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GENERAL ORDERS—

2013 WAIRC 00348

RESCIND GENERAL ORDER NO. 6/2012 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 12 JUNE 2013
FILE NO/S	APPL 7 OF 2013
CITATION NO.	2013 WAIRC 00348
Result	General Order issued

General Order

HAVING heard Ms T Zeid on behalf of the Honourable Minister for Commerce; Ms D Mead-Adams on behalf of the Chamber of Commerce and Industry of Western Australia (Inc); and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby orders –

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

(2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2013.

(3) THAT this General Order replace the General Order in Matter No 6 of 2012 which thereby shall be rescinded.

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

LOCATION ALLOWANCES

SCHEDULE A

Title of Award or Order	Clause No.
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Animal Welfare Industry Award	14
Artworkers Award	20
The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002	5.14
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award	12
Cleaners and Caretakers Award, 1969	3.6
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Control Room Operators) Award 1984	25
Clerks' (Credit and Finance Establishments) Award	31
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks' (Taxi Services) Award of 1970	28
Clerks (Timber) Award	31
Clerks (Unions and Labor Movement) Award 2004 No. A 10 of 1996	37
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award 1990	21
Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011	17.6
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Foremen (Building Trades) Award 1991	15
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989	31
The Horticultural (Nursery) Industry Award, No. 30 of 1980	6
Industrial Spraypainting and Sandblasting Award 1991	19

Title of Award or Order—*continued*	**Clause No.**
Independent Schools Administrative and Technical Officers Award 1993	22
Independent Schools (Boarding House) Supervisory Staff Award	22
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Lift Industry (Electrical and Metal Trades) Award, 1973	20
Local Government Officers' (Western Australia) Interim Award 2011	17.2
Materials Testing Employees' Award, 1984	12
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award 1966	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Interim Award 2011	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003	8.4
Title of Industrial Agreements	**Clause No.**
Altone Continental and SDA Agreement 2002	32
Beverley Four Square Supermarket and SDA Agreement 2002	32
Bindoon General Store and SDA Agreement 2002	32
Bridgetown Mini Mart and SDA Agreement 2002	32
Broadwater Mini Mart and SDA Agreement 2002	32

Title of Industrial Agreements—*continued*	**Clause No.**
Cadoux Traders and SDA Agreement 2002	32
Caversham Store and SDA Agreement 2002	32
Cherries Fine Food Super Mart and SDA Agreement 2002	32
Chicken Treat Dunsborough SDA Agreement 2001	34
Chicken Treat Katanning SDA Agreement 2001	34
Chicken Treat Narrogin SDA Agreement 2001	34
Chicken Treat Padbury SDA Agreement 2001	34
Chicken Treat Rockingham SDA Agreement 2001	34
Chidlow Growers Mart and SDA Agreement 2002	32
Cranberries and SDA Agreement 2002	32
Crisp's Corner Store & Newsagency and SDA Agreement 2002	32
Essentials Supermarket of South Perth and SDA Agreement 2002	32
Foodland Amelia Heights and SDA Agreement 2002	32
Foodland Bayswater (Beechboro Road) and SDA Agreement 2002	32
Foodland Bayswater (Whatley Crescent) and SDA Agreement 2002	32
Foodland Bindoon and SDA Agreement 2002	32
Foodland Boddington and SDA Agreement 2002	32
Foodland Dowerin and SDA Agreement 2002	32
Foodland Lesmurdie and SDA Agreement 2002	32
Foodland Manning and SDA Agreement 2002	32
Foodland Merredin and SDA Agreement 2002	32
Foodland Mukinbudin and SDA Agreement 2002	32
Foodland Ravensthorp and SDA Agreement 2002	32
Foodland Tarcoola and SDA Agreement 2002	32
Foodland Toodyay and SDA Agreement 2002	32
Foodland Wagin and SDA Agreement 2002	32
Foodys Express and SDA Agreement 2002	32
Fresh Food Corner Supermarket and SDA Agreement 2002	32
Glen Forrest Supermarket and SDA Agreement 2002	32
Hall's Creek Caravan Park and SDA Agreement 2002	32
Hannan's Foodmart and SDA Agreement 2002	32
John's Food and Liquor Store and SDA Agreement 2002	32
Kam Food & News Centre and SDA Agreement 2002	32
Kendenup Stores and SDA Agreement 2002	32
Kimberley Super Value and SDA Agreement 2002	32
Kirkwood Food Store & Delicatessen and SDA Agreement 2002	32
K-Mart Western Australia Distribution Centres Enterprise Agreement No. AG 16 of 1995	40
K-Mart Western Australia Distribution Centres Enterprise Agreement No. AG 100 of 1996	40
Laverton Stores and SDA Agreement 2002	32
Leighton Contractors Maintenance Personnel Agreement 2000	Schedule 1, Cl 6
Leighton Contractors Mining and Processing Personnel Enterprise Agreement 1997	Schedule 1, Cl 9
Lionel St Markets and SDA Agreement 2002	32
Little Bucks Supermarket and SDA Agreement 2002	32
Mariella's Continental Deli and SDA Agreement 2002	32
McDonald Wholesalers and SDA Agreement 2002	32
Midland Junction Fresh Markets and SDA Agreement 2002	32
MJ and VD Quinlan and SDA Agreement 2002	32

Title of Industrial Agreements—*continued*	**Clause No.**
Muir's Fresh Food Supermarkets and SDA Agreement 2002	32
Murdoch Drive Continental Super Deli and SDA Agreement 2002	32
Noakes Store Denmark and SDA Agreement 2002	32
P.R. & B.M. Harrington and SDA Agreement 2002	32
Pemberton General Store and SDA Agreement 2002	32
Perenjori Supermarket and SDA Agreement 2002	32
Pioneer Store and SDA Agreement 2002	32
Port Hedland Truck Stop and SDA Agreement 2002	32
R & E General and SDA Agreement 2002	32
Retail Food Establishments Employees Agreement 1992	34
Retail Food Services Employees' Agreement 1991	39
River Rooster Broome Agreement No. AG 271 of 1996	34
River Rooster Bunbury Agreement No. AG 264 of 1996	34
River Rooster Busselton/Dunsborough Agreement No. AG 285 of 1996	34
River Rooster Carnarvon Agreement No. AG 270 of 1996	34
River Rooster Merriwa Agreement No. AG 268 of 1996	34
River Rooster Narrogin Agreement No. AG 265 of 1996	34
South Metropolitan Youth Link (Inc.) Agreement 1997	20
South Perth Food Mart and SDA Agreement 2002	32
Supa Valu Capel and SDA Agreement 2002	32
Supa Valu Dongara and SDA Agreement 2002	32
Supa Valu Hamilton Hill and SDA Agreement 2002	32
Supa Valu High Wycombe and SDA Agreement 2002	32
Supa Valu Huntingdale and SDA Agreement 2002	32
Supa Valu Innaloo and SDA Agreement 2002	32
Supa Valu Kelmscott and SDA Agreement 2002	32
Supa Valu Ocean Reef and SDA Agreement 2002	32
Supa Valu Stirling and SDA Agreement 2002	32
Supa Valu Willeton and SDA Agreement 2002	32
Three Springs General Store and SDA Agreement 2002	32
Top Valu Supermarket and SDA Agreement 2002	32
Trade Winds Supermarket and SDA Agreement 2002	32
Wundowie One Stop and SDA Agreement 2002	32
Wyndham Supermarket and SDA Agreement 2002	32
York Mini Mart and SDA Agreement 2002	32

SCHEDULE B

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

TOWN	PER WEEK
Agnew	$20.20
Argyle	$53.60
Balladonia	$20.60
Barrow Island	$34.90
Boulder	$8.50
Broome	$32.30
Bullfinch	$9.50
Carnarvon	$16.60
Cockatoo Island	$35.50

TOWN—*continued*	PER WEEK
Coolgardie	$8.50
Cue	$20.70
Dampier	$28.10
Denham	$16.60
Derby	$33.60
Esperance	$5.90
Eucla	$22.60
Exmouth	$29.50
Fitzroy Crossing	$40.80
Goldsworthy	$17.50
Halls Creek	$47.00
Kalbarri	$7.10
Kalgoorlie	$8.50
Kambalda	$8.50
Karratha	$33.70
Koolan Island	$35.50
Koolyanobbing	$9.50
Kununurra	$53.60
Laverton	$20.60
Learmonth	$29.50
Leinster	$20.20
Leonora	$20.60
Madura	$21.60
Marble Bar	$51.80
Meekatharra	$17.80
Mount Magnet	$22.30
Mundrabilla	$22.10
Newman	$19.30
Norseman	$17.70
Nullagine	$51.70
Onslow	$34.90
Pannawonica	$26.20
Paraburdoo	$26.10
Port Hedland	$28.00
Ravensthorpe	$10.60
Roebourne	$38.80
Sandstone	$20.20
Shark Bay	$16.60
Shay Gap	$17.50
Southern Cross	$9.50
Telfer	$47.70
Teutonic Bore	$20.20
Tom Price	$26.10
Whim Creek	$33.40
Wickham	$32.30
Wiluna	$20.40
Wittenoom	$45.80
Wyndham	$50.30

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

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

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

(3) Where an employee:

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

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

such employee shall be paid $66^2/_3$ per cent of the allowances prescribed in subclause (1) of this clause.

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

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

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

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

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

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

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

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

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

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

2013 WAIRC 00347

2013 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00347
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
		ACTING SENIOR COMMISSIONER P E SCOTT
		COMMISSIONER S J KENNER
		COMMISSIONER J L HARRISON
		COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 28 MAY 2013, WEDNESDAY, 29 MAY 2013, THURSDAY, 6 JUNE 2013
DELIVERED	**:**	TUESDAY, 11 JUNE 2013
FILE NO.	**:**	APPL 1 OF 2013
	:	ON THE COMMISSION'S OWN MOTION

CatchWords	:	State Wage order - Commission's own motion - Minimum wage for employees under Minimum Conditions of Employment Act 1993 - Award rates of wage - Award minimum wage - State wage principles
Legislation	:	Industrial Relations Act 1979 s 26, s 50A, Minimum Conditions of Employment Act 1993 s 12, Fair Work Act 2009 (Cth) s 14, s 284
Result	:	*2013 State Wage Order issued*

Representation:

Ms S Haynes and Ms M Williams on behalf of the Hon Minister for Commerce

Mr P Moss and Ms J Murphy on behalf of the Chamber of Commerce and Industry of WA (Inc)

Mr M Swinbourn and with him, Dr T Dymond on behalf of UnionsWA

Case(s) referred to in reasons:

Ex parte H.V. McKay (1907) 2 CAR 1

The Fair Work Commission Annual Wage Review 2012-13 [2013] FWCFB 4000

State Wage Order Decision [2012] WAIRC 00346; (2012) 92 WAIG 557

State Wage Order Decision [2011] WAIRC 00399; (2011) 91 WAIG 1008

State Wage Order Decision [2006] WAIRC 04608; (2006) 86 WAIG 1633

Reasons for Decision

INTRODUCTION

1 This is the unanimous decision of the Commission in Court Session. Section 50A of the *Industrial Relations Act 1979* (the Act) requires the Commission before 1 July in each year, of its own motion, to make a General Order –

- setting the minimum weekly rate of pay applicable under s 12 of the *Minimum Conditions of Employment Act 1993* to employees who have reached 21 years of age and who are not apprentices;
- setting the minimum weekly rates of pay applicable to apprentices;
- adjusting rates of wages paid under awards;
- varying each award affected by the General Order to ensure that the award is consistent with the order;
- making other consequential changes to specified awards if appropriate, and
- setting out a statement of principles to be applied and followed in relation to the exercise of jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.

2 The Commission gave public notice of the hearing in local newspapers on 19, 24 and 27 April and 2 May 2013, and on the Commission's website and in the WA Industrial Gazette on 24 April 2013 (2013) 93 WAIG 397 inviting submissions from interested persons. We set out below an outline of the submissions received.

The Hon Minister for Commerce

3 The Minister submits that the WA Government is committed to promoting flexible, fair and productive employment practices to serve the interests of employees and employers. The Minister's principal interest is to ensure that minimum wages meet the needs of the low paid without risking the liability of individual employers or wider prospects for economic growth.

4 The outlook for the WA economy is largely positive with an expectation that presently high levels of growth and labour demand will moderate only slightly in the coming years as major projects currently in the development phase commence operation. The rate of employment growth in WA will slow in the short to medium term and there remains a number of risks in the international environment with a potential to threaten the State's ongoing prosperity. The Minister submits that under these circumstances it is fair and prudent to adjust minimum and award wage rates of pay to the extent that their real value is maintained. Therefore the Minister supports a percentage increase to the minimum wage and award wage rates equivalent to the most recently published WA Department of Treasury estimates of growth in the Consumer Price Index (CPI) for Perth for 2012/13. This estimate is 2.75% and would result in a $17.30 increase to the minimum wage increasing it from $627.70 per week to $645.00 per week.

5 The Minister submits that the increase should also apply to the State minimum wage and award rates of pay for junior employees, apprentices and trainees. The Minister provides detailed submissions on the matters prescribed in s 50A(3) of the Act which the Commission is required to take into consideration.

6 The Minister also provides a submission in relation to the coverage of the General Order to issue in these proceedings. It is recognised that the order to issue will only affect WA employers and their employees who are not national system employers as defined in s 14 of the *Fair Work Act 2009* (Cth) (the Fair Work Act) and who are reliant on the State minimum wage and or awards for wage setting. It remains difficult to estimate the number of employees who are covered by the WA industrial relations jurisdiction because definitive data is not available. The Minister observes that data from the 2010 Employee

Earnings and Hours survey from the Australian Bureau of Statistics indicates that between 21.7 and 36.2% of WA employees are covered by the State industrial relations jurisdiction.

7 The Minister states that an adjustment of the State minimum wage for inflation maintains the real value of minimum and award wages without adversely increasing labour costs and potentially hindering employment growth. Further, employers have already experienced price pressures associated with the carbon tax and will be subject to the extra costs associated with increases to compulsory employee contributions to superannuation from 1 July 2013.

8 The Minister presented evidence from Mr David Christmas, the Acting Director of the Forecasting Quantitative Services Division of the Department of Treasury about the WA economy and which referred also to the national economy and international data. The Commission extends its thanks to the Department of Treasury for making Mr Christmas available.

Chamber of Commerce and Industry of Western Australia (Inc)

9 CCIWA emphasises that WA is the only State which has two different minimum wages applying within the private sector. The current difference between the State minimum wage of $627.70 per week and the national minimum wage of $606.40 per week is $21.30 per week. CCIWA submits that this results in an uneven playing field for business with State-based employers, who are often small businesses with a limited ability to absorb increased costs and, pay higher award rates of pay compared to their often larger national system competitor.

10 Whilst growth within the WA economy remains strong, the benefits of this growth are not shared equally throughout the economy. WA's strong economic performance is positively skewed as a result of growth in the resource industry which is not representative of the industries covered by the State system.

11 Further, growth in the cost of living as measured by the CPI for Perth is in line with the national average. Consequently, it is CCIWA's position that the State minimum wage should be equalised with the national minimum wage by not granting any increase to the State minimum wage in 2013 unless the 2012/13 national Annual Wage Review results in an increase to the national minimum wage of more than $21.30 per week. If the increase is greater than the current gap between the State and national minimum wage, then CCIWA submits that the State minimum wage should be increased by the difference between the 2012/13 national minimum wage and the 2012 State minimum wage.

12 CCIWA also provides data in relation to the State and national economies.

UnionsWA

13 UnionsWA submits that the State minimum wage should be increased by 7%, an increase of $43.94 per week. While WA has arguably the strongest economy of all of the States, it is also the most unequal State in the Commonwealth in terms of income distribution between individuals, between households and between genders.

14 It is UnionWA's contention that the State minimum wage should reflect WA's stronger economic performance; the State minimum wage should also play its part in readdressing the growing inequalities in WA society; and while a minimum wage increase is by no means the only response to these growing inequalities, other responses will not be adequate without a sufficient minimum wage increase.

15 UnionsWA argues for a wage increase greater than the all-groups CPI increase because the components of CPI inflation can, and should, be disaggregated for low paid workers because costs have more impact for those workers than others; this is particularly so in relation to housing costs. UnionsWA attaches to its submission a number of academic articles concerning the effect of minimum wages.

16 UnionsWA also makes submissions regarding the WA and national economies.

17 UnionsWA presented evidence from Professor Rowena Barrett, Head of School of the School of Management at Edith Cowan University and Professor of Human Resource Management. Professor Barrett's evidence, in summary, addressed the coverage of the State minimum wage. It could be estimated that the numbers of employees that could be affected by the State minimum wage decision would range from 19,697 to 374,243 (although the upper limit may be too high), however not all employees of small firms would be affected by the State minimum wage decision as they may not be minimum wage employees. If a smaller number of employees was to be affected by the State minimum wage decision, then small firms' ability to pay is unlikely to be compromised; if the number is larger, an increase could be accommodated through various means without having a negative effect on employment.

18 Professor Barrett's evidence was that there are no Australian studies that have looked at the effect of minimum wages on employment but studies elsewhere address this issue. Over the years economists have studied the effect of minimum wages on employment and this argument has not been conclusively proved. Although traditional economic theory predicts that a number of negative consequences can result from high minimum wages, other outcomes may include employers adjusting employee hours, affecting firms' profits, reducing other costs within the business, changes to the capital-labour ratio and growth in total factor productivity via investment, training and skill development.

19 It is not possible to identify a particular response of all small firms to regulation generally and, in this case, an increase in the State minimum wage specifically. How small firms respond will depend on what the owner-manager knows about the decision and how they make sense of the decision. In a human resource management context, matters relating to wages sit within the range of practices relating to the attraction, motivation and retention of employees. There is reliance on the award system to provide the base rate which is then subject to informal negotiations. Therefore, the effect of the State minimum wage decision on small firm employment will depend on a range of factors and cannot be predetermined. The owner-manager's motivation for business, experience and capability will play an important role in shaping their response.

20 Whilst Professor Barrett's evidence indicates that increases in the minimum wage do not cause job losses as such, there may be other responses such as employers reducing employees' hours of work and this reduction being taken up by working owners;

changes to modes of employment which suggests changes from full time permanent to part time or casual, as well as other "informal negotiation" outcomes including less diligent compliance with award provisions such as penalty rates and overtime.

Australian Hotels Association (Western Australia)

21 AHAWA's written submission recommends that any wage increase awarded by the Commission takes into account the increase in superannuation contributions of 0.25%. The hospitality sector has been significantly impacted by the introduction of the carbon tax. Utility expenses have increased at a rate higher than expected because of the carbon tax and also because of general increases. Trading conditions for hospitality businesses, which are generally small business, family owned and are more likely to be located in regional areas, are poor; there is a reduction in tourism and an adverse impact from the high Australian dollar.

22 In particular, the AHAWA submits that the federal and State minimum wages should be equal. If there was to be an increase to the State minimum wage, consideration should be given to an $8.00 per week wage increase. AHAWA provided detail in relation to these points.

Western Australian Council of Social Services Inc

23 In a detailed submission, WACOSS maintains that an increase of $43.00 in the State minimum wage, and in the minimum award rates for junior employees, apprentices and trainees, is consistent with a need to maintain a fair system of wages and conditions in the current WA context.

24 WACOSS considers minimum wages to be a vital means of protecting low income employees from poverty, the benefits of which are felt by minimum wage employees, their families, their children and society at large. It is important for the wages earned by full time minimum wage employees to be sufficient to ensure that they have the capacity to meet their basic living costs while living with dignity and respect. As such, the primary focus of WACOSS's claim is the increasing cost of living pressures in WA, pressures which are having the greatest adverse impact on low income earners such as those who rely on the minimum wage.

Mannkal Economic Education Foundation

25 A written submission was received from the Chairman of this foundation. The submission addresses the economics of minimum wage laws, observing that there may be more intellectually discredited arguments than those for minimum wages, however it is not easy to find them. The author further addresses the issues under the headings of "Minimum Wages destroy jobs"; "Do Minimum Wages ever do any good?"; "Where has support for Minimum Wage Laws originated?" and provides some comment on what are described as "historic studies".

CONSIDERATION

Coverage of State Wage Order

26 The Minister, CCIWA and UnionsWA give submissions on the coverage of the WA industrial relations system. It is accepted that the application of the Act to employers and their employees in WA is overidden by the Fair Work Act. As we have noted in past State Wage decisions ([2012] WAIRC 00346 at [44]; (2012) 92 WAIG 557 at 561; [2011] WAIRC 00399 at [30]; (2011) 91 WAIG 1008 at 1012), the General Order to issue from this matter will not affect the significant majority of employers in WA which are national system employers under that Commonwealth legislation and their employees. The State minimum wage, and the variations to the awards which result from the General Order to issue, will apply to employers and employees in the approximately 20% of businesses in the private sector in WA which are sole traders, partnerships, some trusts, and incorporated businesses which are not trading or financial corporations.

27 As the Minister observes, the precise number directly, and indirectly, affected is not capable of precise calculation due to the absence of definitive data. It was common ground between those persons appearing that it is not necessary for these proceedings to determine the precise numbers of persons covered by the WA industrial relations system. We see no basis for us to depart from the conclusion of Professor David Plowman, Graduate School of Management at the University of Western Australia who prepared a report for the Commission as part of the 2006 General Order wage case ([2006] WAIRC 04608 at [58]; (2006) 86 WAIG 1633 at 1639).

28 The report dealt with, amongst other things, the numbers of persons who would be covered by the State minimum wage. Professor Plowman made allowances for the percentage of employees coming under the Commonwealth jurisdiction (estimated then at approximately 60%) and made a further allowance for the fact that most of those receiving only the minimum wage are award-only employees whose incidence is higher in the State system. Professor Plowman estimated that about 2.2% of the WA workforce would be directly affected by the State minimum wage adjustment; possibly 4% of the WA workforce could be affected in differing degrees by the adjustments to other wages to maintain established relativities.

29 CCIWA submits that in considering any increases to the State minimum wage and award rates of pay, specific consideration should be given to the impact of the decision on those employers covered by the State system. It placed emphasis upon the state of the WA economy for those employers remaining in the State system.

30 However, the criteria which s 50A(3) of the Act obliges us to take into account do not contain the emphasis placed by CCIWA. The Act requires us to take into consideration the need to ensure that Western Australians as a whole have a system of fair wages and conditions of employment; we are to take into account the state of the economy of WA and the likely effect of our decision on that economy, and in particular on the level of employment, inflation and productivity in WA, and not just to that part of it that remains covered by the Act.

31 Nevertheless, the Commission is required by s 26(1)(a) and (c) to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms; it is to have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole. This will ensure the outcome of our consideration will be tempered with the knowledge that the minimum wage which we set

can only apply to the small minority of the workforce in WA. We pay particular attention to the information before us regarding those industry sectors which are likely to employ minimum wage dependant employees.

The Statutory Criteria

32 Section 50A(3) sets out the matters that the Commission is obliged to take into consideration. The submissions before us address the need to ensure that Western Australians have a system of fair wages and conditions of employment; the need to meet the needs of the low paid; to provide fair wage standards in the context of living standards generally prevailing in the community; and the need to contribute to improved living standards for employees.

33 While there is some common ground in relation to these matters, it is the Minister's view that their correct application will lead to the conclusion that an adjustment based upon forecast movements in prices is appropriate. The Minister points out that it is not a simple matter to determine what sum would be required to meet the material needs of low paid employees given the potentially large variation in household incomes, assets and individual family circumstances.

34 CCIWA submits that the cost of living in WA is marginally lower than the national average thus supporting a conclusion that the State and national minimum wages should be aligned. Further, CCIWA submits that Australia's minimum wage is the highest compared to any of the OECD member countries. Taking into account the tax-transfer system, consideration should also be given to whether the award rates of pay generally applicable to employees achieve the statutory criteria. The AHAWA asks the Commission to approach the task before it by particular reference to the members it represents in the hospitality and accommodation sectors.

35 UnionsWA and WACOSS take a quite different point of view. UnionsWA urges the Commission to approach the criteria from the point of view that although WA is a well-performing economy overall, there are serious concerns about how many Western Australians are actually sharing the benefits of that strong performance. An approach which matches a minimum wage increase to the all groups CPI figure ignores not only the difficulties faced by low income earning individuals and households with essential living costs, but also ignores the need for strong earnings growth to support the growth of local economies and businesses. UnionsWA points out that this is not a new concept, and can be traced back to the landmark "*Harvester*" decision (*Ex Parte H. V. McKay* (1907) 2 CAR 1). An increase to the minimum wage should contribute to improved living standards for employees on lower wages by promoting social inclusion. The cumulative movement in the State minimum wage from June 2006 to June 2012 of 24.4% is less than the index numbers for that period in the subgroups measuring utility prices, rents, medical and hospital service costs and cumulative dental service costs.

36 The WACOSS 2012 Cost of Living Report examined the circumstances of three types of low income households, including households employed slightly above the minimum wage, and found that for single and dual income families, increases in the minimum wage were important for keeping pace with living costs. WACOSS stresses the growing income inequality in Australia and expresses alarm at the rate at which the gap between minimum wage rates and median pay levels is continuing to grow in WA.

37 In particular, WACOSS stresses that average weekly ordinary time earnings (AWOTE) in WA has increased significantly over the last 12 years, owever the State minimum wage has not kept pace with this. In recent years the State minimum wage as a percentage of AWOTE has been falling significantly so that by August 2012, the minimum wage fell below 40% of AWOTE for the first time.

38 WA is recorded as having the highest level of income inequality in the country and among the highest in the world. WA has one of the highest Gini coefficients amongst OECD countries. Correspondingly, WA has become a significantly more expensive place to live with the pressure of cost of living increases being hardest felt by people on low incomes. The increase in, and the cost of, essentials is hardest felt by low income households who spend a much higher proportion of their household income on essentials.

39 Low income individuals and households are, or are at risk of, slipping into poverty and these are the people for whom increases to the State minimum wage really count. WACOSS points particularly to housing as a major cost of living pressure. The requirement of the Commission to consider the need of meeting the needs of the low paid and to provide fair wage standards in the context of living standards generally prevailing in the community requires consideration of these issues, together with the other increases in utilities and food.

40 In reply, CCIWA points out that the term "low paid" in this context would most appropriately be described as those persons reliant on, or affected by, the State minimum wage order and that the reference to "low income" earners is an undefined and unquantifiable category.

41 The differing positions set out above are not easy to reconcile. They each urge the Commission to address the criteria we are obliged to address from their respective points of view to the exclusion of the points of view of others. More fundamentally, the Mannkal Economic Foundation submission seeks to raise doubts about whether there should be a minimum wage at all.

42 In the *Harvester* decision (above at page 2), Higgins J regretted that the Parliament had not indicated what it meant by "fair and reasonable" in the legislation before him. In this case, the WA Parliament has set out the considerations to be applied. These competing considerations must be taken into account and the Commission must reach an equitable conclusion. The strong, and well-supported, submissions of UnionsWA and WACOSS must nevertheless be balanced against at least the capacity of employers as a whole to bear the cost of increased wages, salaries, allowances and other remuneration taking into account also the state of the WA economy and the likely effect of any increase on that economy and in particular on the level of employment, inflation and productivity in WA.

43 With all respect to the views of the Mannkal Economic Foundation, the WA Parliament has decided that this Commission should set a minimum wage each year. On the material before us, it is not established that academic theories supporting a minimum wage are discredited. UnionsWA points to the November 2010 publication of Dube, Lester and Reich *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties* (The Review of Economic and Statistics

(November 2010), 92(4) pp 945 to 964), submitting that the authors' estimates suggested no detectable employment losses from the kind of minimum wage increases seen in the United States.

44 We note too the studies referred to in Professor Barrett's evidence which question the simple neoclassical economic theory that increased minimum wages cause job losses and show a range of other effects, but none show significant negative effects on employment. We have referred earlier to Professor Barrett's evidence indicating that there may be other responses by employers such as reducing employees' hours of work or changes to the mode of employment.

45 We refer also, and more relevantly, to the conclusions of Professor Plowman in relation to the operation of the WA minimum wage in the period 1990 to 2005 which suggests that there has been little minimum wage effect on the economy as a whole, and weak effects on those sectors with higher levels of low paid employees (above at [64]).

Protecting Employees Who May be Unable to Reach an Industrial Agreement

46 The Minister's submission is that it is generally accepted that particular types of employees are less likely to engage in workplace negotiations concerning wages and conditions. This group includes youth, low skilled workers and those with non-permanent jobs. Given that the award system functions as a safety net, it is expected that those on award wages would generally earn less than those on collective or individual agreements.

47 The Minister cautions that although a CPI adjustment to minimum and award wages will not discourage bargaining, and will protect the real value of wages of those employees who cannot bargain, an adjustment in excess of real wage maintenance may have the effect of removing the impetus for employees to pursue bargaining. This position is supported by CCIWA.

48 The submissions before us show that the increases we have given to the State minimum wage for the last ten years have resulted in an increase in the real value of the WA minimum wage: CPI has increased by 34% while the minimum wage has increased 45.5% (Minister's submission paragraph 30). Correspondingly, there has been no evidence before us which could lead to the conclusion that the real wage increases we have given have discouraged bargaining in the workplace.

Encouraging Ongoing Skills Development

49 The Minister observes that although WA's rate of unemployment has risen marginally in recent months, the State is sustaining a period of low unemployment and continues to record high levels of labour force participation. There is a long term requirement for skilled labour. The number of people entering into training in WA has generally increased in recent years. Previous State minimum wage increases for apprentices and trainees have not had a significant impact on the number of apprenticeships and traineeships being undertaken in WA. The submissions were not contested and we accept them.

Providing Equal Remuneration for Men and Women for Work of Equal or Comparable Value

50 The distinction between this consideration and the gender pay gap has been recognised in previous State wage proceedings. There is no evidence before us of any significant change between the relative numbers of men and women who are receiving the minimum wage. We have recognised that in the private sector in Australia, women are much more likely than men to be dependent on the award rate and therefore annual increases to the minimum wage.

51 We have noted also that the reasons for the gender pay gap in WA being greater than any other State, and indeed for the nation as a whole, are complex and we reiterate there are inherent limitations to the role which the minimum wage can play in reducing the overall gender pay gap. This does not mean that we disregard the issue as a matter of relevance. We repeat the conclusion we stated in our 2012 minimum wage decision that an increase to the minimum wage has the potential to assist in providing equal remuneration for men and women for work of equal or comparable value.

The State of the Economy of Western Australia

52 Mr Christmas's evidence is that the WA economy is growing strongly now but there are already signs that the pace of growth in the domestic economy is easing. Conditions in the labour market are softening. Inflation is expected to grow at a moderate pace and within the Reserve Bank's target range of 2 to 3%. There are risks to the outlook. Mr Christmas's evidence covered in detail the sectors of the economy leading to the above conclusions.

53 We set out below Table 1.1 from attachment A to the Minister's submissions containing the major economic aggregates of growth for the State.

Major Economic Aggregates, Annual Growth (%) [(a)]

	2011-12 Actual	**2012-13** Budget Estimate	**2013-14** Forward Estimate	**2014-15** Forward Estimate	**2015-16** Forward Estimate
State Final Demand (SFD)	14.2	7.0	3.75	1.75	1.25
Gross State Product (GSP)	6.7	6.0	5.0	4.25	4.25
Gross State Income (GSI)	6.6	1.25	2.75	2.25	2.25
Employment	3.9	3.25	2.25	2.0	1.75
Unemployment rate [(b)]	4.0	4.25	4.5	4.5	4.5
Consumer price index (CPI) [(c)]	2.2	2.75	2.75	2.75	2.75
Wage price index (WPI)	4.3	4.5	4.25	4.25	4.25
Population	3.0	2.8	2.4	2.3	2.3

(a) Annual average growth unless otherwise stated.
(b) Average rate over the year.
(c) Includes 0.7 percentage points in 2012-13 and 0.2 percentage points in 2015-16, to reflect the price level effects of the Commonwealth Government's Carbon Tax.
Source: Department of Treasury

54 The latest projection is for growth of 6% in the Gross State Product for 2012/13 and 5% 2013/14. Household consumption, which accounts for around 35% of Gross Domestic Product (GDP), has been stronger than anticipated and net exports have made a stronger contribution as well.

55 In the WA economy, the forecast for business investment for 2012/13 is 11.25%. Business investment is expected to peak in 2013/14 and there is general consensus that resource investment is now close to peak levels; it is expected to remain high, but it will not be driving growth.

56 Consumer price growth in Perth has been relatively subdued in the past two years, rising by 1.9% in annual average terms in the March quarter 2013. Overall, the expectation is for relatively subdued price growth: Treasury projects an increase to the Perth CPI of 2.75% pa in 2012/13 and 2013/14. The year-to-date data is showing the actual outcome may be a little less than the Treasury projection.

57 There has been a noticeable softening in the labour market conditions in recent months and the pace of employment growth is expected to moderate in coming years in line with the projected growth in the State's domestic economy.

58 Recent data releases suggest the unemployment rate in 2012/13 will be slightly higher than Treasury's most recent projection: it is expected to average 4.5% pa which is slightly higher than the average of the past ten years. For the past ten years, the State has been able to sustain strong economic growth at an unemployment rate of 4 to 4.5%.

59 The WA Wage Price Index (WPI) has grown by an average of 0.9% per quarter in the first three quarters of 2012/13, slightly below average growth of 1%; in annual average terms it grew by 4.2% in the year to March which is equal to the average growth in the past decade. The growth in WPI was significantly stronger than the growth in national WPI both in the March quarter and in annual average terms. This largely reflects greater economic growth in WA than nationally and strong growth in mining wages. Annual wages growth as measured by the WPI to the December quarter 2012 was more subdued in the accommodation and food services sector at 2.6% and in the retail industry at 2.3%.

60 Mr Christmas dealt also with the risks to the State's economy from the Euro area sovereign debt situation, slowing growth in China, a fall in the Australian dollar relative to other currencies, population growth, and consumer and business sentiment.

61 Although CCIWA queried whether the forecast from the WA Treasury was based upon figures which are out of date, we accept the evidence from Mr Christmas that Treasury's forecast is based upon the pre-election financial projections statement and are effectively a mid-year review.

62 UnionsWA describes WA as maintaining its position as the leading State economy. Its performance includes industries most likely to be affected by the State Wage order including retail trade. Even though WA's unemployment rate has increased, it is lower than the other States. It points out that the November 2012 AWOTE figure for WA is $1590.60 and submits that even with figures relating to mining removed, there is a discernible and increasing disparity between Average Weekly Earnings and the State minimum wage which undermines the fairness of the minimum wage compared to the rest of the community.

The State of the National Economy

63 The Minister observes that WA employees comprise 11.3% of the national workforce. WA is a major driver of growth in the economy. The State's contribution per capita is more than one and a half times higher that of the next highest contributing State. The Australian economy itself is outperforming most other advanced economies and is currently growing around trend. It is expected to continue that growth for the next two years with GDP forecast to increase by 3% in both 2012/13 and 2013/14.

64 Notwithstanding this, there are a number of factors that are creating significant challenges for certain parts of the economy including the challenging global environment, high Australian dollar, cautious household spending behaviour and subdued expectations for asset price increases.

The Capacity of Employers as a Whole to Bear Costs of Increased Wages

65 The Minister observes that many employers are likely to have faced significant cost increases in the past financial year as a result of the introduction of the carbon tax. In addition, compulsory employer superannuation contributions will increase three percentage points over the next six financial years commencing 1 July 2013. These represent a significant impost on employers, particularly those in small business.

66 The Minister observes that although the WA business climate is generally positive, with above-average levels of investment, household consumption and retail spending, there is potential for excessive wage increases to hinder profitability and constrain employment growth. The Minister submits that based upon the Gross Operating Surplus plus Gross Mixed Income recorded by the ABS, viewed with caution, there is some basis to show that profits for WA businesses on the whole increased by 4.2%, which is a moderate growth when compared to the annual growth in June 2011 of 30.2%.

67 The Minister contends that employers generally have the capacity to maintain real wages. It is nevertheless important to recognise the potential for immoderate wage increases to act as a brake on employers' willingness to hire, which may be especially pertinent to those employers to whom the General Order will apply.

68 CCIWA also requests the Commission to consider the increased costs and the subdued growth referred to when assessing the capacity of employers as a whole to pay the increase. In particular, CCIWA and the AHAWA request the Commission to discount any proposed wage increase by 0.25% being the increased superannuation contribution to apply from 1 July 2013.

The Fair Work Commission Annual Wage Review 2012-2013

69 Section 50A(3)(f) requires the Commission to take into consideration relevant decisions of other courts and tribunals. No person sought to persuade us to revisit our conclusion in the 2012 State minimum wage decision that the Annual Wage Review of Fair Work Australia (now the Fair Work Commission (FWC)) is a relevant and significant consideration. We noted in our 2012 decision ([2012] WAIRC 00346 at [90]; (2012) 92 WAIG 557 at 566) that although s 284(1) of the FW Act does not require consideration of the state of the WA economy and the WA award framework which we are obliged by s 50A(3)(b)

and (e) of the Act to take into consideration, we consider it significant that there is a substantial overlap between the considerations of FWC's Minimum Wage Panel and the considerations we are obliged by s 50A(3) to take into account. Further, the timing of the Annual Wage Review and the date of operation of the minimum wage to be set by FWC is contemporaneous with the obligations on this Commission under s 50A of the Act.

70 We consider the Annual Wage Review 2012-13 [2013] FWCFB 4000, which increased the national minimum wage by 2.6% from $606.40 to $622.20 per week, an increase of $15.80 per week, to be a relevant and significant consideration.

CONCLUSIONS

71 The primary submission that is common to the positions of CCIWA and the AHAWA is that we should not increase the minimum wage in order to allow the 1 July 2013 increase to the national minimum wage to align with the WA minimum wage. We consider the proper application of the requirements of s 50A(3) of the Act does not permit us to do so.

72 Section 50A(3) does not refer to the level of the national minimum wage as a matter to be taken into consideration when setting the minimum wage. Section 51(2) of the Act as it was prior to 2006 obliged the Commission to apply the then National Wage Case increase unless it was satisfied that there were good reasons not to do so. In 2006, changes to Commonwealth legislation meant that there was no longer a National Wage Case to follow; in turn the WA Parliament enacted s 50A to require the Commission to set the WA minimum wage independently of the minimum wage applying nationally: it is not a presumption of s 50A of the Act that the WA and national minimum wages are to be aligned. Since 2006, s 50A(3) of the Act and the corresponding national legislative provisions have not been the same and there have been differences in the timing of both national and WA minimum wage decisions. As a direct consequence of this, particularly given the greater strength of the WA economy relative to the national economy, the WA minimum wage is higher than the national minimum wage.

73 If the proper application of the requirements of s 50A(3) of the Act warrants an increase in the State minimum wage, it is not open to the Commission not to award that increase in order to allow the 1 July 2013 increase to the national minimum wage to align with the WA minimum wage.

74 We take into account the submission that employers have already experienced price pressures associated with the carbon tax. The extra cost from 1 July 2013 from the increase to compulsory employee contributions to superannuation is an employment cost which is relevant to our consideration. We are urged by CCIWA to quantify the extent to which we have taken these into account, in the interests of transparency. We consider to do so will depart from the obligation under s 50A(3) to consider broadly the issues we are required to take into account. We have been reluctant to set the minimum wage by specific reference to any one statistic or economic measure; we are similarly reluctant to adopt a mathematical approach when taking these matters into account.

75 For that reason, we recognise the important principle underpinning the Minister's submission that an adjustment of the State minimum wage for inflation maintains the real value of the minimum wage without adversely increasing labour costs and potentially hindering employment growth. However, s 50A(3) obliges us to take more than this principle into consideration.

76 In relation to the primary submission of UnionsWA and WACOSS, in our 2012 minimum wage decision we stated that we considered UnionsWA's submission that the setting of the WA minimum wage should be significantly influenced by its past or present relativity to AWOTE not to be appropriate. UnionsWA urges us to revisit this conclusion. It presents material based upon disaggregating the data to exclude any bias from high wages earned in the mining sector. We note the result. It is important to appreciate that AWOTE, even disaggregated is merely another source of helpful information. We recognise that growth in the State minimum wage is not keeping pace with the growth in wages generally in WA whether measured according to the WPI or to AWOTE. That is, nevertheless only one consideration. To significantly influence setting of the WA minimum wage by reference to AWOTE to the exclusion of the requirements of s 50A(3) would not properly give effect to the Act.

77 The obligation imposed on the Commission requires a balancing of differing considerations. We are obliged to take into consideration the need to ensure that Western Australians have a system of fair wages and conditions of employment; and to provide fair wage standards in the context of living standards generally prevailing in the community. Fairness is a relative concept. In our 2012 minimum wage decision, we stated at [86]:

> Fairness, in the context of setting the WA minimum wage, necessarily includes a comparison with the national minimum wage which is applicable to comparable employees elsewhere in the State. The observation that an employee's judgment of whether or not their wage is fair by reference to what is being received by others, applies equally to the minimum wage received by the others who are the significant majority of low paid employees in WA, and in each other State.

78 We repeat that statement here. An increase in the State minimum wage, and all award wages, by the 7% advocated by UnionsWA may contribute to improved living standards of low paid employees and assist them to meet their needs. However, for the Commission to do so would be to attach no weight at all to the other considerations relevant to setting the State minimum wage. Fairness as a relative concept obliges us to take into consideration the fact that the resulting minimum wage payable to minimum wage dependent employees of non-national system employers in WA would be almost $50.00 per week more than the minimum wage payable to minimum wage dependent employees of national system employers in WA, and in other States.

79 We would be bound also to take into consideration the cost burden it would place upon WA employers covered by the State industrial relations system to pay a 7% increase in base rates of wage when their national system competitors in WA would have to pay less than half that amount.

80 We also would have to take into consideration the capacity of employers as a whole to bear the costs of a 7% increase in the minimum wage and award wages. Some award-reliant sectors of the WA economy including hospitality and tourism show that difficulties are being experienced; they show a limited capacity to afford to pay a significant increase to the WA minimum

wage and award wage rates. To repeat the words said to us during the hearing by both CCIWA and UnionsWA in support of their respective and fundamentally opposite positions: fairness cuts both ways.

81 Further, we would not be confident about the effect of such a significant increase upon the WA economy and, in particular, on the level of employment, inflation and productivity in WA. We would be surprised if such an increase did not have some negative consequences for employees as employers as a whole sought to pay the increase to their employees. The evidence of Professor Barrett has assisted us to understand the different responses of small business employers to an increase in the minimum wage; however some responses may be negative to employees.

82 It is not a question of deferring consideration of the issues raised by UnionsWA and WACOSS; we are not persuaded that accepting their submission for a 7% increase to the State minimum wage can provide the balanced response the Act requires us to provide.

83 We consider that the submissions provided to us by UnionsWA and WACOSS make an important contribution to conclusions we have reached in previous minimum wage cases that a real increase to the WA minimum wage is warranted. We recognise that increasing the minimum wage assists in meeting the needs of the low paid, contributes to improved living standards for employees, provides a wage increase to those employees who may be unable to reach an industrial agreement and assists in a limited way to lessen the gender pay gap in WA.

84 We are conscious that the evidence on this occasion is that the WA economy is growing strongly now however there are already signs that growth in the domestic economy is easing. We note that the unemployment rate is above average for the State at a time when it is desirable for there to be strong earnings growth to support the growth of the local economy. Prices growth overall in the State is relatively subdued. Wages growth is slowing and has been relatively low in the hospitality and retail sectors. Correspondingly, taking into account the matters in s 50A(3), we are conscious of the evidence that WA is recorded as having the highest level of income inequality in the country and has become a significantly more expensive place to live with the pressure of cost of living increases being hardest felt by people on low incomes.

85 These matters, in the context of our consideration of the matters in s 50A(3) we have set out above, lead us to conclude that we should set the State minimum wage at $645.90 per week, being an increase of $18.20 per week. This increase is within the range of past increases we have given to the minimum wage and which have had no measurable effect on the WA economy and in particular upon the level of employment, inflation and productivity. We consider it to be within the capacity to pay of employers as a whole. It is higher, though not significantly higher, than the minimum wage payable elsewhere in WA and Australia generally.

86 On this occasion, we favour a flat-dollar increase rather than a percentage increase. This in large part is due to the emphasis we wish to place upon those employees who are on the minimum wage or slightly above it, rather than those on higher award wages. There was no direct evidence of issues having arisen from any compression of award relativities from past flat-dollar increases. The issue is able to be addressed on a future occasion.

87 We are obliged by s 50A(4) to ensure, to the extent possible, that there is consistency and equity in relation to the variation of awards. No person appearing submitted that we should not correspondingly adjust rates of wages paid under awards. Given that position, and the role of awards in providing fair wage standards, we will adjust award wages by $18.20 per week from the first pay period on or after 1 July 2013. The increase will apply only to employees who are paid the award wage; any wage paid over the award wage is able to be used to offset the increase.

The Minimum Weekly Rate of Pay Applicable to Apprentices and Trainees

88 Section 50A(3)(a)(vi) requires the Commission to take into consideration the need to encourage ongoing skills development. The evidence before us shows that previous minimum wage increases for apprentices and trainees have not discouraged their uptake in WA. No submissions were put to us on this occasion to warrant a departure from the manner by which the Commission has previously set minimum wages applicable to adult apprentices. We propose to apply the increase to adult apprentices, other apprentices and to trainees in accordance with the usual practice of the Commission.

Rounding of Rate of Wages

89 The Minister has submitted a draft clause with the purpose of standardising how wage rates resulting from the application of the General Order are to be rounded. We consider the draft clause is appropriate and we adopt it as an appendix to these reasons for decision.

90 We wish to record our appreciation to Ms Haynes, who appeared for the Minister, for circulating a draft clause well in advance of the hearing which enabled it to be given proper consideration by those persons appearing.

Industry/Skill Levels

91 As in previous years, the Minister has provided an updated industry/skill level classifications table based on advice from the Department of Education and Training. This updated table will be included in Attachment A to the 2013 State Wage order to issue.

THE STATE WAGE PRINCIPLES

92 No person suggested that any change is required to be made to the State Wage Principles. Section 50A(1)(d) of the Act obliges the Commission to set out a statement of principles to be applied and followed in relation to the exercise of jurisdiction to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment. The Statement of Principles July 2013 to issue remains unchanged from the Statement of Principles July 2012 apart from the necessary and consequential amendments to Principle 9.

MINUTE OF PROPOSED GENERAL ORDER

93 A minute of proposed General Order now issues. The Commission should be advised by 2.00 pm on Thursday, 13 June 2013 whether or not a speaking to the minutes is requested. If a speaking to the minutes is necessary, it will be dealt with on the papers and written submissions should be received by 10.00 am on Friday, 14 June 2013.

APPENDIX A

Draft Clause to Deal with Rounding in Award Rate Calculations

Where an award does not expressly provide how the rates of wages paid under it are to be adjusted in accordance with a State Wage order, then the following methodology will apply.

1. If the award's rates of wages are expressed as a weekly rate, then the weekly rates as published on the Commission's website (as of the date of this Decision) will form the basis of all wage rate adjustments under the award.
2. If (1) does not apply because the award's rates of wages are expressed as other than a weekly rate, then the following rates will form the basis of all wage rate adjustments under the award:
   (a) the fortnightly rates of wages; or (if there are no fortnightly rates)
   (b) the hourly rates of wages; or (if there are no hourly rates)
   (c) the annual rates of wages,

   as published on the Commission's website (as of the date of this Decision).
3. The applicable rates identified in (1) and (2), as published on the Commission's website, will be referred to as the "**prevailing rate**".
4. If a State Wage order provides for a percentage or flat dollar increase to the rates of wages paid under an award, then that increase is to be added to the prevailing rate and rounded in accordance with (6). The new, rounded prevailing rate will be referred to as the "**adjusted prevailing rate**".
5. The adjusted prevailing rate will form the basis of calculations for fortnightly, hourly, daily, sessional and annual rates as appropriate, and the resulting rate will be further rounded in accordance with (6).
6. Rates will be rounded in the following manner:
   a. in the case of weekly or fortnightly rates of wages, the rate will be rounded to the nearest 10c (or up to the nearest 10c in the case of a 5c figure);
   b. in the case of hourly, daily or sessional rates of wages, the rate will be rounded to the nearest 1c (or up to the nearest 1c in the case of a 0.5c figure);
   c. in the case of annual rates of wages, the rate will be rounded to the nearest $1 (or up to the nearest $1 in the case of a 50c figure);
7. The calculation of allowances under an award is not covered by this clause. The rounding principles set out in the Commission's 2007 State Wage Case Decision, and clarified in the 2009 State Wage Case Decision, will continue to apply for the purposes of allowances.

2013 WAIRC 00353

2013 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 14 JUNE 2013
FILE NO.	APPL 1 OF 2013
CITATION NO.	2013 WAIRC 00353

Result	2013 State Wage order issued
Representation	Ms S Haynes and Ms M Williams on behalf of the Hon. Minister for Commerce
	Mr P Moss and Ms J Murphy on behalf of the Chamber of Commerce and Industry of WA (Inc.)
	Mr M Swinbourn and with him, Dr T Dymond on behalf of UnionsWA

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2013 State Wage order and thereby orders as follows:

1. THAT the 2013 State Wage order takes effect on 1 July 2013.

2. THAT the General Order which issued in matter No. APPL 2 of 2012 ((2012) 92 WAIG 568) is rescinded with effect on and from the commencement of the first pay period on or after 1 July 2013.

3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be $645.90 per week on and from the commencement of the first pay period on or after 1 July 2013.

Apprentices

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

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

   (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2013:

	1 July 2013
Four Year Term	
First year	$312.00
Second year	$408.60
Third year	$557.20
Fourth year	$653.80
Three and a Half Year Term	
First six months	$312.00
Next year	$408.60
Next year	$557.20
Final year	$653.80
Three Year Term	
First year	$408.60
Second year	$557.20
Third year	$653.80

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be $557.20 per week on and from the commencement of the first pay period on or after 1 July 2013.

Trainees

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

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

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

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2013:

Industry/Skill Level A			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	222.00	265.00	327.00
Plus 1 year out of school	265.00	327.00	377.00
Plus 2 years	327.00	377.00	441.00
Plus 3 years	377.00	441.00	505.00
Plus 4 years	441.00	505.00	
Plus 5 years or more	505.00		
Industry/Skill Level B			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	222.00	265.00	318.00
Plus 1 year out of school	265.00	318.00	362.00
Plus 2 years	318.00	362.00	426.00
Plus 3 years	362.00	426.00	487.00
Plus 4 years	426.00	487.00	
Plus 5 years or more	487.00		
Industry/Skill Level C			
School Leaver	**Year 10 $**	**Year 11 $**	**Year 12 $**
	222.00	265.00	313.00
Plus 1 year out of school	265.00	313.00	351.00
Plus 2 years	313.00	351.00	394.00
Plus 3 years	351.00	394.00	442.00
Plus 4 years	394.00	442.00	
Plus 5 years or more	442.00		

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

Australian Qualification Framework (AQF)

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

Part-time and School-Based Trainees

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

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

	Current year of schooling	
Wage levels	Year 11	Year 12
A	$6.97	$8.61
B	$6.97	$8.37
C	$6.97	$8.24

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

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

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

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

On and from the commencement of the first pay period on or after 1 July 2013:

Industry/Skill Level A	$505.00 per week
Industry/Skill Level B	$487.00 per week
Industry/Skill Level C	$442.00 per week

7. THAT

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

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

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

(iii) Furniture Trades Industry Award;

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

(v) Metal Trades (General) Award;

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

(vii) Printing Award;

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

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

(x) Soft Furnishings Award; and

(xi) Vehicle Builders' Award 1971.

(b) Trainee rates be adjusted as follows:

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

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

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

Award Rates of Pay

8. THAT weekly rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by $18.20 per week on and from the commencement of the first pay period on or after 1 July 2013 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.

9. THAT any increase to wages resulting from this State Wage order on and from the commencement of the first pay period on or after 1 July 2013, unless provided for elsewhere, shall be calculated on the basis that:

(a) Where the award prescribes an adult fortnightly rate of pay, the fortnightly rate of pay is increased by $36.40 per fortnight.

(b) Where the award prescribes an adult annual rate of pay, the annual rate of pay is increased by $949.00 per annum.

(c) Where the award prescribes an adult hourly rate of pay, the hourly rate of pay is increased by the amount of $18.20 per week divided by the number of ordinary hours of work prescribed by the relevant award for a full-time employee. Where applicable, casual loadings are to be calculated based on the hourly rate.

10. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of $18.20 per week to the adult award wage on and from the commencement of the first pay period on or after 1 July 2013.

11. THAT increases under previous State Wage Case decisions prior to 1 July 2013, except those resulting from enterprise agreements, are not to be used to offset this State Wage order increase of $18.20 per week.

12. THAT on and from 1 July 2013 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:

(a) Deleting the words "$627.70 per week payable on and from the first pay period on or after 1 July 2012" and inserting in lieu the words "$645.90 per week payable on and from the commencement of the first pay period on or after 1 July 2013".

(b) Deleting the words "$543.50 per week on and from the commencement of the first pay period on or after 1 July 2012" in the Adult Apprentices section and inserting in lieu the words "$557.20 per week on and from the commencement of the first pay period on or after 1 July 2013".

(c) Deleting the date "1 July 2012" wherever it appears and inserting in lieu the date "1 July 2013".

(d) Deleting the words "2012 State Wage order decision" wherever they appear and inserting in lieu the words "2013 State Wage order decision".

Statement of Principles

13. THAT the Statement of Principles – July 2012 under the General Order in matter No. Appl 2 of 2012 be replaced by the Statement of Principles – July 2013 in Schedule 2.

Publication

14. THAT the Registrar publish in the Western Australian Industrial Gazette and on the Commission's website the clauses of the awards varied by Clauses 8 and 9 of this State Wage order incorporating the amendments made.

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

ATTACHMENT A

INDUSTRY / SKILL LEVEL A (as at May 2013)

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

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Community Services (CHC)	
Career Development Officer	III & IV
Community Care Work	III & IV
Community Services (Aged Care Work)	III & IV
Community Services (Children's Services)	III
Community Services (Youth Work)	III
Community Services Contact Work	II
Community Services Support Work	II
Community Services Work	II & III & IV
Disability Work	III & IV
Aboriginal & Islander Education Worker	III & IV
Aboriginal Child Care Work	III
Child Care Worker	Diploma
Before & After School Care Supervisor	Diploma
Bi-Lingual/Bi-Cultural Community Services Work	II & III
Christian Ministry Work	III & IV & Diploma
Out of School Hours Care Work	IV
Social Housing Work	III & IV
Protective Care Worker	IV & Diploma
Mental Health Work	IV
Youth Work	IV
Construction Plumbing and Services (CPC)	
Assistant Building Surveyor *	Diploma
Building and Construction Para Professional (Level 2) **	II
Building and Construction Trade Trainee (Level 2) **	II
Building Contract Administrator	IV
Building Maintenance	II
Building Supervisor/Construction Manager (Low Rise Commercial/Residential)	IV
Dogging	III
Drainage	II
General Construction	II
General Construction (Demolition)	III
Estimating (Housing)	IV
Marble and Granite Edge Mason	II
Site Management	IV
Scaffolding	III
Rigging	III
Steel fixing	III
Residential Drafting	IV
Correctional Services (CSC)	
Correctional Practice (Custodial)	III & IV
Correctional Practice	III & IV
Financial Services (FNS)	
Finance and Mortgage Broking	IV
Financial Services	II, III & IV
Financial Services (Accounts Clerical)	III
Financial Services (Financial Practice Support)	IV
Financial Services (Accounting)	IV
Financial Services (Superannuation)	IV
Financial Services Bookkeeping	IV
Insurance Services	III & IV
Personal Banker	IV
Drilling(RII)	
Drilling Operations	II & IV
Driller	III
Drilling (Mineral Exploration)	II, III & IV
Electricity Supply – Generation (UEP)	
ESI Generation (Electrical/Electronic)	IV
ESI Generation (Mechanical)	IV
ESI – Generation Operations Manager	Diploma
Electrical/Electronic Service Technician	Diploma
ESI Generation (Operations)	III & IV
ESI Generation (Systems Operations)	IV

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Electricity Supply – Transmission, Distribution, Rail (UET)	
ESI - Power Systems Manager	Diploma & Adv Diploma
Electrotechnology (UEE)	
Antennae Equipment	II
Appliance Servicing - Refrigerants	II
Business Equipment Servicing	II
Fire Alarms Servicing	II
Hazardous Areas	IV
Refrigeration and Air Conditioning Systems	IV
Remote Area Essential Service	II
Electrotechnology Systems Electrician	IV
Computer Assembly & Repair	II
Computer Systems	IV
Computer Systems Engineer	Diploma & Adv Diploma
Data and Voice Communications	II
Electrical/Electronic Service Technician	Diploma
Electrical Engineer	Diploma & Adv Diploma
Electronic Assembly	II
Electronics	II
Electronics and Communications	IV
Electronics & Communications Engineering	Diploma & Adv Diploma
Industrial Electronics and Control	IV
Renewable Energy	II
Security Assembly and Setup	II
Video and Audio Systems	IV
Winding and Assembly	II
Floristry (WRF)	
Floristry	III & IV
Food Processing (FDF)	
Food Processing	III
Food Processing (Wine)	III
Food Processing (Sales)	III
Pharmaceutical Manufacturing	III
Production Line Supervisor	IV
Gas Industry (UEG)	
Gas Operations	III & IV
Gas Industry Advanced Technician	Advanced Diploma
Gas Industry Operations	II, & IV
Gas Industry Technician	Diploma
Gas Operations	III & IV
Information and Communication Technology (ICA)	
Information Technology	II & III
Information Technology (Networking)	IV
Information Technology (Websites)	IV
Information Technology (Multimedia)	IV
Information Technology (Support)	IV
Information Technology (Systems Analysis & Design)	IV
Laboratory Operations(MSL)	
Sampling and Measurement	II
Laboratory Skills	III
Laboratory Techniques	IV
Laboratory Technology	Diploma
Senior Laboratory Technician	Advanced Diploma
Local Government (other than operational works) (LGA)	
Local Government	II & III
Local Government Administration	IV
Local Government Planning	IV
Ranger	IV
Trainee Community Ranger	III

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Manufacturing (MSA)	
Aluminium Window and Frames	II
Aluminium Windows and Frames Manufacturing	II
Glass Processor	II
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Manufacturing Technician - Metallurgy	Diploma
Manufacturing Technologist - Metallurgy	Adv Diploma
Surface Preparation and Coatings Application	III
Metal and Engineering (MEM)	
Engineering Assistant	Advanced Diploma
Engineering Production	II
Engineering Technician	III
Draftsperson	Diploma
Production Systems (Surface Finishing)	III
Engineering (Advanced Trade)	Diploma
Engineering – Higher Engineering Trade	IV
Metallurgical Technician	Diploma & Adv Diploma
Production Systems (Foundry)	III
Production Systems (General Engineering)	III
Production Systems (Surface Finishing)	III
Metalliferous Mining (RII)	
Underground Metalliferous Mining	II & III & IV
Underground Metalliferous Mining Manager	Diploma
Museum and Library/Information Services (CUL)	
Library and Information Services	II & III & IV
Museum Practice	II & III
Plastics, Rubber and Cablemaking (PMB)	
Plastics	III
Process Manufacturing	III
Polymer Technology	IV
Plastics – Film	III
Plastics – Blow Moulding	III
Plastics – Extrusion	III
Plastics – Fabrication	III
Plastics – Injection Moulding	III
Plastics – Thermoforming	III
Plastics – Rotational Moulding	III
Plastics – Polystyrene	III
Rubber	III
Process Manufacturing (Rubber - Injection Moulding)	III
Rubber - Belt Splicing	III
Rubber – Rubber Lining	III
Process Manufactured Mineral Products	III & IV
Process Plant Operations	III
Process Plant Technology	IV
Process Support	III
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Process Plant Advanced Technician	Diploma
Public Safety (PUA)	
Firefighting Operations	III
Policing	Diploma
Public Sector (PSP)	
Government	II & III & IV
Government – Fraud Controller	IV
Government – Investigator	IV
Property Services (CPP)	
Property Management	IV
Spatial Services Technician	Diploma
Surveyor	Diploma

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Retail (including Wholesale and Community Pharmacy) (SIR)	
Retail	III
Retail Management	IV
Community Pharmacy	III & IV
Wholesale	III
Telecommunications (ICT)	
Telecommunications	II & III
Telecommunications Cabling	II
Telecommunications (Access Network)	II
Telecommunications (Cabling & Customer Premises Equipment)	III
Telecommunications Engineering	IV
Customer Contact	III & IV
Data and Voice Communications	II & III
Telecommunications Engineering	IV
Textile Clothing and Footwear (LMT)	
Textile Fabrication	III
Textile Production	III
Laundry Operations	III
Clothing Production	III & IV
Dry Cleaning Operations	III
Early Stage Wool Processing	III
Leather Production	III
Footwear Repair	III
Tourism, Hospitality and Events (THC: SIT: CUE)	
Events Technical	III
Hospitality (Accommodation Services)	III
Hospitality (Food and Beverage)	III
Hospitality – (Asian Cookery)	II
Hospitality – (Catering Operations)	II & III
Hospitality – (Commercial Cookery)	II
Hospitality – (Patisserie)	II
Hospitality – (Operations)	II & III
Hospitality Gaming	III
Hospitality - Supervision	IV
International Retail Travel Sales	III
Tourism	III
Tourism (Attractions and Theme Parks)	II
Tourism (Guiding)	II & III & IV
Tourism (Sales/Office Operations)	II
Tourism (Visitor Information Services)	III
Venues & Events (Customer Service)	III
Costume for Performance	IV
Live Production Theatre & Events	II
Entertainment (Front of House)	II
Live Production Theatre & Events (Technical Operations) Lighting	III & IV
Live Production Theatre & Events (Technical Operations) Vision Systems	III & IV
Live Production Theatre & Events (Technical Operations) Audio	III & IV
Transport and Distribution (TLI)	
Integrated Rating	III
Logistics Operations	III
Cash in Transit	III
Transport and Distribution (Marine Engine Driving)	III
Transport and Distribution (Maritime Operations)	III
Mobile Cranes	III
Rail Infrastructure	III
Rail Operations	III & IV
Road Transport	III & IV
Stevedoring	III
Warehousing & Storage	III & IV
Water Industry(NWP)	
Water Operations	III & IV

INDUSTRY / SKILL LEVEL B (as at May 2013)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Animal Care & Management (ACM)	
Veterinary Nursing	IV
Animal Control and Regulation	IV
Animal Studies	II
Animal Technology	III
Captive Animals	III
Companion Animal Services	III & IV
Asset Maintenance (PRM)	
Asset Maintenance (Cleaning Operations)	II & III
Asset Maintenance (Waste Management)	II & III
Asset Maintenance (Fire Protection Equipment)	II & III
Pest Management Technician	III
Australian Meat Industry (MTM)	
Meat Processing (Abattoirs)	II
Meat Processing (Boning)	III
Meat Processing (Food Services)	II & III
Meat Processing (General)	III
Meat Processing (Rendering)	III
Meat Processing (Smallgoods) Manufacture	III
Meat Processing (Smallgoods) General	II & III
Meat Processing (Slaughtering)	III
Meat Processing (Leadership)	IV
Meat Processing (Quality Assurance)	IV
Meat Inspector	III
Meat Inspector / Quality Assurance Officer	IV
Production Manager (Meat Processing)	Diploma
Automotive Industry Manufacturing (THC)	
Recreational Vehicle Production Assistant	II
Recreational Vehicle Production Team Leader	III
Automotive Industry/Retail Service and Repair (AUR)	
Automotive (Administration)	II & III
Automotive Administration (Rental Vehicles)	III
Automotive Electrical Technology	II
Automotive Management	IV & V
Automotive (Mechanical)	II
Automotive (Sales)	II & III
Automotive (Vehicle Body)	II
Automotive Aftermarket Warehousing Distribution Operations	II & III
Bicycles	II
Marine	II
Outdoor Power Equipment	II
Vehicle Servicing	II
Automotive Retail Service and Repair (Tyre Fitting)	III
Mechanical Driveline	II
Mechanical Engine Overhaul	II
Mechanical Hydraulics	II
Mechanical Machine Assembly	II
Mechanical Transmissions	II
Beauty (WRB)	
Make-Up Services	II
Nail Technology	II
Retail Cosmetic Services	II
Caravan Industry (THC)	
Caravan Park Operations	II & III
Civil Construction (RII)	
Civil Construction for entry level Indigenous Workers	I
Community Recreation Industry (SRC)	
Community Recreation	II & III

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Extractive Industries(RII)	
Extractive Industries Senior Manager	Advanced Diploma
Field/Exploration Operations	II
Minerals Processing	Diploma
Resource Processing	II & III & IV
Surface Extraction Operations	II & III & IV
Surface Operations Manager	Diploma
Fitness Industry (SRF)	
Fitness	III & IV
Floristry (WRF)	
Floristry	II
Food Processing Industry (FDF)	
Food Processing	II
Food Processing (Sales)	II
Food Processing (Wine)	II
Forest and Forest Products Industry (FPI)	
Forest Growing and Management	II & III
Harvesting & Haulage	II & III
Sawmilling and Processing	II & III
Timber Manufactured Products	II & III
Timber Merchandising	II & III
TIMBER FABRICATION DETAILER	IV
TIMBER FABRICATION PRODUCTION MANAGER	Diploma
TIMBER FABRICATION DETAILING MANAGER	Diploma
Timber Fabrication Estimator or Jig Setter	III
Timber Fabrication Production Hand	II
Timber Fabrication Production Specialist Or Leading Hand	IV
Wood Panel Products	II & III
Production Technician (Timber)	IV
Forester (Operations)	IV
Furnishing (LMF)	
Furnishing (Flooring)	II
Furnishing (Polishing)	II
Furnishing (Upholstery)	II
Furniture Making	II
Glass and Glazing	II
Interior Design – Retail Services	III
Picture Framing	III
Soft Furnishing	II & III
Designer (Kitchens, Bathrooms and Interior Spaces) *	IV
Gas Industry (UEG)	
Gas Industry Advanced Technician	Adv Diploma
Gas Industry Technician	Diploma
Gas Industry Operations	II & III & IV
Health (HLT)	
Aboriginal Environmental Health	II & III
Assistant Aboriginal and/or Torres Strait Islander Health Care Worker	II
Aboriginal and/or Torres Strait Islander Health Care Worker	III
Senior Aboriginal and/or Torres Strait Islander Health Care Worker	IV
Allied Health Assistance	III & IV
Client/Patient Support Services	III
Dental Assisting	III & IV
Health Service Assistant	III
Health Support Services	II & III
Optical Dispensing	IV
Sterilization Services	III
Pathology Collection	III
Local Government (Operational Works) (LGA)	
Local Government (Operational Works)	Diploma
Metal and Engineering (MEM)	
Engineering – Production	II
Aluminium Windows and Frames Manufacturing	II
Winding & Assembly	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Outdoor Recreation (SRO)	
Outdoor Recreation	III & IV
Community Recreation	II & III
Sport and Recreation	II & III & IV
Plastics, Rubber and Cablemaking (PMB: PMC)	
Process Manufacturing	II
Process Manufacturing (Cablemaking)	II
Plastics	II
Plastics – Film	II
Plastics – Blow Moulding	II
Plastics – Composites	II
Plastics – Extrusion	II
Plastics – Fabrication	II
Plastics – Injection Moulding	II
Plastics – Thermoforming	II
Plastics – Rotational Moulding	II
Plastics – Polystyrene	II
Rubber	II
Rubber – Rubber Lining	II
Process Manufacturing (Rubber – Injection Moulding)	II
Rubber - Belt Splicing	II
Process Manufactured Mineral Products	II
Process Plant Operations	II
Process Support	II
Printing and Graphic Arts (ICP)	
Desktop Publishing	II
Graphic Arts Services	II
Print Production Support	II
Printing and Graphic Arts (Instant Print)	II
Printing and Graphic Arts (Multimedia)	III
Screen Printing	II
Property Services (CPP)	
Building Contract Administrator	IV
Property Management	IV
Property Services (operations)	III
Technical Security	II & III
Security Operations	III
Hazardous Areas	IV
Spatial Services Technician	V
Strata / Facilities Manager	Iv
Surveying	IV & V
Retail (SIR) (including wholesale and Community Pharmacy)	
Retail	II
Community Pharmacy	II
Salon Assistant	II
Warehouse	II
Screen and Media (CUF)	
Broadcasting (Radio)	II & III & IV
Broadcasting (Remote Area Operations)	III
Broadcasting (Television)	III & IV
Screen	II & III & IV
Multimedia	II & III & IV
Sport Industry (SRS, SIS)	
Fitness	IV
Sport (Career Orientated Participation)	II &III
Community Activity Programs	III
Textile, Clothing and Footwear (LMT)	
Dry Cleaning Operations	II
Footwear Repair	II
Laundry Operations	II
Textile Production (Complex or Multiple Processes)	II
Laundry Operations	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Transport and Logistics (TLI)	
Furniture Removalist	II
Transport and Distribution (Aviation Flight Operations)	II
Aviation Ground Operations and Service	II
Transport and Distribution (Marine Engine Driving	II
Transport and Distribution (Maritime Operations)	II
Transport & Distribution (Maritime Operations – Coxswain)	II
Rail Infrastructure	II
Rail Operations	II
Road Transport	II
Stevedoring	II
Logistics Operations	II
Warehousing & Storage	II
Visual Arts, Craft and Design (CUV)	
Arts Administrator	III
Water Industry(NWP)	
Water Operations	II

INDUSTRY / SKILL LEVEL C (as at May 2013)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Amenity Horticulture (RTF)	
Horticulture	II & III & IV
Horticulture (Arboriculture)	II & III & IV
Horticulture (Floriculture)	II & III & IV
Horticulture (Landscape)	II & IV
Horticulture (Retail Nursery)	II & IV
Horticulture (Wholesale Nursery)	II & IV
Horticulture (Parks and Gardens)	II & IV
Horticulture (Turf)	II & IV
Conservation and Land Management (RTD)	
Conservation and Land Management	II & III & IV
Funeral Services (SIF)	
Funeral Services (Embalmer)	IV
Funeral Services	IV
Gravedigging, Grounds and Maintenance	III
Cemetery and Crematorium Operations	III
Music (CUS)	
Music	III & IV
Music Industry (Foundation)	II
Music Industry (Technical Production)	III & IV
Music Industry (Business)	III
Racing Industry (RGR)	
Racing - Stablehand	II
Racing - Advanced Stablehand	III
Racing - Trackrider	III
Racing - Jockey	IV
Racing (Harness Driver)	III
Rural Production (RTE)	
Agriculture	II & III & IV
Agriculture (Beef Cattle Production)	III & IV
Agriculture (Dairy)	III
Agriculture (Goat Production)	III
Agriculture (Grain Production)	III
Agriculture (Horse Breeding)	III
Horticulture (Production)	II & III & IV
Agriculture (Pig Production)	III
Agriculture (Sheep and Wool)	III
Agriculture (Rural Merchandising)	III
Advanced Wool Handler	III
Irrigation	II & III & IV
Rural Operations	II & III
Shearing	II & III & IV
Wool Handling	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Rural Production (RTE)*—continued*	
Wool Clip Preparation	III
Wool Classing	IV
Seafood Industry (SIF)	
Seafood Processing	II & III
Seafood Sales and Distribution	II & III

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER

Awards that do not contain wages and are therefore excluded:

Alcoa Long Service Leave Conditions Award, 1980

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

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

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

Health Care Industry (Private) Superannuation Award 1987

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

Miscellaneous Government Conditions and Allowances Award No A 4 of 1992

Miscellaneous Workers' (Security Industry) Superannuation Award, 1987

Ngala Superannuation Award, 1989

Printing Industry Superannuation Award 1991

Public Service Allowances (Fisheries and Wildlife Officers) Award 1990

Supported Employees Industry Award

The Swan Brewery Company Limited (Superannuation) Award 1987

West Australian Petroleum Pty Ltd Long Service Leave Conditions Award 1991

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

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

Awards that have certain parts quarantined:

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

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

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

Shearing Contractors' Award of Western Australia 2003 **– Clause 4.2**

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

Clothing Trades Award 1973 **– Clause 18**

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

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

Egg Processing Award 1978 **– Appendix 4**

Electorate Officers Award 1986 **– Schedule G**

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

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

Government Officers (Insurance Commission of Western Australia) Award, 1987 **– Schedule D**

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

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

Public Service Award 1992 **– Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2013

1. Application of the Statement of Principles

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

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

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

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

2. (deleted)

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

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

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

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

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

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

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

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

4. Previous State Wage Case Increases

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

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

5. Test Case Standards

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

6. Adjustment of Allowances and Service Increments

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

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

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

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

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

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

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

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

7. Work Value Changes

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

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

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

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

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

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

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

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

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

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

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

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

8. Total Minimum Rate Adjustments

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

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

8.3 The State Wage order arising from this decision is $18.20 per week.

9. Minimum Adult Award Wage

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

9.2 The minimum adult wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

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

The minimum adult award wage for full-time employees aged 21 or more is $645.90 per week payable on and from the commencement of the first pay period on or after 1 July 2013.

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

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

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

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

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

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

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

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2013 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Adult Apprentices

Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than $557.20 per week on and from the commencement of the first pay period on or after 1 July 2013.

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) sets fair wages.

12. Economic Incapacity

12.1 Any respondent or group of respondents to an award may apply to reduce and/or postpone the variation which results in an increase in labour costs under this Statement of Principles on the ground of very serious or extreme

economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested. The impact on employment at the enterprise level of the increase in labour costs is a significant factor to be taken into account in assessing the merit of an application. It will then be a matter for the Chief Commissioner to decide whether it should be dealt with by a Commission in Court Session.

13. Duration

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

FULL BENCH—Appeals against decision of Commission—

2013 WAIRC 00355

APPEAL AGAINST A DECISION OF THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL IN MATTER NO. RFT 9 OF 2012 GIVEN ON 6 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00355
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S M MAYMAN
HEARD	**:**	WEDNESDAY, 15 MAY 2013
DELIVERED	**:**	FRIDAY, 14 JUNE 2013
FILE NO.	**:**	FBA 1 OF 2013
BETWEEN	**:**	KINGSTYLE INVESTMENTS PTY LTD Appellant AND MR GENE LAWSON Respondent

ON APPEAL FROM:

Jurisdiction	**:**	**Road Freight Transport Industry Tribunal**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2013] WAIRC 00070; (2013) 93 WAIG 294**
File No.	**:**	**RFT 9 of 2012**

Catchwords	**:**	Industrial Law (WA) - appeal against decision of single Commissioner sitting as the Road Freight Transport Industry Tribunal - appellant sought to raise new points on appeal that raise issues going to the jurisdiction of the Tribunal - construction of the meaning of an 'owner-driver' within the meaning of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) considered - points raised could have been met by the calling of evidence at first instance
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26(1)(b), s 49; *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) s 3, s 4, s 4(2), s 5, s 5(1), s 6, s 9, s 38(1), s 38(1)(a).s 40(a), s 43(1), s 43(1)(b), s 47, s 47(1), s 47(4); *Road Traffic Act 1974* (WA) s 5(1), s 111AB(4); *Interpretation Act 1984* (WA) s 19, s 19(1), s 19(1)(a); *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(c); *Road Traffic (Tow Truck) Regulations 1975* (WA) reg 4(7); *Road Traffic (Vehicle Standards) Regulations 2002* (WA) sch 1.
Result	**:**	Appeal dismissed
Representation:		
Counsel:		
Appellant	**:**	Mr A J Power and Ms J M Stevens
Respondent	**:**	Mr A M Dzieciol and Ms C M Collins

Solicitors:

Appellant	:	Messrs Hammond Legal
Respondent	:	Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch

Case(s) referred to in reasons:

Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch (1996) 76 WAIG 4417

Chief Executive Officer, Department of Agriculture and Food v Ward [2008] WAIRC 00079; (2008) 88 WAIG 156

Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Ltd (1990) 70 WAIG 3040

Gordon v Commissioner of Police [2011] WASCA 168; (2011) 91 WAIG 1825

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

Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch (1984) 64 WAIG 852

Holland v Jones (1917) 23 CLR 149

Minister for Education v Liquor Hospitality and Miscellaneous Union, Western Australian Branch [2011] WAIRC 00818; (2011) 91 WAIG 1839

Pochi v Minister for Immigration and Ethnic Affairs [1979] AATA 64

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Re Bolton; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [2012] WASCA 50

Ross v The Queen (1979) 141 CLR 432

SGS Australia Pty Ltd v Taylor (1993) 73 WAIG 1760

The Civil Service Association of Western Australia Inc v Director-General, Department for Child Protection [2010] WAIRC 00206; (2010) 90 WAIG 214

The Minister for Health v Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Water Board v Moustakas (1988) 180 CLR 491

Case(s) also cited:

Knight v FP Special Assets Ltd [1992] HCA 28; (1992) 174 CLR 178

Reasons for Decision

SMITH AP:

The appeal and the order appealed against

1 This is an appeal made pursuant to s 43(1) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) (the Owner-Drivers Act), against an order made by the Road Freight Transport Industry Tribunal (the Tribunal). The order appealed against was made pursuant to s 47 of the Owner-Drivers Act by the Tribunal on 6 February 2013.

2 The matter came before the Tribunal as a dispute referred by Mr Gene Lawson who operated a towing business trading under the name of Autocare Towing Service. The dispute arose out of towage work Mr Lawson carried out for Kingstyle Investments Pty Ltd (Kingstyle).

3 After hearing evidence and submissions, the Tribunal ordered Kingstyle to pay the sum of $12,752 to Mr Lawson. The Tribunal also ordered Kingstyle to pay Mr Lawson interest on the sum at the rate of 6% per annum from 24 April 2011 to the date of the order in the sum of $1,320.

4 Section 47 of the Owner-Drivers Act empowers the Tribunal to hear and determine a dispute referred to it under s 40(a) of the Owner-Drivers Act by a person who is a party to an owner-driver contract that arises under or in relation to an owner-driver contract. Under s 47(1) of the Owner-Drivers Act, the Tribunal is empowered to hear and determine the dispute for the purposes of s 38(1). Section 38(1) of the Owner-Drivers Act provides:

> (1) By this section the Commission has jurisdiction to -
>
> (a) hear and determine disputes that may be referred to the Commission under this Part; and
>
> (b) enquire into and deal with any other matter in relation to the negotiation of owner-driver contracts that may be referred to the Commission under this Part.

5 In making a determination under s 47(4) of the Owner-Drivers Act, the Tribunal is empowered to order the payment of a sum of money found by the Tribunal to be owing by one party to another party.

6 The grounds of appeal raise arguments that go to the Tribunal's jurisdiction to hear and determine the dispute referred under s 38(1)(a) of the Owner-Drivers Act. Kingstyle says that unless the vehicle used by Mr Lawson when carrying out the work in

question was a heavy vehicle within the defined meaning in the Owner-Drivers Act, the Tribunal did not have jurisdiction to hear and determine the dispute. It also argues the Tribunal erred in that it assumed it had jurisdiction to hear and determine Mr Lawson's application on the basis that the contract between him and Kingstyle was an owner-driver contract within the meaning of the Owner-Drivers Act, when Mr Lawson was not an owner-driver and was not a party to an owner-driver contract, so no dispute could arise under the Owner-Drivers Act.

7 Kingstyle's arguments about jurisdiction are two-fold. Firstly, it says that when the established principles of statutory construction are applied to the interpretation of the Owner-Drivers Act, it is clear that an owner-driver contract under the Owner-Drivers Act means an owner-driver contract in what is traditionally understood as the heavy haulage transport or road freight transport industry and is not intended to apply to the towing of vehicles by tow trucks. Kingstyle says that the evidence before the Tribunal, such as it was, demonstrated that Mr Lawson was in the tow truck industry and not in the road freight transport industry which is concerned with the transport of goods in heavy vehicles. In particular, the relevant contract between Kingstyle and Mr Lawson was not one for the transport of vehicles 'in a heavy vehicle' as defined in the Owner-Drivers Act. Secondly, Kingstyle contends that it was not proven by Mr Lawson that the maximum loaded mass of the vehicle in question was as defined in s 3 of the Owner-Drivers Act and s 111AB(4) of the *Road Traffic Act 1974* (WA) (the RT Act).

Tribunal's reasons for decision

8 Mr Lawson claimed that during the period between January 2010 and March 2011, he provided towage services to Kingstyle for which he had not been paid. In concise reasons for decision, Kenner C set out what he found to be the following uncontested facts:

(a) It was not in dispute between the parties that at all material times between January 2008 and May 2011 Mr Lawson operated a tow truck and provided his services to Kingstyle under an owner-driver contract for the purposes of the Owner-Drivers Act.

(b) Mr Lawson gave evidence that he was approached by Kingstyle and offered work as a tow truck operator. Mr Lawson purchased a tilt tray tow truck and commenced working for Kingstyle in accordance with an owner-driver contract. The terms of the arrangement were oral and Mr Lawson mainly dealt with the nephew of the owner of Kingstyle, 'Leon', and the administration staff in Kingstyle's office.

(c) The work Mr Lawson received from Kingstyle was mainly through insurance companies. A call was made by Kingstyle's home base to Mr Lawson to notify him of a tow job which he could accept or decline. There was also some private work done for mechanical workshops. Mr Lawson also undertook a very small amount of work on his own account.

(d) Once Mr Lawson received and confirmed a tow job, he transferred the job number to his invoice book and undertook the towage work. Every few weeks, Mr Lawson submitted his invoices to the office of Kingstyle. Mr Lawson's uncontradicted evidence was that he performed all of the services set out in the invoices that were tendered as exhibit A1. Exhibit A1 comprised of some 129 invoices. Mr Lawson prepared a schedule from his computer records setting out the invoiced jobs, with full particulars, in respect of which no payment had been received from Kingstyle. This document was tendered as exhibit A2. The total amount claimed by Mr Lawson was the sum of $12,834.53.

(e) A term of the owner-driver contract between Mr Lawson and Kingstyle involved a deduction of 25% from the gross invoiced sums, representing in effect, a commission payment payable to Kingstyle for sourcing the towage work.

9 The central contention of Kingstyle's defence at first instance was that there was an agreement that if Kingstyle was not ultimately paid by an insurer, any payments previously paid by Kingstyle were to be deducted from payments owing to Mr Lawson. When this matter was put to Mr Lawson in cross-examination he strongly denied there was any such agreement. Kingstyle was represented by its owner at the hearing before the Tribunal at first instance and it did not call any evidence on its own behalf. In the reasons for decision, Kenner C recorded that Kingstyle's representative, Mr Valentino, was cautioned that in the event that no sworn testimony was adduced by Kingstyle, and there was a conflict in the contentions advanced by it and Mr Lawson, then the Tribunal may be obliged to accept the sworn testimony of Mr Lawson.

10 Commissioner Kenner rejected Kingstyle's argument that there was an agreement with Mr Lawson that if ultimately Kingstyle did not receive payment from its insurer client it could deduct such sums of money from amounts already paid to Mr Lawson. Commissioner Kenner found that Kingstyle led no evidence to support such a contention and the contention was directly inconsistent with the sworn evidence of Mr Lawson, which evidence was accepted by the Tribunal. Commissioner Kenner also found that at the material time by operation of s 9 of the Owner-Drivers Act, it was unlawful for a hirer to make payments to an owner-driver contingent on whether the hirer is ultimately paid by another person.

11 Commissioner Kenner then found that Mr Lawson had given his evidence honestly and accounted for the work he performed for Kingstyle during the material times. However, Kenner C found there was one minor discrepancy between exhibit A3 and exhibit A1 which related to one particular invoice for work performed on 8 April 2010 in the sum of $100. As there was no such invoice contained in exhibit A1, that claim was disregarded.

12 For these reasons, Kenner C found that Mr Lawson had established his claim and made the order the subject of this appeal.

Legislation

13 The preamble to the Owner-Drivers Act provides it is an Act to promote a safe and sustainable road freight transport industry by regulating the relationship between persons who enter into contracts to transport goods in heavy vehicles and persons who hire them to do so, to establish the Tribunal and the Road Freight Transport Industry Council, and for related purposes.

14 Under s 6 of the Owner-Drivers Act, the Act is expressed to apply to and in relation to, among other activities, owner-drivers who are engaged under an owner-driver contract that is entered into in Western Australia or that is subject to the law of Western Australia.

15 The meaning of 'owner-driver' is set out in s 4 of the Owner-Drivers Act. Section 4(2) of the Owner-Drivers Act provides:

> (2) For the purposes of this Act an ***owner-driver*** is -
>
> (a) a natural person -
>
> (i) who carries on the business of transporting goods in one or more heavy vehicles supplied by that person; and
>
> (ii) whose principal occupation is the operation of those vehicles (whether solely or with the use of other operators); or
>
> (b) a body corporate (other than a listed public company) that carries on the business of transporting goods in one or more heavy vehicles that are -
>
> (i) supplied by the body corporate or an officer of the body corporate; and
>
> (ii) operated by an officer of the body corporate (whether solely or with the use of other operators) whose principal occupation is the operation of those vehicles; or
>
> (c) a partnership of persons, at least one of whom is a person referred to in paragraph (a).

16 The meaning of owner-driver contract is defined in s 5(1) of the Owner-Drivers Act which provides as follows:

> For the purposes of this Act, an ***owner-driver contract*** is a contract (whether written or oral or partly written and partly oral) entered into in the course of business by an owner-driver with another person for the transport of goods in a heavy vehicle by the owner-driver.

17 'Goods' are defined in s 3 of the Owner-Drivers Act to include freight and materials. A 'heavy vehicle' is defined in s 3 of the Owner-Drivers Act to mean a vehicle, as defined in the RT Act, with a gross vehicle mass of more than 4.5 tonnes and 'gross vehicle mass' is defined in s 3 of the Owner-Drivers Act as a term that has the same meaning as it has in s 111AB(4) of the RT Act. Section 111AB(4) of the RT Act defines the 'gross vehicle mass' of a vehicle to mean the maximum loaded mass of a vehicle:

> (a) as specified by the manufacturer; or
>
> (b) as specified by the relevant authority if -
>
> (i) the manufacturer has not specified a maximum loaded mass; or
>
> (ii) the manufacturer cannot be identified; or
>
> (iii) the vehicle has been modified to the extent that the manufacturer's specification is no longer appropriate;

Kingstyle's submissions

18 The central issue in this appeal is whether Mr Lawson was at the relevant time an 'owner-driver' within the meaning of the Owner-Drivers Act. To establish this jurisdictional fact, Kingstyle says it was incumbent on Mr Lawson to prove the facts that would establish he carried on a business of transporting goods in a 'heavy vehicle' as defined in the Owner-Drivers Act. Kingstyle argues that when the evidence given in the proceedings before the Tribunal is examined, together with the provisions of the legislation that confer jurisdiction on the Tribunal, it is clear that there was no evidence that adequately demonstrated that Mr Lawson was involved in the transport of goods or materials in a heavy vehicle in the road freight transport industry.

19 Kingstyle says an examination of the evidence is important as it demonstrates that Mr Lawson did not satisfy the onus on him to bring sufficient evidence before the Tribunal that he was carrying on business transporting goods or materials in a heavy vehicle. The only relevant evidence given by Mr Lawson was that he was a truck driver driving tow trucks for Mr Valentino's company from January 2008 to around April to May 2011. When asked what sort of vehicle did he have, he said, 'I supplied my own tilt tray tow truck'. Then when he was asked what was the gross vehicle mass of the vehicle he said, 'Over four and a half thousand tonne. Over 4,500.' (AB 39-40).

20 Kingstyle points out that no evidence was given by Mr Lawson of what a tilt tray tow truck is or how it operates. Kingstyle contends this is not a matter that could properly be the subject of judicial notice. It is only a fact, that is so generally known that every ordinary person may be reasonably presumed to be aware of it, that a court can take judicial notice of such a fact: ***Holland v Jones*** (1917) 23 CLR 149, 153 (Isaacs J). Despite the fact that the Tribunal is required by operation of s 39(2) of the Owner-Drivers Act to have relevant knowledge in the field of road freight transport and that may encompass knowledge of what a tilt tray truck is, such knowledge known to the Tribunal is not sufficient to invoke the principle of judicial notice.

21 A heavy vehicle relevantly means a vehicle as defined in the RT Act with a gross vehicle mass of more than 4.5 tonnes. Whilst Kingstyle does not make any real complaint about Mr Lawson's evidence that the vehicle had a gross vehicle mass of more than four and a half thousand tonne as this was clearly an error as his evidence, in any event, the evidence given by Mr Lawson is merely an expression of an opinion and does not meet the statutory requirement. It is argued that for Mr Lawson to prove that the tilt tray truck had a gross vehicle mass of more than 4.5 tonnes it would be necessary for evidence to be given of the maximum loaded mass of the vehicle as specified by the manufacturer or as specified by the relevant authority. If the vehicle in question was last licensed in Western Australia, the relevant authority is the Director General of the Road Traffic Authority: s 111AB(4) definition of 'relevant authority' in the RT Act and s 5(1) definition of 'Director General' in the RT Act.

22 Consequently, Kingstyle says it was not proven by Mr Lawson that the relevant contract between Kingstyle and Mr Lawson was one for the transport of goods in a heavy vehicle, as defined in the Owner-Drivers Act. This remains the case even though

no evidence was led by Kingstyle about the gross vehicle mass of Mr Lawson's vehicle. Kingstyle points out that it was for Mr Lawson to prove these facts and he did not do so and the failure to prove these matters meant Kingstyle had no case to answer.

23 Kingstyle's second argument goes to the issue as to what industry or industries the Owner-Drivers Act applies. Kingstyle points out that in s 4 of the Owner-Drivers Act, an owner-driver is defined as a person who carries on 'the business of transporting goods in one or more heavy vehicles' and in s 5 of the Owner-Drivers Act, an owner-driver contract is defined to mean a contract entered into in the course of business by an owner-driver with another person for 'the transport of goods in a heavy vehicle' by the owner-driver. Kingstyle's argument turns on the construction of the use of the words 'the business of transporting goods in one or more heavy vehicles' and the words 'transport of goods in a heavy vehicle'. It is argued that these words specifically cover the transport of goods and materials 'on' or 'in' heavy vehicles, but the words used do not contemplate the transport of a vehicle by towing. Of importance, however, Kingstyle concedes that the transport of goods and materials on a truck that has a tray, as opposed to a contained area at the rear, would come within the scope of s 4 and s 5 of the Owner-Drivers Act.

24 Kingstyle says that no evidence was given that Mr Lawson was transporting the vehicles on the back of his truck, as opposed to towing the vehicles. Kingstyle does not say to tow is not to transport, but it says to tow goods or materials is not to 'transport in', or is not capable of being characterised as the 'carrying on the business of transporting goods'. It argues that if the words 'transporting by' was used it would provide for a broader interpretation of the meaning of transporting goods and materials in a heavy vehicle.

25 Pursuant to s 19 of the *Interpretation Act 1984* (WA), extrinsic material can be used in the interpretation of legislative provision. Section 19(1) of the *Interpretation Act* provides:

> (1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
>
> (b) to determine the meaning of the provision when —
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.

26 Kingstyle says regard can be had to the second reading speech for the Owner-Drivers (Contracts and Disputes) Bill 2006 (WA) (the Bill) pursuant to s 19(1)(a) of the *Interpretation Act*. When regard is had to what was said in the second reading speech it can be said that it confirms the ordinary meaning of the text. The passages of the second reading speech that Kingstyle relies upon in support of this argument are as follows:

> The purpose of the Owner-Drivers (Contracts and Disputes) Bill 2006 is to provide legislation that ensures safe and sustainable rates for owner-drivers in the road transport industry. We expect heavy haulage drivers to operate in a safe manner, with proper fatigue management practices in place. However, unless owner-drivers are paid reasonable rates, the pressure will be on to cut corners to meet the high cost environment in which they operate.
>
> This bill recognises inequity in the bargaining positions of owner-drivers and hirers. Several studies have indicated that excessive competition in the trucking industry has resulted in lower than economic rates, leading to driving hours above safe levels, the use of stimulant drugs to keep drivers awake, reduced maintenance on vehicles, unsafe work schedules and unsafe loads.
>
> Owner-drivers are the most vulnerable and least protected sector in their industry. The sector is often characterised by low-level earnings, high rates of business failure, and working conditions that many members of the community would consider unacceptable. This legislation aims to regulate this industry so that standards are maintained at a high level and that self-employed drivers are guaranteed a reasonable rate of return.
>
> Fuel prices have been trending upwards, raising financial pressure upon already marginal owner-drivers in the trucking industry, particularly long-distance drivers. Although increases in fuel prices are directly related to international fuel price increases, owner-drivers have sought relief and assistance from the state. Fluctuations in fuel prices during 2006 indicate that price volatility is likely to continue. The legislation will provide owner-drivers with some capacity to ensure that they do not bear all the risks associated with these fluctuations. The legislation will cover all operators and hirers of vehicles with a tonnage limit greater than 4.5 tonnes, in circumstances in which those vehicles are used for the carriage of goods for reward. The tonnage limit of 4.5 tonnes has been used as it is in a number of other statutes that apply to the road freight industry, including the Western Australian Commercial Driver Fatigue Management Code of Practice and the federal diesel fuel rebate scheme. Amongst other things, the legislation provides owner-drivers with security of payment; establishes the Road Freight Transport Industry Council; and establishes a mandatory code of conduct.

27 Kingstyle says that these passages of the second reading speech confirm Kingstyle's interpretation of what constitutes transport in a heavy vehicle. Kingstyle's written submissions filed together with the notice of appeal also make some submissions about the explanatory notes to the Bill. However, when counsel for Kingstyle appeared before the Full Bench, counsel made a submission that it was only necessary to have regard to what was said in the second reading speech to the Bill. Counsel says it is clear when regard is had to what was said in the second reading speech that owner-driver contracts are contracts for the transport of goods in heavy vehicles, being part the road freight transport industry. In short, it is said it is clear that an owner-

driver contract under the Owner-Drivers Act means an owner-driver contract in what is traditionally understood as the heavy haulage transport or road freight transport industry. It is not intended to apply to the towing of vehicles by tow trucks.

28 Kingstyle says if you take the view that goods and materials must be 'transported on or in a heavy vehicle' to invoke the jurisdiction of the Owner-Drivers Act, you do not need to decide whether there is a distinction to be made between a trucking industry that transports goods on or in a heavy vehicle and the towing industry. Kingstyle says that this issue cannot be determined in this matter as insufficient evidence was given before the Tribunal.

29 Kingstyle concedes that none of the points put to the Full Bench were put before the Tribunal.

30 For these reasons, Kingstyle says the Tribunal was not seized of jurisdiction to hear and determine the application and seeks an order that the appeal be upheld and the order be quashed.

Mr Lawson's submissions

31 Mr Lawson in submissions filed on 10 May 2013 points out the matter of the jurisdiction of the Tribunal was not raised at the hearing at first instance, but says that it is conceded that this issue is properly before the Full Bench on the appeal. However, this concession was made prior to the receipt of Kingstyle's supplementary submissions and oral submissions which made it clear that Kingstyle's arguments do not simply rely upon an interpretation of the legislation as a matter of law but also rely upon the factual circumstances that were established or not established before the Tribunal.

32 Mr Lawson in his submissions pointed out that Kingstyle's written submissions filed with the notice of appeal raised three matters as follows:

(a) the Owner-Drivers Act was enacted to deal with issues in the 'road freight transport industry' which Kingstyle submits refers to 'heavy haulage transport';

(b) Mr Lawson was at all relevant times involved in the 'tow truck industry'; and

(c) the tow truck industry is separate and distinct from the road transport industry.

33 Mr Lawson points out that at the hearing before the Tribunal he gave unchallenged evidence that at the relevant time, he was carrying on the business of transporting motor vehicles in a tilt tray tow truck. Further, it was not in dispute that there was a contract between Mr Lawson and Kingstyle to transport motor vehicles for Kingstyle and Mr Lawson supplied a truck for the purposes of the contract which had a gross vehicle mass of more than 4.5 tonnes.

34 Mr Lawson says that:

(a) an owner-driver contract was made between Mr Lawson and Kingstyle;

(b) the contract was entered into by Mr Lawson as an owner-driver in the course of business;

(c) the contract was for the transport of goods, namely motor vehicles; and

(d) the motor vehicles were to be transported by Mr Lawson in a heavy vehicle, namely a truck with a gross vehicle mass of more than 4.5 tonnes.

35 Mr Lawson does not accept that there is a distinction between the heavy haulage transport or road freight transport industry, and the towing of vehicles by tow trucks.

36 Mr Lawson argues that the description 'tilt tray tow truck' implies that the vehicle in question had a tray that was used for carrying of vehicles. Thus, he says this was evidence of carrying on the business of transporting goods in a heavy vehicle supplied by him. Consequently, Mr Lawson says the jurisdiction of the Tribunal was properly invoked. In any event, Mr Lawson says that the Tribunal could take judicial notice of what a tilt tray tow truck is as such trucks carry their load on the tray of the vehicle.

37 Mr Lawson also points out that there is the obligation on a court or tribunal when construing legislation to prefer a construction that will promote the purpose of legislation and to avoid the construction that would not promote that purpose or object: ***The Civil Service Association of Western Australia Inc v Director-General, Department for Child Protection*** [2010] WAIRC 00206; (2010) 90 WAIG 214, 227 - 229 (Smith AP).

38 Mr Lawson says that:

(a) the meaning of the words in a statute should be derived from the words in the statute itself. Whilst extrinsic materials can be used to assist in this process, if necessary, those materials cannot be used to contradict the plain meaning of the words in the statute: ***Gordon v Commissioner of Police*** [2011] WASCA 168; (2011) 91 WAIG 1825. Nor can regard be had to such materials in the absence of ambiguity, uncertainty or manifest absurdity or unreasonableness as an express statement of intention in an explanatory memorandum cannot prevail over the words actually used in the Act: ***Gordon v Commissioner of Police*** (1828 - 1829) applying ***Re Bolton; Ex parte Beane*** [1987] HCA 12; (1987) 162 CLR 514.

(b) the Owner-Drivers Act should be construed liberally as it is beneficial legislation.

(c) if regard is had to the second reading speech, it is clear that the purpose of the Owner-Drivers Act is to provide safe and sustainable rates for owner-drivers in the road transport industry and to provide a forum for the resolution of disputes between owner-drivers and hirers, including payment disputes, through the Tribunal.

(d) the Owner-Drivers Act does not define 'road freight transport industry' and 'road transport industry'. However, these two terms are synonymous and refer to the transport of goods by road by vehicles of various sizes and types and the only limitation imposed by the Owner-Drivers Act in relation to owner-driver contracts is that the vehicle used by the owner-driver for the purposes of the contract must have a gross vehicle mass of more than 4.5 tonnes.

39 In relation to the argument that there was insufficient evidence about the gross vehicle mass of Mr Lawson's vehicle, Mr Lawson makes a submission that the nature of the work is such that a tow truck driver has to be aware of the mass his vehicle can carry, as significant penalties can be imposed on a truck driver who carries a load beyond the weight allowed by legislation. Mr Lawson also says the owner of Kingstyle was an experienced operator in the transport industry and employed tow truck operators and contractors and was aware of the gross vehicle mass of tow trucks. Consequently, the appellant was in a position where it could have challenged the evidence given by Mr Lawson in respect of the gross mass of the vehicle.

40 It was not in dispute before the Tribunal that Mr Lawson was in business on his own behalf and contracted to Kingstyle and when the evidence is examined there was more than sufficient material upon which the Tribunal who has a degree of knowledge of the transport industry could accept as sufficient to find jurisdiction to properly seize the dispute.

Duty to consider whether jurisdiction has been invoked

41 In every matter before it the Tribunal has a duty to decide whether it has jurisdiction. This duty applies to all courts and tribunals and cannot be conferred by consent. In ***Chief Executive Officer, Department of Agriculture and Food v Ward*** [2008] WAIRC 00079; (2008) 88 WAIG 156 Ritter AP, with whom Wood C agreed, observed [79] - [83]:

> 79 As stated by the Full Bench in ***Crown Scientific Pty Ltd v Clarke*** (2007) 87 WAIG 598 at [96], the '*Commission like any other court or indeed any Tribunal, has a duty to decide whether or not it has jurisdiction*'. As set out in that paragraph there is a wealth of authority to support the proposition. As stated by Kirby J in ***BHP Billiton Ltd v Schultz*** (2004) 221 CLR 400 at [131]:-
>
> > '*Before entering upon the exercise of jurisdiction and power, every court or tribunal must satisfy itself as to the existence of such jurisdiction and power. At least, it must do so where there is a contest or an apparent problem.*'
>
> 80 In the footnote to this sentence, his Honour cited ***Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd*** (1911) 12 CLR 398 at 415; ***Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association*** (1906) 4 CLR 488 at 495; ***Cockle v Isaksen*** (1957) 99 CLR 155 at 161; ***Re Boulton; Ex parte Construction, Forestry, Mining and Engineering Union*** (1998) 73 ALJR 129 at 133 at paragraph [21]. Kirby J repeated the same point more recently in ***Old UGC, Inc v Industrial Relations Commission of New South Wales in Court Session*** (2006) 225 CLR 274 at paragraph [51]. The cases which his Honour cited in *Schultz* show that this is a principle of long pedigree.
>
> 81 In ***Federated Engine-Drivers*** at 415, Griffiths CJ referred to the existence of this '*first duty*' as existing '*if only to avoid putting the parties to unnecessary risk and expense*'. In the same case, Barton J at page 428 said that it '*is wrong to accept jurisdiction without sufficient inquiry as to refuse it with precipitancy*'. The point made by Griffiths CJ about the first duty and the avoidance of unnecessary risk and expense for the parties was adopted by Katz J in ***Re Gilles Contracting Pty Ltd (in Liq); Khatri v Price and Another*** (1999) 95 FCR 287; (1999) 166 ALR 380 at [14] and by the New South Wales Court of Appeal in ***Kirby v Sanderson Motors Pty Ltd*** (2002) 54 NSWLR 135, per Hodgson JA (Mason P and Handley JA agreeing) at paragraph [33], amongst other cases. It is also apposite here.
>
> 82 To use the words of Kirby J quoted earlier, in these applications there was an '*apparent problem*'. It was one which the Senior Commissioner was aware of and noted. Accordingly, the problem needed to be addressed and resolved. It could not be side-stepped merely because the question of '*power*' had '*not been the subject of argument by counsel*'. Even if the issue had not been raised or argued by counsel the Senior Commissioner should have made the parties aware of it, provided an opportunity to make submissions about it and then made a decision.
>
> 83 Also, any agreement between the parties could not have provided jurisdiction when in truth there was none. (See ***Bolgari v Steiner School and Kindergarten*** [2007] VSCA 58 at [55] and footnote 28 where *Federated Engine-Drivers* was cited as well as ***Fingleton v The Queen*** (2005) 227 CLR 166.) In ***Fingleton***, Hayne J at paragraph [196] said that '*a concession about the court's jurisdiction … would not bind the court*'. Although this was said in the context of a criminal trial, the same applies to any civil court or tribunal of limited jurisdiction. Dr Catherine Button in her article '*The Federal Courts "Arising Under" Jurisdiction and the Development of a "Contingent Jurisdiction*"' (2006) 27 Australian Bar Review 327 at 348 cited ***Federated Engine-Drivers*** and said '*even where the parties do not contest jurisdiction … it is well established that a court is obliged to consider its own jurisdiction before exercising it*'. In my respectful opinion this is plainly correct.

42 In this matter, no concession was made that there was jurisdiction to hear and determine the dispute. However, the evidence given by Mr Lawson about the weight of the vehicle used by him to carry out the work the subject of the contract between the parties and description of the vehicle he purchased and used for the work was not disputed by Kingstyle. In Mr Lawson's notice of referral of the dispute filed on 3 August 2012, Mr Lawson pleaded in paragraph 3 of the notice:

> The Applicant provided services to the Respondent between January 2010 and March 2011 by way of towing of vehicles at the request of the Respondent Pursuant to an oral agreement between the parties *('the Owner-Driver contract')*, using a tow truck provided by the Applicant, which was a heavy vehicle for the purposes of the *Owner-Drivers (Contracts and Disputes) Act 2007*) ('the Act').

43 Kingstyle in its counter-proposal did not join issue with the matters pleaded in paragraph 3 of the notice. The counter-proposal raised a number of immaterial matters and made a general plea that Kingstyle did not owe Mr Lawson any money. When the matter was heard by the Tribunal, Mr Valentino on behalf of Kingstyle elected not to give evidence and simply attempted to put forward what Kingstyle claimed was its defence and that was:

(a) It was a term of the contract between the parties that if an invoice was not paid by an insurance company within 90 days the invoiced amount would be deducted by Kingstyle from monies owed to Mr Lawson.

(b) No deduction of a commission fee of 25% had been accounted for in the amounts claimed.

44 At the conclusion of the evidence (which was given solely by Mr Lawson), Mr Lawson's counsel, Mr Dzieciol, made the following submission (AB 61):

> And so - and Mr Valentino still claims that he hasn't had time or opportunity to - to go through the records. So unfortunately that's not really satisfactory, and that's, in our submission, not a defence to the claim. Mr Lawson has given evidence that at the relevant time, he was a - an owner-driver, that his vehicle had a - a gross vehicle mass of in excess of 4.5 tonne and that he had a contract with Mr Valentino's company to undertake work. So - and that doesn't appear to be in dispute, so we say that therefore the contract was an owner-driver contract and that the Tribunal therefore has jurisdiction to deal with this matter.

45 The only observation Kingstyle's representative put forward about the jurisdiction of the Owner-Drivers Act was in answer to a question by Kenner C. At page 31 of the transcript the following exchange took place (AB 64):

> **KENNER C:** All right.
>
> Well, Mr Valentino, are you aware that under the Owner-drivers Contracts and Disputes Act 2007 you can't withhold payments if you don't get paid by your client?
>
> **VALENTINO, MR:** No, sir, because - --
>
> **KENNER C:** That's not lawful?
>
> **VALENTINO, MR:** - - , I did not know that applies to the towing industry. I know it does to - in other industries but it - it doesn't even seem practical in the towing industry.
>
> **KENNER C:** Well, it applies to all parties who are in an owner-driver contractual relationship. That's - that's the law.

46 In this exchange it appears Kingstyle's representative had been unaware of the defence Kingstyle wished to pursue was not available at law in defence of a claim for monies owed under an owner-driver contract and is not a matter relevant to the points now sought to be raised in this appeal.

47 In reasons for decision Kenner C found it was not in dispute between the parties that at all material times Mr Lawson operated a tow truck and provided services to Kingstyle under an owner-driver contract. However, if the points now sought to be raised on appeal and the arguments put forward on behalf of Kingstyle are accepted, an examination of the evidence reveals the finding that Mr Lawson provided services to Kingstyle under an owner-driver contract could not have been open.

Should Kingstyle be permitted to raise new points on an appeal

48 Leaving aside the issue whether the evidence given by Mr Lawson was sufficient at law upon which a finding that an owner-driver contract had been entered into between the parties at the material time, the first issue that arises in this appeal is whether the jurisdictional issue raised by Kingstyle in this appeal can be raised.

49 Whilst Mr Lawson in his written submissions conceded that the issue was properly before the Full Bench, it was not apparent from the written submissions filed by Kingstyle prior to the filing of Mr Lawson's written submissions, that the determination of the issues of jurisdiction turned on not only the interpretation of the Owner-Drivers Act, but also on an analysis of Mr Lawson's evidence at the hearing at first instance. In these circumstances, the issue arises whether the Full Bench should allow the issue to be raised.

50 Appeals brought under s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) are not by way of rehearing, but are appeals in the strict sense: ***Hamersley Iron Pty Ltd v Association of Draughting, Supervisory and Technical Employees, Western Australian Branch*** (1984) 64 WAIG 852; see the discussion in ***The Minister for Health v Drake-Brockman*** [2012] WAIRC 00150; (2012) 92 WAIG 203 [73] (Smith AP and Beech CC). Fresh evidence can, however, be admitted by a Full Bench where special or exceptional circumstances are raised: ***Federated Clerks' Union of Australia, Industrial Union of Workers, WA Branch v George Moss Ltd*** (1990) 70 WAIG 3040. This does not allow a matter to be heard without regard to the manner in which a matter was conducted at first instance. In ***Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*** [2012] WASCA 50, Martin CJ set out the circumstances when a new point may be raised on appeal to an appellate body at [49] - [52]:

> 49 [I]n ***University of Wollongong v Metwally (No 2)*** [1985] HCA 28; (1985) 60 ALR 68, the High Court observed:
>
> > 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 (71).
>
> 50 Similar observations were made by the Court of Appeal of New South Wales in the case under appeal in ***Coulton v Holcombe***. Their Honours observations as to:
>
> > ... the finality of litigation; the difficulty of inducing an appeal court to consider new facts; the undesirability of encouraging tactical decisions not to present an issue at first instance: keeping it in reserve for appeal; and the need for vigilance to avoid injustice to a party having to meet new facts and new issues of law for the first time at the appeal court
>
> were endorsed by the plurality in ***Coulton v Holcombe*** (8) as important principles underpinning the public interest in the finality of litigation: see also ***Liftronic Pty Ltd v Unver*** [2001] HCA 24; (2001) 179 ALR 321, 330 - 331 (Gummow and Callinan JJ).

> 51 However, this is not to say that a new point can never be raised on appeal. In ***Water Board v Moustakas*** [1988] HCA 12; (1988) 180 CLR 491, the plurality (Mason CJ, Wilson, Brennan and Dawson JJ) observed:
>
> > It is true that in ***Maloney v Commissioner for Railways*** (1978) 18 ALR 147, 152 it was recognised 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. No exceptional circumstances arise in this case where the parties adopted the course which they took of their own choice (498).
>
> 52 It is significant to note that the High Court has twice described the circumstances in which a party will be allowed to raise a new point on appeal as 'very exceptional'. Such a course will only be permitted if two requirements are met. First, the interests of justice must require determination of the new point. Second, there must be no prejudice to the party against whom the new point is taken.

51 In ***SGS Australia Pty Ltd v Taylor*** (1993) 73 WAIG 1760, the Full Bench found it was the duty of the Full Bench to entertain a plea as to jurisdiction irrespective whether the point had been taken at first instance. It is clear that this principle applies where the jurisdictional issue sought to be raised for the first time on appeal is a bare legal point. However, in circumstances where additional or different evidence may have been led if the point had been raised at first instance, it is open to the Full Bench to refuse to permit an appellant to raise the issue for the first time. In recent times courts and tribunals have applied this rule strictly.

52 In ***Minister for Education v Liquor Hospitality and Miscellaneous Union, Western Australian Branch*** [2011] WAIRC 00818; (2011) 91 WAIG 1839 [23] - [24], I had regard to the principles set out in ***Water Board v Moustakas*** (1988) 180 CLR 491, 497 - 498 and then had regard to the observations of Branson and Katz JJ in ***H v Minister for Immigration and Multicultural Affairs*** [2000] FCA 1348 [7] - [8] where their Honours said:

> 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.

53 I then observed at [25] - [26]:

> 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.

54 Where the point sought to be raised for the first time is an issue that goes to jurisdiction, the same rule applies. This was made clear by the Industrial Appeal Court in ***Burswood Resort (Management) Ltd v The Australian Liquor, Hospitality & Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch*** (1996) 76 WAIG 4417. In that matter the appellant had applied to register an agreement which had the effect of varying and renewing a current registered industrial agreement. On appeal by the union against the decision to register the agreement the appellant sought to be heard on an issue that was said to be jurisdictional. The appellant sought to advance an argument that the Full Bench had no jurisdiction to hear the appeal because the union's officers had not been duly elected and were not authorised to bring the appeal. The Full Bench refused to entertain the argument and heard and determined the appeal. On appeal to the Industrial Appeal Court the Court held the Full Bench had not erred. Justice Anderson, with whom Rowland and Franklyn JJ agreed, held (4419):

> The Full Bench took the view that this question of authorisation should have been argued below and that all the relevant evidence should have been canvassed below. I am not persuaded this was wrong. An appeal tribunal is entitled to refuse to allow matters which ought to have been agitated below to be raised for the first time before it at least where the matters involve disputed factual issues. This is a rule of broad application, applied in the interests of expedition and the finality of legal proceedings. ***Coulton v Holcombe*** (1986) 162 CLR 1 at 7; ***University of Wollongong v Metwally (No 2)*** (1985) 59 ALJR 481 at 483; ***The Water Board v Mustakis*** (1988) 68 ALJR 209; ***Paltara Pty Ltd v Dempster*** (1991) 6 WAR 85 at 99.

Although in one sense the issue of authority to bring the appeal did not arise until the appeal stage, that would be taking too technical a view of the principle. The appeal proceeding was part of the intervenor proceedings and the issue whether the intervenor proceedings generally were properly authorised and whether the people purporting to file appropriate documents were authorised to do so raised substantial factual issues which could have been settled at first instance. I am not persuaded the Full Bench was wrong to decide the present appellant should be held to the conduct of its case below. There was plainly an opportunity before the Commissioner to challenge the authority of those purporting to represent the first respondent in the intervenor proceedings and the failure to take advantage of that opportunity, whether it was deliberate or inadvertent, entitled the Full Bench to say that should be the end of the matter.

As the appellant's argument was developed before us it seemed to me to be firmly based on the proposition that because this issue of due authorisation went to the jurisdiction of the Full Bench to hear the appeal the Full Bench had no discretion to decline to entertain argument on the point and its refusal to do so therefore constituted fatal error. I am unable to accept this proposition. In the first place I am not sure the rule that an appeal tribunal may refuse to allow a point to be raised for the first time in the appeal where contested issues of fact are involved does not apply even where questions of jurisdiction arise. See the comments of Deane J in ***Squire v Rogers*** (1979) 27 ALR 330 at 337.

55 In this matter it is conceded on behalf of Kingstyle that the points raised in this appeal could be met by the calling of evidence. This concession is important. In my opinion, the points now sought to be raised on appeal should have been raised when the matter was heard at first instance. Even if the matters were raised after Mr Lawson's case was closed, an application could have been made on behalf of Mr Lawson to re-open his case and call further evidence. In the circumstances, whether or not leave would have been granted is a matter of discretion for the Tribunal and is a matter that is not necessary to consider in this appeal.

56 It becomes very clear that the jurisdictional points sought to be raised on behalf of Kingstyle could be met by the calling of evidence when the type of evidence or material that could have been led to establish jurisdiction is considered. In respect of the requirement to prove the gross vehicle mass of the vehicle specified by the manufacturer used by Mr Lawson when carrying out work for Kingstyle was more than 4.5 tonnes, pursuant to s 43(1)(b) of the Owner-Drivers Act and s 26(1)(b) of the IR Act, it is important to have regard to the fact that the Tribunal is not bound by the rules of evidence, but may inform itself on any matter in such a way as it thinks just. This allows the Tribunal to act on material that is rationally probative. In ***Pochi v Minister for Immigration and Ethnic Affairs*** [1979] AATA 64, Brennan J considered s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) that was in substance the same as s 26(1)(b) of the IR Act. In that decision Brennan J asked the question:

How are facts to be proved, and how is the sufficiency of proof to be determined when there are no rules of evidence binding upon either the Minister or the Tribunal? Section 33(1)(c) of the Administrative Appeals Tribunal Act provides that 'the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.' Although the Tribunal is governed by statute in the approach which it must take in assessing the evidence, and the Minister is not, I do not know that the statute confines the Tribunal to an approach which is more restricted than the approach which the Minister might properly take in assessing the same evidence.

The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force', as Hughes C.J. said in - ***Consolidated Edison Co. v. National Labour Relations Board*** [1938] USSC 176; (305 U.S. 197 at p.229). To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J. pointed out, though in a dissenting judgment, in ***The King v. War Pensions Entitlement Appeals Tribunal; ex parte Bott*** [1933] HCA 30; (1933) 50 CLR 228 at p.256:

> 'Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, "bound by any rules of evidence." Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice."'

That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence. Diplock L.J. in ***Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore*** [1965] 1 Q.B. 456 at p.488 said:

> 'These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.'

Lord Denning M.R. in ***T.A. Miller Ltd. v. Minister of Housing and Local Government*** [1968] 1 WLR 992 at p.995 said much the same:

> 'Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law.'

and he repeated that observation in ***Kavanagh v. Chief Constable of Devon and Cornwall*** [1974] 1 Q.B. 624 at p.633. In the United States where considerable judicial attention has been given to fact finding by administrative tribunals (see Schwartz Administrative Law, Boston, 1976 paras. 115 et seq), substantially the same principle has been expressed. It was thought, at one time, that the ***Consolidated Edison*** judgment required that some legal proof had to be adduced, and that hearsay evidence alone could not support an adverse finding (see Schwartz, op.cit., para. 118). But in ***Richardson v. Perales***, [1884] USSC 274; 402 US 389 at p.407 the ***Consolidated Edison*** case was construed in this way:

> 'The contrast the Chief Justice was drawing ... was not with material that would be deemed formally inadmissible in judicial proceedings but with material "without a basis in evidence having rational probative force." This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value. The opposite was the case.'

The majority judgments in ***Bott's*** case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not. Starke J. said at pp. 249,250:

> 'The Appeal Tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; it is not obliged to obtain such independent medical opinion, for instance, upon oath, and whether cross-examination shall take place upon that opinion is entirely a question for the discretion of the Tribunal; it is not bound by any rules of evidence, and is authorized to act according to substantial justice and the merits of the case.'

57 His Honour, Brennan J, then went on to point out:

> As the New South Wales Law Reform Commission has pointed out in its Report on the Rule against Hearsay, hearsay 'has a wide scale of reliability' (1978, L.R.C. 29, p.35), and there is no reason why logically probative hearsay should not be given credence. However, the logical weaknesses of hearsay evidence may make it too insubstantial, in some cases, to persuade the Tribunal of the truth of serious allegations.

58 Whilst the evidence given by Mr Lawson at first instance was insufficient as the evidence given by him did not establish the weight specified by the manufacturer, such a matter may have been within Mr Lawson's knowledge as he was required by law to take steps to obtain accurate and reliable information of the weights specified by the manufacturer that his tow truck could carry and comply with loading limits. Regulation 4(7) of the *Road Traffic (Tow Truck) Regulations 1975* (WA) requires every tow truck to:

> have the name and address of the owner of the vehicle, together with the unloaded mass and GVM of the vehicle and its class as determined by these regulations, clearly marked on some conspicuous part of the right hand side of the vehicle, in letters at least 50 millimetres high and 25 millimetres wide.

59 As counsel for Mr Lawson pointed out, Mr Lawson is bound by the law not to load a vehicle that is in excess of a vehicle's gross vehicle mass: see sch 1 *Road Traffic (Vehicle Standards) Regulations 2002* (WA).

60 Evidence could also have been adduced on behalf of Mr Lawson as to how the tilt tray tow truck operated and whether a vehicle that was to be towed by Mr Lawson's truck was towed from behind or loaded onto Mr Lawson's truck. After hearing this evidence, the Tribunal would be in a position to make a proper assessment of whether Mr Lawson's vehicle could be characterised as used for the transport of goods within the meaning of s 5(1) of the Owner-Drivers Act.

61 For these reasons I am of the opinion that Kingstyle should not be allowed to raise these points in this appeal.

62 In any event, even in the absence of any explanation of how a tilt tray tow truck operates, I do not think that the words used in s 5(1) of 'transport of goods in a heavy vehicle', or the use of the words in s 4(2) to describe an owner-driver as a person or body corporate who 'carries on the business of transporting goods in one or more heavy vehicles', should be construed as narrowly as contended by Kingstyle. Counsel for Kingstyle made a submission that the use of the word 'in' a heavy vehicle would encompass the transport of goods 'on' a heavy vehicle. If that is accepted, then the word 'in' must have a broader meaning that goes beyond the literal spatial concept of 'in'.

63 When construing a legislative provision, the process of construction must always begin by examining the context of the provision that is being construed: ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby and Hayne JJ) and the cases cited therein. The instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals: ***Project Blue Sky*** [70] (McHugh, Gummow, Kirby and Hayne JJ); ***Ross v The Queen*** (1979) 141 CLR 432, 440 (Gibbs J). Thus, the context of a legislative provision must be examined.

64 The Owner-Drivers Act regulates heavy vehicles. A heavy vehicle is defined not by types of vehicles but solely by its gross vehicle mass. As the submissions filed on behalf of Mr Lawson point out, the Owner-Drivers Act applies to owner-drivers who transport goods in small trucks used by couriers and delivery drivers. The Owner-Drivers Act also applies to the owner-drivers of road trains that transport goods interstate. Type of goods transported is immaterial. Provided goods transported by a heavy vehicle can be characterised as freight or materials, the Owner-Drivers Act applies: see definition of goods in s 3 of the Owner-Drivers Act.

65 How those goods are transported is also immaterial. For example, goods could be in a sea container that is loaded on top of a tray truck, or goods may be transported inside a truck. Similarly, goods such as a car that is said to be towed could be transported in a number of ways. The car could be loaded on the tray of a truck, towed partially or wholly behind a truck, with some of the wheels of the car off the road. The method of towing may depend on the type of heavy vehicle and perhaps the car or vehicle that is being towed.

66 Methods of transport in a heavy vehicle are not specified in the Owner-Drivers Act. Nor is there any discussion about the method of transport in the second reading speech of the Bill. The Minister, however, does say, 'This legislation will cover all operators and hirers of vehicles with a tonnage limit greater than 4.5 tonnes, in circumstances in which those vehicles are used for the carriage of goods for reward'. That statement, in my opinion, confirms the meaning of the definition of owner-driver in s 4(2) and s 5(1), that is, the type of vehicle used by an owner-driver in the transport of goods for reward is qualified or defined only by the gross vehicle mass of the vehicle.

67 For these reasons, I am of the opinion the appeal should be dismissed.

BEECH CC:

68 I have had the advantage of reading in draft form the Reasons for Decision of Her Honour the Acting President. I agree with Her Honour that the respondent should not be permitted to raise new points in this appeal. Whether or not Mr Lawson was an owner-driver for the purposes of the *Owner-Drivers (Contracts and Disputes) Act 2007* is a matter for the proper interpretation of that Act. The word "owner-driver" obtains its precise meaning or sense from the context in which it is used in that legislation and not by considering whether Mr Lawson was in the "towing industry". I agree with Her Honour's conclusions and with the order to issue.

MAYMAN C:

69 I have read a draft of the reasons for decision of the Acting President. I agree with those reasons and have nothing further to add.

2013 WAIRC 00356

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KINGSTYLE INVESTMENTS PTY LTD
	APPELLANT
	-and-
	MR GENE LAWSON
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 14 JUNE 2013
FILE NO.	FBA 1 OF 2013
CITATION NO.	2013 WAIRC 00356

Result	Appeal dismissed
Appearances	
Appellant	Mr A J Power (of counsel) and Ms J M Stevens (of counsel)
Respondent	Mr A M Dzieciol (of counsel) and Ms C M Collins (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 15 May 2013, and having heard Mr A J Power (of counsel) and Ms J M Stevens (of counsel) on behalf of the appellant and Mr A M Dzieciol (of counsel) and Ms C M Collins (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 14 June 2013, 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,

[L.S.] Acting President.

PUBLIC SERVICE ARBITRATOR—Awards/Agreements—Variation of—

2013 WAIRC 00319

CHILDREN'S SERVICES (GOVERNMENT) AWARD 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	MINISTER FOR COMMUNITY SERVICES, HON. MINISTER FOR HEALTH, HON. MINISTER FOR EDUCATION
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	APPL 20 OF 2013
CITATION NO.	2013 WAIRC 00319

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for the Minister for Community Services and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Children's Services (Government) Award 1989* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 5- Definitions: Delete clause 5 and replace with the following in lieu thereof:

5. – DEFINITIONS

(1) "Casual employee" shall mean an employee on an hourly contract of employment who is regularly employed for less than four weeks.

(2) "College" shall mean a Technical and Further Education College or a Community College pursuant to the Colleges Act, 1978.

(3) "Part time employee" shall mean an employee who is regularly employed for less hours than that prescribed in Clause 7. - Hours of Work of this Award.

(4) "Union" shall mean United Voice WA.

(5) "Term of semester vacation" shall mean the vacation period generally observed by TAFE or Community Colleges as appropriate.

(6) "Contact – Employee" shall mean an employee who predominantly spends their working hours in immediate contact with the centres children.

(7) "Child Care Support Employee" shall mean an untrained ancillary employee who is employed to undertake cooking duties.

(8) "Child Care Giver" an employee at this level shall be an unqualified employee working under routine supervision, engaged to assist in the supervision and care of children and generally to assist in the functioning of the centre.

(9) "Qualified Child Care Giver" shall mean an employee who holds the qualification of Associate Diploma Social Science (Child Care) or an approved equivalent qualification which is recognised and approved by the Child Care Services Board authorising the employee to be in charge of children 0·6 years and who is so appointed. Qualified Child Care Giver shall also include persons who do not hold approved qualifications but who have obtained an exemption from the Child Care Services Board to work at this level and who are so appointed.

(10) "Senior Qualified Child Care Giver" shall mean a Qualified Child Care Giver appointed to carry out administrative duties in addition to the normal duties of a Qualified Child Care Giver. An employee at this level

shall hold qualifications as defined for Qualified Child Care Giver and shall be responsible for the overall implementation and coordination of programme(s).

2. Clause 10- Overtime: Delete subclause (4)(a) and replace with the following

(4) (a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or be paid $12.20 for a meal, and if, owing to the amount of overtime worked, a second or subsequent meal is required he/she shall be supplied with each meal by the employer or be paid $7.15 for each meal so required.

3. Clause 12 - Annual Leave: Delete subclause (1) and then and replace with the following in lieu thereof:

(1) (a) Except as hereinafter provided, a period of four consecutive weeks' leave with payment of ordinary wages as prescribed in subclause (2) of this clause shall be allowed annually to an employee by his/her employer after a period of 12 months' continuous service with that employer. The leave will normally be taken during the term or semester vacation by employees of a College.

(b) Notwithstanding subclause 12(1)(a) annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

4. Schedule A - Named Union Party: Change the named union party to:

United Voice WA

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2013 WAIRC 00321

CATERING EMPLOYEES AND TEA ATTENDANTS (GOVERNMENT) AWARD 1982

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE MINISTER FOR LABOUR RELATIONS, THE MINISTER FOR PRIMARY INDUSTRY, THE MINISTER FOR COMMUNITY DEVELOPMENT
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	APPL 22 OF 2013
CITATION NO.	2013 WAIRC 00321

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for The Minister for Labour Relations and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Catering Employees and Tea Attendants (Government) Award 1982* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 9 - Additional Rates for Ordinary Hours: Delete Subclauses 9(1) and 9(2) replace it with the following:

9. – ADDITIONAL RATES FOR ORDINARY HOURS

(1) A full-time or part-time employee who is required to work any ordinary hours between 7.00 pm and 7.00 am Monday to Friday, inclusive, shall be paid, in addition to the appropriate wage set out in Clause 22. - Wages, an additional payment equivalent to 15% of the wages paid for the time so worked with a minimum payment of $3.65 per day.

(2) An employee who is required Lo work any of his ordinary hours on any day in more than one period of employ and other than for meal breaks as prescribed by Clause 13. - Meal Breaks of this award, shall be paid an allowance of $3.20 per day, for such broken work period worked.

2. Clause 14 - Meal Money: Delete Clause 14 and replace it with the following:

14. – MEAL MONEY

When an employee is required to work overtime for more than one hour on any day, he or she will either be supplied with a substantial meal by the employer or be paid $12.65 meal money.

3. Clause 19 - Annual Leave: Delete subclause (10) and replace it with the following:

(10) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

4. Clause 22 - Wages: Delete Subclauses 22(2) and 22(3) and replace it with the following:

CLAUSE 22. – WAGES

(2) In addition to the above wage rates service pay will be paid for each year of service at the following rates per week:

Year 1	$ 95.30
Year 2	$104.00
Year 3 and thereafter	$111.80

(3) Leading Hands -

An employee (other than a Chef) who is appointed and placed in charge of other employees by the employer shall be paid the following rates in addition to his or her normal wage per week:-

(a)	If placed in charge of less than six employees	$ 15.80
(b)	If placed in charge of six to ten employees	$ 21.30
(c)	If placed in charge of 11 to 20 employees	$ 24.50
(d)	If placed in charge of more than 20 employees	$ 41.00

5. Clause 25 – Bar Work: Delete Clause 25 and insert the following

25. – BAR WORK

Any employee other than a Bar Attendant, who in addition to their normal duties is required to dispense liquor from a bar, shall be paid a flat rate of $1.25 cents per day in addition to the rate prescribed for such normal duties.

6. Clause 27 - Uniforms and Laundering: Delete Clause 27 and insert the following:

27. – UNIFORMS AND LAUNDERING

Where uniforms are required to be worn by the employer they shall be supplied and laundered by the employer and remain the property of the employer, provided that in lieu of the employer laundering same, the employee shall be paid $4.80 per week for such laundering. Provided further, that any employee employed as a Cook shall be paid $7.20 per week for laundering.

7. Clause 28 - Protective Clothing: Delete Subclause 28(1) and replace it with the following:

28. – PROTECTIVE CLOTHING

(1) Employees who are required to wash dishes. or otherwise handle detergents, acids, soaps or any injurious substances, shall be supplied with rubber gloves free of charge by the employer, or be paid an allowance of $2.40 per week in lieu.

8. Clause 29 – Employers Equipment – Delete Clause 29 and replace it with the following:

29. – EMPLOYEE'S EQUIPMENT

All knives, choppers, tools, brushes. towels and other utensils, implements and material which may be required to be used by the employee for the purpose of carrying out their duties, shall be supplied by the employer free of charge.

Provided that where an employee is required by the employer to use his own knives he shall be paid an allowance of $11.50 per week.

9. Schedule A - Named Union Party: Change the named union party to:

United Voice WA

2013 WAIRC 00318

CLEANERS AND CARETAKERS (GOVERNMENT) AWARD 1975

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

COMMISSIONER MAIN ROADS WESTERN AUSTRALIA , DIRECTOR GENERAL DEPARTMENT OF HOUSING AND WORKS, EXECUTIVE DIRECTOR DEPARTMENT OF CONSERVATION AND LAND MANAGEMENT

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 27 MAY 2013

FILE NO/S APPL 19 OF 2013

CITATION NO. 2013 WAIRC 00318

Result Award varied

Representation

Applicant Mr S Dane

Respondent Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for Commissioner Main Roads of Western Australia and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Cleaners and Caretakers (Government) Award 1975* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 3.4. - ROSTERED DAY OFF (38 HOUR WEEK) Delete subclause 3.4.14 and replace with the following:

3.4.14 Implementation of the 38 hour week for full time employees shall be applied to part time employees on a proportional basis, provided that an employee who at the completion of a 20 day work cycle, has not accrued sufficient hours to enable the employee to take a day off at their normal working hours, will continue to work past the 20 day work cycle until sufficient hours have accrued to enable the employee to take a day off at their normal working hours.

2. Clause 6 - Annual Leave: Delete subclause 6.1.1(c) and replace it with the following:

(c) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

2013 WAIRC 00315

COMMUNITY WELFARE DEPARTMENT HOSTELS AWARD 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES UNITED VOICE WA

APPLICANT

-v-

THE HONOURABLE MINISTER FOR COMMUNITY WELFARE, HON. MINISTER FOR COMMUNITY SERVICES, HON. MINISTER FOR HEALTH

RESPONDENTS

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 27 MAY 2013

FILE NO/S APPL 16 OF 2013

CITATION NO. 2013 WAIRC 00315

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for the Honourable Minister for Community Welfare and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Community Welfare Department Hostels Award 1983* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 8 - Overtime: Delete subclause (5) and replace it with the following:

(5) Where an employee has not been notified the previous day or earlier that they are required to work overtime the employer shall ensure that the employee working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $11.05 for each meal.

2. Clause 9 - Annual Leave: Delete subclause (4) and replace it with the following:

(4) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

3. Clause 18 - Special Rates and Provisions: Delete subclause (1)(a) replace it with the following:

(1)(a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an a11owance of 71 cents per closet per week.

4. Clause 21 - Wages: Delete subclause (3)(b, (3)(c) and 3(d) and replace it with the following:

(b) Senior employees appointed as such by the employer shall be paid $24.30 per week in addition to the rates prescribed herein.

(c) A leading band placed in charge of not less than three other employees shall be paid $24.30 per week in addition to the rates prescribed herein.

(d) Employees who are required to work their ordinary hours each day in two shifts and where the break between the two shifts is not less than three hours shall be paid $3.80 per day reimbursement for travelling expenses.

5. Schedule A - Parties to the Award: Change the named union party to:

United Voice WA

2013 WAIRC 00317

COUNTRY HIGH SCHOOL HOSTELS AWARD, 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	COUNTRY HIGH SCHOOL HOSTELS AUTHORITY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	APPL 18 OF 2013
CITATION NO.	2013 WAIRC 00317

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for the Country High School Hostels Authority; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Country High School Hostels Award, 1979* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 9 – Overtime: Delete subclause (6) and replace with the following;

(6) Where an employee has not been notified the previous day or earlier that they are required to work overtime the employer shall ensure that employees working such overtime for an hour or more shall be provided with any of the usual meals occurring during such overtime or be paid $12.20 each meal.

2. Clause 14 - Annual Leave: Delete subclause (4) and replace it with the following:

(4) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

3. Clause 20 - Meal Money: Delete subclause (1) and replace with the following:

(1) An employee required to work overtime for more than two hours, without being notified on the previous day or earlier that they will be so required to work, shall be supplied with a meal by the employer of paid $12.20 for a meal.

4. Clause 21- Special Rates and Provisions: Delete subclause (1)(a) and replace with the following:

(1) (a) All employees called upon to clean closets, connected with septic tanks or sewerage shall receive an allowance of 78 cents per closet per week.

5. Clause 22 - Supported Wage System: Delete subclause (3)(b) and replace with the following:

(b) Provided that the minimum amount payable shall not be less than $76.00 per week.

6. Clause 22 - Supported Wage System: Delete subclauses (9)(c) and replace with the following:

(c) The minimum amount payable to the employee during the trial period shall be no less than $76.00 per week.

7. Clause 24 – Wages: Delete subclause (2)(a) and (2)(b) and replace with the following:

(a) Senior employees appointed as such by the employer shall be paid $26.10 per week in addition to the rates prescribed herein.

(b) A leading hand placed in charge of not less than three other employees shall be paid $26.10 per week extra.

8. Schedule A - Parties to the Award: Change the named union party to:

United Voice WA

2013 WAIRC 00320

CULTURAL CENTRE AWARD 1987

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE LIBRARY BOARD OF WESTERN AUSTRALIA, THE TRUSTEES OF THE WESTERN AUSTRALIAN MUSEUM, THE BOARD OF THE ART GALLERY
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	APPL 21 OF 2013
CITATION NO.	2013 WAIRC 00320

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for The Library Board of Western Australia and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Cultural Centre Award 1987* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. **Clause 12 - Annual Leave: Delete subclause (9) and replace it with the following:**

(9) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

2013 WAIRC 00314

GARDENERS (GOVERNMENT) 1986 AWARD NO. 16 OF 1983

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE HON. PREMIER OF WESTERN AUSTRALIA , THE HON. MINISTER FOR AGRICULTURE, THE HON. MINISTER FOR POLICE AND EMERGENCY SERVICES & OTHERS
	RESPONDENTS
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	APPL 15 OF 2013
CITATION NO.	2013 WAIRC 00314

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for The Hon. Premier of Western Australia and others; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Gardeners (Government) 1986 Award No. 16 of 1983* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 8. – ROSTERED DAY OFF (38 HOUR WEEK): Delete subclause (13) of this clause and insert the following in lieu thereof:

(13) Implementation of the 38 hour week for full time employees shall be applied to part time employees on a proportionate basis, provided that an employee who at the completion of a 20 day work cycle, has not accrued sufficient hours to enable the employee to take a day off at their normal working hours, will continue to work past the 20 day work cycle until sufficient hours have accrued to enable the employee to take a day off at their normal working hours.

2. Clause 13. – Annual Leave: Delete subclause (6) of this clause and insert the following in lieu thereof:

(6) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

2013 WAIRC 00316

RECREATION CAMPS (DEPARTMENT FOR SPORT AND RECREATION) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	MINISTER FOR SPORT AND RECREATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	APPL 17 OF 2013
CITATION NO.	2013 WAIRC 00316

Result	Award varied
Representation	
Applicant	Mr S Dane
Respondent	Ms N Arys

Order

HAVING heard Mr S Dane, for United Voice WA, as applicant and Ms N Arys, as agent for the Minister for Sport and Recreation; and by consent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the *Recreation Camps (Department for Sport and Recreation) Award* be varied in accordance with the following schedule and that such variations shall have effect from the first pay period on or after the 27th day of May 2013.

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

SCHEDULE

1. Clause 4 - Definitions: Delete subclause (8) and insert the following in lieu thereof:

(8) "Union" shall mean United Voice WA.

2. Clause 8 - Overtime: Delete subclauses (9)(a) and (9)(d) replace with the following:

(9)

(a) An employee required to work continuous overtime for more than one hour shall be supplied with a meal by the employer or.be paid $12.20 for a meal, and if owing to the amount of overtime worked, a second or subsequent meal is required the employee shall be supplied with such meal by the employer or be paid $7.10 for each meal so required.

(d) An employee required to work continuously from midnight to 6.30 am. and ordered back to work at 8.00 a.m. on the same day shall be paid $6.25 for breakfast.

3. Clause 10 - Annual Leave: Delete subclause (1)(b) and replace it with the following:

(b) Annual leave may be taken in more than one period of leave, by mutual agreement between the employer and employee.

4. Clause 15 - Wages: Delete subclause (3) and replace with the following:

(3) Supervision Allowance

Employees placed in charge of other employees shall be paid the following weekly allowance, or part thereof, in addition to the rate prescribed for the employee's class of work

	$ per week
1 to 5 employees	11.20
6 to 10 employees	20.00
11 to 15 employees	24.90
16 to 20 employees	33.90
over 20 (for each additional employee)	0.40

5. Clause 17 - Special Rates and Conditions: Delete subclauses (1), (2) and (4) and replace with the following:

(1) All employees called upon to clean toilet closets shall receive an allowance of 79 cents per closet per week and for these purposes, one metre of urinal shall count as one closet and three urinal stalls shall count as one closet.

(2) An employee who is the holder of an approved First Aid Certificate shall in addition to their normal rate of pay be paid an additional allowance of $2.70 per week.

(4) Mobile Wardens shall in addition to their normal rate of pay be paid an allowance of $98.90 per week to offset the costs associated with living in and maintaining a caravan. This allowance shall be reviewed on the 31st December each year. The adjustment to the rates shall be effective from the beginning of the first pay period to commence on or after the first day of January in each year.

6. Schedule A - Parties to the Award: Change the named union party to:

United Voice WA

NOTICES—Award/Agreement matters—

2013 WAIRC 00325

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 8 of 2013

APPLICATION FOR A NEW AGREEMENT TITLED "SHIRE OF HARVEY LESCHENAULT LEISURE CENTRE ENTERPRISE AGREEMENT 2013"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

4 PARTIES BOUND

4.1 The Parties to this Agreement shall be;

4.1.1 the Shire of Harvey ('the Shire' or 'the Employer'); and

4.1.2 the Western Australian Municipal, Administrative, Clerical and Services Union of Employees ('the Union' or 'WASU').

4.2 This Agreement covers all Shire of Harvey employees who;

4.2.1 Are eligible to be members of the Union and who are employed at the Shire of Harvey's Leschenault Leisure Centre; and

4.2.2 Would otherwise have their employment governed by the terms of the *Local Government Officers' (Western Australia) Interim Award 2011 and/or the Municipal Employees (Western Australia) Interim Award 2011;* and

4.2.3 Are eligible to be members of the Union.

4.3 This salary provisions prescribed by this Agreement shall not apply to the Centre Manager, who is employed under a limited term contract and a negotiated salary.

4.4 This Agreement covers approximately 80 employees.

6 RELATIONSHIP TO AWARDS AND AGREEMENTS

6.1 This Agreement shall be read and interpreted wholly in conjunction with the *Local Government Officers' (Western Australia) Interim Award 2011* and the Municipal Employees (Western Australia) Interim Award 2011 ("the Awards") provided that where there is any inconsistency between the Award(s) and the terms and conditions prescribed by this Agreement, the terms of this Agreement shall prevail to the extent of the inconsistency.

6.2 Where the Agreement is silent, the Award(s) provisions will apply.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

28 May 2013

INDUSTRIAL MAGISTRATE—Claims before—

2013 WAIRC 00283

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2013 WAIRC 00283
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 24 APRIL 2013
DELIVERED	**:**	WEDNESDAY, 15 MAY 2013
FILE NO.	**:**	M 8 OF 2012
BETWEEN	**:**	GLENN JAMES ROSS

APPLICANT

AND

PETER CONRAN, DIRECTOR GENERAL, DEPARTMENT OF THE PREMIER AND CABINET

RESPONDENT

Catchwords	**:**	Application to amend claim alleging three further breaches of section 41 of the *Minimum Conditions of Employment Act 1993*; whether proposed amendments disclose a cause of action.
Legislation	**:**	*Minimum Conditions of Employment Act 1993* *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* *Public Sector Management Act 1994* *Public Sector Management (Redeployment and Redundancy) Regulations 1994* *Corruption and Crime Commission Act 2003*
Case(s) referred to in reasons	**:**	***Glenn Ross -v- Peter Conran, Director General of Department of Premier and Cabinet*** 2011 WAIRC 01041
Result	**:**	Application granted in part
Representation:		
Applicant	**:**	Mr Glenn Ross appeared in person
Respondent	**:**	Mr R Andretich instructed by the State Solicitor for Western Australia appeared for the Respondent

REASONS FOR DECISION

Application

1 On 24 January 2012 Mr Glenn Ross lodged an originating claim in which he alleged that on 11 January 2012, the Respondent appointed him to a new position without first giving him an opportunity to discuss with the Respondent the likely effects of the appointment and the measures that might have been taken to avoid or minimise significant effects of that appointment. He says that the Respondent has by that omission contravened or failed to comply with section 41 of the *Minimum Conditions of Employment Act* 1993 (MCE Act).

2 On 30 April 2012 Mr Ross lodged and subsequently served a multipurpose form by which he attempted to seek leave to amend his claim. It was his intention to obtain leave to amend his claim to allege three further breaches of the MCE Act. It suffices to say that the process that Mr Ross used in attempting to seek leave to amend his claim was not in accordance with that which was required of him by Regulations 61 and 62 of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (the Regulations). Consequently the Court was, at that stage, not called upon to consider or resolve whether Mr Ross should be permitted to amend his claim.

3 At the commencement of the trial on 3 April 2013, Mr Ross indicated that he was intending to argue all four alleged breaches of section 41 of the MCE Act. That drew an objection from the Respondent. In the end result the trial was vacated and the matter was adjourned in order to give Mr Ross the opportunity to make his application, in the proper form, for leave to amend his claim.

4 On 10 April 2013, Mr Ross in compliance with Regulation 61 and 62 of the Regulations, made an application to amend his claim to include three further alleged breaches of section 41 of the MCE Act. The further alleged breaches are:

1. No one from the Department of Premier and Cabinet (the Department) spoke to Mr Ross about the likely effects and the measures that might have been taken to avoid or minimise the significant effect of the decision made by the Respondent to terminate his secondment to Edith Cowen University (ECU); and

2. No one from the Department spoke to Mr Ross about the likely effect and the measures that might have been taken to avoid or minimise the significant effect of the decision made by the Respondent to register him for redeployment; and

3. No one from the Department spoke to Mr Ross about the likely effect and the measures that might have been taken to avoid or minimise the significant effect of the decision made by the Respondent not to provide him with any work following the cessation of his secondment to ECU.

5 The Respondent opposes the application for the following reasons:

1. The cessation of Mr Ross' secondment does not fall within the description of the meaning given to an action of an employer that had a "significant effect" ; and

2. There was no action taken with respect to Mr Ross' proposed redeployment which had the possibility of having a significant effect on him; and

3. Given that Mr Ross has always occupied a position without specific duties there was no decision made of the type contemplated by section 41 of the MCE Act.

6 These reasons concern Mr Ross' application lodged on 10 April 2013 for leave to amend his claim.

Background

7 On 1 September 2006, Mr Ross' employment with the Corruption and Crime Commission ended and he reverted to the Public Service where he accepted employment with the Department. He, however, remained in dispute with the Department concerning his level of classification.

8 On 20 July 2007, Mr Ross was seconded to ECU as a lecturer. The secondment came to be rolled over at six month intervals and lasted in excess of three years.

9 On 25 May 2010, the Respondent wrote to Mr Ross to advise that his secondment would not continue beyond 30 June 2010. Mr Ross was directed to report to the Department's office where he would be given work until such time as he could be redeployed to a suitable position in the public sector. Mr Ross was advised that it was the Respondent's intention to register him for redeployment as the Department had no suitable positions into which he could be deployed.

10 After a delay Mr Ross's secondment to ECU was terminated and he returned to work for the Department on 16 August 2010. Upon his return to the Department he was given a position without specific duties however, the Department did not proceed with its intention to register him for redeployment.

11 Mr Ross was subsequently diagnosed with major depression and anxiety said to have been existent in May and June 2010. Shortly after recommencing with the Department Mr Ross was absent from the workplace, on sick leave, and has remained on sick leave since then.

Determination

12 In determining this application, I need to decide whether the facts as put before me by Mr Ross could substantiate the three further breaches alleged. I am not called upon to finally determine each further alleged breach but rather determine whether the further three alleged breaches are arguable.

13 Section 41 of the MCE Act provides:

"(1) Where an employer has decided to —

(a) take action that is likely to have a significant effect on an employee; or

(b) make an employee redundant,

the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).

(2) The matters to be discussed are —

(a) the likely effects of the action or the redundancy in respect of the employee; and

(b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,

as the case requires."

14 Relevantly, section 40 of the MCE Act provides:

"**40. Terms used**

(1) In this Part —

employee does not include a casual employee or an apprentice;

redundant means being no longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person.

(2) For the purposes of this Part, an action of an employer has a significant effect on an employee if —

(a) there is to be a major change in the —

(i) composition, operation or size of; or

(ii) skills required in,

the employer's work-force that will affect the employee; or

(b) there is to be elimination or reduction of —

(i) a job opportunity; or

(ii) a promotion opportunity; or

(iii) job tenure,

for the employee; or

(c) the hours of the employee's work are to significantly increase or decrease; or

(d) the employee is to be required to be retrained; or

(e) the employee is to be required to transfer to another job or work location; or

(f) the employee's job is to be restructured."

Termination of the Secondment

15 In ***Glenn Ross -v- Peter Conran, Director General of the Department of the Premier and Cabinet*** [2011] WAIRC 01041, Her Honour Acting President Smith made a specific finding concerning the legal nature of Mr Ross' secondment. In that regard, she said at paragraph 133:

> "… at law, other than the performance of functions, services or duties in the service of ECU, the appellant's (Mr Ross) other terms and conditions of employment as a public service officer remained unchanged and his contract of employment with the respondent did not cease and nor was it or the terms and conditions of his employment as a public service officer suspended"

16 The Respondent says that throughout the period of Mr Ross' secondment, and following, he occupied the position of a "Principal Policy Officer" in the Department. That position is described as unattached because it was and is not attached to any specific duties (see ***Glenn Ross -v- Peter Conran, Director General of the Department of the Premier and Cabinet*** (supra) at paragraph 133).

17 The Respondent submits that the ending of the secondment was no more than an end to the temporary placement with respect to which Mr Ross did not have ongoing rights. He argues that it cannot be reasonably submitted that the cancellation of the secondment came within the description of an action of an employer that had a significant effect on Mr Ross.

18 Subsection 40(2) of the MCE Act sets out the actions, which for the purposes of section 41 of the MCE Act, have a significant effect on an employee. Mr Ross does not, with respect to the cessation of his secondment, rely on any of the actions set out in subsections 40(2)(a), (2)(c), 2(d) or (2)(f). His claim is founded on subsections 40(2)(b) and/or 40(2)(e) of the MCE Act.

19 It is difficult for Mr Ross to argue that section 40(2)(b) has application given that the job he was doing at ECU was of a temporary nature. A placement in perpetuity is inconsistent with the notion of secondment and is not permitted by section 66 of the *Public Sector Management Act 1994.* Consequently he did not have an ongoing right to do the job that he was doing at ECU. By its very nature, his job at ECU was temporary. It did not have the quality of permanency required by section 40(2)(b) of the MCE Act.

20 Mr Ross knew, or ought to have known, from the start of his secondment that the job he was doing at ECU would, for the purposes of the secondment, come to an end. Given the innate temporary nature of the secondment, the ending of his secondment was contemplated by all parties and could not be regarded as the action of an employer that has a significant effect on the employee. That is so, even if the Respondent has unilaterally brought the secondment to an end. The secondment arrangements fall outside that contemplated by section 40(2)(b) of the MCE Act. The MCE Act only has application to Mr Ross' substantive position as it existed before, during, or after the secondment.

21 Once Mr Ross' temporary arrangement ended he continued in his substantive position. He was not required to transfer to another job or work location but rather required to resume his substantive position at his work location.

22 It appears that Mr Ross was of the view that his secondment to ECU would be ongoing. He was hopeful that it might have led to a permanent appointment. Clearly such a permanent appointment could not occur within the terms of the secondment. The ending of the secondment could not therefore eliminate or reduce his substantive job opportunity, promotion opportunity or job tenure.

23 In so far as section 40(2)(e) of the MCE Act is concerned it cannot be said that Mr Ross was required to transfer to another job or work location. There was no transfer. The cessation of his secondment put him back in the same position he had been in prior to his secondment. He resumed his position. The position to which he returned was the same as it was prior to the secondment.

24 The claim founded on the cessation of his secondment is not arguable. The amendment of Mr Ross' claim in that regard will be not permitted.

Redeployment

25 Registration under the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* is at the discretion of the Public Sector Commission (see Regulation 11). Although the decision to register an employee for redeployment is discretionary, it may nevertheless have a significant effect on that employee. It is the type of action contemplated by section 40(2)(d) and (2)(e) of the MCE Act.

26 The Respondent argues that given that registration or redeployment did not occur there was no action taken which had the possibility of invoking a significant effect on Mr Ross. The factual circumstances take it outside that contemplated by section 41 of the MCE Act.

27 However, based on the evidentiary material produced by Mr Ross in support of his application he could well argue that Mr Conran, in his letter to him dated 25 May 2010, indicated he had made the decision to register Mr Ross for redeployment. That decision at that time could possibly have had a significant effect on Mr Ross. It seems to me arguable that the decision made on or about 25 May 2010 was of the type contemplated by section 41 of the MCE Act.

28 Whether or not the subsequent decision not to proceed with the registration impacts the alleged breach is open to argument.

29 Mr Ross is granted leave to pursue his claim in that regard.

Failure to Provide Work

30 Mr Ross argues that the Respondent's failure to provide him with work upon his return to the Department following his secondment is an "action" contemplated by section 40(2)(c), (2)(d) and (2)(e) of the MCE Act.

31 It appears however, that when Mr Ross returned to the Public Service in 2007, under section 180(3) of the *Corruption and Crime Commission Act 2003*, he took up a position within the Department to which no work or specific duties were attached. His position was a supernumerary position.

32 Mr Ross' secondment to ECU was agreed as a result of his own initiative. However, that secondment was always temporary. It could never be permanent because any permanent appointment would have been impossible. A permanent appointment would have amounted to a change in employment.

33 The cessation of his secondment, irrespective of who initiated it or how it came about, had the effect of bringing the temporary arrangement to an end. There was no change to Mr Ross' employment notwithstanding that there were changes in the performance of his functions, services or duties. The interlude created by the secondment finished and Mr Ross continued in exactly the same position he was in prior to his secondment. It follows that the contention that the Respondent has taken the action specified in sections 40(2)(c), (2)(d) or (2)(e) of the MCE Act is not maintainable. The reasoning I adopted with respect to the secondment issue has equal application to this ground.

34 On 25 May 2010 Mr Ross was advised in writing that he would be provided with work when he returned to the Department. He was subsequently orally advised on 2 June and 11 August 2010 that no work would in fact be provided. He says that such change was one with respect to which he should have been consulted and that such failure constitutes a breach of section 41 of the MCE Act. In that regard it suffices to say that although different permutations were put to him with respect to his proposed duties upon return to the Department, the fact is that when he returned to the Department there was no change from that which pre-existed the secondment. There was in reality no change made. There was no decision made which required the need for the Respondent to consult with Mr Ross. Given that there was no action taken that had a significant effect upon Mr Ross, there can be no basis for his claim.

35 Leave is not granted for Mr Ross to amend his claim with respect to this ground.

Conclusion

36 The application is granted in so far as leave is granted for the Claimant to amend his claim alleging a breach of section 41 of the MCE Act, constituted by the Respondent's failure to speak with him regarding his redeployment.

37 The application is otherwise dismissed.

38 The Claimant shall, within 14 days hereof, lodge and serve his further fresh outline of claim. The respondent shall lodge and serve his further response within 14 days thereafter. The requirement for a pre-trial conference is dispensed with. The Clerk of Court shall immediately after the lodgement of the further response, list this matter for trial.

G. Cicchini

Industrial Magistrate

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 00244

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00244
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 24 JANUARY 2013, FRIDAY, 25 JANUARY 2013, THURSDAY, 7 FEBRUARY 2013, THURSDAY, 17 JANUARY 2013, WEDNESDAY, 21 NOVEMBER 2012
DELIVERED	**:**	FRIDAY,19 APRIL 2013
FILE NO.	**:**	B 193 OF 2012
BETWEEN	**:**	LAURENCE BROWN
		Applicant
		AND
		NORTHERN SUBURBS HEBREW CONGREGATION INC ABN 42328493370
		Respondent

Catchwords	:	Industrial law (WA) – Alleged denied contractual entitlements – Application that claim for payment of salary be dismissed on the basis of Deed of Release arising out of workers' compensation claim – Principles applied – Exercise of discretion to dismiss part of claim – Claim for underpayment of salary – Variation of term of contract – Claim for payment of out of pocket expenses – Principles applied – Application dismissed.
Legislation	:	Industrial Relations Act 1979 ss 26, 27(1)(a), 29(1)(b)(ii)
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr D Vilensky of counsel

Case(s) referred to in reasons:

Hotcopper Australia Ltd v Camp David Saab (2001) 81 WAIG 2704*;*

Balfaur v TravelStrength (1980) 60 WAIG 1015*;*

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd 2004 219 CLR 165*;*

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451;

International Transport Association v Ansett Holdings Ltd (2008) 234 CLR 151*;*

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266.

Reasons for Decision

1 The applicant, Rabbi Brown, took up a position as Rabbi of the respondent, the Northern Suburbs Hebrew Congregation, in January 2008. As Rabbi of the Congregation, Rabbi Brown was responsible for the spiritual and pastoral care of the Congregation. He was also required to assist the Board of the Congregation in its development and growth. Rabbi Brown was engaged under a written Employment Agreement (exhibit R2) on a salary package of $105,000 per annum with some additional benefits. It is Rabbi Brown's salary entitlements and other benefits which are controversial in these proceedings.

2 The Agreement provided for an initial term of appointment of three years which was to expire at the end of 2010. Both parties had an option to extend the Agreement for a further term of three years. Rabbi Brown did not exercise this option. The Board of the Congregation determined to extend the Agreement for a further term of one year, to expire on 31 December 2011. By about mid-2011, relations between Rabbi Brown and the Board of the Congregation became very strained to the point where there was an irretrievable breakdown in the employment relationship. As a result of events on 20 July 2011, Rabbi Brown went on workers' compensation and resigned from his employment with the Congregation on 7 November 2011. He did not return to the Congregation after 20 July 2011.

3 Rabbi Brown now seeks the recovery of contractual benefits which he says arose from his Agreement and which were denied to him by the Board of the Congregation. These are:

(a) A claim for $40,800 in salary said to arise from a breach of cl 10 of the Agreement;

(b) A claim for $18,842.60 in relation to reasonable expenses Rabbi Brown incurred under cl 2(e) of the Agreement;

(c) A claim for $946.00 for the cost of a replacement windscreen for Rabbi Brown's car which was damaged while it was left in the Congregation's Synagogue car park;

(d) A claim for $280.00 for the reimbursement of an airfare as an expense under cl 2(e) of the Agreement;

(e) An amended claim for $17,019.72 for superannuation contributions; and

(f) An amended claim for $58,903.23 for contractual entitlements from 20 July to 31 December 2011.

4 As to the claim for superannuation in par 4(e) above, Rabbi Brown withdrew this claim. As to the claim for $280.00 for the reimbursement of an airfare, in the course of proceedings before the Commission, the Board of the Congregation paid Rabbi Brown this sum.

5 As to the amended claim in par 4(f) above, in relation to additional salary, at the outset of the hearing the Congregation sought an order that this claim be dismissed on the basis of a Deed of Release arising out of the workers' compensation proceedings. The Congregation contended that Rabbi Brown was precluded from pursuing further claims arising from his employment after signing the Deed. The Commission adjourned briefly to consider the issues and in short reasons published at 29-30T, dismissed that part of Rabbi Brown's claim. To the extent that it is necessary to do so, I briefly expand upon those reasons as follows.

6 It was common ground that Rabbi Brown left the premises of the Congregation in late July 2011 and did not return. From 20 July 2011 he was on sick leave. On 24 July 2011 Rabbi Brown made a workers compensation claim and also issued common law proceedings for damages. These related to an alleged serious psychological injury said to have been sustained by Rabbi Brown arising from events in the workplace on 20 July 2011. Both claims were subsequently settled by the parties and the settlement was recorded in a Deed of Release made on 14 October 2011. The settlement required the Congregation to pay to Rabbi Brown the sum of $55,000 plus $5,000 costs. By cl 3(a), (b) and (c) of the Deed, the parties agreed that the payments

made presented a complete discharge of all present and future claims arising from the injury and workers' compensation payments. Also, there was a release and discharge from any future claims arising from the injury, workers' compensation or common law claims.

7 As noted above, Rabbi Brown subsequently resigned from his employment effective 7 November 2011.

8 The Commission was not persuaded that the releases in cl 3(c) and (d) of the Deed were effective to constitute a bar to his present claims. In the Commission's view, they were limited to claims arising not out of Rabbi Brown's employment generally, but specifically related to his injury, and subsequent workers compensation and common law claims. However, as a matter of discretion, the Commission considered that Rabbi Brown's amended contractual claim for payment of salary between 20 July 2011 and 31 December 2011 should not be allowed to proceed.

9 Firstly, on the evidence, Rabbi Brown, in a letter to the Congregation of 13 September 2011, advised that he was absent from work on sick leave due to a serious illness until the end of October 2011. At that time, he would be able to "plan his return to work". As I have said, Rabbi Brown resigned effective on 7 November 2011. Thus, on this basis, the Commission could not be satisfied that Rabbi Brown was ready, willing and able to work in accordance with his contract of employment from 20 July to 7 November 2011, in support of his claim for salary over this period.

10 Secondly and in any event, the payment to Rabbi Brown as a settlement of his workers' compensation and common law claims, in the total of sum of $60,000, was greater than the total sum of his salary payable for the period 20 July to 7 November 2011. The settlement sum was, in part, in recognition of weekly payments of workers' compensation that Rabbi Brown would otherwise be entitled to receive under the workers' compensation legislation, in the period over which he may have remained in employment. As a matter of equity and good conscience, such a settlement sum should not be seen to be a windfall to Rabbi Brown, such that he could then, additionally, pursue his contractual entitlements in this jurisdiction. There was a significant degree of double dipping. It was open to the Commission to have regard to these matters considering s 26 of the Act, and in the exercise of its powers under s 27(1)(a) of the Act, to dismiss the matter or any part of it, or refrain from further hearing or determining a matter or part, for the reasons set out. On this basis, the Commission dismissed this part of Rabbi Brown's claim.

11 After the conclusion of the hearing, the Congregation sought leave to re-open to admit a document setting out minutes of a meeting of the Board of the Congregation. It did not proceed with the application. No regard has been had to the document by the Commission.

12 Before considering the remaining claims in detail I first mention some matters of principle.

Legal principles

13 As the applicant, the onus is on Rabbi Brown to establish that the claims he has made were contractual benefits as benefits under the Agreement and that they have been denied: *Hotcopper Australia Ltd v Camp David Saab* (2001) 81 WAIG 2704. The meaning of "benefit" is to be construed broadly, as any "advantage, entitlement, right, superiority, favour, good or perquisite": *Balfour v Travel Strength* (1980) 60 WAIG 1015. However, the benefit must still arise under a contract of employment.

14 As a general proposition, the interpretation of a contract involves ascribing meanings to the words used that would be given to them by a reasonable person in the position of the parties at the time the contract was entered into. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* 2004 219 CLR 165 Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said at 40:

> The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties and the purpose an object of the transaction.

15 Furthermore, it is also well settled that the interpretation of a provision in a contract is to be considered in its context. That is, the text of the Agreement needs to be read as a whole and against the background of circumstances known to the parties, and the purpose and object of the transaction: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; *Toll*; *International Transport Association v Ansett Holdings Ltd* (2008) 234 CLR 151. This entails an objective approach to contractual interpretation. The subjective views of the parties at the time of contracting cannot be relied upon.

16 As was said by the Court in *Toll* at par 40:

> This Court, in Pacific Carriers Ltd v BNP Paribas, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of the contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text but also of the surrounding circumstances known to the parties and the purpose and object of the transactions.

17 I now turn to consider each of the claims.

Claim for salary

18 Rabbi Brown claims underpayment of salary in the sum of $40,800. It was contended that the Congregation, in accordance with the relevant provisions of the Agreement, increased Rabbi Brown's annual salary from $105,000 to $120,000 per annum from October 2008. However, the Congregation unilaterally reduced the salary to $110,000 per annum from April 2009. On the other hand, the Congregation contended that the conditions specified in the Agreement for an increase to Rabbi Brown's

salary were not met. Furthermore, it contended that in any event, in subsequent negotiations with Rabbi Brown, it was agreed that Rabbi Brown's salary be reduced to $110,000 per annum and there was no unilateral reduction.

19 Under the Agreement, cl 10 deals with an increase in salary. It provides as follows:

> 10. **INCREASE IN ENTITLEMENT**
>
> Notwithstanding anything to the contrary contained in this Agreement, the Congregation and the Rabbi acknowledge that after a period of six (6) months reckoned from the Date of Commencement, they will negotiate in good faith to see if at that time the Entitlement of the Rabbi can be increased from $105,000 (One Hundred and Five Thousand Dollars) to $120,000 (One Hundred and Twenty Thousand Dollars) per annum exclusive of superannuation. The parties acknowledge that the ability of the Congregation to increase the Entitlement as provided in this clause will depend on the income of the Congregation from new membership, fundraising and other sources on which the Rabbi has had an influence and the financial position of the Congregation generally. The Congregation and the Rabbi agree to negotiate this clause in good faith on the understanding that if the Congregation is not able to afford an increase in the Entitlement, it will be deferred for a further six months.

20 It is immediately apparent from the terms of cl 10 that the "entitlement" to an increase in salary is qualified. That qualification turns on the satisfaction of a number of elements. Those elements include income of the Congregation from new membership; fundraising and other sources of income; and the overall financial position of the Congregation. As to the first two elements, an important qualification to them is the need for Rabbi Brown to have demonstrated influence on increasing membership, fundraising and other sources of income. The obligation imposed on the parties by cl 10 was an obligation to negotiate in good faith, having regard to these criteria. As a matter of construction, it seems reasonably plain to me that in the event that the Congregation was not in a financial position to increase Rabbi Brown's salary, then there would be no obligation upon it to do so.

21 Mr Cohen was the President of the Congregation at the time of negotiations to review Rabbi Brown's salary. He testified that in November 2008 Rabbi Brown prevailed on him to increase his salary because of financial commitments that he had assumed, including the purchase of a new house and other expenses. It was Mr Cohen's testimony that Rabbi Brown informed him that the Congregation's membership was growing and on the strength of commitments given to him by Rabbi Brown, Mr Cohen said he agreed on behalf of the Board, to increase his salary ahead of time to $120,000. Mr Cohen emphasised that it appeared that Rabbi Brown was at that time, under financial duress and Mr Cohen took it upon himself to increase his salary, on the basis of the representations made to him, and to keep Rabbi Brown and his wife happy. This increase was subsequently ratified by the Board.

22 However, it transpired that by January 2009, when membership accounts had been sent out to the Congregation, no new membership was demonstrated. In fact, according to Mr Cohen, there had been a net loss in membership. This would appear to be supported by documents tendered by Rabbi Brown as exhibit A3. These documents show that for the period 2008, 2009 and 2010, there had been 36 new members as opposed to 38 resignations and deaths over the same period, leading to a net loss of two members. More relevantly for this particular claim, for the year 2008 and to January 2009, 17 members either resigned or died. Only about 10 or so new members were recorded over the same period. Not all of these were financial, either.

23 Additionally, Mr Cohen referred to the Congregation being in general financial difficulty, and in reality, having no capacity to pay the increase in remuneration. As a result of these circumstances, Mr Cohen testified that he was "hauled over the coals" by the Board, and was directed to go back to Rabbi Brown and renegotiate his salary. In this regard, Mr Cohen said that he and Rabbi Brown had many discussions about this issue. Mr Cohen described his conversations with Rabbi Brown as "difficult".

24 At a meeting with Rabbi Brown at Mr Cohen's home on 17 February 2009, Mr Cohen said that he set out the difficulties that the Congregation faced. That it could not afford to maintain the increase in salary as had previously been agreed. Mr Cohen said that he took detailed notes during the meeting and let Rabbi Brown do much of the talking without interruption. According to Mr Cohen, Rabbi Brown conceded that there were no new members and there would not be any because of less immigration and another congregation getting new members instead. Mr Cohen said that in the course of the meeting, Rabbi Brown said he was prepared to look at his remuneration package, but not to the extent where he could not live at his current level. After the meeting, Mr Cohen sent a detailed email to the other Board members. A copy of the email was document 45 in exhibit R1. Its content largely corresponds with Mr Cohen's testimony.

25 After further discussion, Rabbi Brown sent an email to Mr Cohen on 16 March 2009, setting out his position. In it, relevantly, he said:

> You have asked me to forego my increase of 15K. This will be difficult. If you accept my offer I am prepared to drop 10K to take effect immediately. I would also expect public recognition of my offer and the matter to be officially minuted and acknowledged by letter.

26 Mr Cohen said that at the Board meeting on the evening of 16 March Rabbi Brown's offer was officially minuted by the Board. The minutes of the meeting also referred to collections of membership fees being slow and that fund raising initiatives were being progressed. The Congregation also agreed to make a public announcement at the upcoming annual general meeting regarding Rabbi Brown's agreement to reduce his remuneration.

27 In the meantime, Mr Hadassin was elected to the Presidency of the Congregation, to take effect at the upcoming annual general meeting. On 19 March 2009, Rabbi Brown sent an email to Mr Hadassin affirming his confidence in Mr Hadassin and referred to his offer to reduce his remuneration in the following terms:

> In regards to my offer I need to know what the plans are for fundraising in the community as well as debt recovery. If I am putting my salary and livelihood on the line I need to know what else and who else is doing the same. I will not be the only one to be making efforts to stabilise the financial situation. I also feel that the present administration needs to

> answer why we find ourselves in this predicament and why the warnings were not sounded several months ago. It is puzzling. I was brought here with the understanding that the financial situation was stable and that the community could maintain my salary. This was confirmed several times over.

28 However, a little later, on 31 March 2009, Rabbi Brown sent a further email not to Mr Hadassin, but to Mr Cohen referring to his offer to reduce his remuneration and his earlier emails of 16 and 19 March 2009. In his email to Mr Cohen of 31 March, relevantly, Rabbi Brown said:

> I am now more than disappointed. It is now March 31 2009. I have asked for several conditions to be met upon acceptance of my offer. The executive has been very quick to ask me to come forward and I have met your requests in all respects every time.
>
> The executive has not considered my conditions at all. Accordingly my offer is withdrawn and I expect my contract to be met in full.

29 The evidence of both Mr Cohen and Mr Hadassin was that this was perplexing, as the Board had at its meeting on 16 March 2009 accepted Rabbi Brown's offer and had met his conditions. The offer had been minuted at the Board meeting on 16 March. Further, at the Board meeting on 8 June 2009, various appointments were made to subcommittees to progress fundraising and debt collection. Mr Hadassin testified that a number of steps were taken to hold fundraising functions and other activities in an endeavour to improve the financial position of the Congregation. Additionally, Mr Hadassin said that in a letter to the Congregation dated 12 May 2009, a copy of which was exhibit R2, he specifically referred to these matters and said:

> The year ahead is a challenging one financially and NSHC is not immune from the global economic crisis. We have set up a strong fundraising committee to meet the shortfall in the budget. Additionally, our Rabbi has graciously agreed to a salary reduction to help ease the burden and Adam Levitan has offered to continue to do the Shabbat Torah reading at no charge to the Shul. Our sincere thanks to them.

30 Mr Hadassin's letter also sought assistance from the Community to attend the Synagogue and to emphasise the importance of paying accounts promptly to assist in cash flow.

31 In short, the Congregation considered that all of the conditions imposed by Rabbi Brown had been met. In relation to fundraising, it was emphasised that these efforts would need to be ongoing, and that there could not be an instantaneous financial turnaround. Moreover, Mr Hadassin testified that there was nothing in Rabbi Brown's offer, which had been accepted, which imposed any time limits on when certain conditions would need to be met.

32 Because of the ongoing disputation about the issue of Rabbi Brown's salary, Mr Cohen, on behalf of the Board undertook to write to Rabbi Brown setting out the Board's position in detail. The letter was dated 20 April 2009. First, it challenged Rabbi Brown's assertion that anyone in authority had informed him that his employment was at risk because of the financial position of the Congregation. Secondly, although referring to the financial health of the Congregation, the letter denied that there was any incapacity to meet Rabbi Brown's ongoing salary commitments. Thirdly, the letter referred to steps being taken by the Board concerning fundraising.

33 As to any other staff who might contribute, the letter noted that there was only one other salaried employee in the office as all other contributions were voluntary. The letter also referred to the fall-off in membership. When the original salary increase was made in late 2008, on the assurances of Rabbi Brown as to new membership, the Board considered there would be increased revenue. However, this was not so. Finally, in relation to the assertion that Rabbi Brown had withdrawn his offer in his email of 31 March 2009, Mr Cohen noted that the Board had accepted and officially minuted his offer at the Board meeting on the evening of 16 March 2009. As a result, Rabbi Brown's revised salary took effect from 1 April 2009. There was no response from Rabbi Brown to this letter.

34 The version of events outlined by Rabbi Brown in his testimony was somewhat different. He said that at the meeting with Mr Cohen, which he thought occurred on 16 February 2009, he was told that the Congregation could no longer afford his salary increase and that if it was not resolved, he would not have a job by March 2009. He said that he therefore felt under pressure to renegotiate. He felt he was bullied by Mr Cohen. He finally agreed to a reduction in salary but this was subject to conditions. On Rabbi Brown's interpretation, the conditions included a letter of gratitude by the Congregation to him personally; the announcement of a plan by the Board to recover debts and engage in fundraising; a contribution by others to share in the reduction of costs; public recognition of his offer; and the offer to be formally minuted by the Board.

35 However, in Rabbi Brown's view, not all of his conditions were fulfilled. That led him to write the email of 31 March 2009 to Mr Cohen, recording his disappointment and withdrawing his offer to agree to a reduction in his salary. Accordingly, he regarded the actions of the Board in reducing his salary effective 1 April 2009 as a breach of his Agreement. In particular, when he was cross-examined on this issue, Rabbi Brown regarded the commitment to fundraising as involving an established "track record" of action by the Board which could be demonstrated. Having said this, Rabbi Brown conceded in his evidence, that there was no time limit set in his communications with the Board in relation to his offer.

36 Having considered all of the evidence, oral and documentary, in relation to this issue, I am not persuaded that Rabbi Brown has made out his claim. First, it is to be noted that by cl 10 of the Agreement, the increase in entitlement was subject to negotiations in good faith. In particular, any increase in entitlement was subject to the financial position of the Congregation and Rabbi Brown's impact on new membership, fundraising and other sources of income. I am satisfied on the evidence that at the time Rabbi Brown requested a review of his salary, which was agreed to by Mr Cohen, representations were made by Rabbi Brown that there were new members in the Congregation and that he was satisfying his obligations under cl 10 of the Agreement.

37 I am also satisfied on the evidence, that by early 2009 17 members had either resigned or died and far fewer had joined as new members. There was also the uncontradicted evidence from Mr Cohen and Mr Hadassin that the finances of the Congregation were of concern.

38 As to whether Rabbi Brown's offer conditions were satisfied, on any reasonable view of the evidence, they were. First, the offer was formally minuted by the Board at its meeting of 16 March 2009. Second, there was public recognition of Rabbi Brown's offer in the letter to the Congregation from Mr Hadassin dated 12 May 2009. This letter referred to Rabbi Brown having "graciously agreed to a salary reduction to help ease the burden". I also regard such a letter, to the extent it is necessary, as being a letter of gratitude to Rabbi Brown as a member of the Congregation. Third, in relation to debt recovery and fundraising, from the minutes of its meetings, in particular that of 8 June 2009, the Board was clearly taking steps to increase its fundraising activities and its debt recovery, in an endeavour to put the Congregation on a more secure financial footing.

39 In my view, it is not open to Rabbi Brown to now attempt to qualify his condition in relation to fundraising, as being linked to a demonstrated "track record" of action over a possibly lengthy period of time. No such stipulation was put in his offer to Mr Cohen in his email of 16 March 2009. The suggestion of a long lead time and a "track record" is completely at odds with Rabbi Brown's offer to reduce his salary by $10,000 per annum "to take effect immediately". There is no suggestion in the email of 16 March, or indeed the emails of 19 and 31 March 2009, that the conditions in relation to fundraising and debt recovery, involved any particular time frame against which the Board's performance was to be measured. After the event, to attempt to erect it as such, is, in my view, quite misleading. In any event, even if such a condition were agreed to, it is difficult to see how such a term could have any certainty. How long would the Board be given? What level of fundraising or debt recovery would be the yardstick of performance? In my view, the Board took steps to progress these matters in good faith in accordance with the agreement that was reached with Rabbi Brown.

40 Moreover, Rabbi Brown's conditions of acceptance were put to and agreed by the Board of the Congregation at its meeting of 16 March 2009. Its acceptance of the offer was evidenced by its subsequent conduct in taking the steps to which I have just referred.

41 Accordingly, in my view, there is no basis upon which it could be said that the Congregation unilaterally reduced Rabbi Brown's remuneration. The salary increase, although not made in accordance with the terms of cl 10 of the Agreement in the first place, in that the preconditions for it were not met, was the subject of extensive discussions between the Congregation and Rabbi Brown. This resulted in an agreement to reduce the salary, albeit I note, not to its original level of $105,000 per annum, but to the increased rate of $110,000 per annum. That is, Rabbi Brown still enjoyed a salary increase, but it was not the full increase available under the terms of the Agreement.

Claim for expenses

42 Rabbi Brown claimed he has been denied a contractual benefit in the form of "out of pocket" expenses under cl 2(e) of the Agreement. Clause 2(e) provides as follows:

> The Congregation shall pay all out of pocket expenses reasonably incurred by the Rabbi in the discharge of his duties under this Agreement as shall be approved by the Congregation.

43 In accordance with this subclause, Rabbi Brown claimed expenses incurred in the use of his private motor vehicle to discharge his duties as Rabbi and also the provision by him, of a mobile telephone. The claim was set out in a letter to the Congregation dated 20 July 2011, which was document 56 in exhibit R1. In it Rabbi Brown claimed that approximately 80% of all telephone calls and data used on his mobile telephone were for the purposes of his Congregational duties. Based upon costs incurred by him from the commencement of his employment to 31 July 2011, the claim is a total of $2,717.60.

44 In terms of his motor vehicle expenses, Rabbi Brown calculated that having regard to distances travelled for work purposes, and applying the Australian Taxation Office guidelines and other vehicle running cost guidelines, he estimated that his vehicle and employment related travel costs were a total of $16,125.01.

45 Therefore, the total expense claimed under both of these heads was $18,842.61. The Congregation denied that Rabbi Brown had any entitlement to such benefits under his Agreement.

46 It was common ground that at no time since the commencement of his employment had Rabbi Brown raised any claim for such expenses before July 2011. It was clear on the evidence that by this time, the relationship between Rabbi Brown and the Congregation had broken down. In response to the proposition that this was an "ambit claim" only made because of the break down in the relationship between the parties, Rabbi Brown testified that there was no time limit under the relevant provision of the Agreement for making such claims and he simply did not get around to doing it. Regardless of the factual matrix giving rise to such a claim, the determination of it depends on the proper construction of cl 2(e) of the Agreement.

47 Applying the legal principles referred to above, the following analysis is undertaken. By cl 2(a) of the Agreement the parties agreed for Rabbi Brown to be "renumerated" for the provision of his services to the Congregation, in consideration of which he was to be paid a "gross ministerial entitlement of $105,000 pa". This was paid tax free. By cl 2(b) the "composition of the Entitlement under cl 2(a)" was to be by mutual agreement between Rabbi Brown and the Congregation "from time to time". This was subject to the proviso that the Congregation shall not be obliged to pay any amount exceeding the Entitlement of $105,000 per annum, except as otherwise provided in the Agreement.

48 Under cl 2(c) there was a further entitlement of an entertainment allowance of $1,000 a month for the purposes of entertaining persons or members of the Congregation. There were also additional benefits prescribed by cls 2(d) and 2(f) in relation to reasonable relocation costs and return airfares for Rabbi Brown and his family to travel to Melbourne each year.

49 In my view, the inclusion of the additional entitlements in cls 2(c), (d), (e) and (f), construed within cl 2 as a whole, reinforces the interpretation of cls 2 (a) and (b), that the parties intended to limit the total remuneration payable under the Agreement to $105,000 per annum. This was subject to the mechanism within the Agreement to increase that sum during its life in cl 10. In

my view, from the terms of cl 2 read as a whole, any other "benefit" falling outside of the expressly enumerated additional entitlements set out in cls 2(c) to (f) that would otherwise, in the ordinary and natural sense, be regarded as a part of "remuneration", would, by implication, be included in the total remuneration of $105,000 per annum as a maximum.

50 Returning then to cl 2(e). This subclause contains four elements. To be entitled to a benefit under this subclause, it needs to be established that the relevant claim is an "out of pocket expense"; that it was "reasonably incurred"; that it was incurred in the "discharge of Rabbi Brown's duties"; and that it was "approved by the Congregation". It is necessary, therefore, to take each element in turn as to whether each is satisfied. Furthermore, on its plain terms cl 2(e) conferred a benefit on Rabbi Brown that was conditional. The condition was that any benefit paid was required to be "approved by the Congregation". Thus, even if a claim for an entitlement satisfies the other elements in the subclause, the Congregation reserved the right not to approve it.

51 By cl 16 of the Agreement the "Congregation" is to be represented by the Board. That was so for "all purposes in connection with this Agreement". The "Board" meant the "duly elected Board of the Congregation from time to time". For the purposes of this clause, consideration also needs to be given to the Constitution and Rules of the Congregation.

52 The Congregation is an incorporated body established under the name of the Northern Suburbs Hebrew Congregation, Perth (Inc). By cl 19 of the Constitution, it is provided that the affairs of the Congregation shall be managed by the Board. The Board is elected and consists of a President, a Vice-President, a Treasurer, a Secretary and a minimum of six to a maximum of eight additional Board members. By cl 24.1 the quorum of a meeting of the Board is greater than 50% of all elected members. Subject to elsewhere provided, the Board is to meet together for dealing with the business of the Congregation. Further, and importantly, by cl 25.4, the President and two other members of the Board in any situation considered by them to be an emergency can "act as they think fit". Such actions are required to be reported to the next meeting of the Board.

53 It is plain by the combined effect of cl 16 of the Agreement read with the relevant provisions of the Constitution of the Congregation that the Board acts for and on behalf of the Congregation. Where any provision of the Agreement refers to the Congregation, it is to be read as referring to the Board.

54 In his testimony, Rabbi Brown said that when he was negotiating the Agreement, he had in mind that it was the custom of Jewish Congregations that Rabbis be reimbursed for their expenses, such as the use of a private motor car and mobile phone expenses. Rabbi Brown said he considered this to be a worldwide practice and that when he was involved in drawing up the contract he had this definitely in mind as "reasonable expenses". Rabbi Brown testified that as he used his motor vehicle and mobile phone for work duties he considered that these should be regarded as expenses that were reimbursable. For the reasons noted above, this subjective intention cannot be taken into account in construing cl 2(e).

55 Further, Rabbi Brown contended that there was no evidence that the Board had approved or not approved his expenses claim. He seemed to be under the impression that there were no Board meetings after 20 July 2011, which was the date he gave his expenses claim to the President, Mr Hadassin, in the presence of another Board member, Mr Dworcan. Whilst Rabbi Brown initially challenged whether the Board could act on behalf of the Congregation for the purposes of cl 2(e) of the Agreement, a proposition that I consider to be plainly untenable, he later retracted that submission.

56 Rabbi Brown was cross-examined on whether the expenses claim was approved by the Congregation. In this respect, he did not accept that a letter from the Congregation's solicitors dated 23 August 2011, rejecting the claim, was an appropriate response. When the expenses claim was put to the then President, Mr Cohen, in his testimony, he said that no such "out of pocket" expenses had ever been claimed by Rabbi Brown. The only items Mr Cohen referred to were a couple of occasions when Rabbi Brown requested to go to a conference and the Board agreed to pay for it. Mr Cohen testified that at no time prior to 20 July 2011, did Rabbi Brown ever suggest that the Congregation pay for his motor vehicle or mobile telephone expenses. Further, Mr Cohen testified that the Congregation would never regard the claims made as "out of pocket expenses". During his time as President, no past Rabbi has ever made such claims either.

57 Mr Hadassin said in his evidence that he regarded "out of pocket expenses" as items involving a direct outlay of cash such as food for a congregational event, printing, stationery and matters of that nature. A receipt would be required for reimbursement in those circumstances. When he saw the expenses claimed by Rabbi Brown, Mr Hadassin testified that he regarded them as an "ambit claim". The use by Rabbi Brown of his car and mobile phone was regarded by the Congregation as a normal part of his duties as set out in the Agreement. Mr Hadassin noted that the Congregation provided an office and a telephone for Rabbi Brown's use.

58 When the expenses claim was received by Mr Hadassin he discussed it with the President and the then Treasurer and Secretary of the Congregation. It was resolved that it would not be paid and those instructions were passed onto the Congregation's solicitors. The solicitors then informed Rabbi Brown that the Congregation did not approve his expenses claim. When Mr Hadassin was cross-examined on this issue, he said that he did not believe that there were official Board meetings minuted after 20 July 2011. He did not believe that there was a formal resolution taken by the Board at which Rabbi Brown's expenses claims were rejected.

59 Whilst Mr Hadassin did accept that when he and the Executive members of the Board considered and rejected Rabbi Brown's expenses claim, they did not constitute a majority of the Board, he noted that many decisions that were made by the Executive were done with the full permission of the Board. The Board met irregularly and the Executive had the power to make decisions on its behalf. Accordingly, Mr Hadassin considered that he had the authority to reject Rabbi Brown's claim, which he did.

60 Having considered all of the evidence and the proper construction of cl 2 (e) of the Agreement, the Commission is not persuaded that this claim can succeed. Regardless of whether claims for motor vehicle expenses and mobile telephone expenses can be reasonably categorised as "out of pocket expenses" and there must be considerable doubt as to this, especially with regard to motor vehicle claims, the condition attaching to such an entitlement, that being the approval by the Congregation, has not be satisfied. The onus was on Rabbi Brown to establish his claim. It was for him to prove, on the balance of probabilities, that the expenses claim was approved by the Congregation. On the evidence, he has not discharged that burden.

61 It is beyond doubt that at all material times the Board acted on behalf of the Congregation and a decision by the Board was a decision of the Congregation for the purposes of the Agreement. It is plain from the terms of the Constitution of the Congregation, that the President and at least two other Board members acting as the Executive may discharge all of the powers of the Board from time to time. I have no doubt that this has occurred on this occasion, and on other occasions on Mr Hadassin's evidence. It could not reasonably be contended on any view of the evidence as a whole, that the Congregation had approved Rabbi Brown's expenses claim. Furthermore, and in any event, the letter from the solicitors acting for the Congregation to Rabbi Brown about this matter, also makes it clear that the Congregation was not approving the expenses claim. In my view, if there was any doubt about the matter up to that point in time, the letter from the Congregation's solicitors put the matter beyond doubt.

Claim for windscreen damage

62 A further claim advanced by Rabbi Brown was for a broken windscreen as a result of leaving his car in the car park of the Synagogue on one occasion, when it was damaged. He contended that as a result of his inability to drive his vehicle home on the evening in question, because of tenets of the Jewish faith, he should be entitled to compensation. Rabbi Brown contended that he was using his vehicle for work and as he was required to leave it at the Congregation's premises overnight, he had an entitlement to be recompensed for the damage.

63 There is no merit in this claim in my view. There is no express term in the Agreement for compensation arising from damage to Rabbi Brown's property, as a consequence of the use of that property in the course of his employment. Given that the Agreement is detailed and complete on its face, there is no basis for such a term being implied on the authorities: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. Rabbi Brown was in no different position to any other employee who may park their motor vehicle in their employer's car park where it sustains damage. That ultimately is an insurance matter. It did not give rise to an entitlement under the Agreement that could form the basis of an order in his favour.

Conclusion

64 For the foregoing reasons, I am not persuaded that the claims have been made out. The application is therefore dismissed.

2013 WAIRC 00245

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LAURENCE BROWN
	APPLICANT
	-v-
	NORTHERN SUBURBS HEBREW CONGREGATION INC ABN 42328493370
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 19 APRIL 2013
FILE NO/S	B 193 OF 2012
CITATION NO.	2013 WAIRC 00245

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr D Vilensky of counsel

Order

HAVING heard the applicant on his own behalf and Mr D Vilensky of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2013 WAIRC 00313

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTIAN CHIARAMONTE
	APPLICANT
	-v-
	LUCAFE AND PIAZZA DEL SOL
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	U 56 OF 2013
CITATION NO.	2013 WAIRC 00313

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 23 May 2013 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.

2013 WAIRC 00288

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOAQUIM FARIA CLETO
	APPLICANT
	-v-
	TARAMORE PTY LTD T/AS ONTRAQ HAULAGE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 MAY 2013
FILE NO/S	B 161 OF 2012
CITATION NO.	2013 WAIRC 00288

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr K Otway

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.

2013 WAIRC 00324

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TYSON ROBERT DUNN
	APPLICANT
	-v-
	HUTCHINSON LANDSCAPING/TOM HUTCHINSON
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 28 MAY 2013
FILE NO/S	U 18 OF 2013
CITATION NO.	2013 WAIRC 00324

Result	Application discontinued
Representation	
Applicant	Mr G Grasa (of counsel)
Respondent	Mr J Hulmes (of counsel)

Order

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

AND WHEREAS on 5 April 2013 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 23 May 2013 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00304

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00304
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	MONDAY, 25 MARCH 2013, WEDNESDAY, 22 MAY 2013
DELIVERED	**:**	FRIDAY, 24 MAY 2013
FILE NO.	**:**	U 22 OF 2013
BETWEEN	**:**	GODWIN EKHAYEME
		Applicant
		AND
		B.D KIRK & C.E MCELWEE TRADING AS FOUNTAINS CHEMMART PHARMACY
		Respondent

CatchWords	**:**	Industrial Law (WA) – Alleged harsh, oppressive, unfair dismissal – Application filed outside time – Application for extension of time – Principles applied – Application dismissed.
Legislation	**:**	Industrial Relations Act 1979 (WA) s 29(3)
		Pharmacy Act 2010 (WA) s 57
		Poisons Act 1964 (WA) Sch 8
Result	**:**	*Application to accept claim of unfair dismissal out of time dismissed*

Representation:

Applicant	:	Mr G Ekhayeme
Respondent	:	Ms S Owen, as agent

Case(s) referred to in reasons:

Concut Pty Ltd v Worrell [2000] HCA 64; 75 ALJR 312

Malik v Paul Albert, Director General, Department of Education of Western Australia (2004) 84 WAIG 683

Reasons for Decision

1 This is a claim of unfair dismissal which was received by the Commission on the 15 February 2013. The claim relates to Mr Ekhayeme's dismissal which occurred on the 29 or 30 April 2012. The claim is therefore 8½ months out of time. Section 29(2) of the *Industrial Relations Act 1979* (WA) (the Act) provides that a claim of unfair dismissal is to be referred to the Commission not later than 28 days after the date on which the employee's employment is terminated.

2 The capacity to accept a claim of unfair dismissal out of time is provided for in s 29(3) of the Act. Considerations which usually are relevant are discussed in the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* (2004) 84 WAIG 683. Those "principles" or considerations are not exhaustive and, putting to one side the uncontestable proposition that there must be something positively to satisfy the Commission that it would be unfair not to accept the referral out of time, none of them is necessarily decisive and each case will turn upon its own individual facts and circumstances.

3 On the facts of this matter, what I have found to be particularly important is the length of the delay. Eight months is eight times longer than the time stipulated by the Parliament for referral of such claims. That is a very long time. The record, and submissions from Mr Ekhayeme, show that in May 2012 his agent A Whole New Approach Pty Ltd made an application on his behalf to Fair Work Australia (FWA) to deal with a general protections dispute; this was sent to the respondent on 28 May 2012. The matter was listed before FWA on 6 June 2012 but was discontinued 12 June 2012 because the respondent is not a national system employer. His agent had therefore filed his claim in the wrong jurisdiction.

4 Filing a claim of unfair dismissal in the incorrect jurisdiction in WA is not uncommon although as Ms Owen observed, correctly if I may say, an agent would be expected to know the correct jurisdiction and not make such an elementary and fundamental error. Filing the claim, even in the incorrect jurisdiction, does place the former employer on notice that the dismissal is not accepted and is being contested. In this case, the respondent was aware within the time frame required under the Act that the dismissal was contested.

5 However once the error regarding the incorrect jurisdiction becomes known, the former employee has an obligation to file another claim promptly in the correct jurisdiction. In this case not only did this not occur, but Mr Ekhayeme understood that his agent was going to pursue a claim of discrimination, not a claim of unfair dismissal, in a different jurisdiction. This did not occur and it was not until February 2013 that Mr Ekhayeme realised he should have done it himself.

6 Nevertheless the fact is that Mr Ekhayeme did not pursue the unfairness of his dismissal once the error regarding the incorrect jurisdiction became known. He is critical of his agent, and possibly with good reason, however as he recognises, it was his responsibility to "really make sure [his] agent [was] doing the right thing". He did not do so and in fact he enrolled in a course of tertiary education for the second half of 2012. He was in hospital for a period of five weeks in January to February 2013. He took no further action himself to contest his dismissal until January 2013. By then, eight months had passed during which it appears that nothing actually was done by anyone to show that Mr Ekhayeme continued to contest his dismissal.

7 Correspondingly, for all of the time since 6 June 2012 the respondent had heard nothing and was entitled to assume that he was not contesting his dismissal. I accept Ms Owen's submission that in that time, at least some witnesses to Mr Ekhayeme's behaviour on the 18 April 2012 have left the business which means that it will be prejudiced if this claim is accepted out of time.

8 Another relevant consideration is the merits of Mr Ekhayeme's claim that his dismissal was unfair in the sense that there is a sufficiently arguable case. A consideration of the merits of his claim at this stage does not require a detailed analysis. It is sufficient to note that Mr Ekhayeme was summarily dismissed for serious misconduct as a result of his behaviour on 18 April 2012. He was employed as a pharmacist at a pharmacy in Geraldton. The respondent's Notice of Answer helpfully sets out what occurred on that day and Mr Ekhayeme does not contest what is written there, except for whether he left the rear door unlocked. What occurred was that:

- he removed his shoes and rolled-up the dispensary mat;
- he broke an oil burner, the property of the employer;
- he left the rear door unlocked (contested);
- he threw the pharmacy phone in the bin;
- he left the premises without authorisation, leaving the pharmacy without a qualified pharmacist in attendance (s 57 of the *Pharmacy Act 2010 (WA))* makes it an offence for the person in whose name the pharmacy is registered, or the person with overall responsibility for the pharmacy business, to fail to ensure that the pharmacy business is carried on under the personal supervision of a pharmacist at all times).
- he threw into a public rubbish bin papers containing confidential information and a script for schedule 8 medicines which, under the *Poisons Act 1964 (WA)*, are controlled and include drugs of addiction;
- he subsequently lost the keys to the premises.

9 The Notice of Answer also states that staff picked up dispensing errors made by him and that his behaviour so concerned other staff they rang the retail manger. In submissions made in this matter, Ms Owen stated that in the respondent's view, Mr Ekhayeme had attended work in an impaired state and did not notify management that he was not able to perform his duties. In its view Mr Ekhayeme's conduct was in breach of the professional standards of practitioner health, in violation of the Poisons Act, failed to follow business security procedures and did not notify management of his departure. The respondent sees his behaviour as serious misconduct because it led to a serious breach of safety of staff and security of the pharmacy.

10 For his part, Mr Ekhayeme submits that at the time he was fasting. It was his decision to fast. He says he decided to do so because he had not been feeling well and also for reasons to do with his religion. He had not realised it was putting him into what he described as a "confusional state" and he had telephoned his wife to bring him some food which he had eaten, along with drinking a lot of liquid. He attached to his Notice of Application a letter dated 24 April 2012 from the clinical director of the Central West Mental Health Service. In this letter, the clinical director referred to Mr Ekhayeme having been admitted to hospital "in a confusional state after a marathon fasting episode, which he did for spiritual reasons".

11 I accept that on 18 April 2012 Mr Ekhayeme did do the things described (other than, perhaps, leaving the rear door unlocked). It is certainly arguable that it constituted serious misconduct. As to Mr Ekhayeme's explanation that he did not realise that he was getting into a confusional state, I am not persuaded that it is likely that he would be able to show by this explanation that his summary dismissal for doing these things was unfair. I note the action of the employer in paying two weeks' pay in lieu of notice when it was not obliged to do so, agreeing to provide a reference based upon his work, and to assist with future employment as well as permitting him to remain in the accommodation provided, for which I commend it.

12 Mr Ekhayeme submits that he should have been given a second chance and that he had had no previous incidents during his employment. He had written to the respondent a week afterwards apologising and had understood the respondent would review its decision; he had hopes the decision to dismiss him would be reversed. However, while his writing an apology was proper, and is to his credit, the fact is that he did do the things set out above while he was the pharmacist in charge of the pharmacy and the reason he did so was as a result of his own decision to fast to the extent that he could no longer perform his duties.

13 Even if Mr Ekhayeme's behaviour on 18 April 2012 could be seen as a single act of misconduct, it is clear that conduct which is destructive of the mutual trust between the employer and employee, once discovered, ordinarily falls within the class of conduct which, without more, authorises summary dismissal (*Concut Pty Ltd v Worrell* [2000] HCA 64; 75 ALJR 312 per Kirby J in at [51]). On 18 April 2012 Mr Ekhayeme was in a position of trust as pharmacist and was expected to maintain a professional standard of behaviour and act in accordance with the Pharmacy Act and the Poisons Act. It is hardly surprising that the respondent found that his behaviour had removed the trust it previously had in him: his behaviour demonstrated a lack of judgment on his part in ensuring he was fit for his work as a pharmacist and as an employee.

14 Mr Ekhayeme also submitted that his wife will give evidence that on 19 April 2012 that she received a phone call from the respondent saying a doctor's certificate would be needed before he could return to work. He says that it was unfair that when he did return to the workplace, his letter of dismissal had already been typed and his computer access had already been withdrawn. He could not compose himself to put words together as a result. This is opposed by the respondent who states firmly that the decision to dismiss Mr Ekhayeme was not made at that point. In my view, this is not a strong point for Mr Ekhayeme; even if his letter of dismissal had been prepared beforehand, the respondent could still not have given it to him. In any event, the point he seeks to make goes more to process than it does to the substantive issue of his behaviour on 18 April 2012 and for that reason is not likely to be a persuasive issue in the overall context.

Conclusion

15 The 28-day time limit imposed by the Parliament to commence proceedings alleging unfair dismissal, is to be observed. The onus is on Mr Ekhayeme positively to satisfy the Commission that it would be unfair not to accept his claim of unfair dismissal. To do so he would need to show at least that there is an acceptable explanation for the delay of eight months and that it would, having regard to all of the circumstances including the likely merits of his claim, be unfair for the Commission to not extend the time. In my view he has not done so, and therefore an order now issues dismissing his claim.

2013 WAIRC 00303

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GODWIN EKHAYEME
	APPLICANT
	-v-
	B.D KIRK & C.E MCELWEE TRADING AS FOUNTAINS CHEMMART PHARMACY
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 24 MAY 2013
FILE NO/S	U 22 OF 2013
CITATION NO.	2013 WAIRC 00303

Result	Application to accept claim of unfair dismissal out of time dismissed
Representation	
Applicant	Mr G Ekhayeme
Respondent	Ms S Owen, as agent

Order

HAVING heard Mr G Ekhayeme and Ms S Owen, as agent for the respondent,

AND HAVING given reasons for decision, I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby order:

THAT this application to accept the claim of unfair dismissal out of time be dismissed.

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

2013 WAIRC 00333

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ADRIAN NEIL EYRE
	APPLICANT
	-v-
	TOM WARNER.
	TITAN RECRUITMENT
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 5 JUNE 2013
FILE NO/S	B 47 OF 2013
CITATION NO.	2013 WAIRC 00333

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 9th day of May 2013 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 engage in further negotiations in an endeavour to reach a resolution; and

WHEREAS by email on the 3rd day of June 2013 the applicant advised that the application was resolved;

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.

2013 WAIRC 00332

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALISON HEWSON
	APPLICANT
	-v-
	LOWER GREAT SOUTHERN FAMILY SUPPORT ASSOCIATION INC.
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 5 JUNE 2013
FILE NO/S	U 2 OF 2013
CITATION NO.	2013 WAIRC 00332

Result Application dismissed

Order

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

WHEREAS on the 28th day of February 2013 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 continue negotiations in an endeavour to reach a resolution; and

WHEREAS by telephone on the 12th day of April 2013 the applicant advised that she no longer wished to proceed with 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.

2013 WAIRC 00299

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES REBECCA HOBSON

APPLICANT

-v-

ONSLOW PRIMARY SCHOOL P&C ASSN

RESPONDENT

CORAM COMMISSIONER S M MAYMAN
DATE TUESDAY, 21 MAY 2013
FILE NO/S U 218 OF 2009
CITATION NO. 2013 WAIRC 00299

Result Application discontinued
Representation
Applicant Mr E Barzotto (as agent)
Respondent Ms S Hochheimer, Ms J Loader and Ms L Whitburn

Order

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

AND WHEREAS on 13 January and 24 February 2010 the Commission convened conferences for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conferences held on 24 February 2010 agreement was reached between the parties;

AND WHEREAS on 20 May 2013 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.

2013 WAIRC 00329

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT JAMES IVERS
	APPLICANT
	-v-
	ALLWEST MINING INFRASTRUCTURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 30 MAY 2013
FILE NO/S	B 46 OF 2013
CITATION NO.	2013 WAIRC 00329

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 29 May 2013 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00328

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BRETT JAMES IVERS
	APPLICANT
	-v-
	ALLWEST MINING INFRASTRUCTURE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 30 MAY 2013
FILE NO/S	U 46 OF 2013
CITATION NO.	2013 WAIRC 00328

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 29 May 2013 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00298

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANGELA KITCHEN
	APPLICANT
	-v-
	TAI - HILLVIEWS MIGHTY BITE LUNCHES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 MAY 2013
FILE NO/S	U 31 OF 2013
CITATION NO.	2013 WAIRC 00298

Result	Application discontinued
Representation	
Applicant	Ms A Kitchen
Respondent	Mr T Trinh

Order

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

AND WHEREAS on 4 April 2013 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 20 May 2013 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.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2013 WAIRC 00330

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GERARDA MAAS
	APPLICANT
	-v-
	L.A. EVANS AND A.A. FOLEY T/AS ZEPHYR CAFE AND KIOSK
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 31 MAY 2013
FILE NO/S	U 174 OF 2012
CITATION NO.	2013 WAIRC 00330

Result	Discontinued
Representation	
Applicant	Mr P King (agent)
Respondent	Ms M Ivanovski (counsel)

Order

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

WHEREAS on 29 October 2012 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, 12 and 13 March 2013; and

WHEREAS on 25 February 2013 the Commission was advised that the parties had reached an in principle settlement; and

WHEREAS on 27 February 2013 the hearing was vacated; and

WHEREAS on 30 April 2013 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application; and

WHEREAS on 5 May 2013 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.

2013 WAIRC 00346

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER GARRY MCCARTHY
	APPLICANT
	-v-
	MR JEREMY EDWARDS CHIEF EXECUTIVE OFFICER SHIRE OF GINGIN
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 11 JUNE 2013
FILE NO/S	U 8 OF 2013
CITATION NO.	2013 WAIRC 00346

Result	Dismissed
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr B Taylor and later Mr J Lord (as agent)

Order

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

WHEREAS the Commission set down a conference on 22 February 2013; and

WHEREAS on 21 February 2013 the conference was vacated at the request of the parties; and

WHEREAS the Commission listed a conference on 19 April 2013; and

WHEREAS on 19 April 2013 the conference was vacated as the applicant's representative advised the Commission that he had been unable to contact the applicant; and

WHEREAS on 16 May 2013 the applicant's representative informed the Commission that the applicant had not contacted him and he therefore had no further instructions with regard to this matter; and

WHEREAS the matter was listed for a show cause hearing on 11 June 2013 and the applicant was advised that non-attendance by him in person would result in an order being issued dismissing the application for want of prosecution; and

WHEREAS the applicant attended the show cause hearing in person on 11 June 2013 and informed the Commission that he no longer wished to proceed with his application; and

WHEREAS given this, the Commission advised the parties that an order will issue dismissing the application; and

WHEREAS the respondent has no issue with an order issuing in these terms;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

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

2012 WAIRC 00875

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID PRATT
	APPLICANT
	-v-
	CARMIKE NOMINEES PTY LTD T/AS WEST COAST VACUUM TRUCKS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 27 SEPTEMBER 2012
FILE NO.	B 162 OF 2012
CITATION NO.	2012 WAIRC 00875

Result	Directions made
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr P King as agent

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr P King as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the respondent file and serve on the applicant further and better particulars of its notice of answer and counter proposal by no later than 10 October 2012.

(2) THAT each party shall give an informal discovery by serving its list of documents by no later than 24 October 2012.

(3) THAT inspection of documents shall be completed by 31 October 2012.

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

2013 WAIRC 00285

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00285
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	WEDNESDAY, 26 SEPTEMBER 2012, MONDAY, 11 FEBRUARY 2013, MONDAY, 10 DECEMBER 2012
DELIVERED	**:**	THURSDAY, 16 MAY 2013
FILE NO.	**:**	B 162 OF 2012
BETWEEN	**:**	DAVID PRATT
		Applicant
		AND
		CARMIKE NOMINEES PTY LTD T/AS WEST COAST VACUUM TRUCKS
		Respondent

Catchwords	**:**	Industrial law (WA) - Alleged denied contractual entitlements - Construction of contract of employment - Contract partly written and partly oral - Term regarding hours of work - Term regarding duties required to be undertaken - Refusal to comply with lawful and reasonable request - Repudiation of contract - No right to stand employee down without pay - Summary dismissal - No entitlement to payment in lieu of notice.
Legislation	**:**	Industrial Relations Act 1979 s 29(1)(b)(ii)
Result	**:**	Application granted in part.

Representation:

Applicant	:	Mr A Dzieciol of counsel
Respondent	:	Mr P King as agent

Case(s) referred to in reasons:

Steele v Tardiani (1946) 72 CLR 386;

Roberts v Groome (1984) 64 WAIG 774;

Mason v Bastow (1990) 70 WAIG 19;

Stylianou v Country Realty Pty Ltd as trustee for the Marcelli Family Trust (2010) 91 WAIG 2029;

Triantopoulos v Shell Company of Australia Ltd (2011) 91 WAIG 67;

Automatic Fire Sprinklers v Watson (1946) 72 CLR 435;

Byrne v Australian Airlines Ltd (1995) 185 CLR 410;

Visscher v Jiudice (2009) 239 CLR 361.

Case(s) also cited:

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125

Currie v Misa (1875) LR 10 Ex 153

Ryan v Textile Clothing and Footwear Union of Australia (1996) 130 FLR 313

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Searle v Moly Mines Ltd [2008] AIRCFB 1088,

GlaxoSmithKline Australia Pty v Gauci [2008] AIRCFB 439,

Lodder v Department of Families, Housing, Community Services and Indigenous Affairs [2008] AIRC 684

Knight v Alinta Gas Ltd (2002) 82 WAIG 2392

Reasons for Decision

1 Mr Pratt was employed by Carmike Nominees Pty Ltd t/as West Coast Vacuum Trucks as an operator of a vacuum truck. The company is engaged in the business of waste removal, trenchless evacuations and potholing. Mr Pratt's employment commenced in January 2012 and came to an end in June 2012 in circumstances that are controversial. Mr Pratt claims that Carmike has denied him contractual benefits in the total sum of $9,247. This is comprised of $5,663 for underpayment of wages; $1,344 for a week of work ending on 17 June 2012 and for one day on 18 June; and two weeks' wages in lieu of notice in the sum of $2,240.

2 Mr Pratt was engaged under a contract of employment which was partly written and partly oral. To the extent that the contract was in writing, it is contained in a written agreement between the parties dated 6 January 2012. To the extent that the contract of employment was oral, it comprised conversations between Mr Pratt and Mr Bray, a principal of Carmike.

3 Two issues arise in this case in relation to these claims. The first, and that relating to the claim for unpaid wages of $5,663, is the required hours of work under the contract. Mr Pratt contended that his contractual hours of work were 40 hours per week. On the other hand, Carmike contended, perhaps somewhat unusually, that the agreement was if Mr Pratt worked less than 20 hours per week he would be paid for 20 hours. If, however, Mr Pratt worked more than 20 hours per week, he would be paid for 40 hours. As the written contract is silent on hours of work, this issue falls to be resolved on the basis of what was said to have been discussed and agreed orally between Mr Pratt and Mr Bray.

4 The second issue relates to Mr Pratt's claims for wages for one week to 17 June and one day on 18 June 2012 and for pay in lieu of notice. It turns on the circumstances of the termination of the contract of employment in June 2012. Mr Pratt contended that he was unlawfully stood down by Carmike and unlawfully dismissed without notice. Carmike contended that Mr Pratt breached his contract of employment, by refusing to perform duties he was required to perform on 12 June 2012. As a result, Carmike contended that it lawfully dismissed Mr Pratt for misconduct, in which case no further monies were owing to him.

5 Whilst it was agreed that Mr Pratt's employment was covered by the Waste Management Award 2010 (Cth), it was accepted that the claims relate to the recovery of amounts in excess of the award entitlements. As such, the application can be competently brought as recovery of the whole amount, as a non-award benefit: *Steele v Tardiani* (1946) 72 CLR 386; *Roberts v Groome* (1984) 64 WAIG 774; *Mason v Bastow* (1990) 70 WAIG 19. Additionally, the Commission has jurisdiction to enforce contracts of employment in relation to constitutional corporations: *Stylianou v Country Realty Pty Ltd as trustee for the Marcelli Family Trust* (2010) 91 WAIG 2029; *Triantopoulos v Shell Company of Australia Ltd* (2011) 91 WAIG 67.

6 I will deal with each of these issues in turn.

Hours of work

7 There was a conflict on the evidence as to the agreed hours of work. Mr Pratt testified that at the time of the initial discussions before he commenced employment, there was no mention of hours of work. Mr Pratt said however, that at all times he expected to be a full time employee and to be paid for 40 hours per week. Mr Pratt's testimony was that he raised this matter after his commencement. His evidence was that when he raised the issue with Mr Bray, Mr Bray informed him that he would

pay him at least 20 hours per week and if he worked more than 20 hours per week, he would be paid for 40 hours. In response, Mr Pratt testified that he informed Mr Bray that he was not able to survive on 20 hours per week. Accordingly, Mr Bray agreed to discuss the issue with his partner. Subsequently, Mr Pratt said he received a telephone call from Mr Bray, who was in Queensland, and he was informed that as Carmike did not want to lose his services, they had agreed to pay him for a 40 hour week.

8 Mr Bray's evidence was at odds with that of Mr Pratt. Mr Bray said that as Carmike's business was new, it depended on jobs coming in as to the hours Mr Pratt would work. At the time that the parties entered into the agreement on 6 January 2012, Mr Bray said that he mentioned this to Mr Pratt. He proposed to pay him 20 hours per week if he worked up to that number of hours, and 40 hours if he worked in excess of 20 hours per week. Mr Bray contended that effectively, therefore, Mr Pratt was employed on a part time basis. He also said Mr Pratt did not complain to him about his paid hours of work. In the early stages of his employment, particularly during January 2012, Mr Pratt was doing a lot of inductions, obtaining licences for the business and running around in the truck. Mr Bray said he was therefore prepared to pay Mr Pratt for these hours.

9 The written contract of employment, set out at exhibit A2, is, somewhat unusually, completely silent as to hours of work. My conclusions in relation to this issue therefore, turns upon an assessment of the oral testimony, in light of the other evidence before the Commission.

10 In this respect, I refer to documentary evidence in the form of payslips for Mr Pratt, set out at exhibit A3, and his timesheets, set out at exhibit R1. There is a substantial discrepancy between these documents. The payslips cover the period 9 January 2012 up to and including 17 June 2012. Contrary to the evidence of Mr Bray, for some 11 of the total of 22 pay periods during the course of Mr Pratt's employment, Mr Pratt was paid for 40 hours per week but on only three of those occasions, did Mr Pratt work more than 20 hours per week. Thus Carmike's own time and wages and payroll records for Mr Pratt are not consistent with the case advanced by Carmike. In most of these cases, there was no explanation as to why Mr Pratt was paid for 40 hours per week. On many occasions, Mr Pratt worked considerably less than 40 hours, and on some occasions, less than 10 hours in the course of a pay period.

11 Coupled with the fact that Mr Pratt said in his evidence that he raised the issue of his wages and hours with Mr Bray, which I accept he did, the evidence as a whole supports the proposition advanced by Mr Pratt. I am satisfied that it was an oral term of the contract that Mr Pratt be paid by Carmike for 40 hours per week, irrespective of the actual hours worked. I accept on the evidence that this issue was raised at an early stage by Mr Pratt with Mr Bray, and Mr Bray subsequently agreed, in order to keep Mr Pratt's services, to pay him 40 hours per week. It was the case, however, that despite the terms of the contract, the business of Carmike, at least at that stage, did not generate sufficient work to gainfully engage Mr Pratt for a full 40 hours each week.

12 The Commission is therefore satisfied on the evidence that Mr Pratt has established his claim on the balance of probabilities, in relation to hours of work. He has been denied as a contractual benefit, some 202.25 hours at $28 per hour in the total sum of $5,663.

Termination of employment

13 This issue turns on the interpretation of the events as they occurred on or about 14 June 2012, in relation to a job to be performed in Bayswater and whether it fell within Mr Pratt's duties and responsibilities, as set out in his contract of employment. The issue in dispute was the performance of work described as "pot holing". It turns on the terms of the contract, and whether such "pot holing" work was a duty Mr Pratt was required to perform. Potholing was described by Mr Bray as being essentially an extension of trenchless excavation work, and not materially different in terms of the process involved.

14 Mr Pratt testified that at the initial meetings with Mr Bray in November 2011 to discuss the position, there was some discussion of potholing work. Mr Pratt testified that he had not performed this sort of work before. Shortly after he commenced employment, Mr Pratt said that Mr Bray mentioned potholing work again a few times, but he and Mr Pratt would discuss the work at a future time.

15 This issue raised its head on 12 June 2012. Mr Pratt testified that he had finished a job about mid-morning that day. He received a telephone call from Mr Bray to do a potholing job in Bayswater. According to Mr Pratt, he had not had instruction or training in this sort of work. As a result, he refused to perform it. Mr Pratt maintained that this sort of work "was not in his contract". Mr Bray was not impressed by Mr Pratt's refusal to work. Mr Pratt testified that some discussion then took place as to what would happen. Mr Pratt said he told Mr Bray words to the effect "we can either terminate this contract, rip it up and redraw it up, alright, to a new contract with the potholing and all that in the contract": 28T.

16 Mr Bray in his testimony confirmed that he had such a discussion with Mr Pratt. Mr Bray said that Carmike's business was formed for the purpose of doing potholing work. He testified that he was to meet Mr Pratt onsite at Bayswater on the day in question, to do the work with Mr Pratt. He had done so in the past. Mr Bray said the work involved nothing really different to other liquid waste work. Mr Pratt had also been given basic instructions on the work previously. Mr Bray's evidence was that Mr Pratt was refusing to do the work, as he considered it "below him": 49T.

17 Mr Bray testified that at the conclusion of the conversation on 12 June, Mr Pratt said that if Mr Bray was not happy with him not performing this sort of work, they may as well "go our own separate ways": 49T. Mr Bray then told Mr Pratt that if that was the way he wanted it he would have to reorganise the work and Mr Pratt should take the truck home. Later in the day, Mr Pratt was requested to drop the truck off at Carmike's premises, which he did. Mr Bray said he gave Mr Pratt a week to consider his position. Mr Pratt testified that he tried to contact Mr Bray by text message over the course of the following week to clarify matters, but received no response. This attempt at contact was denied by Mr Bray in his evidence.

18 On or about 18 June 2012, Mr Bray telephoned Mr Pratt. He said that he did so because he had had no contact from Mr Pratt and was unsure of his intentions. He had assumed, however, that Mr Pratt was not going to return to work. When it was put to him in cross-examination as to why he felt it necessary to confirm Mr Pratt's position in the phone call on 18 June, if Carmike

took the view that Mr Pratt had terminated his own employment on 12 June, Mr Bray testified that he wanted to "confirm" that they were "parting ways": 57T. Mr Pratt's evidence was that in this conversation with Mr Bray, he again put it to him whether he wanted to "rip up the contract and start it again": 32T. Mr Pratt said that Mr Bray's response was there was "no point in going on". Mr Pratt testified that he took this as the termination of his employment: 29T

19 Mr Pratt contended that potholing was not a part of the responsibilities under his contract. Thus, the request by Mr Bray on 12 June to do the job with him at Bayswater was not a lawful and reasonable request. I do not agree with this contention. In my view, the request by Mr Bray to Mr Pratt to perform the Bayswater job on 12 June was both a lawful and reasonable request.

20 The relevant terms of the contract are as follows:

> **SCHEDULE 1**
>
> **1 Employee and Capacity**
>
> The full name of the Employee is: David Pratt
>
> Whose address is: 10970 Great eastern Hwy Sawyers Valley
>
> The Employee will be employed as: Vacuum Truck Operator/manager
>
> Duties will include:
>
> - Daily operation of truck
> - Maintaining and developing existing customer relations
> - Reporting and submitting job dockets to Michael Bray (Manager)
> - Business development
> - Maintain company assets by way of keeping vehicle and equipment regularly cleaned, serviced and in good condition.
> - Knowledge of environmental duties and responsibilities
> - Knowledge of pot holing and trench less excavation techniques
>
> [sic]

21 Whilst as counsel for Mr Pratt observed, the first five dot points under the heading "Duties will include" are expressed somewhat differently to the last two dot points, in my view, the work involving trenchless excavation and potholing was a responsibility contemplated by the contract. It was under the heading "Duties will include" in the contract. Furthermore, the evidence was that the issue of potholing was discussed between Mr Bray and Mr Pratt when consideration was being given to his employment. I also accept that some similar work had been done prior to 12 June by both Mr Bray and Mr Pratt. Importantly, Mr Bray was to work with Mr Pratt on the day in question. In light of these considerations, Mr Pratt's refusal to do the work with Mr Bray was unreasonable and a breach of his obligations under the contract. The question then becomes, what was the consequence of this conduct?

22 At common law, the wilful disobedience of a lawful and reasonable instruction may constitute grounds for summary dismissal. As observed by the learned authors in *Macken's Law of Employment* Seventh Edition, at par 8.270:

> *Wilful disobedience of lawful orders*
>
> [8.270] Wilful disobedience of lawful orders may constitute grounds for summary dismissal. The disobedience must strike at the essence of the contract of employment; it must be inconsistent with the continuing relationship of master and servant:
>
> > it is necessary to determine having ascertained what the contract was between the parties, (1) whether the order disobeyed by the employee was one within the terms or scope of the contract, and, if so, (2) whether, applying the principles laid down in the cases … 'the conduct of the party who has broken the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions', or , ... 'whether his conduct was inconsistent with the maintenance of the relation created'.

23 In this case, the conduct of Mr Pratt, in refusing to perform the work in question, and in suggesting to Mr Bray on 12 June that the contract be "ripped up and redrawn", was, on any reasonable view, a repudiation of the essential conditions of the contract. Mr Bray was entitled to conclude from Mr Pratt's comments that Mr Pratt did not intend to perform his end of the bargain. In my view, therefore, there was no obligation on Carmike to give Mr Pratt two weeks' notice under cl 8–Termination of the contract, when it was terminated. By cl 8b Mr Pratt had, by his conduct, forfeited his right to such notice.

24 This then leaves the issue of the status of the period between 12 June and 18 June, when Mr Bray telephoned Mr Pratt to "confirm" the position regarding his employment status. Carmike contended, belatedly, and for the first time on the day of the hearing, that in the period 12 June to 18 June, Mr Pratt had "abandoned his employment". This contention advanced by Carmike's agent, is completely at odds with Carmike's particulars of answer filed in the proceedings. At pars 25-28 of the particulars of answer, Carmike alleges that as a result of Mr Pratt's refusal to perform the potholing duties, Mr Pratt was "stood down" without pay and sent home. It is further contended that Mr Pratt was given time to consider his position. It is then said that Carmike telephoned Mr Pratt on 18 June and informed him that his employment was terminated for "breach of contract and misconduct". There is no mention of abandonment of employment in the particulars of answer. It is trite to observe that as a matter of law, if there had been an abandonment of employment, there would be no need for Carmike to terminate Mr Pratt's employment. No application was made by the agent for Carmike, for leave to amend the "particulars of defence" as filed. Mr Pratt was entitled to prepare his case on the basis of what he had to meet, as revealed by the particulars of answer.

25 In any event, regardless of this untenable proposition advanced by the agent for Carmike, I am not satisfied to any degree on the evidence, that Mr Pratt had abandoned his employment. He was clearly awaiting confirmation of the outcome of the somewhat uncertain response of Mr Bray in the conversation on 12 June. Mr Bray did not exercise his contractual right of dismissal at that time.

26 On the evidence, I am satisfied and I find that Mr Pratt was dismissed as a consequence of the telephone call between him and Mr Bray on 18 June. This was the case as advanced by Carmike in its particulars of answer at par 28. This was also confirmed in exhibit A3, Mr Pratt's final payslip for the period 11 June 2012 to 17 June 2012 and in an email from Carmike to Mr Pratt, dated 19 June 2012, a copy of which was exhibit A5. This email confirmed Mr Pratt's final payment, following the discussion with Mr Bray the day prior, and importantly, the forfeiture of two weeks' pay in lieu of notice. This is clearly referring to Carmike's contention that it terminated Mr Pratt's employment summarily for a breach of his contract of employment.

27 As I have already mentioned, therefore, Mr Pratt had no entitlement to two weeks' pay in lieu of notice and this claim is refused.

28 It is trite to observe that there is no right at common law, or under the Award, to stand down an employee without pay (see generally *Macken's Law of Employment* Seventh Edition, at par 7.90). No such term was express in Mr Pratt's contract of employment and there is no basis in my view, to imply such a term. In the case of a repudiation of a contract of employment by an employee, the employer has the option of accepting the repudiation or affirming the contract: *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410; *Visscher v Giudice* (2009) 239 CLR 361.

29 In this case, the contention of Carmike, and the evidence, supports the conclusion that Carmike did not accept Mr Pratt's repudiation and dismissed him on 12 June. The contract remained on foot until 18 June, when, as I have found, Mr Bray telephoned Mr Pratt and dismissed him. Therefore Mr Pratt is entitled to be paid to 18 June 2012.

Conclusion

30 Accordingly, based upon the foregoing, the Commission will order that Carmike pay to Mr Pratt the sum of $5,663 for unpaid wages for 202.25 hours of work and the sum of $1,344 for unpaid wages from 12 June to 18 June 2012 inclusive.

2013 WAIRC 00293

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID PRATT
	APPLICANT
	-v-
	CARMIKE NOMINEES PTY LTD T/AS WEST COAST VACUUM TRUCKS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 20 MAY 2013
FILE NO/S	B 162 OF 2012
CITATION NO.	2013 WAIRC 00293

Result	Application granted in part.
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr P King as agent

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr P King as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders-

THAT the respondent pay to the applicant:

(a) the sum of $5,663 for unpaid wages for 202.25 hours of work; and

(b) the sum of $1,344 for unpaid wages from 12 June to 18 June 2012 inclusive;

as denied contractual benefits within 21 days of the date of this order.

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

2013 WAIRC 00297

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EDWARD RIST
	APPLICANT
	-v-
	CAMERON CARAVANS (ABN 27870697124 - THE TRUSTEE FOR M & G CAMERON FAMILY TRUST)
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 21 MAY 2013
FILE NO/S	U 36 OF 2013
CITATION NO.	**2013 WAIRC 00297**

Result	Application discontinued
Representation	
Applicant	Mr E Rist
Respondent	Mr J Swann (of counsel)

Order

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

AND WHEREAS on 18 April 2013 a conference between the parties were convened;

AND WHEREAS at the conclusion of the conference held on 18 April 2013 agreement was reached between the parties;

AND WHEREAS on 17 May 2013 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00292

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DONNA SECREVE
	APPLICANT
	-v-
	ORD VALLEY ABORIGINAL HEALTH SERVICES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 20 MAY 2013
FILE NO/S	U 238 OF 2012
CITATION NO.	2013 WAIRC 00292

Result	Discontinued
Representation	
Applicant	In person and later Mr T Allen (of counsel)
Respondent	Ms A Murphy (of counsel)

Order

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

WHEREAS on 12 February 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant was given further time to consider an offer to settle the matter; and

WHEREAS on 1 March 2013 the applicant requested that the matter be listed for hearing; and

WHEREAS the application was set down for hearing and determination on 11 and 12 June 2013; and

WHEREAS on 6 May 2013 the applicant filed a Notice of Withdrawal or Discontinuance form in respect of the application; and

WHEREAS on 6 May 2013 the respondent consented to the matter being discontinued; and

WHEREAS on 7 May 2013 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.

2013 WAIRC 00286

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES PETER WEARE

APPLICANT

-v-

SCOTT'S MOBILE MECHANICS

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 MAY 2013
FILE NO/S	U 268 OF 2012
CITATION NO.	2013 WAIRC 00286

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr R Jones

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.

2013 WAIRC 00263

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES MS TANYA WILLIAMS

APPLICANT

-v-

HON MURRAY JOHN COWPER MLA
MINISTER FOR CORRECTIVE SERVICES

RESPONDENT

CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 6 MAY 2013
FILE NO/S	U 202 OF 2012
CITATION NO.	2013 WAIRC 00263

Result	Application discontinued
Representation	
Applicant	Ms M Lalli
Respondent	Mr D Hughes

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.

2013 WAIRC 00312

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NATASHA WOODS
	APPLICANT
	-v-
	RETAIL ADVENTURES
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 27 MAY 2013
FILE NO/S	U 15 OF 2013
CITATION NO.	2013 WAIRC 00312

Result	Application discontinued
Representation	
Applicant	Ms N Woods
Respondent	Ms R Healy

Order

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

AND WHEREAS on 20 March 2013 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 23 May 2013 the applicant filed a Notice of Discontinuance in respect of the application;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Craig Larsen	Weir Minerals Australia Ltd	U 34/2013	Chief Commissioner A R Beech	Agreement reached

CONFERENCES—Matters referred—

2013 WAIRC 00334

CONFERENCE REFERRED RE DISPUTE REGARDING WITHDRAWAL OF LETTER SENT TO UNION MEMBER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN NURSING FEDERATION INDUSTRIAL UNION OF WORKERS
	APPLICANT
	-v-
	CHRISTOPHER BALDWIN, DIRECTOR OF NURSING QUADRIPLEGIC CENTRE ON BEHALF OF THE QUADRIPLEGIC CENTRE BOARD OF MANAGEMENT.
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 5 JUNE 2013
FILE NO/S	CR 58 OF 2012
CITATION NO.	2013 WAIRC 00334

Result	Discontinued
Representation	
Applicant	Ms J McCulloch
Respondent	Mr S Bibby (agent)

Order

WHEREAS this is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Commission listed the matter for hearing and determination on 25 and 26 February 2013; and

WHEREAS on 21 February 2013 the Commission was advised that the parties had reached an agreement on a process that may settle the matter and the hearing was vacated; and

WHEREAS on 26 March 2013 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 resolve the matter; and

WHEREAS on 3 May 2013 the applicant filed a Notice of Withdrawal or Discontinuance form 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 the application be, and is hereby, discontinued.

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

2013 WAIRC 00351

DISPUTE RE COMMUTED ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 13 JUNE 2013
FILE NO	PSACR 36 OF 2012
CITATION NO.	2013 WAIRC 00351

Result Application dismissed

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 21st day of December 2012, the 31st day of January 2013, the 19th day of February 2013, the 12th day of March 2013 and the 5th day of April 2013 the Public Service Arbitrator (the Arbitrator) convened conferences for the purpose of conciliating between the parties; and

WHEREAS on the 24th day of April 2013 the Arbitrator referred the matter for hearing and determination; and

WHEREAS on the 30th day of May 2013 the applicant filed a Notice of Discontinuance in respect of the matter;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this matter be, and is hereby dismissed.

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

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Liquor, Hospitality and Miscellaneous Union, Western Australian Branch	Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board	Harrison C	C 19/2010	19/05/2010 15/06/2010 6/01/2011	Dispute re duties & responsibilities of Hospital Service Assistants	Discontinued
The Civil Service Association of WA Incorporated	Ms Sharyn O'Neil Director General, Dept of Education	Scott A/SC	PSAC 3/2013	N/A	Dispute re on-call roster	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Environment and Conservation	Harrison C	PSAC 28/2012	17/10/2012 23/01/2013 8/03/2013	Dispute re disciplinary process	Discontinued
United Voice WA	The Roman Catholic Archbishop of Perth Trading as Identity WA	Mayman C	C 191/2013	1/03/2013	Dispute re dismissal	Referred

CORRECTIONS—

2013 WAIRC 00322

BOTANIC GARDENS AND PARKS AUTHORITY (OPERATIONS) GENERAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES WESTERN AUSTRALIAN MUNICIPAL, ROAD BOARDS, PARKS AND RACECOURSE EMPLOYEES' UNION OF WORKERS, PERTH AND ANOTHER

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE MONDAY, 27 MAY 2013

FILE NO. AG 7 OF 2013

CITATION NO. 2013 WAIRC 00322

Result Correction Order Issued

Correction Order

WHEREAS an error occurred in the Order issued on the 20th day of May 2013 in application AG 7/2013;

NOW THEREFORE the Commission, in order to correct this error and pursuant to the powers conferred under the Industrial Relations Act 1979, hereby orders:

THAT the Order be corrected that the parties should be named as applicant The Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth and Another and in the preamble, it should read Ms A McCracken as agent on behalf of the Botanic Gardens and Parks Authority.

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

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 00354

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES KEVIN LANGE

APPLICANT

-v-

C2CE PTY LTD

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT

DATE THURSDAY, 13 JUNE 2013

FILE NO/S B 197 OF 2012

CITATION NO. 2013 WAIRC 00354

Result Name of respondent amended

Representation

Applicant Mr K Lange on his own behalf

Respondent Mr A Connor

Order

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

WHEREAS at the hearing of the applicant's application for discovery on the 13th day of June 2013 the applicant sought to amend the name of the respondent in that application to "C2CE Pty Ltd"; and

WHEREAS the respondent agreed to that amendment;

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 for discovery be amended to "C2CE Pty Ltd".

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00352

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN LANGE
	APPLICANT
	-v-
	C2CE PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 13 JUNE 2013
FILE NO.	B 197 OF 2012
CITATION NO.	2013 WAIRC 00352

Result	Direction issued
Representation	
Applicant	Mr K Lange on his own behalf
Respondent	Mr A Connor

Direction

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

WHEREAS the applicant filed an application for discovery and this was set down for hearing on the 13th day of June 2013; and

WHEREAS the Commission is of the opinion that the issuing of a Direction will assist in the conduct of the hearing of the matter;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs:

THAT respondent is to answer the application for discovery within seven days.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00343

DISPUTE RE CLASSIFICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 10 JUNE 2013
FILE NO.	CR 51 OF 2012
CITATION NO.	2013 WAIRC 00343

Result	Directions
Representation	
Applicant	Mr V Nguyen
Respondent	Ms K Johnson

Directions

WHEREAS an application was filed in the Commission pursuant to s 44 of the *Industrial Relations Act 1979* on 31 August 2012;

AND WHEREAS on 5 June 2013 a conference between the parties was convened;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs –

1. The parties participate in informal discovery;
2. The applicant prepare a draft statement of agreed facts and seek agreement from the respondent by close of business on 29 July 2013.
3. The applicant file and serve its summary of submissions by close of business on 19 July 2013;
4. The respondent file and serve its summary of submissions by close of business on 23 July 2013;
5. Should the applicant seek to submit a reply it will do so by close of business 26 July 2013.
6. That the matter be listed for a three day hearing commencing Wednesday 31 July 2013.
7. There be liberty to apply.

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

2013 WAIRC 00323

APPEAL AGAINST TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS SVJETLANA SAKIC
	APPELLANT
	-v-
	HUMAN RESOURCES DEPARTMENT
	ROYAL PERTH HOSPITAL
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR P HESLEWOOD - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
DATE	TUESDAY, 28 MAY 2013
FILE NO	PSAB 11 OF 2013
CITATION NO.	2013 WAIRC 00323

Result	Name of respondent amended
Representation	
Appellant	Ms S Sakic on her own behalf
Respondent	Ms J Symons and with her Ms C Reid

Order

WHEREAS this is an appeal pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS at the Directions hearing on the 23rd day of May 2013 the appellant sought to amend the name of the respondent to "The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1972 (WA) as the Hospitals formerly comprised in the Metropolitan Health Services Board"; and

WHEREAS the respondent agreed to the name of the respondent being amended;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the name of the respondent in the appeal be amended to "The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1972 (WA) as the Hospitals formerly comprised in the Metropolitan Health Services Board".

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Botanic Gardens and Parks Authority (Operations) General Agreement 2013 AG 7/2013	20/05/2013	Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth, and Another	(Not applicable)	Commissioner S M Mayman	Agreement registered

NOTICES—Appointments—

2013 WAIRC 00363

APPOINTMENT

PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, A/Senior Commissioner PE Scott to be the Public Service Arbitrator for a period of two years from the 22nd day of June, 2013.

Dated the 13th day of June, 2013.

CHIEF COMMISSIONER A.R. BEECH

2013 WAIRC 00362

APPOINTMENT

ADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a period of one year from the 26th day of June, 2013.

Dated the 13th day of June, 2013.

CHIEF COMMISSIONER A.R. BEECH

NOTICES—Cancellation of Awards/Agreements/Respondents—under Section 47—

2013 WAIRC 00350

NOTICE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

TAKE NOTICE that the Commission acting pursuant to Section 47 of the Industrial Relations Act, 1979, and following an order issuing to vary the area and scope provisions of the Police Award 1965 to include coverage of Aboriginal Police Aides intends, by order, and by consent of the parties, to cancel the following award, namely the -

ABORIGINAL POLICE AIDES AWARD

on the grounds the employees will be employed under the conditions of the Police Award 1965.

Any person who has a sufficient interest in the matter may, within 30 days of the date of the publication of this notice, object to the Commission making such order.

Please quote File No. Adm 64/2013 on all correspondence.

DATED at Perth this 12th day of June 2013.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00132

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHALIL IHDAYHID
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G SUTHERLAND - BOARD MEMBER
	MR C TOGNOLINI - BOARD MEMBER
DATE	FRIDAY, 8 MARCH 2013
FILE NO	PSAB 22 OF 2012
CITATION NO.	2013 WAIRC 00132

Result	Directions issued
Representation	
Appellant	Ms K Hagan of counsel
Respondent	Mr D Anderson of counsel

Direction

HAVING heard Ms K Hagan of counsel on behalf of the appellant and Mr D Anderson of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve upon the respondent any witness statements upon which he intends to rely no later than 21 days before the date of hearing.

(2) THAT the respondent file and serve upon the applicant any witness statements upon which it intends to rely no later than seven days before the date of hearing.

(3) THAT the parties file and serve a written outline of submissions no later than three days prior to the date of hearing.

(4) THAT the matter be listed for hearing for one day on a date to be fixed.

(5) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.
[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00265

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KHALIL IHDAYHID
	APPELLANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF MINES AND PETROLEUM
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR C TOGNOLINI - BOARD MEMBER
	MR G SUTHERLAND - BOARD MEMBER
DATE	MONDAY, 6 MAY 2013
FILE NO	PSAB 22 OF 2012
CITATION NO.	2013 WAIRC 00265

Result	Application discontinued
Representation	
Appellant	Ms K Hagan
Respondent	Mr D Matthews

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,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00302

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 22 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LOUISE MEYERS
	APPELLANT
	-v-
	METROPOLITAN REDEVELOPMENT AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR R KEYS - BOARD MEMBER
	MR G LEE - BOARD MEMBER
DATE	THURSDAY, 23 MAY 2013
FILE NO	PSAB 7 OF 2013
CITATION NO.	2013 WAIRC 00302

Result	Appeal dismissed
Representation	
Appellant	Ms L Meyers on her own behalf
Respondent	Ms F Clarke of counsel

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to s 80I of the *Industrial Relations Act 1979*; and

WHEREAS the appeal was set down for a Directions hearing on the 10th day of April 2013; and

WHEREAS at that hearing the parties reached an agreement in principle in respect of the appeal; and

WHEREAS on the 9th day of May 2013 the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00264

APPEAL AGAINST TERMINATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS TANYA WILLIAMS
	APPELLANT
	-v-
	HON MURRAY JOHN COWPER MLA
	MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR G RICHARDS - BOARD MEMBER
	MS M KINSELLA - BOARD MEMBER
DATE	MONDAY, 6 MAY 2013
FILE NO	PSAB 19 OF 2012
CITATION NO.	2013 WAIRC 00264

Result	Application discontinued
Representation	
Appellant	Ms M Lalli
Respondent	Mr D Hughes

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,
Commissioner.
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2013 WAIRC 00305

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ROYCE WALTER BOND

APPLICANT

-v-

DEPARTMENT OF RACING GAMING AND LIQUOR

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 24 MAY 2013

FILE NO PSA 1 OF 2013

CITATION NO. 2013 WAIRC 00305

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 14th day of May 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2013 WAIRC 00306

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STEPHEN BRIAN GOODRIDGE

APPLICANT

-v-

DEPT RACING GAMING & LIQUOR

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE FRIDAY, 24 MAY 2013

FILE NO PSA 2 OF 2013

CITATION NO. 2013 WAIRC 00306

Result Application dismissed

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 14th day of May 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2013 WAIRC 00308

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ROGER DAVID LONGHURST
	APPLICANT
	-v-
	DEPT RACING, GAMING AND LIQUOR
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 MAY 2013
FILE NO	PSA 4 OF 2013
CITATION NO.	2013 WAIRC 00308

Result	Application dismissed

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 14th day of May 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2013 WAIRC 00307

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL RUSSELL PEARCE
	APPLICANT
	-v-
	DEPT RACING, GAMING & LIQUOR
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 MAY 2013
FILE NO	PSA 3 OF 2013
CITATION NO.	2013 WAIRC 00307

Result	Application dismissed

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 14th day of May 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

2013 WAIRC 00309

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHNNY JAY WHYTE
	APPLICANT
	-v-
	DEPARTMENT OF RACING, GAMING AND LIQUOR
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 24 MAY 2013
FILE NO	PSA 5 OF 2013
CITATION NO.	2013 WAIRC 00309

Result Application dismissed

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 14th day of May 2013 the applicant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

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

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 25/2013	Request for mediation re accusations against employee	Beech CC	18/04/2013	Concluded
APPL 26/2013	Request for mediation re employee performance	Beech CC	16/04/2013	Concluded

NOTICES—Union Matters—

2013 WAIRC 00340

NOTICE

FBM No. 1 of 2013

NOTICE is given of an application by *The Master Painters, Decorators and Signwriters Association of Western Australia (Union of Employers)* to the Full Bench of the Western Australian Industrial Relations Commission for alterations to its Rule 1 - Name, Rule 4 - Scope and Extent of the Painting and Decorating Industry and Rule 6 - Membership.

The proposed alterations are detailed below.

Existing Rule 1

1 - NAME

The Association shall be known as "The Master Painters, Decorators and Signwriters Association of Western Australia (Union of Employers)" hereinafter referred to as "The Association".

Proposed Rule 1

1 - NAME

The Association shall be known as "~~The~~ Master Painters~~,~~ **and** Decorators ~~and Signwriters Association of Western~~ Australia ~~(Union of Employers)~~**(Industry Association)**" hereinafter referred to as "The Association".

Existing Rule 4

4 - SCOPE AND EXTENT OF THE PAINTING AND DECORATING INDUSTRY

Painting and Decorating work shall be deemed to be the work and processes as described in the following clauses but shall not be limited to or by these clauses.

Painting:

Means the application by any method recognised or adopted by the painting trade of paint, varnish or stain or any substance or preparation of a composition similar thereto or recognised by the said trade as a substitute therefor to the whole or any part of a building or other structure of a kind recognised by law as a fixture (but not being a floor, path or drive-way composed of concrete or other similar substance) and -

(a) includes such processes or treatments as are commonly known to the said trade as graining, kalsomining, marbling, distempering, gilding, colour-washing, staining, varnishing and plastic reliefing;

(b) includes the hanging of wall paper and any substitute therefor;

(c) does not include painting which consists of the application of a protective coating to part of a building or structure (not being a dwelling-house or like building or structure) which has first been treated by a process known as abrasive blasting or mechanical cleaning under a contract whereby the same contractor undertook both that process and the application of the protective coating.

Proposed Rule 4

4 - SCOPE AND EXTENT OF THE PAINTING AND DECORATING INDUSTRY

Painting and Decorating work shall be deemed to be the ~~work and~~ processes **and application by any method recognised or adopted by the painting trade** as described in the following clauses but shall not be limited to or by these clauses.

Painting:

~~Means the application by any method recognised or adopted by the painting trade of paint, varnish or stain or any substance or preparation of a composition similar thereto or recognised by the said trade as a substitute therefor to the whole or any part of a building or other structure of a kind recognised by law as a fixture (but not being a floor, path or drive-way composed of concrete or other similar substance) and -~~

~~(a) includes such processes or treatments as are commonly known to the said trade as graining, kalsomining, marbling, distempering, gilding, colour-washing, staining, varnishing and plastic reliefing;~~

~~(b) includes the hanging of wall paper and any substitute therefor;~~

~~(c) does not include painting which consists of the application of a protective coating to part of a building or structure (not being a dwelling-house or like building or structure) which has first been treated by a process known as abrasive blasting or mechanical cleaning under a contract whereby the same contractor undertook both that process and the application of the protective coating.~~

Includes such processes as the applications of coatings or treatments as are commonly known to the painting trade.

Includes the hanging of wall coverings and any relevant products.

Existing Rule 6

6 - MEMBERSHIP

6.1 Eligibility

Any person, firm, company or corporation who, or which, is or is usually an employer within the meaning of the Industrial Relations Act 1979, or a sole trader working in, or in connection with all or any facet of the Painting Industry described in Rule 4 of these Rules, shall be eligible for membership.

6.2 Classes of Membership

There shall be classes of membership of the Association as follows:-

Ordinary Members

Country Members

Industry Members

Life Members

Teaching Members

Retired Members

all of whom shall, unless the context otherwise requires, be included in any reference to "member" wherever appearing in these Rules and Constitution.

6.3 Ordinary Members

Ordinary members of the Association shall comprise those individuals, sole traders, partnerships, companies or other legal entities carrying on a bona fide painting contracting business and the proprietor/principal/nominee of which shall hold a registration certificate where applicable issued by the appropriate statutory authority.

Such members may be admitted to the Association upon the endorsement of the Executive Committee.

6.4 Country Members

Country members of the Association shall comprise those individuals, sole traders, partnerships or other legal entities who or which meet the criteria for ordinary membership defined in Clause 6.3 but whose business is operated outside the boundaries of the 26 Perth Metropolitan Regional Shires.

Such members may be admitted to the Association upon the endorsement by the Executive Committee.

6.5 Industry Members

Industry members of the Association shall comprise those individuals, sole traders, partnerships, companies or other legal entities carrying on a bona fide business actively engaged in manufacture, distribution and/or servicing of the painting industry interpreted in its broadest sense, and on the endorsement of the Executive Committee, may be admitted to the Association as Industry Members.

Industry members shall be ineligible to hold office, exercise voting rights or display emblems of the Association.

6.6 Life Members

In recognition of faithful services rendered to the Association and/or the painting industry by an ordinary member, a General Meeting may elect such a member as a Life Member of the Association.

Every nomination for the appointment of a Life Member shall be submitted to the Executive Committee in writing and accompanied by not less than three testimonials in support of such application.

Because Life Membership is the highest honour which the Association may bestow upon a member, the conferring of Life Membership shall be restricted to not more than one nominee per annum and such nomination must be submitted to the Annual General Meeting of members each year for approval by that meeting.

Life Membership shall entail all the privileges and rights of ordinary membership of the Association without payment of fees, subscriptions, dues or levies.

6.7 Teaching Members

Any person who is an approved instructor, teacher or lecturer in the School of Painting of the W.A. Department of Technical & Further Education or any person holding a similar position at any private institution either secondary or tertiary in nature, may apply to the Association for teacher membership. Every application for teacher membership shall include details of the qualifications held, and the establishment or establishments at which tuition is currently being given.

Upon endorsement by the Executive Committee such persons may be admitted to membership as Teaching Members.

Teaching members shall be ineligible to hold office or exercise voting rights.

6.8 Retired Members

For the purposes of this clause a Retired Member is a person, sole trader, nominee of a company or other legal entity who has sold or otherwise relinquished control or has ceased to exercise control of a painting contracting organisation previously enrolled with the Association as an Ordinary member. An application for retired membership must be made in writing to the Executive Committee and subject to the acceptance of that Committee may be admitted to the Association as a Retired Member.

6.9 Admission to Membership

Admission to membership of the Association shall be conditional upon compliance with the following:

(a) Members of the Association as at present constituted at the time of the meeting adopting these Rules creating the classes of membership shall be and subject to these rules shall continue to be members of the Association in the applicable category for such membership.

(b) All new applicants for membership shall lodge with the Director, a signed application on an approved form together with a nomination fee (if applicable) and subscription. The Director shall submit every application received to the Executive Committee which shall review the suitability of the applicant and shall:

(i) Accept the application

(ii) Reject the application

(iii) Defer action in terms of (i) and (ii) pending further enquiries being made except that action in terms of (i) and (ii) shall not be delayed beyond the next schedule meeting of the Executive Committee.

(c) An application by a firm, company or corporation shall nominate a representative to the Association who shall be a person acceptable to the Executive Committee. The person so nominated shall represent the firm, company or corporation if admitted to membership. The representative shall attend meetings and vote as for the firm, company or corporation he represents and the term Member shall also mean the representative of the Member. In the event of the representative ceasing to represent the firm or company a further representative acceptable to the committee shall be nominated by the firm, company or corporation.

6.10 Members Bound by the Rules and Constitution

Every applicant for membership shall, on acceptance as a member of the Association, be bound by the Rules and Constitution of the Association in force from time to time and until he shall have formally resigned his membership in terms of rule 6.12 or his membership terminated in terms of rule 6.13.

6.11 Violation of the Rules and Penalties Therefor

(a) The Executive Committee shall be empowered to recommend to General Meeting, supported by reasons in writing, the expulsion, suspension or fine of any member on proof to the satisfaction of the Committee that such member has been guilty of:

(i) Failing to observe, or the commission, of any breach of any of these Rules or of the Code of Conduct or refusal to carry out any order or direction of the Committee or of any General Meeting in accordance with these Rules.

(ii) Divulging or making known or making use of correspondence, business, or information gained in a privileged position either as a member or officer of the Association to the advantage of the member or officer to the detriment of the Association or any members.

(b) The Procedure for dealing with charges against a member for violation of the Rules shall be as follows:-

(i) Any charge against any member shall be in writing signed by the person laying the charge, or by the Director acting on behalf of a member or members at his or their request.

(ii) Upon notification by the Director that a charge has been laid against a member, the Executive Committee shall cause a notice to be sent by Certified Mail to the member complained against at his address as shown in the Register of Members, ordering him to attend before the Executive Committee to answer the charge at a Meeting of the Executive Committee called for that purpose and shall also send a copy of such notice to the person laying the charge if other than the Director and such notice shall be sent not less than 7 clear days before the time appointed for the meeting.

(iii) The Director shall upon application by either party send a notice to any other member to appear and give evidence providing that such application is made 3 clear days before the date of the hearing of the charge. Should either of the two parties fail to attend, the Committee shall take evidence and decide the case as if all parties were present. The member charged shall remain in attendance while all evidence given against him is taken and shall be given full and complete opportunity to answer the same and to ask questions of all witnesses.

(iv) If after hearing the evidence the Committee shall be of the opinion that the charge is sustained, it shall recommend such penalty as it thinks fit to the next General Meeting or to a Special General Meeting convened (inter alia) for the purpose of considering the Executive Committee recommendation.

(v) Upon the resolution of General Meeting to approve, amend or reject the recommendation of the Executive Committee in respect of penalty the Director shall thereupon cause notices of such resolution to be sent to the member charged at the said address by Certified Mail.

(c) Effect of Expulsion and Suspension or Fine

(i) Any expelled member shall forfeit all claim he may have upon the funds or property of the Association and shall remain liable for all subscriptions or other monies due by him to the date of his expulsion.

(ii) No member expelled, suspended or fined shall be entitled to take any action or proceeding whatsoever against the Association for or in respect of any such fine, suspension or expulsion.

(Rule 6.12 disallowed as of 22/1/96 Appl 1326 Order by the President)

~~***6.12 Resignation of Membership***~~

~~***Any member shall be entitled to resign from membership of the Association upon giving at least three months written notice to the Director, or by payment of three months membership fees in lieu of notice, but such resignation shall not be effective until such member has paid all fees, fines, levies or other dues payable by him under these rules to the end of the period covered by such notice and obtains a clearance in writing which thereupon shall be issued by the Director. Upon his resignation taking effect a member shall cease to be bound by and to have any rights under these Rules and must forthwith remove all emblems or other indication of membership from vehicles, documentation, advertising or wherever elsewhere displayed.***~~

6.13 Termination of Membership

(a) If a member ceases to be eligible as a member of the Association his membership shall be terminated.

(b) Where there is a reported alteration in the constitution of a member whether it be the formation or dissolution of a partnership or the formation or winding up of a company the Director shall make appropriate investigations and recommend:

(i) that existing membership or memberships should continue in changed nomenclature

(or)

(ii) that existing membership or memberships be terminated.

(c) If any member becomes bankrupt assigns his estate for the benefit of his creditors (or in the case of a partnership is dissolved or in the case of a company is wound up except for the purpose of reconstruction or amalgamation) such membership shall be terminated.

(d) If any member fails to pay all outstanding dues by the last day of the Association's Financial Year such membership shall be terminated without prejudice to any action initiated in terms of Rule 7.5.

(e) Recommendations for termination of membership in terms of Rule 6.13 (a) - (d) shall be submitted by the Director to the Executive Committee for approval and the decision of Executive Committee shall be recorded in the Minutes of such Executive Committee Meeting.

6.14 Expulsion from Membership

Any member committing an offence against these Rules as herein provided may be expelled after such notice and upon such conditions as are set out in Rule 6.11.

6.15 Register of Members

The Director shall cause to be kept in one or more books a register of the members of the Association with relevant particulars thereof including the name and address of the member and the name of the representative.

Proposed Rule 6

6 - MEMBERSHIP

6.1 Eligibility

Any person, firm, company or corporation who **is actively involved**~~, or which, is or is usually an employer within the meaning of the Industrial Relations Act 1979, or a sole trader working in, or in connection~~ with ~~all or~~ any facet of the Painting Industry ~~described in Rule 4 of these Rules~~, shall be eligible for membership.

6.2 Classes of Membership

There shall be classes of membership of the Association as follows:-

Voting Members

~~Ordinary Members~~ Master Painter Metropolitan Members

~~Country Members~~ Master Painter Regional Members

~~Industry Members~~

Life Members

~~Teaching Members~~

Retired Members

Teaching Members

Non-Voting Members

Associate Members

Apprentice Members

Affiliate Members

all of whom shall, unless the context otherwise requires, be included in any reference to "member" wherever appearing in these Rules and Constitution.

6.3 ~~Ordinary~~**Master Painter Metropolitan** Members

~~Ordinary~~**Metropolitan** members of the Association shall comprise those individuals, sole traders, partnerships, companies or other legal entities carrying on a bona fide painting contracting business and the proprietor/principal/nominee of which shall hold a registration**/licensing** certificate where applicable issued by the appropriate statutory authority.

Such members may be admitted to the Association upon the endorsement of the Executive Committee.

6.4 ~~Country~~**Master Painter Regional** Members

~~Country~~**Regional** members of the Association shall comprise those individuals, sole traders, partnerships or other legal entities who or which meet the criteria for ~~ordinary~~**metropolitan** membership defined in Clause 6.3 but whose business is operated outside ~~the boundaries of the 26 Perth Metropolitan Regional Shires~~**a 100km radius of the State GPO**.

Such members may be admitted to the Association upon the endorsement by the Executive Committee.

~~6.5~~**6.8** ~~Industry~~**Associate** Members

~~Industry~~**Associate** members of the Association shall comprise those individuals, sole traders, partnerships, companies or other legal entities carrying on a bona fide business actively engaged in manufacture, distribution and/or servicing of the painting industry interpreted in its broadest sense, and on the endorsement of the Executive Committee, may be admitted to the Association as ~~Industry~~**Associate** Members.

~~Industry~~**Associate** members shall be ineligible to hold office, exercise voting rights or **use or** display emblems of the Association **without the prior consent of the Association. Only the primary company holding the Associate membership is permitted to use the logo with prior consent.**

~~6.6~~**6.5** Life Members

In recognition of faithful services rendered to the Association and/or the painting industry by ~~an ordinary~~ **a** member, a General Meeting may elect such a member as a Life Member of the Association.

Every nomination for the appointment of a Life Member shall be submitted to the Executive Committee in writing and accompanied by not less than three testimonials in support of such application.

Because Life Membership is the highest honour which the Association may bestow upon a member, the conferring of Life Membership ~~shall be restricted to not more than one nominee per annum and such nomination~~ must be submitted to the Annual General Meeting of members each year for approval by that meeting.

Life Membership shall entail all the privileges and rights of ~~ordinary~~**Master Painter** membership of the Association without payment of fees, subscriptions, dues or levies.

6.7 Teaching Members

Any person who is an approved instructor, teacher or lecturer ~~in the School of Painting of the W.A. Department of Technical & Further Education or any person holding a similar position at any private institution either secondary or tertiary in nature~~, **at a registered training organisation,** may apply to the Association for teacher membership. Every application for ~~teacher~~**teaching** membership shall include details of the qualifications held, and ~~the establishment or establishments at which tuition is currently being given~~**confirmation of place of employment**.

Upon endorsement by the Executive Committee such persons may be admitted to membership as Teaching Members.

~~Teaching members shall be ineligible to hold office or exercise voting rights.~~

~~6.8~~**6.6** Retired Members

For the purposes of this clause a Retired Member is a person, sole trader, nominee of a company or other legal entity who has sold or otherwise relinquished control or has ceased to exercise control of a painting contracting organisation previously enrolled with the Association as ~~an Ordinary~~**a Master Painter** member. An application for retired membership must be made in writing to the Executive Committee and subject to the acceptance of that Committee may be admitted to the Association as a Retired Member. **As financial members, Retired Members retain their voting rights.**

6.9 Apprentice Members

Any person who is undertaking a certified apprenticeship in painting and decorating with a registered training organisation, may apply to the Association for apprentice membership. Every application for apprentice membership shall include details of course enrolment and confirmation of the registered training organisation.

Upon endorsement by the Executive Committee such persons may be admitted to membership as apprentice members.

Apprentice Members shall be ineligible to hold office or exercise voting rights.

6.10 Affiliate Member

Any person who is affiliated with the painting industry as defined in Section 4, may apply to the Association for affiliate membership. Every application for affiliate membership shall include details of involvement with the painting industry.

Upon endorsement by the Executive Committee such persons may be admitted to membership as affiliate members.

Affiliate Members shall be ineligible to hold office or exercise voting rights.

6.~~9~~**11** Admission to Membership

Admission to membership of the Association shall be conditional upon compliance with the following:

~~(a)~~ ~~Members of the Association as at present constituted at the time of the meeting adopting these Rules creating the classes of membership shall be and subject to these rules shall continue to be members of the Association in the applicable category for such membership.~~

~~(b)~~**(a)** All new applicants for membership shall lodge with the ~~Director~~**Association**~~,~~ ~~a signed application on an approved~~ **the appropriate** form ~~together with a nomination fee (if applicable)~~ and subscription. ~~The Director shall submit every~~ **Every** application ~~received~~ **will be submitted** to the Executive Committee which shall review the suitability of the applicant and shall:

(i) Accept the application

(ii) Reject the application

~~(iii)~~ ~~Defer action in terms of (i) and (ii) pending further enquiries being made except that action in terms of (i) and (ii) shall not be delayed beyond the next schedule meeting of the Executive Committee.~~

~~(c)~~**(b)** An application by a firm, company or corporation shall nominate a representative to the Association who shall be a person acceptable to the Executive Committee. The person so nominated shall represent the firm, company or corporation if admitted to membership. The representative shall attend meetings and vote as for the firm, company or corporation he represents and the term Member shall also mean the representative of the Member. In the event of the representative ceasing to represent the firm or company a further representative ~~acceptable to the committee shall~~**must** be nominated by the firm, company or corporation.

6.~~10~~**12** Members Bound by the Rules and Constitution

Every applicant for membership shall, on acceptance as a member of the Association, be bound by the Rules and Constitution of the Association ~~in force from time to time and until he shall have formally resigned his membership in terms of rule 6.12 or his membership terminated in terms of rule 6.13~~.

6.~~11~~**13** Violation of the Rules and Penalties ~~Therefor~~

(a) The Executive Committee shall be empowered to recommend to General ~~Meeting~~**Membership**, supported by reasons in writing, the expulsion, suspension or fine of any member on proof to the satisfaction of the Committee that such member has been guilty of:

(i) Failing to observe, or the commission, of any breach of any of these Rules or of the Code of Conduct or refusal to carry out any **reasonable** order or direction of the Committee ~~or of any General Meeting in accordance with these Rules~~.

(ii) Divulging or making known or making use of correspondence, business, or information gained in a privileged position either as a member or officer of the Association to the advantage of the member or officer to the detriment of the Association or any members.

(b) The Procedure for dealing with charges against a member for violation of the Rules shall be as follows:-

(i) Any charge against any member shall be in writing signed by the person laying the charge, or by the Director acting on behalf of a member or members at his or their request.

(ii) Upon notification by the ~~Director~~**Chief Executive Officer** that a charge has been laid against a member, the Executive Committee shall cause a notice to be sent by ~~Certified~~**Registered** Mail to the member complained against at his address as shown in the Register of Members, ordering him to attend before the Executive Committee to answer the charge at a Meeting of the Executive Committee called for that purpose and shall also send a copy of such notice to the person laying the charge if other than the ~~Director~~**Chief Executive Officer** and such notice shall be sent not less than 7 clear days before the time appointed for the meeting.

(iii) The ~~Director~~**Chief Executive Officer** shall upon application by either party send a notice to any other member to appear and give evidence providing that such application is made 3 clear days before the date of the hearing of the charge. Should either of the two parties fail to attend, the Committee shall take evidence and decide the case as if all parties were present. The member charged shall remain in attendance while all evidence given against him is taken and shall be given full and complete opportunity to answer the same and to ask questions of all witnesses.

(iv) If after hearing the evidence the Committee shall be of the opinion that the charge is sustained, ~~it shall recommend such penalty as it thinks fit to the next General Meeting or to a Special General Meeting convened (inter alia) for the purpose of considering the Executive Committee recommendation~~ **the Chief Executive Officer shall cause a notice to be sent by Registered Mail to the member charged at the said address**.

~~(v) Upon the resolution of General Meeting to approve, amend or reject the recommendation of the Executive Committee in respect of penalty the Director shall thereupon cause notices of such resolution to be sent to the member charged at the said address by Certified Mail.~~

(c) Effect of Expulsion and Suspension or Fine

(i) Any expelled member shall forfeit all claim he may have upon the funds or property of the Association and shall remain liable for all subscriptions or other monies due by him to the date of his expulsion.

(ii) No member expelled, suspended or fined shall be entitled to take any action or proceeding whatsoever against the Association for or in respect of any such fine, suspension or expulsion.

(Rule 6.12 disallowed as of 22/1/96 Appl 1326 Order by the President)

~~***6.12 Resignation of Membership***~~

~~***Any member shall be entitled to resign from membership of the Association upon giving at least three months written notice to the Director, or by payment of three months membership fees in lieu of notice, but such resignation shall not be effective until such member has paid all fees, fines, levies or other dues payable by him under these rules to the end of the period covered by such notice and obtains a clearance in writing which thereupon shall be issued by the Director. Upon his resignation taking effect a member shall cease to be bound by and to have any rights under these Rules and must forthwith remove all emblems or other indication of membership from vehicles, documentation, advertising or wherever elsewhere displayed.***~~

6.~~13~~**14** Termination of Membership

(a) If a member ceases to be eligible as a member of the Association his membership shall be terminated.

(b) Where there is a reported alteration in the constitution of a member whether it be the formation or dissolution of a partnership or the formation or winding up of a company the ~~Director~~**Chief Executive Officer** shall make appropriate investigations and recommend:

(i) that existing membership or memberships should continue in changed nomenclature

(or)

(ii) that existing membership or memberships be terminated.

(c) If any member becomes bankrupt assigns his estate for the benefit of his creditors (or in the case of a partnership is dissolved or in the case of a company is wound up except for the purpose of reconstruction or amalgamation) such membership shall be terminated.

(d) If any member fails to pay all outstanding dues by the last day of the Association's Financial Year such membership shall be terminated without prejudice to any action initiated in terms of Rule ~~7.5~~**7.4**.

(e) Recommendations for termination of membership in terms of Rule ~~6.13~~**6.14** (a) - (d) shall be submitted by the ~~Director~~**Chief Executive Officer** to the Executive Committee for approval and the decision of Executive Committee shall be recorded in the Minutes of such Executive Committee Meeting.

6.~~14~~**15** Expulsion from Membership

Any member committing an offence against these Rules as herein provided may be expelled after such notice and upon such conditions as are set out in Rule 6.~~11~~**13**.

6.~~15~~**16** Register of Members

The ~~Director~~**Chief Executive Officer** ~~shall cause to be kept in one or more books~~ **will keep** a register of ~~the members of the~~ Association **members**~~with relevant particulars thereof including the name and address of the member and the name of the representative~~ **as outlined in Rule 10.2(d)(i)**.

The matter has been listed before the Full Bench at 10:30am on Thursday, the 8th day of August 2013, in **Court No. 11, Supreme Court, Supreme Court Gardens, Cnr Barrack Street and St Georges Terrace, Perth**. A copy of the Rules of the organisation and the proposed rule alterations may be inspected at Level 16, 111 St Georges Terrace, Perth.

Any organisation/association registered under the *Industrial Relations Act 1979*, or any person who satisfies the Full Bench that he/she has a sufficient interest or desires to object to the application may do so by filing a notice of objection (Form 13) in accordance with the Industrial Relations Commission Regulations 2005.

(Sgd.) S BASTIAN,
[L.S.] Registrar.

10 JUNE 2013

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2012 WAIRC 00822

REFERRAL OF DISPUTE RE PAYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAURICE & ERICA MURPHY T/AS TILT AND TOW
	APPLICANT
	-v-
	KINGSTYLE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 10 SEPTEMBER 2012
FILE NO.	RFT 8 OF 2012
CITATION NO.	2012 WAIRC 00822

Result	Directions issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	No appearance

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and there being no requirement for the respondent to appear, the Tribunal, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT within 14 days of the date of this direction the respondent do file its notice of answer and counter proposal, and in that notice of answer and counter proposal the respondent deal with the following matters:

(a) As to the deduction by the respondent of the sum of $6,161.30 from the monies due and owing to the applicant on the grounds that the respondent had, allegedly, not been paid by its client(s) in relation to that work:

(i) The term of the owner-driver contract between the applicant and the respondent that the respondent claims allowed it to make that deduction, or details of any other legal basis for the deduction; and

(ii) Particulars of how the amount of $6,161.30 was arrived at;

(b) As to the deduction of the sum of $1,635.00 for "administration fees" from the monies due and owing to the applicant:

(i) The term of the owner-driver contract between the applicant and the respondent that the respondent claims allowed it to deduct that amount, or details of any other legal basis for this deduction; and

(ii) Particulars of how that amount of $1,635.00 was arrived at.

(c) As to the deduction of the sum of $15,000.00 for the "estimated percentage owed on Autocare work … but no paperwork produced":

(i) The term of the owner-driver contract that the respondent claims allowed it to make that deduction, or details of any other legal basis for this deduction; and

(ii) Particulars of how the amount of $15,000.00 was arrived at.

(2) THAT within 14 days of the date of this direction the respondent do provide discovery of documents that it intends to rely upon at the hearing of this matter in opposition to the applicant's claim, including:

(a) Documents that show that the said sum of $6,161.30 was, allegedly, not paid to the respondent by its clients;

(b) Documents that support the claim for the sum of $1,635.50 for administration fees; and

(c) Documents that show that the applicant did Autocare work but did not produce paperwork in relation to that work.

(3) THAT the documents referred to in par 2 be provided to the applicant's representative, the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

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

2012 WAIRC 00955

REFERRAL OF PAYMENT DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	MAURICE & ERICA MURPHY T/AS TILT AND TOW
	APPLICANT
	-v-
	KINGSTYLE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 29 OCTOBER 2012
FILE NO/S	RFT 8 OF 2012
CITATION NO.	2012 WAIRC 00955

Result	Direction issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Mr A Valentino

Direction

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Mr A Valentino on behalf of the respondent, the Tribunal, pursuant to the powers conferred on it under the Owner-Drivers (Contracts and Disputes) Act 2007, hereby directs –

(1) THAT the referral be and is hereby adjourned by consent to a date to be fixed in early February 2013.

(2) THAT the direction of the Tribunal dated 10 September 2012 be and is hereby revoked.

(3) THAT by 15 December 2012 the respondent file and serve its notice of answer and counter proposal, and in that notice of answer and counter proposal the respondent deal with the following matters:

(a) As to the deduction by the respondent of the sum of $6,161.30 from the monies due and owing to the applicant on the grounds that the respondent had, allegedly, not been paid by its client(s) in relation to that work:

(i) The term of the owner-driver contract between the applicant and the respondent that the respondent claims allowed it to make that deduction, or details of any other legal basis for the deduction; and

(ii) Particulars of how the amount of $6,161.30 was arrived at;

(b) As to the deduction of the sum of $1,635.00 for "administration fees" from the monies due and owing to the applicant:

(i) The term of the owner-driver contract between the applicant and the respondent that the respondent claims allowed it to deduct that amount, or details of any other legal basis for this deduction; and

(ii) Particulars of how that amount of $1,635.00 was arrived at.

(c) As to the deduction of the sum of $15,000.00 for the "estimated percentage owed on Autocare work … but no paperwork produced":

(i) The term of the owner-driver contract that the respondent claims allowed it to make that deduction, or details of any other legal basis for this deduction; and

(ii) Particulars of how the amount of $15,000.00 was arrived at.

(4) THAT by 15 December 2012 the respondent provide discovery of documents that it intends to rely upon at the hearing of this matter in opposition to the applicant's claim, including:

(a) Documents that show that the said sum of $6,161.30 was, allegedly, not paid to the respondent by its clients;

(b) Documents that support the claim for the sum of $1,635.50 for administration fees; and

(c) Documents that show that the applicant did Autocare work but did not produce paperwork in relation to that work.

(5) THAT the documents referred to in par (4) be provided to the applicant's representative, the Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

(6) THAT the parties have liberty to apply on short notice.

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

2013 WAIRC 00289

REFERRAL OF DISPUTE RE PAYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAURICE & ERICA MURPHY T/AS TILT AND TOW
	APPLICANT
	-v-
	KINGSTYLE INVESTMENTS PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 MAY 2013
FILE NO/S	RFT 8 OF 2012
CITATION NO.	2013 WAIRC 00289

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	Mr A Valentino

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.

2013 WAIRC 00051

REFERRAL OF DISPUTE

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	REV TRANS WA PTY LTD
	APPLICANT
	-v-
	AMCO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 31 JANUARY 2013
FILE NO/S	RFT 1 OF 2013
CITATION NO.	2013 WAIRC 00051

Result	Order issued
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Not applicable

Order

WHEREAS on 24 January 2013 the applicant made application to the Tribunal under s 40(a) and/or (b) of the Owner-Drivers (Contracts and Disputes) Act 2007 alleging that the respondent has failed to pay the applicant outstanding monies owed to the applicant under an owner-driver contract;

AND WHEREAS on 24 January 2013 the applicant filed an application under reg 99D(4) of the Industrial Relations Commission Regulations 2005 seeking an order that the time for the respondent to file a notice of answer in the application be shortened to seven (7) days from the date of service of the notice of referral;

AND WHEREAS having considered the grounds in support of the application for shortened time for filing answers the Tribunal is satisfied that an order should be made;

NOW THEREFORE the Tribunal, pursuant to the powers conferred on it under the Industrial Relations Act, 1979, hereby orders –

(1) THAT the time for the filing of a notice of answer by the respondent be and is hereby shortened to seven (7) days from the date of service of the notice of referral on the respondent.

(2) THAT a copy of this order be served on the respondent at the time of service of the notice of referral.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 00290

REFERRAL OF DISPUTE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	REV TRANS WA PTY LTD
	APPLICANT
	-v-
	AMCO PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 MAY 2013
FILE NO/S	RFT 1 OF 2013
CITATION NO.	2013 WAIRC 00290

Result	Application discontinued
Representation	
Applicant	Mr A Dzieciol
Respondent	No appearance

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.