appeal, including the ground that the decision of the decision-maker being appealed from is in excess of jurisdiction. The amendment is described in the Explanatory Memorandum to the Labour Relations Reform Bill 2002 (WA):

> 97. Grounds of appeal are limited to questions of jurisdiction on the basis that the subject matter of the appeal is not an industrial matter and to questions of construction and interpretation.
>
> 98. To ensure that justice is properly administered, failure to afford the right to be heard will *continue* to be within the jurisdiction of the Industrial Appeal Court. (emphasis added)

The ground that the appellant has been denied the right to be heard was a ground contained within s 90(1) before its amendment, not an extension of that ground. The ground before amendment applied only to a decision of the Commission and the ground described in s 90(1) after amendment should be construed to also apply only to a decision of the Commission.

11 Secondly, the further evidence sought to be adduced is not capable of establishing that the Commissioner denied the appellant the right to be heard. On 1 October 2008 the Commissioner served on the appellant a notice of intention to remove him and informed the appellant of his right to make written submissions to the Commissioner in response. On 22 October 2008 the appellant made detailed written submissions to the Commissioner. The appellant submits that it is to be inferred from the Minister's letter, and the date on which the Hon Rob Johnson was appointed Minister, that the Commissioner had already determined to remove the appellant before he received the appellant's

submissions. However, that does not establish that the appellant was denied the right to be heard by the Commissioner. The Commissioner considered the appellant's submissions before he decided on 20 April 2009 to recommend to the Minister that he approve the removal of the appellant. The appellant's argument is in substance one of prejudgment. Prejudgment is an aspect of the rule against bias, not the hearing rule: see eg Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (4th ed, 2009) [9.195]. Establishing prejudgment does not establish that the appellant was denied the right to be heard.

12 Leave to adduce the Minister's letter into evidence should be refused. The evidence is sought to be led in support of the proposed new ground of appeal. The proposed new ground of appeal has no prospect of success and hence admitting the Minister's letter into evidence would be futile. There are other reasons why leave to adduce the further evidence might be refused but it is not necessary to address those additional reasons.

Jurisdiction of the court

13 The respondent submits that the court does not have jurisdiction to hear the appeal because Industrial Relations Act s 90(1) as applied by Police Act s 33S does not confer on a member of the police force a right of appeal from a decision of the Commission dismissing the member's appeal to the Commission under Police Act pt IIB div 3.

14 Industrial Relations Act s 90(1) as applied by Police Act s 33S to an appeal under Police Act pt IIB provides:

> Subject to the section, an appeal lies to the Court in the manner prescribed from a decision of the Commission under s 33U of the Police Act 1892 [on the grounds stated in (a), (b) and (c)] but upon no other ground.

Police Act s 33U(1) and (2) provide:

> (1) This section applies if the WAIRC decides on an appeal that the decision to take removal action relating to the appellant was harsh, oppressive or unfair.
>
> (2) If this section applies and unless an order is made under subsection (3) the WAIRC may order that the appellant's removal from office is and is to be taken to have always been of no effect.

15 Subsection 33U(3) provides that if the Commission considers that it is impracticable for it to be taken that the appellant's removal from office is and has always been of no effect the Commission may order the Commissioner to pay the appellant compensation for loss or injury caused by the removal. Subsections 33U(4) - (9) provide for matters the Commission is to consider in deciding whether to order compensation, the amount of compensation to be ordered and ancillary matters.

16 Police Act s 33S provides that the provisions of the Industrial Relations Act listed in the Table apply to and in relation to an appeal and a determination of an appeal instituted under Police Act pt IIB subject to pt IIB, any necessary modifications and the specific modifications set out in the Table. The specific modifications set out in the Table limit the right of appeal to an appeal from a decision of the Commission under s 33U of the Police Act. The right of appeal so conferred does not include an appeal from a decision of the Commission that the decision to take removal action was not harsh, oppressive or unfair.

17 The appellant submits that Police Act s 33S requires Industrial Relations Act s 90(1) to apply to an appeal under Police Act pt IIB subject to 'any necessary modifications'. However, it is not necessary to modify Industrial Relations Act s 90(1) so as to confer on a member of the police force a right of appeal from a decision of the Commission dismissing his appeal. To further modify Industrial Relations Act s 90(1), as already modified by the specific modifications set out in the Table to s 33S, would be to confer a right of appeal which is excluded by the specific provision conferring the right of appeal. That is not a 'necessary modification'.

18 The appellant referred to the Explanatory Memorandum to the Police Amendment Bill 2002 (WA) which inserted pt IIB into the Police Act. In relation to s 33S the explanatory memorandum states:

> Members are provided with a further limited right of appeal from a decision of the [Commission] to the Western Australian Industrial Appeal Court, of a similar nature to the existing appeal right in relation to decisions of the President, the Full Bench, or the Commission in Court Session under s 90 of the Industrial Relations Act 1990.

19 That is not inconsistent with Police Act s 33S not providing members with a right of appeal from a decision of the Commission dismissing their appeal to the Commission. If the Commission decides on appeal that the decision to take removal action relating to the appellant was harsh, oppressive or unfair it may order that the appellant's removal from office is and is to be taken to have been always of no effect. The effect of this is that the member will effectively be reinstated from the date of removal. Alternatively, the Commission may decide that it is impracticable for the member to be reinstated and may order compensation. The decision of the Commission under s 33U may include a decision that the member be reinstated or a decision that the Commissioner pay the appellant compensation and if so the amount of compensation. A member may appeal to the court against a decision that he be paid compensation rather than reinstated or against a decision as to the amount of compensation. A member may arguably also be entitled to appeal against a decision that he be reinstated rather than paid compensation but it is not necessary to decide that matter on this appeal. Thus, although members may not appeal against a decision that their removal was not harsh, oppressive or unfair they nevertheless are provided with a limited right of appeal to the court.

20 In any event, in the absence of ambiguity, uncertainty or manifest absurdity or unreasonableness, an express statement of intention in an explanatory memorandum cannot prevail over the words actually used in the Act. In ***R v Bolton; Ex Parte Beane*** (1987) 162 CLR 514, the question was whether a statutory provision concerned with 'visiting forces' applied to deserters from the armed forces of the United States. Mason CJ, Wilson and Dawson JJ said at 518:

> [T]he second reading speech of the Minister … quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.

21 The construction of Industrial Relations Act s 90(1), as applied by Police Act s 33S, that the subsection does not confer on a member a right of appeal from a decision of the Commission that the member's removal was not harsh, oppressive or unfair is not absurd or unreasonable. Prior to the *Police Amendment Act 2003* (WA) (the Amendment Act) s 8 of the Police Act gave the Commissioner a largely unfettered power, with the approval of the Minister, to remove police officers. Police officers had limited rights of judicial review but no statutory rights of appeal in respect of decisions to remove them. The Amendment Act introduced a requirement that before a police officer can be removed from office under s 8 the Commissioner must have lost confidence in the officer's suitability to continue as a police officer, having regard to the officer's integrity, honesty, competence, performance or conduct: see s 33L read with s 8(2). The Amendment Act also introduced a number of measures to protect the interests of members, including the right to a hearing before being removed. Before taking action to remove a member in whom he has lost confidence, the Commissioner is required to provide the member with a notice setting out the grounds of his loss of confidence. The member has 21 days to make written submissions to the Commissioner in respect of the grounds on which the Commissioner has lost confidence in the member's suitability to continue as a member. If the Commissioner decides to remove the officer he must disclose to the member the reasons for his decision and the materials he examined and took into account in making the decision. The Amendment Act also gave members who have been removed from office a right of appeal to the Commission. Members had had no such right before that.

22 The Amendment Act introduced statutory provisions to give members a right to a hearing and a right of appeal in relation to the Commissioner's decision to remove them from office. The hearing and appeal process is quite different from the process of the Commission on claims of unfair dismissal by employees. Appeals from a removal decision are heard before three members of the Industrial Relations Commission rather than one, as in an unfair dismissal case. Similar remedies are available, although the maximum compensation available to a police officer found to have been unfairly removed, but who cannot practicably be reinstated, is 12 months compared with six months for ordinary employees. An appeal from a removal decision will generally involve a review of the materials examined and taken into account by the Commissioner, any written submissions made to the Commissioner, the Commissioner's grounds for his loss of confidence and reasons for his decision to take removal action. The appeal will not involve a rehearing or a hearing de novo as is the case with unfair dismissal claims. In appropriate circumstances provision is made for new evidence to be tendered on appeal. Thus, the appeal is quite unlike the hearing of an unfair dismissal claim. It is not unreasonable or unlikely that the Parliament would intend that a member of the police having had a hearing before the Commissioner and an appeal to the Commission should not have a further right of appeal against a decision that his or her removal was not harsh, oppressive or unfair.

23 Upon the proper construction of Industrial Relations Act s 90(1), as applied by Police Act s 33S, a member of the police has no right of appeal from a decision of the Commission dismissing his appeal on the grounds that his removal was not harsh, oppressive or unfair. The appeal is incompetent. Nevertheless, as the matter was argued I will set out my findings in relation to the matters raised by the grounds of appeal.

Grounds of appeal

24 There are two grounds of appeal:

1. The Commission erred in law in construing section 33P(1) of the *Police Act* by having no or insufficient proper regard to whether the decision to remove the Appellant as a police officer was fair.

2. The Commission erred in law in its interpretation and construction of section 33P(1) of the *Police Act* in that it imported the concept of whether or not there had been any abuse of the right to remove by the Commissioner of Police using the criteria of harsh and oppressive whereas the proper construction of s 33P(1) does not require or permit the importation of any such concept of abuse of the right to remove. Section 33P(1) should have been interpreted as requiring the Commission to decide only whether the decision of the Commissioner of Police to take removal action relating to Mr Gordon was harsh, oppressive or unfair.

25 The two grounds of appeal in substance raise the same argument and may be considered together. The appellant's argument is founded on [51] of the reasons for decision of Beech CC, with whom Scott ASC and Mayman C agreed, and in particular the two sentences:

> It cannot reasonably be said that the legal right of the Commissioner of Police to remove Mr Gordon has been exercised so harshly or oppressively against Mr Gordon as to amount to an abuse of that right (as set out in Re ***Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385). Accordingly, the appeal will be dismissed.

26 In considering whether the Commission misconstrued Police Act s 33P(1) as asserted by the appellant it is necessary to consider the provisions of the Police Act relating to an appeal to the Commission, the appellant's case before the Commission and the structure of the reasons for decision of Beech CC.

27 Police Act s 33P provides that an appeal is instituted by a notice stating the reasons for the decision the subject of the appeal being harsh, oppressive or unfair. Section 33Q(1) provides that on the hearing of the appeal the Commission shall first consider the Commissioner's reasons for deciding to take removal action; secondly consider the case presented by the appellant as to why that decision was harsh, oppressive or unfair; and thirdly consider the case presented by the Commissioner in answer to the appellant's case. Section 33Q(4) provides that without limiting the matters to which the Commission is otherwise required or permitted to have regard in determining the appeal, it shall have regard to the interests of the appellant and the public interest which is taken to include the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the police force and the special nature of the relationship between the Commissioner and members of the force.

28 Beech CC, after setting out the background to the appeal, summarised the Commissioner's reasons for deciding to take removal action. Beech CC considered the case presented by the appellant by addressing the appellant's grounds of appeal. The appellant put forward six reasons why the Commissioner's decision was harsh, oppressive or unfair. The appellant did not press ground 1. Beech CC found that each of the other grounds were not made out. Beech CC then set out observations and findings under the heading 'Concluding Comments'. Beech CC correctly identified the essential question before the Commission to be whether the decision to take removal action was harsh, oppressive or unfair. Beech CC addressed the interests of the appellant as required by s 33Q(4)(a). Beech CC found that removal has significant consequences for the appellant and his family but found that the reasons relied upon by the Commissioner were soundly based. Beech CC summarised the incidents and conduct of the appellant which provided the Commissioner's reasons for deciding to take removal action. Beech CC referred to the public interest which he was required to take into account by s 33Q(4)(b). In the final paragraph of his reasons Beech CC said that the appellant's removal was not because of one incident but because of three incidents. Beech CC concluded his reasons with the final two sentences of [51] that I have referred to earlier.

29 When the reasons of Beech CC are considered as a whole it is apparent that he made no error in the construction or interpretation of Police Act s 33P. Beech CC correctly stated that the question that the Commission was required to determine was whether the decision of the Commissioner to take removal action was harsh, oppressive or unfair. If he made any error it was in the application of the law to the facts. That is not an appealable error.

30 Beech CC identified the essential question to be whether the decision of the Commissioner was harsh, oppressive or unfair. He correctly directed himself as to the proper construction of Police Act s 33P. When the Commissioner's reasons are read as a whole it is apparent that he did not substitute a different test for that required by Police Act s 33P. In [51] of his reasons Beech CC reproduced words from ***Re Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385. In doing so, Beech CC did no more than refer to authority in support of the proposition that it was apposite to consider whether there was an abuse of power to remove in determining whether the removal was harsh, oppressive or unfair. It cannot be reasonably inferred from the failure of Beech CC to expressly use the word 'unfair' in the penultimate sentence of [51] that he was applying a test that did not include unfairness as an element. The Commissioner's reference to the dicta from ***Undercliffe*** does no more than demonstrate that having considered and dismissed the appellant's grounds of appeal and weighed the appellant's interests against the public interest by reference to the notion of a 'fair go all around', Beech CC was further satisfied that the Commissioner's decision to remove the appellant was not otherwise exercised so harshly or so oppressively that it amounted to an abuse of the legal right to remove members.

31 For those reasons the grounds of appeal are not made out. If the grounds of appeal were made out I am satisfied that no injustice has been suffered by the appellant and would confirm the decision of the Commission pursuant to Industrial Relations Act s 90(3a). The Commission considered the Commissioner's reasons for deciding to take removal action and found them to be sound. The Commission considered the case presented by the appellant as to why that decision was harsh, oppressive or unfair and found that the grounds were not made out. The Commission had regard to the interests of the appellant and the public interest and found that having regard to those matters the appeal should be dismissed. No injustice was done to the appellant by the Commission also considering whether the Commissioner exercised his right to remove the appellant so harshly or oppressively as to amount to an abuse of that right.

32 The appeal should be dismissed.

2011 WAIRC 00815

APPEAL AGAINST THE DECISION OF THE COMMISSION IN MATTER NO. APPL 38 OF 2009 GIVEN ON 1 OCTOBER 2010

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	ALISTAIR LINDSAY GORDON
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PULLIN J
	BUSS J
	LE MIERE J
DATE HEARD	FRIDAY, 8 APRIL 2011
DATE DELIVERED	MONDAY, 8 AUGUST 2011
FILE NO/S	IAC 3 OF 2010
CITATION NO.	2011 WAIRC 00815

Result	Appeal dismissed
Representation	
Appellant	Mr GM Cridland (of Counsel)
Respondent	Ms DP Scaddan (of Counsel)

Order

HAVING HEARD Mr GM Cridland (of Counsel), for the Appellant, and Ms DP Scaddan (of Counsel), for the Respondent, THE COURT HEREBY ORDERS THAT:-

1. The appeal is dismissed.

[L.S.]

(Sgd.) J SPURLING,
Clerk of Court.

FULL BENCH—Appeals against decision of Commission—

2011 WAIRC 00821

APPEAL AGAINST THE DECISION OF THE COMMISSION GIVEN ON 26 JULY 2011 IN MATTER U 173 OF 2010

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2011 WAIRC 00821
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	MONDAY, 8 AUGUST 2011
DELIVERED	:	THURSDAY, 11 AUGUST 2011
FILE NO.	:	FBA 6 OF 2011
BETWEEN	:	RAINBOW COAST NEIGHBOURHOOD CENTRE INC
		Appellant
		AND
		KYLIE WOOD
		Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Western Australian Industrial Relations Commission**
Coram	:	**Commissioner S M Mayman**
Citation	:	**[2011] WAIRC 00780**
File No	:	**U 173 of 2010**

Catchwords	:	Industrial law (WA) – Appeal against finding of a single Commissioner – application for an adjournment – relevant principles considered – denial of procedural fairness – in the public interest an appeal should lie – decision quashed
Legislation	:	*Industrial Relations Act 1979* (WA) s 6(c), s 7, s 23A(6), s 26(1)(c), s 29(1)(b), s 29(1)(b)(i), s 29(1)(b)(ii), s 34(1), s 35, s 36, s 46(1)(a), s 49, s 49(1), s 49(2), s 49(2a)
Result	:	Appeal upheld
Representation:		
Appellant	:	Mr G McCorry (as agent)
Respondent	:	In person

Case(s) referred to in reasons:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Crown Scientific Pty Ltd v Clarke [2007] WAIRC 00334; (2007) 87 WAIG 598

House v R (1936) 55 CLR 499

Khatri v Price (1999) 166 ALR 380

McCorry v Como Investments Pty Ltd (1989) 69 WAIG 1000

Murdoch University v The Liquor, Hospitality and Miscellaneous Union Western Australian Branch (2005) 86 WAIG 247

Myers v Myers [1969] WAR 19

Palermo v Rosenthal [2010] WAIRC 00242; (2010) 90 WAIG 371

R v Blakely; ex parte The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia (1950) 82 CLR 54

R v Judges of the Federal Court; ex parte The Western Australian National Football League (Inc) (1979) 143 CLR 190

Registrar v Metal and Engineering Workers' Union of Western Australia (1994) 74 WAIG 1487

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1989) 69 WAIG 1873

Springdale Comfort Pty Ltd v BTAUWA (1986) 67 WAIG 325

The Registrar of the Western Australian Industrial Relations Commission v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2007) 87 WAIG 126

Reasons for Decision

THE FULL BENCH:

The appeal

1 The appellant seeks to institute an appeal pursuant to s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision of the Commission given on 26 July 2011: [2011] WAIRC 00780. The decision sought to be appealed against is a declaration that the hearing of the matter before the Commission would be rescheduled in Albany on 16, 17 and 18 August 2011 at the Albany Courthouse. The notice of appeal was filed on 1 August 2011.

2 Pursuant to s 49(2a) of the Act an appeal does not lie from a decision that is a 'finding' of the Commission unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie. A finding is a decision made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate: s 7 of the Act.

3 The application before the Commission at first instance is an application brought under s 29(1)(b)(i) of the Act by the respondent. The respondent claims that she has been harshly, oppressively or unfairly dismissed by the appellant on 24 September 2010 and seeks an order that the appellant pay her compensation pursuant to s 23A(6) of the Act.

The grounds of the appeal

4 The grounds of appeal are that the Commission erred in law in refusing an adjournment application in that:

(a) the Commission failed to have regard or any proper regard for the principles applicable to consideration of application for adjournment, or in the alternative had regard for irrelevant principles; and

(b) in all of the circumstances the decision was wholly unreasonable.

5 The grounds of appeal also address the following principles which go to the public interest. These are as follows:

1. It is in the public interest that decisions of the Commission in interlocutory matters where well established principles of law have applied for a long period and no distinguishing factors are identified that would justify a departure from previous decisions remain consistent.
2. It is not in the public interest for decisions to be made on apparently arbitrary grounds without reasons for decision being provided.
3. It is not in the public interest for decisions that are wholly unreasonable in all the circumstances to be allowed to stand.

6 After hearing the parties on 8 August 2011, the Full Bench informed the parties that the appeal had been made out and that an order would be made to quash the decision. These reasons set out the reasons why the Full Bench made that decision.

Background

7 No reasons for decision have been issued by the Commission at first instance which set out the reasons for the declaration being made. However, in two letters from the Associate to Commissioner Mayman to the appellant's agent, some of the factual circumstances which led to an adjournment and a relisting of the hearing are referred to. The material part of the first letter which is dated 26 July 2011 states as follows:

> I have received a request from the respondent's agent seeking an adjournment of:
>
> > The conference listed for 27 July 2011; and
> >
> > The hearing scheduled for 2, 3 and 4 August 2011.
>
> The Commission has also received a response to the respondent's request opposing such an adjournment.
>
> The Commission has considered the parties' submissions and declares, in the circumstances, that the hearing listed for 2, 3 and 4 August 2011 in Albany is hereby vacated. Furthermore, the conference scheduled for tomorrow afternoon, 27 July 2011, is also vacated.
>
> A declaration regarding the vacation of the next week's hearing is attached. The Commission's reasons for vacating the hearing will issue at a later date.
>
> The teleconference will be rescheduled for the week commencing 8 August 2011.
>
> The hearing will be rescheduled in Albany on 16, 17 and 18 August 2011.

8 A copy of the letter was sent to the appellant's agent on the same day. Later that day the appellant's agent sent an email to the Associate to Commissioner Mayman. In that email he said (AB 5A):

> I refer to the adjournment of the above proceedings. I have a matter listed for hearing in the Federal Magistrates Court on 17 August 2011 and therefore request that this new listing be adjourned. However I am free the following week and I anticipate Ms Ireland and/or Ms Robinson will also be available that week, but I note from Ms Wood's previous correspondence of 25 July 2011 that one of her witnesses - Ms Bramley - is going to be away for several weeks, although the dates are not known. Subject to the importance Ms Wood places on Ms Bramley giving evidence, the listing dates may need to be reviewed to accommodate this witness.
>
> For your assistance in scheduling other dates, my unavailable dates because of prior listings are 6, 7, 13 & 14 September 2011

9 Following some discussion between the appellant's agent and the Associate to Commissioner Mayman, the Associate sent the appellant's agent a second letter. In a letter dated 29 July 2011, the Associate to Commissioner Mayman stated:

> This matter was initially set down for hearing on 2, 3 and 4 August 2011. Following a request from the respondent to have the hearing adjourned the Commission considered submissions from the parties and granted the adjournment. At the same time a declaration was issued relisting the hearing in Albany for 16, 17 and 18 August 2011.
>
> The Commission has now received a request from Mr McCorry, the respondent's agent, for a further adjournment due to his commitment in the Federal Magistrates Court on 17 August 2011.
>
> In order to accommodate Mr McCorry's commitment the Commission has decided to rearrange the hearing for that week. The Commission now proposes to sit on Monday, 15 August 2011 and Tuesday, 16 August 2011 with extended hours and to recommence the hearing at lunch time on Thursday, 18 August 2011 having regard for Mr McCorry's request of 26 July 2011.
>
> The Commission has also indicated sitting hours would be arranged to accommodate the applicant's need to breast feed her baby.
>
> This matter has now been adjourned at the request of the respondent on one occasion and the applicant on one occasion. All being well the matter may be completed in two days.
>
> Enclosed is a notice of hearing incorporating the above changes.

10 Some time later the appellant's agent received a copy of the declaration made by the Commission on 26 July 2011 which provides:

> HAVING received written submissions from Mr G McCorry as agent for the respondent and Ms K Wood, the applicant, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

DECLARES that the hearing of this matter listed on 2 August 2011, 3 August 2011 and 4 August 2011 at the Albany Courthouse is hereby vacated.

DECLARES that the hearing of this matter will be rescheduled in Albany on 16, 17 and 18 August 2011 at the Albany Courthouse.

11 The appellant's complaint is that the scheduling of the hearing on 16, 17 and 18 August 2011 of this matter at the Albany Courthouse will cause an injustice to the appellant, the appellant's agent and another unrelated party.

Relevant circumstances of fact

12 The appellant's agent, Mr Graham McCorry, filed an affidavit made by him on 3 August 2011. In his affidavit he sets out the information he provided to the Commission through the Associate to Commissioner Mayman in seeking an adjournment of the hearing listed for 2, 3 and 4 August 2011 and the relisting of the hearing of the matter. As the Commission has not provided any reasons for decision in which the relevant material facts and issues on which an exercise of discretion for granting adjournment are founded we are of the opinion that it is appropriate in these circumstances for the Full Bench to receive the affidavit sworn by the appellant's agent in which relevant communications and submissions to the Commission are set out.

13 In his affidavit Mr McCorry states he is the appointed representative of the appellant and is authorised to make the affidavit on its behalf. He then goes on to state the following matters:

2. I have been involved in matters between the appellant and the respondent to this appeal since June 2010 and have intimate knowledge of the facts, claims and contentions of the parties and have provided advice to the appellant on the alleged unfair dismissal of the respondent and other matters. I refer to the Notice of Answer and Counterproposal to application U173 of 2010 at pages 8 to 20 of the appeal book for particulars of some of my involvement.

3. I am also the appointed representative of Bansley Pty Ltd in matter PEG 121 of 2011 in the Federal Magistrate's Court. I have been involved in all matters between the applicant, her union and the Respondent in matter PEG 121 of 2011 since January 2010 and have intimate knowledge of the facts, claims and contentions of the parties. I am instructing Counsel and am required to be present during Federal Magistrate's Court proceedings in Matter PEG 121 of 2011 that are scheduled for 17 August 2011.

4. The respondent to this appeal commenced proceedings in the Commission in October 2010 alleging she was unfairly dismissed from her employment with the appellant. I prepared the appellant's Notice of Answer and Counter Proposal to the application which was numbered U173 of 2010. The matter was allocated to Commissioner Mayman for hearing and determination.

5. Conciliation did not resolve the matter and the hearing of the matter was initially scheduled for dates in June 2011. The hearing was adjourned at the respondent's request and rescheduled for hearing on 2, 3 and 4 August 2011.

6. Ms Karen Ireland, the former Chairperson of the appellant was to be the appellant's sole witness at the hearing. I was advised by Ms Ireland that on the weekend of 23/24 July 2011 her mother had died in Carnarvon and that the funeral was scheduled for 3 August 2011.

7. Because of this [sic] circumstances, on 25 July 2011 on behalf of the appellant, I applied for an adjournment of the hearing. The applicant opposed the adjournment.

8. Commissioner Mayman on 26 July 2011 vacated the hearing dates and rescheduled them for 16, 17 and 18 of August 2011. Commissioner Mayman did not seek information about my availability on those dates before listing them.

9. I advised Commissioner Mayman's associate that I was scheduled to be in the Federal Magistrate's Court on 17 August 2011 and asked that the hearings be adjourned.

10. I further advised the associate that the respondent had indicated that a witness she had intended to call was going to be away for some time in August and that consideration might need to be given to accommodating the need for the respondent's witness to be available.

11. Commissioner Mayman's associate orally advised me that the Commissioner was not prepared to vacate the hearing dates of 16, 17 and 18 August 2011.

12. On receipt of this advice, I advised the Commissioner's associate by email and orally that the listing of the hearing for these dates would prejudice both the appellant and Bansley Pty Ltd in the proceedings in the Federal Magistrate's Court and would likely have an adverse physical impact on me. I informed the Commissioner's associate that for personal reasons, I would have to drive to Albany and return and that it was approximately a 4.5 hour trip each way.

13. On 29 July 2011 the Commission issued an order that purported to accommodate my need to be in Perth for the Federal Magistrate's Court matter on 17 August 2011 by commencing the Albany hearing on 15 August 2011, having extended sittings times on 15 and 16 August 2011 and not commencing the hearing on 18 August 2011 until lunch time.

14. I am of the belief that the appellant in this matter and Bansley Pty Ltd in matter PEG 121 of 2011 will suffer a serious injustice and I will be subject to adverse physical effects if the hearings dates of 15, 16 and 18 August 2011 are not vacated.

15. My basis for this belief is that it is my experience that each day of a hearing results in a need to consult with the client at the end of each day and thereafter prepare for the next day of the hearing. The consultation and

subsequent preparation in my experience can take a considerable time and mental effort. The Commission's proposal to have extended sitting hours on 16 August 2011 coupled with an approximately 4.5 hour drive from Albany to Perth would not enable me to consult with Counsel and Bansley Pty Ltd about the proceedings on 17 August 2011 until late in the evening. This would be the case even if I flew back to Perth on the evening of 16 August 2011 and flew back to Albany on the evening of 17 August 2011 or the morning of 18 August 2011.

16. I would not be able to consult with the appellant or begin any preparation for the further hearing until I returned to Albany. The physical demands of such travel would in my view affect my ability to properly represent the appellant and also participate in the proceedings in the Federal Magistrate's Court to the potential prejudice of both parties.

The appellant's submissions

14 The appellant points out that the Commission is required to deal with applications for adjournments in accordance with the well known principles set out in ***Myers v Myers*** [1969] WAR 19 (21). The appellant also points out that when the Commission exercises its discretion, it is required to do so in accordance with the principles enunciated by the High Court in ***House v R*** (1936) 55 CLR 499. Applying those principles, the appellant says the Commission was required to consider the application for an adjournment by assessing whether the adjournment would result in serious injustice to the appellant and also to the respondent. The Commission did not carry out this task, or in the alternative, the Commission did not carry out the task properly. When making a decision as to when the hearing should be rescheduled, the appellant says the Commission should have had regard to the following matters:

(a) Obtaining alternative representation for the appellant or for the client in the Federal Magistrate's Court matter would not be appropriate because of the appellant's representative's deep involvement in the factual issues in both cases, requiring the representative to be present at both proceedings.

(b) It is almost inevitable that consultation with a client and further preparation for a subsequent day's hearing will be required at the end of each day of a hearing in any jurisdiction and a requirement to immediately return to Perth would prevent or seriously disrupt this activity.

(c) Even if the appellant's representative was able to fly back to Perth after the extended sitting times for the proceedings on 16 August 2011, the representative would not be able to consult with the Perth client or Counsel until late in the evening, to the possible prejudice of the following day's proceedings.

(d) As the appellant's representative will be travelling by car to and from Albany, a scheduling of hearing dates that imposes a requirement that the appellant's representative spend a considerable time driving after an extended sitting period and also before a scheduled sitting period, does pose a significant physical burden on the representative to the possible prejudice of the appellant and others.

(e) The respondent is a new mother and not engaged in the workforce: she would not be required to make alternative arrangements for her absence from the workplace if the proceedings were adjourned.

(f) The respondent has objected to having set aside the witness summons issued to her witness who will be absent at some period in August 2011. This gives rise to an inference that the respondent considers the witness's evidence important and thus her attendance essential if an injustice is not to occur. Refusal of an adjournment may cause such an injustice to occur.

(g) The Commission has already indicated to the respondent that there is no need for the respondent's witnesses to attend and remain at the courthouse all during the proceedings until they are called to give evidence, but they may go about their normal duties and be summoned by a telephone call from the respondent with little consequent delay to the proceedings. The witnesses are thus local and would not be unduly inconvenienced by an adjournment.

15 The appellant says that the Commission failed to take into account any of these factors and that while reasons for decision have not been given, it appears from the letter from the Associate to the appellant's representative dated 29 July 2011, that the only reasons for the refusal of the adjournment are that each party has previously been granted an adjournment on one occasion. The appellant says this is an extraneous or irrelevant matter and to act on it is to act on the wrong principle. Further, the failure to take into account material considerations is contrary to the principles set out in ***House v R***.

16 The appellant also says that in all of the circumstances the decision of the Commission to refuse the adjournment is wholly unreasonable and falls within the principle that administrative bodies and tribunals must not act unreasonably which was established and enunciated by Lord Green in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223.

The respondent's submissions

17 The respondent appeared in person by teleconference at the hearing of the appeal. The respondent informed the Full Bench that she did not wish to make a submission in reply to the appellant's submission. In answer to a question from the Full Bench, she also informed the Full Bench that the hearing and determination of the application brought pursuant to s 29(1)(b)(i) of the Act was, from her point of view, not an urgent matter.

Procedural issues

18 Pursuant to s 49(1) and s 49(2) of the Act, an appeal may lie against a decision of the Commission. The Full Bench has a duty to decide whether or not it has jurisdiction: ***R v Blakely; ex parte The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia*** (1950) 82 CLR 54, 69; ***Khatri v Price*** (1999) 166 ALR 380 [15]; ***R v Judges of the Federal Court; ex parte The Western Australian National Football League (Inc)*** (1979) 143 CLR 190, 202 - 204, 225 - 226, 228 and 230;

Springdale Comfort Pty Ltd v BTAUWA (1986) 67 WAIG 325, 330 and ***Crown Scientific Pty Ltd v Clarke*** [2007] WAIRC 00334 [96] – [97]; (2007) 87 WAIG 598, 609 – 610.

19 The only 'decision' within the meaning of s 49 of the Act made by the Commission is a declaration issued on 26 July 2011. The appellant complains about an amended notice of hearing which issued by the Commission on 29 July 2011 in which the hearing dates set in the 'decision' were purported to vary to exclude 17 August 2011 and substitute 18 August 2011 to commence at 12.00 midday. Two procedural issues arise.

20 The first issue raises a jurisdictional matter. The appellant's complaint is about the amended notice of hearing which purports to vary the dates of hearing set out in the 'decision' given on 26 July 2011, although it clearly cannot do so in law. Pursuant to s 49(2) of the Act, an appeal lies to the Full Bench in the manner prescribed from any decision of the Commission. A 'decision' is defined in s 7 of the Act to include an award, order, declaration or finding. A 'finding' is defined in s 7 of the Act to mean a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or depose of the matter to which the proceedings relate. Pursuant to s 34(1) of the Act, a decision must be signed by a member of the Commission and under s 35 of the Act the decision must be drawn up in the form of minutes before it is delivered. In addition, s 36 of the Act requires that each decision of the Commission is to be sealed with the seal of the Commission, deposited in the office of the Registrar and be open to inspection by any person interested without charge and during office hours.

21 It is clear that the amended notice of hearing cannot be said to be a 'decision' within the meaning of the Act. It is not a 'finding' and no appeal can be instituted under s 49 of the Act: ***McCorry v Como Investments Pty Ltd*** (1989) 69 WAIG 1000; ***Registrar v Metal and Engineering Workers' Union of Western Australia*** (1994) 74 WAIG 1487 (recently applied by the Full Bench in ***Palermo v Rosenthal*** [2010] WAIRC 00242; (2010) 90 WAIG 371). When this issue was raised with the appellant's agent he conceded that an appeal could not be against the issuance of an amended notice of hearing as it was not an appealable decision within the meaning of s 49 of the Act.

22 The second issue arises in relation to the jurisdiction of the Commission to make a 'decision' in the form of a declaration. A declaration is a statement of the law of existing rights and obligations, for example a statement that a contractual benefit is owed in an application made under s 29(1)(b)(ii) of the Act, or a statement of the true interpretation of an award under s 46(1)(a) of the Act. The setting of hearing dates in a 'decision' made by the Commission should properly be made in the form of an order. It is doubtful that a 'decision' that declares the date, or proposed dates, of hearing has any force and effect. It should be noted, however, that it is not usually necessary for an order to be made to set a matter down for hearing as usually such an administrative step is uncontroversial. In the usual course an order would not need to be made.

23 Leaving aside the issue whether the 'decision' is valid or enforceable, it is open for this Full Bench to consider whether an appeal should lie against the decision made by the Commission on 26 July 2011 and, if so, whether the decision should be quashed.

Is the matter of such importance that in the public interest an appeal should lie?

24 The principles that apply when considering the importance of an appeal in the public interest was settled in ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia*** (1989) 69 WAIG 1873. In that matter the Full Bench unanimously held that the words 'public interest' are not to be narrowed to mean 'special or extraordinary circumstances'. An application may involve circumstances which are neither special nor extraordinary. It may involve circumstances which, because of their very generality, are of great importance in the public interest. Each matter will be a question of impression and judgment whether the appeal has the required degree of importance. Also important questions that may have effect in other industries, and substantial matters of law affecting jurisdiction, can give rise to matters of sufficient importance in the public interest to justify an appeal: ***Murdoch University v The Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** (2005) 86 WAIG 247 (Ritter AP) [13] – [14].

25 We formed the opinion that the present matter is of sufficient importance that it is in the public interest that an appeal should lie. This is because this appeal raises the proper procedural process that should apply to applications for an adjournment of the hearing of an application under s 29(1)(b).

26 Applications for adjournment are routinely made to the Commission. Whilst the principles set out in ***Myers v Myers*** are well established, the application of the rules of procedural fairness when considering an adjournment and the relisting of a matter for hearing is a matter which goes to a discretionary power vested in the Commission and is a matter of importance affecting the jurisdiction of the Commission.

Scheduling of a hearing

27 In the initial scheduling of a hearing, the Commission may consult with the parties about convenient and appropriate dates before setting those dates, or may list the matter, inviting the parties to advise within a specified time, if the dates listed are not suitable. In the case of urgent matters, it may not always be possible to fully consult with parties about the issues which require consideration in setting hearing dates.

28 There are other circumstances where parties attempt to delay the hearing for some strategic advantage, or take an unreasonable approach to their availability in an endeavour to promote their own case. The same circumstances may apply where there is an application for adjournment of a hearing which has already been set down. However, we do not suggest that this is the case here.

The principles applicable for applications for adjournment of a hearing of an application made under s 29(1)(b) of the Act

29 Where a refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party: ***Myers v Myers*** (21). In considering whether to grant an adjournment of a hearing by the Commission, the exercise of discretion is to consider not only fairness and justice to the parties but, in an appropriate case, the public interest is to be considered. As Ritter AP in ***The Registrar of the Western Australian Industrial Relations Commission v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** (2007) 87 WAIG 126

[45] - [46] observed, this is consistent with the principal object in s 6(c) of the Act and the exercise of the jurisdiction of the Commission set out in s 26(1)(c) of the Act.

30 When the application was made to vacate the hearing date set on 2 August 2011, 3 August 2011 and 4 August 2011 it appears from the material before the Full Bench that the Commissioner made a declaration vacating the hearing dates and setting new hearing dates without any consultation with the appellant. Importantly, in making a proper inquiry of the parties and their representatives, the Commission must observe the rules of procedural fairness and provide each party an opportunity to provide any information or instructions that are relevant as to whether an adjournment should be granted, the length of an adjournment and any periods of unavailability of witnesses and representatives.

31 It should be noted it is intended that the principles set in these reasons deal only with applications for adjournments in respect of applications brought under s 29(1)(b) of the Act and should not be taken to apply to applications and matters that arise under other provisions of the Act, in particular s 44 of the Act.

32 Part of the assessment by the Commission as to whether an adjournment should be granted necessarily involves a consideration as to when the proceedings should be adjourned. It is proper to consider whether the refusal of an adjournment would result in serious injustice to one party or whether an adjournment itself and the relisting of the hearing would mean serious injustice to the other party. Relevant considerations involve considering the period of time for which an adjournment is to be granted and whether the dates on which it is proposed that a hearing is to be re-listed would result in any serious injustice to either party.

33 Whether an injustice is raised can require a myriad of factors to be considered depending upon the issues raised by the parties. In an application made under s 29(1)(b) some relevant matters are:

(a) The availability of witnesses. To a lesser degree is the availability of the parties' representatives. In some cases, it may be necessary for a party to find alternative representation. The availability of lawyers or agents cannot be allowed to dictate the listing of matters before the Commission. The Commission is obliged by s 22B to act with as much speed as the requirements of the Act and a proper consideration of the matter before it permit. This may mean that on occasions they will have to advise their clients that they will have to obtain alternative representation. Yet if an adjournment is to be for a short period of time, obliging a party to seek alternative representation may not be practicable.

(b) Whether the hearing and determination of the application is urgent.

(c) On occasions the raising of a new issue may necessitate an adjournment to obtain legal advice.

(d) The length of a delay.

(e) Where a matter is to be heard away from the place the Commission usually sits to hear matters, the practicalities of travel to that place should be taken into account.

(f) Case management principles are also a relevant consideration as the convenience of the Commission reconvening a hearing may be an important factor and any difficulties associated with that are also proper considerations.

34 Each application for an adjournment is to be considered on its merits. In this matter no opportunity was afforded to the appellant to make a submission about what dates were suitable for a rescheduled hearing and no assessment was made by the Commission of the relevant circumstances, including whether the matter should be heard urgently. In all the circumstances, the Commission denied the appellant procedural fairness. For these reasons, we formed the opinion that ground (a) of the grounds of appeal had been made out and the decision made on 26 July 2011 should be quashed.

2011 WAIRC 00812

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAINBOW COAST NEIGHBOURHOOD CENTRE INC
	APPELLANT
	-and-
	KYLIE WOOD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 9 AUGUST 2011
FILE NO/S	FBA 6 OF 2011
CITATION NO.	2011 WAIRC 00812

Result	Orders and declaration issued
Appearances	
Appellant	Mr G McCorry (as agent)
Respondent	Ms K Wood (by telephone)

Order

This appeal having come on for hearing before the Full Bench on Monday, 8 August 2011, and having heard Mr G McCorry as agent on behalf of the appellant, and Ms K Wood, the respondent, by telephone, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby —

1. ORDERS that the Notice of appeal be amended to delete the words 29 August 2011 and substitute the words 26 July 2011.
2. ORDERS that the appellant be given leave to serve an electronic copy of the appeal book on the respondent as well as a paper copy.
3. DECLARES that service of an electronic copy of the appeal book on the respondent is sufficient service.
4. ORDERS that:
   (a) the hearing of the appeal be expedited; and
   (b) the regulations in relation to the filing of submissions be waived.

By the Full Bench

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

2011 WAIRC 00813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	RAINBOW COAST NEIGHBOURHOOD CENTRE INC
	APPELLANT
	-and-
	KYLIE WOOD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 9 AUGUST 2011
FILE NO/S	FBA 6 OF 2011
CITATION NO.	2011 WAIRC 00813

Result	Ground a) upheld and decision quashed.
Appearances	
Appellant	Mr G McCorry (as agent)
Respondent	Ms K Wood (by telephone)

Order

This appeal having come on for hearing before the Full Bench on Monday, 8 August 2011, and having heard Mr G McCorry as agent on behalf of the appellant, and Ms K Wood, the respondent, by telephone, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. Ground a) of the grounds of the appeal is upheld.
2. The decision of the Commission made on 26 July 2011 [2011] WAIRC 00780 is quashed.

By the Full Bench

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

FULL BENCH—Appeals against decision of Industrial Magistrate—

2011 WAIRC 00818

APPEAL AGAINST A DECISION OF THE INDUSTRIAL MAGISTRATES COURT GIVEN ON 25 AUGUST 2010 MATTER NO. M 32/2009

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2011 WAIRC 00818
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		ACTING SENIOR COMMISSIONER P E SCOTT
		COMMISSIONER J L HARRISON
HEARD	:	WEDNESDAY, 12 JANUARY 2011, FRIDAY, 3 JUNE 2011
DELIVERED	:	WEDNESDAY, 10 AUGUST 2011
FILE NO.	:	FBA 17 OF 2010
BETWEEN	:	MINISTER FOR EDUCATION
		Appellant
		AND
		LIQUOR HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
		Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Industrial Magistrates Court**
Coram	:	**Industrial Magistrate G Cicchini**
Citation	:	**[2010] WAIRC 00305; (2010) 90 WAIG 1542**
File No	:	**M 32 of 2009**

CatchWords	:	Industrial Law (WA) - Appeal against order of Industrial Magistrate - Alleged breach of *Cleaners and Caretakers (Government) Award 1975* - Whether employee a shift employee or rostered employee within meaning of the Award considered - Principles upon which a court can exercise its discretion to allow new point being raised for first time on appeal considered - Appellant refused leave to rely upon new point raised in grounds of appeal
Legislation	:	*Industrial Relations Act 1979* (WA) s 83(1), s 83(4), s 83A, s 84, s 84(1), s 84(2), s 84(4).
Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr A Shuy (of counsel) instructed by State Solicitor of Western Australia
Respondent	:	Mr A Clark

Case(s) referred to in reasons:

Amcor Ltd v Construction, Forestry, Mining and Energy Union [2005] HCA 10; (2005) 222 CLR 241; (2005) 79 ALJR 703; (2005) 138 IR 286; (2005) 214 ALR 56

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813; (2006) 153 IR 426

City of Wanneroo v Holmes (1989) 30 IR 362

H v Minister for Immigration and Multicultural Affairs [2000] FCA 1348

Kucks v CSR Ltd (1996) 66 IR 182

Metwally [No 2] v University of Wollongong [1985] HCA 28; (1985) 60 ALR 68

Minister for Health v Hospital Salaried Officers' Association of Western Australia (Union of Workers) (1983) 63 WAIG 1153

The Chief Executive Officer Department of Agriculture and Food v Wall [2011] WAIRC 00263; (2011) 91 WAIG 443

Water Board v Moustakas (1988) 180 CLR 491

Case(s) also cited:

Australian Liquor Hospitality & Miscellaneous Workers Union v Broadlex Cleaning Australia Pty Limited (1997) 78 IR 464

BHP Billiton Iron Ore v AFMEPKJU (2006) 153 IR 397

Boans Ltd v Federated Clerks' Union of Australia. WA Branch (1984) 64 WAIG 651

Brunskill v Sovereign Marine and General Insurance Co Ltd (1985) 62 ALR 53

FCU-v- George Moss Ltd (1989) 70 WAIG 3040

Hospital Salaried Officers' Association of WA v Minister for Health (1982) 62 WAIG 2839.

Hospital Salaried Officers' Association of WA v Minister for Health (1982) 63WAIG 13.

Miscellaneous Workers, Union and Sunny West Co-Operative Dairies Ltd (1965) 45 WAIG 246

Transport Workers' Union of Australia, WA Branch v Arrow Holdings Ply Ltd (1989) 69 WAIG 1050

Warren v Coombes (1979) 142 CLR 531

Reasons for Decision

SMITH AP:

Introduction

1 This is an appeal against a decision of the Industrial Magistrate issued on 25 August 2010. Judgment was entered for the claimant, Liquor Hospitality and Miscellaneous Union, Western Australian Branch (the respondent), against the Minister for Education (the appellant). The Industrial Magistrate found that between 29 July 2005 and 2 April 2009 the appellant had on 85 separate occasions failed to comply with the *Cleaners and Caretakers (Government) Award 1975* (the Award) and made an order that the appellant pay to the respondent for disimbursement to a member of the respondent, Mr Brett Clements, the agreed sum of $3,800. In the order, the Industrial Magistrate also issued a caution to the appellant in respect of 85 breaches of the Award and made no order as to costs.

2 The relevant factual circumstances which led to finding that the Award had been contravened are not in dispute. The respondent is a named party to the Award. Mr Clements was engaged by the appellant as a cleaner in charge at the Mount Lawley Senior High School during the period 29 July 2005 to 2 April 2009 inclusive. At all material times Mr Clements' employment was covered by the provisions of the Award and he worked 40 hours a week. The school had outsourced its cleaning requirements to contract cleaners and had done so for some years. Sometime prior to April 2005 a decision was made to return to the use of day labour cleaning at the school. Mr Shane Longman, the school's business manager, was responsible for recruiting the day labour cleaning staff. He recruited Mr Clements as a full-time cleaner in charge. He also recruited a part-time assistant cleaner in charge and 11 part-time cleaners. Prior to all cleaners commencing their duties, the cleaning staff, including Mr Clements, participated in an induction process on 14 and 15 April 2005 conducted by the school. During that process all inductees received an induction booklet containing, among other matters details about their conditions of service (exhibit 5). The induction booklet relevantly contained a statement that all cleaners who were to work 40 hours per week the general spread of hours for work for cleaning staff was as follows:

(a) 5.30 am to 9.30 am; and

(b) 2.00 pm to 6.00 pm.

3 It is common ground that from 29 July 2005 until 1 April 2009 Mr Clements started work at 5.30 am and continued to work through to 9.30 am at which time he had a break. He thereafter commenced work at 2.00 pm and finished at 6.00 pm.

4 It came to the attention of Mr Clements in 2007 during a union training session that his start times may not comply with the provisions of the Award. This led to a dispute about the start time of 5.30 am because cl 3.1.1(b) of the Award provides that 'ordinary hours should be worked between the hours of 6.00 am and 7.00 pm, Monday to Friday inclusive'. This arrangement was capable of authorisation as cl 3.1.1(e)(i) of the Award provided a procedure whereby if the majority of school cleaners, including the cleaner in charge, requests, the start time could be varied to allow cleaners to start earlier than 6.00 am with the written permission of the principal of the school. Until 2 April 2009 no such arrangement had been put in place.

5 After some delay, in March 2009 Mr Clements held a number of discussions with the school's business manager which resulted in an arrangement pursuant to cl 3.1.1(e)(i) of the Award to vary the start times being put in place. As most of the school cleaners were happy to continue to start work at 5.30 am, Mr Clements in accordance with the procedure set out in cl 3.1.1(e)(i) requested written approval for cleaners to commence work at 5.30 am, in lieu of 6.00 am. On 2 April 2009 the principal of the Mt Lawley school granted approval of that arrangement.

6 The respondent later lodged the claim that the appellant had failed to comply with the Award during the period 29 July 2005 to 2 April 2009 in that it required Mr Clements to start work at 5.30 am instead of 6.00 am on each working day. The remedy sought was payment of overtime for the 30 minutes worked each day pursuant to cl 3.2.2(a) of the Award which provides as follows:

> Except as otherwise provided for in 3.2 – Overtime, and subject to 3.1.2 – Rostered and shift employees, all time worked in excess of or outside of the usual hours or outside the daily spread shall be paid for at the rate of time and one-half for the first two hours and double time thereafter.

7 The central issue in dispute between the parties when the claim was heard by the Industrial Magistrate was whether Mr Clements was directed to work outside the usual hours of work. This issue is not the subject of any ground of appeal.

The grounds of appeal

1. The learned Industrial Magistrate erred in law in finding that the appellant breached clause 3.2.2(a) of the *Cleaners and Caretakers (Government) Award 1975* (Award) by failing to pay the employee the subject of the claim overtime for time worked between 5.30 am and 6.00 am.

Particulars

(a) In the facts and circumstances of the claim the employee was a shift employee under clause 1.5.15 of the Award.

(b) As a shift employee the employee had no fixed daily spread of hours under clause 3.1.2(b)(i) of the Award.

(c) The operation of clause 3.2.2(a) of the Award was subject to clause 3.1.2(b)(i) of the Award and no overtime was attracted.

2. The learned Industrial Magistrate erred in law in not applying the provisions of the Award as they stood between 29 July 2005 and 19 March 2007.

8 The appellant seeks the following orders:

1. The appeal be allowed.
2. The orders of the learned Industrial Magistrate made on 25 August 2010 be quashed.
3. Such further or other order as this Honourable Court thinks fit.

Relevant provisions of the *Cleaners and Caretakers (Government) Award 1975*

9 The resolution of ground 1 of the appeal turns upon whether Mr Clements is a 'rostered employee' or a 'shift employee' within the meaning of the Award. Ground 1 of the appeal turns on a construction of the following provisions of the Award which provide for the working arrangements for rostered employees and shift employees.

10 Clause 1.5.13 defines a rostered employee to mean:

> '[R]ostered employee' means an employee who is rostered to work day shift on any of the seven days of the week in accordance with 3.1 – Hours.

11 Clause 1.5.15 defines a shift employee to mean:

> '[S]hift employee' means an employee who is rostered to work outside the ordinary hours of work as prescribed by 3.1 – Hours.

12 Clause 3.1 relevantly provides for hours of work as follows:

3.1.1 (a) Except as otherwise provided for in 3.1 – Hours, the ordinary hours of work shall be 38 per week with the hours actually worked being 40 hours per week or 80 hours per fortnight.

(b) Ordinary hours shall be worked between the hours of 6.00 am and 7.00 pm, Monday to Friday inclusive.

…

(e) (i) Notwithstanding the provisions of 3.1.1(a), where the majority of school cleaners, including the Cleaner in Charge, request, the start time may be varied to allow cleaners to start earlier than 6.00 am with the written permission of the Principal. Under no circumstances are cleaners allowed to start work more than 4.5 hours before the official opening time of the school at which they are employed.

(ii) In considering a request made in accordance with 3.1.1(e)(i), the Principal will take into account, but is not limited to, such factors as:

(aa) operational needs of the schools;

(bb) natural and artificial lighting;

(cc) safety and security of the cleaning staff; and

(dd) security of school premises and property.

(iii) Where the request of cleaners to start earlier than 6.00 am is granted, the loadings prescribed in 5.1 – Special Rates and Provisions of this award will not apply.

(iv) In the event that the Cleaner in Charge does not agree to an earlier start time, but the majority of cleaners do, another cleaner may volunteer to take responsibility for opening the school and switching off the security alarm system. Under such circumstances, no additional allowances are payable to the cleaner who elects to undertake this duty.

(v) The starting times for cleaners will be reviewed at the end of Term 1 and Term 3 each year.

3.1.2 Rostered and shift employees

(a) The ordinary hours of work for a rostered employee may be worked between the hours of 6.00 am and 7.00 pm on any of the seven days of the week.

(b) Except as provided for in 3.1.6:

(i) the ordinary hours of work for a shift employee or caretaker may be worked on any of the seven days of the week and there shall be no fixed daily spread of hours; and

(ii) the ordinary hours for shift employees shall be worked in not more than ten shifts per fortnight of eight hours each and not more than one shift in every 24 hours.

13 Overtime is provided for in cl 3.2. Clause 3.2.2(a) provides:

(a) Except as otherwise provided for in 3.2 – Overtime, and subject to 3.1.2 – Rostered and shift employees, all time worked in excess of or outside of the usual hours or outside the daily spread shall be paid for at the rate of time and one-half for the first two hours and double time thereafter.

14 Shift work loadings are set out in cl 3.3. Clause 3.3 provides:

3.3.1 Subject to 3.3.2, a loading of fifteen per cent of the ordinary wage shall be paid for time worked on afternoon or night shift as defined in 3.3.1(a) and 3.3.1(b):

(a) 'Afternoon shift' means a shift commencing at or after 12.00 noon and before 6.00 pm.

(b) 'Night shift' means a shift commencing at or after 6.00 pm and on or before 4.00 am.

3.3.2 A shift employee shall be paid for ordinary hours worked between midnight on Friday and midnight on Sunday at the rate of time and one half.

3.3.3 The rate prescribed in 3.3.2 shall be in substitution for and not cumulative on the rate prescribed in 3.3.1.

Findings made by the Industrial Magistrate

15 Much of the evidence given by the witnesses and the submissions made by the parties at the hearing before the Industrial Magistrate went to discussions about the starting times for work between Mr Longman and Mr Clements. After considering all of the evidence the learned Industrial Magistrate found that there was never any agreement concerning the earlier starting time at 5.30 am and that the work times were presented as an inflexible condition of employment.

16 The learned Industrial Magistrate found that cl 3.1.1(b) of the Award provides that ordinary hours are to be worked between 6.00 am and 7.00 pm Monday to Friday inclusive and the corollary of that is that work done outside of those times on those days and any hours worked on a Saturday and/or Sunday are not ordinary hours [19]. He also held that the effect of cl 3.1.1(e)(i) is that the spread of hours can be changed to run between the agreed earlier starting time and the finishing time stipulated in the Award.

17 The appellant argued at first instance that by starting earlier than otherwise permitted in writing, the cleaners committed breaches of the Award, albeit unwittingly. That argument was rejected by the learned Industrial Magistrate. He found that cl 3.1.1(e) of the Award was not concerned with prohibition; but subject to the limitations contained therein, with the facilitation of an earlier starting time [21]. Another argument put forward by the appellant was that the spread of hours set out in cl 3.1.1(b) did not have application to Mr Clements and the other cleaners, because their start times were regulated outside of the Award. In support of that contention, the appellant argued that based on a historical overview of cl 3.1.1, the words 'except as otherwise provided for in cl 3.1 – Hours' in cl 3.1.1(a) of the Award, limited the operation of cl 3.1.1(b). The learned Industrial Magistrate rejected that argument. After having regard to the established principles of interpretation of industrial instruments, he held [25]:

> The words of subclause 3.1.1(b) are plain. They do not draw confusion or ambiguity. The subclause makes it clear that all hours worked between 6.00 am and 7.00 am Monday to Friday inclusive are to be classified as ordinary hours. Given that its terms are clear there is no need to look elsewhere in order to construe it. Indeed the language used is not only plain but also explicit. In those circumstances it is inappropriate for it to be construed so as to import the exception in subclause 3.1.1(a). Although I accept that errors have occurred in the Award modernisation process, it does not follow that there was an error made in subclause 3.1.1(b) and that the parties to it had intended that it be subject to the same exception as in subclause 3.1.1(a). In my view, such an approach invites speculation.

18 The learned Industrial Magistrate then had regard to the fact that it was not in dispute that during the material period, Mr Clements commenced work at 5.30 am and found that the appellant's officer instructed him to do so. As a consequence, the learned Industrial Magistrate then went on to find, Mr Clements started work outside of ordinary hours and was entitled to be paid overtime rates in accordance with cl 3.2.2(a) of the Award. The learned Industrial Magistrate then found [28] – [29]:

> Clause 3.2.2(a) is clear and unambiguous. It provides for the payment of overtime rates for hours worked 'in excess of or outside' of the usual hours. The words 'outside of' refers to work carried out before or after usual hours. In the current context usual hours can only mean the ordinary hours as permitted by the Award. What is meant by ordinary hours may be different dependant upon the nature of employment. For example the ordinary hours of rostered and shift employees are between 6.00 am and 7.00 pm seven days a week (see subclause 3.1.2(a)).
>
> The language of subclause 3.2.2 makes it clear those employees who works outside of their ordinary hours or outside the duly spread of hours are to be paid at overtime rates.

19 For these reasons, it was found that the appellant obliged Mr Clements to start work at a time earlier than provided by cl 3.1.1(b) of the Award. The earlier start time did not arise out of an agreement but from a directive given by the school to Mr Clements that Mr Clements work outside his ordinary hours. Consequently the Industrial Magistrate found that the claim was proven as Mr Clements should have been paid at overtime rates for the first half hour worked each day but was not.

Hearing of the appeal

20 The hearing of this appeal was first listed for hearing on 12 January 2011. On this occasion the Full Bench informed the appellant that it had significant difficulty with ground 1 of the appeal in that it raised a new argument that appeared not to have been pleaded in defence at first instance, nor put to the learned Industrial Magistrate. This raised a principle established by the High Court in ***Metwally [No 2] v University of Wollongong*** [1985] HCA 28; (1985) 60 ALR 68 where the Full Court observed (71):

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so. It is impossible to regard the court's answer to question (ii) as intended to be subject to the correctness of the unexpressed assumption that the 1975 Act was valid and, in consequence, to give the answer a merely conditional effect. If it had been suggested that the answer to the question was intended to be only a provisional one the court would not have dealt with the matter. It is quite irrelevant that Mr Metwally was permitted, under the rules of the Court of Appeal, to give the notice of contention which he gave. Those rules could not alter the rights of parties under an order made in this court and were not intended to do so.

21 As the appellant's submissions did not address this issue, the appeal was adjourned for the appellant to take instructions.

22 On 24 March 2011, the appellant's solicitors advised the Full Bench that they wished the matter to be listed for hearing. On 30 May 2011, the appellant filed a supplementary outline of submissions addressing whether ground 1 of the appeal was raised in the court below.

Was the issue raised in ground 1 taken in the court below?

23 The principles upon which a court can exercise its discretion to allow a point being raised for the first time on appeal was considered by the High Court in ***Water Board v Moustakas*** (1988) 180 CLR 491 by Mason CJ, Wilson, Brennan, Dawson JJ where their Honours observed (497 - 498):

> More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.
>
> In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. In cases where the breach of a duty of care is alleged, the particulars should mark out the area of dispute. The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings. Nevertheless, failure to amend will not necessarily preclude a verdict upon the facts as they have emerged. In *Leotta v Public Transport Commission (N.S.W.)*, a case having been submitted to the jury which was factually different from that alleged in the pleadings and particulars, Stephen, Mason and Jacobs JJ. observed that the pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence. The failure to apply for the amendment in that case was held not to be fatal. But in *Maloney v Commissioner for Railways (N.S.W.)*, Jacobs J., with whom the other members of the Court agreed, pointed out that the conclusion in *Leotta* was reached only upon the presupposition that the new issue or new way of particularizing the existing issue had emerged at the trial and had been litigated.
>
> It is necessary to look to the actual conduct of the proceedings to see whether a point was or was not taken at trial, especially where a particular is equivocal.
>
> …
>
> It is true that in *Maloney* it was recognized that in 'very exceptional cases' a plaintiff's omission to put at trial a case formulated on appeal may not be conclusive against him. But it was pointed out that the opportunity to assert the new case at another trial should only be granted where the interests of justice require it and such a course can be taken without prejudice to the defendant (footnotes omitted).

24 In ***H v Minister for Immigration and Multicultural Affairs*** [2000] FCA 1348 Branson and Katz JJ notably said [7] and [8]:

> As Gibbs CJ, Wilson, Brennan and Dawson JJ observed in Coulton v Holcombe (1986) 162 CLR 1 at 7:
>
> > 'It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.'
>
> In our view, the readiness with which appeal courts have in the past been satisfied that it is expedient in the interests of justice to allow a fresh point to be argued and determined on appeal is unlikely to continue into the future. The volume and complexity of the cases presently required to be heard and determined by the intermediate appellate courts of Australia is such that it is increasingly important that such courts are able to devote their time to the genuine review of first instance decisions. It is becoming increasingly difficult, in our view, to establish that it is expedient in the interests of justice that the time of three or more judges should be spent giving original consideration to issues that ought to have been raised before the primary judge. The interests of justice in this sense extend beyond the interests of the parties to the appeal to encompass the interests of other litigants whose appeals require hearing and determination, and the broad public interest in efficient judicial administration.

25 When assessing whether it would be expedient in the interests of justice to allow a new point to be raised Branson and Katz JJ also had regard to whether the point had any merit [9].

26 From these passages the following principles guide when a finding could be made that it is expedient and in the interests of justice to entertain a point:

(a) The point must be one of construction or of law and not be met by calling evidence.

(b) In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance.

(c) In very exceptional cases an omission to put a case formulated on appeal may not be conclusive. The opportunity to assert the new case should be granted only where the interests of justice require it and such a course can be taken without prejudice to the defendant.

(d) Consideration of the interests of justice should extend to a consideration of relevant matters beyond the interests of the parties to the interests of other litigants and efficient case management.

(e) When assessing the interests of justice, the merit of the new point sought to be raised is a relevant consideration.

27 The appellant says when an examination of the pleadings and submissions are analysed in a way that is not narrow nor technical, the issue sought to be raised in ground 1 of the appeal was raised by the appellant at trial as an alternative argument.

28 The appellant's primary submission at trial was based on an argument that cl 3.1.1(e) of the Award prohibits school cleaners from starting early without written permission, so that no overtime is attracted for time worked before 6.00 am without written permission. The appellant says the second argument put in the alternative at trial was based on a decision of the Industrial Appeal Court in ***Minister for Health v Hospital Salaried Officers' Association of Western Australia (Union of Workers)*** (1983) 63 WAIG 1153 (the ***Hospital Salaried Officers*** case). In that matter, the employee in question was found to be a 'shift worker' and not a 'day worker' for work carried out on Saturdays. The appellant says it inferentially raised an argument before the learned Industrial Magistrate that Mr Clements was a shift worker within the meaning of cl 3.1.2(b)(i) of the Award as it was argued the facts established that Mr Clements had no 'spread of hours'.

29 The respondent says that the point now sought to be raised on appeal was not taken at the trial. In particular, of significance among none of the submissions made, or in the evidence, was there any suggestion by the appellant that Mr Clements was other than a rostered employee. The respondent says the appellant is now attempting to re-open the case based on an argument it did not take up. The appellant did not question its own witness on this point and it did not question Mr Clements about this issue. Nor did the appellant rely upon the ***Hospital Salaried Officers*** case.

30 In support of the contention the issue pleaded in ground 1 of the appeal was raised at trial the appellant refers to the following matters pleaded in the statement of claim, the appellant's particulars of response and oral submissions:

(a) Paragraphs 2.8 and 2.9 of the respondent's statement of claim set out and plead the relevant clauses of the Award as cl 3.1.1(a), cl 3.1.1(b), cl 3.1.2(a) and cl 3.2.2(a) (AB 8).

(b) The appellant in its particulars of the response did not plead to paragraphs 2.8 and 2.9 of the respondent's statement of claim and simply said the appellant would refer to the Award for its full terms and effect (paragraph 4 of particulars of response (AB 53, AB 54)).

(c) The appellant in its particulars of response also pleaded that Mr Clements' 'usual' hours of work were 5.30 am to 9.30 am and 2.00 pm to 6.00 pm Monday to Friday (paragraph 5 (Q) of particulars of response (AB 55)).

(d) In paragraph 12 of the respondent's outline of submissions filed on 21 April 2010 the respondent pleaded that pursuant to cl 3.1.2 the hours of rostered and shift employees cannot be set outside the hours of 6.00 am and 7.00 pm. The appellant points out that this is incorrect as that provision only applies to rostered employees and not shift employees. In any event, that clause refers to 'ordinary hours'.

31 In closing submissions both parties referred to the Industrial Appeal Court decision in the ***Hospital Salaried Officers*** case. In particular, the appellant's counsel in closing submissions made the following submission about the ***Hospital Salaried Officers*** case:

> The reason I refer to this case is because my learned friend submits that it's distinguishable, and the basis for that is that the overtime provision in that case is different from the one in our case because this one refers to 'in excess of' only. If I could turn your Honour to the bottom right-hand side of the first page of that judgment where it cites clause 14, and that provides:
>
> > Subject to the provisions of subclauses (3) and (11) of this clause, and except as provided in subclause (2) of this clause, all time worked at the direction of the employer outside a worker's ordinary hours shall be paid for at the rate of time and a half for the first three hours and double time thereafter.
>
> It appears to me, on reading that provision, that it's effectively the same as the provision that we have in our award, especially if ordinary hours means the same as usual hours, as is contended. Then if you look at the definition of 'day worker' on the left-hand side of that page, just directly opposite, we can see that the ordinary hours are defined for a day worker and that anyone else is a shift worker. And then at the hours provision at the bottom, going over to the top of the next column:
>
> > The ordinary hours shall not exceed 37 and a half in any week nor seven and a half in any day and such hours shall be worked on five consecutive days in each week.

Then it says in 2(a) over the page:

> A worker shall not be required to work his ordinary hours on afternoon or night shift or on a Saturday or Sunday unless the employer and the Union agree that the hours may be so worked.

What that does is, that prevents a worker being able to be required to work ordinary hours on afternoon or night shift or on a Saturday or Sunday unless it's agreed with the Union. That's an obligation on the employer. In our case, we've got a start time provision which puts the obligation on the employee to seek written permission. So we say that, if this case was distinguishable, it's only distinguishable in the fact that we don't even get to the stage of looking at this case because it's not the employer that's bound in our case; it's the employee. Nevertheless, if a finding is made to the contrary of the submissions I've made thus far, this case would be on all fours with this case.

Obviously we don't rely on this case because we rely on our primary submissions. However, there appears to be a misunderstanding between the parties as to the daily spread of hours for different types of employees. In the applicant's submissions at paragraphs 11 and 12, reference is made to clause 3.1.2 and it's headed, Rostered and Shift Employees. However, what's cited there is only a partial citation. You actually have to look at the next provision to see what applies for shift employees. And if one looks to that next provision, one sees that:

> The ordinary hours of work for a shift employee or caretaker may be worked on any of the seven days of the week and there shall be no fixed daily spread of hours.

So if we get as far as this case that's been cited by the applicants, it doesn't result in any different conclusion, in our submission, from what we're submitting initially, which is that there is no spread of hours for school cleaners that are working before 6 am. And that's so, whether or not the employee or the employer was in breach of the award because in this case it was the employer that was in breach; in this case, it's the employee. It's hard to see how one can arrive at a different result in those circumstances. I've no further submissions, your Honour.

32 Having considered the matters pleaded by both parties and the submissions made by the appellant's counsel at first instance, I am not persuaded that the issue raised in ground 1 of the appeal can be said to have been raised at the hearing at first instance as all that occurred was the raising of a contention that Mr Clements had no spread of hours. Although one of the features of a 'shift worker' within the meaning of that term under the Award, is that pursuant to cl 3.1.2(b) a shift employee has no spread of hours, this observation was put without any argument being put that where a cleaner has no spread of hours, it should be found that in the circumstances Mr Clements was a shift employee and not entitled to overtime. It could be argued that this was because the work performed before 6.00 am was not outside his ordinary hours or usual hours within the meaning of cl 3.2.2(a) of the Award.

33 Clearly the point was not developed in any meaningful way in the hearing before the learned Industrial Magistrate. For this reason, I find that the issue raised in ground 1 of the appeal was not raised at first instance.

If the point was not taken below, can the appeal be entertained?

34 The decision in ***Moustakas*** establishes the principle that a ground of appeal not raised as an issue at trial may be entertained if the point is solely one of construction, cannot be met by the calling of evidence, will result in no prejudice to the respondent and is expedient to do so in the interests of justice. The appellant says there is no prejudice to the respondent as the point turns solely on a point of construction and not evidence. Nor is it a matter of intention. They say the material evidence is clear and uncontested. The evidence unequivocally establishes that Mr Clements worked from 5.30 am each day. This fact is all that is needed to be known to determine this point of construction. There is no prejudice to the respondent because the employee has been paid the overtime underpayment. It is also said it is expedient and in the interests of justice to entertain the appeal because it has the potential to avoid prolonged litigation and remove the possibility of an inconsistent decision being made in the Industrial Magistrates Court in respect of a number of similar matters in M 113 of 2010. M 113 of 2010 alleges multiple ongoing failures to pay overtime to 441 school cleaners from and between 1 January 2005 to 8 November 2010. In that matter school cleaners are alleged to have started early without written permission under cl 3.1.1(e) of the Award. The hearing and determination of M 113 of 2010 has been adjourned by consent by the Industrial Magistrate pending the outcome of this appeal as the same issue sought to be argued in ground 1 of this appeal will arise in that matter.

35 The respondent does not concede the issue sought to be raised in ground 1 of the appeal could not be met by evidence. In particular, they say if the issue was raised before the Industrial Magistrate in this matter it would have been open to adduce evidence that the appellant did not regard, nor treat Mr Clements as a shift employee. Whilst they agree that the matters in M 113 of 2010 could raise the same issue sought to be raised in ground 1 of the appeal, the respondent is of the opinion that the circumstances giving rise to a commencement time of cleaning work prior to 6.00 am in M 113 of 2010 are different to the facts raised in this appeal.

Substantive argument - ground 1 of the appeal

36 The appellant points out that the learned Industrial Magistrate found the following matters:

a) in the current context 'usual hours' can only mean the ordinary hours as permitted by the Award ([28]);

b) what is meant by ordinary hours may be different dependent upon the nature of employment - for example, the ordinary hours of rostered and shift employees are between 6.00 am and 7.00 pm seven days a week under clause 3.1.2(a) of the Award ([28]);

c) the employee's usual hours were 6.00 am to 7.00 pm, Monday to Friday under clause 3.1.1(b) of the Award ([19]-[26]);

d) work done outside of the usual hours were not ordinary hours ([19]);

e) clause 3.1.1(e) is a facilitative provision under which if the cleaners' proposal suits the school an early start time may be permitted without penalty to the school ([21]);

f) no written permission was granted under clause 3.1.1(e) of the Award ([16], [30]);

g) the language of clause 3.2.2(a) makes it clear that those employees who work outside of their ordinary hours or outside the daily spread of hours are to be paid at overtime rates ([29]); and

h) overtime was attracted under clause 3.2.2(a) of the Award ([30]).

37 The appellant also points out that the learned Industrial Magistrate wrongly found that pursuant to cl 3.1.2(a) of the Award the ordinary hours of rostered and shift employees are between 6.00 am and 7.00 pm. Properly construed, cl 3.1.2(a) only applies to rostered employees and cl 3.1.2(b)(i) relevantly applies to shift employees. Clause 3.1.2(b)(i) makes it clear that shift work under the Award is characterised by no fixed hours and this is reflected in the definition of shift employee in cl 1.5.15 of the Award.

38 As shift work is characterised by no fixed hours, the appellant says it is expressly recognised in cl 3.2.2(a) that an employee cannot be entitled to overtime for the usual hours of a shift worked. The appellant contends that the words 'usual hours' of a shift employee in cl 3.2.2(a) must be construed as the hours usually worked by the shift employee and there is no daily spread. The relevant emolument for shift employees is a shift loading under cl 3.3 and not overtime under cl 3.2.2(a).

39 The appellant also contends that shift work patterns permissible under the Award are governed by, among other provisions, cl 3.1.2(b)(ii) and cl 3.1.3 of the Award. These provisions demonstrate that the full range of shift patterns are permitted under the Award. By this submission, I understand the appellant to say that the Award contemplates the working of fixed shifts and rotating shifts. They then say it follows that school cleaners work a fixed shift by reason of an early start time and this is expressly contemplated in cl 3.1.1(e)(iii).

40 The appellant points out that cl 1.5.15 refers to a shift employee as being 'rostered' to work outside of the prescribed ordinary hours. In particular, they point out that the term 'rostered' is not expressly defined and is used in many different senses in the Award (for example, rostered days off, rostered employees and shift employees). The appellant says the term 'rostered' must be read in the context of the Award as a whole and must be given a practical and common sense application having regard to industrial reality. The appellant also says that it is well recognised that shift work may be anything other than 'day' work and may involve fixed shifts with pre-determined hours. Consequently it is argued that as the Award recognises anything other than day work and fixed shifts involving pre-determined hours as shift work, including school cleaners starting earlier than 6.00 am, it is self evident that the term 'rostered' does not necessarily imply a formal requirement for a roster.

41 The appellant points out that cl 3.3 provides for afternoon, night and weekend loadings. It does not provide for a shift loading for a shift commencing after 4.00 am or before 12.00 pm. Consequently, the appellant contends that it is open for the appellant to roster school cleaners to start after 4.00 am and before 6.00 am without attracting overtime or a shift loading. Having found that Mr Clements was rostered to work outside of the ordinary hours of work as prescribed in cl 3.1.1(b) of the Award, the learned Industrial Magistrate should have found that the employee was a shift employee under cl 1.5.15, with no fixed daily spread of hours under cl 3.1.2(b)(i), and no entitlement to overtime under cl 3.2.2(a) of the Award.

42 The appellant argues that if the decision of the learned Industrial Magistrate's decision is correct, as the work in question was outside the employee's usual hours as a rostered employee, the consequence at law would be that Mr Clements was a part-time employee. This is because time worked outside of ordinary hours between 5.30 am and 6.00 am would be hours worked outside the ordinary hours agreed to by the employer and employee as contemplated by cl 3.2.2(c) of the Award. The appellant points out that this argument was considered and found to be in error in the ***Hospital Salaried Officers*** case.

43 The central issue in the ***Hospital Salaried Officers*** case was was the employee in question a shift worker or a day worker. The employee was a physiotherapist who worked at the Osborne Park Hospital employed by the Minister for Health. The employee had regularly worked during the day from Monday to Friday each week. Some time later an agreement was reached between her and her employer for her to work from Tuesdays to Saturdays. Under the provision of the relevant award she was entitled to a shift allowance for work on Saturdays and she was paid a shift allowance for the work she performed on Saturday. When the matter came before the Industrial Magistrates Court the Industrial Magistrate found the employee was a shift worker working ordinary hours on Saturday and entitled to a shift loading that she was paid and she was not entitled to payment of overtime for the work performed on Saturday. When the matter came before the Full Bench on appeal, the President and Chief Commissioner found that the employee was a shift worker, but nevertheless was working outside the ordinary hours, therefore overtime was payable not a shift loading. Commissioner Johnson who was the third member of the Bench found that the employee was a day worker, who became a part-time day worker working overtime on each Saturday. When the matter came before the Industrial Appeal Court each member of the Industrial Appeal Court unanimously overturned the decision of the Full Bench in separate judgments.

44 The appellant points out that the award in the ***Hospital Salaried Officers*** case and the Award both provide for the creation of shift employees who do not have a spread of hours. The respondent says that when the definition of a rostered employee in cl 1.5.13 is read together with cl 3.1 – Hours, it is clear that Mr Clements is a rostered employee as he was rostered to work day shift within the meaning of the definition of rostered employee in cl 1.5.13. The respondent also says that the work of Mr Clements was not continuous across the entire day as he regularly stopped work around 9.00 am and started again at 3.00 pm. Therefore, it follows that if he was a shift employee, he would be entitled to be paid a shift allowance pursuant to cl 3.3.1(a) of the Award as he would be working an afternoon shift that commenced after 12.00 noon. Or put another way, that if, as the appellant asserts, Mr Clements had no fixed spread of hours and was therefore a shift employee, he would have been entitled to shift loadings for every single day he commenced a shift after 3.00 pm. The respondent also argues that if the Full Bench is persuaded by the appellant's argument, the Full Bench should issue a decision declaring that the loadings in cl 3.3 applied to Mr Clements' work performed after 3.00 pm each day.

45 Alternatively, the respondent says that it is clear that Mr Clements went to work twice a day and that such a split shift arrangement is contemplated by cl 5.1.5. The induction handbook clearly indicates Mr Clements had a daily spread of hours which was a split shift. He was a rostered employee who was required to work hours outside the ordinary hour prohibitions of the Award. As such he worked day shift and is entitled to overtime for the period worked prior to 6.00 am each day.

Does the appeal ground 1 turn solely on a question of construction?

46 It is common ground the point sought to be argued by the appellant turns solely upon one material fact that is not in dispute. That fact is that on each day he worked, Mr Clements commenced 30 minutes prior to 6.00 am. This pattern of work squarely raises an issue of construction of the Award. The issue is whether the 30 minutes of work was work outside 'ordinary hours', outside 'usual hours' or outside the 'daily spread' within the meaning of cl 3.2.2(a) of the Award. Part of the consideration of those questions is whether this pattern of work had the effect that Mr Clements was a 'rostered' employee or a 'shift' employee and as such, these issues turn solely upon the proper construction of the Award and the intention of the parties is irrelevant to the resolution of these issues.

Should the Full Bench exercise its discretion to entertain ground 1 of the appeal?

47 The question the Full Bench must ask itself is whether exceptional circumstances exist so that when considered it can be said that the interests of justice favour the hearing of the point not taken in the hearing at first instance.

48 The appellant contends that the point is of importance as it raises a matter going to the interests of justice as it is a point that can be raised in defence to the matters pending in M 113 of 2010 which are proceedings on foot between the same parties for outstanding claims for overtime payments involving 441 school cleaners, who are alleged to have commenced work early without written permission under cl 3.1.1(e) of the Award. Whilst the respondent says the matter before the Full Bench is not a test case Mr Clark reluctantly conceded on behalf of the respondent that the point sought to be raised in this appeal could be raised in that matter.

49 Having considered the submissions of the parties, I am of the opinion that the circumstances relevant to an exercise of discretion to entertain ground 1 of the appeal are as follows:

(a) The concession made on behalf of the respondent that the point sought to be raised could be raised in a matter before the Industrial Magistrate that concerns alleged underpayments to 441 cleaners employed in schools throughout Western Australia

(b) The fact that the point sought to be raised relies upon the material uncontroverted facts that at all material times Mr Clements commenced work at 5.30 am (without a request of majority cleaners to vary the start time earlier than 6.00 am and written permission being granted by the school principal pursuant to cl 3.1.1(e) of the Award).

(c) The point raised is solely a matter of construction of the terms of the Award and if it is successfully raised will not result in the matter being re-heard by the Industrial Magistrate.

(d) The point does not raise any complex issues or argument.

(e) The respondent raises no issue of prejudice.

(f) Whether the point sought to be raised in ground 1 has no merit.

Does ground 1 of the appellant's grounds of appeal have any merit?

50 The principles to be applied to the construction of industrial instruments were recently considered by Smith AP and Beech CC in ***The Chief Executive Officer Department of Agriculture and Food v Wall*** [2011] WAIRC 00263; (2011) 91 WAIG 443 [90] – [91] where after observing that the text of each industrial instrument must be considered as a whole and in context, they had regard to passages by French J in ***City of Wanneroo v Holmes*** (1989) 30 IR 362 where his Honour said (378 - 379):

> The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words: *Re Clothing Trades Award* (1950) 68 CACR 597 (Aust Indus Ct, Full Ct). The words are to be read as a whole and in context: *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award: *Picard v John Heine & Son Ltd* (1924) 35 CLR 1. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all: *Seymour v Stawell Timber Industries Pty Ltd* (1985) 13 IR 289 at 290; 9 FCR 241 at 244 (Northrop J) (13 IR at 299; 9 FCR at 254) (Keely J) cf 13 IR at 309; 9 FCR at 265 (Gray J). The logs of claim and arbitrator's reasons for decision may be referred to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. Evidence of the conduct of the parties subsequent to the making of the award however, cannot be relied upon to construe it: *Seamen's Union of Australia v Adelaide Steamship Co Ltd* (1976) 46 FLR 444, 446, disapproving *Merchant Seamen's Guild of Australia v Sydney Steam Collier Owners and Coal Stevedores Association* (1958) 1 FLR 248. That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in Liq) v McKenzie* [1929] AR (NSW) 498 at 503:
>
> > 'it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award. - see also *Re Crown Employees* (Overtime) Award (1969) AR (NSW) 60, 63; *Re Hospital Employees Administrative and Clerical* (State) Award (1982) 2 IR 123'.

> It is of course no part of the Court's task to assign a meaning in order that the Award may provide what the Court thinks is appropriate - *Australian Workers Union -v- Graziers Association* (NSW)(1939) 40 CAR 494. Indeed it has been said that a tribunal interpreting an Award must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the Award making authority - *Re Health Administration Corporation; Re: Public Hospital Nurses (State) Award* (1985) 12 IR 122; *Rogers Meat Co. Pty Ltd -v- Howarth* (1960) AR (NSW) 291; Re *Government Railways and Tramways (Engineers etc.) Award* [1928] AR 53 at 58 (Cantor J.)

51 Justice French subsequently observed in ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813; (2006) 153 IR 426 [57]:

> It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities — *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378–379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned — see eg *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in *City of Wanneroo v Holmes* (at 380):
>
> > Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.

52 As Smith AP and Beech CC observed in ***Wall*** at [92], the observations of French J in ***Holmes*** are somewhat different to the observations of Kirby and Callinan JJ in ***Amcor Ltd v Construction, Forestry, Mining and Energy Union*** [2005] HCA 10; (2005) 222 CLR 241; (2005) 79 ALJR 703; (2005) 138 IR 286; (2005) 214 ALR 56 [96] and [129] who favoured an even more generous contextual approach expressed by Madgwick J in ***Kucks v CSR Ltd*** (1996) 66 IR 182 as follows (184):

> It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

53 When regard is had to these observations, I now turn to the appellant's argument. The appellant does not argue that any relevant terms of the Award are ambiguous. The appellant has pointed to a number of drafting errors in the numbering of particular clauses which were made at the time the Award was modernised on 19 March 2007 ((2007) 87 WAIG 620). However none of the drafting errors are material to the appellant's arguments and contentions in respect of ground 1 of the appeal. The appellant puts forward an argument that industrial reality in the industry is such that the Award contemplates that shifts may be 'fixed' and not be rostered. Whilst this contention is accepted, it does not assist the appellant's case.

54 The appellant's arguments about the construction of the Award rely heavily upon the analysis of the *Hospital Salaried Officers Award* considered by the Industrial Appeal Court in the ***Hospital Salaried Officers*** case. However, when the provisions of the *Hospital Salaried Officers Award* at the time when the Industrial Appeal Court considered its decision in 1983 are reviewed, it is clear that the facts of that case and the provisions of the award in that matter can be distinguished.

55 The material provisions of the *Hospital Salaried Officers Award* were as follows:

(a) (i) A 'day worker' was defined to mean, a worker who works his ordinary hours from Monday to Friday inclusive and who commences work on such days after 6.00 am and before 12.00 noon.

(ii) A 'shift worker' was defined to mean, a worker who is not a day worker as defined.

(b) (i) The hours clause provided a worker was not required to work his ordinary hours on afternoon or night shift or on a Saturday or on a Sunday unless the employer and the union agreed that the hours may be so worked.

(ii) If the union and the employer agreed, the ordinary hours of work could be worked on a roster that provided for an average of 35 or 37½ hours per week as the case may be over each roster period.

(iii) The ordinary working hours, exclusive of meal intervals, were not to exceed 37½ hours in any week nor 7½ hours in any day. Such hours were required to be worked on five consecutive days in each week.

(c) In the overtime clause, it was provided that all time worked at the direction of the employer outside a worker's ordinary hours was to be paid for at the rate of time and a half for the first three hours and double time thereafter.

(d) In the shift work clause, a day shift, an afternoon shift and a night shift were expressly defined by commencing and finishing times. For example, a day shift was defined to mean a shift which commences after 6.00 am and before 12.00 midday. Also it was provided that shift work performed during ordinary hours on Saturdays or Sundays was to be paid for at the rate of time and a half.

56 In the ***Hospital Salaried Officers*** case the hours of employment of the employee in question were Monday to Friday from 8.00 am to 4.00 pm. They were ordinary hours. In July 1981 she agreed to work the same hours from Tuesday to Saturday. From that time onwards she was paid a shift allowance for work that she performed on Saturdays as a shift worker. It was argued in that matter that Mrs Knight was a day worker and not a shift worker.

57 Whilst there were some similarities in the clauses in the Award and the ***Hospital Salaried Officers*** case there are some material differences. Firstly, a day worker was defined and distinguished from a shift worker in the *Hospital Salaried Officers Award* as a person who worked their ordinary hours from Monday to Friday inclusive. Also a day shift was defined by the actual commencement of the spread of hours as a person who commenced work after 6.00 am and before 12.00 noon. As Brinsden J pointed out in his reasons for decision in the ***Hospital Salaried Officers*** case (1155) the shift work clause in that case enlarged the meaning of shift worker in the definitions clause by defining a day, afternoon and night shift.

58 In this appeal when the definition of 'shift employee' in cl 1.5.15 is read together with cl 3.3 shift work, it is apparent that a day shift is not contemplated in cl 3.3 and 'shift employee' is defined as an employee who is rostered to work an afternoon or night shift. However, the concept of a day shift is contemplated in the definition of 'rostered employee' in cl 1.5.13 of the Award which defines a 'rostered' employee to mean an employee who is rostered to work 'day shift' on any of the seven days of the week. So when the definitions of rostered employee, shift employee and cl 3.3 are read together, it is apparent that whilst in one sense a person who works day shift might be contemplated to be a shift worker for the purposes of the Award, that person is a rostered employee in cl 1.5.13. This distinction is further maintained in cl 3.1.2, the heading of which properly refers to rostered and shift employees, as cl 3.1.2(a) deals with rostered employees and cl 3.1.2(b) deals with shift employees. In both of those subclauses there is a reference to ordinary hours. The ordinary hours for a rostered employee are defined separately in cl 3.1.2(a) from the ordinary hours for a shift employee in cl 3.1.2(b). Whilst it is the case that a shift employee has no fixed daily spread of hours it is also notable that a shift employee is prohibited from working their ordinary hours in more than 10 shifts per fortnight of eight hours each and not more than one shift in every 24 hours. This prohibition is not extended to rostered employees who can be rostered to work their ordinary hours each day in two shifts and where they do so they are entitled to an allowance pursuant to cl 5.1.5.

59 For these reasons, I am not satisfied that the work patterns of Mr Clements had the effect that he was a shift employee within the meaning of cl 1.5.15 of the Award. As a 'rostered employee' his spread of hours were to be worked between 6.00 am to 7.00 pm, Monday to Friday inclusive, within the meaning of cl 3.1.1(a) and cl 3.1.2(a) of the Award.

Conclusion – ground 1 of the appeal

60 I accept that ground 1 seeks to raise a point that goes to an issue of relevance in other matters that are sought to be litigated in the Industrial Magistrates Court and as such is an issue of general importance to the public and the proper interpretation of the Award in the cleaning industry in public schools generally. Whilst it is relevant that the point seeks to raise a simple issue of construction of the terms of the Award, as the ground has no merit, I am of the opinion that it would not be expedient in the interests of justice to allow the appellant to rely upon ground 1 of the appeal.

Ground 2

61 The Award was renumbered when it was modernised in 2007. Prior to 19 March 2007, cl 3.2.2(a) of the Award was numbered cl 8(1). On 19 March 2007, cl 8(1) was renumbered cl 3.2.2(a).

62 The statement of claim alleges the appellant breached cl 3.2.2(a) of the Award between 29 July 2005 and 2 April 2009. No application was made to amend the statement of claim in respect of the period 29 July 2005 and 19 March 2007 to allege a breach of:

(a) clause 8(1) of the Award between 29 July 2005 and 18 March 2007; and

(b) clause 3.2.2(a) of the Award between 19 March 2007 and 2 April 2009.

63 The appellant argues that the learned Industrial Magistrate erred in:

(a) failing to apply the Award as it stood between 29 July 2005 and 19 March 2007 and in treating the former Award provisions as only being relevant by way of historical context; and

(b) finding that the appellant breached cl 3.2.2(a) of the Award between 29 July 2005 and 19 March 2007.

64 The learned Industrial Magistrate simply found at [30] of his reasons that the claim was proved (AB 79), and made no reference in so finding that cl 3.2.2(a) of the Award had for a material period been numbered cl 8(1). However, this omission in the 'reasons for decision' is not reflected in the 'decision' that is the subject of the appeal. Under s 84 of the *Industrial Relations Act 1979* (WA) (the Act) an appeal does not lie to the Full Bench from reasons for decision but from a 'decision' as defined in s 84(1) of the Act. Section 84(1), s 84(2) and s 84(4) of the Act relevant provides:

(1) In this section ***decision*** includes a penalty, order, order of dismissal, and any other determination of an industrial magistrate's court, but does not include a decision made by such a court in the exercise of the jurisdiction conferred on it by section 96J.

(2) Subject to this section, an appeal lies to the Full Bench in the manner prescribed from any decision of an industrial magistrate's court.

…

(4) On the hearing of the appeal the Full Bench —

(a) may confirm, reverse, vary, amend, rescind, set aside, or quash the decision the subject of the appeal;

(b) may remit the matter to the industrial magistrate's court or to another industrial magistrate's court for further hearing and determination according to law; and

(c) subject to subsection (5), may make such order as to costs as the Full Bench considers appropriate.

65 The learned Industrial Magistrate made an order on 25 August 2010 pursuant to s 83(1), s 83(4) and s 83A of the Act and that order is the decision that the Full Bench may review and make any order contemplated in s 84(4) of the Act.

66 Pursuant to s 84(1), s 84(4) and s 83A of the Act, it is not the learned Industrial Magistrate's reasons for decision that have force and effect but the terms of the order. Consequently, if an Industrial Magistrate makes observations and findings that may be in error or omits to make a finding in reasons for decision that is not reflected in an order, the Full Bench acting under s 84(4) of the Act has no cause to reverse, vary, amend, rescind, set aside or quash the order in question, unless the order itself is in error or contains an omission.

67 The following orders were made by the learned Industrial Magistrate in the order made on 25 August 2010:

1 Judgement for the Claimant against the Respondent.

2. There is a finding that between 29/7/2005 and 2/4/2009 the Respondent has on 85 separate occasions failed to comply with the Cleaners and Caretakers (Government) Award 1975.

3. The Respondent shall pay to the Claimant for disbursement to Mr Brett William Clements the agreed sum of $3800.

4. The Respondent is cautioned for each of its 85 breaches of the award.

5. There is no order as to costs.

68 As the terms of the order simply contain a finding that between the material dates the appellant on 85 separate occasions failed to comply with the Award, and does not set the clause that was breached, no error arises on the face of the record of the order that requires correction. If any criticism can be made of the terms of the order is that this finding could have been drafted in a more precise way to reflect the particulars of provision of the Award breached on each of the 85 occasions. Although the order could have been drafted with more particularity, no error arises.

69 For these reasons, ground 2 of the grounds of appeal has not been made out and I am of the opinion that an order should be made dismissing the appeal.

SCOTT ASC:

70 The appellant appeals against a decision of the Industrial Magistrate given on 25 August 2010. The first ground of appeal is that the Industrial Magistrate erred in finding that the appellant breached cl 3.2.2(a) of the *Cleaners and Caretakers (Government) Award 1975* (the Award) by failing to pay the employee, Mr Clements, overtime for work performed between 5.30am and 6.00am for a period of time. The particulars of this ground of appeal include that the facts are said to demonstrate that Mr Clements was a shift employee under cl 1.5.15. As such he is said to have had no fixed daily hours under cl 3.1.2(b)(i) of the Award. As the operation of cl 3.2.2(a) of the Award is subject to cl 3.1.2(b)(i), it is said that no overtime is attracted.

71 The second ground of appeal is that the Industrial Magistrate did not take into account an amendment to the Award which applied between 29 July 2005 and March 2007 resulting in errors in the numbers of clauses referred to in the decision.

72 The question raised by the first ground of appeal is whether Mr Clements was a shift worker and as a consequence whether he was working overtime for the period between 5.30am and 6.00am. However, I agree with the Reasons for Decision of the Honourable Acting President that this matter was not raised before the Industrial Magistrate. The issue was not raised in any substantive way by the appellant during the proceedings before the Industrial Magistrate but was merely commented upon in passing and did not form part of the appellant's defence of the appeal at first instance. Furthermore, the appellant did not suggest that Mr Clements was in fact a shift employee until it had filed its appeal. The grounds for the defence of the matter before the Industrial Magistrate were quite different.

73 In accordance with the normal requirements for appeals, the appeal ought not be allowed on the basis that there ought be finality to litigation and the appellant ought not have the right to raise on appeal a matter not dealt with at first instance (***Water Board v Moustakas*** (1988) 180 CLR 491). The circumstances of the likely impact of this matter and other matters pending before the Industrial Magistrate, involving many other cleaners, justify the consideration of this issue. Those circumstances constitute the interests of justice in the ground of appeal being determined.

74 I also agree with the Acting President, for the reasons she has stated, that Mr Clements was a rostered employee whose ordinary hours were worked in a split shift, which was subject to the appropriate allowance.

75 As he was rostered to work before the ordinary spread of hours commencing at 6.00am under cl 3.1.1(b), and there was no written permission to start work earlier than 6.00am in accordance with cl 3.1.1(e)(i), Mr Clements was entitled to be paid overtime for the period before 6.00am each day.

76 Ground 2 has no real consequences for the decision of the Industrial Magistrate as it is not reflected in the Order which resulted from the Reasons for Decision. While there may have been an error it is not one which affected the decision.

77 Therefore, I too would dismiss this appeal.

HARRISON C

78 I have read a draft of the reasons for decision of the Acting President. I agree and have nothing to add.

2011 WAIRC 00819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR EDUCATION
	APPELLANT
	-and-
	LIQUOR HOSPITALITY AND MISCELLANEOUS UNION, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 10 AUGUST 2011
FILE NO/S	FBA 17 OF 2010
CITATION NO.	2011 WAIRC 00819

Result	Appeal dismissed
Appearances	
Appellant	Mr A Shuy (of counsel) instructed by State Solicitor of Western Australia
Respondent	Mr A Clark

Order

This appeal having come on for hearing before the Full Bench on 12 January 2011 and 3 June 2011, and having heard Mr A Shuy (of counsel) on behalf of the appellant, and Mr A Clark on behalf of the respondent, and reasons for decision having been delivered on 10 August 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2011 WAIRC 00786

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2011 WAIRC 00786
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT
		CHIEF COMMISSIONER A R BEECH
		COMMISSIONER S M MAYMAN
HEARD	:	MONDAY, 11 APRIL 2011, TUESDAY, 12 APRIL 2011, FRIDAY, 6 MAY 2011
DELIVERED	:	MONDAY, 1 AUGUST 2011
FILE NO.	:	FBM 10 OF 2010
BETWEEN	:	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
		Applicant
		AND
		THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
		Objector

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 - Application seeks to cover all officers appointed under the *Police Act 1892* (WA) and public service officers employed by the Commissioner of Police - Registration refused of proposed rule that would extend to public service officers - Whether police auxiliary officers are employees considered - Will overlapping coverage occur if application granted - Qualification for membership rules of the CSA considered - Not practicable to discourage overlapping coverage of police auxiliary officers - Degree of overlapping coverage of police auxiliary officers will be minor - Good reason consistent with the objects of the *Industrial Relations Act* to permit registration of proposed rule insofar as it will apply to police auxiliary officers.
Legislation	:	*Industrial Relations Act 1979* (WA) s 6, s 6(ab), s 6(e), s 7, s 41, s 53(2), s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 62(2), s 72A, s 72A(2)(a), s 80C, s 80C(1)(b), sch 3 cl 2, sch 3 cl 2(3); *Police Act 1892* (WA) s 5, s 6, s 7, s 7(2), s 9, s 10, s 12, s 13, s 23, s 35(1), s 38B(1), s 38C, s 38D, s 38G, s 38G(1), s 38G(2)(b), s 38G(3), s 38G(4), s 38H, s 38H(1), s 38H(2), s 38H(3), s 38I, s 136, s 136(1), s 137, s 138, pt IIA, pt IIB; *Public Sector Management Act 1994* (WA) s 3, s 4(3), s 5, pt 3, s 34, s 35, s 64, s 64(1),s 65, s 66, s 100, s 100(2), sch 1 item 5; *Industrial Arbitration Act 1912* (WA); *Misuse of Drugs Act 1981* (WA); *Fish Resources Management Act 1994* (WA); *Surveillance Devices Act 1998* (WA) s 5; *Public Service Act 1904* (WA) (repealed); *Public Service Arbitration Act 1966* (WA) (repealed); *Criminal Investigation Act 2006* (WA) s 9; *Criminal Investigation (Identifying People) Act 2002* (WA); *Firearms Act 1973* (WA); *Hospitals and Health Services Act 1927* (WA) s 15, s 19; *Sentence Administration Act 2003* (WA) s 98(3), s 101, s 103; *Witness Protection (Western Australia) Act 1996* (WA).
Result	:	Application granted in part
Representation:		
Applicant	:	Mr R L Hooker (of counsel) and with him Ms M Binet (of counsel)
Objector	:	Mr S Farrell and with him Ms S Bhar
Solicitors:		
Applicant	:	Gregor & Binet Pty Ltd

Case(s) referred to in reasons:

Association of Draughting, Supervisory and Technical Employees (1981) 61 WAIG 1729

Association of Professional Engineers, Australia (Western Australian Branch) v Civil Service Association of Western Australia (Inc) (1984) 65 WAIG 4

Attorney-General for New South Wales v Perpetual Trustee Co (Ltd) (1955) 92 CLR 113

Attorney-General for New South Wales v The Perpetual Trustee Co (Ltd) (1952) 85 CLR 237

Employment Status of the Police in Australia (2003) 27 Melbourne University Law Review 1

Enever v R (1906) 3 CLR 969

Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch (1985) 65 WAIG 2033

Gerhardy v Brown [1985] HCA 11; (1985) 159 CLR 70

Hospital Salaried Officers Association of Western Australia (Union of Workers) (1995) 76 WAIG 1671

Civil Service Association of Western Australia Inc (1985) 65 WAIG 2045

Restaurant and Catering Industry Association of Employers of Western Australia Inc v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch (2004) 85 WAIG 32

The United Firefighters Union of Western Australia (2003) 83 WAIG 1400

R v Metropolis Police Commissioner; ex parte Blackburn [1968] 2 QB 118

RAC Patrolmen's Association (1975) 55 WAIG 1638

Re an application by the Civil Service Association of Western Australia (Inc) (2004) 84 WAIG 422

Re an application by The West Australian Psychiatric Nurses' Association (Union of Workers) (1994) 74 WAIG 1500

Re application by McGee for inquiry by the court into elections for offices within the Transport Workers' Union of Australia (1992) 41 IR 27; BC9203419

Re Sharkey; Ex Parte Burswood Resort (Management) Ltd (1994) 55 IR 276

Re The Federated Miscellaneous Workers' Union of Australia, WA Branch (1993) 73 WAIG 3342

Stacey v Civil Service Association of Western Australia (Inc) (2007) 87 WAIG 1229

The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees [No 1] (2007) 87 WAIG 2556

The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees [No 2] (1988) 69 WAIG 1057

The Attorney General in and for the State of Western Australia v Western Australian Prison Officers' Union of Workers (1982) 62 WAIG 517

The Civil Service Association of Western Australia Inc (2009) 89 WAIG 2381

The Civil Service Association of Western Australia Inc v St John Ambulance Association in Western Australia Inc (1989) 70 WAIG 311

The Honourable Minister of Police v Western Australian Police Union of Workers (2000) 81 WAIG 356

The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers [2001] WAIRC 02020; (2001) 81 WAIG 382

Case(s) also cited:

Baking Industry Employers' Association of Western Australia (2005) 86 WAIG 265

Civil Service Association of Western Australia (Inc) v Jones [2003] WAIRC 08378; (2003) 83 WAIG 1403

Civil Service Association of Western Australia Inc v Director General, Department of Justice (2003) 83 WAIG 503

Hospital Salaried Officers' Association of Western Australia (Union of Workers) v The Hon Minister for Health (1981) 61 WAIG 616

In the matter of an application by the Federated Ironworkers Association of Australia Industrial Union of Workers Western Australian Branch (1985) 65 WAIG 1094

In the matter of an application by The Western Australian Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union of Workers (1986) 67 WAIG 341

Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44

Kirkland-Veenstra v Stuart (No 2) (2008) 23 VR 36

Konrad v Victoria Police (1999) 165 ALR 23

Merchant Service Guild of Australia, Western Australian Branch, Union of Workers v Fisheries Department of Western Australia (1998) 78 WAIG 3648

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

R v Aird; Ex parte Australian Workers' Union [1973] HCA 53; (1973) 129 CLR 654

Re an application by The Federated Miscellaneous Workers' Union of Australia, WA Branch (1993) 73 WAIG 1232

Re The Federated Miscellaneous Workers' Union of Australia, WA Branch (1993) 73 WAIG 563

The AMP Society Staff Association v The Australian Insurance Staffs Federation (1944) 53 CAR 836

The Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v Hamersley Iron Pty Ltd (1982) 62 WAIG 815

The Civil Service Association of Western Australia Inc (2008) 88 WAIG 194

The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1988) 68 WAIG 1705

The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous WA Branch v The Civil Service Association of Western Australia Inc (1988) 69 WAIG 1205

The Health Services Union of Western Australia (Union of Workers) v Director General of Health [2009] WAIRC 00447; (2009) 89 WAIG 1039

Western Mining Corporation Ltd v The Australian Workers' Union, Western Australian Branch, Industrial Union of Workers (1990) 70 WAIG 3525

INDEX

Reasons for Decision

SMITH AP AND BEECH CC:

1.0 INTRODUCTION

1 This is an application by the Western Australian Police Union of Workers (the Police Union), filed on 25 August 2010, made pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act). The Police Union, as a registered organisation under the Act, seeks the authorisation of the Full Bench for the Registrar to register alterations to its qualification for membership rule. The alterations to the rule sought by the Police Union are to substitute a new r 5 to replace the existing r 4 which provides for eligibility membership to the Police Union. Currently r 4 provides as follows:

(1) The following classes of employees of the Western Australia Police Service shall be eligible to be members of the Union:

(a) Sworn Police Officers;

(b) Police Cadet (Recruits); and

(c) Aboriginal Police Liaison Officers.

(2) The Union shall be constituted of those classes of members specified in sub rule (1) of this Rule and persons upon whom Life Membership of the Union has been conferred in accordance with these Rules.

(3) Any sworn officer of the Police Service as defined by sub rule (1) of this Rule may apply to the Board for membership of the Union, and the Union shall have the power to accept or reject such applications; provided that any applicant whose application for membership is rejected by the Board shall have the right of appeal to the next Annual Conference of Delegates whose decision shall be final.

(4) A register of the names of the officers and members of the Union shall be kept by the General Manager at the Registered Office and will be open at all convenient times for inspection by any member or by the Registrar or any person appointed by him or her. 3

(5) Subscriptions for members of the Union shall be:

(a) For Sworn Police Officers an amount equivalent to 1% of the base salary applicable to the rank of a third year Constable rounded up to the next nearest 10 cents, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(b) For Police Cadets (Recruit) an amount determined by the Board, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(c) For Aboriginal Police Liaison Officers an amount equivalent to 1% of the base salary applicable to the rank of a First Class Aboriginal Police Liaison Officer rounded up to the next nearest 10 cents, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(d) For a member who converts to part time employment an amount determined by the Board, with such amount to be paid fortnightly or at other greater intervals as may be determined by the Board.

(e) For a member (who must inform the Union in writing of their intention to do so) proceeding on maternity leave or, other absence from duty without pay, normal subscriptions shall not be required to be paid during such leave but the member shall contribute an amount determined by the Board and will be still

entitled to the full privileges of membership. Such amount is to be paid fortnightly or at other greater intervals as may be determined by the Board.

(f) For Life Members, subscriptions shall not be required to be paid, whether or not they are entitled to membership under another classification.

(6) A member may end membership of the Union by giving written notice of the intention to resign. The notice of resignation shall be delivered in person or by certified mail to the Registered Office. The resignation takes effect from the day on which it is received by the Union or on such later date specified in the notice but the member will remain responsible for any subscriptions, levies or fines owing up to and including the date of ceasing to be a member of the Union.

(7) Where a member's subscription has not been paid for a period of three months then that person shall cease to be a member of the Union, but shall be responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.

(8) (a) The Union shall remove from the register the name of any person who ceases to be a member in accordance with sub rule (7).

(b) The Union shall ensure persons specified in sub rule (7) shall have their names removed by purging the register at least four times each year.

(c) The Board may remove from the register the name of any member whose levies or other monies owing, other than subscriptions, is in arrears for six months. 4

(d) Any member whose name is removed in accordance with sub rule (8) (a) or (c) shall not be free from arrears due, and the General Manager may, after 14 days notice, sue such member in any court of ordinary jurisdiction pursuant to Section 109 of the Act.

(9) Any sworn officer of the Western Australia Police Service eligible to be a member of the Union voluntarily resigning from the Union and wishing to rejoin may only be admitted on the approval of the Board.

(10) Any member of the Union who ceases to be a member of the Western Australia Police Service by reason of retirement because of age or because of total and permanent incapacity may remain a member of the Union insofar as those privileges and benefits determined solely by the Board are concerned and will be eligible to receive the benefits to be derived therefrom without any further payments to the Union.

(11) The Board may by resolution confer Life Membership on any person, in recognition of long or special services rendered to the Union. Any person on whom Life Membership has been conferred shall enjoy the full benefits of membership of the Union without payment of any subscriptions or levy as from the date of conferring of such Life Membership. For the purposes of these Rules such person shall be deemed to be a financial member of the Union.

(12) The Union shall not credit any moneys from a members subscription fees to a political fund.

2 The proposed replacement to r 4 is the insertion of a new r 5. The eligibility rule is to be re-ordered pursuant to an application before the Registrar to modernise the entire rules of the Police Union. The proposed new r 5 is as follows:

5 Membership

5.1 Ordinary Membership

To be eligible to be an Ordinary Member of the Union a person must be:

(a) appointed under the *Police Act 1892* (WA) and employed by the Commissioner of Police; or

(b) a Police Recruit; or

(c) engaged by the Commissioner of Police in some other capacity undertaking work currently or traditionally performed by a member of the Police Force appointed under the *Police Act 1892* (WA).

5.2 Retired Membership

(a) Any Member who ceases to be eligible for membership by reason of their retirement because of age or total permanent incapacity may apply for membership as a Retired Member.

(b) A Retired Member shall be entitled to those benefits of membership as determined by the Board from time to time without further payment of any subscription, fee, fine or levy.

(c) A Retired Member shall not be entitled to stand for election as an Officer of the Union or vote in any election held pursuant to these Rules.

(d) For the purposes of these Rules a Retired Member shall be deemed to be a financial member of the Union.

5.3 Life Membership

(a) The Board may by resolution confer life membership on any person, in recognition of long or special services rendered to the Union.

(b) A Life Member shall be entitled to the full benefits of membership of the Union without payment of any subscription, fee, fine or levy.

(c) A Life Member who has retired shall not be entitled to stand for election as an Officer of the Union or vote in any election held pursuant to these Rules.

(d) For the purposes of these Rules a Life Member shall be deemed to be a financial member of the Union.

5.4 Application for Membership

Any person eligible to be an Ordinary or Retired Member may apply to the Board for membership of the Union, and the Board shall have the power to accept or reject such applications; provided that any applicant whose application for membership is rejected by the Board shall have the right of appeal to the next Annual Conference whose decision shall be final.

5.5 Register of Members

(a) The Union shall consist of Ordinary Members, Retired Members and Life Members.

(b) A register of the names and residential addresses of the Officers and Members of the Union and such other information as required by section 63 of the Act shall be kept by the Secretary at the Registered Office and will be open at all convenient times for inspection by any Member or by the Registrar or any person appointed by the Registrar.

(c) The Register of Members shall be purged on not less than four (4) occasions in each year in accordance with section 64D of the Act.

5.6 Membership of the Police Federation of Australia

(a) In order to develop and maintain relations between the Police Federation of Australia and the Union, the President may make an application to the Police Federation of Australia on behalf of any Member who is eligible for, but is not already a member of, the Police Federation of Australia for that Member to become a member of the Police Federation of Australia.

(b) At least four weeks before making an application pursuant to this Rule, the President shall notify those Members of the Union on whose behalf it is proposed to make the application of the intention to make the application by placing a notice in a metropolitan daily newspaper in Western Australia and in the Journal.

(c) The notice published pursuant to this Rule must state that Members who do not wish to become members of the Police Federation of Australia must advise the President in writing within 4 weeks of the date of the publication of the notice that they do not wish to become a member of the Police Federation of Australia.

(d) The President shall not make an application for membership of the Police Federation of Australia on behalf of any person who notified the President in accordance with this Rule that they did not wish to become a member of the Police Federation of Australia.

5.7 Termination of Membership

(a) A Member's membership of the Union shall be terminated:

(1) by resignation;

(2) by expulsion in accordance with Rule 13 - Disciplinary Matters;

(3) by death of the Member;

(4) by the Member ceasing to be eligible to become a Member; or

(5) by a Member becoming non financial.

(b) A Member who fails to pay the applicable subscription for a period of more than 3 months or a fee, fine or levy for a period of 6 months without making an alternative arrangement satisfactory to the Board shall be deemed a non financial member.

(c) A Member may resign by giving written notice of the intention to resign. The notice of resignation shall be delivered in person or by certified mail to the Registered Office. The resignation takes effect from the day on which it is received by the Union or on such later date specified in the notice.

(d) Where a Member's membership is terminated that person shall cease to be a Member but shall be responsible for any subscriptions, fees, levies or fines owing up to and including the date of termination of membership.

(e) Any subscriptions, fees, levies or fines payable but not paid by the former Member in relation to a period before the termination of the former Member's membership took effect may be sued for and recovered in the name of the Union in a court of competent jurisdiction as a debt due to the Union.

(f) The Secretary shall remove from the Register of Members the name of any person who ceases to be a Member in accordance with Rule 5.7 - Termination of Membership

5.8 Rejoining After Termination of Membership

A person whose membership is terminated in accordance with Rule 5.7 - Termination of Membership may only reapply for membership with the written approval of the Board.

3 On 12 October 2010, The Civil Service Association of Western Australia Incorporated (the CSA) filed a notice of objection to the proposed alterations to proposed r 5.1. In its notice of objection the CSA put forward two grounds of objection. In its first ground the CSA states that:

(a) The class of employees that is the subject matter of the application is indeterminate and incapable of definition sufficient enough to determine the coverage sought;

(b) The CSA is of the opinion that there is no specified definition of police recruit in the *Police Act 1892* (WA) or any other relevant legislation and therefore it cannot determine who is a police recruit; and

(c) The proposed r 5.1 purports to encroach on or overlap the coverage of the CSA's membership rule, in particular r 6(a)(1) to r 6(a)(5) of the CSA's eligibility for membership rule.

1.1 Applicant's Further and Better Particulars

4 Pursuant to an order made by the Full Bench on 29 October 2010, the Police Union filed and served on 11 November 2010, further and better particulars of the class of officers and/or employees contemplated to be covered by proposed r 5.1(a), r 5.1(b) and r 5.1(c).

A Proposed r 5.1(a) - Appointed under the *Police Act 1892* (WA) (the Police Act) and employed by the Commissioner of Police

5 The Police Union in its further and better particulars states that:

(a) This category is intended to apply to any person appointed under the Police Act and who is employed by the Commissioner of Police, whether presently or in the future. At the present time the following are employed by the Commissioner of Police:

(i) Commissioned officers;

(ii) Non-commissioned officers;

(iii) Constables;

(iv) Cadets;

(v) Aboriginal police liaison officers; and

(vi) Police auxiliary officers.

(b) This proposed amendment would:

(i) maintain the existing eligibility arrangements for sworn police officers (Commissioned officers, Non-commissioned officers and constables) and Aboriginal police liaison officers; and

(ii) would extend coverage of any future classification of officer whose appointment will be created under the Police Act (as amended from time to time) and who will be employed by the Commissioner of Police.

B Proposed r 5.1(b) – A Police Recruit

6 The Police Union says the proposed amendment to the rules is a necessary clarification to the existing arrangement provided for by r 4(b) in respect of police cadets (recruits). There has been a change to the arrangement, titles and method of appointment of cadets so that the wording of the current rules is no longer accurate or appropriate. Pursuant to s 7(2) of the Police Act, the Minister responsible for the administration of the Police Act, or a person authorised by him, may appoint persons to be police cadets. This arrangement was utilised between 1936 and 1996. In 1996 the appointment of cadets under s 7(2) of the Police Act ceased and at this time has not been revisited. The current practice is for the Commissioner of Police to appoint persons as trainees under the *Public Sector Management Act 1994* (WA) (the PSM Act). The term 'recruit in training' in *The Police Award 1965* and industrial agreements is defined as 'an employee undertaking academy-based initial training as a member of the Police Force'. The Police Union submits the term 'police recruit' is traditionally used and well understood nomenclature in Western Australia for constables undergoing initial training at the academy and is interchangeable with the term 'recruit in training'. Consequently, it is not the intention of the proposed amendment to obtain coverage of:

(a) people who may be identified as 'recruits' other than those who are truly 'recruits', that is, constables undergoing initial police academy-based training; or

(b) those people who are 'trainees' under the PSM Act, with the title of 'cadet'.

C Proposed r 5.1(c) – Engaged by the Commissioner of Police in some other capacity undertaking work currently or traditionally performed by a member of the Police Force appointed under the Police Act

7 Proposed r 5.1(c) is intended to cover persons who the Commissioner of Police engages to undertake duties currently or traditionally performed by police officers appointed under the Police Act but who may be appointed under other acts of Parliament. This proposed rule is intended to cover any form of engagement, such as full-time, permanent part-time, casual, or contracted by the Commissioner of Police. In the Police Union's reply to the objector's oral and written closing submissions filed on 13 May 2011, the Police Union further particularised the word 'engaged' intending to have a broad meaning covering a wide range of circumstances where work for reward may be performed for the Commissioner of Police otherwise within the scope of the proposed rule (such as engagement of officers in the strict sense or of contractors, as well as employment).

8 The reason why this rule change is sought is because there has been a divestment by the Commissioner of Police of functions that require some 'police powers' from sworn police officers to other persons who are employed by the Commissioner of Police who have prescribed limited police powers. For example, police auxiliary officers are employed by the Commissioner of Police with limited 'police powers' for the following functions:

(a) custody work in large lock-ups and the Perth Watch House;

(b) property and exhibit transportation and processing; and

(c) clandestine drug laboratory deconstruction.

9 Custody officers are employed for the Perth Watch House only and their positions will be phased out through attrition and replacement by police auxiliary officers. It is anticipated that with the changing nature of crime and policing, the financial

imperatives affecting government and a fluctuating labour market, that potentially the Commissioner of Police will continue to divest traditional or current police functions to other groups with limited police powers rather than fully sworn police officers. Consequently, the Police Union says that it is necessary to create an imprecise category of membership rather than to attempt to identify every occupational group in proposed r 5.1(c). It is not the intent of the Police Union to obtain coverage of persons who are undertaking work which does not require the exercise of either some form of statutory powers, or some explicit policing knowledge.

1.2 Statutory Requirements for the alteration of the rules of an organisation

10 Pursuant to s 62(2) of the Act, 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 rule 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:

> 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.

11 Section 55(5) of the Act also relevantly provides:

> Notwithstanding that an organisation complies with section 53(1) or 54(1), the Full Bench shall refuse an application by the organisation under this section if a registered organisation whose rules relating to membership enable it to enrol as a member some or all of the persons eligible, pursuant to the rules of the first-mentioned organisation, to be members of the first-mentioned organisation unless the Full Bench is satisfied that there is good reason, consistent with the objects prescribed in section 6, to permit registration.

12 The first requirement pursuant to 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. Rule 31 of the rules of the Police Union provide the process to alter its rules. Rule 31 provides:

> (1) Should the Board or any Branch desire to alter, amend or rescind any existing Rule or sub rule, or desire to have any new Rule or sub rule inserted, such Rule or sub rule shall not be altered, amended, or rescinded and no new Rule or sub rule adopted unless it has appeared on the Agenda for the Annual Conference.
>
> (2) No amendment, repeal, alteration or insertion of a new rule shall be made unless the amendment, repeal, alteration or addition has been passed and approved by a vote of the majority of the members of the Annual Conference present in accordance with Rule 5. Annual Conference, sub rule (3).
>
> (3) No amendment, addition to, repeal or substitution of this Constitution and Rules shall be made unless a notice of the proposed alteration and the reasons therefore, is given to the members of the Union. Such notice shall be posted to all Branch Secretaries and reasonable steps shall be taken to inform members of the proposal.
>
> (4) (a) In the notice referred to in sub rule (3) of this Rule members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Registrar to reach him or her no later than 14 days after the date of receipt of the notice.
>
> (b) In the notice referred to in sub rule (3) of this Rule and with respect to any proposed alteration of the rule relating to the qualifications of persons for membership of the Union, members are to be informed that they or any of them may object to making of the application for the proposed alteration and/or object to

the proposed alteration by forwarding a written objection to the Registrar to reach their office no later than 14 days after the date of receipt of the notice.

(5) No alteration to any of the Rules of the Union shall become effective until the Registrar has given to the Union a certificate that the alteration has been registered.

13 In particular, r 31(2) provides that the alteration or insertion of a new rule can only be made if it has been passed and approved by a vote of the majority of the members present in accordance with r 5(3) at an annual conference. Rule 5 of the rules of the Police Union currently provides:

(1) The Annual Conference of the Union shall be the supreme authority over all matters affecting the general management and policies of the Union.

(2) The Annual Conference shall be held each year in the months of May or June, with the date and other arrangements being determined by the Board.

(3) The following persons shall comprise the members of an Annual Conference:

(a) the members of the Board, each of whom shall have one vote in respect to any question before the Conference;

(b) the Directors - Elect attending Conference, shall be entitled to vote, by virtue of that office alone, in respect to any question before the Conference; and

(c) the Delegates of Branches, each of whom shall have two votes in respect to any question before the Conference.

(4) Each Branch shall be represented at such Conference by one delegate, but such delegate shall not be a member of the Board or a Director - Elect.

(5) Each delegate must be elected by a meeting of the Branch they represent. Where two meetings of the Branch called for the purpose of electing a delegate lapse for want of quorum, the delegate from that Branch is to be selected by the Office Bearers of the Branch from among those Office Bearers.

(6) Branch delegates shall present their credentials, duly signed by the President and Secretary of their Branch, to Conference at the beginning of the first day.

(7) At the Annual Conference 20 members shall form a quorum.

(8) At the dissolution of the Conference the office of the Board of Directors - Elect shall commence.

(9) At each Annual Conference an Auditor's Report and an audited balance sheet of the assets and liabilities, a statement of the receipts and expenditure and a statement of the sources and application of funds of the Union are to be presented.

(10) The Board shall give at least three months notice to the Branches of the date for the Annual Conference. Agenda items submitted by the Branches for Conference shall be forwarded to the Union 60 clear days before such date.

(11) Upon receipt of the Branches agenda items, the Board shall prepare the Agenda for Conference, and the Agenda shall be given to the Branches at least 30 days before Conference. The Branches shall then meet to discuss the Agenda.

14 The facts setting out the circumstances of compliance of the rules of the Police Union are in a statutory declaration made on 25 August 2010 by Russell Lee Armstrong, the General President of the Police Union. His statutory declaration and the documents attached evidence the following matters:

(a) At least three months notice of the annual conference was given to all branches of the Police Union by way of notice by email sent on 25 March 2010 by the general manager on behalf of the Board.

(b) Emails were sent to the branches on 19 April 2010 and 28 April 2010 reminding the branches that all agenda items for the annual conference must be submitted by 28 April 2010.

(c) The Board prepared the agenda for the annual conference. The agenda set out the motion to be considered by the annual conference to amend proposed r 5. The agenda was sent to the branches as attachment to an email sent by the general manager of the Police Union on 28 May 2010. The agenda also contained a statement of the reasons for the proposed alteration.

15 The annual conference was held on 28 June 2010. The minutes of the meeting record that the members of the Board, the directors and the delegates of the branches and a total of 20 members were present at the annual conference which constituted a quorum. The minutes record that a motion was put that the existing rules of the Police Union be replaced in their entirety with the proposed rules. That motion was moved, seconded and carried. The proposed rules considered in that motion contained an amendment to replace r 4 with proposed r 5.

16 A notice was then sent to all the members by email on 21 July 2010 setting out the proposed alterations and the reasons therefore. The notice also attached a copy of the proposed rules and a comparison document of the existing and proposed rules. The email was sent to each branch. In the email members were informed that if any member wished to object to any or all of the alterations, or to the union making an application to the Commission for the alterations to be registered they could do so by forwarding a written objection to the Registrar of the Commission no later than 14 days after the receipt of the notice. A copy of the notice and the documents were attached as attachments to a letter dated 21 July 2010.

17 After having regard to this evidence, I am satisfied the application has been authorised in accordance with the rules of the Police Union. In particular, I am satisfied that:

(a) the requirements of r 5 and r 31 were satisfied;

(b) reasonable steps have been taken to inform the members of the intention of the organisation to apply for the registration of the proposed substitution of r 4 by proposed r 5;

(c) each member was provided with a notice setting out the proposed alterations to the rules and the reasons for their variations; and

(d) each member had been given notice that they could object to the alterations of the rules by forwarding the written objection to the Registrar no later than 14 days after the date of the notice.

18 I am also satisfied that the members of the Police Union have been forwarded a reasonable opportunity to make an objection and I note that no member of the Police Union has objected to the making of the application or to the proposed substitution of r 4 by proposed r 5.

19 For these reasons, I am satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act have been complied with. Section 55(4)(e) and s 56(1) of the Act relate to procedural rules of elections for office, including secret ballots. The proposed variations do not deal with the matters specified in those provisions. Consequently, no issue arises in this matter in relation to the requirements of those provisions.

20 The only issue that requires consideration in some detail of the evidence given in these proceedings together with the issues raised by the objector, the CSA, is whether pursuant to s 55(5) of the Act the Full Bench should refuse the application to register proposed r 5.1. Pursuant to s 55(5) of the Act the Full Bench is to refuse an application if a registered organisation whose rules relating to membership enable it to enrol as a member some of the persons eligible, pursuant to the rules of another organisation, to be members of the first mentioned organisation unless the Full Bench is satisfied there is good reason, consistent with the objects prescribed in s 6 of the Act, to permit registration.

21 Both the Police Union and the CSA presented witness evidence in the form of written statements of evidence. Some witnesses were not required for cross-examination. Those who were not required for cross-examination their statements were tendered into evidence without objection. The most contentious evidence was given by two police auxiliary officers who gave their evidence both in written statements and orally.

2.0 EVIDENCE GIVEN BY WITNESSES ON BEHALF OF THE POLICE UNION

2.1 Mr Peeyush Allan Srivastava

22 The first police auxiliary officer to give evidence was Peeyush Allan Srivastava. Prior to being engaged as a police auxiliary officer Mr Srivastava was employed as a custody officer. He commenced work as a custody officer on 5 January 2009, graduated on 6 March 2009, and was posted to the East Perth Watch House on 8 March 2009. On 13 October 2010, he returned to the police academy to undertake a course for transition to a police auxiliary officer. He graduated as a police auxiliary officer on 28 October 2010. After he graduated, he was assigned to the Property Receival Exhibit Storage Section (PRESS). The key duties of his position as a police auxiliary officer - property management are set out in a position description form which is annexed to Mr Srivastava's witness statement. Importantly, the position description form provides the following relevant matters:

(a) The position reports to the supervisor of PRESS who is a level 5 (public service officer) and the officer in charge (exhibit management) whose rank is that of a senior sergeant.

(b) The role of the work unit is as follows:

> The Property Management Division has corporate responsibility for providing operational, technical and general support across the agency to ensure the accountable, secure and appropriate storage and handling of all property and exhibits (evidence) holdings, state-wide. The Property Management Division includes the Property Receival & Exhibit Storage Section (PRESS) and the Exhibit Management Unit (EMU).

(c) Under the heading 'Decision Making Role' it is stated:

> The incumbent of this position will be granted specific police powers to carry out the functions of the position.
>
> The parameters within which the position operates are established by the position's supervisor, however, within the given framework the position holder exercises independence in organising and managing assigned tasks and in referring enquiries to the appropriate staff member for action.
>
> In relation to duties associated with clandestine laboratories, it is imperative the position incumbent follows the directions of the chemist and supervisor to avoid injury to themselves and the operation.

(d) Among other duties, under the heading 'Property Management' the duties of a police auxiliary officer (PRESS) are:

> 1.1 Assists in providing an efficient and effective property management service to WAPOL business units.
>
> 1.2 Transports property, drugs and firearms from Police Facilities within metropolitan area to the Property Management Division.
>
> 1.3 Ensures property, drugs and firearms are received, recorded, stored, maintained and released under the provisions of relevant legislation, at WAPOL warehouses and police stations.
>
> 1.4 Regularly liaises with and ensures supervisor(s) is kept fully informed of all matters.
>
> 1.5 Reviews on-hand property and exhibits and considers appropriate methods to reduce holdings.

1.6 Assists in the development of internal best practice regarding activities associated with the receipt, storage and disposal of property and exhibits.

1.7 Provides information and advice to customers both within and external to the agency on property procedures and processes in accordance with relevant legislation and WAPOL policies and procedures.

1.8 Ensures that all administrative practices are consistent with the provisions of the Occupational Health and Safety Act, the Commissioner's manuals and legislative requirements.

1.9 Supports WAPOL business units by ensuring their unclaimed or seized property and exhibits are received, recorded, stored and maintained under the provisions of relevant legislation.

1.10 Ensures the integrity and security of property and exhibits and maintenance of accurate records on the Incident Management System (IMS) computer databases.

1.11 Provides evidence in Court or other forums relevant to the receipt, custody, movement or disposal of exhibits.

(e) Under the heading 'Property Management (Crime Support)' the duties are as follows:

2.1 Ensures relevant equipment is operationally ready.

2.2 Under the direction of a Chemist and senior police officer, assists with processing and the management of exhibits obtained from clandestine laboratories.

2.3 Assists with the storage and transportation of exhibits that are made safe to disposal facilities.

2.4 Assists with inputting information and data onto the National Clandestine Laboratory Database.

2.5 Maintains contemporary knowledge in dangerous goods and exhibit handling.

23 On 28 November 2010, Mr Srivastava was assigned for six weeks to the Organised Crime Squad. At the Organised Crime Squad, he worked with police officers attending clandestine drug laboratories to participate in gathering exhibits and the disposal of chemicals used in the manufacture of drugs. Exhibits collected are logged into the computer system which was called Incident Management System (IMS).

24 When giving oral evidence, Mr Srivastava explained that part of his job was to dispose of chemicals with sworn police officers and chemists. For example, if a clandestine lab is making methamphetamines substances are quite volatile, so they need to wear breathing apparatus, obtain exhibits from the house and make sure the chemicals are separate with the help of the chemist in which the police officer's name and all the property are recorded. When inputting information into IMS he worked alongside a police officer. He also did so when property was destroyed or if there were drugs to be transferred to the drug unit.

25 After Mr Srivastava worked in the Organised Crime Squad, he moved to the Exhibit Management Unit (EMU). At EMU he was involved in collecting and logging into the relevant computer system information relevant to drugs, firearms, DNA and fingerprints. He was also involved in passing of relevant information to either the Chemistry Centre or the Fingerprints Section by following established protocols. At this unit, his officer in charge was a senior sergeant and the second officer in charge was a sergeant. Again he worked alongside sworn police officers when dealing with DNA from crime scenes and buccal swabs.

26 When Mr Srivastava was engaged as a custody officer he joined the CSA. At the time of the hearing of this application he remained a member of the CSA. As a custody officer he was employed as a public service officer under the PSM Act and the CSA were the only union that covered the custody officers. Mr Srivastava informed the Full Bench that he does not intend to remain a CSA member and he wishes to join the Police Union for a variety of reasons. Mr Srivastava points out he is now employed under the same legislation as sworn police officers; he works alongside sworn police officers and the same policies, disciplinary measures and operational procedures that apply to sworn police officers also apply to him as a police auxiliary officer. He wants to access to the same level of assistance as sworn police officers have through membership of the Police Union (in particular legal representation) as he faces the same risk of exposure to disciplinary issues as sworn police officers because he works alongside them. Mr Srivastava also testified that he does not consider the CSA can provide him with anywhere near the same level of assistance as the Police Union because the CSA has coverage of a wide range of employees and he would prefer to be represented by a union whose experience is with the specific issues that face people working in a policing environment.

27 As a result of discussions over some months with his fellow police auxiliary officers, Mr Srivastava undertook a survey of police auxiliary officers by way of a petition. He spoke to approximately 70 per cent of police auxiliary officers who are currently employed by the Police Commissioner. He then arranged for a petition to be circulated among police auxiliary officers. Attached to Mr Srivastava's witness statement is a copy of a petition in which each police auxiliary officers who has signed the petition has stated that they wish to be covered by the Police Union. The petition was signed by 46 police auxiliary officers on various dates in March 2011. The petition contains the name, signature, address, date of signing and comments by some police auxiliary officers. The police auxiliary officers who signed the petition work at a variety of places which include the Perth Watch House, EMU, PRESS and some regional police stations.

28 When cross-examined, Mr Srivastava conceded that public service officers who work in the department of the Western Australia Police also work alongside police officers. When asked about the services the CSA have to offer Mr Srivastava was unable to say what services the CSA offer.

2.2 Ms Taryna Michelle Clark

29 Taryna Michelle Clark is also a police auxiliary officer. She too gave evidence on behalf of the Police Union. Ms Clark began her training as a police auxiliary officer on 26 April 2010. She graduated on 16 July 2010 and was posted to the East Perth Watch House on 17 July 2010, where she still works.

30 Ms Clark also attached a copy of her position description form to her witness statement. The position description form is for a police auxiliary officer – custody/support. Like the position description form produced by Mr Srivastava it stated that the position incumbent is required to be able to wear the supplied appropriate clothing during rostered working hours only. Both Ms Clark and Mr Srivastava presented to the Commission in their police auxiliary officer uniform. The uniform is very similar to the uniform worn by a sworn police officer. The only apparent difference to an untrained eye is that the badge on the uniform states 'auxiliary' and the shoulder tabs are a different colour to the tabs on the uniform of a police officer.

31 The position description form attached to Ms Clark's witness statement relevantly contains the following:

(a) The position of police auxiliary officer custody/support reports to a sergeant and senior sergeant position.

(b) Under the heading of accountabilities/duties custody services it is stated:

1.1 Performs functions relevant to the administration, supervision, management and monitoring of persons in custody. These functions are separated into three areas of the Custody process:

- Admissions
- Custody
- Release

1.2 Processes all necessary documentation in relation to the release of detainees, including court briefs and bail.

1.3 Escorts offenders in custody (including mental health, juvenile and general escorts) throughout the metro and regional locations.

1.4 Performs Evidential Breath Analysis (EBA) on detainees as required.

(c) Under the heading judicial services the following duties are stated:

2.1 Ensures unclaimed or seized property and exhibits, including drugs and firearms, are received, recorded, stored and maintained under the provisions of relevant legislation.

2.2 Reviews on-hand property/exhibits lists and considers appropriate methods to reduce holdings.

2.3 Acts as the point of contact for the supervision, quality control and continuity of firearms management matters, as required.

2.4 Witnesses the signing of statutory declarations by members of the public.

2.5 On police premises, processes summons and restraining orders.

(d) Under the heading station support the following duties are stated:

3.1 Operates children's crossing in accordance with established operational procedures to ensure the safety of children and motorists using the crossing, as required.

3.2 Under appropriate supervision and protection, undertakes security duties ensuring police premises are safe guarded in the event of a critical incident and guarding hospital prisoners.

3.3 Under the direction of the incident manager, undertakes major event/incident support in a command post by performing a communications, record-keeping or logistics role.

3.4 In peak periods at their assigned station, attending to members of the public at the front counter in support of Customer Service Officers or Police Officers.

3.5 Undertakes special projects, as required.

32 Ms Clark in her written statement of evidence said that she wishes to join the Police Union for a variety of reasons. She works with sworn police officers and the same policies and disciplinary procedures that apply to sworn police officers also apply to her as a police auxiliary officer. Because she is subject to the same disciplinary process as sworn police officers she considers she needs access to the same level of legal assistance as sworn police officers have through their membership of the Police Union. She also said in her witness statement she does not consider the CSA can provide her with legal assistance anywhere near the same level as the Police Union as the Police Union have dedicated in-house lawyers who have extensive experience dealing with police disciplinary matters.

33 Ms Clark, as a police auxiliary officer, has the powers of a sworn police officer. However she recognises that a police officer can exercise their powers when off duty which she cannot. However, she says she is subject to the same working conditions as sworn police officers and takes on similar work to sworn police officers. As such, she says it seems logical that, should an industrial issue arise, police auxiliary officers should receive the same assistance that Police Union members are afforded by the Police Union. She does not wish to join the CSA, as she believes there are a lot more options and services available to her if she is a member of the Police Union.

34 Ms Clark said in her witness statement that she found the approach of the CSA to be overly aggressive. She also said in her witness statement that from discussions at work she was aware that many police auxiliary officers shared the same opinion about the conduct of the CSA. When she gave oral evidence she elaborated in some detail about the discussions that she had

had with other police auxiliary officers. However I intend to only have regard to this evidence where it has been corroborated by other evidence.

35 On 22 February 2011, Ms Clark had attended a meeting held by Mr Sadlier, as a representative of the Police Union, at the Perth Watch House. This meeting was requested by the police auxiliary officers who were asking to be updated on when they would be able to join the Police Union. At the end of the meeting she approached Mr Sadlier and told him that she wanted to join the Police Union. She also told him that many other police auxiliary officers felt the same way and he asked her to ask the police auxiliary officers to write down if they had joined the CSA, when they had joined, what they knew about the Police Union wanting to give them cover and if they wanted to be covered by the Police Union and to forward those emails to him. She told him that she would do that.

36 On 23 February 2011, she sent an email to the police auxiliary officers at the East Perth Watch House and then later to the remaining police auxiliary officers at outstations. In her email she said as follows:

> I have spoken with Kim Sadlier from the Police Union. He informed a group of us yesterday that due to the CSA (the other union) trying to get Police Auxiliary Officers to join them instead of Police Union, they have launched court action which has held us up!
>
> The court case is scheduled for April this year.
>
> Could you please email me and tell me if you have become a member of the CSA and if so, how did they recruit you?? Was it by phone, face to face, etc.
>
> It is an individual preference as to who you join. Relevant facts to look at are:
>
> CSA have taken this to court on the strength that they believe Police Auxiliary Officers have the same duties as Custody Officers. Whilst we do perform the same duties at the Perth Watch House, we have a wider range of roles to perform at Police Stations with these roles possibly increasing in future. We need to have a union who understands this. This is in no way discriminatory towards the wonderful Custody Officers that work at PWH! Just looking at fact.
>
> CSA do not cover Sworn Police or Aboriginal Liaison Officers.
>
> Police Union DO cover Sworn Police and Aboriginal Liaison Officers. This is due to being employed under the Police Act. We as Police Auxiliary Officers are also employed under the Police Act. It should therefore follow (in my opinion) that we too should be covered by the Police Union to better protect ourselves.
>
> In my opinion, there are a lot more options, services and help available to us under the Police Union.
>
> I have included below an email I received from Kim Sadlier from Police Union with his phone number for your reference.
>
> In the mean time, if you could email me and let me know if you have joined CSA already and if so, is it only an interim solution. No discrimination as it is personal preference.
>
> Also, would you be happy to sign a sheet saying you want to join the Police Union so that it can strengthen our chances in court?

37 Attached to that email was an email from Mr Sadlier requesting the information about how many police auxiliary officers are currently members of the CSA and how they were recruited among other matters.

38 In response to her email, Ms Clark received 29 emails from police auxiliary officers. Each email from the police auxiliary officers indicated that they wished to join the Police Union. Some indicated that had not joined a union at all and were waiting the outcome of the decision in this matter. Others indicated that they had joined the CSA as an interim measure until they were able to join the Police Union.

39 When cross-examined Ms Clark conceded that she worked alongside public service officers but she did not know the disciplinary regimes that the members of the CSA worked under. Nor did she know what financial services, insurance services and industrial services the CSA offers its members. She also was not able to say how many industrial staff the CSA employs or how many of its industrial staff are legally qualified or what was the quantum of the last pay rise or improved conditions that the CSA won for its members. She also said that the only time she has had face-to-face contact with a staff member of the CSA was on one occasion when she was at the police academy. When questioned why she said in her witness statement she found the approach of the CSA to be overly aggressive, she said that she received one email that she had found personally offensive but she was unable to say that she personally found that the approach of the CSA to be overly aggressive and she was simply repeating discussions she had with other police auxiliary officers. Ms Clark also said when cross-examined that she had not said any negative things about the CSA to police auxiliary officers but she had said that as an interim measure it would be sensible for police auxiliary officers to be covered by a union as opposed to no union.

2.3 Mr Peter John Kelly

40 Peter John Kelly is a senior industrial officer for the Police Union. He has held that position since 1 November 2000. Mr Kelly has been an industrial relations practitioner since 1 February 1979. Prior to being employed by the Police Union, Mr Kelly held a number of senior industrial officer positions in the Western Australian government including the central agency of the Office of Industrial Relations. He has had regular involvement in negotiations with a number of unions including the Police Union, the CSA and the Liquor, Hospitality and Miscellaneous Workers Union. Mr Kelly says that the Police Union has a long history of providing comprehensive and strong industrial and legal representation of its members' interests. He personally has been involved in negotiations for a number of industrial agreements with the Commissioner of Police and government.

41 In Mr Kelly's first witness statement made on 15 December 2010 Mr Kelly recited the history of the Police Union and the industrial regulation of its members as follows:

(a) The Police Union was formed in 1912.

(b) The first agreement registered under the *Industrial Arbitration Act 1912* (WA) was registered in the Court of Arbitration on 23 July 1926 and the first award made from 2 November 1927.

(c) The employment conditions of police officers and Aboriginal police liaison officers were until 1992 covered by *The Police Award 1965* and *The Aboriginal Police Aides Award* respectively. These awards have been replaced by industrial agreements but are still in force.

(d) The Police Union is the sole respondent to all police awards and police industrial agreements.

(e) In 1992, due to a question raised as to whether police officers were employees, employment conditions were set by an exchange of letters endorsed by the Commission and known as the *Police Services Award*. Some conditions were later incorporated into the awards in a piecemeal fashion.

(f) Effective from 15 January 1995, employment conditions were set by a combination of workplace agreements, the *Police Services Award* and by industrial agreements which replaced the award and workplace agreements.

(g) The employment conditions for police officers and Aboriginal police liaison officers (formerly police aides) are currently provided for under the *Western Australian Police Industrial Agreement 2009*.

(h) Between 1936 and 1996 cadets were appointed pursuant to s 7(2) of the Police Act.

(i) The conditions of employment of cadets were contained in the *Police Cadets' Award*. The Police Union was the sole respondent to the award and that award was revoked when it was decided not to appoint cadets under the Police Act. The current group known as 'cadets' are in traineeships and are appointed under the PSM Act.

(j) A recruit in training, or recruit, is colloquial nomenclature for a sworn constable undergoing initial academy based training at the academy. *The Police Award 1965* and all subsequent industrial agreements contain salary rates for the classification of recruit in training.

42 Mr Kelly also gave evidence about divesting of modern police functions and the interchange ability of particular roles of members of the Police Force and public service officers appointed under the PSM Act.

43 Mr Kelly testified that police officers are employed to undertake a wide range of functions. Some, or all the duties and responsibilities, require police specific powers, training, knowledge and/or experience. In particular, police officers have traditionally been utilised in many diverse categories of employment which although not specific to the usually recognised role of general duties, criminal investigations and traffic control and enforcement, still require either police powers, police training, police knowledge and/or police experience. He says these diverse roles include but are not limited to:

(a) training other officers;

(b) prosecuting and legal service;

(c) forensics and fingerprinting investigations;

(d) call taking at operation centres;

(e) watch house duties;

(f) State security;

(g) water police including diving;

(h) airwing operations;

(i) bomb disposal;

(j) corruption prevention and investigation;

(k) covert operations;

(l) dog handling;

(m) mounted police operations;

(n) coronial investigations; and

(o) areas of administrative support.

44 Mr Kelly said in his first witness statement the Police Union represents the industrial interests of all members equally. He also said that the industrial representation of different groups doing essentially the same fundamental functions and subject to the same disciplinary processes under the Police Act would best be delivered by one union in the same workplace. In his experience having different unions in the same workplace covering functions which largely overlap different work groups often leads to demarcation issues and inefficiency. Therefore, greater efficiency can be delivered from a single union representation arrangement. When giving evidence Mr Kelly qualified this statement and said that when he was employed by the Western Australian government he had experience of harmful demarcation disputes, however, these disputes were between industry and craft unions but he had never seen any issues arise between the Police Union and the CSA as a result of actual or arguable overlap in coverage.

45 As to police auxiliary officers, Mr Kelly testified that the roles and functions carried out by police auxiliary officers are those which have been traditionally undertaken by members of the Police Force and will continue, on occasions, to be done by members of the Police Force.

46 In Mr Kelly's second witness statement made on 25 March 2011, Mr Kelly set out a history of negotiations which occurred between the Police Union and the government in relation to the creation of limited function police officers. This history was as follows:

(a) From May 1988 until October 2000, Mr Kelly was employed as an industrial relations consultant with the Police department. Whilst carrying out that position, he was involved in negotiations with the Police Union for structural efficiency pay increases and developing productivity initiatives as part of a special case submission in the Commission.

(b) As part of the matter before the Commission, a number of productivity initiatives were developed and ratified by government and sent to the Police Union. Part of those productivity initiatives was the creation of limited function personnel and divesting non-police functions.

(c) During those negotiations the Police department and the Police Union agreed that to develop these initiatives would require legislative change.

47 Whilst the creation of limited function personnel and divesting of non-police functions from sworn police was proposed as a productivity initiative in 1991, these initiatives were not introduced immediately but have been introduced over a number of years in a sequence of Police Award amendments and workplace and enterprise bargaining agreements. Until 2010, no legislative change had been made to enable the engagement of limited function police officers. However, between 1991 and 2010, the divesting initiative has been implemented with many roles being amended and adjusted with departmental restructuring to a degree where some roles can be interchangeably undertaken by sworn or unsworn officers with a minor variation to duties and responsibilities in the position descriptions.

48 Some examples of positions which are interchangeable are:

(a) Administrative positions in police senior management.

(b) Administrative, lecturing and supervisory positions at the police academy ranging from assistant commissioner/level 9 director down to sergeant level.

(c) Positions at media and public affairs.

(d) Positions at the Western Australian police airwing.

(e) A number of positions in the traffic policy unit.

(f) Ministerial liaison roles.

49 Other positions traditionally undertaken by sworn police officers have been civilianised on a permanent basis. Some examples of this are:

(a) The superintendent staff officer. This position included responsibility for the health and welfare of police officers. These duties are now undertaken by a civilian director and/or assistant director with some of the staff in the interchangeable group.

(b) The inspector employee relations branch and staff at sergeant level have also been absorbed into the civilian led and principally civilian staff workplace relations branch.

(c) Radio call takers at police operations centre.

(d) A number of positions in the Strategic Intelligence Unit.

(e) Police pipe band.

(f) PCYC State office.

(g) custody officers at Perth Watch House.

(h) A number of positions in the FOI release centre.

(i) parole board liaison officer.

(j) A number of positions in the forensics area.

(k) A number of positions in the Emergency Management and Counter Terrorism Division.

(l) A number of positions in the Indigenous and Community Diversity Unit.

50 When asked about how the positions for certain police officers are interchangeable with public service officers, Mr Kelly explained using an example of an assistant commissioner position. He said that the salaries of an assistant commissioner and a level 9 public service officer are about the same, so from time to time a level 9 public service officer will carry out the role of an assistant commissioner. However, they use a different job description form (JDF) which is classified by using the Cullen Egan and Dell classification system. He then went on to explain that at the present time the senior executive group of the department is composed of the executive director who is currently a public service officer, a deputy commissioner and the Commissioner of Police. In the past the executive director's position has been held by an assistant commissioner. Whether the position of executive director is held by a public service officer or an assistant commissioner depends upon who the Commissioner of Police thinks is the most appropriate person to carry out the skills of that role at the time. Inspectors and level 8 and level 7 public service officers regularly swap jobs in senior administration positions. Examples of those are the Assistant to the Commissioner, the Assistant to the Executive Director and the Assistant to the Deputy Commissioner and all of the Assistant Commissioners. Another example is the person in charge of the academy. Currently the position is substantially held by an assistant commissioner but he is currently on leave and a level 9 public service officer is carrying out the duties of his position.

51 Mr Kelly went on to explain that a lot of the interchangeable positions are specialist positions such as positions in the media and public affairs. From time to time it has been necessary to engage journalists. The police airwing is presently staffed by a combination of police and civilian pilots. In the air wing, some observers are police officers but they also engage civilians as observers to spot activity such as drug crops. In the traffic policy unit traditionally work was undertaken by police officers. However, in recent years positions in the traffic policy unit have been comprised of a combination of police officers and expertise from the civilian area who are appointed under the PSM Act. This unit has similar dual position descriptions for public service officers and police officers.

52 About 15 years ago human resources was composed of a staff officer who was a superintendent and an employee relations officer who was an inspector and they had a separate human resources branch which looked after public service officers. In the late 1990s they combined all of the positions under the Director of Human Resources whose position was held by a public service officer and over time they basically civilianised the whole area. In the police operations centre, the call takers used to be all police officers. They staff the telephone line 000 and another line that members of the public can ring for non-emergency calls. The work is allocated through an inspector in charge of the section. The police operation centre now has been split into two groups whereby the police officers take 000 calls and the non-urgent phone line number is manned by public service officers.

53 Fifteen or 20 years ago, the police pipe band was always 90% filled by police officers. Now they are all civilians except for the band master, who is a police officer. However, his position could be filled by a public service officer as they have created two different position descriptions for that position. The PCYC State office always had a police officer in charge until about 15 years ago with senior constable positions throughout the State at different districts. Now the PCYC is completely run by civilians who are public service officers.

54 Custody officer positions were created at the Perth Watch House as public service officer positions as there was no provision in the Police Act for second tier police officers. Custody officers were appointed on the understanding that the Police Act was to be amended and the custody officers would be offered positions as police auxiliary officers. The majority of the positions dealing with custody are now held by police auxiliary officers at the Perth Watch House and it is intended that no more custody officer positions will be filled.

55 About 10 to 15 years ago an inspector was in charge of the Freedom of Information Release Centre (FOI Release Centre) and two-thirds of the officers who worked in the centre were police officers. The police officers dealt with the freedom of information legislation and made recommendations to the Commissioner of Police about the release of documents and the civilian officers just carried out support work. Subsequently, public service positions have been created and there are now only two positions held by police officers in the FOI release Centre.

56 Traditionally all of the officers working in the forensic area were police officers. Recently people with special forensic skills have been recruited who are public service officers. Police officers still train for the positions but all those who work in the area give evidence in the court as expert witnesses after they have reached a certain level of accreditation.

57 In the Emergency Management and Counter Terrorism Division a number of public service officer positions have been appointed.

58 The Indigenous and Community Diversity Unit did have an inspector in charge and was called the Aboriginal Police Liaison Officers Branch. Now the unit is managed by the Indigenous and Community Diversity Unit and all of the positions in the unit are public service positions.

59 Limited function police were introduced in Western Australia and that followed a movement across the world. They were first introduced in England and have also been introduced in other States of Australia.

60 Mr Kelly conceded that whilst the work of public service officers and police officers roles may be interchangeable, that a police officer will always have a different and greater role. In particular, he said they have more power and they generally have different skill sets because their police training equips them to do all sorts of things, but there are certain skills that civilians have that the police officers do not have and that is why from time to time police auxiliary officers can be appointed to those positions or public service officers to those positions that have traditionally been filled by police officers.

2.4 Mr Kim Youle Sadlier

61 Kim Youle Sadlier is a sergeant in the Western Australian Police Force. He has been a police officer since 7 January 1980. He holds the position of emergency management coordinator. He has held that position since October 2005. He is a director on the board of the Police Union and has held that position since June 2006. He is also the current chairman of the Police Union's industrial committee.

62 Sergeant Sadlier in his witness statement said that the introduction of police auxiliary officers has created concern amongst some police officers, particularly 'non-operational' police officers. Non-operational police officers are those who can no longer perform frontline or operational duties due to illness or injury, either temporarily or permanently. They are deployed to undertake tasks that do not require frontline or operational status, but still require a level of 'police power' or 'experience'.

63 When cross-examined, Sergeant Sadlier said the only issue which has arisen from time to time is the concern by some sworn police officers who have had some long-term injury or because of their age they are unsuitable for frontline duties and it is a concern that some of the positions which would usually be reserved for them would be taken by police auxiliary officers. He said, however, that members of the Police Union have voted unanimously to have police auxiliary officers bought into the membership of the Police Union because they are going to be doing tasks that sworn police officers normally do and they wanted them to be protected by the same protections and looked after in exactly the same way as sworn officers because they are doing the same sort of tasks as sworn police officers.

64 Sergeant Sadlier expressed the view that:

(a) the introduction of police auxiliary officers into positions traditionally held by non-operational police officers is likely to spread from the current areas in which they have been introduced into areas such as forensic services, prosecuting and the police academy; and

(b) such expansion may cause further unease between non-operational police officers and police auxiliary officers. He also stated that if police auxiliary officers are members of an alternative union then the ability to resolve issues of work allocation and task erosion will be made more complicated and it is in the interests of working together to achieve a teamwork approach to policing activities that the Police Union should have industrial coverage of other persons performing policing type functions.

65 When Sergeant Sadlier gave oral evidence he described the process of civilianisation of the Police department that has occurred since 1980. He said that great changes had occurred. When he first joined the Police Force in 1980, at police stations police officers did everything from counter duties through to lockup and basic cleaning. Police officers would also act as pay officers. They collected the funds from the bank, counted out the money and paid all the staff. Also all staff officers were police officers and transfer and deployment positions were held by police officers through the rankings with an inspector or a superintendent in charge. Those positions have been replaced by public service directors' positions. Since about 1992, the Commissioner of Police has changed a lot of positions into public service officers' positions to allow police to go on to the frontline and put more police on the street. Interchangeable positions are created by not changing the position per se but by changing the person who holds that position from time to time from a sworn officer to an unsworn officer. From time to time that trend in a particular position has been reversed. The process of interchangability has never been challenged by the Police Union.

66 Sergeant Sadlier also said in his witness statement made on 25 March 2011, that as the appointment of custody officers was only intended to be a short term solution, the Police Union conceded coverage to the CSA of these officers so as these employees had their industrial interests protected. However, the Police Union immediately sought to amend its rules after the introduction of police auxiliary officers through amendments to the Police Act to allow it to have constitutional coverage of police auxiliary officers.

3.0 EVIDENCE GIVEN BY WITNESSES ON BEHALF OF THE CSA

3.1 Ms Toni Beverley Walkington

67 Toni Beverley Walkington gave evidence in a witness statement and orally. She is the general secretary of the CSA and has been employed by the CSA in various capacities since 18 February 1991. She is also the branch secretary of the Community and Public Sector Union, WA Branch (CPSU) and on the Federal executive. She has been a member of the CSA since 16 July 1986, initially as a public service officer and later as a CSA employee or elected official.

68 It is apparent from the written statement of Ms Walkington and her oral evidence that Ms Walkington has not had in recent times direct involvement with the negotiation of agency specific agreements or other arrangements that cover police officers. This is a task which has been allocated to other senior officers of the CSA. However, it is apparent from her evidence that she has been briefed on material aspects of negotiation of agreements and the CSA's efforts to recruit members to the CSA which are as follows:

(a) The Commissioner of Police has entered into an agency specific agreement with the CSA (*Western Australia Police Agency Specific Agreement 2009*) (the 2009 ASA). The 2009 ASA sets out specific conditions for a number of public service officers including unsworn officers engaged as camera operators, call takers and radio operators in the Police Operations Centre. Ms Walkington estimated that the 2009 ASA applies to 1,851 employees of the department of the Western Australia Police. Attached to her witness statement is a copy of the 2009 ASA. The express terms of cl 3.1 of the 2009 ASA provide that the ASA only applies to persons appointed as public service officers under the provisions of Part 3 of the PSM Act and employed by the Commissioner of Police as the Chief Executive Officer of the department.

(b) The CSA is currently attempting to negotiate terms and conditions of employment for school traffic wardens employed in the department under s 100 of the PSM Act. If a warden is absent, a police officer has to be deployed to cover this work.

(c) The CSA has also attempted to negotiate terms and conditions of employment for police auxiliary officers. The CSA has made an application for an award to cover them. When giving evidence she said it is intended that the award covers about 150 police auxiliary officers who are currently employed by the Commissioner of Police. She also said that she had been informed that the records of the CSA indicate that at the time of giving her evidence there were currently 40 police auxiliary officers who are members of the CSA.

69 When giving oral evidence Ms Walkington spoke of what problems she could see if there is an overlap in union coverage between the CSA and the Police Union. In particular, when asked if this application was successful and WAPU or West Australian Police Union and the CSA have overlap in coverage, what problems could eventuate, she said:

> Oh, look, the … there's quite considerable and significant problems arising for us as for any Union, I think, if there's overlap in coverage. We have quite different processes. All unions tend to have a way of operating; a distinct and different way of operating to each other, so in terms of how we manage matters, having an alternate union offering representation could mean that we end up with different conditions for the same sort or set of workers; different wage outcomes. We have different processes and timing for wages and different … and conditions implementations. It can end up with employees in disputation with each other; unions acting in a way that is raising expectations of various groups of employees in a means to be able to exploit the differences and try to invite other workers into their Union membership.

> So on the whole, I don't think it's a constructive process to have overlap in coverage and I think it leads to a deterioration of workplace relations and can present in problems in that for the employer.

70 Ms Walkington then went on to explain that the CSA was currently in negotiations with government with a view to replacing the 2008 General Agreement which covers the entire public sector. When asked what problems could eventuate if the Police Union and CSA have an overlap in coverage in relation to this agreement she said:

> At the … we are attempting to negotiate an agreement for a very large number of workers and in doing that we have processes that we consult with our members in developing the claim. We have structure for decision-making that involves delegates and our committee of management. That's extensive and comprehensive. If we were to have the involvement of another organisation as a Union party to that agreement that has quite different processes and different decision-making forums and comes to different conclusions, that could place in jeopardy, I think somewhat, a significant risk to having … securing outcomes in that bargaining process.

71 When asked in cross-examination what she saw to be the scope of the CSA's coverage, Ms Walkington said that although the CSA regards the public service to be the area in which it should have exclusive coverage, what is regarded as the 'public service' in 2011 is vastly different to the content of that sector in 1985 when its eligibility rule was expanded.

72 In re-examination Ms Walkington went on to explain that in 2011 the CSA covers a wide range of employees from public servants, government officers and other persons who are neither government officers nor public servants such as those who had been working in functions that were once part of the public service like private prisons and others that have been contracted out through to areas such as the Water Corporation. The CSA is a public sector union. The rigid or narrow definition of public service no longer really applies in State government and the CSA scope of coverage is much wider than in 1985 (ts 115).

73 Ms Walkington also testified that the CSA had been trying to engage with the police auxiliary officers to obtain an award to cover their terms and conditions of employment. However, that had been made difficult by the application by the Police Union and that people were waiting for the outcome of this particular matter to progress that application. She also said that she was concerned about why the police auxiliary officers say they prefer to belong to the Police Union as she did not know the basis of that preference or what expectations or promises that had been made that resulted in those views of those police auxiliary officers (ts 112).

74 Ms Walkington was unable to point to any examples of industrial disharmony that have arisen as a result of the interchangeability of roles of sworn police officers and public service officers in the Police Service. She did, however, say that she was more concerned about the risk of industrial disharmony where there is overlapping coverage. She said that history had shown with dental technicians and fisheries officers in Western Australia that whilst there had been demarcation disputes and overlapping coverage that the employees concerned did not obtain a pay increase for four years. Also a competitive union dispute between the CSA/CPSU and the NTU had resulted in a lack of growth because workers did not wish to join either union because they did not wish to belong to organisations that were fighting.

3.2 Mr Gavin Gerard Richards

75 Gavin Gerard Richards is a public service officer employed in the department of the Western Australia Police in the Management Audit Unit as a principal auditor. He has been a member of the CSA since 28 November 1991 and he is a member of the CSA's council and its executive. He is a member of the elected delegates committee for the Western Australia Police. He is also a member of the Federal executive of the CPSU and he represents the CSA's interests on the international committee of UnionsWA. He, along with two other delegates, participated in negotiation of the 2009 ASA for public service officers employed within the Western Australia Police.

76 Mr Richards gave his evidence in writing in a witness statement and also orally. He has been employed by the department since 25 November 1991. He has been aware that the civilianisation of the Western Australia Police has been increasing since 1994. From 27 July 1995 to 19 September 1996, he was employed as an employee relations officer in the Civilianisation/Deployment Unit. During this time, civilianisation occurred on an 'ad hoc' basis as part of a drive to civilianise 300 jobs performed by police officers and to return these officers to sworn duties. In his view, at that time there was a failure to adopt and adhere to a rationale for civilianisation of police positions.

77 In March 1996, Mr Richards assisted in the formation of the professional standards portfolio, to ensure the integrity of the Western Australia Police by establishing ethical standards, programs of anti-corruption, internal investigations and ethical development. He stayed with the portfolio until 1998. During that period he worked with Assistant Commissioner Jack McKay. During that period the office of the Commander of the Inspectorate was abolished and a significant part of its functions were assumed by the Management Audit Unit, headed by a civilian assistant director. One of his roles in this position was to oversee all departmental policy in relation to the portfolio's mission, which meant he was aware of strategic management directions in relation to the further civilianisation of functions performed by police. Since that time he became the principal auditor with the Management Audit Unit.

78 Much of the cross-examination of Mr Richards was taken up by a debate about Mr Richards' views of the rationale that has been applied in the department for the civilianisation of police positions. Importantly, he says the critical determinant on whether a position should be civilianised is premised on whether the function requires the exercise of a full range of powers of the office of constable at common law.

79 Part of Mr Richards' responsibility in the audit unit was to audit whether the recommendations made in the Kennedy Royal Commission in 2002 and 2003 report had been implemented by the Police department.

80 When giving evidence Mr Richards quoted from page 123 of the Kennedy Royal Commission Report in which it was stated:

> During the most recent initiative to introduce more civilians into WAPS, it was reported that considerable resistance was encountered from sections of the Union who took the position that any job that has a duty that requires knowledge of

> policing should be occupied by a sworn officer. That contention is illogical. The argument that any position, a function of which requires the occupant to exercise the power of constable, should be occupied by a sworn officer has more force. Knowledge of policing is not exclusive to police and at least for administrative managerial or specialist positions, it is not difficult to acquire an adequate knowledge of policing issues in a relatively short period of time. Furthermore, positions involving only minor use of policing powers should be re-engineered to remove such components to enable their undertaking by unsworn staff.

81 Mr Richards went on to explain that he regarded civilianisation to be obligatory so that the frontline entity of a costly trained police officer does not occupy positions that do not require the full exercise of police powers. To do otherwise was a waste of public resources.

82 Mr Richards said in his witness statement that civilianisation of functions currently performed by police will continue into the future as a consequence of social change, the influence of international best practice and cost effectiveness. He points out that the CSA is the sole respondent to the industrial instruments that apply to public service officers in the department of the Western Australia Police.

3.3 Mr Andrew James Robson

83 Andrew James Robson is employed by the department of the Western Australia Police as the manager of PRESS. He is a public service officer. PRESS receives and stores exhibits not requiring further analysis until the court processes relating to the cases that the exhibits are part of have been completed. Exhibits include vehicles, seized firearms, hydroponic equipment, jewellery, general furniture and any item that can be used as a weapon. Mr Robson supervises 10 staff, five of whom are police auxiliary officers. The remainder are public service officers. No sworn police officers work at PRESS. However, when a property management organisational chart was put to Mr Robson in cross-examination he agreed that PRESS is a sub-unit of the Property Management Division which has a number of sworn police officer positions, together with public service officers and police auxiliary officers. In the sub-unit of PRESS the public service officers and police auxiliary officers are part of the same team and perform similar tasks. They work well with each other and in a collegiate atmosphere. One of the duties of the public service officers is to train the police auxiliary officers and sign off on their training record as being competent to do the tasks. It is clear from the organisational chart (exhibit 15) that Mr Robson supervises the police auxiliary officers and public service officers who work in PRESS. Mr Robson agreed he reports to an assistant divisional officer inspector who in turn reports to a public service officer who is an assistant director at level 8.

84 Police auxiliary officers rotate through different sections of property management. Mr Robson said this was to meet their workplace training. They rotate through from PRESS to EMU and to the Watch House. In EMU the officer in charge is a senior sergeant and particular areas of EMU are only accessible by sworn police officers who are authorised persons under the *Misuse of Drugs Act 1981* (WA). Mr Robson agreed that there are both sworn officers and police auxiliary officers who have relevant policing powers for the handling of drugs and that there are other public service officers who work within EMU. Mr Robson said that some of the public service officers receive drugs from police officers under the supervision of other police officers for the purpose of receiving the drugs into EMU.

3.4 Ms Susan Jane Thomas

85 Susan Jane Thomas is employed by the CSA as the lead in UnionLink which involves managing the call centre for the CSA. She has held this position for approximately two and a half years. Between 9 March and 12 March 2011, she was asked to deal with three identically worded emails sent to Ms Walkington from three CSA members who all identified themselves in their emails as police auxiliary officers. As at 12 April 2011, there were 29 police auxiliary officers who are members of the CSA. The wording used in each three emails stated:

> I have previously advised representatives of your organisation that I do not wish to be a member of the Civil Service Association. I do not wish to receive any further correspondence from yourself or other representatives of the Civil Service Association. I have sent a copy of this email to the Police Union which is the union to which I wish to belong.

86 As all of the police auxiliary officers who had sent the emails were current financial members of the CSA and had not previously advised the CSA they did not wish to be a member, she formed the view the wording in the email was unclear as to their intentions regarding their association with the CSA. Consequently, on 18 March 2011, she sent an email to each of the three police auxiliary officers asking them to clarify whether or not their intention was to resign their membership with the CSA. As at 29 April 2011, when she made her written statement, Ms Thomas had not received a reply to her email from any of the three police auxiliary officers and the records of the CSA still indicated that they were current financial members of the CSA.

3.5 Other evidence

87 The CSA tendered in support of their case five witness statements made by public service officers who were not required by the Police Union to be produced as witnesses for cross-examination. These witness statements were made by Leslie Peter Garbellini who is employed by the Department of Fisheries as a fisheries and marine officer (investigator), Stephen Andrew Norton who is employed by the Department of Transport in the Prosecutions Unit as a prosecutions officer, Benjamin Wayne Smith who is also employed by the Department of Fisheries as a fisheries and marine officer (investigator) and John Leslie Wrightson who is employed in the infringement management and operations section of the department of the Western Australia Police as a camera operator.

88 Leslie Peter Garbellini has been employed by the Department of Fisheries since April 1988. As a fisheries and marine officer he has enforced the provisions of the *Fish Resources Management Act 1994* (WA) and other fisheries related legislation and has educated and advised the general public on their obligations under the legislation.

89 Benjamin Wayne Smith has been employed by the Department of Fisheries since 8 November 1999. His role as a fisheries and marine officer (investigator) is to undertake covert and/or overt intelligence-led investigations into illegal fisheries

activity. The Serious Offences Unit is tasked with conducting intelligence led investigations into persons and organisations involved in serious offences against the fisheries legislation and regulations. Officers, who are appointed to the Serious Offences Unit, are authorised officers as defined in the *Surveillance Devices Act 1998* (WA). On occasions he executes search warrants and deploys tracking, listening and optical surveillance devices to gather further intelligence against targets.

90 Stephen Andrew Norton is a member of the CSA and has been employed by the Department of Transport since 12 June 2008. He works as a prosecutor and it is his role to prepare prosecution notices, briefs and represent the Department of Transport in court, including the preparation of witness statements and preparing witnesses to give evidence.

91 John Leslie Wrightson is employed as a public service officer. He is a member of the CSA and has been employed by the department of the Western Australia Police since 13 May 1996. He is aware that the civilianisation of the Western Australia Police has been increasing since 1993. When he first started in his position as a camera operator, he was aware that there were police officers who operated the speed cameras as well as public service officers. Police officers were phased out of the role and replaced by public service officers. As a camera operator, his role is to operate photographic speed measuring equipment to detect road users who commit traffic offences. His position is a level 2 public service officer position. A job description form attached to his witness statement for a camera operator states that he is required to provide sworn statements that may be used as evidence in relation to speeding and other offences and/or incidents. He is also required to attend court as a witness to provide operational evidence.

3.6 Mr Warwick Douglas Claydon

92 Warwick Douglas Claydon is a senior industrial officer employed by the CSA. He has been employed by the CSA and been a member of the CSA since 22 March 2005. He has had approximately 30 years practical or academic experience in industrial relations in either New Zealand or Australia. He holds a Master of Laws with Honours. He has been a member and federal councillor of the National Tertiary Education Union, where he was employed as a senior lecturer, Faculty of Business at Edith Cowan University.

93 In Mr Claydon's witness statement made on 21 January 2011, Mr Claydon sets out in some detail the structure of the Western Australia Police as a government agency and positions which are currently available. He also looks at a snapshot in time of appointments of public service officers to the Western Australia Police prior to the enactment of the PSM Act. The period of time he examines is from 2004 until April 1979. In summary the history that he records in his witness statement and in oral evidence is as follows:

A Appointments under the PSM Act

94 Unsworn staff employed by the department of the Western Australia Police are generally appointed to positions within the department by the Commissioner of Police under s 64 of the PSM Act as public service officers, subject to the requirements of the *Public Service Award 1992* and the *Public Service General Agreement 2008* (General Agreement 2008). By virtue of their position or status or calling, public service officers are eligible to become members of the CSA.

95 The Commissioner of Police also appoints school traffic wardens and others as casual employees pursuant to s 100(2) of the PSM Act.

96 By operation of s 4(3) of the PSM Act, the Police Commissioner is deemed to be the Chief Executive Officer of the department of the Western Australia Police.

B Awards and agreements negotiated by the CSA

97 The Commissioner of Police is a respondent to both the *Public Service Award 1992* and the *General Agreement 2008*.

C The Western Australia Police organisational structure

98 Mr Claydon reviewed an organisational chart of Western Australia Police as at 29 March 2010. The chart indicates that there are public service officers employed in various capacities throughout the divisions of the organisation, commencing with the Commissioner's office, and extending beyond the divisions of directors – strategy and performance or media and public affairs, legal counsel, executive director and deputy and assistant commissioners. Mr Claydon also refers to the Western Australia Police Annual Report 2010 which sets out the organisational structure of the senior management of the department. The structure in that report contains the following six offices or divisions which have civilian or unsworn managers:

- Director – Media and Public Affairs
- Executive Director
- Director – Human Resources
- Director – Asset Management
- Director – Finance
- Chief Information Officer – Corporate Programs and Development.

The remaining offices and divisions are managed by sworn officers at the rank of deputy or assistant commissioner or commander.

99 The Annual Report also states that the Western Australia Police employs 5,733 police officers and 2,033 police staff as at 30 June 2010. The report identifies where police staff are located in areas managed by sworn officers:

- Specialist Crime
- Specialist enforcement operations
- Counter Terrorism and State Protection

- Judicial Services
- Professional Standards
- State Intelligence
- Strategy and Performance.

100 The report identifies areas under civilian management where police officers are employed, in addition to police staff:

- Media and Public Affairs
- Human Resources
- Corporate Programs and Development.

101 The report also identifies the number of police staff appointed to levels 1 to class 1 on the general salary scale of the *Public Service Award 1992* and the *General Agreement 2008* and those on the specified calling scale. Occupations specifically identified are:

- Solicitor
- Band officers
- Cadets
- Wages staff.

The wages staff include school traffic wardens, who are eligible to join the CSA.

D Current job advertisements for public service officer positions within Western Australia Police

102 Mr Claydon's witness statement contains a table of positions that were advertised by the Western Australia Police and covered by the *General Agreement 2008* and the 2009 ASA from October 2010 until December 2010. When regard is had to that table it can be seen that 44 categories of positions were advertised in that period of time. The positions widely vary from camera operator, administration assistants, to managers, senior intelligence analyst, FOI co-ordinator, engineer, trainer, manager communications planning. Some of these positions report to more senior public service positions. Others report to sworn officer positions such as inspectors.

E Appointments of public service officers to the Western Australia Police prior to the PSM Act

103 Mr Claydon's witness statement contains a table of positions that were advertised from 1941 until 1979. Most of the positions advertised were of a clerical and accountancy nature. However, there were some technical assistants and data processing operator positions advertised.

104 Mr Claydon says an historical analysis of the positions advertised in the Government Gazette and the current JDFs for positions advertised in 2010 show that the placement or title of jobs for civilian appointments within the Western Australia Police might have changed over time because of re-organisation or technological change, but in essence, the nature of the positions advertised were and are within the CSA's membership rule, which covers professional, administrative, computing and technical staff within the public sector at large.

F Appointments of police auxiliary officers under the Police Act

105 Mr Claydon said when giving evidence that the reason why the award application was made was that they were having custody officers wanting to become police auxiliary officers and had new officers appointed by the Police Commissioner becoming police auxiliary officers on common law contracts of employment, and the CSA was of the view that these officers needed an award safety net, so following discussions with police auxiliary officers who were members of the CSA, the CSA made an application for an award.

106 Mr Claydon subsequently became aware that there were police auxiliary officers who wished to join the Police Union as opposed to the CSA when he saw the petition signed by the police auxiliary officers after it was served on the CSA in late March 2011. His first concern was an opinion expressed in the petition about the attitude of an organiser so he did some research about that. The next concern he had was how the petition was organised. It then came to his attention that the general secretary had received several emails from police auxiliary officers in protest about the activities of the CSA. Of those who had signed the petition, 21 were members of the CSA. He did not think the opinions that they had expressed in the petition as being dissatisfaction with the CSA per se, but that they had a genuine wish for whatever reason to belong to the Police Union. Mr Claydon checked the membership records of the CSA on 25 March 2011 and ascertained that only two of the 21 police auxiliary officers who had signed the petition who were members of the CSA had resigned as members of the CSA.

107 He also said that the CSA acknowledged the right of police auxiliary officers to express a view but they would do their best to keep them until this matter is determined.

G The current role of police auxiliary officers

108 Mr Claydon analysed three JDFs which specify the work and location of police auxiliary officers. There are two types of police auxiliary officers which are located within the Judicial Services Directorate in either the Property Management Division or Custodial Services. In the Prosecuting Division, the role is work for the Prisoners Review Board and the Supervised Release Review Board. That title is Police Auxiliary Officer – Offender Review. In Custodial Services, the police auxiliary officer's role is limited to the Perth Watch House. There is also a generic JDF entitled Police Auxiliary Officer – Custody/Support presumably for future developments. There are also JDFs written for assistant supervisors and supervisors of police auxiliary officers. This type of work is already being performed by public service officers. All JDFs contain a statement that the role of the portfolio/section/unit is 'to provide effective and efficient delivery of the core functions to the

community, in line with the WAPOL's purpose and direction and strategic intentions therein and the relevant business plan requirements'.

4.0 POLICE UNION'S SUBMISSIONS

4.1 CSA Coverage

109 The Police Union strongly contests the assertion by the CSA that with the exception of police officers it has coverage of all persons sought to be covered by proposed r 5.1(a), r 5.1(b) and r 5.1(c).

110 Rule 6(a) of the rules of the CSA provides as follows:

> Membership shall be confined to any person who is:
>
> (1) employed as a public service officer under and within the meaning of the Public Sector Management Act 1994 (WA); or
>
> (2) employed under the Forests Act, the Main Roads Act or any Act now in force or hereafter enacted whereby any Board, Commission or other body is constituted to administer any such Act; or
>
> (3) otherwise employed in any of the established Branches of the Public Service, including State trading concerns, business undertakings and government institutions controlled by Boards; or
>
> (4) employed by the State of Western Australia; or
>
> (5) employed by the Crown or by any Minister of the Crown in right of the State of Western Australia; or
>
> (6) employed by any statutory body representing the State of Western Australia; or
>
> (7) employed by any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of the State of Western Australia; or

111 The Police Union points out that special constables, Aboriginal police liaison officers and police auxiliary officers are respectively appointed by the Commissioner of Police pursuant to s 35(1), s 38B(1) and s 38G(1) of the Police Act. As they are appointed by the Commissioner of Police under the Police Act they cannot be said to be employed as public service officers or employed in the public service as defined by r 6(a) of the CSA rules. The Police Union also contends that a police auxiliary officer cannot be said to be employed within and for the Western Australia Police as a government department.

112 Although s 38D of the Police Act provides that Aboriginal police liaison officers are not members of Police Force of Western Australia for the purposes of the Police Act, and similarly s 38I of the Police Act provides the same in respect of police auxiliary officers, that does not mean that Aboriginal police liaison officers and police auxiliary officers are not members of the Police Force. They remain members of the Police Force for the purposes of s 136 of the Police Act and for the purposes of all written laws except to the extent that the relevant written law confers powers, duties, and obligations to the contrary: s 38C and s 38H of the Police Act.

113 The Police Union argues that whilst under r 6(a)(2) of the CSA rules, the CSA has coverage of persons employed under any Act whereby any Board, Commission or other body is constituted to administer any such Act, there is no Board, Commission or other body constituted to administer the Police Act. The Police Union also contends that the Commissioner of Police is an individual, not a body. The Commissioner of Police is not charged with the administration of the Police Act. Rather the Commissioner of Police is charged with the control and management of the Police Force.

114 Under r 6(a)(7) of the CSA rules, the CSA has coverage of persons employed by any instrumentality or authority whether corporate or unincorporated acting under the control of or for or on behalf of or in the interest of the State of Western Australia. An 'instrumentality' or 'authority' for the purposes of this membership rule is not only the instrumentality or authority that performs a traditional governmental function but it is controlled by or at least answerable to government: ***The Civil Service Association of Western Australia Inc v St John Ambulance Association in Western Australia Inc*** (1989) 70 WAIG 311 (Fielding C).

115 As the Commissioner of Police is:

> (a) an individual and not an instrumentality or authority;
>
> (b) appointed by the Governor and is vested with the general control and management of the Police Force: s 5 of the Police Act,

the Commissioner of Police is not controlled by or answerable to government. Consequently, those that he appoints under the Police Act are not eligible for membership of the CSA pursuant to this rule.

116 The Police Union also puts a submission that the true character of the relationship of a police auxiliary officer may not be that of an employee but an officer in the strict sense of an officer of the State. The position of police officers at common law continues to be that as enunciated by the High Court in ***Enever v R*** (1906) 3 CLR 969 and ***Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)*** (1955) 92 CLR 113 (129). Whilst it may not be necessary for the Full Bench to rule on this issue, the Police Union says that the similarities between the relationship of a police officer with the Commissioner of Police and the relationship of a police auxiliary officer with the Commissioner of Police are considerable. Consequently, they say there is real doubt whether police auxiliary officers are employed by the Commissioner of Police. However, should the Full Bench find it necessary to conclude, and in fact conclude, that the true character of the relationship between the Commissioner of Police and police auxiliary officers is that of officer in the strict sense rather than employees, it may be necessary to vary the text of the proposed r 5.1(a).

4.2 Exclusions from CSA membership

117 If it is concluded that police auxiliary officers are unequivocally 'employed' by the Commissioner of Police and that r 6 of the CSA rules may potentially operate to provide coverage of police auxiliary officers, the Police Union argue that r 6(b)(i) of the CSA rules has the effect of excluding coverage under r 6(a). Rule 6(b)(i) of the CSA rules provides that:

> Provided that the following persons shall not be eligible for membership: Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st of March, 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA, or however so named, shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

118 The Police Union points out that *The Police Award 1965* was made under the Act and was in force on 1 March 1985. The Police Union is the sole union respondent to *The Police Award 1965*. The callings mentioned in *The Police Award 1965* as at 1 March 1985 were as follows:

- Commissioned officers
- Uniformed and detective sergeants
- Other ranks.

119 The Police Union says the proviso to the CSA's eligibility rule should be considered in light of what was said by the Full Bench when the current form of the CSA 's was registered in 1985: ***Civil Service Association of Western Australia Inc*** (1985) 65 WAIG 2045 (***CSA Eligibility Rule Case***). In that matter, Acting President Edwards recorded that (2048):

> The CSA repeatedly assured the Full Bench and the objectors throughout the proceedings that it has no desire to encroach upon the legitimate industrial preserve of other industrial organisations of employees nor does it intend to extend its interests beyond 'the flavour of public service'.
>
> The frequency with which those assurances were made is a matter with which the CSA will no doubt have to live - and we are confident it knew that when they were made.

120 The Police Union says in making the objection to the proposed changes to the rules of the Police Union the CSA seeks to extend its own interests beyond 'the flavour of the public service'. They say that public service officers now performing civilianised functions (such as vehicle examiners and radio call takers) and police auxiliary officers perform the same or substantially the same duties as those which were performed by sworn police officers employed in the classifications mentioned in *The Police Award 1965* as at 1 March 1985.

4.3 Coverage never contested

121 It is not correct to say that the CSA's coverage of police auxiliary officers has never been contested by the Police Union or the Western Australian Police Service. The Police Federation of Australia filed an application to allow limited function officers engaged in Western Australia to be eligible for membership of the Police Federation of Australia in December 2008. The CPSU, the CSA, the Police Federation of Australia and the Police Union have been in ongoing discussions about that matter since then. Despite these ongoing discussions, the CSA lodged an application in the Commission for the issuance of a new award to cover police auxiliary officers. When the Police Union became aware of the application the Police Union intervened seeking for the award application to be adjourned pending the outcome of this application. Western Australia Police has indicated that it would work constructively with whichever union is successful in representing police auxiliary officers.

4.4 Coverage by the Police Union

122 The Police Union has provided representation to persons performing police functions in this State since the Police Union's inception as the Police Association in 1912. It has been the sole union respondent to every industrial instrument that has applied to police officers since 1926. Until the appointment of custody officers under the PSM Act, the Police Union was the only industrial organisation which was a party to an industrial instrument determining the terms and conditions of employment of limited function police officers. The appointment of custody officers under the PSM Act was intended to be an interim measure to address an immediate need for limited function police officers. The appointments were made commencing in 2008 pending the introduction into Parliament and passing of legislation to amend the Police Act to allow for the appointment of limited function officers under the Police Act. Custody officers have slowly been phased out and have been replaced by police auxiliary officers. As at the date of the hearing in May 2011 only 29 custody officers were employed. Due to an outdated and inflexible eligibility provision the Police Union was unable to immediately provide industrial representation to the custody officers, as due to the procedural requirements contained in the Police Union rules any change to eligibility would take at least 12 months to implement.

123 Until the process of civilianisation commenced in earnest in 1992, the Police Union provided exclusive coverage to all persons performing policing functions. The civilianisation process was introduced as part of substantial productivity initiatives in the special case submissions in the September 1991 wage round. Until 2010 no legislative change was made to enable the engagement of limited function police officers as agreed in productivity initiative 5, but over the period between 1992 to 2010 civilianisation has been implemented with many former roles being transferred either temporarily or permanently to non-sworn personnel.

124 The Police Union says that as a craft union, it can more effectively represent those who work for the Western Australia Police more effectively than the CSA. The Police Union exists solely to represent the interests of persons employed in policing related roles. This can be contrasted with the CSA, which represents employees in any public sector position.

125 Employment regulation in the policing sector is the subject of a discrete area of industrial law. It is highly complex and peculiar to that sector: ***Employment Status of the Police in Australia*** (2003) 27 Melbourne University Law Review 1. The policing sector can be distinguished from the employment regulation of those members of the CSA who exercise statutory and quasi policing functions in other public sector agencies but who are subject to mainstream industrial law.

126 All of those persons who will become eligible to be members of the Police Union for the first time if this application succeeds perform roles or functions whose primary purpose is to facilitate the performance by the existing members of the Police Union of their duty to ensure the safety and security of the public of Western Australia. These potential members work alongside and/or under the supervision or guidance of members of the Police Union.

127 There is a community of interest between persons appointed by the Commissioner of Police whether as police officers, police auxiliary officers, or call takers and other positions in the Western Australia Police, that does not exist with public service officers employed in the broader public sector. As a craft union, the Police Union can devote its entire resources to represent that community of interest, in contrast to the CSA that has obligations to represent the potentially conflicting interests of its 16,000 members who are employed in the wider public sector.

128 Due to the operational requirements of the Police Force, the employment conditions and arrangements for persons employed by the Commissioner of Police differ in many cases from those more typically experienced in clerical public sector positions and have more in common with those that apply to sworn police officers. Also the working arrangements of police auxiliary officers are more consistent with those of sworn officers than of public service officers.

129 The evidence clearly establishes that the CSA enjoys little or no trust and confidence among police auxiliary officers. The petition created and circulated by the police auxiliary officers reveals that 46 police auxiliary officers believe that they will be best supported and represented by the Police Union. Thirteen of the police auxiliary officers who signed the petition indicated that although they were members of the CSA they would prefer to be members of the Police Union. As at 18 April 2001, there were 62 police auxiliary officers employed by the Commissioner of Police (Exhibit 16).

130 The email circulated by Police Auxiliary Officer Clark to her fellow police auxiliary officers and their replies by 29 police auxiliary officers reveal evidence of a lack of trust and confidence and a clear preference by police auxiliary officers for coverage by the Police Union.

4.5 Overlapping coverage with existing CSA membership

131 The Police Union says that its proposed r 5.1(a) will not result in overlapping coverage as the CSA is not capable of enrolling police auxiliary officers as members. However, to the extent that r 5.1(c) does result in overlapping coverage, the Police Union says that overlapping coverage will not necessarily cause industrial disharmony.

132 They say actual or potential overlapping coverage is not uncommon and can arise for many reasons which include:

(a) Union rules may have been drafted many years ago in different industrial circumstances.

(b) Union rules may be drafted by lay persons with unrefined drafting skills.

(c) Eligibility provisions of particular types of unions, such as industry unions, are by nature broadly drafted to encompass the industry as a whole.

133 The CSA is an industry union. Characteristically of an industry union, it has extremely wide eligibility provisions. Examples of organisations which the CSA has or had overlapping coverage include the:

(a) Health Services Union of Australia;

(b) Australian Municipal Administrative Clerical and Services Union of Employees – WA Clerical and Administrative Branch;

(c) Australian Medical Association; and

(d) Association of Professional Engineers.

134 The Police Union submits that the CSA ought not now be permitted to rely on its broad eligibility provision to encroach upon the legitimate traditional industrial presence of the Police Union in a manner beyond the genuine 'flavour' of the public service: ***CSA Eligibility Rule Case***.

135 Industrial organisations regularly deal with situations of overlapping coverage and most cases resolve these situations without industrial disharmony. The mere existence of overlapping coverage does not necessarily mean the intervention of the Commission is warranted: ***Hospital Salaried Officers Association of Western Australia (Union of Workers)*** (1995) 76 WAIG 1671 (1690). Nor does the mere existence of overlapping coverage necessarily mean industrial disharmony is inevitable: ***Re The Federated Miscellaneous Workers' Union of Australia, WA Branch*** (1993) 73 WAIG 3342.

136 The Police Union would endeavour to resolve particular cases of overlapping coverage with the CSA in an industrially responsible manner. No doubt the CSA would employ like endeavours. If the CSA is unable to reach agreement with the Police Union a mechanism exists under s 72A of the Act to resolve any demarcation dispute that might occur as a result of overlapping coverage.

4.6 Good reason to permit overlapping coverage

137 The Police Union also contends the objector bears the onus of persuading the Full Bench to refuse to authorise the rule variation: ***The Attorney General in and for the State of Western Australia v Western Australian Prison Officers' Union of Workers*** (1982) 62 WAIG 517 and ***Association of Professional Engineers, Australia (Western Australian Branch) v Civil Service Association of Western Australia (Inc)*** (1984) 65 WAIG 4 (***Professional Engineers***).

138 The Police Union says that as a matter of fact, good reasons, consistent with the objects of the Act, exist to permit overlapping coverage, to the extent that overlapping coverage might arise as a result of this application succeeding. Furthermore, to the extent that overlapping coverage might arise, they say it is not practicable to discourage such overlapping.

139 The good reasons which exist are as follows:

A Promote goodwill

140 The Police Union submits there is a real risk that industrial disharmony may arise if this application fails.

141 All of those persons who will become eligible to be members of the Police Union for the first time, if the application succeeds, perform roles or functions whose primary purpose is to facilitate the performance by the existing members of the Police Union of their duty to ensure the safety and security of the public of Western Australia. These potential members work alongside and/or under the supervision or guidance of members of the Police Union. There can be a real risk of demarcation disputes arising where workers so extricably tied together are covered by different industrial organisations and are bound by different industrial instruments providing different terms and conditions of employment.

142 Furthermore, the Police Union will be obliged to pursue its legitimate industrial interest to ensure its members' job security is preserved by challenging the allocation of its members' duties to members of the CSA. This is a particularly important issue for the redeployment of police officers who are temporarily or permanently incapable of performing frontline or operational positions.

B Encourage freedom of association

143 The Full Bench is entitled to permit overlapping coverage to occur where to do so promotes the principles of freedom of association and the right to organise. Police auxiliary officers in particular, have made it clear they wish to exercise their right to organise under the auspices of the Police Union. There is evidence that:

(a) Potential members of the CSA preferring to remain unrepresented rather than joining the CSA.

(b) Members of the CSA joining only as an interim measure pending an opportunity to join the Police Union.

(c) CSA members being dissatisfied with the CSA.

(d) A clear preference for coverage by the Police Union.

C Facilitate efficient organisation and performance of work

144 As a craft union representing members with a community of interest, the Police Union submits that it is better able than an industry union such as the CSA to work closely and effectively with the Commissioner of Police to facilitate the efficient organisation and performance of work. The Police Union is the only industrial organisation with the capacity to represent members of the Police Force and, if this application succeeds, the Police Service. With a wider membership base the Police Union will be able to negotiate on a broader range of issues with the Commissioner of Police and facilitate the resolution of structural change in the Police Service and Police Force more effectively.

D Agreements appropriate to the needs of the enterprise and the employees

145 The policing sector is the subject of a discrete area of industrial law. Due to the operational requirements of the Police Force the working conditions and arrangements for persons appointed by the Commissioner of Police differ in many cases from those more typically experienced in clerical public sector positions and have more in common with those which apply to sworn police officers.

E Other relevant factors

(i) Extent of potential overlapping

146 The extent of potential overlapping in membership eligibility is a relevant matter: ***Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch v Federated Clerks Union of Australia, Industrial Union of Workers, WA Branch*** (1985) 65 WAIG 2033. It is significant that the potential overlap forms a comparatively small part of the potential CSA membership base. In any event even a substantial overlap need not be fatal to an application.

(ii) Organisation best able to provide industrial representation

147 The Police Union submits that it is best placed to provide industrial representation and services. The Police Union has 98.2% of eligible members as members of the Police Union and explains why so many other employees of the Commissioner of Police are so proactively seeking the right to join the Police Union.

(iii) Shared community of interest

148 Whether the persons sought to be covered by the Police Union share a community of interest with those who are currently eligible to belong to and actually belong to the Police Union is a relevant factor. Those proposed to be covered by the Police Union share a community of interest with the existing membership of the Police Union that they do not share with members of the CSA who are part of the much wider public service.

(iv) Would order reduce number of organisations in industry

149 If this application fails the number of organisations in this industry will remain the same. However, if the application were to succeed in full the Police Union will have enterprise wide coverage of those performing policing related functions.

(v) Substantially the same duties

150 ***The United Firefighters Union of Western Australia*** (2003) 83 WAIG 1400, the Commission permitted the United Firefighters Union to alter its eligibility rule to permit it to enrol as members communications officers who were eligible to be members of the CSA on the grounds that these officers performed substantially the same duties as members of the Firefighters Union. The Police Union says that by its very terms proposed eligibility r 5.1(c) seeks to grant eligibility to persons who perform the same or similar duties as existing members of the Police Union to be eligible to become members of the Police Union.

(vi) Overlapping coverage allowed

151 The Commission has on many occasions allowed overlapping coverage to occur in the following matters:

- ***Association of Draughting, Supervisory and Technical Employees*** (1981) 61 WAIG 1729;
- ***RAC Patrolmen's Association*** (1975) 55 WAIG 1638;
- ***Re an application by The Civil Service Association of Western Australia (Inc)*** (2004) 84 WAIG 422;
- ***The Civil Service Association of Western Australia Inc*** (2009) 89 WAIG 2381;
- ***The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees*** [No 1] (2007) 87 WAIG 2556.

152 The Police Union says there are potential benefits arising from overlapping coverage. These include competition:

(a) for membership is likely to result in better service delivery;

(b) for membership is likely to result in a greater variety of benefits for being offered to members; and

(c) to attract membership which will be likely to result in the competing union endeavouring to deliver better industrial outcomes for members.

4.7 Not practicable to discourage overlapping

153 It is only practicable to discourage overlapping coverage if it is capable of being done so with reason or prudence: ***Re an application by The West Australian Psychiatric Nurses' Association (Union of Workers)*** (1994) 74 WAIG 1500. Whilst it is not practicable to prevent overlapping if to do so might result in industrial disharmony, the Police Union submits there is a real risk that industrial disharmony may arise if this application fails. This is because there is a real risk of demarcation disputes arising where workers so extricably tied together are covered by different industrial organisations and are bound by different industrial instruments providing different terms and conditions of employment.

A Contrary to the objects of the Act to encourage organisation and representation

154 There is evidence in this matter that potential members of the CSA prefer to remain unrepresented rather than joining the CSA and a clear preference for coverage of the Police Union.

B Adverse consequences for the Police Union

155 An order disallowing this application will have adverse consequences on the Police Union. International and national trends are for the 'civilianisation' of police functions to continue at an increasing rate. If the Police Union is not allowed to amend its outdated eligibility clause the Police Union will, despite its extraordinary high union density rates, likely experience a decline in membership numbers and consequently declining industrial strength as the number of sworn police officers is reduced in favour of the appointment of limited function police officers at a lower cost base for the employer.

5.0 THE CSA'S SUBMISSIONS

156 The CSA's main grounds of objections go to:

(a) The wording of proposed r 5.1(c); and

(b) The potential encroachment on and/or overlap of the coverage of the CSA's existing membership rule.

157 The CSA objects to the proposed amendment to proposed r 5.1(a) on the basis that it will extend to coverage of any future classification of officer whose appointment will be created under the Police Act and who will be employed by the Commissioner of Police. In particular, the CSA's objection is to the coverage of police auxiliary officers by this proposed change to the rules.

158 The CSA has no objection to the amendment proposed by r 5.1(b) in respect of police recruits as this category will only cover recruits who are constables undergoing initial Police Academy based training.

159 The CSA says proposed r 5.1(c) will extend the scope and reach of the Police Union's amendments to include public service officers who are employed in the department of the Western Australia Police. Public service officers employed in the department of the Western Australia Police are appointed under the PSM Act and can perform roles which require the exercise of some form of statutory power and/or some explicit policing knowledge. The scope and reach of proposed r 5.1(a) and r 5.1(c) purports to encroach on or overlap with the coverage of the CSA's existing membership rule. The CSA enjoys the trust and confidence of public service officers. In its submissions filed prior to the hearing commencing it contended that it enjoys the trust and confidence of police auxiliary officers who are employed in the Western Australia Police and who are within the scope of the Police Union's proposed rule changes.

160 The CSA points out that the Police Union has not applied for exclusive coverage in accordance with s 72A(2)(a) of the Act which enables an organisation to apply to the Full Bench for an order that an organisation has the right, to the exclusion of another organisation to represent the industrial interests of a particular class or group of employees employed in an enterprise who are eligible for membership of the organisation.

5.1 The CSA's existing coverage of public service officers and police auxiliary officers

161 The CSA argues its membership rule, r 6(a), covers public service officers and other government officers as defined by s 80C of the Act and these provisions encompass police auxiliary officers and public service officers employed in the department of the Western Australia Police.

162 Western Australia Police comprises two entities, the department established under the provisions of the *Public Service Act 1904* (WA) (repealed) and the Police Force established under the Police Act. The Police Force is not part of the public service as defined by the PSM Act by virtue of being listed in Schedule 1 as an entity which is not an organisation.

163 Police auxiliary officers are not appointed under the PSM Act. They are appointed by the Commissioner of Police under s 38G(1) of the Police Act. Section 38I of the Police Act clearly states that a police auxiliary officer is not a member of the Police Force of Western Australia for the purposes of the Police Act. The CSA submits that since a police auxiliary officer is not a member of the Police Force but is appointed by the Commissioner of Police, the work of police auxiliary officers must be within and for the department. The Commissioner of Police is also the Chief Executive Officer of the department under s 4(3) of the PSM Act.

164 The CSA says it has coverage of police auxiliary officers under r 6(a)(2), r 6(a)(3) and r 6(a)(7) of the rules of the CSA.

165 The CSA contends it has coverage under r 6(a)(2) of its rules as the Commissioner of Police is generally tasked to administer the Police Act. They say whilst there might be an argument that the Commissioner of Police is a 'person', rather than a body, s 5 of the *Interpretation Act 1984* (WA) defines a 'person' to include a public body, company, or association or body of persons, corporate or unincorporate. Also, the Shorter Oxford Dictionary defines the word 'administration' as 'the action of administering in any office, including performance of that office' and the Macquarie Dictionary defines 'administration' as including 'the management or direction of any office or employment'. Consequently, insofar as the Commissioner of Police governs the control and management of the Police Force under s 5 of the Police Act, he can be said to be administering the Police Act.

166 Rule 6(a)(3) of the rules of the CSA provides that the CSA also has coverage of persons 'otherwise employed in any of the established Branches of the Public Service'. The CSA submits that although police auxiliary officers are employed by the Commissioner of Police, because they are not members of the Police Force they are therefore regarded as being employed in the department, which is an established branch of the public service. The CSA argues the intention of the enactment of s 38H of the Police Act, is that police auxiliary officers are to be employees and government officers of the Commissioner of Police.

167 The department is an established branch of the public service. The 'public service' is a much wider service as a concept than public service officers. Whilst in s 34 of the PSM Act the public service is constituted by government departments, SES organisations and persons employed under Part 3 of the PSM Act, the reference to 'public service' in r 6(a)(3) of the rules of the CSA encompasses government officers within the meaning of s 80C of the Act.

168 Rule 6(a)(7) of the CSA rules provides coverage of persons employed by any instrumentality or authority, whether corporate or unincorporated, acting under the control of, or on behalf of, or in the interest of the State of Western Australia. The CSA says it is clear that the Commissioner of Police acts either under the control of, or on behalf of, or in the interest of, the State of Western Australia as public accountability requires him to do so. The Commissioner of Police is appointed by the Governor and is charged with the control and management of the Police Force of Western Australia and may, with the approval of the Minister for Police frame rules, orders and regulations for the general government of the members of the Police Force, police auxiliary officers, police cadets and Aboriginal police liaison officers. The Governor is a representative of the Crown. As there is a direct line of appointment from the Executive Government to the Governor to the Commissioner of Police, the Commissioner of Police can be seen to be acting on behalf of the State of Western Australia. In addition the Commissioner of Police is an 'instrumentality' or 'authority' which is something wider than an agent of the Crown: ***The Civil Service Association of Western Australia Inc v St John Ambulance Association in Western Australia Inc***.

169 The definition of 'public authority' in s 7 of the Act is also of assistance. The definition provides:

> ***public authority*** means the Governor in Executive Council, any Minister of the Crown in right of the State, the President of the Legislative Council or the Speaker of the Legislative Assembly or the President of the Legislative Council and the Speaker of the Legislative Assembly, acting jointly, as the case requires, under the *Parliamentary and Electorate Staff (Employment) Act 1992*, the Governor or his or her delegate under the *Governor's Establishment Act 1992*, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law but does not include a local government or regional local government

5.2 Are police auxiliary officers and public service officers in Western Australia Police excluded from CSA membership by virtue of r 6(b)(i) of the CSA rules

170 Rule 6(b)(i) of the CSA's eligibility rule excludes from the CSA's membership:

> Persons who are employed by an employer bound by an award made or an industrial agreement registered under the Industrial Relations Act 1979 and in force on 1st March, 1985 and to which an organization of employees registered under the aforementioned Act other than The Civil Service Association of Western Australia Incorporated is party, in the callings which on 1st March, 1985 were mentioned in any such award or agreement or in a classification, not specifically mentioned in the award or agreement as at the 1st March 1985 the duties of which are the same or substantially similar to any classification which was so mentioned. Notwithstanding the above, employees of the Lotteries Commission of WA,

or however so named, shall be eligible for membership of The Civil Service Association of Western Australia Incorporated.

171 The CSA says the background to the ***CSA Eligibility Rule Case*** needs to be properly understood. Prior to 1985 the *Public Service Arbitration Act 1966* (WA) (repealed) was in force which resulted in the CSA having a monopoly of audience before the Public Service Arbitrator. The arbitration powers of the Public Service Arbitrator were subsequently vested in a number of constituent authorities under the Act and the CSA sought to amend its eligibility rule as a consequence of this.

172 The proposed amendments (in part) allowed the CSA to retain the constitutional coverage which it necessarily enjoyed as a consequence of its exclusive rights before the Public Service Arbitrator: ***CSA Eligibility Rule Case*** (2047). The Full Bench recognised that before these amendments were made, the CSA had constitutional coverage of employees other than public servants. The Full Bench acknowledged the changing structure of employment in the public sector as the State sought to reduce its role as direct employer and consented to the rule changes to allow the CSA to seek industrial coverage within that evolving landscape: (2048). The Full Bench also observed that the CSA (in such circumstances) would need to justify its industrial presence within areas not previously viewed as within the public or civil service. In that matter the Full Bench did not allow an amendment to the CSA's constitutional coverage to the extent enabling the CSA to enrol as members persons who were employed by any company or corporation in which issued shares were held by or for or on behalf of or in the interest of the State of Western Australia. Thus the CSA was unsuccessful in seeking to follow out its public sector members to the private sector. It was in that application the exclusion contained in r 6(b)(i) was inserted as part of the amendments considered in that case in 1985.

173 The CSA says that police auxiliary officers are not excluded by the operation in r 6(b)(i) of the rules of the CSA as the callings in *The Police Award 1965* as at 1 March 1985 did not include the position of police auxiliary officer as a calling or a classification.

174 Section 7 of the Act defines a 'calling' as meaning 'any trade, craft, occupation, or classification of an employee'. There is no definition of 'classification' in the Act. Classification is defined in the Macquarie Dictionary as 'the act or result of classifying' which is in turn derived from the word 'class' meaning, 'any division of persons or things according to rank or grade'. Consequently, the CSA argues that calling and classification are interchangeable terms. So that if the word 'calling' is substituted for the word 'classification' then the two excluded classes under r 6(b)(i) of the rule of the CSA are persons employed in callings which on 1 March 1985 were mentioned in *The Police Award 1965* and persons employed in the calling not specifically mentioned in the award, the duties of which are the same or substantially similar to any calling which was so mentioned.

175 The CSA says for a person to be a commissioned officer, uniformed sergeant, detective sergeant or other rank as described in *The Police Award 1965* as at 1 March 1985, it would be necessary for the person to be a sworn police officer and a member of the Police Force to perform all of the duties required of them. Consequently, they say unless all of the duties are performed and not just some of the duties the exclusion does not apply. It therefore follows that the Police Union would have to establish that the duties of a police auxiliary officer are the same or substantially similar to any of the callings of either commissioned officers, uniformed sergeant, detective sergeant or other ranks. That cannot be established as the functions of a police auxiliary officer are dealt with on a case to case basis by the Commissioner who has the discretion to determine what functions can be allocated to individual officers pursuant to s 38H of Police Act. In any event, the duties of police auxiliary officers are not the same, or substantially similar, to the duties of callings in *The Police Award 1965*. The evidence has shown that police auxiliary officers perform duties that were previously performed by both public service officers and police officers. In addition, some functions performed by police auxiliary officers are the same, or similar to those undertaken by CSA members in a range of other public sector entities.

176 Alternatively, the CSA submits that the words 'calling' and 'classification' in r 6(b)(i) of the rules of the CSA are not intended to be interchangeable terms. The use of the two terms within the subclause implies they must have different meanings. The word 'classification' is frequently used in industrial awards and agreements in reference to salary or level of expertise of a group of employees. For example, in the sergeant ranks named in *The Police Award 1965*, the ranks and salary are listed and there is a listing for senior sergeant and the rates for a sergeant and senior sergeant.

177 Police auxiliary officers do not fall within the category of 'classification' in *The Police Award 1965* as at 1 March 1985, because of the facts that:

(a) The Commissioner has a discretion to limit the functions and duties of police auxiliary officers under s 38H of the Police Act; and

(b) Police auxiliary officers are not members of the Police Force which is intended coverage of the Police Award by virtue of the scope provisions.

5.3 Application of exclusion to public service officers in the WA Police Service

178 As a public service officer is employed pursuant to the PSM Act such an officer falls within the core coverage area of the CSA. To use the terminology of the 1985 case, how can a current public service role not be within the 'flavour of the public service' or relevant to the legitimate interest of the CSA within a changing public sector landscape?

179 It is the CSA's position that the exclusion in r 6(b)(i) of the rules of the CSA does nothing to assist the Police Union's case. This is because the duties of sworn police officers can never be the same or substantially similar to that of a public service officer. At the very minimum, sworn police officers will always have powers of arrest and other powers and obligations under the Police Act which cannot be transferred to the public service officer.

180 Furthermore, for a person to be within the callings mentioned in *The Police Award 1965* as at 1 March 1985, he or she would have to be a commissioned officer, uniformed sergeant, detective sergeant or other ranked police officer. The Police Union would then need to establish that the duties of a public service officer are the 'same or substantially similar to' any of the

callings of commissioned officers, uniformed and detective sergeants or other ranks. The CSA says this requires a determination that public service officers have 'all or predominantly all of' the duties of any of the callings mentioned in *The Police Award 1965* as at 1985 and the Police Union has not discharged its burden to establish as such.

5.4 Whether police auxiliary officers are employees

181 In response to the Police Union's contention that it is not clear whether the relationship between a police auxiliary officer and the Commissioner of Police is that of employment, the CSA firstly says that this point is irrelevant. This is because, pursuant to r 6(a)(iii) of the rules of the CSA, the CSA has coverage of persons otherwise employed in the established branches of the public service. The words 'employed in' should not be construed in the same way as the words 'employed by' because the latter infers the existence of an employment relationship whereas the former should be interpreted as 'engaged in' or 'working in' and does not require the existence of an employment relationship: ***Re application by McGee for inquiry by the court into elections for offices within the Transport Workers' Union of Australia*** (1992) 41 IR 27; BC9203419 (Keely J).

182 Alternatively, the CSA says that police auxiliary officers can be characterised as 'government officers' employed by the Commissioner of Police within the meaning of s 80C of the Act. Section 80C of the Act defines a 'government officer' as among others, every other person employed on the salaried staff of a public authority. The CSA says that the department is a public authority and police auxiliary officers are remunerated on a fortnightly basis. They also point out that sch 3 cl 2 of the Act is to be taken to include a reference to a police auxiliary officer.

183 The CSA says when regard has been had to what was said by the High Court in ***Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)*** (PC) where it was held that the authority of a constable is exercised at his own discretion by virtue of this office, it is clear that the police auxiliary officers are not such officers. In contrast, the functions of a police auxiliary officer can be limited by the Commissioner of Police in any way that the Commissioner thinks fit: s 38G(3) and s 38G(4) of the Police Act and police auxiliary officers do not exercise any common law powers of a sworn police officer. Consequently the common law position that applies to police officers cannot be extended to police auxiliary officers. They also say that the power of the Commissioner of Police to limit the functions of the police auxiliary officers, confers on the Commissioner of Police a personal discretion to 'direct and control' the powers and functions of police auxiliary officers. In addition, as police auxiliary officers are specifically excluded from being members of the Police Force under s 38I of the Police Act at law, police auxiliary officers are not intended to have the common law incidents of sworn police officers because they are specifically excluded from being members of the Police Force.

184 Further, the JDFs for police auxiliary officers indicate that an employment relationship is contemplated because the JDFs state that police auxiliary officers are:

(a) employed under a contemplated industrial agreement;

(b) required to wear uniform during rostered duties;

(c) subject to the codes of conduct;

(d) subject to the direction and control of an officer in charge or supervisor; and

(e) to undertake other duties as required.

185 In addition, the terms and conditions of police auxiliary officers are contained in a common law contract of employment and are similar to those contained in the public sector awards or general agreements.

5.5 Encroachment and/or overlapping coverage

186 The CSA contends that proposed r 5.1(a) and r 5.1(c) purport to encroach on or overlap with the coverage of the CSA's existing membership rule in that the proposed rules seek to cover police auxiliary officers and public service officers employed in Western Australia Police. Whereas the Police Union does not have existing constitutional coverage of either group of employees, the CSA has constitutional coverage and has historically and industrially represented a significant number of those persons whom the Police Union seeks to cover. The CSA has approximately 1,000 members who are employed in Western Australia Police. Their union density is 50%. This is to be contrasted with current national statistics which were released in April 2011 in which it was found that union membership in Western Australia is 16.4% and in the public sector including police it is 41.5%.

187 The CSA has demonstrated its capacity and competence to properly and effectively represent those persons whom the Police Union seeks to cover. The CSA has obtained awards and negotiated agreements to cover conditions and wages of employees employed by the Commissioner of Police and say detailed knowledge and understanding of these instruments is essential for the proper representation of those persons' industrial interest. Public service officers employed in the department of the Western Australia Police are covered by the *Public Service Award 1992*, the *Public Service General Agreement 2008* and the 2009 ASA. Many public service officers in the department including customer service officers, custody officers, auditors, camera operators, human resources and other administrative roles are examples of roles that were traditionally performed by a member of the Police Force which, as a result of the processes of civilianisation, have been reassigned to non-police officers to enable the police officers to focus on frontline duties. The CSA has officials, officers and industrial staff who have experience in the representation of those persons who may be eligible to become members of the Police Union by virtue of this application. The CSA says it can more effectively represent and protect the industrial interests of those members than the Police Union.

5.6 Exercise of statutory powers and policing knowledge

188 The CSA points to the evidence of Mr Kelly that police officers have traditionally been utilised in many diverse categories of employment which are outside the general duties of police officers still require police powers and/or police training and/or police knowledge and/or police experience. In particular, Mr Kelly said these diverse roles include, but are not limited to, training other police officers, prosecuting and legal service, forensics and fingerprinting investigations; call taking in operation

centres; watch house duties; State security; water police including diving; airwing operations; bomb disposal; corruption prevention and investigation; covert operations; dog handling; mounted police operations; coronial investigations and areas of administrative support. The CSA submits that it has members who undertake many of those roles. These include camera operators, call takers and radio operators. These positions are all covered by the 2009 ASA.

189 The process of civilianisation of the police department commenced as early as 1904 and has increased since 1994 to the point whereby a large majority of the CSA members in the Western Australia Police perform work currently or traditionally performed by police officers. They contend that policing knowledge is not exclusive to police and some form of policing knowledge is required for administrative, managerial or specialist positions.

190 The CSA produced evidence which demonstrates that it has members in other government agencies who exercise some form of statutory and policing powers. For example, the CSA has members employed by the Department of Transport as prosecution officers or employed by the Department of Fisheries as fisheries and marine officers. Legislation such as the *Criminal Investigation Act 2006* (WA) and the *Criminal Investigation (Identifying People) Act 2002* (WA) allows 'public officers' to exercise powers under those Acts in specified circumstances. A public officer is defined as persons other than police officers appointed under written law to a prescribed office. There are also justice officers who work in court services, who are authorised to issue an order to a person in custody and may use such reasonable force as necessary to ensure that the order is complied with. In addition, the *Firearms Act 1973* (WA) authorise employees of the department of the Western Australia Police as well as members of the Police Force to have a firearm or ammunition for the use in and performance of duties.

191 Consequently, the CSA argues that policing knowledge and policing powers are not exclusive to police officers.

5.7 No good reason to allow registration

192 Prior to considering whether there is good reason under s 55(5) of the Act to allow overlapping coverage and grant an application, the Full Bench is firstly required to determine that it is not practicable to discourage overlapping. In ***Re Sharkey; Ex Parte Burswood Resort (Management) Ltd*** (1994) 55 IR 276, Ipp J considered the proper approach to the registration of overlapping eligibility rules. His Honour found that before the Full Bench can determine that there is 'good reason' within the meaning of s 55(5) of the Act to permit registration, it has to determine that it is not practicable, within the meaning of the object in s 6(e) of the Act, to discourage overlapping (280). If the Full Bench decides it is not practicable, in the circumstances, to discourage overlapping, it can determine there is good reason, consistent with the objects prescribed in s 6 of the Act, to permit registration. On the other hand, if it is practicable to discourage overlapping, there could not be good reason, consistent with s 6(e) of the Act to permit registration (280).

193 The CSA says in this matter, it is practicable for the Full Bench to discourage overlapping coverage and maintain the status quo.

194 The CSA points to the evidence given by Mr Kelly that having different unions in the same workplace often leads to demarcation disputes and inefficiency. They also point to the evidence of Ms Walkington who gave evidence that competitive unionism can lead to 'union shopping'. This can also result in employees being in dispute with one another, as one or each union can raise expectations of various groups of employees by trying to exploit differences in union coverage and inviting other employees into their union membership.

195 As to the requirement of practicability, the CSA says the reasoning of Sharkey P in ***Re an application by The West Australian Psychiatric Nurses' Association (Union of Workers)*** should be applied where his Honour said 'it is only practicable to discourage overlapping if it is capable of being done so with reason or prudence'. The CSA also refers to the Shorter Oxford Dictionary definition of 'practicable' which provides 'able to be put into practice, able to be effected, accomplished or done, feasible'.

196 The CSA says it is practicable to discourage overlapping coverage because:

(a) Competitive unionism is not in the interest of the employees and must be avoided as much as practicable.

(b) Having different unions in the same workplace often leads to demarcation issues and inefficiency.

(c) The Police Union's claim that it has greater industrial strength when negotiating with the Commissioner of Police does not consider how the Commissioner of Police would be able to decide between two competing groups.

(d) Public service industrial instruments are superior to that of police officers and the current conditions of employment of police auxiliary officers.

5.8 Risk of industrial disharmony

197 The CSA is the sole union responsible for negotiating the terms and conditions of employment of public service officers under the *Public Service Award 1992* and the general agreements. The *Public Service Award 1992* and general agreements apply to public service officers across the public sector and not just to those in the department of the Western Australia Police. The CSA has been instrumental in ensuring that public service officers across the entire WA public sector are governed by the same award and agreements. The relativities between the *Public Service Award 1992* and the general agreements have been set for years. They were realigned in the 2002 General Agreement to allow for transferability of public service officers between government departments.

198 If the Police Union is successful in amending its eligibility rule to include proposed r 5.1(c) this would enable the Police Union to apply to be a party to the *Public Service Award 1992* and the general agreements. The potential industrial disharmony that would ensue would be enormous. Alternatively, the Police Union could include public service officers in its own award and industrial agreement or create a new award and industrial agreement. This too would cause industrial disharmony among public service officers.

199 Importantly, police officers and public service officers have worked along side each other for many years with no disharmony. The creation of more civilian jobs has not resulted in a decrease in police jobs. The 2008 and 2010 Western Australia Police Annual Reports statistical summaries indicate in 2008 there were 5,647 police officers and in 2010 it was reported there were 5,733 police officers (Exhibit 10). In addition, the Commissioner of Police has indicated that there is to be a further growth of the numbers of sworn police officers over the next five years.

5.9 Express wishes of employees and employer

200 There is evidence to contradict the Police Union's contention that the employer prefers police auxiliary officers to be covered by the Police Union. At the time the CSA filed its written submissions in January 2011, there was no evidence to indicate that its members who are police auxiliary officers had little or no trust and confidence in the CSA. The employees' preference is not based on an informed choice. The cross-examination of Mr Srivastava and Ms Clark revealed that neither of them had any real knowledge of the services that the CSA could provide. The email that Ms Clark sent to police auxiliary officers was riddled with misleading information. The responses she received from policy auxiliary officers have to be seen in a light that the email by Ms Clark was written by a passionate person who is seeking only one outcome. It is also relevant that the emails sent by police auxiliary officers to the CSA were each identical. In none of those emails did they state that they wished to resign from the CSA. In light of all of this evidence the CSA says it is open for the Full Bench to draw an inference that the complaints made against the CSA by the police auxiliary officers are misinformed.

201 The CSA also says there is no evidence that the CSA had advised police auxiliary officers that it was seeking to cover them as an interim measure. Nor is there any evidence before the Full Bench that can be relied upon that the CSA harassed and hounded potential members.

202 As to the complaint that the CSA has harassed police auxiliary officers, Ms Clark admitted when cross-examined the only contact that she had had with an official of the CSA was when she was in the same room as one at the police academy. She had received one email which she found personally offensive but she did not explain why (Exhibit 12). When this email is read it shows that the CSA was only inviting police auxiliary officers to join. Also the evidence of Ms Clark is inconsistent with evidence of Sergeant Sadlier who in cross-examination said Ms Clark had told him that there had been aggression to the extent that she kept getting phone calls and consistently had to ask them to stop and that the phone calls still came.

203 In any event, the CSA says, that preference of employees is not necessarily a determining factor: ***The Merchant Service Guild of Australia, Western Australian Branch, Union of Workers*** [2001] WAIRC 02020; (2001) 81 WAIG 382.

204 The CSA also says that little regard should be given to the Police Union's contention that there is evidence of potential members of the CSA preferring to remain unrepresented rather than joining the CSA. Employees in this State do not have the freedom to choose the union they wish to cover them. Union coverage is governed by the eligibility rules of registered organisations.

205 The only evidence led by the Police Union of CSA members being dissatisfied with the CSA is the evidence given by Mr Srivastava that his efforts to seek assistance from the CSA were not successful and he complains that the CSA harassed potential members to join the CSA. However, he only sought assistance from the workplace delegate, Mr Shannon Ellison, who is not an employee of the CSA. The CSA points out that Mr Srivastava could have contacted the CSA to get assistance from either an organiser or an industrial officer through its membership services union link.

206 There is no evidence before the Full Bench that shows that CSA members who are public service officers including custody officers are dissatisfied with the CSA. In fact the CSA says that the opposite is true. There is evidence before the Full Bench that the CSA members are satisfied with the CSA (Attachment M to written statement of Mr Claydon where he states that a recent survey of members reported a satisfaction rating of 72%).

5.10 No good reason to allow overlapping coverage

207 The CSA does not say that the application should fail if the Full Bench finds it will result in overlapping coverage. The application must fail if there are no good reasons to allow overlapping coverage.

208 The CSA points out that the cases referred to by the Police Union in which the Full Bench allowed overlapping coverage to occur, two of those decisions the ***RAC Patrolmen's Association*** and the ***Association of Draughting, Supervisory and Technical Employees*** were made before s 55(5) was inserted into the Act. In the other decisions, the CSA and all other unions came to an agreement over coverage.

209 If the Full Bench forms the view that it is not practicable to discourage the overlapping of coverage the CSA maintains proposed r 5.1(c) that there is no good reason that it would be consistent with the objects of the Act to allow the application in relation to this proposed sub-rule.

210 The CSA says that the public service officers within the department of the Western Australia Police have a strong community of interest with other public service officers:

(a) Public service officers are governed by the same awards and agreements.

(b) Public service officers are eligible to be members of the same union.

(c) Public service officers are transferrable between different government agencies.

(d) Public service officers perform similar duties and have similar qualifications.

(e) Public service officers are appointed under the PSM Act.

(f) There is no evidence from public service officers in the department that they wish to be members of the Police Union or that they do not wish to be members of the CSA.

211 The CSA also says that public service officers do not share a community of interest with sworn police officers. Police auxiliary officers have a community of interest with the existing membership of the CSA as they:

(a) Are not sworn police officers and never can be. There is a difference in status between police auxiliary officers and police officers.

(b) Do not have all the powers of sworn police officers.

(c) Are not members of the Police Force.

(d) Are employed within the department.

(e) Undertake roles not only alongside sworn police officers but also alongside public service officers.

(f) Like public service officers carry out policing type functions and work alongside public service officers who undertake such roles.

212 The CSA argues that overlapping coverage between the CSA and Police Union of public service officers will result in persons doing the same role being able to join different unions. This raises a number of issues which are as follows:

(a) Which union will people join?

(b) What will be the impact of this preference on the industrial interests of their counterparts?

(c) Which union will negotiate their terms and conditions of employment?

(d) What will happen in the event of a ballot outcome for members of different unions? For example, if 15,000 members of the CSA vote in support of a ballot and 200 members of the Police Union vote against it, what happens? Alternatively, if a majority of persons joins the Police Union and vote against a ballot, and CSA members vote in favour. What will or should happen?

(e) What will happen if the Police Union negotiated a different industrial instrument for public service officers in the department of the Western Australia Police? What impact would this have on relativity as for other public service officers?

213 The CSA says that all of these issues would cause industrial disharmony. Whilst the evidence of Mr Kelly establishes in the past 30 years there has not been any serious demarcation issues between the CSA and the Police Union, should proposed r 5.1(c) be allowed there is a real possibility that this may change.

5.11 Proposed wording of proposed r 5.1(c) is too broad and incapable of determination

214 The CSA says that the ambiguous nature of the proposed r 5.1(c), if allowed, would result in substantial, persistent and resource intensive arguments and matters of interpretation about 'work currently or traditionally performed by a member of the Police Force'. The evidence given in these proceedings establishes that it is inherently difficult to define work that was traditionally performed by a sworn police officer which has been devolved to pubic service officers through the process of civilianisation and for this reason the proposed r 5.1(c) should not be allowed. They also says that many of the areas sought to be covered by proposed r 5.1(c) are areas in which public service officers have also traditionally performed duties or are currently performing duties. Consequently, they say the proposed r 5.1(c) should be disallowed on grounds that it is too broad and incapable of determination. Further, by the use of the word 'traditionally' by itself adds uncertainty and has no determinable meaning and it raises the question how far back should traditional be measured. Should it be 10 years, 20 years or since the inception of the Western Australian Police Service?

5.12 Alternative orders

215 The CSA says that proposed r 5.1 should be approved by the Full Bench as follows:

To be eligible to be an ordinary member of the union a person must be:

(a) a sworn police officer; or

(b) a police recruit; or

(c) an Aboriginal liaison officer.

216 However, if the Full Bench is mindful to find that the CSA's rules do not cover police auxiliary officers and that the Police Union is an appropriate union to cover these officers then the clear way forward is for the relevant acts (the Police Act and the PSM Act) to become the determinant factor of which union an employee should belong to. If an employee is appointed under the Police Act then that employee should be covered by the Police Union and if an employee is appointed under the PSM Act then that employee should be covered solely by the CSA. The CSA says this could be achieved by disallowing proposed r 5.1(c).

6.0 ALTERNATIVE WORDING TO PROPOSED R 5.1(C) PROPOSED ON BEHALF OF THE POLICE UNION

217 Counsel for the Police Union suggested the following amendments to proposed r 5.1(c):

(a) inserting the word 'operational' so that the proposed rule 5.1(c) would then read:

'engaged by the Commissioner of Police in some other capacity undertaking operational work currently or traditionally performed by a member of the Police Force appointed under the *Police Act 1892* (WA)';

and/ or

(b) replacing the word 'traditionally' with the word 'formerly' so that the proposed rule 5.1(c) would then read:

'engaged by the Commissioner of Police in some other capacity undertaking [operational] work currently or formerly performed by a member of the Police Force appointed under the *Police Act 1892* (WA)';

or

(c) the introduction of a temporal restriction by limiting the scope of proposed rule 5.I(c) to persons engaged by the Commissioner of Police on or after I January 2009.

218 The CSA says the inclusion of the word 'operational' to limit the scope of proposed r 5.1(c) to operational staff will add nothing. There is no current definition of operational staff used. Macquarie Dictionary defines 'operational' as 'pertaining to operations'. This raises the following questions:

(a) What does operational staff mean in this context?

(b) Does it mean staff working with the public?

(c) Does it mean staff that have a working knowledge of policing type activities?

(d) Does it require specific policing knowledge and/or experience and/or skills and/or the exercising of some form of statutory powers?

(e) Does it mean staff that assist frontline police?

(f) Can the Police Union define with any amount of certainty who operational staff are?

219 The CSA says that if one were to examine a range of roles within the Western Australian Police Service one would find that all of the roles would answer must, if not all, of the questions in the affirmative.

220 As to the suggestion of replacing the word 'traditionally' with the word 'formerly' the CSA points out that 'traditionally' is defined in the Macquarie Dictionary as 'pertaining to tradition' and 'formerly' is defined as meaning 'in time past or of old'. As those words are loosely interchangeable they do not alter the substantive scope of the Police Union's proposed r 5.1(c) in any way.

221 The Police Union also suggests that the scope of the proposed r 5.1(c) can be restricted to persons engaged by the Commissioner of Police after 1 January 2009. The CSA says it is not clear as to whether this temporal restriction is to apply only to the police auxiliary officers or public service officers or both. They also say that this proposal would also cause industrial disharmony, which would be compounded because two public service officers who sit side by side and perform the same role could belong to two different unions depending upon when they were employed and could be governed by two sets of terms and conditions of employment.

7.0 Consideration of the Issues

7.1 Onus

222 Where the onus lies is an issue raised on behalf of the Police Union who have put an argument that the onus lies upon or shifts to the CSA as the objector to persuade the Full Bench the application should be refused. Whilst there is an onus on the Police Union to show good reasons why the application should be granted, once satisfied, they say the onus lies upon, or shifts to the CSA.

223 It is not entirely correct to say that an objector bears the onus of persuading a Full Bench hearing an application not to register an alteration or alterations to the eligibility rule of an organisation to refuse to authorise where the rule variation overlapping coverage is raised. In ***Professional Engineers,*** the Industrial Appeal Court heard argument about where the onus lay where a Full Bench of the Commission was considering the registration of a society under s 53(2) of the Act. Section 53(2) at that time provided:

A society consisting of less than 200 employees may be registered if the Full Bench is satisfied -

(a) that the number of members in the society constitutes a substantial proportion of all employees in the industry or calling by reference to which the society seeks registration; or

(b) that there is good reason, consistent with the objects prescribed in section 6, to permit the registration of the society.

224 Whilst the application considered in that matter was not an application under s 55(4) of the Act, the Full Bench was required to form the requisite opinion prescribed in s 53(2) of the Act. In matters where a statute casts a statutory duty to form an opinion as to certain facts before an order can be made, the application of principles that apply to onus in private litigation do not strictly apply. This was made clear by Olney J in ***Professional Engineers*** when his Honour observed (8):

> Much has been said in this case on the question of onus of proof, it being argued and indeed conceded that the onus rests upon an objector to establish facts upon which the Full Bench may form an opinion adverse to registration, but I think that it would be a mistake to make too much of conventional legal concepts like onus of proof in this jurisdiction. It is fair to say that if there is no actual basis upon which the Full Bench may form an opinion then it is not open to it to form such an opinion on the basis of mere instinct or gut feeling. But there will be cases when even in the absence of formal objection the material placed before the Commission pursuant to section 55(1) will provide a basis for an opinion to be formed that registration is not necessary or desirable. In my opinion there is no doubt that an onus (or perhaps obligation would be a preferred term) rests upon each applicant to establish the facts referred to in paragraphs (a) and (f) of section 55(4). Some of these facts will be capable of proof from a mere perusal of the applicant's rules but others will require evidence in some form and unless such evidence is produced there will be no basis upon which the Full Bench can be satisfied as to the required details. By the same token, a society seeking registration needs to be able to establish that it is indeed one of those societies to which section 53(1) or section 54(1) refers. Unless the applicant is such a society it cannot be registered as a union and this would be so whether or not any objection to registration is made. One of the facts, and indeed the first fact, which must be established by a society claiming entitlement to be registered pursuant to section 53(1) is that it is a society 'consisting of not less than 200 employees' associated for one or other of the specified purposes.

225 Similar observations have been made about the ascertainment of the scope of Commonwealth law on constitutional grounds. In ***Gerhardy v Brown*** [1985] HCA 11; (1985) 159 CLR 70 (Brennan J) observed (141)-(142):

> There is a distinction between a judicial finding of a fact in issue between parties upon which a law operates to establish or deny a right or liability and a judicial determination of the validity or scope of a law when its validity or scope turns on a matter of fact. When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants. When the validity of a State law is attacked under s 109 of the *Constitution* and the scope of the Commonwealth law with which it is thought to be inconsistent depends on matters of fact (which I shall call the statutory facts) the function of a court is analogous to its function in determining the constitutional validity of a law whose validity depends on matters of fact. In *Breen v. Sneddon* (1961) 106 CLR 406 (411) Dixon CJ said, pointing to the distinction between constitutional facts and facts in issue between the parties—
>
> > It is the distinction between, on the one hand, ordinary questions of fact which arise between the parties because one asserts and the other denies that events have occurred bringing one of them within some criterion of liability or excuse set up by the law and, on the other hand, matters of fact upon which under our peculiar federal system the constitutional validity of some general law may depend. Matters of the latter description cannot and do not form issues between parties to be tried like the formal questions. They simply involve information which the Court should have in order to judge properly of the validity of this or that statute or of this or that application by the Executive Government of State or Commonwealth of some power or authority it asserts.

226 It follows therefore, in this matter if the Full Bench is of the view the proposed variation to the rules of the Police Union will result in overlapping coverage, the Full Bench, after properly considering all of the material before it, must be positively satisfied that there is good reason, consistent with the objects of the Act, to authorise the variation or variations. This is not a matter of considering where the onus lies in the strict sense but is a matter of the proper consideration of the evidence that has been put before the Full Bench by the Police Union and the CSA.

7.2 Will overlapping coverage occur if the proposed variations are authorised

227 It is clear that if proposed r 5.1(c) is authorised by the Full Bench that overlapping coverage will be created as it will allow the Police Union to enrol as members a substantial number of public service officers employed by the Commissioner of Police in the department of the Western Australia Police. However whether overlapping coverage will arise in respect of police auxiliary officers if proposed r 5.1(a) is allowed depends upon the resolution of two issues. They are, firstly, whether police auxiliary officers are at law employees, and, secondly, whether the eligibility for member rules of the CSA currently enable the CSA to enrol police auxiliary officers as members.

A Are police auxiliary officers employees

228 The question whether police officers in Western Australia were employees was finally put to rest by the Full Bench in ***The Honourable Minister of Police v Western Australian Police Union of Workers*** (2000) 81 WAIG 356. In the judgment of Sharkey P, his Honour set out the following material points of law [79] - [90]:

(a) At common law, a constable or police officer was regarded as the holder of a public office and was regarded as exercising an original and not delegated authority: ***Enever v R*** and ***Attorney-General for New South Wales v The Perpetual Trustee Co (Ltd)*** (HC) (1952) 85 CLR 237.

(b) A police constable is not a servant employed to do a master's bidding: ***Attorney-General for New South Wales v The Perpetual Trustee Co (Ltd)*** (Webb J) (273).

(c) Police are servants of no one but the law itself*:* ***R v Metropolis Police Commissioner; Ex parte Blackburn*** [1968] 2 QB 118 (Lord Denning MR) (136) and (Salmon LJ) (138).

(d) The office of police constable is a creature of the common law and statute.

229 The Full Bench found that police officers appointed under the Police Act are not employees. When Sharkey P made this finding, he had regard to the fact that there is no contract of employment and to the following incidents of service of police officers created by the Police Act. These are as follows [66] - [75]:

(a) Commissioned officers are appointed by the Governor and shall be subject to the control and discipline of the Commissioner of Police: s 6 of the Police Act. Non-commissioned officers and constables are appointed by the Commissioner of Police: s 7 of the Police Act.

(b) The Commissioner of Police is vested with the control and management of the Police Force: s 5 of the Police Act.

(c) All officers and constables must subscribe to an oath before holding office: s 10 of the Police Act.

(d) The engagement is to:

  (i) well and truly serve … the Queen … until legally discharged;

  (ii) keep and preserve the peace, and prevent all offences: s 10 of the Police Act.

(e) No non-commissioned officer or constable can resign his office or withdraw from the duties of his office, notwithstanding his period of engagement has expired unless expressly authorised in writing by the Commissioner of Police or unless he has given a period of notice prescribed by s 12 of the Police Act.

(f) Only the Governor may remove from office a commissioned officer, and the Commissioner of Police, subject to the Minister's approval, may remove any non-commissioned officer or constable.

230 Turning to the statutory scheme that enables the appointment of police auxiliary officers, when regard is had to incidents of service of police officers it is difficult to say that police auxiliary officers exercise original authority like police officers rather than delegated authority. Nor can the 'office' of a police auxiliary officer be characterised as the law itself. Section 38G, s 38H and s 38I of the Police Act provide:

38G. Appointing police auxiliary officers

(1) The Commissioner may appoint any person as a police auxiliary officer.

(2) A police auxiliary officer's appointment is —

(a) for such period as the Commissioner decides; and

(b) on such terms and conditions of service, including remuneration, as the Commissioner decides from time to time; but they must not be less favourable than is provided for in —

(i) any applicable award, order or agreement under the *Industrial Relations Act 1979*; or

(ii) the *Minimum Conditions of Employment Act 1993*.

(3) The Commissioner may at any time amend the terms of a police auxiliary officer's appointment referred to in section 38H(3).

(4) Subject to Part IIB, the Commissioner may at any time cancel the appointment of a police auxiliary officer.

(5) The appointment of a police auxiliary officer, its terms and conditions and any cancellation of it must be in writing and signed by the Commissioner.

(6) The Commissioner must issue a police auxiliary officer with a certificate of his or her appointment as a police auxiliary officer.

(7) A police auxiliary officer whose appointment as such ceases must return any certificate issued to him or her under subsection (6) to the Commissioner.

Penalty: a fine of $500.

38H. Functions of police auxiliary officers

(1) Unless the document appointing a police auxiliary officer says otherwise —

(a) a police auxiliary officer has all of the powers, duties and obligations that a police officer or a member of the Police Force has under any written law other than this Act; and

(b) any authorisation, exemption or exception in any written law other than this Act that applies to a police officer or a member of the Police Force applies to a police auxiliary officer,

unless that written law expressly says otherwise.

(2) If a provision of a written law other than this Act refers to a police officer or to a member of the Police Force but does not confer a power, duty or obligation on, or create an authorisation, exemption or exception for, a police officer or a member of the Police Force, the provision is to be taken to include a reference to a police auxiliary officer, unless the contrary intention appears in the provision.

(3) The document appointing a police auxiliary officer may limit the powers, duties or obligations of the officer or the application of any authorisation, exemption or exception to the officer in any way the Commissioner thinks fit.

(4) Without limiting subsection (3) or section 38G(3), the document appointing a police auxiliary officer may do any or all of the following —

(a) limit the powers that the officer may exercise;

(b) limit when the officer may exercise his or her powers or any of them;

(c) limit where in the State the officer may exercise his or her powers or any of them;

(d) limit the circumstances in which the officer may exercise his or her powers or any of them;

(e) limit the offences in respect of which the officer may exercise his or her powers or any of them;

(f) limit the purposes for which the officer may exercise his or her powers or any of them;

(g) limit or prohibit the possession or use of any thing that the officer would otherwise be authorised under a written law to possess or use, despite the written law.

38I. Police auxiliary officers not in the Police Force

(1) A police auxiliary officer is not a member of the Police Force of Western Australia for the purposes of this Act.

(2) Subsection (1) does not affect the operation of section 38H(1) or (2) or 136.

231 Although the Commissioner of Police is vested with the control and management of the Police Force, the statutory obligation to do so is necessary only to maintain proper standards of conduct and not to enable the Commissioner of Police to direct a police officer to execute his or her duties in the same way as an employer may direct an employee to perform particular duties.

232 Whereas a police officer derives his or her original authority from the oath of engagement and from the common law powers of a constable, the powers, duties and functions of a police auxiliary officer arise only under a written law of the State pursuant to the operation of s 38H(1) of the Police Act and can be expressly limited by the Commissioner of Police pursuant to s 38H(3) of the Police Act. A sworn police officer is required by his or her oath to uphold the law and keep the peace 24 hours a day,

seven days a week, whereas the Commissioner of Police may, among other matters pursuant to s 38H of the Police Act, limit when the police auxiliary officer may exercise his or her powers. Police Commissioner K J O'Callaghan has in fact recently done so (Exhibit 9).

233 As police auxiliary officers:

(a) do not take an oath of office;

(b) are not conferred with any powers or duties at common law;

(c) can have their authority to carry out the statutory powers, duties and obligations of a sworn police officer limited at the discretion of the Commissioner of Police; and

(d) their terms and conditions of service are (subject to the prescribed minimum safety net in s 38G(2)(b) of the Police Act), to be determined by the Commissioner of Police;

the nature of the office of police auxiliary officer can be said to arise by way of a contract of service, as these incidents of service, in particular the statutory right to restrict statutory powers, duties and obligations of a police officer that are carried out by a police auxiliary officer raise a clear inference that the Commissioner of Police is the employer of a police auxiliary officer. This is because the Commissioner of Police is expressly empowered to determine each and every power and function of each police auxiliary officer appointed under the Police Act in much the same way as any other employer can determine the duties and functions to be carried out by an employee.

234 It is also notable that the power conferred on the Commissioner of Police to appoint a police auxiliary officer by s 38G of the Police Act is similar to the power conferred on the Commissioner of Police as an employing authority to appoint public service officers (other than executive officers), pursuant to s 4(3) and s 64(1) of the PSM Act. Section 64(1) of the PSM Act relevantly provides:

> Subject to this section and to any binding award, order or industrial agreement under the *Industrial Relations Act 1979* or employer-employee agreement under Part VID of the *Industrial Relations Act 1979*, the employing authority of a department or organisation may in accordance with the Commissioner's instructions appoint for and on behalf of the State a person as a public service officer (otherwise than as an executive officer) on a full-time or part-time basis —
>
> (a) for an indefinite period as a permanent officer; or
>
> (b) for such term not exceeding 5 years as is specified in the instrument of his or her appointment.

235 It is well established that public service officers appointed under s 64(1) of the PSM Act are employees. Both police auxiliary officers appointed under the Police Act and public service officers appointed under the provisions of the PSM Act are appointed as statutory officers and most are at the lower levels of those who can be said to be servants of the Crown, but in neither case can they be said to be the holders of an independent office of the Crown.

B Does the CSA's eligibility rule provide coverage of police auxiliary officers

236 The principles that apply to the construction of rules of an organisation are settled. They were summarised recently by Ritter AP in ***Stacey v Civil Service Association of Western Australia (Inc)*** (2007) 87 WAIG 1229 [90] - [93]:

> 90 Brinsden J with whom Smith J agreed in Hospital Salaried Officers Association of Western Australia (Union of Workers) v The Hon Minister for Health (1981) 61 WAIG 616 at 618 said:-
>
> > 'Generally speaking the correct approach to the interpretation of a union rule is to interpret it in the same manner as any other 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 p522. 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.'
>
> 91 These observations have been cited and applied in s66 applications. An example is Williams v SDAEAWA (2005) 85 WAIG 1963.
>
> 92 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)

93 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.

237 To determine the ordinary or popular meaning of the CSA's eligibility rule requires an examination of the use of the words used in that rule in the industry the CSA operates. To do so requires a consideration of the statutory provisions that create categories of officers the rules of the CSA seek to cover. Whether police auxiliary officers are covered by the eligibility rule of the CSA requires a consideration of the statutory character of the office of police auxiliary officer as an employee and the Commissioner of Police as an employer of a police auxiliary officer. It is common ground that police auxiliary officers are not employed under the provisions of the PSM Act, yet it appears that they can be characterised as 'government officers' under s 80C(1)(b) of the Act as they are employed on the staff of a public authority. A 'public authority' is defined in s 7 of the Act to mean:

> the Governor in Executive Council, any Minister of the Crown in right of the State, the President of the Legislative Council or the Speaker of the Legislative Assembly or the President of the Legislative Council and the Speaker of the Legislative Assembly, acting jointly, as the case requires, under the *Parliamentary and Electorate Staff (Employment) Act 1992*, the Governor or his or her delegate under the *Governor's Establishment Act 1992*, State Government department, State trading concern, State instrumentality, State agency, or any public statutory body, corporate or unincorporate, established under a written law but does not include a local government or regional local government;

238 For a police auxiliary officer to be characterised as a 'government officer' within the meaning of s 80C(1)(b) of the Act, a police auxiliary officer must be employed by a public authority; in this case, a State Government department or an unincorporated public statutory body. Section 38H of the Police Act provides that if a provision of a written law other than the Police Act refers to a member of the Police Force, the provision is to be taken to include a reference to a police auxiliary officer. Section 38I of the Police Act provides that a police auxiliary officer is not a member of the Police Force for the purposes of the Police Act. Item 5 of Schedule 1 of the PSM Act does not refer to a member of the Police Force, but to the entity of the Police Force within the meaning of the Police Act. Except for the operation of s 38H(1), s 38H(2) or s 136 of the Police Act a police auxiliary officer is not part of the entity of the Police Force. Section 38H(1) and s 38H(2) of the Police Act is only concerned with the function of police auxiliary officers under other written laws and not with the entity of the Police Force per se. Also the definition of 'member of the Police Force' in s 136 of the Police Act is only for the purposes of s 137 and s 138 of the Police Act which deals with actions in tort against a member of the Police Force. Except for these extended definitions of a member of the Police Force in s 136 of the Police Act, a police auxiliary officer does not form part of the Police Force and cannot be said to be part of the Police Force within the meaning of the Police Act for the purposes of Item 5 of Schedule 1 of the PSM Act.

239 As set out above, pursuant to s 4(3) of the PSM Act, the Commissioner of Police is the chief executive officer of the department now known as the Western Australia Police. Police auxiliary officers are not employed by the Commissioner of Police as the chief executive officer of the Western Australia Police. They are employed or engaged by the Commissioner of Police under s 38G of the Police Act. However, the definition of 'government officer' also includes a person employed by an unincorporated public statutory body. Although the Police Union contends the Commissioner of Police is an individual and not an instrumentality or authority, that distinction only applies to the person who holds the office of Commissioner of Police and not to the office itself. The office of Commissioner of Police is a creature of statute created by s 5 of the Police Act. Section 5 of the Police Act empowers the Governor to appoint a fit and proper person to be Commissioner of Police throughout the State. The office of Commissioner of Police is unincorporated. The office carries with it statutory powers to perform a number of functions including the making of particular rules, orders and regulations (with the approval of the Minister): s 9 of the Police Act. When the provisions of the Police Act are examined as a whole it is clear that as the head of an arm of the law that the office of the Commissioner of Police is a public statutory unincorporated body. Also the person holding the office of Commissioner of Police also has the power to examine under oath any member of the Police Force, a police auxiliary officer and others upon a charge of an offence against discipline and if a charge is proven, to impose penalties including the imposition of a fine: s 23 of the Police Act.

240 When r 6(a) of the CSA's rules are considered in light of these findings the following observations can be made.

(a) As r 6(a)(3) of the rules of the CSA extends to any of the established branches of the Public Service, including trading concerns, business undertakings and government institutions controlled by boards, does the rule extend beyond departments established under s 35 of the PSM Act, to organisations that employ public service officers and other employees who are not public service officers. To determine this issue it is useful to look at an organisation that is composed of employees only. One such example is the categories of employees of a board of a hospital. The Public Service is comprised in part by many government institutions such as boards established under s 15 of the *Hospitals and Health Services Act 1927* (WA) who employ public service officers as senior executive officers, government officers and wages employees: s 19 of the *Hospitals and Health Services Act*. Yet government officers who are not public service officers employed by boards and wages employees are not in the

established branches of the Public Service, they are within the established branches of the public sector. The Public Service and the public sector are not the same. Section 3 of the PSM Act defines the 'Public Service' as the Public Service as constituted under s 34 of the PSM Act. Section 34 of the PSM Act provides:

> The Public Service is constituted by —
>
> (a) departments; and
>
> (b) SES organisations, insofar as any posts in them, or persons employed in them, or both, belong to the Senior Executive Service; and
>
> (c) persons employed under this Part, whether in departments or in the Senior Executive Service in SES organisations, or otherwise.

(b) Whereas s 3 of the PSM Act defines the 'public sector' to mean:

> (a) the agencies; and
>
> (b) the ministerial offices; and
>
> (c) the non-SES organisations;

(c) An 'agency' is in turn defined in s 3 of the PSM Act to mean:

> (a) a department; or
>
> (b) a SES organisation;

(d) When the operative words used in r 6(a)(3) are applied to boards established under the *Hospitals and Health Services Act* this sub-rule must be read to apply only to those employed in the Public Service by a hospital board, that is, the senior executive officers.

(e) When this analysis is applied to the department of the Western Australia Police, it is apparent that the police service is composed of more than public service officers. On one view sworn police officers may not be said to be strictly part of the department as a legislative entity because of the effect of Item 5 of sch 1 of the PSM Act. However it is not necessary in these proceedings to resolve that issue. In any event, the 'department' in a general sense and not in the strict sense contemplated by s 34 of the PSM Act is comprised of public service officers, the Police Force and other officers appointed by the Commissioner of Police under the Police Act. As r 6(a)(3) only extends to public service officers, only part of the organisation can be said to be in an established branch of the Public Service. It follows therefore that as police auxiliary officers are not public service officers, we are not satisfied that the CSA has coverage of police auxiliary officers under r 6(a)(3).

(f) The issue then arises whether r 6(a)(7) provides constitutional coverage of police auxiliary officers. Rule 6(a)(7) provides the CSA with constitutional coverage of persons employed by any unincorporated instrumentality or authority acting on behalf of or in the interest of the State of Western Australia. In ***The Civil Service Association of Western Australia Inc v St John Ambulance Association in Western Australia Inc*** Fielding C considered whether the respondent in that matter was an instrumentality or authority within the meaning of r 6(a)(7) of the rules of the CSA and observed (316):

> I readily accept that an instrumentality or authority for these purposes connotes something wider than an agency of the Crown [cf: Committee of Direction of Fruit Marketing v. Delegate of the Australian Postal Commission *(supra)*]. Employees of the Crown are elsewhere provided for in the Rule. An instrumentality or authority in this context is an instrument or agency of Government in the broad sense of that term. What is comprehended is a body which is a creature of Government established to perform Governmental functions, not merely an agency in which Government has or may have an interest. Ordinarily such bodies comprise statutory commissions, boards, committees, tribunals and the like which have of recent years become a fashionable means of discharging tasks formerly undertaken more directly by Government departments.

241 Fielding C then went on to observe (317):

> What makes a body an instrumentality or authority for the purposes of the Applicant's Membership Rule is not only that it performs a traditional Governmental function but that it is controlled by or at least answerable to Government.

242 With respect, we do not agree that the last observation is an entirely comprehensive finding of what constitutes an instrumentality or authority, as the words 'or in the interest of the State' in r 6(a)(7) extend this category of membership beyond those instrumentalities or authorities of which the State has direct or indirect control of, to those that act on behalf of or in the interest of government. We do, however, agree that this category of eligibility is intended to cover bodies that are a creature of government that are established to perform functions that are 'governmental' in nature. As it is clear that the Commissioner of Police, through the control and management of the Police Force and through the appointment of police auxiliary officers and other officers under the Police Act, delivers core government functions, the CSA has constitutional coverage of police auxiliary officers under this sub-rule as it is clear the Commissioner of Police in delivering these functions does so on behalf of government.

C Does the exclusion in r 6(b)(i) of the rules of the CSA exclude the CSA's constitutional coverage of public service officers employed in the department and police auxiliary officers

243 There were no express duties set out for the classifications and callings in *The Police Award 1965* as at 1 March 1985. However, it can be inferred that the duties of police officers at that date included the common law duties of a peace officer of

the Crown and all express statutory functions conferred by legislation. It also appears from the evidence given in these proceedings that police officers also carried out a wide variety of administrative duties.

244 It would be an odd result to construe the exclusion in r 6(b)(i) of the rules of the CSA, to exclude public service officers employed in the department of the Western Australia Police, as these officers form part of the core and heart of those persons eligible to be members of the CSA. However, whether such a consequence has or could result, requires an analysis of the powers and functions of public service officers in the department of the Western Australia Police.

245 To determine whether the duties of any public service officer or police auxiliary officer are the same or substantially similar to any callings or classifications mentioned in *The Police Award 1965* as at 1 March 1985 within the meaning of r 6(b)(i) of the rules of the CSA, the Full Bench is required to consider the functions and powers of the offices mentioned in *The Police Award 1965* as at 1 March 1985 and each public service position in the department and each category of police auxiliary officers. What constitutes 'substantially similar duties' must be a matter of degree.

246 Whilst the word 'substantially' could be said to be ambiguous, it must mean not insubstantial in a relative or qualitative sense. The addition of the word 'similar' to 'substantially' in r 6(b)(i) adds generality to the phrase so that it means less than all duties of the callings or classifications in *The Police Award 1965* as at 1 March 1985, but must amount to a considerable number of duties that are generally the same as the duties of the callings and classifications that were in *The Police Award 1965* at the material date.

247 Having considered the evidence adduced in these proceedings in respect of the functions and powers of positions of public service officers in the department, it is difficult to make any definitive findings about each public service position in the department of the Western Australia Police given the generality of the evidence. One definitive matter is clear and that is if public service officers do not take an oath of office and cannot exercise any of the functions or powers of a peace officer of the Crown at common law or any core statutory powers of law enforcement (which are at the heart of enforcement functions and powers of a sworn police officer), they cannot be said to carry out duties which are the same or substantially similar to any callings or classifications mentioned in *The Police Award 1965* as at 1985. Whilst r 6(b)(i) of the rules of the CSA contemplates that the duties of the callings and classifications in *The Police Award 1965* as at 1 March 1985 need not be the same, it cannot be said that for r 6(b)(i) of the rules of the CSA to operate, the callings or classifications of a public service officer must have attached to them duties which contain among those duties, all of the duties of callings and classifications mentioned in *The Police Award 1965* as at 1 March 1985. Yet to make a finding that the relevant callings and classifications are substantially similar, there must be a similarity of core functions of each office to make a finding that the classification or callings of any public service officers are substantially similar. Without core law enforcement powers or functions, public service officer's callings and classifications cannot be said to be substantially similar to the duties of a sworn police officer who comprised the callings and classifications in *The Police Award 1965* as at 1 March 1985.

248 Having said that, however, some of the duties of some public service officers may come within this category. Like police auxiliary officers, some public service officers in the department can be authorised to carry out some functions of investigating or prosecuting offences pursuant to s 9 of the *Criminal Investigation Act*. Section 9 of the *Criminal Investigation Act* provides:

> (1) For the purposes of this Act and in particular the definition of *public officer* in section 3(1), another Act or the regulations made under this Act may prescribe —
>
> (a) an office to which people are appointed under a written law for a public purpose and the functions of which are or include investigating or prosecuting offences; and
>
> (b) in respect of that office, some or all of the powers in this Act that a holder of that office may exercise, being powers that this Act expressly provides may be exercised by a public officer.
>
> (2) A public officer may only exercise a power in this Act in relation to an offence if —
>
> (a) this Act provides that the power may be exercised by a public officer; and
>
> (b) the office held by the public officer has been prescribed under subsection (1)(a); and
>
> (c) the power is one that the officer may exercise because it is prescribed under subsection (1)(b); and
>
> (d) the offence is one that the officer, by virtue of being such an officer, is authorised to investigate or prosecute.
>
> (3) If a public officer, under subsection (2), exercises a power in this Act, any enactment that protects the officer or the State from liability for the officer's acts or omissions is to be taken to operate as if those acts and omissions included the officer's acts and omissions when exercising the power.

249 The *Criminal Investigation Act* provides for statutory powers of among other matters, entering premises and searching people and places and vehicles with and without a search warrant; forensic procedures; interviewing suspects; arrests with and without a 'warrant'; and the seizure of property. However, insufficient evidence has been adduced in these proceedings, as to what, if any, of these functions public service officers in the department have been authorised to carry out.

250 Turning to police auxiliary officers, s 38H of the Police Act contemplates that each police auxiliary officer is to have all the powers, duties and obligations of a police officer under any written law of the State of Western Australia unless the Commissioner of Police determines otherwise when appointing the police auxiliary officers.

251 If the Commissioner of Police when appointing any police auxiliary officer limits the functions of a police auxiliary officer so as to exclude the police auxiliary officer from carrying out a substantial number of the statutory law enforcement powers, duties and obligations, a finding may be open that the powers and functions of the police auxiliary officer are not substantially the same as the duties of the callings and classifications in the Police Award as at 1 March 1985.

252 In one Certificate of Appointment provided to the Full Bench as an example of the type of certificate that has been made, the powers, duties and obligations of a police auxiliary officer are almost all encompassing. These are stated as (Exhibit 9):

> For the purposes of this Certificate of Appointment:
>
> 'Certificate of Appointment' refers to this Certificate of Appointment.
>
> 'Formally on Duty' refers to the period in which you are working as a Police Auxiliary Officer consistent with:
>
> - a duty roster;
> - approved overtime;
> - approved recall to duty; or
> - any other periods as may be specifically required by your Supervisor.
>
> 'Police Officer' means a member of the Police Force of Western Australia appointed under Part 1 of the *Police Act 1892*.
>
> 'Terms and conditions of employment' refers to any contract or applicable industrial agreement or award that is made in respect to the wages, allowances and conditions of Police Auxiliary Officers.
>
> 'Western Australia Police' means the Police Service and the Police Force of Western Australia.
>
> Your appointment terms and conditions are in accordance with your offer of appointment and terms and conditions of employment dated ……, subject to the terms, conditions and limitations specified in this Certificate of Appointment.
>
> Your appointment is valid from the date of this Certificate of Appointment. Your appointment may be cancelled at any time.
>
> You are not a Police Officer by virtue of your appointment. As such, you should not at any time represent yourself as being a Police Officer.
>
> As a Police Auxiliary Officer, you have all of the powers, duties and obligations that a Police Officer has under any written law, other than the *Police Act 1892* and any authorisation, exemption or exception in any written law, other than the *Policed Act 1892* applies to you, subject to the following limitations:
>
> 1. you may only exercise these powers or perform these duties or obligations; and
> 2. be entitled to these exemptions or exceptions,
>
> when undertaking the duties of a Police Auxiliary Officer and limited only to while you are formally on duty.
>
> Additionally, the exception contained in section 8(1)(d) of the *Firearms Act 1973* applies to you as a Police Auxiliary Officer only to the extent that you possess a firearm for the purposes of:
>
> - dealing with stolen or lost property or evidentiary exhibits; and
> - cleaning firearms within the Western Australia Police armoury,
>
> as may be required from time to time. The exception under section 8(1)(d) of the *Firearms Act 1973* does not apply to you in respect to the use of a firearm. That is, you are not allowed to discharge or otherwise use a firearm whilst formally on duty.

253 In another example of a Certificate of Appointment provided to the Full Bench, the powers, duties and obligations conferred on a police auxiliary officer holding that position are very limited. This Certificate of Appointment provides (Exhibit 9):

> Pursuant to Part IIIB of the *Police Act 1892*, a Police Auxiliary Officer – Offender Review is appointed in accordance with their offer of appointment and terms and conditions of employment dated, and subject to the terms, conditions and limitations specified in this Certificate of Appointment.
>
> For the purposes of this Certificate of Appointment:
>
> "Certificate of Appointment" refers to this Certificate of Appointment.
>
> "Terms and conditions of employment" refers to any contract or applicable industrial agreement or award that is made in respect to the wages, allowances and conditions of Police Auxiliary Officers.
>
> "Police Officer" means a member of the Police Force of Western Australia appointed under Part I of the *Police Act 1892*.
>
> "Western Australia Police" means the Police Service and the Police Force of Western Australia.
>
> An appointment is valid from the date of each individual's Certificate of Appointment, and may be cancelled at any time by the Commissioner of Police.
>
> A Police Auxiliary Officer is not a Police Officer by virtue of their appointment. As such, they should not at any time represent themselves as being a Police Officer.
>
> A Police Auxiliary Officer has all of the powers, duties and obligations that a Police Officer has under any written law, other than the *Police Act 1892* and any authorisation, exemption or exception in any written law, other than the *Police Act 1892* applies to Police Auxiliary Officers, only in respect to the performance of duties under the *Sentence Administration Act 2003*.

254 It is irrelevant that police auxiliary officers perform other duties such as administrative functions usually carried out by public service officers, as historically police officers have often and consistently carried out administrative functions and duties. Nor is it relevant that police auxiliary officers are not members of the Police Force as the consequence of the operation of s 38I of the Police Act is simply that police auxiliary officers are not police officers and not part of an entity that is not an organisation

under the PSM Act. They are, however, subject to the same disciplinary regime as police officers under s 9, s 13, s 23, pt IIA and pt IIB of the Police Act. They also have the same protection from personal liability as police officers under the Police Act.

255 The core duties of police officers in Western Australia at least at 1 March 1985 and prior to that time consisted of common law functions of a peace officer and all statutory powers, duties and obligations. The first Certificate of Appointment set out in these reasons at [252] establishes that the only limitations imposed on this class of police auxiliary officers appointed by the Commissioner of Police, are that a police auxiliary officer may only exercise the statutory functions given under s 38H(1) of the Police Act when undertaking the duties of a police auxiliary officer and only while formally on duty (Exhibit 9). Consequently, the only powers and functions of a sworn officer that a police auxiliary officer of this class does not have, are the powers and functions of an officer of the peace at common law and the duty to uphold and enforce statutory functions of a police officer when off duty. They however substantially perform core police officer functions and not simply policing type functions. Consequently, it follows all police auxiliary officers who have been appointed by the Commissioner of Police who have been appointed on such terms are likely to have been appointed to carry out duties which can be said to be substantially similar to the duties of the callings and classifications in *The Police Award 1965* as at 1 March 1985.

256 However, it would appear that the CSA exclusion rule does not apply to all police auxiliary officer positions. The terms of appointment of some police auxiliary officers have been extensively limited by the Commissioner of Police. This class of police auxiliary officer would include any police auxiliary officer who is appointed in the terms stated in Exhibit 9 to the position of Police Auxiliary Officer – Offender Review which is set out in [253] of these reasons. This class of police auxiliary officer has been given very limited powers of a police officer. Under the terms of that appointment a police auxiliary officer only has the powers, duties and obligations of a police officer in respect of the performance of duties under the *Sentence Administration Act 2003* (WA).

257 Under the *Sentence Administration Act*, a police officer has the following functions:

(a) Pursuant to s 98(3) of the *Sentence Administration Act*, a member of the Police Force who holds a designated position (as defined in the *Witness Protection (Western Australia) Act 1996* (WA)) may be an honorary community corrections officer for the purposes of supervising an offender who is a participant in the State Witness Protection Program.

(b) Under s 101 of the *Sentence Administration Act*, a member of the Police Force may, if requested by the Chief Executive Officer of the agency administrating pre-sentence orders, community orders, sentences of conditional suspended imprisonment, parole orders, re-entry release orders, work and development orders and community correction centres or by a community corrections officer, assist in the exercise or performance of any function conferred or imposed by the *Sentence Administration Act*.

(c) Police officers are members of the Prisoners Review Board: s 103 of the *Sentence Administration Act*.

258 In the job position description for the position of Police Auxiliary Officer – Offender Review, it is stated under the heading 'Context and Scope' (Exhibit H, Attachment L):

> The prime focus of the position is to ensure ongoing provision of quality WAPOL representation at all Prisoners Review Board and Juvenile Review Board meetings. This requires the position to assess Prisoner Files compiled by the Boards and make recommendations concerning the release of prisoners.
>
> The position provides timely advice to the Board and as an equal member on the Board, the position is required to state whether WAPOL denies, recommends or defers a prisoner's release.
>
> Additionally, the position compiles reports and briefing notes for the information of the Prisoner Review Board and the Supervised Release Review Board.
>
> Within the agency the position liaises with WAPOL personnel at all levels. Externally the position liaises with the Prisoners Review Board, Supervised Release Review Board, Department of Corrections and Community Justice Services.
>
> DECISION MAKING ROLE
>
> The incumbent of this position will be granted specific police powers to carry out the functions of the position.
>
> The Prisoners Review Board and the Supervised Release Review Board assign cases to be considered, timeframes, expected outcomes and the policy and legal parameters within which the incumbent operates.
>
> This position has considerable autonomy in ensuring that the needs and expectations of the reflective boards are met on an ongoing basis as required by statute law and represents the WAPOL on such matters.

259 As all of the functions of a police officer under the *Sentence Administration Act* are functions of community corrections officer and other non-police officers, an inference cannot be drawn that the duties of a police auxiliary officer appointed on these terms are substantially similar to the duties of the callings or classifications in *The Police Award 1965* as at 1 March 1985. In addition, it is plain from the stated requirements in the job description form for this position that whilst the position requires policing knowledge the work to be performed is of a specialist administrative nature.

260 For these reasons we are of the opinion that at the time of the hearing of this matter that the CSA has no constitutional coverage of some police auxiliary officers. The consequence of this finding is that s 55(5) of the Act can have no application to the police auxiliary officers to whom the CSA has no coverage, as no overlapping coverage will result if registration of proposed r 5.1(a) is permitted by the Full Bench. However, given our finding in respect of the position of Police Auxiliary Officer – Offender Review, the CSA is likely to have coverage of some police auxiliary officers. Therefore, to grant the application in respect of proposed r 5.1(a) would create overlapping coverage in respect of some police auxiliary officers only.

7.3 Is it practicable to permit overlapping coverage of public service officers employed in the department of the Western Australia Police

261 As public service officers are eligible to belong to the CSA, allowing proposed r 5.1(c) would give coverage of public service officers to the Police Union and thus result in overlapping coverage of public service officers.

262 Both the Police Union and the CSA recognise that s 55(5) of the Act obliges the Full Bench to refuse the application unless the Full Bench is satisfied that there is good reason, consistent with the objects described in s 6 of the Act, to permit the amendment. Relevantly, object 6(e) of the Act is:

> [T]o encourage the formation of representative organisations of employers and employees and their registration under this Act and to discourage, so far as practicable, overlapping of eligibility for membership of such organisations.

263 The reluctance of the Commission to create overlapping coverage between registered organisations is long standing. Yet s 55(5) of the Act when read with s 6(e) of the Act is not a prohibition on the Commission creating overlapping coverage. Section 6(e) of the Act contemplates that in some circumstances it might not be 'practicable' to discourage overlapping of eligibility for membership. In ***Re Sharkey; Ex parte Burswood Resort (Management) Ltd***, Ipp J recognised the particular circumstances may be such that it would not be practicable to discourage overlapping of eligibility for membership and that the registration of a competing union should be allowed. His Honour stated (280):

> Nevertheless, once permission to register an organisation will result in overlapping of eligibility for membership, before the Full Bench can determine that there is 'good reason' within the meaning of s 55(5) to permit registration, it has to determine that it is not practicable, within the meaning of s 6(e), to discourage overlapping.

264 Later, His Honour observed (280):

> … if it is practicable to discourage overlapping, then, in my view, there could not be good reason, consistent with s 6(e), to permit registration.

265 However 'consistent' with the objects of the Act does not mean to advance the objects of the Act: ***Restaurant and Catering Industry Association of Employers of Western Australia Inc v Liquor, Hospitality and Miscellaneous Union, Western Australian Branch*** (2004) 85 WAIG 32 (36) (Sharkey P).

266 It follows therefore that the Full Bench is required to consider whether it is practicable within the meaning of s 6(e) to discourage overlapping. The object of the Act in s 6(e) is to discourage overlapping of eligibility for membership 'so far as practicable'. The word 'practicable' means 'capable of being put into practice, done, or effected, especially with the available means or with reason or prudence' (see the Macquarie Dictionary).

267 Both the Police Union and the CSA are very competent, well resourced and staffed organisations who serve their members effectively. One of the 'core' roles of the CSA is to service public service officers. The nature of the public service is that it is an 'industry' within the meaning of s 7 of the Act, which defines 'industry' to include:

> (a) any business, trade, manufacture, undertaking, or calling of employers;
>
> (b) the exercise and performance of the functions, powers, and duties of the Crown and any Minister of the Crown, or any public authority;
>
> (c) any calling, service, employment, handicraft, or occupation or vocation of employees,
>
> whether or not, apart from this Act, it is, or is considered to be, industry or of an industrial nature, and also includes —
>
> (d) a branch of an industry or a group of industries;

268 The Police Union is a craft union as it represents a discrete occupational group. The nature of appointment of a public service officer, is that whilst each public service officer is appointed by a discrete employing authority of a department or organisation under s 64 of the PSM Act, the Public Service is constituted under s 34 of the PSM Act by departments, SES organisations and persons employed under pt 3 of the PSM Act. Under s 65 and s 66 of the PSM Act public service officers can be transferred or seconded to other organisations. What can be drawn from these provisions is that it is contemplated that public service officers are able to move from one department or organisation to another. This is reflected in the public service general agreements that are industrial agreements registered under s 41 of the Act and apply to all public service officers across the public service. The general agreements contain a common set of core conditions and salaries which assists in the transferability of public service officers and creates equity in work value.

269 The CSA is the sole respondent union to the general agreements. In our opinion it would not be practical for the Police Union to be able to enrol as members public service officers as it would not be practicable for the Police Union to engage in negotiations on behalf of any public service officers it represents in relation to the common set of core conditions and salaries that should apply to all public service officers in the public service. Such representation would be further complicated by the fact that proposed r 5.1(c) does not seek to cover all public service officers in the department of the Western Australia Police. It is also notable that there is no evidence that any public service officer employed in the department wishes to join the Police Union. If overlapping coverage of public service officers was to be allowed, the potential for industrial disharmony in these circumstances is substantial.

270 In addition we are not satisfied that overlapping coverage of public service officers is practicable for the reason that the form of proposed r 5.1(c) and the alternative proposed amendments would contribute to disharmony. There would be uncertainty raised in relation to the categories of public service positions from which the Police Union would be entitled to seek members.

271 Nor are we persuaded that proposed r 5.1(c) should be amended to confine it to custody officers. Custody officers are also public service officers whose terms and condition of employment are provided for in the PSM Act, the 2008 General Agreement and the 2009 ASA. As there are now only 29 custody officers employed in the department, to enable overlapping

coverage of these officers could cause industrial disharmony as the Police Union would be entitled to represent any custody officer who chooses to become a member of the Police Union in negotiations for the next general agreement and the next agency specific agreement that is to apply to public service officers in the department.

272 For these reasons we are of the opinion that proposed r 5.1(c) should not be registered.

7.4 Would it be practicable to discourage overlapping constitutional coverage of police auxiliary officers and if not, is there good reason to permit registration of proposed r 5.1(a)

273 The CSA submits that it is not impracticable to discourage the overlapping of constitutional coverage as the situation does not involve any out-of-the-ordinary issues that would make it impracticable (CSA submission at [78] and closing written submissions [54] - [83]).

274 Of fundamental importance to the issue of practicability is our finding that the CSA does not have constitutional coverage of some police auxiliary officers. To disallow proposed r 5.1(a) would leave some police auxiliary officers without constitutional coverage. It follows therefore, it is not practicable to discourage overlapping coverage, as such a course would be patently undesirable and contrary to object 6(ab) of the Act that provides that it is a principal object of the Act to promote the principles of freedom of association and the right to organise.

275 For its part, the Police Union submits that overlapping coverage is not uncommon and can arise for many reasons. Overlapping coverage does not automatically result in industrial disharmony. There may be good reasons consistent with the objects of the Act to prevent overlapping coverage for example, given the evidence of police auxiliary officers who wish to join the Police Union, granting overlapping coverage would encourage freedom of association (s 6(ab) of the Act). The Police Union is a craft union representing police officers who have a community of interest with police auxiliary officers, so there is potential for overlapping coverage to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it. In this context, the disciplinary regime contained in the Police Act is unique to that Act and the Police Union is the sole union with experience in representing persons who are subject to it.

276 It is not reasonably practicable for these factors not to be recognised by regarding police auxiliary officers as equivalent to public service officers for the purposes of the constitutional coverage of the CSA. A proper and appropriate recognition of these factors would be achieved by granting constitutional coverage of police auxiliary officers to the Police Union. For that reason, it is not practicable, in the sense of it not being capable of being put into practice, done, or effected with reasonable prudence, to discourage the overlapping of membership which will result if constitutional coverage of police auxiliary officers is granted to the Police Union occurs.

277 Turning to whether there is good reason, consistent with the objects in s 6 of the Act, to permit the registration of proposed r 5.1(a), we have considered the material before us and consider there is strength in the submissions of the Police Union in relation to the issue of overlapping coverage of police auxiliary officers. Granting overlapping coverage in relation to police auxiliary officers can encourage the formation of representative organisations, as this Commission has held on previous occasions: ***The Association of Professional Engineers, Australia (Western Australian Branch) Organisation of Employees*** [No 2] (1988) 69 WAIG 1057; ***Association of Draughting, Supervisory and Technical Employees*****;** ***RAC Patrolmen's Association***.

278 Another factor we have taken into account is the evidence of police auxiliary officers who indicate a wish to join, or express a preference to join, the Police Union. In this regard, there is the evidence in attachments B, C and D of the attachments to the supplementary statement of Kim Sadlier (Exhibit 7). There is the evidence of Mr Srivastava and the evidence of Ms Clark given both during the proceedings and in their tendered witness statements. There is, within their evidence, evidence of marked preference of police auxiliary officers to join the Police Union in preference to the CSA.

279 Although the CSA invites the Full Bench to go behind their stated preference, and to consider that their objections to belonging to the CSA are not informed objections because they do not fully comprehend the services which the CSA is able to offer, their preferences nevertheless carry considerable weight. This is because the expressed preferences of those police auxiliary officers are based in part on a perceived community of interest seen to exist between police auxiliary officers and police officers. Significantly:

(a) Police auxiliary officers are appointed under the Police Act which is the same Act under which police officers are appointed.

(b) Police auxiliary officers are defined as being members of the Police Force for some limited matters (s 136(1) of the Police Act): these are protection from personal liability (s 137 of the Police Act) and in relation to corrupt or malicious acts (s 138 of the Police Act).

(c) By s 38H(1) of the Police Act, unless the document appointing a police auxiliary officer says otherwise, a police auxiliary officer has all of the powers, duties and obligations that a police officer or a member of the police force has under any written law other than the Police Act. In this regard, we distinguish between exercising 'police' powers and those examples drawn to our attention by the CSA of their members who exercise 'policing' or 'enforcement' powers under other legislation.

(d) By s 38H(2) of the Police Act, police auxiliary officers are taken to be a "police officer or a member of the Police Force" in any written law other than the Police Act itself.

(e) Notwithstanding s 38H(2) of the Police Act, the Police Act itself applies to police auxiliary officers for certain matters. Notably, those matters include the disciplinary provisions (s 23 of the Police Act) and the removal positions (pt IIB of the Police Act). However, the Police Act also applies to police auxiliary officers in relation to:

(i) Rules, orders and regulations made by the Commissioner of Police (s 9 of the Police Act); and

(ii) Return of uniforms and other accoutrements (s 13 of the Police Act).

280 Correspondingly, the jurisdiction of the Public Service Arbitrator does not apply to the transfer, promotion, suspension or removal of a police auxiliary officer (sch 3, cl 2(3) of the Act). These factors distinguish police auxiliary officers from public servants employed under the PSM Act in the department of the Western Australia Police. Further it is clear from the police auxiliary officers' position description forms that it is intended that a large number of these officers will work close to and form part of frontline of the operational roles of police enforcement. As such, as a homogenous group their community of interest with police officers is likely to be strengthened.

281 Unlike public service officers, the terms and conditions of appointment of police auxiliary officers are award and industrial agreement free. Nor have they been the subject of long standing representation by any industrial organisation as they are a new classification or calling of employees in the public sector. Their terms and conditions of employment are at this point in time contractual. As pointed out by the Police Union, the following working arrangements of police auxiliary officers are more consistent with those of sworn officers than public service officers ([79] of Police Union's reply):

	Western Australian Police Industrial Agreement 2009	WA Police Auxiliary Officers Terms and Conditions of Employment 2010	PSGA/PSA
Hours of Duty	Average 40 hours per week	Average 40 hours per week	37.5 hours per week
Overtime	No distinction between weekdays, weekends and public holidays	No distinction between weekdays, weekends and public holidays	Different rates apply for weekends and public holidays.
Shift Allowance	4 shift types no distinction between weekdays, weekends and public holidays.	4 shift types no distinction between weekdays, weekends and public holidays.	3 shift types applicable Monday to Friday only.
Public Holidays/ Weekends	Normal rates of pay for all public holiday and weekend work	Normal rates of pay for all public holiday and weekend work.	Penalty rates for weekend and public holiday work.
Annual Leave	6 weeks annual leave	6 weeks annual leave	4 weeks annual leave up to one week extra for shift work
Higher duty allowance	Payable after 40 hours	Payable after 40 hours	Payable after 5 days.

282 Moreover, the degree of overlap will be minor: police auxiliary officers are a discrete classification or calling of whom there are approximately only 60 currently and this is expected to increase to 150 by 2013 (ts 176). However, the CSA will not have coverage of all of these officers. Necessarily, there usually is a potential for disharmony arising from the creation of the overlapping coverage. On the evidence, we consider the risk that there will be disharmony to be slight. To date, both the CSA and the Police Union have behaved professionally and responsibly. In particular, the creation of the position of custody officer had the potential for causing disharmony. However the fact that this did not occur, lends weight to our conclusion. The established differences between police auxiliary officers and public service officers constitutes good reason why this part of the Police Union's claim should be granted.

283 Accordingly, there is good reason, consistent with the objects described in s 6 of the Act, to permit the registration of proposed r 5.1(a).

8.0 Conclusion

284 We note that the CSA has only sought to object to the registration of proposed r 5.1(a) and proposed r 5.1(c). As set out above we are of the opinion that proposed r 5.1(a) should be registered. We are also of the opinion that with the exception of proposed r 5.1(c) the remainder of proposed r 5 as published in the Industrial Gazette on 22 September 2010: (2010) 90 WAIG 1588 should also be registered.

285 For these reasons we intend to make an order that with the exception of proposed r 5.1(c), the registrar is authorised to register proposed r 5. We will also make an order that the application be otherwise dismissed.

MAYMAN C

286 I have read a draft of the reasons for decision of Smith AP and Beech CC. I agree with those reasons and the order they propose.

2011 WAIRC 00789

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-and-
	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	OBJECTOR
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 4 AUGUST 2011
FILE NO.	FBM 10 OF 2010
CITATION NO.	2011 WAIRC 00789

Result	Application granted in part
Appearances	
Applicant	Mr R L Hooker (of counsel) and with him Ms M Binet (of counsel)
Objector	Mr S Farrell and with him Ms S Bhar

Order

This matter having come on for hearing before the Full Bench on 11 and 12 April and 6 May 2011, and having heard Mr R L Hooker (of counsel) on behalf of the applicant, and Mr S Farrell on behalf of the objector, and reasons for decision having been delivered on Monday, 1 August 2011, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT with the exception of proposed r 5.1(c), the Registrar is hereby authorised to register the alterations to r 5 of the rules of the applicant as published in the Western Australian Industrial Gazette on Wednesday, 22 September 2010 ((2010) 90 WAIG 1588).

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

DECLARATIONS—

2011 WAIRC 00780

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KYLIE WOOD
	APPLICANT
	-v-
	RAINBOW COAST NEIGHBOURHOOD CENTRE INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 26 JULY 2011
FILE NO.	U 173 OF 2010
CITATION NO.	2011 WAIRC 00780

Result	Declaration issued
Representation	
Applicant	Ms K Wood
Respondent	Mr G McCorry

Declaration

HAVING received written submissions from Mr G McCorry as agent for the respondent and Ms K Wood, the applicant, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979,* hereby:

DECLARES that the hearing of this matter listed on 2 August 2011, 3 August 2011 and 4 August 2011 at the Albany Courthouse is hereby vacated.

DECLARES that the hearing of this matter will be rescheduled in Albany on 16, 17 and 18 August 2011 at the Albany Courthouse.

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

CANCELLATION OF—Awards/Agreements/Respondents—

2011 WAIRC 00522

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00522
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 18 JULY 2011
DELIVERED	**:**	WEDNESDAY, 20 JULY 2011
FILE NO.	**:**	APPL 154 OF 2010
BETWEEN	**:**	COMMISSION'S OWN MOTION
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

CatchWords	**:**	Cancellation of an award – no employees to whom an award applies – *Industrial Relations Act 1979* s 47(1), s 47(3)(a), s 47(5) – *WA Health - HSU Award 2006 – Health Services Union - WA Health State Industrial Agreement 2008*
Result	**:**	Award cancelled

Representation:

Ms T Sweeney	–	Director General of Health
Mr M Hammond	–	Department of Commerce
Mr M Swinbourn	–	Health Services Union of Western Australia (Union of Workers)
Ms J O'Keefe	–	The Civil Service Association of Western Australia Incorporated

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings,
taken from the transcript as edited by the Commission)

1 These are proceedings on the Commission's Own Motion to consider the cancellation of the *Graylands Selby-Lemnos and Special Care Health Services Award 1999* (the Award). Section 47(1) of the *Industrial Relations Act 1979* (the Act) provides for the Commission to cancel an award where it is of the opinion that there is no employee to whom the Award applies. Section 47(3)(a) provides that the Commission shall not make an order cancelling an award unless before doing so it has directed the Registrar to make inquiries and the Registrar has reported on the result of those inquiries.

2 The Registrar reported to the Commission on 5 April 2011 amongst other things that the named parties to the award are prescribed at Schedule L - Named Parties as The Civil Service Association of Western Australia Incorporated (the CSA), the Health Services Union of Western Australia (Union of Workers) (the HSU) and The Metropolitan Health Service Board. The investigation also identified that Graylands-Selby Lemnos and Special Care Health Service continues to operate and is part of the North Metropolitan Area Health Service Mental Health, which falls within the Metropolitan Health Service. The Metropolitan Health Service Board was abolished on 9 March 2001 and succeeded by the Metropolitan Health Service. The Minister for Health assumed the role formerly undertaken by the Metropolitan Health Service Board under the *Hospitals and Health Services Act 1927* in an incorporated capacity as the Board of all the hospitals formerly under the control of the Metropolitan Health Service Board as the Metropolitan Health Services. The Minister has delegated his powers and functions as the Board to the Director General of Health.

3 All employees covered by the Award are now also covered by the *WA Health - HSU Award 2006* and *Health Services Union - WA Health State Industrial Agreement 2008*. By its terms the *Health Services Union - WA Health State Industrial Agreement 2008* applies to the exclusion of the *WA Health - HSU Award 2006*.

4 While the CSA has two remaining union members employed at the Graylands Selby-Lemnos site who are employed in callings in which they are eligible for membership of the CSA both these members agreed to be covered by the terms and conditions of the *WA Health - HSU Award 2006* and the *Health Services Union - WA Health State Industrial Agreement 2008*.

5 The only employer bound by the Award is the successor to the Metropolitan Health Service Board.

6 The HSU's opinion is that in the foreseeable future there will not be any employees to whom the Award applies and the view of the Department of Commerce is that it is unlikely in the foreseeable future that there will be an employee to whom the Award applies. The parties to the Award have no objection to the Commission issuing an order cancelling the Award.

7 Following the Registrar's report and in accordance with s 47(3)(b) of the Act, the Commission directed the Registrar to provide general notice by publication in the required manner, of the Commission's intention to make an order cancelling the Award. The Registrar was also required to serve copies of the notice on such persons as the Commission may specify. The Commission issued a direction to publish such a notice and to serve the notice on the parties to the Award.

8 On 3 May 2011 the Registrar served notice on the parties to the Award being the CSA, the HSU, the Director General of Health as delegate of the Minister of Health in his incorporated capacity under s 7 of the *Hospitals and Health Services Act 1927* (WA) for the Metropolitan Health Services Board as the hospitals formerly comprised of the Metropolitan Health Service Board. The notice was published in (2011) 91 WAIG at page 835. No objections have been received as a consequence of the publication of the notice or from parties to the Award.

9 Having heard from the parties today and noting the requirements of the Act, I am of the opinion that there is no employee to whom the Award applies. An order shall issue for the cancellation of the Award and according to s 47(5) I intend to direct the Registrar to serve a copy of the order on each of the organisations of employees that is a named party to the Award and on the Council, the Chamber, Mines and Metals Association and the Department of Commerce.

2011 WAIRC 00521

GRAYLANDS SELBY-LEMNOS AND SPECIAL CARE HEALTH SERVICES AWARD 1999

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 18 JULY 2011
FILE NO/S	APPL 154 OF 2010
CITATION NO.	2011 WAIRC 00521

Result Award cancelled

Order

HAVING heard Ms T Sweeney on behalf of the Director General of Health and with her Mr M Hammond on behalf of the Department of Commerce, Mr M Swinbourn on behalf of the Health Services Union of Western Australia (Union of Workers) and Ms J O'Keefe on behalf of the Civil Service Association of Western Australia Incorporated, the Western Australian Industrial Relations Commission, pursuant to the powers conferred by s 47 of the *Industrial Relations Act 1979,* hereby orders:

THAT the Graylands Selby-Lemnos and Special Care Health Services Award 1999 be, and is hereby cancelled.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

NOTICES—Award/Agreement matters—

2011 WAIRC 00817

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 16 of 2011

APPLICATION FOR A NEW AGREEMENT ENTITLED

"WESTERN AUSTRALIA POLICE SCHOOL TRAFFIC WARDENS AGREEMENT 2011"

NOTICE is given that an application was made to the Commission, on 19 July 2011, by the Western Australia Police, under the Industrial Relations Act 1979, for registration of the above named Agreement.

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

5. APPLICATION AND PARTIES BOUND

5.1 The parties bound by this Agreement are the Commissioner of Police and

The Civil Service Association of Western Australia Incorporated.

5.2 At the date of registration the approximate number of employees bound by this Agreement is 546.

6. SCOPE

6.1 This Agreement shall apply throughout the State of Western Australia to all employees employed as Traffic Wardens, On-Road Assessors or Survey Officers who are members of or eligible to be members of the The Civil Service Association of Western Australia Incorporated.

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

(Sgd.) J SPURLING,
[L.S.] Registrar.

21 July 2011

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2011 WAIRC 00779

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ERIKA BESMER
	APPLICANT
	-v-
	WEST COAST PSYCHOLOGY
	MARIE-ANNE HAWKINS
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	U 6 OF 2011
CITATION NO.	2011 WAIRC 00779

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Ms M Hawkins

Order

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

WHEREAS on 5 April 2011, and with the consent of the respondent, the Commission convened a conference for the purpose of conciliating between the parties however, agreement was not reached; and

WHEREAS the matter was set down for hearing on 14 June 2011 as to whether the application should be accepted out of time; and

WHEREAS on 13 June 2011 the respondent requested that the hearing be adjourned; and

WHEREAS on 14 June 2011, and given the applicant's consent, the hearing was adjourned; and

WHEREAS on 14 June 2011 the applicant put a proposal to the respondent to settle the matter; and

WHEREAS on 16 June 2011 the respondent accepted the applicant's proposal; and

WHEREAS on 20 June 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 21 June 2011 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00775

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JASON BOYS
	APPLICANT
	-v-
	BAREFOOT BROOME PTY LTD, TRADING AS BROOME SANCTUARY RESORT
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	B 35 OF 2011
CITATION NO.	2011 WAIRC 00775

Result	Discontinued
Representation	
Applicant	On his own behalf
Respondent	Ms G Gower

Order

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

WHEREAS on 9 June 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the respondent was given further time to consider its position; and

WHEREAS on 23 June 2011 the respondent made an offer by way of email to settle the applicant's claim; and

WHEREAS on 24 June 2011 the applicant advised the Commission that he accepted the respondent's offer; and

WHEREAS on 11 July 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 12 July 2011 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00524

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARY COLEMAN
	APPLICANT
	-v-
	DRUMMOND CATERING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 JULY 2011
FILE NO/S	U 34 OF 2011
CITATION NO.	2011 WAIRC 00524

Result	Application discontinued
Representation	
Applicant	Ms M Coleman
Respondent	Ms C Magner and Mr D Drummond

Order

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

AND WHEREAS on 23 June 2011 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 13 July 2011 the applicant advised the Commission to file the 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.

2011 WAIRC 00527

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2011 WAIRC 00527
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WRITTEN SUBMISSIONS
DELIVERED	**:**	MONDAY, 25 JULY 2011
FILE NO.	**:**	U 4 OF 2011, B 4 OF 2011
BETWEEN	**:**	EMMA CRINITI Applicant AND SCOTT TURNER - VIP PUBLISHERS AND ADCONNECT LOCAL MARKETING Respondent

CatchWords	**:**	Unfair dismissal, denied contractual benefits, application for adjournment
Result	**:**	Application for adjournment dismissed
Representation:		
Applicant	**:**	Mr P Mullally (as agent)
Respondent	**:**	Mr S Turner

Reasons for Decision

1 These are applications pursuant to s 29(1)(b)(i) and s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act) which are listed for hearing on Wednesday 27 July 2011, before Commissioner Harrison. In Commissioner Harrison's absence, the application for an adjournment has been allocated to me for determination.

2 The history of proceedings in these matters includes that on Tuesday 12 April 2011 the Commission issued an order granting an application by the respondent for the adjournment of the hearing set for 14 April 2011, 2011 WAIRC 00282.

3 The Commission conferred with the parties as to their availability for the rescheduling of the hearing and the hearing was then set down for Wednesday 27 July 2011 and the parties were notified on 19 May 2011 by a Notice of Hearing.

4 Also on 19 May 2011 the Commission issued Directions as to the notification by each party of their witnesses and for informal discovery.

5 The applicant has complied with these directions.

6 On Monday 18 July 2011 Mr Scott Turner of the respondent wrote to the Commission seeking an adjournment of the hearing on the basis that he would "be interstate the week Monday July 25 to Friday July 29." He apologised for the late notice, advised that a business was being sold and "I am required for due diligence in Brisbane with the purchasor (sic) for that week." He advised that he ran the business solely by himself and he was required to be present personally.

7 The respondent was advised by the Associate to file a formal application including evidence of his unavailability, for example, a copy of the airline tickets including information about when the booking was made.

8 On 20 July 2011 the respondent filed an application for adjournment on the grounds that "Scott Turner is required interstate July 26 to 29 to sign a business sale agreement for Adconnect at Ooh Media offices Sydney." Attached was an undated confirmation of itinerary and tax invoice for a one way booking for Mr Scott Turner to travel to Sydney on Tuesday 26 July 2011 at 12.20pm. Also provided was a booking confirmation for accommodation in Sydney arriving Tuesday 26 July 2011 and departing Friday 29 July 2011. Neither of these notices was dated.

9 The applicant opposes the application for the adjournment noting that the respondent had not complied with directions made on 18 March or 19 May 2011; that the applicant's agent had received from the respondent an offensive email a copy of which was attached; that the respondent had not filed an affidavit in support of his application for adjournment nor had he provided any independent evidence to corroborate his assertions. Most significantly, the applicant opposes the application on the grounds that she has prepared herself and incurred costs for the preparation for the two hearings and has arranged for time off work with her current employer on two occasions to attend the hearing. The applicant also says that the respondent's documents are in conflict, noting the correspondence initially referred to Mr Turner being required in Brisbane and then being required in Sydney, that he had not produced his airline ticket, that none of the supporting documents was dated, therefore it is not possible to determine when the bookings were made. The applicant also noted that there is no independent evidence produced in connection with those documents or of Mr Turner being required in Sydney on the day of the hearing. The applicant says that the respondent was aware of the hearing dates since 19 May 2011 and "the respondent on his own evidence would be available by 10.30am Perth time on the 27th July 2011 to partake in the hearing by telephone" and yet has not made an application to participate by telephone.

10 The applicant also noted that the respondent has taken legal action against the applicant in the Perth Magistrates Court for recovery of an alleged debt. This action is listed for a pre-trial conference on Thursday 28 July 2011 at 11.00am. The applicant had been informed by the Perth Magistrates Court that the conference was still listed and that there had been no application made by the respondent for the conference to be adjourned. Relevant documents were attached to the applicant's submission.

11 A copy of the applicant's submission and documents opposing the application for adjournment were forwarded to Mr Turner. On Friday 22 July 2011 at 12.24pm Mr Turner provided to the Commission an email in which he noted that he had a meeting "next Wednesday in Sydney as per below". He noted the sale of the business was critical and that it was for a significant sum. He advised that a Geoff Dutton was representing him in regard to "Emma Criniti's claims. Regrettably, I will not be here, as I need to execute my business sale, which has been under due diligence for three months." I take the reference to "Emma Criniti claims" to be a reference to the matter before the Magistrates Court.

12 Mr Turner attached to this email an email string which included an email from himself sent on Wednesday 20 July 2011 at 12.56pm to a Chantel Ryan, the subject was "meeting". The text read:

> "Hi Chantel
>
> Can you please email me a time for next Wednesday for you so I can put it in my diary."

What appears to be the reply to this email was:

> "Hi Scott
>
> How's 11.00am?"

I say that it appears to be a reply email, although the words "Hi Scott How's 11.00am?" do not fall within the normal structure of an email in that those words simply follow on from Mr Turner's email to the Associate, without the usual "original message" heading, and there are no details of the name of the sender, to whom the email is sent, a date and time or subject matter.

13 This is the extent of any material which I presume relates to the meeting in Sydney.

14 Following the despatch by the Associate to Mr Turner of the applicant's submissions opposing the adjournment which included reference to the Magistrates Court proceedings and that there is a pre-trial conference to be held on Thursday 28 July

2011 at 11.00am, Mr Turner provided to the Commission on Friday 22 July 2011 at 12.50pm a copy of a Form 23 – Magistrates Court of Western Australia (Civil Jurisdiction) Application, in which he as a claimant, sought an adjournment of the pre-trial conference "… as claimant is in Sydney to execute a sale agreement of a business". It appears to be signed by Mr Turner and is dated 20 July 2011.

15 The Associate sent an email to Mr Turner at 12.59pm on Friday 22 July 2011 asking him to provide a stamped copy of that document which would confirm it had been lodged in the Magistrates Court. By 10.00am on Monday 25 July 2011 no stamped copy had been received by the Commission.

Consideration and Conclusions

16 The basis on which an application for adjournment is to be considered is set out in *Myers v Myers* [1969] WAR 19 at 21 as follows:

> "To grant or refuse an adjournment is a matter for the discretion of the court to whom the application is made. But where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party."

17 The respondent bears the onus of proving those facts which he asserts in support of the application for adjournment. Although Mr Turner has provided documents which indicate that he has booked an airline ticket to fly to Sydney, and has booked accommodation, there is no evidence as to when these bookings were made, or why it is necessary for this trip to be undertaken at this time, including why it could not be at another time. While I appreciate that the sale of a business is a very significant event, without more information it is difficult to conclude what, if any, prejudice there would be to the respondent in the adjournment not being granted. There is no evidence beyond Mr Turner's assertion in correspondence, that the trip is necessary for the sale of the business. In fact there is a paucity of evidence to support the application.

18 The email correspondence with a person called Chantel Ryan is of no assistance. There is no indication of who this person is. Even if she is in some way related to the trip to Sydney, the email to her from Scott Turner of 20 July 2011 merely asks for her to "email me a time for next Wednesday for you so that I can put it in my diary". Her response is to nominate a time. There is no indication of what the meeting relates to, when the date of the meeting was set and why it was set for the Wednesday.

19 I also note that Mr Turner has had notice of the reasons why the applicant opposes the application for adjournment and has not responded to whether he could participate in the hearing by way of telephone.

20 In all of those circumstances, the respondent has not provided sufficient evidence to demonstrate that he is genuinely unable to attend the hearing and will in fact suffer a serious injustice if the adjournment is not granted.

21 I also take into account that the applicant will be required to prepare for the hearing a further time, including incurring costs which are not usually recoverable and suffer disruption to her current employment.

22 Accordingly, the balance is in favour of not granting the adjournment. The application for the adjournment will be dismissed.

2011 WAIRC 00526

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EMMA CRINITI
	APPLICANT
	-v-
	SCOTT TURNER - VIP PUBLISHERS AND ADCONNECT LOCAL MARKETING
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 25 JULY 2011
FILE NO/S	U 4 OF 2011, B 4 OF 2011
CITATION NO.	2011 WAIRC 00526

Result	Application for adjournment dismissed

Order

HAVING heard Mr P Mullally as agent for the applicant and Mr S Turner on his own behalf, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* hereby orders:

> THAT the application for an adjournment of the hearing scheduled for Wednesday 27 July 2011 be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2011 WAIRC 00776

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KAREN LEE DRURY
	APPLICANT
	-v-
	ARCADIA SUN MOON RESTOR
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	U 45 OF 2010
CITATION NO.	2011 WAIRC 00776

Result	Discontinued
Representation	
Applicant	Mr P Mullally (as agent)
Respondent	Ms A McKay (of counsel)

Order

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

WHEREAS on 10 June 2010 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of the conference the applicant was given time to consider her position and was to advise the Commission within seven days if she wished to proceed with her application however, this did not occur; and

WHEREAS the Commission attempted to contact the applicant by telephone on a number of occasions without success; and

WHEREAS on 27 July 2010 the Commission wrote to the applicant requesting she advise her intentions in relation to this matter by no later than 4.00 pm on 3 August 2010; and

WHEREAS as the applicant did not contact the Commission by the due date the matter was listed for a show cause hearing on 23 September 2010; and

WHEREAS the applicant attended the show cause hearing on 23 September 2010 and advised the Commission that she wished to proceed with her application; and

WHEREAS after hearing from the applicant the Commission was satisfied with her reasons for not pursuing her application in a timely manner; and

WHEREAS the application was set down for hearing and determination on 8 and 9 February 2011; and

WHEREAS on 8 February 2011 at a conference held prior to the hearing commencing the parties reached an agreement to settle the matter and the hearing was vacated; and

WHEREAS on 24 March 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 4 April 2011 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00523

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARQUS HOWARD
	APPLICANT
	-v-
	KINETIC IT
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 21 JULY 2011
FILE NO/S	B 95 OF 2011
CITATION NO.	2011 WAIRC 00523

Result	Application dismissed

Order

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

WHEREAS on the 15th day of July 2011 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.

2011 WAIRC 00777

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IAN ROSS MACGREGOR
	APPLICANT
	-v-
	JEMENA CONTRACTING SERVICES WEST
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	B 7 OF 2011
CITATION NO.	2011 WAIRC 00777

Result	Discontinued
Representation	
Applicant	Mr G Sturman (as agent)
Respondent	Ms J Wright

Order

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

WHEREAS on 24 March 2011 the Commission convened a conference for the purpose of conciliating between the parties, however, agreement was not reached; and

WHEREAS the application was set down for hearing and determination on 11 August 2011; and

WHEREAS on 3 June 2011 the parties advised the Commission that the matter had been resolved; and

WHEREAS on 8 June 2011 the hearing was vacated; and

WHEREAS on 5 July 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 14 July 2011 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00519

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR NATHAN JOHN RZEPECKI
	APPLICANT
	-v-
	INDEPTH INTERACTIVE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 15 JULY 2011
FILE NO/S	B 94 OF 2011
CITATION NO.	2011 WAIRC 00519

Result	Application stayed
Representation	
Applicant	In person
Respondent	Mr G Mitchell

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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 stayed.

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

2011 WAIRC 00787

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JUSTIN PASCOE
	APPLICANT
	-v-
	TRANSFIELD-WORLEY
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 2 AUGUST 2011
FILE NO/S	B 77 OF 2011
CITATION NO.	2011 WAIRC 00787

Result	Application dismissed

Order

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

WHEREAS on the 1st day of July 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties agreed to exchange additional information; and

WHEREAS on the 28th day of July 2011 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.

2011 WAIRC 00525

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK PIRIE
	APPLICANT
	-v-
	MANDURAH BOBCATS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 25 JULY 2011
FILE NO/S	U 65 OF 2011
CITATION NO.	2011 WAIRC 00525

Result	Application discontinued
Representation	
Applicant	Mr M Pirie
Respondent	Mr D Jones (as agent)

Order

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

AND WHEREAS on 20 May 2011 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 12 July 2011 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.

2011 WAIRC 00773

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHANNELE JANET STRATTON
	APPLICANT
	-v-
	BROOKE FIORE HAIR AND BEAUTY
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	B 22 OF 2011
CITATION NO.	2011 WAIRC 00773

Result	Discontinued
Representation	
Applicant	On her own behalf
Respondent	Mr C Garvey (of counsel)

Order

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

WHEREAS on 28 April 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given further time to consider their positions; and

WHEREAS on 27 May 2011 the Commission contacted the parties about the status of the matter and in response was advised that no agreement had been reached; and

WHEREAS the application was set down for hearing and determination on 16 and 17 August 2011; and

WHEREAS on 13 July 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 15 July 2011 the respondent consented to the matter being discontinued; and

WHEREAS on 18 July 2011 the hearing was vacated;

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

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00774

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SHANNELE JANET STRATTON

APPLICANT

-v-

BROOKE FIORE HAIR AND BEAUTY

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 26 JULY 2011
FILE NO/S U 22 OF 2011
CITATION NO. 2011 WAIRC 00774

Result Discontinued
Representation
Applicant On her own behalf
Respondent Mr C Garvey (of counsel)

Order

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

WHEREAS on 28 April 2011 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties were given further time to consider their positions; and

WHEREAS on 27 May 2011 the Commission contacted the parties about the status of the matter and in response was advised that no agreement had been reached; and

WHEREAS the application was set down for hearing and determination on 16 and 17 August 2011; and

WHEREAS on 13 July 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 15 July 2011 the respondent consented to the matter being discontinued; and

WHEREAS on 18 July 2011 the hearing was vacated;

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

THAT this application be, and is hereby discontinued.

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

2011 WAIRC 00778

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KIMBERLEY ZANIK

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S 7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMALLY COMPRISED IN THE METROPOLITAN HEALTH SERVICES BOARD

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 26 JULY 2011
FILE NO/S U 201 OF 2010
CITATION NO. 2011 WAIRC 00778

Result	Discontinued
Representation	
Applicant	Ms C Lever
Respondent	Mr J Sheppard

Order

WHEREAS this is an application pursuant to s29(1)(b)(i) of the *Industrial Relations Act 1979*; and

WHEREAS on 28 February 2011 the Commission convened a conference for the purpose of conciliating between the parties and at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on 12 May 2011 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 23 May 2011 the respondent consented to the matter being discontinued;

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

THAT this application be, and is hereby discontinued.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Dennis Valenta	Shire of Williams	U 71/2011	Commissioner J L Harrison	Consent order issued
Sharon Marie Stevenson	Sandra Denise Miller @ Fairies Forever	U 86/2011	Commissioner J L Harrison	Consent order issued

CONFERENCES—Matters arising out of—

2010 WAIRC 00456

PROPOSED MEETING OF MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE PUBLIC TRANSPORT AUTHORITY

APPLICANT

-v-

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

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 21 JULY 2010
FILE NO	C 28 OF 2010
CITATION NO.	2010 WAIRC 00456

Result	Statement issued
Representation	
Applicant	Mr R Farrell
Respondent	Mr P Woodcock

Statement

An urgent application for a compulsory conference under s 44 of the Industrial Relations Act 1979 ('the Act') was filed on 20 July 2010 concerning a proposed stop work meeting called by the respondent for railcar driver members based at the applicant's Claisebrook Depot to take place at noon Thursday 22 July 2010. The applicant seeks an order of the Commission that the unauthorised stop work meeting not proceed on the grounds that it would cause significant disruption to the urban passenger rail network and the delivery of the applicant's services to the public.

The Commission convened an urgent compulsory conference under s 44 of the Act this morning. At the conference the Commission was informed that the parties are in dispute in relation to the implementation of a new roster for drivers based at the

Claisebrook Depot and furthermore, the effect of the introduction of a Pedestrian Gate System at Claisebrook on the rostering arrangements. Concerns had been raised by the respondent that the introduction of the Pedestrian Gate System will negatively impact on the time available for railcar drivers to travel to and from trains at crib breaks and for other purposes.

A number of issues were canvassed between the parties before the Commission. Arising from the conference agreement has been reached as to the future conduct of the matter.

The parties have agreed to enter into further discussions in accordance with cl 7 – Dispute Resolution Procedure of the Public Transport Authority Railcar Drivers (Transperth Train Operations) Award 2006 ('the Award'). The parties have agreed that their objective is to conclude those discussions prior to mid August 2010 in view of the proposed implementation timetable for the new rosters and the Pedestrian Gate System at Claisebrook Station.

Furthermore, the parties have agreed that if, at the conclusion of those negotiations, a meeting of members of the respondent is required the parties will discuss this matter with a view to reaching agreement on the timing and arrangements for such a meeting. If agreement cannot be reached in relation to a proposed meeting of the respondent's members, the parties have agreed that the matter be the subject of a Recommendation by the Commission, which the parties will accept.

If any issues concerning the present application before the Commission arise from the negotiations, either prior to or after mid August 2010, then those matters can be brought back before the Commission by either party for further conciliation and/or arbitration as may be necessary.

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

2011 WAIRC 00814

PROPOSED MEETING OF MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE PUBLIC TRANSPORT AUTHORITY
	APPLICANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 9 AUGUST 2011
FILE NO/S	C 28 OF 2010
CITATION NO.	2011 WAIRC 00814

Result	Application discontinued by leave
Representation	
Applicant	Mr R Farrell
Respondent	Mr P Woodcock

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.

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Nursing Federation	The Minister for Health in his incorporated capacity under s 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formally comprised in the Metropolitan Health services Board	Harrison C	C 5/2011	24/01/2011	Dispute re termination of union member	Discontinued
Health Services Union of Western Australia (Union of Workers)	the Director General of Health as a delegate of the Minister of Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 for the Metropolitan Health Services B	Scott A/SC	PSAC 36/2010	9/12/2010	Dispute re shift compensation of union members	Discontinued
Liquor, Hospitality and Miscellaneous Union Western Australian Branch	Registry Officer WA Health Industrial Relations Service Department of Health	Harrison C	C 31/2011	2/06/2011 27/06/2011	Dispute re alleged misconduct of union member	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Department of Health	Harrison C	C 40/2009	3/12/2009 18/08/2010 21/01/2011	Dispute re termination of employment for union member	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Minister for Health in his incorporated capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board, the Peel	Harrison C	C 55/2010	21/12/2010 11/02/2011	Dispute re bargaining of Industrial Agreement	Discontinued
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Minister for Health, Metropolitan Health Service Board	Harrison C	C 49/2010	7/12/2010 19/01/2011	Dispute re entitlements of union member	Concluded
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	The Department of Health	Harrison C	C 40/2010	8/10/2010	Dispute re dismissal of union member	Discontinued
The Civil Service Association of Western Australia Incorporated	The Commissioner, Department of Corrective Services	Harrison C	PSAC 4/2011	27/04/2011	Dispute re alleged misconduct of Union Member	Discontinued
The Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Pingelly	Harrison C	C 6/2011	10/02/2011	Dispute re an alleged breach of members agreement	Discontinued
Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	Shire of Pingelly	Harrison C	C 4/2011	23/02/2011	Dispute re negotiations & finalisation of proposed new agreement	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2011 WAIRC 00791

DISPUTE RE ALLEGED BREACH OF CODE OF CONDUCT OF UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	THE GOVERNING COUNCIL OF POLYTECHNIC WEST
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 5 AUGUST 2011
FILE NO	PSAC 9 OF 2011
CITATION NO.	2011 WAIRC 00791

Result Interim Order issued

Order

WHEREAS this is an application made pursuant to s 44 of the *Industrial Relations Act 1979* (the Act); and

WHEREAS the Public Service Arbitrator (the Arbitrator) convened a conference pursuant to s 44 of the Act on Thursday, 4 August 2011; and

WHEREAS at this conference the Arbitrator heard that the respondent has written to Ms Anita Tancred, a member of the applicant, alleging that she has breached the respondent's code of conduct by referring to another employee of the respondent, Ms Debbie Ellis, in a derogatory manner in a public forum on the World Wide Web; and

WHEREAS the respondent intends to proceed to investigate this alleged breach of discipline; and

WHEREAS the applicant says that the alleged conduct does not touch upon Ms Tancred's employment with the respondent and accordingly, the respondent has no entitlement to deal with the matter or to investigate it, and that it is a private matter between Ms Tancred and another person who happens to be an employee of the respondent; and

WHEREAS the applicant seeks that the respondent cease the disciplinary process until the matter of whether the alleged conduct touches on the employment or is limited to a personal matter is determined; and

WHEREAS the respondent has declined to cease the disciplinary process whilst that matter is heard and determined; and

WHEREAS the Arbitrator considered the requirements set out in s 44(6)(ba) and formed the opinion that the issuing of an order to require the respondent to cease the disciplinary process pending the hearing and determination, will prevent the deterioration of industrial relations in respect of the matter in question until arbitration has resolved that matter, as the parties would continue to be in dispute about whether the employer is entitled to investigate this matter were such an order not issued; and

WHEREAS such an order would be interim in nature, it being only for the purpose of requiring the respondent to cease the disciplinary process until the substantive matter of whether the conduct touches on the employment relationship is determined by the Arbitrator.

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

1. THAT the respondent cease the disciplinary process against Ms Anita Tancred until the determination by the Arbitrator of the question of whether her alleged conduct touches on her employment with the respondent.

2. THAT the parties shall have liberty to apply upon notifying the Arbitrator.

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

2011 WAIRC 00820

APPLICATION FOR AUTHORITY TO BE ISSUED TO MR JOSEPH MCDONALD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR KEVIN REYNOLDS, THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 10 AUGUST 2011
FILE NO.	APPL 31 OF 2011
CITATION NO.	2011 WAIRC 00820

Result	Direction issued
Representation	
Applicant	Mr J Nicholas, of counsel
Intervenors	Mr M McLean on behalf of the Master Builders' Association of Western Australia (Union of Employers), by correspondence, seeking leave to intervene
	Ms MH Kuhne on behalf of the Chamber of Commerce and Industry of WA, Inc seeking leave to intervene
	Mr AJ Power, of counsel, on behalf of the Australian Building and Construction Commissioner foreshadowing seeking leave to intervene

Direction

WHEREAS this is an application for an order pursuant to s 49J(2) of the *Industrial Relations Act, 1979* ("the Act") that the Registrar issue an authority to Mr Joseph McDonald for the purposes of Part II Division 2G of the Act;

AND WHEREAS this application was listed for a directions hearing on 9 August 2011;

AND WHEREAS on 8 and 9 August 2011 the Commission received applications to intervene from the Master Builders' Association of Western Australia (Union of Employers) ("MBAWA") and the Chamber of Commerce and Industry of Western Australia (Inc) ("CCIWA"), respectively;

AND WHEREAS on 9 August 2011, the Commission received a letter from the Australian Building and Construction Commissioner ("ABCC") foreshadowing an intention to intervene;

AND WHEREAS the Commission, having regard to s 26(1)(b) and (c) of the Act, is of the view that it should have the capacity to be informed of any circumstances relevant to the application and that it is appropriate to direct the Registrar to publish a notice of the application on the Commission's internet website.

AND HAVING HEARD from Mr J Nicholas, on behalf of the applicant, Ms M Kuhne on behalf of the CCI and Mr A Power on behalf of the ABCC;

NOW THEREFORE, the Commission in Court Session directs:

1. THAT the Registrar forthwith publish notification of this application on the Commission's internet website.
2. THAT any person with sufficient interest wishing to be heard in relation to this application must by 25 August 2011 file in the Commission, and serve on the applicant, an application in Form 1 containing the particulars of their reasons for seeking leave to be heard.
3. THAT by 25 August 2011 the MBAWA and the CCIWA file in the Commission and serve on the applicant particulars of their grounds for seeking leave to intervene.
4. THAT the hearing of this matter resume on 1 September 2011 in order to:
    (a) determine any applications from persons wishing to be heard; and
    (b) program the hearing of the substantive application.

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

2011 WAIRC 00816

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MRS SANDRA HELEN RAJECKI
	APPLICANT
	-v-
	MRS CASSANDRA COATES C/O- EAST KENWICK PRIMARY SCHOOL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 10 AUGUST 2011
FILE NO/S	U 106 OF 2011
CITATION NO.	2011 WAIRC 00816

Result Name of respondent amended

Order

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

WHEREAS on the 29th day of June 2011 the respondent filed a Form 5 – Notice of answer and counterproposal in which she said that she was not the applicant's employer and naming the employer; and

WHEREAS at a conference on the 9th day of August 2011 the applicant sought to amend the name of the respondent to "East Kenwick Primary School Parents & Citizens Incorporated Association"; and

WHEREAS the respondent agreed to amending the name of the respondent;

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

THAT the name of the respondent in the application be amended to "East Kenwick Primary School Parents & Citizens Incorporated Association".

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department for Child Protection Agency Specific Agreement 2011 - The PSAAG 11/2011	28/06/2011	Civil Service Association of Western Australia Incorporated, The Department For Child Protection	(Not applicable)	Commissioner S J Kenner	Order issued
Electorate and Research Employees General Agreement 2011 PSAAG 10/2011	28/06/2011	The President of the Legislative Council, The Speaker of the Legislative Assembly, The Civil Service Association of Western Australia Incorporated	(Not applicable)	Commissioner S J Kenner	Order issued
Public Service and Government Officers General Agreement 2011 PSAAG 7/2011	28/06/2011	The Civil Service Association of Western Australia Incorporated, Curriculum Council of Western Australia	(Not applicable)	Commissioner S J Kenner	Order issued

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
School Support Officers (Government) General Agreement 2011 PSAAG 9/2011	28/06/2011	The Civil Service Association of Western Australia Incorporated, Department of Education	(Not applicable)	Commissioner S J Kenner	Order issued
Shire of Murray Collective Agreement 2011 Operations Centre Employees AG 11/2011	28/07/2011	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth	The Shire of Murray	Commissioner J L Harrison	Agreement registered
Social Trainers General Agreement 2011 PSAAG 12/2011	28/06/2011	The Civil Service Association of Western Australia Incorporated, The Disability Services Commission	(Not applicable)	Commissioner S J Kenner	Order issued

PUBLIC SERVICE APPEAL BOARD—

2011 WAIRC 00790

AGAINST THE DECISION TO ANNUL CONTRACT OF EMPLOYMENT MADE ON 14 FEBRUARY 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES HELEN PEARSON ROBSON

APPELLANT

-v-

GEORGE TURNBULL DIRECTOR OF LEGAL AID WA

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRPERSON
MR K TRENT - BOARD MEMBER
MS B KASTEN - BOARD MEMBER

DATE THURSDAY, 4 AUGUST 2011

FILE NO PSAB 2 OF 2011

CITATION NO. 2011 WAIRC 00790

Result Discontinued

Representation

Appellant On her own behalf

Respondent Ms R Hartley (of counsel)

Order

WHEREAS this is an appeal to the Public Service Appeal Board ("the Board") lodged in the Commission pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS on 5 May 2011 the Board convened a scheduling conference; and

WHEREAS at the conclusion of that conference the parties were given further time to see if a resolution could be reached in respect to the matter; and

WHEREAS on 6 July 2011 the appellant advised the Board that no agreement had been reached between the parties; and

WHEREAS the matter was set down for hearing on 8 and 9 September 2011; and

WHEREAS on 20 July 2011 the appellant advised the Board that she did not wish to proceed with her appeal; and

WHEREAS on 22 July 2011 the appellant filed a Notice of Withdrawal or Discontinuance in respect of the appeal; and

WHEREAS on 22 July 2011 the respondent advised that it had no issue with the matter being discontinued; and

WHEREAS on 25 July 2011 the hearing was vacated and a Minute of Proposed order issued to discontinue the application; and

WHEREAS on 28 July 2011 the respondent advised the Commission that the correct name of the respondent is George Turnbull Director of Legal Aid WA;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the name of the respondent be deleted and that George Turnbull Director of Legal Aid WA be substituted in lieu thereof.

2. THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2011 WAIRC 00518

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRIAN DENZIL NEWMAN AND CRAIG PHILIP STEEL
	APPLICANTS
	-v-
	MR PAT ITALIANO
	GENERAL MANAGER TRANSPERTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	FRIDAY, 15 JULY 2011
FILE NO	PSA 43 OF 2010
CITATION NO.	2011 WAIRC 00518

Result	Application Discontinued
Representation	
Applicant	No Appearance
Respondent	No Appearance

Order

THE COMMISSION, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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