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FULL BENCH—Appeals against decision of Commission—

2013 WAIRC 00812

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 118 OF 2012 GIVEN ON 25 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00812
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
HEARD	**:**	FRIDAY, 7 JUNE 2013
DELIVERED	**:**	MONDAY, 23 SEPTEMBER 2013
FILE NO.	**:**	FBA 2 OF 2013
BETWEEN	**:**	DAVID ERNEST ELEY Appellant AND POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Commissioner S J Kenner**
Citation	**:**	**[2013] WAIRC 00109; (2013) 93 WAIG 219**
File No	**:**	**U 118 of 2012**

Catchwords	**:**	Constitutional Law - Commonwealth Constitution s 51(xx) - trading corporation - activities - whether Potato Marketing Corporation of Western Australia engaged in trade - statutory corporation - regulatory activities considered - the effect of some functions of the organisation determined by the Minister considered - commercial nature of price setting by the organisation considered - organisation a trading corporation

Legislation	:	*Commonwealth Constitution* s 51(xx)
		Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
		Fair Work Act 2009 (Cth) s 12, s 14(1)(a), s 27(2)(o)
		Judiciary Act 1903 (Cth) s 78B
		Marketing of Potatoes Act 1946 (WA) s 5, s 7, s 7(1), s 8, s 9, s 10, s 17A, s 19(1), s 19(3), s 19A, s 20A, s 20A(1), s 20A(2), s 22, s 22(1), s 22B, s 22C, s 22C(1)(c), s 23, s 24, s 24(2), s 24(3), s 25, s 26, s 26(2), s 26(3), s 27, s 28, s 29, s 30(1), s 30(2), s 32, s 32(1), s 32(2), s 36, s 37(1), s 43(2)(e), s 43(2)(h)
		Marketing of Potyatoes Regulations 1987 (WA) reg 38, reg 38(2), reg 38(3), Part IX, reg 66, reg, 67, reg 68, reg 68(3)
		Trade Practices Act 1974 (Cth) s4(1), s 52
		Higher Education Funding Act 1988 (Cth) s 39
		Workplace Relations Act 1996 (Cth) s 16(1)
		Financial Management Act 2006 (WA)
		Auditor General Act 2006 (WA)
Result	:	Appeal dismissed
Representation:		
Appellant	:	In person
Respondent	:	Mr D Howlett (of counsel)
Solicitors:		
Respondent	:	Kott Gunning

Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450; (2008) 252 ALR 136; (2008) 228 FLR 318

Bank of New South Wales v The Commonwealth (1948) 76 CLR 1

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; (2007) 166 IR 196

Higgins v Gateway Printing [2010] WAIRC 00296; (2010) 90 WAIG 529

J S McMillian Pty Ltd v Commonwealth (1997) 77 FCR 337

Mid Density Development v Rockdale Municipal Council (1992) 39 FCR 579

Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243; (2001) 184 ALR 260

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

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd [1978] FCA 50; (1978) 36 FLR 134

Shire of Ravensthorpe v Galea [2009] WAIRC 01149; (2009) 89 WAIG 2283

State Superannuation Board v Trade Practices Commission [1982] HCA 72; (1982) 150 CLR 282; (1982) 44 ALR 1

Stylianou v Country Realty Pty Ltd [2010] WAIRC 01074; (2010) 91 WAIG 2029

Triantopoulos v Shell Company of Australia Ltd [2011] WAIRC 00004; (2011) 91 WAIG 67

Case(s) also cited:

Aboriginal Legal Service of Western Australia Inc v Lawrence [2007] WAIRC 00435; (2007) 87 WAIG 856

The 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 Services Board -v- Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Warren v Coombes (1979) 142 CLR 531; (1979) 23 ALR 405

Reasons for Decision

SMITH AP:

Background

1 This appeal turns solely upon the question whether the respondent, the Potato Marketing Corporation of Western Australia (the Corporation), is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

2 This issue arose when the employment of the appellant, David Ernest Eley, was terminated by the Corporation on 14 May 2012. Mr Eley had been briefly appointed as the chief executive officer of the Corporation for a period of seven days. Mr Eley brought proceedings in the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (IR Act) alleging that the Corporation had dismissed him unfairly. He also brought a claim for contractual benefits for three years' salary in the sum of $457,011 and $61,000 by way of a motor vehicle allowance.

3 A preliminary issue arose in relation to the application of unfair dismissal. If the Corporation is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution it is a national system employer for the purposes of s 14(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act). This has the effect that the FW Act applies to the exclusion of the IR Act and this Commission has no jurisdiction to hear and determine Mr Eley's claim of unfair dismissal.

4 The jurisdictional issue was not raised in respect of Mr Eley's claim for contractual benefits. If the Corporation is a constitutional corporation this does not preclude a contractual benefits claim being brought before the Commission as the jurisdiction to hear and determine a claim is not an excluded matter by s 27(2)(o) of the FW Act: ***Stylianou v Country Realty Pty Ltd*** [2010] WAIRC 01074; (2010) 91 WAIG 2029; ***Triantopoulos v Shell Company of Australia Ltd*** [2011] WAIRC 00004; (2011) 91 WAIG 67; ***Higgins v Gateway Printing*** [2010] WAIRC 00296; (2010) 90 WAIG 529.

5 The jurisdictional issue was heard by Commissioner Kenner. He held on 22 February 2013 that the Corporation was a constitutional corporation and dismissed the application for unfair dismissal for want of jurisdiction.

6 Prior to the hearing of this appeal the appellant served notices on the Attorneys-General under s 78B of the *Judiciary Act 1903* (Cth). Following service of the notices no Attorneys-General advised that they wished to intervene in this appeal.

The Corporation's activities and functions

7 The sole issue before the Commission was the characterisation of the Corporation's activities. The factual circumstances of the activities of the Corporation are not in dispute between the parties. The matter proceeded by the tender into evidence of two affidavits made by Mr Eley, two affidavits made by Ms Leslie Patricia Chalmers, a member of the Board of the Corporation, and one affidavit made by Mr Timothy John Cusack, the Corporation's chief operating officer. The affidavits contain evidence about the activities of the Corporation. Ms Chalmers also gave oral evidence before the Commission. Mr Cusack's affidavit was filed and served after oral submissions were made by the parties. It addressed questions that were raised by Commissioner Kenner after hearing evidence from Ms Chalmers. Mr Eley did not request the opportunity to cross-examine Mr Cusack as Mr Eley was of the opinion that Mr Cusack's evidence was not in contest.

Evidence of activities of the Corporation

8 The Corporation has not received any money, funds or financial support from the Western Australian or Commonwealth governments since 2005 as it generates most of its income by sales of ware potatoes: Ms Chalmers' affidavit sworn on 22 August 2012.

9 The Corporation's annual report for the financial year ended 30 June 2012, which is annexed to the affidavit of Mr Eley sworn on 26 November 2012, shows that the Corporation receives a substantially large income from the sale of potatoes. In the 2011-2012 financial year it says it sold 47,931 tonnes of potatoes, received revenue of $32,889,779 of which its costs were $2,605,145 and it made grower payments of $30,711,150: 2012 annual report page 14 (AB 264). In its statement of comprehensive income for 2011-2012 it received interest revenue of $99,029 and other revenue of $168,756: 2012 annual report page 26 (AB 276). The other revenue amount was comprised of $134,932 for store rentals, $33,749 for laboratory analysis and $75 for other items: 2012 annual report page 42 (AB 292). In the annual estimates for the five year plan of the budget for each year from 2012-2013 through to 2016-2017 the Corporation projects a budget for grower payments which takes account of a first payment, an interim payment and a final payment to growers: 2012 annual report page 68 (AB 318).

10 In Ms Chalmers' second affidavit sworn on 19 September 2012, Ms Chalmers states that:

(a) the Corporation earns income from the processes of a number of functions of the Corporation which are as follows:

(i) regulating and controlling the process of growing and sale, to the retail market, of potatoes in Western Australia;

(ii) licensing persons who are permitted to grow potatoes;

(iii) issuing permits to persons who are permitted to act as agents of the Corporation who are permitted to act as a wholesale potato merchants to receive, pack and grade potatoes on behalf of the Corporation; and

(iv) issuing permits to persons who are permitted to act as agents of the Corporation who are permitted to act as a wholesale potato merchant to distribute potatoes to retailers on behalf of the Corporation.

(b) at the present time, all of the agents who have been appointed to receive, pack and grade potatoes have also been appointed to distribute potatoes to retailers.

(c) the Corporation makes payments to the growers of the potatoes in return for the growing and supplying of potatoes to the merchants and the Corporation receives payments from the merchants in return for their participation as agents.

11 Annexed to Ms Chalmers' second affidavit are copies of two redacted permits. These two documents appear to be in a prescribed form. One is a permit to act as a wholesale potato merchant (packing and grading) and the other is a permit to act as a wholesale potato merchant (distributor). These documents are at the present time not prescribed as permits that can be issued

under the *Marketing of Potatoes Regulations 1987* (WA) (MP Regulations) and are in a form to be issued by the Western Australian Potato Marketing Authority. When Ms Chalmers gave oral evidence before the Commission, she said that the merchants are commercial entities who would be trading corporations and the agents' agreements set out the terms of the relationship between the Potato Marketing Board and the agent. Ms Chalmers also said that there are presently four agents of the Corporation. The Potato Marketing Board and the Western Australian Potato Marketing Authority are, however, no longer in existence. These names are the former names of the Corporation which are preserved and continued in existence as the Corporation: s 7(1) of the *Marketing of Potatoes Act 1946* (WA) (MP Act).

12 After oral submissions were made by the parties, the associate to Commissioner Kenner wrote to the Corporation's solicitors on 30 November 2012 and asked for a number of questions to be addressed in an affidavit that the respondent proposed to file. Those questions were as follows:

(a) Whilst the affidavit evidence refers to the statutory functions of the respondent, there is presently no succinct statement in evidence as to the actual day-to-day operations of the respondent. Specifically, it would be helpful if the further affidavit could briefly describe the process by which potato products are received and dealt with by the respondent. In that respect, reference is made to p 83 of annexure DE-D of Mr Eley's affidavit of 26 November 2012. This document is a flow chart of product movement. It would be helpful if the evidence could outline, in summary, how the respondent deals with a grower's product.

(b) Reference is made in the various Annual Reports in evidence to payments to growers. It is not entirely clear as to when the growers are paid. Are they paid when they deliver potato product to the respondent and/or its agents or are they paid at a later time, for example, when potatoes are sold by merchants (see s 30 Marketing of Potatoes Act 1946)?

(c) What payments does the respondent receive from the sale of potatoes? Are such payments limited to 'service costs' as referred to on p 27 of Mr Eley's affidavit of 26 November 2012?

(d) What is the 'Grower Reserve' fund and what role does it play in the operations of the respondent?

(e) Could clarification please be provided by the respondent of the respondent's statement in its 2012 Annual Report on p 18 of Mr Eley's affidavit of 26 November 2012, to the effect that 'the Corporation has withdrawn from commercial activities, including exporting potatoes and domestic market advertising and promotion.'

(f) Could clarification please be provided of the statement at par 8 to Ms Chalmer's supplementary affidavit filed on 21 September 2012 to the effect that 'The PMC receives payments from the Merchants in return for their participation in the process described at paragraphs 4(c) and (d) above.' Do the payments received from the merchants reflect the sales made by merchants on behalf of growers to retailers, less a margin paid to the merchants? Are payments to the merchants the result of negotiations between the respondent and the merchants?

13 The affidavit of Mr Cusack sworn on 11 December 2012 addressed each question. In his affidavit Mr Cusack states:

(a) The Corporation's central commercial role is to ensure that there is sufficient supply of potatoes to satisfy Western Australian consumers and to market them within the State and elsewhere. The Corporation undertakes these commercial activities through its extensive network of licensed growers and merchants. At the present time there are four main merchants and approximately 60 growers. The merchants are either packing/grading agents or distributor agents. At present all of the packing/grading agents are also distributor agents.

(b) All of the growers are independent commercial enterprises. They grow potatoes in order to make a profit, which is achieved by growing and delivering them in accordance with the system provided by the MP Act and MP Regulations.

(c) The merchants are also independent profit-making commercial enterprises.

(d) Three merchants have some of their terms and conditions reflected in similar forms as the permits annexed to Ms Chalmers' affidavit sworn on 19 September 2012. There is a more detailed 'one' for the most recently appointed merchant. Otherwise there is no other written agreement with the merchants. Most of the dealings with the merchants are primarily the result of longstanding practice rather than reliance upon any written agreement.

(e) After a grower has harvested its potatoes, it will pack them in bins, by variety and deliver these bins to a merchant. The choice of the merchant is usually the result of a private, commercial agreement between the grower and the merchant, although if there is a shortage or surplus with respect to a particular merchant, the Corporation will direct the grower to deliver potatoes to a different merchant.

(f) The merchant grades the potatoes into the different classes of potatoes. These are class 1, class 2, smalls, waste and unsaleable coloured smalls. Once the potatoes have been graded the merchant logs into the Corporation's computer system via the internet and electronically submits a packout result. This will include a reference to the potato consignment advice from where the potatoes originally came. The Corporation electronically generates an invoice to the merchant, based on the packout results.

(g) The Corporation nominates the amount that the merchants pay to the Corporation based on a number of factors, including the availability or otherwise of supply, the price and availability of South Australian imports (South Australia has by far the strongest potato market) and any other matters that may effect the ultimate price of potatoes to customers. The Corporation collects market price data from various sources to assess the prevailing competitive environment. In effect, the Corporation attempts to set potato prices which maximise their value to the Corporation, yet allows them to be sold to customers by the merchants at a competitive price. The amount is

reviewed every two weeks by the Corporation, but could be reviewed at any time depending on the circumstances. Pricing is dynamic to prevailing market conditions, not a fixed transfer price.

(h) The merchants pay the amount of the invoice to the Corporation in accordance with their payment terms, irrespective of whether or not those potatoes have been sold to customers. The merchants have different payment terms, which were negotiated and agreed many years ago. Two of the merchants must pay within 14 days of the date of the invoice, one must pay within 12 days, and one must pay within seven days. In effect, this payment is the price the merchants pay to the Corporation to be given the right to sell the potatoes to customers. Sometimes the price to be paid is discounted as the merchants often contact the Corporation to ask whether it would be prepared to apply a discount for a particular batch of potatoes, usually because of oversupply. On occasions, the Corporation will agree on the discount and sometimes it will not. Sometimes it will agree on a lesser discount than what is being asked. This depends on an assessment by the Corporation as to the commercial value of the potatoes in question, and whether the amount the merchant wants to pay is reasonable in light of the current price of potatoes, the availability of import potatoes, the amount of potatoes of that type available, and so on. If the Corporation cannot reach agreement with the merchants on the amount, the merchants can deliver the consignment of potatoes to the Corporation, and those potatoes will go in what is referred to as the 'board store'. This is a shed located on the Corporation's property. If the first 10% graded potatoes are of poor quality, the merchant can reject the consignment and it will be delivered to the board store. The potatoes in the board store can be offered to another merchant, and, if so, the Corporation will negotiate with the merchant as to the amount the merchant pays, and the merchant may or may not accept. Otherwise, the Corporation will sell potatoes in the board store direct to customers. Usually these potatoes will be of a lower quality, so the sales are usually to processors. For the year ending June 2012, the Corporation received a total of $51,071.09 from sales from the board store direct to customers. If potatoes cannot be sold from the board store, they are disposed of as animal feed.

(i) The merchants sell the potatoes they do not send to the board store (being the vast majority), to customers at the best price they can obtain. The Corporation is not directly involved in this process. The merchants keep the entirety of the sale price, and thereby make a profit.

(j) The growers are paid through a pool system. There are four pools every year, each being 13 weeks long. Within each pool there are four payments made by the Corporation to the growers. The first one will usually be within 14 days of the first consignment of that pool being delivered to merchants. There is money steadily flowing into the Corporation from the merchants and from potatoes sold from the board store, direct from customers over the course of the pool. The amount that each grower receives is based on the tonnage, grades and varieties delivered by that particular grower. The actual amounts are calculated using an elaborate financial model controlled by the Corporation's chief financial officer. The aim is to spread the income of the growers within each pool and in proportion to the amount they have contributed to the pool. This involves at the start of each pool forecasting what the Corporation expects to receive (from the merchants) for the potatoes, and ends with paying out whatever is remaining (which is generally only a small amount). The growers receive more money from a particular pool if they have produced higher grades of potatoes.

(k) The Corporation retains a proportion of the funds that are paid into each pool to cover its operating costs. This proportion changes, in the Corporation's discretion, dependent on its requirements at the particular time of the pool. These costs include such things as salaries and wages for staff (of whom there are currently 12), motor vehicle costs, general administrative costs (stationery, computers, etc), marketing, legal and other professional costs.

(l) There is also a grower reserve fund of which 2% of the dollar value of each pool is deducted and is placed. One of the uses of the fund is what is known as the 'winter incentive' as it is more difficult to grow potatoes in the winter months, and so the fund is used to increase the price paid to growers to ensure that fresh potatoes are available for sale year round. The fund is also available for market research and development.

14 In the 2012 annual report on page 6 a statement is made to the effect that the Corporation had withdrawn from commercial activities, including exporting potatoes and domestic market advertising and promotion (AB 256). Mr Cusack said about this statement in his affidavit that as the result of a report in 2004 the responsibility for marketing, research and development had been divested to Western Potatoes Pty Ltd (with the Corporation providing some funds for this purpose), and the Corporation stopped exporting potatoes. He also said that the Corporation had recently subcontracted marketing activities to Western Potatoes Pty Ltd, on a commercial basis to provide the marketing manager of Western Potatoes Pty Ltd to the Corporation for one day a week. This arrangement has been funded from the Corporation's ordinary operating costs.

Reasons for decision of Commissioner at first instance

15 After considering all of the evidence set out in the affidavits and the oral evidence given by Ms Chalmers, the learned Commissioner found that the Corporation engages in substantial trading activities, as the vast majority of its revenue is derived from such trading activities which can be broadly characterised as the receipt, dealing with and sale of ware potatoes in the State on a large scale. In making this finding he had regard to the following matters and made the following findings:

(a) The written agency agreements referred to by Ms Chalmers contain the commercial terms of agreement between the Corporation and the merchants.

(b) The potatoes grown by the growers are dealt with by the Corporation in terms which are plainly trading. The evidence establishes the relationship between the Corporation and its merchants, and in accordance with Part IX of the MP Regulations, the merchants are agents of the Corporation. From the terms of the MP Regulations, and

applying general principles of agency, the activities and conduct of merchants, as agents for the Corporation, are to be regarded as conduct of the Corporation itself.

(c) On the evidence, and from the plain terms of the MP Act, the agents, as grading and packing and distribution merchants, are performing activities that the Corporation could otherwise perform itself if it had the necessary resources.

(d) The fact that the Corporation is empowered to, and chooses to conduct its business regarding the wholesale disposal of ware potatoes through agents, does not detract from the essential character of the activity of the Corporation as being that of trading.

(e) The trading activity is not only characterised by the sale of ware potatoes by the distributor merchants, but also through the purchase by them from the Corporation of the right to on-sell ware potatoes into the market for a profit.

(f) The evidence as to the pricing structures that the Corporation uses is clearly intended to enable merchants to operate as independent businesses in their own right, in accordance with their relationship with the Corporation, to enable a profit margin to be achieved by the merchants through their distribution sales.

(g) The revenue derived by the Corporation from the merchants is in turn distributed back to the growers in accordance with the pool system and does not detract from the essential nature of the trading activities undertaken by the Corporation, in relation to the distribution and sale of ware potatoes.

(h) The Corporation plainly operates in a businesslike manner, and operates sophisticated systems of pricing and management of potato supply, through the quite complex pool arrangements which are in evidence. This finding is supported by the evidence given by Ms Chalmers of the negotiations between the Corporation and the merchants.

(i) The fact that the growers receive a set price for potatoes produced by them does not detract from the trading activities undertaken by the Corporation on their behalf.

(j) The overall activities of the Corporation, with revenues of some $33 million in 2012 derived from the buying or selling, or exchanging, of commodities (ware potatoes) by wholesale or retail in the State, can only reasonably be characterised as trading activity. The fact that the Corporation is essentially a not for profit organisation, and redistributes surpluses back to growers, is not of itself decisive against the proposition that the Corporation is a trading corporation.

(k) The fact that the Corporation has a significant regulatory role in terms of the grant of permits and licences which may be considered to be one in the public interest does not mean that the Corporation cannot be characterised as a trading corporation. On the basis of all of the evidence and materials before the Commission, the Corporation engages in trading activities for the purposes of achieving its regulatory functions in s 17A of the MP Act. The fact that it does so, does not mean it cannot be characterised as a trading corporation: ***R v Trade Practices Tribunal; Ex parte St George County Council*** (1974) 130 CLR 533, 543 (Barwick CJ).

The grounds of appeal

16 The first ground of appeal is that the decision (declaring that the Corporation is a constitutional corporation as defined in s 12 of the FW Act and the order dismissing the application for unfair dismissal for want of jurisdiction) is against the evidence or the weight of evidence.

17 The second ground of appeal is that the decision is wrong in law. Part of this ground of appeal is an argument that the relationship of agency between the Corporation and the merchants was not established at law, or on the facts. The second argument raised in this ground is that the fact that the Corporation is empowered under the MP Act to engage in trading activities does not mean in law that it is to be characterised as a trading corporation.

18 The first argument raised by Mr Eley in ground 1 of the appeal relies upon the proposition that while the evidence considered by the Commission at first instance establishes there is an exchange of goods (potatoes) for payment, there is no trade in the commercial sense between the growers and the Corporation or the four merchants and the Corporation. He says this finding can be made and should have been made at first instance, when regard is had to, or alternatively, proper weight is given to the following matters:

(a) Contrary to the finding of the learned Commissioner at [8] of his reasons for decision that Ms Chalmers produced written agency agreements of the four packing/grading and distributor merchants, no evidence was produced of the terms of any agreements, when they were made, or pursuant to what legislative provisions. In particular, no agency agreements were produced to the Commission, only redacted copies of two permits to act. In any event, Mr Cusack's evidence establishes that other than a recent written agreement with one merchant there are no written agreements and the arrangements are the result of longstanding practice.

(b) The growers of the ware potatoes are licensed to grow a certain amount of potatoes and are compelled by statute to deliver their ware potatoes to the Corporation or as directed by the Corporation to the merchants.

(c) There is no commerciality between the growers and the Corporation or between the merchants and the Corporation (even if the merchants can be characterised as agents of the Corporation). There is merely an exchange of goods for payment. The price paid by the merchants to the Corporation for the potatoes is set by the Corporation without any negotiation. The Corporation in performing its functions is subject to the direction of the Minister: s 20A MP Act. The price set by the Corporation is a price that is designed to enable the growers to

make a profit and for the merchants to make a profit. The merchants, as independent profit-making commercial enterprises, engage in commercial activity to sell the potatoes for a price that generates a profit to them. The price the merchants pay the Corporation is for the right to sell potatoes to their customers: Mr Cusack's affidavit paragraph 23 (AB 343). They pay the amount set by the Corporation in advance. Once the merchants pay the Corporation for the potatoes, the potatoes are then for the merchants to sell.

(d) The Corporation does not make a profit. The Corporation, after allowing for its operating costs and required statutory levies, distributes the revenue back to the growers.

(e) The Corporation does not, in fact, operate in accordance with prescribed procedures for the appointment of agents which are set out in reg 67 and reg 68 of the MP Regulations. If the prescribed procedures were followed then the merchants would sell the potatoes for the Corporation. However, the clear evidence of Mr Cusack is that is not what happens. Once the merchants have paid their fee for the potatoes they have packed and graded they can then sell the potatoes on the open market. The merchants set their own prices. The clients of the merchants are not clients of the Corporation.

(f) The 2012 annual report of the Corporation contains a statement that 'the Corporation has withdrawn from commercial activities, including exporting potatoes and domestic market advertising and promotion'. The affidavit of Mr Cusack does not explain the part of the statement that the Corporation has withdrawn from commercial activities. This statement in the annual report appears to be a clear suggestion that the Corporation is not engaged in commercial activities anymore and all they engage in is a role of market overseer.

(g) A finding by the Commission that the Corporation operates in a businesslike manner, and operates sophisticated systems of pricing and management of potato supply does not mean it is a trading corporation. To operate in a businesslike manner does not mean it is in business; just that it operates in an efficient, professional and competent manner. Most government agencies operate in a businesslike manner. The Corporation is simply a regulatory body that can fix prices and dictate the conduct of people it deals with to ensure a supply of potatoes is maintained.

19 In ground 2, Mr Eley argues that a finding that the conduct of the merchants is the conduct of the Corporation could only be made if the Commission had before it evidence of the terms of the agreements between each merchant and the Corporation and that evidence supports a finding of agency. This issue is also raised in ground 1 of the appeal. Mr Eley points out that there was no evidence before the Commission of the terms of the agreements and that the only activity the merchants engage in as distributors is to pay the Corporation for the potatoes. Mr Eley, however, concedes that insofar as the merchants act as packers and graders it is clear from the evidence given by Mr Cusack that they do so as agents as their activities in this capacity are highly controlled. The second argument raised in ground 2 relies upon an assessment of the Corporation's current activities.

Legal Principles – commercial nature of activities

20 At the heart of the arguments put forward to support ground 1 of the appeal is the contention that when all of the evidence and statutory functions and duties of the Corporation is analysed the Corporation cannot be said to be engaged in 'trading' and thus a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution, as its engagement in the acquisition and sale of ware potatoes lacks an element of commerciality and constitutes a mere exchange of goods for payment.

21 In ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]*** [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450; (2008) 252 ALR 136; (2008) 228 FLR 318 (***ALS***) the majority of the Industrial Appeal Court found the Aboriginal Legal Service did not have a commercial character. All of its services in all but exceptional cases were provided free for altruistic purposes.

22 After comprehensively reviewing the relevant authorities, Steytler P in ***ALS*** set out the following established principles of determining whether a corporation can be characterised as a trading corporation [68]:

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 - 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 - 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott*** (589); ***Quickenden*** [52], [101]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

23 In ***Shire of Ravensthorpe v Galea*** [2009] WAIRC 01149; (2009) 89 WAIG 2283 the Full Bench applied the decision in ***ALS.*** In my reasons for decision in ***Shire of Ravensthorpe*** I was in the minority as to whether the Commission could on the evidence before it find the Shire of Ravensthorpe was a trading corporation. I had formed the view that there was insufficient information before the Commission in respect of some of the activities carried out by the Shire to analyse whether those particular activities could be said to constitute trading. The majority of the Full Bench (Ritter AP and Beech CC) disagreed. The facts of that matter are immaterial as the facts and legislation considered by the Full Bench in that matter were substantially different to the matters raised in this appeal. The Shire of Ravensthorpe engaged in a broad range of activities, some were trading, many were not. However, the activities that were trading were activities of a kind that were incidental to the Shire functioning as a local government body. The essential nature of the enterprise of the Shire was that it was an arm of government constituted by local government and it had extensive regulatory and executive functions of a governmental kind.

24 In my reasons in ***Shire of Ravensthorpe*** I considered at some length the issue whether the carrying on of activities without profit to the Shire could lead to a finding being made that the activities lacked commerciality. The other members did not make any observations about this issue and found the Shire to be a trading corporation on other grounds.

25 When a corporation is a private organisation that is not funded by government or any other body and engages in activities with the aim of making a profit, a characterisation that the activities of that body are commercial is a characterisation that can be easily made. However, when a corporate body engages in activities that do not return a profit to the corporation itself, discerning whether the activities of such a corporation can be said to be commercial in nature is a more difficult task. President Steytler in ***ALS*** did not explain what the markers of commerciality were other than to refer to an element of profit. In ***Shire of Ravensthorpe*** I observed that [213]:

> When considering the element of commerciality Steytler P said in *ALS* that '[t]he making of a profit is not an essential prerequisite to trade, but it is a usual concomitant' [68](4). Justice Pullin also stated that '[w]hether the operations or activities of a corporation produce a profit or are intended to produce a profit may not be determinative, but it will often be an important relevant factor' [82]. However Steytler P and Pullin J did not specifically analyse the requirements of 'commerciality' in *ALS*. It might be said that it was not necessary to do so in that matter as it was plain that no element of commerciality arose on the facts as the provision of services by the Aboriginal Legal Service was essentially free of charge. President Steytler (with whom Pullin J agreed), however, considered a number of authoritative decisions in which the element of commerciality was discussed.

26 The authoritative decisions that Steytler P examined in ***ALS*** are as follows:

(a) In ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** [1978] FCA 50; (1978) 36 FLR 134 the majority of the Full Court of the Federal Court found that terminating building societies who raised funds from banks to loan to their members to provide public welfare housing were financial corporations within the meaning of s 51(xx) of the Commonwealth Constitution. All funds were used by the members who were the ultimate borrowers and purchasers of homes. The applicants could not use the funds for their own advantage and they did not administrate a revolving fund. When the societies had run their course they were to be wound up. Justice Deane found that at the heart of the business of the building societies were commercial dealings in finance (160). His Honour said (167):

> > The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phrases of development of trade, commerce and commercial communication, the terms are clearly of the widest import (see, generally, W. & A. McArthur Ltd. v. State of Queensland (1920) 28 CLR, at pp 546 et seq and Bank of New South Wales v. The Commonwealth (1948) 76 CLR, at pp 284 et seq, 381 et seq). They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial acitivities [sic] and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making. I have already expressed the conclusion that, notwithstanding the particular nature of the applicants and the particular character of their activities, their lending to their members are commercial or business dealings in finance. In my view, that lending is, for the purposes of s. 47 of the Act, in trade or commerce.

(b) ***Mid Density Development v Rockdale Municipal Council*** (1992) 39 FCR 579 concerned the examination of the activities of a local government authority. In that matter Davies J examined the activities of Rockdale, including its statutory functions, and found that its trading and financial activities did not form a sufficiently significant proportion of its overall activities to justify its description as a 'trading' or 'financial corporation'. His Honour found the carrying out of statutory functions, such as the charging of a fee for the provision of a certificate or the provision of garbage services, whether Rockdale used its own employees or contractors to perform the whole or part of the works, were not trading activities. He also found that even though interest from investments amounted to 5% of total income and borrowed money at interest these activities were too minor and formed too much of an integral part of local government to confer the character of a financial corporation. (584 - 585).

(c) ***J S McMillian Pty Ltd v Commonwealth*** (1997) 77 FCR 337 came before the Federal Court as an application for relief under the *Trade Practices Act 1974* (Cth). The applicants claimed that the Commonwealth in connection with a tender process had acted in contravention of s 52 of the *Trade Practices Act.* The Commonwealth argued that the *Trade Practices Act* did not apply to the conduct in question as it was not in trade and commerce. Justice Emmett found that the Commonwealth was only bound by the *Trade Practices Act* where the conduct complained of is engaged in or in the course of carrying on business. He also found that the conduct of the Commonwealth in issuing the tender and dealing with prospective tenderers was not activity engaged in in carrying on business. The tender was for work for the purchase of assets and commercial operations of the Australian Government Publishing Service (AGPS) who were the primary publishers, printers and distributors of government information, including parliamentary printing of Bills and legislation and official documents such as passport production. Justice Emmett distinguished functions of government or regulatory functions that could not be regarded as trading with functions which entail the carrying on of business (355). His Honour found that insofar as the Commonwealth in the guise of the:

(i) Department of the Senate, the Department of the House of Representatives and other departments, utilises the services provided or procured by AGPS, it does so in the carrying out of governmental functions for the purpose of governing and is not engaged in carrying on a business.

(ii) AGPS is doing what any citizen or private trader might do, namely, providing those services for remuneration; it is carrying on a business. That remuneration may or may not be adequate remuneration and the services are being provided to the Commonwealth in its governmental guises (355).

(d) In ***Quickenden v O'Connor*** [2001] FCA 303; (2001) 109 FCR 243; (2001) 184 ALR 260 the Full Court of the Federal Court held that the University of Western Australia was a trading corporation because it engaged in substantial trading activities, which included selling computer equipment for $4.8 million in 1996 and $7.1 million in 1997, buying, selling, renting of property and investing from which it derived $44.393 million in 1995 and $48.048 million in 1996. It also provided services for fees from students in a statutory framework. Fees paid directly from students for HECS contributions amounted to $8.849 million in 1995. HECS payments directly from the Commonwealth amounted to $17.318 million in that year for those students who had taken out HECS loans from the Commonwealth. The amount of the payments was not fixed by the University but by the Minister. The criteria for the amount fixed for each course of study was expressed under s 39 of the *Higher Education Funding Act 1988* (Cth) as a 'contribution' ascertained in accordance with the section towards the costs of the provision of that course of study. The University submitted the HECS payments paid directly by the students should also be characterised as revenue derived from trading. Chief Justice Black and French J doubted whether that characterisation could be made. Their Honours said [51]:

> It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory. For present purposes, however, this aspect of the claimed trading activities can be disregarded. For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does. The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.

(e) In ***Hardeman v Children's Medical Research Institute*** [2007] NSWIRComm 189; (2007) 166 IR 196 the Children's Research Institute was a charitable public welfare research corporation. The Institute raised a jurisdictional objection to an application made in the New South Wales Industrial Relations Commission on the basis it was a constitutional corporation, and, thereby, s 16(1) of the *Workplace Relations Act 1996* (Cth) operated to remove the Commission's jurisdiction. The New South Wales Industrial Court held that the Institute was not a trading or financial corporation within the meaning of s 51(xx) of the Commonwealth Constitution. They found overall, the majority of the Institute's activities concentrated on its central activity of children's medical research and that its trading activities were peripheral to its research responsibilities. They also found the Institute was not a financial corporation despite sizable returns from its investments and associated returns as its activities necessitated by the investments were not a sufficiently significant proportion of overall activities. This was because the Institute was consciously passive regarding its investments; had limited financial deliberation or interaction and acts related to finance, minimal staffing arrangements and extensive utilisation of external

financial advice and expertise [58]. Nor did the Court find that the financial activities of the Institute were commercial. In their reasoning, the Court considered what sort of activities could be regarded as commercial dealings in finance. After considering what Deane J had said in ***Ku-ring-gai*** they found [67]:

> In our view, for an organisation to be engaged in commercial dealings in finance, the activities must do more than merely touch on finance. The activities must, of course, be a sufficiently significant proportion of the corporation's overall activities and they must involve transactions or dealings in the nature of business where the subject of the transactions is finance.

Their Honours then went on to consider whether it was necessary to find that an organisation consistently carried on transactions in the nature of business. They said at [69] - [74]:

> 69 In *Re Ku-ring-gai* it was apparent that the predominant benevolent motive underpinning the Societies' activities was outweighed by the commercial nature of the activities. It was the commercial element to the dealing in finance, the commercial dealing in finance, which characterised the Societies as financial corporations for the purposes of s 51(xx). Hence, the importance of the reference point.
>
> 70 The relevant commercial activities were the borrowing and lending of money and the subsequent payments and receipts of money pursuant to obligations and rights resulting from those dealings. Despite the commercial activities being severely curtailed because the loans were moderate interest loans, limited in amount, and that the activities of the loans served an important social function, commercial financial activity was present in the form of borrowing from the bank at interest and lending to members at interest and payments and receipt of money pursuant to obligations and rights resulting from those dealings. Thus, the financial dealings were transactions in the nature of business.
>
> 71 It was the integral nature of the financial activities to the Societies, the borrowing and lending, and payment of receipt of money by them, that established the commercial nature of the activities. The activities themselves were transactions in the nature of business because they were consistently carried on, being the corporation's primary activity.
>
> 72 Deane J stated (at 160):
>
> > 'Whatever may have been the motivation of borrower or lender or of those involved in making or assisting in making the relevant funds available, the borrowing from the bank by each applicant was a secured borrowing at interest and was a commercial dealing in finance. Praiseworthy and altruistic though the motives of those associated with the promotion and management of the applicants may, to no small extent, be, the lending by the applicants to members upon security and at interest are, likewise, commercial dealings in finance. Neither the borrowing nor the lending can be seen in isolation from one another. Neither can they be seen as merely incidental or ancillary to some other and predominant activity. The lending to members is the raison d'etre of the applicants and both the purpose and the culmination of their operations. Their borrowing is so that they may lend.'
>
> 73 It is acknowledged that borrowing and lending constituted commercial dealing, however, this was so because interest and security were integral to the borrowing and lending engaged in by the Societies. The activities could not be carried on without the inherent commercial aspects of interest payment and lending upon security. The carrying on of the activities necessarily involved a commercial or business dealing. Commerciality was an ever-present aspect of the financial activities in which the Societies engaged, activities that were at the heart of the Societies' operations.
>
> 74 By their recurring nature as the Societies' primary activities, coupled with their necessary commerciality, the activities of the Societies in *Re Ku-ring-gai* demonstrate that financial activities must do more than touch on finance.

The Court then went on to consider the nature of the Institute's investments and whether the nature of its financial activities could be said to be commercial. They found its financial activities consisted of investments (which came from government funding and charitable donations), that had a capital value and produced revenue through dividends. It also had savings accounts which produced some income through interest [90]. They then found that these factors alone were not determinative of whether the Institute engaged in commercial dealings in finance. When combined, however, with the circumstances that the funds were managed in an uncomplicated process of funds received from a non-commercial source, with infrequent movement of the funds and with the day-to-day management of the funds being undertaken by a corporate financial advisor who acted as an intermediary, it was apparent that these activities lacked a commercial aspect [91] – [93].

Conclusion – is the Corporation a trading corporation?

27 The activities of the Corporation are in a sense limited. The purpose, duties and functions of the Corporation are to engage in activities relating to the supply of potatoes in Western Australia. The scheme of the MP Act is regulatory. It is an enactment of government policy to control the production, marketing, supply and sale of potatoes. The scheme established by the MP Act has continued for a substantial period of time since the MP Act was first enacted in 1946. To that extent the functions of the

Corporation are governmental. However, the Corporation itself exercises no functions of government. Nor is it generally an agent of the Crown: s 10 MP Act. Yet, the Corporation has regulatory functions. These are:

(a) Issuing of area licences authorising the planting and production of potatoes: s 22B and s 22C.

(b) Registering commercial producers to grow potatoes for sale: s 22B

(c) Issuing of permits to growers to purchase, sell or use potatoes: s 25, reg 38(2), reg 38(3), Form 12 and Form 13.

(d) The purchase of and sale of ware potatoes: s 22 and s 23.

28 It is notable that although the Corporation is empowered to charge fees for the issuing of area licences and registering commercial growers pursuant to s 22C(1)(c) of the MP Act, no fees have been prescribed in the MP Regulations. There is also a general power to prescribe fees for incidental functions of the Corporation pursuant to s 43(2)(h) of the MP Act, yet it appears that no fees for incidental functions have been prescribed.

29 The Corporation is established under the MP Act. The long title of the MP Act states that it is an Act to make provision for the marketing, sale and disposal of ware potatoes and to control their production; to require the registration of growers, and the licensing of areas of land used for the production, of potatoes and to constitute the Corporation and for other relative purposes. A ware potato is defined in s 5 of the MP Act to mean a potato which:

(a) is grown in the State; and

(b) is sold, or in respect of which there are reasonable grounds to believe that it is intended for sale, for human consumption; and

(c) is unprocessed, except for cleaning and grading.

30 Whilst the long title of the MP Act only refers to ware potatoes, there are a number of provisions in the MP Act which empower the Corporation to regulate all potatoes.

31 The Corporation is established as a body corporate under s 7 and s 9 of the MP Act. The Corporation consists of six members appointed for the administration of the MP Act, two of whom shall be persons elected by the commercial producers under s 8 of the MP Act. The Corporation also consists of four other members of whom one is appointed as the chairman of the Corporation, being a person who, in the opinion of the Minister, has relevant commercial expertise and three other persons who, in the opinion of the Minister, have relevant commercial expertise in finance, marketing, or in the food industry.

32 Under s 10 of the MP Act, the Corporation is deemed expressly not to be an agent of the Crown.

33 The functions of the Corporation are provided for in s 17A of the MP Act which provides as follows:

The functions of the Corporation are to —

(a) regulate the production of ware potatoes so as to ensure the supply of the quantities, kinds and qualities preferred by consumers in the State; and

(b) take delivery of, and otherwise deal with, potatoes in accordance with this Act and market potatoes in the State and elsewhere; and

(c) register persons who are to be authorised to carry on business as a commercial producer of potatoes, and license the areas of land to be used in any such business; and

(d) encourage and promote the use of potatoes and provide for the monitoring and, if thought fit, regulation of the production of potatoes for propagation or for any other prescribed kind of use; and

(e) foster methods of production and adopt methods of marketing that will enable potatoes grown in the State to compete in price and quality against potatoes from alternative sources of supply; and

(f) promote, encourage, fund and arrange for the conduct of research into matters relating to the production and marketing of potatoes, and undertake market development; and

(g) seek and apply knowledge of new and improved techniques and materials that will assist it to perform its functions.

34 The general powers of the Corporation are extremely broad. The Corporation is given a full range of powers to enable it to regulate the production of ware potatoes, the delivery of potatoes and to market and sell potatoes. In particular, s 19(1) of the MP Act provides:

(1) The Corporation may for the purposes of carrying out the duties and functions imposed on it by the other provisions of this Act —

(a) buy or sell any property;

(b) enter into any contract;

(ba) enter into a partnership or an arrangement for the sharing of expenditure, profits and losses;

(bb) form or establish, or participate in the formation or establishment of, any corporation or joint venture;

(bc) subscribe for, invest in or otherwise acquire, and dispose of, shares in, or debentures or other securities of, a corporation;

(c) borrow money and mortgage or charge any of its property as security for the repayment of any money borrowed;

(d) fix a minimum price at which potatoes from a domestic marketing pool may be sold to wholesalers by the Corporation;

(e) establish or maintain premises for receiving, handling, grading, treatment, storage or sale of potatoes;

(f) receive, handle, wash, brush, package, grade, treat, process, store, purchase or sell potatoes, or contract or arrange for any such matter;

(g) purchase, hire, construct, erect and maintain any premises, machinery, plant and equipment required for the performance of its functions;

…

(n) prohibit the production of potatoes for sale to consumers in the State except in accordance with the conditions determined by the Corporation;

35 Importantly, the Corporation is expressly empowered to appoint persons as agents to carry out particular activities. Under s 19(3) of the MP Act, the Corporation may from time to time appoint any person:

(a) on such terms and conditions as are; and

(b) to the extent and in the area that is,

agreed between the Corporation and that person, to act as the agent of the Corporation and that person may be thereby authorised to take deliveries from growers, to act as a grading and packing merchant, to sell or distribute potatoes, or to perform any other specified function on behalf of the Corporation.

36 The MP Act contemplates that not only can the sale of ware potatoes be carried out by merchants who are agents of the Corporation, but also it can have its activities carried out by persons who act under permits. Section 22(1) of the MP Act provides:

(1) A person shall not sell or deliver ware potatoes, otherwise than —

(a) to —

(i) the Corporation; or

(ii) an agent authorised to act on behalf of the Corporation;

or

(b) in accordance with a permit granted, or exemption notified, under section 25.

37 Under s 25 of the MP Act, the Corporation, on an application in the prescribed manner, may grant to any person a permit to purchase or to sell potatoes. It appears clear from the reading of s 22 and s 25 of the MP Act that potatoes can only be sold or delivered by the Corporation or by an agent acting on behalf of the Corporation or in accordance with a permit granted under s 25. Although counsel for the Corporation made a submission that agents can also be the holders of permits, I do not think that submission can be correct. The MP Act appears to contemplate a clear distinction between activities of those who act under permits and those who act as agents of the Corporation. However, it appears from the evidence that some of the merchants who have been appointed to carry out the activities of the Corporation have held or do hold permits to pack/grade and/or sell potatoes wholesale. Yet, the copies of redacted permits annexed to the first affidavit of Ms Chalmers may no longer be in force. At the present time and during the period Mr Eley was employed the only permits to pack/grade and/or sell that can or could be issued are those that can be granted to growers: reg 38, Form 12 and Form 13 in Schedule 2 of the MP Regulations. The express terms of the redacted copies of permits annexed to Ms Chalmers' affidavit do not appear to be permits that were granted to growers. It is unfortunate that copies of the permits without editing were not provided and no other evidence was given about the terms of the relationships the Corporation has with the merchants.

38 Under s 24 of the MP Act, once potatoes are delivered to the Corporation or an agent of the Corporation by growers, the property in those potatoes becomes absolutely vested in the Corporation. This provision is not restricted to ware potatoes and does not on its terms apply to potatoes that are delivered to the holder of a permit to pack/grade or sell potatoes. In any event, delivery to the Corporation does not take place until the potatoes are accepted by the Corporation. Under s 24(2) of the MP Act, potatoes are taken to have been accepted by the Corporation when delivery has been made to or on behalf of the Corporation in accordance with documentation which contains the prescribed information; and a price has been determined, by or on behalf of the Corporation following the grading of the potatoes.

39 The price that the Corporation pays for ware potatoes in the domestic market is regulated by specific criteria set out in s 32 of the MP Act. Importantly, this provision only applies to ware potatoes.

40 Payments made to the growers are provided for in s 30 of the MP Act. Section 30(1) provides that the Corporation is to pay the growers out of the proceeds of potatoes disposed of by it under the MP Act on the basis of the net proceeds of the sale of potatoes of a comparable quality, standard, variety or grade, delivered to the Corporation and accepted for the purposes of the same marketing pool and pool period. Pursuant to s 30(2), the Corporation is empowered to make progress payments to the growers, having regard to expected market returns, as the Corporation may determine.

41 Under s 43(2)(e) of the MP Act, the Governor is empowered to make regulations for a number of matters including to prescribe the duties, functions and conduct of agents, or persons holding permits, under the MP Act.

42 Under Part IX of the MP Regulations, the regulations prescribe three types of agents that can be appointed by the Corporation. Firstly, primary potato agents can be appointed under reg 66. These agents deal with applications for planting and growing of potatoes. Under reg 67, the Corporation can appoint wholesale potato merchants (packing and grading) to act as agents to receive delivery of ware potatoes from registered and licensed growers and undertake washing, brushing, grading and packing of ware potatoes in accordance with the directions given by the Corporation. The Corporation can also appoint wholesale potato merchants (distributors) under reg 68 whose functions are to take delivery of ware potatoes from the Corporation, or from another appointed wholesale potato merchant (distributor) or any appointed wholesale potato merchant (grading and packing). They are also empowered to sell or otherwise dispose of potatoes. However, the wholesale potato merchant (distributor) is prohibited, unless specifically authorised in a separate appointment, to sell or otherwise dispose of ware potatoes to the public at large: reg 68(3).

43 As reflected in the 2012 annual report of the Corporation, almost all of the income of the Corporation is from the sale of potatoes. The acquisition and sale of potatoes by the Corporation is highly regulated by the MP Act. Under s 22 of the MP Act, ware potatoes can only be delivered to the Corporation or to an agent of the Corporation; or in accordance with a permit granted, or exemption notified. Delivery to an agent is deemed to be delivery to the Corporation: s 24(3). The Corporation is required to accept delivery of ware potatoes from a grower: s 23. Potatoes are taken to be accepted when a price has been determined by the Corporation: s 24(2). The volume of ware potatoes the Corporation will accept is allocated to each registered commercial producer for each domestic marketing pool: s 28. The specification of a marketing pool is determined by s 27. Section 27 provides:

> The specification of a marketing pool —
>
> (a) shall establish —
>
> (i) the quantity of potatoes which the Corporation is willing to accept in respect of that pool, if that is not to be unlimited; and
>
> (ii) any market entitlements, and the method by which they are to be allocated;
>
> and
>
> (b) may impose conditions as to —
>
> (i) the quality; and
>
> (ii) the size; and
>
> (iii) testing for potato cyst nematodes, or other matters relating to disease or pests; and
>
> (iv) public health matters; and
>
> (v) timing; and
>
> (vi) variety; and
>
> (vii) the packaging; and
>
> (viii) other matters,
>
> relating to the potatoes that may be delivered.

Pursuant to s 26(3) of the MP Act, marketing pools for potatoes other than ware potatoes can also be established. The criteria for establishing a marketing pool is set out in s 26 of the MP Act. Pursuant to s 26(2), prior to the commencement of each pool period the Corporation must submit to the Minister a written statement setting out an estimate of the quantity or the area to be licensed to satisfy the anticipated domestic demand for ware potatoes in that pool period and any additional provision not exceeding 5% of the quantity or area to ensure if the anticipated domestic demand is exceeded that the actual requirement of consumers in the State can be met. The Minister, after considering the statement, establishes the quantity of ware potatoes by directions given under s 20A(1). By public notice the Corporation then advertises the pool period, the tonnage to be accepted, and any particular specifications. If there is any shortfall in the quantity of potatoes delivered in the pool period, subject to any direction given by the Minister under s 20A, the Corporation can make available potatoes from another market or import potatoes: s 29.

44 The price to be paid for ware potatoes is determined by criteria set out in the MP Act. The basis of the pricing in a marketing pool must be put as a recommendation by the Corporation to the Minister for approval: s 32. Under s 32(1), the Corporation is required to recommend a price that takes into account:

> (a) a level of return that should provide a reasonable opportunity for profit from the economically efficient production of potatoes during preferred planting periods in the State; and
>
> (b) such other material factors as may be determined by the Corporation at discretion and are explained to the Minister,
>
> and, if the basis of the pricing is approved by the Minister, payment under section 30 shall, subject to subsection (2), be made accordingly.

45 Pursuant to s 32(2), the price paid to an individual grower may, however, be varied from the price approved by the Minister, at the discretion of the Corporation having regard to commercial considerations, by the Corporation taking into account –

> (a) a seasonal premium, payable for the purpose of encouraging the production of potatoes otherwise than during preferred planting periods;

(b) a premium, or a discount, applicable to the quality or variety of the potatoes delivered and reflecting normal competitive conditions;

(c) other premiums, or penalties, applicable to that grower having regard to conditions or circumstances determined by the Corporation,

but any such premium or discount is to be based on market research, and the price to be paid to that grower may be fixed, according to the quality of the potatoes, either at the time of grading or at the time of the actual marketing of those potatoes.

There are four marketing pools each year and each is 13 weeks long.

46 Although under the MP Act the price for each pool must be approved by the Minister, it seems in practice from the evidence given by Mr Cusack that the price set by the Minister is constantly varied by the Corporation. The price is reviewed at least every two weeks or more often than that. It is very clear from his evidence that the price paid to the growers is as required by s 32(2), set by having regard to commercial considerations. These include availability and supply of imports from South Australia and market price data. The aim in setting the price of each pool or varying the price is to maximise value to the growers yet allow the potatoes to be sold at competitive prices by the merchants. The amount growers are paid for their potatoes is based on tonnage, grades and varieties delivered to each pool.

47 All of the income received in the pool is distributed to the growers in the pool, except for a retained portion that is used by the Corporation for operating costs and a grower reserve fund of 2%. Returns to the growers each year vary according to market demands. In the 2011 annual report the Corporation reported that average grower payments were well below 2009-2010 rates in all pool periods. This was due, in part, to an oversupply of some grades of potatoes which resulted in an excess of unsaleable potatoes of 1,500 tonnes and heavy discounting of 1,200 tonnes of potatoes. Quality issues also arose. These were often caused by climatic extremes and increasingly demanding quality specifications set by major retailers: 2011 annual report page 15 (AB 156). In the 2012 annual report it is reported that returns to growers in 2011-2012 were a little lower than 2010-2011. This occurred largely due to discounts which became necessary during the period of high imports from South Australia. A lesser reason was the delivery of approximately 2,500 tonnes of potatoes that was outside demand specifications: 2012 annual report page 20 (AB 270).

48 As Mr Eley points out in his submissions the Corporation only receives the payments that are the prices set by the Corporation under the MP Act. The Corporation does not set the price the merchants sell the potatoes to their customers. The merchants are private profit-making enterprises who sell the potatoes to their customers at a price that generates a profit to them. That does not necessarily mean that there is no commerciality in the transactions between the Corporation and the merchants.

49 There was insufficient evidence before the learned Commissioner at first instance to determine whether all or any of the merchants are agents, or if all or some are holders of permits to sell. It follows therefore that the learned Commissioner erred in finding that the evidence established the merchants were agents of the Corporation. However, this error is not in my view material. Whether the merchants are the agents of the Corporation is immaterial as the evidence clearly establishes that the Corporation sells the right to sell the potatoes to the merchants, at prices that enable the growers (in this sense the growers are the clients of the Corporation) to make a profit and also enable the merchants to make a profit. Whether those sales are to the merchants as holders of permits, by arrangements agreed to over time or whether the merchants sell the potatoes to wholesalers as agents of the Corporation is irrelevant. Whether the Corporation retains property in the potatoes until the potatoes are sold by the merchants is also immaterial. If the merchants sell the potatoes as agents of the Corporation then property in the potatoes would not pass to the merchants. If the merchants do not sell the potatoes as agents but in accordance with a permit granted to sell, then property would pass at the time the merchants pay the Corporation the price set by the Corporation, as there is nothing in the MP Act or MP Regulations that enables the Corporation to deal with the potatoes after the merchants pay the Corporation for the potatoes. The fact that the merchants pay the Corporation for the potatoes before the merchants sell the potatoes is also immaterial. Clearly, there is an element of commerciality is in the price paid to the growers by the Corporation which is the price the merchants must pay to the Corporation.

50 The commercial nature of the activities of a corporation is but one element in considering whether a corporation is a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution. Mr Eley raises an important point and that is the Minister can give directions to the Corporation concerning the performance of its functions, either generally or with respect to a particular matter and the Corporation must give effect to any direction: s 20A(1) of the MP Act. This raises the issue whether the setting of the price for the potatoes is in fact the independent act of the Corporation as a business, or is simply the act of a statutory organisation carrying out the directions of the Minister which is part of its statutory obligations under the MP Act. Not only does the Minister determine the tonnages of potatoes the growers can grow in each pool, the Minister can give binding directions to the Corporation in respect of all of its functions.

51 Pursuant to s 20A(2) of the MP Act, the text of any direction given by the Minister must be included in the Corporation's annual reports.

52 In the 2006 financial year it is reported in the 2006 annual report at page 19 that the Minister gave one direction and that was to direct the Corporation to invest $600,000 in Western Potatoes Limited (AB 103). Western Potatoes Limited is the company that the Corporation has recently subcontracted marketing activities to. This was funded from the Corporation's ordinary operating costs: Mr Cusack's affidavit (AB 346 - 347).

53 In the 2011 financial year the Minister gave six directions under s 26(2) of the MP Act to accept specified tonnes during six pools which ran from seasons in 2010-2011 to 2011-2012. It is also reported in the 2011 annual report that on 27 March 2009 the Minister directed the Corporation to fund an independent study conducted by an appropriate qualified person, to determine the level of return to be paid to growers for each pool which will provide a reasonable opportunity for profit from the

economically efficient production of potatoes. In the direction given on 27 March 2009, the Minister also directed that: 2011 annual report page 56 (AB 197):

(a) the report be updated annually;

(b) the information be quoted when submitting recommendations under s 32(1) of the MP Act;

(c) the Corporation consult with the Potato Merchants Association when determining the quantity of potatoes to be recommended under s 26(2) of the MP Act; and

(d) provide detailed statistical data in the annual report of the performance of each marketing pool.

In the 2012 annual report the Corporation reported that the Minister gave five directions under s 26(2) to accept specified tonnes during five pools which ran from seasons in 2011-2012 to 2012-2013. The direction given by the Minister on 27 March 2009 is also repeated in the 2012 annual report: 2012 annual report page 62 (AB 312).

54 It is apparent from the terms of the direction given by the Minister on 27 March 2009 that the Corporation is required to operate its activities as a government organisation. It can be inferred from the terms of the direction that the direction was given in an attempt to ensure transparency in the processes in which the tonnages and the prices of potatoes is recommended by the Corporation and set by the Minister for each pool. The requirement of transparency, integrity and accountability is also reflected in the following express provisions of the MP Act:

(a) A person aggrieved by a decision made by the Corporation in exercise of a power conferred on the Corporation, may apply to the State Administrative Tribunal for a review of the decision: s 19A;

(b) The liability of the Corporation is limited for particular payments made in good faith and without negligence: s 36;

(c) The provisions of the *Financial Management Act 2006* (WA) and the *Auditor General Act 2006* (WA) regulating the financial administration, audit and reporting of statutory authorities apply to and in respect of the Corporation and its operations: s 37(1).

55 The fact that the Corporation must operate its activities with transparency by operation of the provisions of the MP Act and by the direction given by the Minister in March 2009, is not on its own a factor that is critical to the issues raised in this appeal. It is but one factor that must be considered when considering the nature of the activities of the Corporation.

56 The Minister is not the Corporation. Yet, the Corporation must comply with the directions given by the Minister and the Minister sets what is in practice the commencement price of potatoes in each pool. Once a pool starts it appears, from the evidence given by Mr Cusack and the statements made in the 2011 and 2012 annual reports, that the price to be paid to the growers is varied throughout the pool on a basis that can only be described as commercial. Despite that fact, the question must be asked whether the fact that the setting of the initial price in each pool is not set by the Corporation but by the Minister acting on the recommendation of the Corporation, does it follow that the activity of selling the potatoes is not 'trading' within the meaning of s 51(xx) of the Commonwealth Constitution as the tonnages grown in each pool and fixing of the prices of the potatoes is regulated not only by statutory criteria but by the Minister who is not a corporate body. Yet the fact that some functions may be regulated by a government Minister may not be material.

57 In ***State Superannuation Board v Trade Practices Commission*** [1982] HCA 72; (1982) 150 CLR 282; (1982) 44 ALR 1 the Victorian State Superannuation Board was a corporate body regulated by the *Superannuation Act 1958* (Vic) charged with the administration of a fund established for the purpose of providing pensions for public servants. The issue before the High Court was whether the Board was a 'financial corporation' within the meaning of the definition of 'corporation' in s 4(1) of the *Trade Practices Act*. The Board employed eight persons in property management whose salaries were met by the fund. Apart from these staff it had 86 administrative staff who were public servants whose salaries were met by the Victorian government. Under the *Superannuation Act*, the Board was authorised to invest the fund in:

(a) a variety of governmental and semi-governmental debentures;

(b) unsecured stock and loans;

(c) loans secured by mortgages of real estate;

(d) loans to authorised dealers in the short term money market; and

(e) the purchase of land and in constructing and carrying out improvements to such land.

The Board was required to obtain the consent of the Treasurer of the Victorian government to purchase land and the Treasurer was given power to determine the aggregate amount that could be invested in loans on mortgage security. Otherwise, the management and investment of the funds was invested in the Board. The fact that the Treasurer exercised control over certain investments could not have been considered material by the members of the High Court. The fact that the decisions of a government Minister could effect the way in which the Board carried out some of its activities was not a matter the High Court considered. All members of the Court looked at activities of the Board and found that ascertainment of a 'financial corporation' should be the same as its approach to what constitutes a 'trading corporation' after making due allowance for the difference between 'trading' and 'financial': (289) (Gibbs CJ and Wilson J) and (303) (Mason, Murphy and Deane JJ). The majority of the Court, Mason, Murphy and Deane JJ, found the Board was a financial corporation within the meaning of s 51(xx) of the Commonwealth Constitution. They observed (305):

> Like the expression 'trading corporation', the words 'financial corporation' are not a term of art; nor do they have a special or settled legal meaning. They do no more than describe a corporation which engages in financial activities or perhaps is intended so to do. The nature and the extent or volume of a corporation's financial activities needed to justify its

description as a financial corporation do not call for much discussion in the present case. A finance company is an obvious example of a financial corporation because it deals in finance for commercial purposes, whether by way of making loans, entering into hire purchase agreements or providing credit in other forms, and this activity is not undertaken for the purpose of carrying on some other business. However, just as a corporation may be a trading corporation, notwithstanding that its trading activities are entered into in the course of carrying on some primary or dominant undertaking, so also with a corporation which engages in financial activities in the course of carrying on its primary or dominant undertaking. Thus a corporation which is formed by an employer to provide superannuation benefits for its employees and those of associated employers may nevertheless be a financial corporation if it engages in financial activities in order to provide or augment the superannuation benefits.

58 In this matter the Minister's involvement in the work of the Corporation extends to more activities than the Minister in the ***State Superannuation Board***. The Minister has more direct control of the market of ware potatoes. Also, the Minister's involvement is different to the facts in ***Quickenden***. In ***Quickenden***, the Minister set the price of HECS contributions to be paid for each course of study. There was no commerciality in setting the amounts to be paid for HECS as each amount to be paid was only a contribution. In this matter, the Minister sets the tonnages for each pool. Whilst the Minister is required to consider the recommendations of the Corporation before determining the quantity or area of each pool or the prices of the categories of ware potatoes in each pool, there is nothing in the MP Act that obliges the Minister to act on the recommendations of the Corporation. Except where the Minister has made a direction under s 20A of the MP Act, the only activity within a pool the Corporation can act independently of the Minister is the payment of a price to individual growers: s 32(2) MP Act. It appears clear from the annual reports of 2011 and 2012 that the Minister has not made any directions to the Corporation as to how it should act in a variation of the pool price under s 32(2). Consequently, it appears that from July 2010 until June 2012 the Corporation acted independently when varying a price or prices within a pool. When varying a price for particular potatoes the Corporation often engages in direct negotiations with the merchants to discount, if there is an issue of the quality of particular potatoes, which may result in potatoes being rejected by a merchant and being sent to the board store.

59 Whether a corporation is a trading corporation is ultimately a question of fact and degree which depends upon whether its current trading activities are substantial and not peripheral: ***R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)*** (1979) 143 CLR 190 (***Adamson***) (234) (Mason J). These activities must form a sufficiently significant proportion of the Corporation's overall activities: ***Adamson*** (233) (Mason J), (237) (Jacobs J concurring); applied in ***ALS*** [68] (Steytler P), [80] (Pullin J concurring). Trade is sale of exchange or commercial dealing marked by use, regularity and course of conduct: ***Bank of New South Wales v The Commonwealth*** (1948) 76 CLR 1, 381 (Dixon J).

60 When the activities of the Minister are separated from the activities of the Corporation it remains the case the activities of the Corporation in the process of varying the price of potatoes to ensure marketability within each of the four pools each year are carried out on a regular basis and are of a significant scale. These activities are constant and systematic and are carried out by regard to commercial considerations. Its activities cannot be regarded as simply the fixing of a fee within a statutory framework. Nor is the nature of the work of the Corporation within the framework of the MP Act part of the delivery of government functions in the same way as a local government body delivers essential services to the public such as rubbish collection. Whilst a primary purpose of the MP Act is to ensure a sufficient supply of marketable potatoes to the public in Western Australia, at the heart of the activities of the Corporation is the setting of prices for profit for the growers and the merchants whereby, at all material times, the Corporation carries out its activities in a businesslike and commercial way.

61 For these reasons, I am of the opinion that the appeal should be dismissed as the Corporation is a trading corporation with the meaning of s 51(xx) of the Commonwealth Constitution.

SCOTT A/SC:

62 I have had the benefit of reading the draft Reasons for Decision of the Acting President which set out the background to this matter and in particular the legislation and evidence. However, I respectfully disagree that the Potato Marketing Corporation of Western Australia (the Corporation) is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution.

63 My reasons are these. In a case such as this, it seems appropriate to look at the true nature of the organisation and its activities rather than to enumerate each of the Corporation's activities, assess whether each activity is of a trading nature and then determine whether the trading activities are sufficient to characterise the Corporation as a trading corporation. I recognise that case law says that the ends to be served by the Corporation may be irrelevant to that characterisation: *R v Trade Practices Tribunal*; Ex parte St George County Council (1974) 130 CLR 533, 534 (Barwick, CJ). However, in this case, the Corporation's trading and commercial activities all revolve around and are undertaken solely as an essential part of its control and regulation of the industry, under the *Marketing of Potatoes Act 1946* (MP Act) and the *Marketing of Potatoes Regulations 1987* (MP Regulations) and for no other purpose. That is, the trading activities, if they can properly be called that, are incidental to its functioning as a regulatory body (*Shire of Ravensthorpe v Galea* [2009] WAIRC 01149; (2009) 89 WAIG 2283). The heart of the business activities of the Corporation is regulation (*Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134 per Deane J). It is not simply a matter of the Corporation buying potatoes from growers and selling them to merchants.

64 This regulatory function and purpose is achieved by:

- directing growers for the planting and production of ware potatoes and, in particular, of designated amounts;
- setting prices it will pay to growers;
- controlling prices paid by merchants and agents.

- undertaking an income equalisation process for the growers;
- in some cases, directing the grower as to which merchant it is to deliver to;

65 The delivery of ware potatoes to the Corporation is deemed to occur and ownership of them is vested in the Corporation. However, in reality, the ware potatoes, other than that small proportion which goes into its store, do not come into the actual possession of the Corporation. Rather this is an artificial mechanism by which the Corporation regulates the industry.

66 The price set by the Corporation takes account of commercial considerations, but, as Mr Cusack says, the amount paid by the merchants to the Corporation "is the price that the merchants pay to the respondent to be given the right to sell the potatoes to customers" (Affidavit of Timothy John Cusack [23]).

67 The Corporation sets the price, not only by reference to commercial aspects such as supply and demand, but also to cover its own operating costs and provide a grower reserve fund. In this sense, it is not pursuing a profit but funding the regulation it undertakes.

68 It does not set the price the merchants may charge for the sale of potatoes they sell to their customers as this is not an element of the Corporation's role. In this way, the Corporation controls supply and pricing up to the point where the potatoes are to go to the retail market.

69 The Minister's involvement in the process is integral to its operation. The Minister has power to direct the Corporation concerning the performance of its functions and the Corporation must give effect to any such direction, such as determining the tonnages of potatoes the growers can grow in each pool. Even though the 2011 and 2012 annual reports indicate that the Minister may not have made any direction to the Board in that period as to how it should act, the power to do so is extant and significant in the consideration of whether the Corporation is undertaking trading activities.

70 In all of the circumstances, whilst this is not a clear cut and straight forward case because of the complexity of the process of licensing through to the sale of potatoes, and due to the different categories of players in the process, I find that, on balance, the Corporation's major activities, whilst having the appearance of commerciality, are in fact performed in the context and for the sole purpose of the regulation of the industry. The activities which have the appearance of being trading activities are substantial and not peripheral, however those activities are an essential part of the functions of the Corporation as set out in s 17A of the MP Act in the regulation of the industry.

71 I would uphold the appeal.

HARRISON C

72 I have had the benefit of reading the reasons for decision of her Honour, the Acting President. I agree with those reasons and have nothing to add.

2013 WAIRC 00813

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID ERNEST ELEY
	APPELLANT
	-and-
	POTATO MARKETING CORPORATION OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	MONDAY, 23 SEPTEMBER 2013
FILE NO/S	FBA 2 OF 2013
CITATION NO.	2013 WAIRC 00813

Result	Appeal dismissed
Appearances	
Appellant	In person
Respondent	Mr D Howlett (of counsel)

Order

This appeal having come on for hearing before the Full Bench on Friday, 7 June 2013, and having heard the appellant in person and Mr D Howlett, of counsel, on behalf of the respondent, and reasons for decision having been delivered on Monday, 23 September 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,
Acting President.

[L.S.]

2013 WAIRC 00816

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. U 93/2012 GIVEN ON 18 APRIL 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00816
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER J L HARRISON COMMISSIONER S M MAYMAN
HEARD	**:**	FRIDAY, 16 AUGUST 2013
DELIVERED	**:**	TUESDAY, 24 SEPTEMBER 2013
FILE NO.	**:**	FBA 3 OF 2013
BETWEEN	**:**	TREVOR DAVID HOFFMAN Appellant AND PERTH MOBILE GP SERVICES LTD ACN 129 336 803 Respondent

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ON APPEAL FROM:		
Jurisdiction	**:**	**Western Australian Industrial Relations Commission**
Coram	**:**	**Acting Senior Commissioner P E Scott**
Citation	**:**	**[2013] WAIRC 00242; (2013) 93 WAIG 424**
File No	**:**	**U 93 of 2012**

Catchwords	**:**	Constitutional Law - Commonwealth Constitution s 51(xx) - trading corporation - activities - whether respondent is engaged in trade - statutory corporation - activity of providing medical services not-for-profit - transactions lack a commercial character - turns on own facts
Legislation	**:**	*Commonwealth Constitution* s 51(xx) *Industrial Relations Act 1979* (WA) s 29(1)(b)(i), s 33(3), s 33(5) *Fair Work Act 2009* (Cth) s 14(1)(a) *Corporations Act 2001* (Cth) s 124, s 125 *Judiciary Act 1903* (Cth) s 78B *Income Tax Assessment Act 1997* (Cth) div 50 *Health Insurance Act 1973* (Cth) s 4(1), s 10, s 20A *Health Insurance (General Medical Services Table) Regulation 2012* (Cth)
Result	**:**	Appeal allowed
Representation:		
Appellant	**:**	Dr T D Hoffman in person
Respondent	**:**	Mr D Jones, as agent, and with him Dr D Davies

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Case(s) referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450; (2008) 252 ALR 136; (2008) 228 FLR 318

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410

Eley v Potato Marketing Corporation of Western Australia [2013] WAIRC 00812

Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243

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

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd [1978] FCA 50; (1978) 36 FLR 134; (1978) 22 ALR 621

Shire of Ravensthorpe v Galea [2009] WAIRC 01149; (2009) 89 WAIG 2283

Case(s) also cited:

Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169

Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309

Armory v Delamirie (1722) 93 ER 664

Australian Workers' Union of Employees, Queensland v Etheridge Shire Council [2008] FCA 1268

Bankstown Handicapped Children's Centre Association Inc v Hillman [2010] FCAFC 11; (2010) 182 FCR 483; (2010) 265 ALR 23; (2010) 192 IR 212

Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325,

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363

British Medical Association in Australia v The Commonwealth (1949) 79 CLR 201

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256

Coal and Allied Operations Pty Ltd v AIRC [2000] HCA 47

E v Australian Red Cross Society (1991) 27 FCR 310

Earles v Barclays Bank Plc [2009] EWHC 2500 (Mercantile) (8 October 2009)

Educang Ltd v Queensland Industrial Relations Commission (2006) 154 IR 436

Edwards v Skyways Limited [1964] 1 All ER 494

Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8; (2002) 209 CLR 95

Fencott v Muller (1983) 152 CLR 570

Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10

Indian Oil Corporation v Greenstone Shipping SA (Panama) [1988] QB 345

Merritt v Merritt [1970] 1 WLR 1211

Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak [2006] NSWSC 844

Norbis v Norbis [1986] 161 CLR 513

Pellow v Umoona Community Council Inc [2006] AIRComm 426

Placer Development Ltd v Commonwealth (1969) 121 CLR 353

R v Arundel (1617) 80 ER 258 (KB); 1 Hob 109

Shahid v Australasian College of Dermatologists [2008] FCAFC 72

State Superannuation Board (Vic) v Trade Practices Commission (1982) 150 CLR 282

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

WA Municipal, Road Boards, Parks & Racecourse Employees' Union v Shire of Northampton [2012] WAIRC 00349; (2012) 92 WAIG 642

Williams v Commonwealth of Australia [2012] HCA 23

Reasons for Decision

SMITH AP:

Background

1 This is an appeal against the decision of the Commission delivered on 18 April 2013 dismissing an application for unfair dismissal for want of jurisdiction on grounds that the respondent, Perth Mobile GP Services Ltd (the medical practice), was a constitutional corporation within the meaning of s 51(xx) of the Commonwealth Constitution.

2 The appellant, Trevor David Hoffman, was employed as a medical practitioner by the medical practice from 1 February 2011 until 19 April 2012. Dr Hoffman brought proceedings in the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (the IR Act) alleging that he was dismissed by the medical practice and his dismissal was harsh, oppressive or unfair.

3 In the notice of answer and counter proposal, the medical practice pleaded Dr Hoffman was employed by a constitutional corporation. If the medical practice is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution, it is thereby a national system employer for the purposes of s 14(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act). This has the effect that the FW Act applies to the exclusion of the IR Act and this Commission has no jurisdiction to hear and determine Dr Hoffman's claim.

4 The jurisdictional issue was heard by Acting Senior Commissioner Scott. She dismissed the application on 18 April 2013 after delivering reasons for decision in which she found that the medical practice is a trading corporation.

5 Prior to the hearing of this appeal, Dr Hoffman served notices on the Attorneys-General as required by s 78B of the *Judiciary Act 1903* (Cth). None of the Attorneys-General provided advice to the Commission that they wished to intervene in this appeal.

Government grants

6 When the financial statements of the medical practice are examined it can be clearly seen that since 2010 the activities of the medical practice have been funded in part by substantial grants from the Commonwealth and the State. Copies of the grant agreements the medical practice entered into with the Commonwealth in 2010 and the State of Western Australia in 2011 were called for by Dr Hoffman when the accountant for the medical practice, Mr Priest, gave evidence (ts 67). At the conclusion of the evidence, the medical practice agreed to provide unredacted copies of the Commonwealth and State Agreements to the Commission, but not to Dr Hoffman. Dr Hoffman was granted inspection of redacted copies of the documents which had the sums involved blacked out. Dr Hoffman complained to the Commission that he could not discover from the redacted documents the total amount granted to the medical practice. It was, however, conceded on behalf of the medical practice that the income derived from the agreements was not trading income.

7 Unfortunately, Dr Hoffman was prohibited by the operation of s 33(3) and s 33(5) of the IR Act from seeking discovery of unredacted copies of the agreements. Section 33(3) and s 33(5) provide:

> (3) Evidence relating to any trade secret, or to the profits or financial position of any witness or party, shall not be disclosed except to the Commission, or published without the consent of the person entitled to the trade secret or non-disclosure.
>
> (5) All books, papers, and other documents produced in evidence before the Commission may be inspected by the Commission and also by such of the parties as the Commission allows, but the information obtained therefrom shall not be made public without the permission of the Commission, and such parts of the documents as in the opinion of the Commission do not relate to the matter at issue may be sealed up, but such books, papers, and documents relating to any trade secret or to the profits or financial position of any witness or party shall not, without the consent of that witness or party, be inspected by any party.

8 Whilst in some matters the operation of s 33(3) and s 33(5) may make it difficult for the Commission to make a proper assessment of the activities of a corporation to determine whether it is a financial or trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution, such an issue does not arise in this matter. Firstly because the financial statements of the medical practice disclose the amounts received by the medical practice as income from the grants and secondly when the terms of the grants are examined it is clear the amounts received from the grants was not income received from trading activities.

Onus – Jurisdiction of the Commission

9 Where an issue arises whether the scope of law confers jurisdiction on a tribunal or court to hear and determine a claim when the issue turns on a matter of fact, there is no onus on either party to establish jurisdiction or the absence of jurisdiction. In ***Shire of Ravensthorpe v Galea*** [2009] WAIRC 01149; (2009) 89 WAIG 2283 I considered this issue and observed [188] - [191]:

> 188 By operation of s 109 of the *Constitution* this Commission does not have jurisdiction to hear and determine claims for unfair dismissal where the employee in question is employed by a constitutional corporation. The Commission must have material before it from which it can be legitimate to draw a conclusion as to whether it has jurisdiction to hear and determine a claim. No question of jurisdiction can be conceded at first instance or conferred on a court or tribunal when it does not have it: *SGS Australia Pty Ltd v Taylor* (1993) 73 WAIG 1760.
>
> 189 Whether the onus of proof arises and whether it lies on a party in a matter where an issue arises whether an employer is a constitutional corporation was recently considered by the Full Bench in *Guest v Kimberley Land Council* [2009] WAIRC 00668; (2009) WAIG 2063. Acting President Ritter (with whom Scott & Mayman CC agreed) held that the question of whether an aboriginal land corporation is a constitutional corporation did not involve an onus of proof but is a factual enquiry in which it is the first duty of a statutory court or tribunal to decide whether it has jurisdiction [71], [75 - 82]. As Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70 said:
>
> > 'When a court, in ascertaining the validity or scope of a law, considers matters of fact, it is not bound to reach its decision in the same way as it does when it tries an issue of fact between the parties. The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants. When the validity of a State law is attacked under s 109 of the Constitution and the scope of the Commonwealth law with which it is thought to be inconsistent depends on matters of fact (which I shall call the statutory facts) the function of a court is

analogous to its function in determining the constitutional validity of a law whose validity depends on matters of fact (141 – 142).'

190 Where a company is a charitable body or a local government organisation, a real question arises whether the body in question can be characterised as a trading or financial corporation within the meaning of s 51(xx) of the *Constitution.* In matters before this Commission if an employer simply asserts that they are a trading corporation without being prepared to lead sufficient evidence of the facts on which a finding of the constitutional issue can be made, the Commission should direct that such evidence be put by the employer. Or where such knowledge is in the knowledge or control of the applicant, the applicant should be required to produce evidence. In most matters relevant evidence is more likely to be in the possession or control of the employer. It is not only appropriate for the Commission to make an order requiring an employer (and/or the applicant) to provide evidence of the employer's activities but also for the Commission, when considering those activities, to make enquiries of the parties if it is not satisfied that there is sufficient information before it to make a determination whether a corporate body is or is not a constitutional corporation. To use the words of Brennan J, in *Gerhardy v Brown* such a determination should not be left in the hands of the litigants. This approach to hearing and determining such a matter is in my view inherent in the warrant given to the Commission in s 26(1)(a) and s 26(1)(b) of the *Industrial Relations Act (1979)* (WA) (the *Act*) which requires the Commission in the exercise of its jurisdiction to 'act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms' and not to 'be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just'.

191 It is my view that the legal consequence that follows from the principle that no onus of proof arises where a court or tribunal is called upon to find constitutional facts, is the Full Bench in this matter is required to be positively satisfied that there was sufficient evidence before the Commission at first instance on which a finding can be made that the Commission has jurisdiction to hear and determine the respondent's claim.

The activities and functions of Perth Mobile GP

10 The medical practice was established as a public company on 22 January 2008. It provides mobile health care services to homeless and marginalised people. It is a not-for-profit public benevolent institution and is exempt from income tax under div 50 of the *Income Tax Assessment Act 1997* (Cth) (Notes to the financial statements for the year ended 30 June 2009) (AB 132). It is not a charity but can receive deductible gifts as it is registered as a deductible gift recipient (ts 66). Under its constitution:

(a) it is limited by guarantee;

(b) is not able to make any distribution to any members, whether by way of dividend, surplus on winding up or otherwise;

(c) its objects are to advance and promote the health of homeless and marginalised people; and

(d) it is not restricted by the doctrine of ultra vires in what activities it may pursue in furtherance of its activities: cl 30 Constitution (AB 219), s 124 and s 125 *Corporations Act 2001* (Cth).

11 The medical practice trades under the name of Mobile GP. It collaborates with other agencies that work with homeless and marginalised people by taking its mobile general practice clinics to the places where the homeless and marginalised people feel comfortable. The mobile clinics are undertaken in the premises of other organisations which provide support to the homeless such as Tranby, which is conducted by Uniting Care West, and St Bartholomew's House in East Perth. The medical practitioners and nurses take their equipment, computers and forms with them to the clinics and operate from space provided in those places.

12 The medical practice employs 12 part-time employees and one full-time. Of the 13 employees, three are administrative staff. The others are medical practitioners and nurses. In 2012, it conducted approximately 12 mobile clinics a week and 6,000 consultations (ts 74). The provision of medical services represents 99% of the activities of the medical practice (ts 76). All services provided to their patients are provided at no cost. The medical practice provides direct care to its patients by medical practitioners and mental health nurses. Its medical practitioners also prepare health care plans to enable referral of their patients to allied health care professionals such as psychologists or diabetic educators (ts 45, 53). The purpose of a health care plan is to provide preventative care (ts 53). Where a health care plan is in place the patient can access Medicare payments for those services (ts 45).

13 Patients with Medicare cards are bulk-billed and those who do not have a Medicare card or Medicare number use the service without charge.

14 Pursuant to s 20A of the *Health Insurance Act 1973* (Cth) (HI Act) a patient is able to assign a Medicare benefit. To do so the patient must enter into an agreement in accordance with the approved form to assign their right to payment to a practitioner and the practitioner accepts the assignment in full payment of the medical expenses incurred in respect of the professional service. The medical practice uses electronic billing to access Medicare payments. Consequently, there is no approved form for a patient to sign. Ms Rhonda Williams, the area manager for the Department of Human Resources, gave evidence that the Department is responsible for the Medicare master program. She said that to effect an assignment of a Medicare benefit, a patient must either sign a manual bulk-bill form or press the 'yes' button on an EFTPOS device which says, 'Do you assign these benefits to the provider' (ts 32). It appears, however, that, at all material times, the patients of the medical practice did not sign a form or effect an assignment of Medicare benefits by pressing a button on an EFTPOS machine. The evidence was that patients were asked if they had a Medicare number. If they did, the number was recorded. Once a Medicare number is recorded and a doctor recorded the item number or item numbers in the patient notes, that information was inputted into the computer software and later that day or on the next day, the information was submitted online to Medicare (ts 58, 75). As

Mr Jones for the medical practice points out, even if the Medicare benefits are not assigned in the manner prescribed by the HI Act it does not show the transaction was invalid or did not occur: ***Automatic Fire Sprinklers Pty Ltd v Watson*** (1946) 72 CLR 435, 454 (Latham CJ); ***Byrne v Australian Airlines Ltd*** [1995] HCA 24; (1995) 185 CLR 410, 428 (Brennan CJ, Dawson and Toohey JJ).

15 The Medicare payments received by the medical practice are not, however, sufficient to pay for the cost of delivering the medical services provided by the medical practice. In the financial report for the year ended 30 June 2012, the directors' report states that (AB 190):

(a) clinical work of the service is funded in part by Medicare;

(b) the total amount of Medicare payments they receive is much lower than a regular general practice and inadequate to cover the costs of operating the service; and

(c) the reason the Medicare payments are inadequate is that long consultations are required to meet the needs of patients and deal with the multiple health issues facing the patients in order to help them break free from the cycle of homelessness. Yet, the Medicare payment system is designed to provide higher payments for multiple short consultations than it does for long consultations.

16 It is common ground that the medical practice would not be able to operate if it relied solely upon payments from Medicare. Since its inception the financial reports show it has primarily relied upon grants and donations to fund the provision of its services.

17 The financial reports for the medical practice and the evidence of Mr Priest, the accountant for the medical practice, establish that the following amounts of income were received in the financial years from 2008 to 2012:

	$
2008	
Donations	20,984
Medicare	64,598
2009	
Donations	2,678
Medicare	322,093
Grants	25,000
Other income	3,786
ICPH income	268
Coffee sale	1,063
Fluvax sale	491
2010	
Donations	11,447
Medicare	375,640
Commonwealth grant	239,348
Other income	5,877
Interest	2,692
2011	
Donations	15,711
Medicare	276,103
Lotterywest grant	26,400
Metro Health Board grant	281,818
Other income	10
Interest	3,630
2012	
Donations	34,747
Medicare	384,472
Metro Health Board grant	298,182
Interest	4,508

18 Taking into account all income received in each of these financial years, Medicare payments accounted for 75% of income received in the 2008 financial year, 90% of income received in the 2009 financial year, 56% of income received in the 2010 financial year, 46% of income received in the 2011 financial year and 53% of income received in the 2012 financial year.

19 The amount of grant money received by the medical practice has varied each year. The Commonwealth Agreement required the medical practice to create and test an educational program that adapts lifestyle modification interventions and chronic disease management plans for the self-management of chronic disease in homeless and marginalised people. The program required individual discussions and group discussions about smoking, drugs, alcohol, physical activity, nutrition and lifestyle risks. The medical practice was required by the agreement to provide reports to the Commonwealth on the progress or achievements made in performance of the project. Payments of grant funds were subject to the approval of the Commonwealth Department of Health and Ageing of the progress reports demonstrating that sufficient progress was being made in the conduct of the project.

20 The State Agreement required the establishment of agreed medical services to support the viability of out of hours general practice services to marginalised groups. The aim of that program was to reduce the demand on emergency departments and improve access for the community to general practitioners. Payments of monies payable under this agreement were also subject to reports being provided by the medical practice to the State which provided data on:

1. Details of numbers of patients seen in the extended hours period on a daily basis as per the sample template included in the appendix.
2. Details of the time of the day patients were seen in the extended hours period on a daily basis as per the sample template included in the appendix.
3. Details of numbers of patients who are bulk billed for their consultation as per the sample template included in the appendix.
4. Details of the age of the patients seen as per the sample template included in the appendix.
5. Details of postcodes indicating patients location of residence accessing the service in the after hours period as per the sample template included in the appendix.
6. Details relating to patient diagnosis attending in the extended hours period as per the sample template included in the appendix.

21 Whilst the medical practice is a non-profit organisation, it recorded in its financial statements a profit of $6,489 in 2008, $5,596 in 2009, $39,685 in 2010, $78,361 in 2011 and a loss of $8,462 in 2012.

Findings made by the Commission at first instance

22 After considering all of the evidence and the submissions and documents provided by the parties, Acting Senior Commissioner Scott made the following findings:

(a) The medical practice provides medical services or general practitioner services to patients who are generally homeless people. It also engaged in research associated with the medical and health requirements of those patients through the Commonwealth Agreement in 2011 and 2012.

(b) The services the medical practice provides to the patients are provided at a fee. The fee is paid by way of the patients assigning to the medical practice the Medicare benefits they would otherwise receive from Medicare, under bulk-billing arrangements. The fact that the fee is paid by way of an assignment of a benefit does not change it to something else.

(c) The provision of services by the medical practice has a public benefit; however this may be said of all general medical practices.

(d) The health care plans are a part of the professional service provided to patients and are allocated a Medicare item number. This, as with a standard consultation, attracts a Medicare benefit. Therefore, the plans are not distinguishable from other health and medical services provided by the medical practice, even though they bring consequential referrals to bulk-billing allied health professionals.

(e) The patients may provide their Medicare numbers at the initial consultation and this is recorded. The records may be referred to for future claims. Because of the nature of this particular practice, a patient who is unable to pay and does not have a valid Medicare number is not denied treatment.

(f) The distinction between the medical practice and other medical practices, apart from it being mobile, appears to be at one end of the spectrum of billing arrangements. Some practices are operated for a profit returnable to the proprietors. In this case, the medical practice has accrued profits most years, but these profits are retained for the use by the medical practice.

(g) It is immaterial that some patients may not be aware that they are assigning their Medicare benefit to the medical practice. Nor does it make such a practice invalid. If, as Dr Hoffman suggests, patients do not comply with the formal requirements for assignment, that is a matter of whether the process has been breached rather than whether the fee is paid by way of the assignment provisions of the HI Act.

(h) There are many arrangements entered into in everyday life which are not entirely understood by those participating in them and these include paying charges and fees and other costs such as through the HICAPS arrangement. The nature of the relationship between a purchaser of products from a retail business and the intervention into that relationship of a credit provider in the use of a credit card is another example.

(i) In providing services to patients and in receiving a fee in return, the medical practice is undertaking a trading activity. It provides services and charges a fee in much the same way as other medical practices. That fee is paid by way of the Medicare benefit which would otherwise be due to the patient who would otherwise have to pay the fee. The bulk-billing process merely short circuits the process of the patient paying the bill and claiming the Medicare benefit, or claiming the Medicare benefit then paying it to the medical practice.

(j) The trading activity is substantial by a number of measures. It provides the most substantial and ongoing proportion of income of the medical practice of between 46% and 90% of the overall income each year.

(k) The revenue from the Commonwealth Agreement in 2011 and 2012 involved the medical practice in research and education activities and is not trading income.

(l) The revenue received in 2010 and 2011 from the State Agreement to support the medical practice's after hours GP services supported its trading activity, even though that income is not directly from the trading activity.

Grounds of appeal

23 The grounds of appeal are lengthy and contain prolix particulars. The grounds can be summarised as follows:

(a) Grounds 1 and 2 of the appeal essentially raise the same issue and that is whether the Acting Senior Commissioner erred in law and in fact in finding that the activity of generating and receiving income exclusively derived from statutory benefits under assignment and bulk-billing arrangements of Medicare (under s 10 and s 20 of the HI Act) was trading activity.

(b) Ground 3 raises an argument that the Acting Senior Commissioner erred in law and in fact in finding that the relationship between the medical practice, Medicare and bulk-billed patients was of the same nature as that between a retailer, a credit provider and a purchaser of products by credit card.

(c) Grounds 4 and 7 raise similar issues. In ground 4 it is contended that the Acting Senior Commissioner erred in law in failing to give any or any adequate reasons for finding that the medical practice which exclusively bulk-bills Medicare for health and medical services was in a spectrum with medical practices which directly billed their patients. In ground 7 it is contended that the Acting Senior Commissioner erred in law and in fact in finding that the nature of the relationship between the medical practice, Medicare and patients being bulk-billed was like that of a HICAPS arrangement, when there was no evidence of that before the Acting Senior Commissioner and the issue was not raised at the hearing.

(d) Ground 5 contends that the Acting Senior Commissioner erred in law and in fact in finding that medical services provided to the patients of the medical practice were provided at a fee.

(e) Ground 6 contends that the Acting Senior Commissioner erred in law and in fact in finding that patients assigned benefits to the medical practice under the bulk-billing arrangement.

(f) In ground 8 it is argued that the Acting Senior Commissioner erred in law and in fact in finding that the income derived by the medical practice from bulk-billing Medicare was a substantial proportion of its income when:

(a) There was no or no sufficient evidence before the Acting Senior Commissioner of the nature and quantum of the respondent's other income

(b) There was no sufficient evidence before the Acting Senior Commissioner of the respondent's income from grants

(c) There was no evidence before the Acting Senior Commissioner of the respondent's activity in generating income from grants or the proportion of that activity to it's [sic] overall activity

(d) The issue of the respondent's activity in generating income from grants was not raised at the hearing.

(g) In ground 9 it is put that the Acting Senior Commissioner erred in law and in fact in finding that revenue received by the medical practice from the grant described as 'the State Agreement' supported its trading activity, when there was no or no sufficient evidence of such arrangement before the Acting Senior Commissioner and the issue was not raised at the hearing.

24 When the evidence given in this matter and the reasons for decision are considered, it is apparent that the central issue in this appeal is whether the activities of the medical practice in providing medical services to its clients, were and are 'trade' or 'trading' activities within the meaning of s 51(xx) of the Commonwealth Constitution. If that is so, then ground 8 falls away as the uncontradicted evidence given by Dr Davies is that 99% of the activities of the medical practice is the provision of medical services. Ground 9 would also fall away as the finding made by the Acting Senior Commissioner is simply that the funds provided by the State Agreement supported the trading activities of the medical practice. She did not find that the performance of the terms of the State Agreement was in 'trade' or amounted to 'trading'.

25 Grounds 4, 5, 6 and 7 raise issues of fact and law which go to the central issue in this appeal which turns on the nature of the transactions or exchange between the medical practice and each of its patients.

Legal principles – trading

26 To constitute trade, an activity need not be engaged in with the intention of a profit but must generate a result in an exchange for reward.

27 In ***Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*** [1978] FCA 50; (1978) 36 FLR 134; (1978) 22 ALR 621 Bowen CJ described the characteristics of trade. He said (139):

> The terms 'trade' and 'commerce' are ordinary terms which describe all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements (*W. & A. McArthur Ltd.* v. *State of Queensland* (1920) 28 CLR 530, at p 547). The word 'trade' is used with its accepted English meaning: traffic by way of sale of exchange or commercial dealing (*Commissioners of Taxation* v. *Kirk* [1900] AC 588, at p 592 per Lord Davey; *W. & A. McArthur Ltd.* v. *State of Queensland* (1920) 28 CLR 530). The commercial character of trade was mentioned more recently by Lord Reid in *Ransom* v. *Higgs* [1974] 1 WLR 1594. His Lordship there said: 'As

> an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or service [1974] 1 WLR, at p 1600'. Moreover, the word covers intangibles, such as banking transactions, as well as the movement of goods and persons, for historically its use has been founded upon the elements of use, regularity and course of conduct (*Bank of New South Wales* v. *Commonwealth* (1948) 76 CLR 1, at p 381).

28 Justice Deane made a similar observation. At (167) Deane J said:

> The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phrases of development of trade, commerce and commercial communication, the terms are clearly of the widest import (see, generally, *W. & A. McArthur Ltd*. v. *State of Queensland* (1920) 28 CLR, at pp 546 et seq and *Bank of New South Wales* v. *The Commonwealth* (1948) 76 CLR, at pp 284 et seq, 381 et seq). They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit-making.

29 Where a fee for a service is fixed by a government Minister or by regulation, it may be doubtful whether such an activity constitutes trading within the meaning of s 51(xx) of the Commonwealth Constitution. In ***Quickenden v O'Connor*** [2001] FCA 303; (2001) 109 FCR 243 Black CJ and French J made this observation. In ***Eley v Potato Marketing Corporation of Western Australia*** [2013] WAIRC 00812 I recently considered the facts of ***Quickenden*** in which their Honours made that observation. In ***Eley*** I said ([25](d)):

> In ***Quickenden v O'Connor*** [2001] FCA 303; (2001) 109 FCR 243; (2001) 184 ALR 260 the Full Court of the Federal Court held that the University of Western Australia was a trading corporation because it engaged in substantial trading activities, which included selling computer equipment for $4.8 million in 1996 and $7.1 million in 1997, buying, selling, renting of property and investing from which it derived $44.393 million in 1995 and $48.048 million in 1996. It also provided services for fees from students in a statutory framework. Fees paid directly from students for HECS contributions amounted to $8.849 million. HECS payments directly from the Commonwealth amounted to $17.318 million for those students who had taken out HECS loans from the Commonwealth. The amount of the payments was not fixed by the University but by the Minister. The criteria for the amount fixed for each course of study was expressed under s 39 of the *Higher Education Funding Act 1988* (Cth) as a 'contribution' ascertained in accordance with the section towards the costs of the provision of that course of study. The University submitted the HECS payments paid directly by the students should also be characterised as revenue derived from trading. Chief Justice Black and French J doubted whether that characterisation could be made. Their Honours said [51]:
>
> > It is questionable whether the provision of educational services within the statutory framework of the *Higher Education Funding Act* amounts to trading. The Act creates a liability for each student to the University in respect of each course of study undertaken in a semester. The amount is not fixed by the University but rather by the Minister under published guidelines. The concept of 'trading' is a broad one. It is doubtful, however, that it extends to the provision of services under a statutory obligation to fix a fee determined by law and the liability for which, on the part of the student, appears to be statutory. For present purposes, however, this aspect of the claimed trading activities can be disregarded. For it is plain that the other activities cited are trading activities and are a substantial, in the sense of non-trivial, element albeit not the predominant element of what the University does. The University was not established for the purpose of trading and at another time, closer to the time of its creation, it may not have been possible to describe it as a trading corporation. But at the time relevant to this case and at present, it does fall within that class.

30 What appeared to be of importance in ***Quickenden*** was the fact that the university did not set the fees payable by the students. Also, the fees were merely 'contributions' to the cost of providing the courses of study.

31 President Steytler in ***Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2]*** [2008] WASCA 254; (2008) 89 WAIG 243; (2008) 37 WAR 450; (2008) 252 ALR 136; (2008) 228 FLR 318 (***ALS***) recently summarised the following established principles of determining whether a corporation can be characterised as a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution [68]:

(1) A corporation may be a trading corporation even though trading is not its predominant activity: ***Adamson*** (239); ***State Superannuation Board*** (303 - 304); ***Tasmanian Dam case*** (156, 240, 293); ***Quickenden*** [49] - [51], [101]; ***Hardeman*** [18].

(2) However, trading must be a substantial and not merely a peripheral activity: ***Adamson*** (208, 234, 239); ***State Superannuation Board*** (303 - 304); ***Hughes v Western Australian Cricket Association Inc*** (1986) 19 FCR 10, 20; ***Fencott*** (622); ***Tasmanian Dam case*** (156, 240, 293); ***Mid Density*** (584); ***Hardeman*** [22].

(3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: ***Ku-ring-gai*** (139, 159 - 160); ***Adamson*** (235); ***Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*** (1982) 150 CLR 169, 184 - 185, 203; ***Bevanere Pty Ltd v Lubidineuse*** (1985) 7 FCR 325, 330; ***Quickenden*** [101].

(4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: ***St George County Council*** (539, 563, 569); ***Ku-ring-gai*** (140, 167); ***Adamson*** (219); ***E*** (343, 345); ***Pellow*** [28].

(5) The ends which a corporation seeks to serve by trading are irrelevant to its description: ***St George County Council*** (543, 569); ***Ku-ring-gai*** (160); ***State Superannuation Board*** (304 - 306); ***E*** (343). Consequently, the fact that the trading activities are conducted is the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as 'trade': ***St George County Council*** (543) (Barwick CJ); ***Tasmanian Dam case*** (156) (Mason J).

(6) Whether the trading activities of an incorporated body are sufficient to justify its categorisations as a 'trading corporation' is a question of fact and degree: ***Adamson*** (234) (Mason J); ***State Superannuation Board*** (304); ***Fencott*** (589); ***Quickenden*** [52], [101]; ***Mid Density*** (584).

(7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: ***State Superannuation Board*** (294 - 295, 304 - 305); ***Fencott*** (588 - 589, 602, 611, 622 - 624); ***Hughes*** (20); ***Quickenden*** [101]; ***E*** (344); ***Hardeman*** [18].

(8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: ***Adamson*** (209, 211); ***Ku-ring-gai*** (139, 142, 160, 167); ***Bevanere*** (330); ***Hughes*** (19 - 20); ***E*** (343); ***Fowler***; ***Hardeman*** [26].

32 What may be of particular importance in considering whether an activity of a public benevolent corporation constitutes 'trade' or 'trading' is to consider whether there are any fees payable by clients in exchange for the provision of services, or whether there is any intention to earn a profit. In ***ALS*** Steytler P discussed the effect of a funding contract the Aboriginal Legal Service had with the Commonwealth to provide legal services to its clients mostly without charge. After considering all of the relevant aspects of the activities of the Aboriginal Legal Service, Steytler P found the Aboriginal Legal Service was not a trading corporation. At [70] - [74] his Honour found:

> 70 The appellant in the present case was set up to perform what are best described as public welfare services. As is apparent from cl 4 of its constitution, its function is to provide direct relief to indigenous people from 'poverty, suffering, destitution, misfortune, distress and helplessness caused directly or indirectly by their involvement with [the law] … '. It was for this purpose that it was given power to provide legal assistance to indigenous persons and to receive and spend grants from the Commonwealth. It exists for no other purpose and there is no suggestion that its activities had ever deviated from those necessary to achieve its primary purpose in the public interest.
>
> 71 That, of itself, is not determinative. However, there are other factors which point against the appellant's trading character. As I have said, its constitution requires that all of its income and property, derived from whatever source, be applied exclusively towards the 'promotion' of its objects and its members are not to receive any form of profit, bonus or dividend. There is no suggestion that the appellant earns, or tries to earn, any form of profit, bonus or dividend. Nor is there any suggestion that it profits from, or tries to profit from, its activities under the contract so as to fund any other activities that are permitted under its constitution. There is no suggestion, even, that it undertakes any other activities of any significance at all. Also, I have said that it is classed as a public benevolent institution and that it enjoys tax concessions accordingly. Its services are provided only to those it has been set up to help and it does not compete for those, or any other, clients.
>
> 72 There is nothing in its funding arrangements that alters any of this. Although the appellant tendered for its funding contract, the tender was not one based on price. Rather, as I have said, the whole process was designed to enhance efficiency in respect of services funded by government. The recitals to the contract, and the provisions to which I have referred, make it plain that the funding is designed to ensure that indigenous Australians have access to high quality and culturally appropriate legal aid services so as to enable them fully to exercise their legal rights as Australian citizens. Those who are given access to these services must demonstrate both that they are eligible persons and that they satisfy a means test establishing that they are unable to pay for their legal services. The overwhelming majority of the services are provided free of any charge. If contributions can be made towards expenses, they must be used to enhance the quality of the services provided. Services under the contract are overseen, and controlled, by Government. Although fees are paid on invoice, this is merely an accounting device and the fees must be provided in the pre-ordained sums, so long as the contracted services are provided. The Policy Directions make it plain that the funding is provided in order to achieve a welfare function in fulfilment of government policy.
>
> 73 The services performed by the appellant under the contract are essentially the same services, with the same welfare or public interest purpose, as had previously been the case. Also, as had previously been the case, the funding still came primarily from government. The only change of any substance was that the nature and quality of the services were controlled under the contract rather than by grant conditions. Although, theoretically, a private law firm intending to derive some profit from the contract might have tendered for it, that has no bearing on the characterisation of the appellant. It remained the same public interest, non-profit organisation that had previously performed welfare services of the same kind.
>
> 74 None of these factors, taken individually, necessarily has the consequence that the appellant is not a trading corporation. A trading corporation can contract with government to provide a charitable or welfare function in fulfilment of government policy. Ordinarily, the provision of large scale legal and allied services, for reward, is trading and the fact that it is not done for profit is not determinative of its character, as I have said. However, when all of the factors to which I have referred are taken together, it cannot be said that what is done by the appellant has a commercial character. Rather, its activities, including its entry into the contract, seem to me to be removed from ordinary concepts of trade or trading, whether for reward or otherwise, in much the same way as

those of a government-run legal aid agency. As I have stressed, its services are provided, in all but the most exceptional cases, free of charge: ***St George County Council*** (569). They are provided for altruistic purposes, not shared by ordinary commercial enterprises (***Ku-ring-gai*** (160) (Deane J)), under a constitution which requires the appellant to act only in furtherance of the altruistic objects. The appellant engages in a major public welfare activity pursuant to an agreement with the Commonwealth under which it will be re-imbursed for most of its costs: ***E*** (343) (Wilcox J); ***Fowler***. Although its services have been 'purchased' by the Commonwealth under the contract, its activities continue to lack a 'commercial aspect': ***Hardeman*** [26]; ***J S McMillan*** (355) (Emmett J); ***Ku-ring-gai*** (142) (Bowen CJ), (167) (Deane J). It follows from what I have said that the appellant is not a 'trading corporation' for the purposes of s 51(xx) of the Constitution and the notice of contention succeeds. The Commission has jurisdiction to determine the issue before it.

Does the medical practice engage in 'trading'?

33 In 2009, the medical practice earned a small amount of income from the sale of coffee and the sale of fluvax. Since 2009, however, its only substantial sources of income have been from grants and Medicare payments.

34 On behalf of the medical practice, it is argued that contractual relationships between the patients and the medical practice arise out of the following facts:

(a) that patients attend various clinic locations and receive medical attention from the doctors employed by the medical practice;

(b) no mention was made of any payment for the medical consultation provided;

(c) 75% of patients presented a Medicare card to provide essential information for the purpose of later bulk-billing by the company. The remainder of the patients did not have a Medicare card;

(d) processing of the paperwork was done by the duty nurse and administrative staff;

(e) no physical assignment of the health insurance rebate was effected by the patient signing any forms, but the medical practice claimed and was paid the Medicare rebate;

(f) Medicare has refused payment of the rebate on only rare occasions when the patient's Medicare number did not match that in its records. Otherwise, all assignments of the rebate have been honoured by Medicare and paid to the medical practice.

35 It is clear that no discussion with any patient about payment is held. Nor does it appear that there is any discussion with any patient about the medical practice using the patient's Medicare card to obtain a payment from Medicare for medical services provided to the patient. Even if there was such a discussion, it is my opinion that it would be immaterial.

36 In the law of contract there can be no offer or acceptance unless the parties intend to effect an exchange. A promise qualifies as an offer only if it proposes an exchange and a promise or performance qualifies as an acceptance only if it is given in response to that proposal: Seddon N, Bigwood R and Ellinghaus M, *Cheshire & Fifoot Law of Contract* (10th ed, 2012) [1.17], [3.2].

37 In this matter, the evidence at its highest is that when a patient presents for the first time to see a doctor or a mental health nurse they are asked if they have a Medicare card or Medicare number. If the patient has a Medicare number the number is recorded for future use by the medical practice and the patient is provided with medical services. After the patient receives those services, staff employed by the medical practice input the Medicare number into a computer generated payment program together with the item number or item numbers for the services provided to the patient. If a patient has no Medicare number they are provided with medical services and no payment is sought or received for those services.

38 It is apparent from the evidence that the terms upon which the medical practice offers medical services to homeless and marginalised people is that the services will be provided without charge to the patient. A payment will be sought from Medicare only if a patient has a Medicare number. The provision of a Medicare number is not a condition of treatment, or put another way, it is not part of the terms of the offer. Thus, no contract is entered into between the patient and the medical practice, as there is no intention on behalf of the medical service to effect an exchange. It is simply the gratuitous provision of a medical service.

39 Even if it was accepted that the provision of a Medicare number was part of the terms of the offer and the production by the patient of a Medicare number effected an exchange so that a contractual relationship was created between each patient and the medical practice, it does not necessarily follow that the transaction can be characterised as 'trading' or 'trade' within the meaning of s 51(xx) of the Commonwealth Constitution.

40 The reason why I am of the opinion that the activity of providing medical services cannot constitute 'trading' or 'trade' is that, when regard is had to the character of the services the medical practice provides and the nature and the character of the payments from Medicare, it is apparent that these transactions lack a commercial aspect, or put another way the transactions lack a commercial character. Without the receipt of the annual grant payments from the Commonwealth and the State the medical practice would be unsustainable. Leaving that issue aside, the payments received from Medicare are inadequate to cover the cost of providing any particular medical service to any patients. The directors' statement in the 2012 financial report made it clear that Medicare payments are not sufficient to cover the long consultations that the patients of the medical practice require. Also of importance, the medical practice cannot determine the amounts it receives from Medicare in respect of any of the services it delivers. Medicare payments are set annually by Commonwealth regulation: see *Health Insurance (General Medical Services Table) Regulation 2012* (Cth). Pursuant to s 4(1) of the HI Act, the regulations are made to prescribe a table of medical services setting out:

(a) items of medical services;

(b) the amount of fees applicable for each item; and

(c) rules for interpretation of the table.

41 No patient incurs a fee of any kind. Nor does it appear the medical practice competes with any other medical service for patients. In particular, the provision of medical services to patients for free who do not have a Medicare card in itself is, as the appellant submits, inconsistent with ordinary business or commercial activity.

42 Whilst the financial statements have recorded a modest 'profit' in the financial years of 2008 to 2011 and a loss in 2012, it is a non-profit organisation. No profits can be distributed. All funds of the medical practice are required to be distributed in furtherance of its object, which can only be described as altruistic and a public welfare service. Whilst this factor is not determinative in itself, importantly:

(a) patients are treated for free and without discrimination or distinction irrespective of whether they can provide a Medicare number;

(b) the funds the medical practice obtains from Medicare are inadequate to recover the cost of providing any of the medical services the medical practice provides; and

(c) the medical practice obtains substantial funding from the Commonwealth and more recently from the State to extend medical services to its clients who are solely homeless and marginalised.

43 The provision of medical services in these circumstances is inconsistent with the concept of 'trade' or 'trading' within the meaning of s 51(xx) of the Commonwealth Constitution. As it currently carries out no other activities that can be regarded as trading activities, I am of the opinion the medical practice is not a constitutional corporation.

44 For these reasons, I am satisfied that grounds 1 and 2 are made out. I do not find it necessary to consider grounds 3, 6, 8 and 9.

45 As to grounds 4, 5 and 7, the activity of obtaining Medicare benefits for the part payment of the provision of some medical services may be different to the activity of a commercial general medical practice who may bulk-bill some patients or utilise the assignment of HICAP payments from health care funds. Such practices are usually administered on a fee for profit basis and often require patients to pay a fee that represents the gap between the amount of a Medicare benefit payment or HICAP payment and the fee charged by the general medical practice. In such circumstances, these transactions could clearly be regarded as 'trade' or 'trading'. However, providing facilities to access funds for part or whole payment of services is not a matter that can be viewed in isolation from the entire activities of a corporation. When considering whether a corporation is a trading corporation within the meaning of s 51(xx) of the Commonwealth Constitution, the totality of the activities of the corporation must be considered. Other factors may also be of importance, such as whether a medical service competes with other services for clients. Whether a corporation is a trading corporation is ultimately a question of fact and degree which depend upon whether its current activities are substantial and not peripheral: ***R v The Judges of the Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)*** (1979) 143 CLR 190 (***Adamson***) (234) (Mason J).

46 For these reasons, I am of the opinion that an order should be made allowing the appeal and to suspend the operation of the decision and remit the case to the Commission for further hearing and determination.

HARRISON C:

47 I have had the benefit of reading the reasons for decision of her Honour, the Acting President. I agree with those reasons and have nothing to add.

MAYMAN C:

48 I have had the benefit of reading the Reasons for Decision of her Honour the Acting President. I respectfully agree with the conclusions that she reached and have nothing further to add.

2013 WAIRC 00822

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TREVOR DAVID HOFFMAN
	APPELLANT
	-and-
	PERTH MOBILE GP SERVICES LTD ACN 129 336 803
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 25 SEPTEMBER 2013
FILE NO.	FBA 3 OF 2013
CITATION NO.	2013 WAIRC 00822

Result	Appeal allowed
Appearances	
Appellant	Dr T D Hoffman in person
Respondent	Mr D Jones, as agent, and with him Dr D Davies

Order

This appeal having come on for hearing before the Full Bench on 16 August 2013 and having heard the appellant in person and Mr D Jones, as agent, and with him Dr D Davies on behalf of the respondent, and reasons for decision having been delivered on 24 September 2013, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The appeal is allowed.
2. The decision made by the Commission on 18 April 2013 in matter No U 93 of 2012, [2013] WAIRC 00242; (2013) 93 WAIG 424 is suspended.
3. The matter is remitted to the Commission at first instance for further hearing and determination.

By the Full Bench

(Sgd.) J H SMITH,

[L.S.] Acting President.

FULL BENCH—Unions—Application for Alteration of Rules—

2013 WAIRC 00861

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2013 WAIRC 00861
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER J L HARRISON
HEARD	**:**	WEDNESDAY, 2 OCTOBER 2013
DELIVERED	**:**	MONDAY, 14 OCTOBER 2013
FILE NO.	**:**	FBM 4 OF 2013
BETWEEN	**:**	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Applicant AND (NOT APPLICABLE) Respondent

Catchwords	**:**	Industrial Law (WA) - Application pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) for the Full Bench to authorise registration of alterations to registered rules - Qualifications of persons for membership - Application sought to enable applicant to enrol members of two organisations that have ceased to function
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 6, s 6(ab), s 6(e), s 6(f), s 55, s 55(2), s 55(4), s 55(4)(a), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 55(5), s 56(1), s 62(2), s 62(4)
Result	**:**	Application granted
Representation:		
Counsel:		
Applicant	**:**	Mr S Millman and with him Mr D Stojanoski
Solicitors:		
Applicant	**:**	Slater & Gordon

Case(s) referred to in reasons:

Nil

Case(s) cited:

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch [2013] WAIRC 00123; (2013) 93 WAIG 205

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

Western Australian Police Union of Workers v The Civil Service Association of Western Australia Incorporated [2011] WAIRC 00786; (2011) 91 WAIG 1851 & 2089

Western Australian Principals' Federation v (Not applicable) [2008] WAIRC 01285; (2008) 88 WAIG 1812

Western Australian Principals' Federation v (Not applicable) [2011] WAIRC 00397; (2011) 91 WAIG 885

Reasons for Decision

THE FULL BENCH:

Introduction

1 This application by the Health Services Union of Western Australia (Union of Workers) (the applicant) was filed on 30 May 2013. The applicant, as a registered organisation, seeks the authorisation of the Full Bench, pursuant to s 62(2) of the *Industrial Relations Act 1979* (WA) (the Act), for the Registrar to alter the rules of the applicant to insert two new sub-rules into r 3 – Constitution. These proposed sub-rules seek to alter the qualifications of persons for membership to extend the coverage of the applicant to persons who are currently eligible to be members of the Salaried Pharmacists' Association Western Australian Union of Workers and the W.A. Dental Technicians' and Employees' Union of Workers, Perth.

2 The reason why the alterations are sought is that the Salaried Pharmacists' Association Western Australian Union of Workers (SPA) and the W.A. Dental Technicians' and Employees' Union of Workers, Perth (DTEU) have ceased to function.

3 As the proposed alterations seek to alter the qualifications of persons for membership, the alterations sought cannot be registered by the Registrar unless the registration is authorised by the Full Bench.

4 This matter was listed for hearing on 2 October, 2013. After hearing from Mr Millman on behalf of the applicant and after Mr Daniel Patrick Hill, the secretary of the applicant, gave oral evidence, the Full Bench was satisfied the requirements of the Act that regulate the alteration of rules of an organisation had been met. It then made the following order on 3 October 2013:

> The Registrar is hereby authorised to register the alterations to the rules of the applicant as published in the Western Australian Industrial Gazette on 28 August 2013 ((2013) 93 WAIG 1354).

5 These reasons set out the reasons why the Full Bench formed the view that the proposal to register the alterations to the eligibility rule of the applicant should be authorised by the Full Bench.

The proposed alterations to rule 3 – Constitution

6 As required by s 55(2) of the Act, a notice was published in the Western Australian Industrial Gazette and on the Commission's website on 28 August 2013 setting out the alterations proposed by the applicant: (2013) 93 WAIG 1354.

7 The alterations sought to r 3 are the insertion of the following sub-rules in r 3(1):

> The Union shall consist of workers…employed by:-
>
> (k) Notwithstanding any preceding provision of this rule, employers in or in connection with the industry of compounding, dispensing, preparation, manufacture, distribution and sale of drugs, medicines, chemicals and medicinal substances and without limiting the forgoing, also including persons who are:
>
> (i) registered Pharmacists employed as Managers or Managing Assistants of a Friendly Society, a retail pharmacy, the dispensary of a Medical Practitioner or Hospital or Public Institution;
>
> (ii) assistants who are Registered Pharmacists;
>
> (iii) students who are undergoing training prescribed by the Australian Pharmacy Council, engaged or usually engaged in Western Australia as prescribed by law in retail pharmacies and dispensaries connected with Friendly Societies or Hospitals or Public Institutions or conducted as part of the practice of duly qualified Medical Practitioners in the compounding dispensing preparation manufacture distribution and sale of all those drugs medicines chemicals and medical substances which are included in the British Pharmacopoeia, the British Pharmaceutical Codex, the Australian Pharmaceutical Formulary and the formularies issued on behalf of any Public Hospital or similar institution or are used for the alleviation treatment of cure of diseases of the human body.
>
> (l) Subject to subrule (aa) of this rule, Dentist's, employers in the industry of Dental Mechanics including dental prosthetics and/or dental laboratories associated therewith, and the term 'Dental Mechanics' shall be construed to cover the following:-
>
> (i) Dental Technicians, meaning and including dental mechanics skilled in the mechanics of prosthetic dentistry;
>
> (ii) Dental Trainee Technicians;

(iii) Dental Attendants and Assistants:

(iv) Dental Receptionists; and

(v) all persons in the industry not registered as dentists.

The applicant's rules about alterations

8 Pursuant to s 62(2) of the Act, the requirements of s 55(4) of the Act must be satisfied before the Full Bench can approve a rule alteration application to alter its rules of eligibility for membership. Section 55(4) of the Act provides the Full Bench shall refuse an application by an organisation under s 55 unless it is satisfied that:

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

9 The first matter the Full Bench must consider is that s 55(4) of the Act requires it to refuse a rule alteration application unless it has been authorised by the organisation in accordance with its rules.

10 The steps to be followed to alter the rules of the applicant are set out in r 27 – Alteration of Rules. Rule 27 provides:

(1) The Union shall have the right to make Rules for its own use and guidance. Rules may be amended, added to, varied or repealed by notice of any proposed alteration to the Rules being given by any member to the Secretary in writing. The same shall be laid before the next meeting of the Committee of Management or before a special meeting of the Union which may amend, add to, vary or repeal the Rules or any part of them in accordance with the proposal in the said notice or any reasonable amendment of same.

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

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

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

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

11 The facts supporting the applicant's submission that it complied with its rules and the statutory requirements of the Act were set out in a statutory declaration made by Mr Hill, on 18 June 2013. This statutory declaration contained evidence of the following matters:

(a) As required by r 27(1), the requirement that written notification to the secretary of a proposed alteration be given to the secretary by a member was given by Ms Cheryl Hamill, a member of the applicant, to the secretary in a letter dated 13 February 2012.

(b) As also required by r 27(1), the alterations proposed by Ms Hamill were laid before a committee of management meeting of the applicant which was held on Monday, 26 March 2012. Pursuant to r 5, the committee of management consists of the president, the vice-president, the secretary, the treasurer and nine committee members. Pursuant to r 12(1)(a), the quorum for a committee of management is a meeting of the majority of the committee. The minutes of the meeting of the committee of management held on 26 March 2012 records that there were 11 members of the committee of management present at the meeting. Consequently, it is clear from

the minutes that a quorum was present at that meeting. The minutes also record that the matter raised in the letter lay on the table for consideration at the next scheduled meeting of the committee of management.

(c) Pursuant to r 27(1), the committee of management can amend, add to, vary or repeal the rules in accordance with the proposal in the notice or any reasonable amendment of same. The committee of management met on 21 May 2012. The minutes record that again at that meeting a quorum was present. At that meeting a resolution was passed unanimously that the rules be amended in accordance with the proposal contained in the letter to the secretary from Ms Hamill dated 13 February 2012. It was later revealed that the resolution that was passed and recorded in those minutes contained a typographical error. This typographical error was corrected and the resolution that was passed at the committee of management meeting on 21 May 2012 was rescinded by a later meeting of the committee of management on 25 June 2012. The minutes of that meeting record that a quorum of the committee of management was present and there was a typographical error in the proposed alterations to the rules that had been passed at the last meeting of the committee of management. This error was that r 3 – Constitution was referred to as r 5. Constitution. Consequently, a resolution was put to the committee of management on 25 June 2012. The committee unanimously carried a motion that the previous resolution be rescinded and noted that although the proposal by Ms Hamill, referred to r 5. Constitution, the intention was to refer to r 3 – Constitution. Accordingly the alteration of the rules as proposed needed to be amended. A resolution was then passed that pursuant to r 27, the secretary was authorised to amend the rules in accordance with the proposal contained in the letter of Ms Hamill, subject to one change, being that where the proposed amendment in the letter referred to r 5. Constitution, it be amended to refer to r 3 – Constitution.

(d) As required by r 27(2), the members of the applicant were notified of the proposed alterations to the rules by way of a notice published to all members in the Winter 2012 edition of the applicant's journal called 'The Journal of the Health Services Union of WA – Feedback'. As required by r 27(2), the notice included a brief description of the proposed alteration, the proposed alterations and the reasons for the proposed alterations. The notice was also published on the applicant's website on 13 June 2012. Members were also advised by email in a regular electronic newsletter in which they were advised to refer to the website for details of the proposed changes. In the notices published in the applicant's journal and on its website, a brief description of the proposed alteration of the rules was given by stating that the proposal was to import the coverage of two registered organisations of employees into the coverage of the applicant. Those unions are the Salaried Pharmacists' Association Western Australian Union of Workers and the W.A. Dental Technicians' and Employees' Union of Workers, Perth. Members were also informed that in order to do so they needed to alter the rules of the applicant and that the proposed alterations had the endorsement of the committee of management of the applicant. The proposed alterations of the rules were then set out in full. The reasons for the proposed alterations of the rules were set out to members in the notice as follows:

1 The proposed additional coverage is part of the Health Industry and is for callings that fit with the existing callings covered by the HSU of WA.

2 The Registered address for both the Dental Technicians and Employees Union of Workers, Perth [DTEU], and the Salaried Pharmacists Association of Western Australia Union of Workers [SPA], is the same as for the HSU of WA.

3 For many years, the DTEU and the SPA have only operated by virtue of the support and largess of the HSU of WA. In effect they exist separately in name only and are no longer able to protect and further the interests of the employees within their scope of coverage without the efforts of the HSU made on their behalf.

4 The HSU of WA is an effective organisation of employees that represents employees in the same or similar callings across the Health Industry within the State of Western Australia.

5 Given the incapacity of the DTEU and the SPA, the co-location of those organisations with the HSU of WA, the capacity of the HSU to provide proper representation, the limitations on the HSU in providing proper industrial representation while it does not have the said coverage, and the fit of the coverage of the SPA and the DTEU with that of the HSU of WA, it makes industrial, operational and practical sense for the HSU to include the coverage of the respective unions in its own coverage.

6 It is consistent with the objectives of the HSU of WA, the Objects of the Act and in the public interest for the HSU of WA to alter its rules to take on the additional coverage as proposed.

(e) Pursuant to r 27(3) of the rules of the applicant, the notice given to the members must also contain information that they have a right to object, the manner by which they can object, the address of the Registrar and the time limit that applies to lodge an objection. As required by r 27(3), the members were informed in the notices that they had a right to object to the proposed alteration of the rules by forwarding a written objection to the Registrar at the address of the Commission and that objections must reach the Registrar no later than 21 days after the date of the issue of the edition of the journal of the applicant.

(f) As at the date of making the statutory declaration, Mr Hill was unaware of any objection to the application having been made by any member of the applicant.

12 Having regard to all of this evidence, we were satisfied that the application to alter the rules of the applicant had been authorised in accordance with its rules as required by s 55(4)(a) of the Act.

13 We were also satisfied that the members of the applicant had been provided with a reasonable opportunity to make an objection to the alterations and noted that no member of the applicant had objected to the making of the application or to the

proposed alterations. For these reasons, we were satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act had been complied with.

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

15 Pursuant to s 62(4) and s 55(5) of the Act the Full Bench is required to refuse an application by a registered organisation to alter its rules to enable it to enrol persons who are eligible to be members of another registered organisation unless the Full Bench is satisfied there is good reason, consistent with the objects prescribed in s 6 of the Act, to permit registration. The application says there is good reason to permit registration. In particular that as the SPA and the DTEU have ceased to function, persons eligible to be members of those registered organisations are being denied the benefits of the rights to organise that can be provided by an organisation such as the applicant. After hearing oral evidence from Mr Hill and submissions made on behalf of the applicant we were satisfied that there was good reason to permit registration of the proposed variations to r 3(1) of the rules of the applicant. Mr Hill gave the following relevant oral evidence:

(a) He has been the secretary of the applicant since 1993.

(b) The records of the applicant indicate that:

(i) sometime between 1988 and 1989 the applicant entered into an arrangement with the SPA and the DTEU to collect membership fees, recruit members and provide administrative support and industrial services:

(ii) the last election of officers for the SPA and DTEU occurred sometime prior to 1993;

(iii) since the arrangement was entered into with the SPA and the DTEU the members of those organisations were treated by the applicant as if they were enrolled as members of the applicant;

(iv) the last membership returns for the SPA and DTEU were filed in the Commission in January 2003.

(c) Both the applicant and the SPA are named parties to the Retail Pharmacists' Award 2004.

(d) The DTEU is the only named party to the Dental Technicians' and Attendant/Receptionists' Award 1982.

(e) If the proposed variation is registered it will enable the applicant to not only regularise the membership of persons that the applicant services, it will enable the applicant to actively enrol members in the private sector of the dental and pharmacy industries.

16 In written submissions filed by the applicant on 2 October, 2013 the applicant stated:

(a) it has one 'member' who a pharmacist in the private sector who is eligible to be a member of the SPA and 67 members who are pharmacists in the public sector. The public sector pharmacists are part of the traditional coverage of the applicant in public hospitals.

(b) in private dental practices the applicant has four dental assistants and one dental technician who may be eligible to be members of the DTEU and three dental therapists/hygienists who are eligible to be members of the applicant under the traditional coverage of the applicant. In the public sector the applicant has four dental assistants who fall under the traditional hospital and health service coverage of the applicant.

17 When regard was had to this evidence and the material contained in the written submissions it was clear to us that there was good reason to permit the amendments as the proposed amendments are consistent with objects s 6(ab) (promotion of the right to organise) and s 6(f) (encouragement of full participation by members in the affairs of an organisation). We were also satisfied that the proposed amendments are consistent with object s 6(e) of the Act, because we were satisfied that the SPA and the DTEU have ceased to function as representative employee organisations, so that any overlapping eligibility for membership will have no practical effect.

2013 WAIRC 00837

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	APPLICANT
	-and-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER J L HARRISON
DATE	THURSDAY, 3 OCTOBER 2013
FILE NO/S	FBM 4 OF 2013
CITATION NO.	2013 WAIRC 00837

Result	Order issued
Appearances	
Applicant	Mr S Millman (of counsel) and with him Mr D Stojanoski (of counsel)

Order

This matter having come on for hearing before the Full Bench on Wednesday, 2 October 2013, and having heard Mr S Millman (of counsel) and with him Mr D Stojanoski (of counsel) on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The Registrar is hereby authorised to register the alterations to the rules of the applicant as published in the Western Australian Industrial Gazette on 28 August 2013 ((2013) 93 WAIG 1354).

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2013 WAIRC 00804

WA HEALTH - UNITED VOICE - HOSPITAL SUPPORT WORKERS INDUSTRIAL AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00804
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD		WEDNESDAY, 5 JUNE 2013, FRIDAY, 14 JUNE 2013, THURSDAY, 1 AUGUST 2013
DELIVERED	**:**	WEDNESDAY, 11 SEPTEMBER 2013
FILE NO.	**:**	AG 51 OF 2012
BETWEEN	**:**	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS: (A) THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, THE PEEL HEALTH SERVICES BOARD, THE WA COUNTRY HEALTH SERVICE AND (B) THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY Applicants AND UNITED VOICE, WESTERN AUSTRALIAN BRANCH Respondent

Catchwords	**:**	Industrial Agreement - Application for registration of an Agreement - Application for an order as to specified matters on which agreement has not been reached - Agreement to arbitration of second and third wage increases to be included in agreement - Order issued
Legislation	**:**	*Industrial Relations Act 1979* s 6(ae), (af) and (ca), s 26(1) and s 42G *Public Sector Management (Redeployment and Redundancy) Regulations 1994*
Result	**:**	Order issued
Representation:		
Counsel:		
Applicant	**:**	Mr H Dixon SC
Respondent	**:**	Mr M T Ritter SC
Solicitors:		
Applicant	**:**	State Solicitor's Office

Reasons for Decision

1 This application involves the arbitration of wage increases to apply to employees covered by the *WA Health - United Voice - Support Workers Industrial Agreement 2012* (the 2012 Agreement) under s 42G of the *Industrial Relations Act 1979* (the Act). The quantum of the second and third wage increases to be included in the 2012 Agreement was in dispute between the parties and they agreed that the Commission would determine the annual wage increases to apply from 1 August 2013 and 1 August 2014, within the range of 3.75% and 4.5%. The cost difference between the applicants' claim of 3.75% and the respondent's claim for increases of 4.5% is $1.9 million in 2013/2014 and $4.1 million in 2014/2015.

Submissions

Applicants

2 The applicants' total offer under the 2012 Agreement constitutes a 12% increase (including the two 3.75% increases) which is greater than the predicted CPI of 8.25% over the life of the 2012 Agreement. The real increase in wages in the applicants' offer is also in addition to a Superannuation Guarantee Charge (SGC) increase effective 1 July 2013.

3 The applicants claim that the Perth Consumer Price Index (CPI) is the best and most reliable measure of cost of living increases to apply to its employees. In the past 10 years support workers have received substantial wage increases of approximately 25% above the CPI as well as improvements to their conditions of employment. The applicants reject the respondent's reliance on increased utility costs faced by support workers as this is only a small portion of the CPI basket of goods.

4 The applicants argue that support workers are not low paid employees as their average annual total incomes are significantly higher than the Western Australian minimum wage.

5 The Public Sector Wages Policy 2009 (the Wages Policy) operates by increasing employees' wages by the CPI and any additional increases above that must be based on improved efficiencies or work practice reform initiatives. If the increase sought by the respondent is granted it would therefore be outside of the Wages Policy. The respondent's claim for increases of 4.5% also exceeds the current Wage Price Index (WPI) forecast for Western Australia.

6 Support workers have gained a number of benefits under the terms of the 2012 Agreement and the applicants have not gained any benefits of significance. The applicants claim that the increases they propose more than compensates employees for any limited productivity and efficiency measures contained in the 2012 Agreement.

7 The 2012 Agreement contains the following new entitlements for support workers:

(a) a broader commitment to bargaining (clause 9);

(b) a number of new restrictions on the applicants' ability to redeploy employees or terminate employment on the ground of redundancy (clause 11B) restricting management prerogative. The *Western Australian Government / Liquor, Hospitality and Miscellaneous Union Redeployment, Retraining and Redundancy Agreement 2004* (the RRR Agreement) ceased to apply on 27 March 2011 pursuant to Item 20 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

(c) a new foul linen allowance payable at level 5 and above (clause 24.9);

(d) a new higher duties allowance for support workers who temporarily fulfil the role and responsibilities of a Hospital Salaried Officer position (clause 31.5);

(e) international sporting leave (clause 32);

(f) additional flexibilities for taking long service leave (clauses 38 and 43.6);

(g) new parental leave entitlements including the continuation of the higher duties allowance for four weeks if an employee commencing parental leave has been in receipt of such an allowance for 12 months prior to commencing leave. Increased access to adoption leave and one week's paid partner leave following the birth of a child (clauses 39, 39A, 39B and 39C);

(h) a new entitlement of up to 52 weeks' unpaid grandparent leave (clause 39D); and

(i) a new entitlement to witness leave and a new entitlement for casual employees to jury leave (clause 45).

8 A number of clauses in the *WA Health – LHMU – Support Workers Industrial Agreement 2007* (the 2007 Agreement) have been modified to the benefit of both support workers and the applicants:

(a) the operation of clause 7, relating to further claims, has been clarified;

(b) Clause 11. - Contract of Service has been simplified by removing elements which have no contemporary application or were no longer required, it provides for improved rostering practices for the benefit of casual employees, it now provides for a minimum three hour period of engagement for casuals (previously there was no minimum period) and the capacity of the applicants to vary the regular pattern of work for part-time employees has been clarified;

(c) in Clause 11A. – Permanency of Employment, the applicants have agreed to restrictions regarding the use of fixed term contracts effectively providing job security for existing support workers. Under these restrictions, fixed term contracts can be used when 'necessary to establish or maintain a pool of permanent staff vacancies in order to subsequently redeploy permanent staff who are displaced or potentially displaced by organisational change' (clause 11A.2(xviii)) and where 'necessary to temporarily fill vacancies because a decision has been made which will affect the number of permanent staff vacancies' (clause 11A.2(xix)). This benefits support workers because it allows the applicants to 'quarantine' permanent job vacancies and then offer those vacancies to existing permanent employees who would, or might be affected by the opening of Fiona Stanley Hospital and Midland Health Campus;

(d) in Clause 14. - Hours of Work - Accrued Days Off a uniform method of payment for accrued days off (ADO) has been implemented and the method chosen was the one preferred by the respondent in negotiations. The applicants are now required to respond to an application for an ADO within 14 days providing greater certainty for support workers to plan absences;

(e) Clause 33. – Annual Leave contains a new requirement for the applicants to respond within 14 days to annual leave applications. There is a new capacity to require support workers to take annual leave where a support worker has in excess of 10 weeks' leave which is consistent with the principle of taking annual leave for recreational purposes and this is of benefit to both support workers and the applicants; and

(f) the classification review process under the 2007 Agreement was prescriptive and onerous for both the applicants and support workers and the old process has been replaced with a simplified process.

9 The applicants reject the respondent's claim that it gains significant benefits due to the changes to agency employment and the process relating to outsourcing. Requiring evidence of illness and thus addressing fraudulent access to personal leave and the change to dispute settlement procedures does not justify a pay increase. The change to the leading hand allowance will assist more employees to undertake leading hand responsibilities and be paid for doing so. Clause 10. - Relationship with Awards and Agreements is an updating of the agreement and does not justify a wage increase. Changes to the employment of agency staff are of benefit to employees and this provision remains in the 2012 Agreement in a simplified form. The ongoing commitment by the applicants to engage permanent employees rather than use agency staff does not justify the pay increase sought by the respondent. There is also no benefit to the applicants with respect to changes to information requests as the applicants are still required to provide information to the respondent.

10 There will be a decrease of 750 beds operated by the Western Australian health system due to the reorganisation of health services associated with Fiona Stanley Hospital and Midland Health Campus. However there will be approximately 340 nett additional beds in the metropolitan area so a greater number of support workers will be required to be employed in the metropolitan area. The respondent cannot rely on the potential cost of redundancies to offset the cost of wage increases as no employee will be forced to accept being made redundant. Furthermore many support workers are likely to take up employment at Fiona Stanley Hospital and Midland Health Campus.

11 The applicants argue that the Western Australian Council of Social Services Inc (WACOSS) Cost of Living Report 2012 is of marginal relevance as the households used for its modelling are not representative of a typical support worker. Housing and utility costs have not had a big impact on costs on households in recent years and there is no information reflecting the impact of specific cost of living increases on support workers.

12 The applicants argue that the respondent's reliance on other public sector bargaining outcomes is unhelpful because the circumstances relating to the negotiation of each of these agreements and outcomes are different. It is also unsafe to rely on any other agreements negotiated under the Wages Policy as there are many differences that apply and issues relevant to each agreement. In any event the applicants' offer is equitable when compared to other public sector bargaining outcomes. The Australian Nursing Federation Industrial Union of Workers (ANF) agreement was negotiated under a unique set of circumstances in a different context and this agreement turns on its own set of unique circumstances.

13 The applicants argue that there is a need to take account of the potential flow on effect of any pay rise above the applicants' offer and any increase above 12% might set a precedent for other public sector wage outcomes. The respondent's claim would also result in an additional $6 million liability to the applicants and Western Australia is currently experiencing a challenging fiscal environment, along with economic uncertainty.

14 From 27 October 2012 the applicants and the respondent ceased to be parties to the 2007 Agreement. The applicants decided to only apply a limited number of conditions provided for in the 2007 Agreement, namely support workers' wages, allowances and leave entitlements, despite the 2007 Agreement no longer applying. All other obligations and restrictions in the 2007 Agreement on the applicants no longer applied. The applicants therefore reject the respondent's claim that a number of revised clauses contained in the 2012 Agreement are of benefit to the applicants.

15 Clause 11A. – Permanency of Employment containing a change to an increased range of circumstances when fixed term contracts can be used is not a benefit to the applicants as restrictions on the applicants employing fixed term employees did not apply at the time the 2012 Agreement was negotiated because the applicants had retired from the 2007 Agreement in October 2012. The applicants also argue that this provision imposes a restraint on them that did not exist at the time the 2012 Agreement was negotiated. It would be unfair to award an increase to permanent employees for a provision that protects permanent employees, that is, the ability to occasionally use fixed term contracts.

16 Changes to the contracting out clause are of no benefit to the applicants because there is currently no contracting out occurring and changes to rostering has a minimal impact and employees still have a right of veto. The removal of the clause dealing with the implementation of Patient Care Assistants in hospitals was due to the process being completed and the clause is therefore obsolete. The classification review process change still requires a process to be undertaken by the applicants even though it has been simplified. Changes to recouping overpayments are minimal and the change to the leading hand allowance has resulted in more employees receiving the allowance which has resulted in greater costs to the applicants. Changes to district allowance provisions were not due to a concession by the respondent and there is no benefit to the applicants as the clause reflects the current arrangement. Dealing with excessive leave is a management prerogative it has always had and the ability for the applicants to require an employee to provide medical evidence when taking personal leave does not justify a pay increase. The ability to pay out purchased leave if not taken during the 12 months clarifies a dispute which occurred under the 2007 Agreement as to whether this leave could be paid out by the applicants. The agreed changes also provide equitable access to purchased leave for all support workers. Changes to the dispute settlement procedure prevent support workers from delaying the process. Changes to the dispute procedure related to redundancy situations, which required the involvement of the 'Australian Industrial Relations Commission' (now the Fair Work Commission), do not justify an increase in wages. The

applicants also argue that the RRR Agreement ceased to apply on 27 March 2011 and the same provisions in the RRR Agreement now apply.

17 The applicants have the capacity to pay the increases being sought by the respondent however the awarding of any increase must be based on fairness. Caution must also be shown by the Commission notwithstanding the applicants' capacity to pay. The Commission is also required to take into account economic considerations under s 26(1)(d) of the Act particularly given that there are limited productivity benefits for the applicants in the 2012 Agreement.

18 The applicants argue that the evidence of Dr Timothy Kerswell should not be accepted. Dr Kerswell has not demonstrated that he is qualified to give his evidence and in any event Dr Kerswell's argument that support workers are low paid and more susceptible to inflation than other employees has not been made out. Neither are his assertions about the government having capacity to pay the respondent's claim. The applicants argue that the personal situations of employees who gave evidence on behalf of the respondent cannot be taken into account as their circumstances are individual and provide little benefit when considering the awarding of an across the board wage increase to over 5000 employees.

Respondent

19 The respondent submits that a 13.5% (4.5%, 4.5% and 4.5%) wage increase over three years is fair. This claim is also within the parameters of the Wages Policy which provides that if improved efficiencies or work practice reform are demonstrated increases above CPI can be taken into account. This policy does not state that the quantum of previous increases are relevant and efficiencies can be both ways. Other public sector workers have received increases of up to 13.25% despite demonstrating far fewer efficiencies than those included in the 2012 Agreement.

20 The respondent argues that when determining this application the Commission should take into account the terms of s 26(1)(a), (b), (c), (d)(i), (ii), (iii), (v) and (vi) of the Act.

21 The respondent claims that the economic indicators relevant to this matter are those that applied on 5 December 2012 when an in principle agreement was reached between the parties and the delay in hearing this application should not impact on the quantum of the respondent's claim. Furthermore if current economic indicators are to be taken into account this is only one element to consider when dealing with the equity and fairness of awarding an increase.

22 The applicants cannot rely on retiring from the 2007 Agreement as a basis for not being bound by the clause relating to the use of fixed term employees. Correspondence between the parties prior to the finalisation of the 2012 Agreement demonstrates that the applicants used the terms of the 2007 Agreement as a basis for negotiation. Furthermore, any prospect of flow on if the respondent's claim is successful is irrelevant.

23 The respondent contests the applicants' claim that minimal if any efficiencies have been delivered to them under the 2012 Agreement. The respondent claims that the 2012 Agreement delivers numerous efficiencies and work value reforms to the applicants which justify the increased wages the respondent is seeking. These changes are in the following areas:

(a) fixed term contracts;

(b) excess leave;

(c) purchased leave;

(d) leading hand allowance;

(e) major changes in rosters;

(f) uniform method of ADO payment;

(g) information requests;

(h) efficiency/work value reforms; and

(i) parking.

When these changes to the 2007 Agreement are considered collectively the applicants have gained significant advantages and efficiencies.

24 A number of simplified clauses are included in the 2012 Agreement. The contracting out and privatisation of work clause gives the applicants greater flexibility to operate its services, there is a new process for the classification review process and changes to the underpayments clause provides benefits to the applicants. Evidentiary requirements to take personal leave have been changed to the applicants' benefit and the dispute settlement procedure relating to redundancy situations has been simplified.

25 The expanded use of fixed term contracts was raised by the applicants between May 2012 and November 2012 within the context of massive changes to the numbers of staff who will be required to undertake the work currently done by support workers under the 2012 Agreement. Changes to the fixed term contracts provision give a significant capacity for the applicants to increase the number of fixed term employees within the context of organisational change and the reduction in the numbers of public hospital beds. This change will significantly reduce the number of permanent employees the applicants employ. The respondent argues that the potential redundancy costs the applicants will no longer face given these changes would be higher than the differential in the cost of the parties' different positions. With an attrition rate of approximately 10%, the applicants no longer have to employ permanent employees in these positions which is a significant advantage to the applicants. Whilst there will be no forced redundancies under the 2012 Agreement there is no evidence that employees will resign to work outside of the public health system and lose their entitlements.

26 There is no advantage to employees arising out of the inclusion of a redeployment and redundancy clause in the 2012 Agreement as this is not a new entitlement. Changes to the rostering clause make it easier to effect a roster change and the new process has made it more streamlined thus giving greater efficiency to the applicants.

27 The respondent maintains that its claim should be granted given the increased living costs faced by support workers who are low income employees. The applicants' proposed increases do not match rising living costs and CPI movements do not equate

to the actual cost of living which has been rising rapidly in Western Australia in recent years. Recent increases to the cost of living for employees is documented by empirical data (see WACOSS Cost of Living Report 2012). The respondent argues that whether support workers are classified as low paid is not important. The important issue is that the employees' base rates are not high and the earnings of support workers relied upon by the applicants are inflated by the inclusion of the income of casual employees, overtime and shift penalties.

28 The evidence of some support workers highlights the difficult circumstances faced by them and the significant impact on them of increases to fixed costs. These case studies also show that each employee's disposable and discretionary income is low. The difficulties provided by the respondent's members are not isolated examples neither are they atypical of the type of support workers. Significant increases to utility costs have been foreshadowed which are not discretionary for low income earners such as support workers and parking costs for employees covered by the 2012 Agreement will increase significantly during the life of the 2012 Agreement. In large metropolitan hospitals these costs will increase by 51%. Employees using these facilities will therefore not receive any real wage increase during the term of the 2012 Agreement.

29 The Wages Policy is not a barrier to granting pay rises of 4.5%. The 4.5% annual increases are also justified when taking into account pay rises received by government employees covered by other agreements all of which were negotiated under the Wages Policy.

Agreement	**Wage Outcome**
Western Australia Police Industrial Agreement 2011	13.25%
Main Roads CSA Enterprise Agreement 2012	12.75%
WA Health – Health Services Union PACTS Industrial Agreement 2011	12%
Public Services and Government Officers General Agreement 2011	12%

Efficiencies provided to the applicants in the 2012 Agreement provide greater benefits than the above four agreements all of which provided equal or better wage outcomes than the applicants' offer. ANF members were granted a pay increase of 14% over three years with no loss of conditions and this offer was in excess of and in breach of the Wages Policy. The cost of this deal to the government is approximately $158 million and the Premier described the increase from 12.75% to 14% as being relatively small.

30 The respondent rejects the applicants' claim that Dr Kerswell's evidence should be disregarded and argues that he had no opportunity to respond to the applicants' claim that he was not an expert witness.

Evidence

Applicants

31 The applicants rely on the evidence of:

Mr Michael Court, Executive Director, Economic Business Unit, Department of Treasury; and

Mr Marshall Warner, Director, Health Industrial Relations Service, Department of Health.

Michael Court

32 Mr Court's unit provides advice to the Western Australian Government on economic and financial policy.

33 Western Australia is experiencing a challenging fiscal environment and ongoing economic uncertainty. The forecast operating surpluses are small, there are significant demands on services and infrastructure. The economy is growing strongly but this is expected to moderate. In this environment, any small increase in government expenditure may require reductions in other areas or increasing debt. With salary and superannuation costs representing 43% of the government's recurrent expenses in 2012/2013 the precedent of a 13.5% wage increase sought by the respondent would apply additional pressure on the State's finances through potential flow through to other public sector wage outcomes. Whilst operating surpluses are forecast in the Western Australian Government's 2013 Pre-election Financial Projections Statement, the recent volatility in the iron ore price, the persistently high Australian dollar, a declining share of the Goods and Services Tax grants and the demand for government services and infrastructure from strong population and economic growth are placing significant strains on the State's finances. This will also affect the ability of the government to deliver an operating surplus for 2013/2014 and beyond.

34 Under the Wages Policy increases in excess of the CPI are required to be supported by improved efficiencies and/or work practice reform and total wage increases are capped at an amount equivalent to WPI. A 13.5% increase is in excess of other recent public sector outcomes in the same period except the offer to registered nurses.

35 The CPI is the best available measure of cost of living increases. The downward revisions to projected CPI mean that the applicants' offer to support workers of 12% over three years now exceeds projected CPI by a total of 3.75%.

	2012-13	2013-14	2014-15
Government Offer	4.50%	3.75%	3.75%
Latest CPI Forecast	2.75%	2.75%	2.75%
Latest WPI Forecast	4.50%	4.25%	4.25%
Union Claim	4.50%	4.50%	4.50%

36 Public sector wage growth in Western Australia has been the highest of all states over the past year.

Public Sector Wage Price Index Growth over Year to December 2012							
NSW	Vic	Qld	WA	SA	Tas	NT	ACT
3.1%	3.3%	2.6%	**4.4%**	2.5%	3.1%	3.7%	5.2%

37 Across the four year financial forecast period, general government revenue growth is expected to average 4.8% per annum, well below the long-run average growth rate of 8.5% recorded over the last decade. In 2012/2013, recurrent government sector spending is expected to be $25.2 billion. Just over half of this is in the areas of health and education. Since September 2008, and in response to the global financial crisis, the government has implemented a range of savings measures to ensure the sustainability of the State's finances. Over the period 2008/2009 to 2015/2016 these measures are expected to deliver savings worth a total of $8.7 billion. One savings initiative involved lowering the Full Time Equivalent (FTE) ceiling by around 1,200 FTE to reflect actual FTE levels across the general government sector and restrict potential growth. This would restrict potential salary expenditure that would ordinarily have occurred in filling the vacant positions. Given a fixed budget, if FTE costs increase by more than budgeted, then FTE ceilings may be further reduced to offset increased costs.

38 The world economy remains fragile which is a risk for Western Australia.

39 The Department of Health is already at risk of not meeting its approved budget parameters and it has a limited capacity to fund increases above the government's offer, particularly in light of the recent commitment to registered nurses. There is also the possible impact of any wage increase above 12% on the State's finances by creating a precedent for other public sector wage outcomes.

40 Mr Court claims that Dr Kerswell's use of Average Weekly Earnings to suggest that support workers are different to the 'average person' is misleading. Dr Kerswell incorrectly argues that support workers are different to the 'average person' and 'vulnerable to inflation in a way that the average person is not' partially based on support workers being at the lower end of the wages spectrum. In 2012 the median support worker, if working full time, was paid $66,126 per annum ($1,271 per week) including additional pay for working shifts and overtime. Support workers' total median income in 2012 places them in the middle, rather than the lower end, of the wage spectrum. The total weekly median earnings of support workers are higher than half of Australia's full time workers' earnings. In 2012 the average wage for a support worker if working full time was $64,189 per annum ($1,234 per week) including additional pay for working shifts and overtime.

41 Although households with different income levels have different expenditure patterns, lower income households spend a greater proportion of income on such items as housing and food than higher income households, these different expenditure patterns are only relevant if the price of items purchased by different types of households change at a different rate to the overall CPI. The government's 12% pay offer over three years will more than compensate support workers for current and projected inflation, including any increases to the price of food and housing.

Marshall Warner

42 In the last decade support workers have gained significant improvements to their pay and conditions of employment. The total pay rises given to support workers in the 10 years since 1 January 2003, including the 4.5% increase effective from 5 December 2012, ranges from 48% to 58% depending on the classification. The classifications which apply to the overwhelming majority of support worker (91%), levels 1/2 and level 3/4 have received pay rises of 56% to 58%. A number of benefits to support workers were included in all agreements negotiated with the respondent between 2002 and 2007. Pay rises provided for support workers in industrial agreements since 1 January 2003 have considerably exceeded CPI which increased 33% in the 10 years since 1 January 2003.

43 Changes to support workers' terms and conditions of employment under the 2012 Agreement include:

(a) increases to wages and allowances;

(b) new entitlements for support workers;

(c) changes which benefit both support workers and the applicants;

(d) importation of certain standard government conditions; and

(e) other miscellaneous amendments.

44 The reduction in the CPI since the registration of the 2012 Agreement means that support workers have had an additional increase beyond maintaining the real value of their wages of 1.75% over the term of the 2012 Agreement. The following tables show the rates needed to maintain real wages for third year levels 1/2 and levels 3/4 using the CPI for 2012/2014 as forecast at the time agreement between the parties for the 2012 Agreement was reached (Table 1) and the current forecast (Table 2):

Table 1 – CPI December 2012

Classification	**1 August 2011**	**5 December 2012**	**1 August 2013**	**1 August 2014**
		3.5%	**3.25%**	**3.25%**
Level 1/2 3rd year	$822.86	$851.66	$879.34	$907.92
Level 3/4 3rd year	$848.68	$878.38	$906.93	$936.41

Table 2 – CPI February 2013

Classification	1 August 2011	5 December 2012	1 August 2013	1 August 2014
		2.75%	**2.75%**	**2.75%**
Level 1/2 3rd year	$822.86	$845.49	$868.74	$892.63
Level 3/4 3rd year	$848.68	$872.02	$896.00	$920.64

45 The total amount paid in salaries and allowances to support workers is significantly higher than their annualised base wage. The table below shows for each classification of support worker the number of FTE in that classification, the percentage of the total FTE population in that classification, the annualised wages for that classification immediately prior to the 5 December 2012 pay rise of 4.5% and the average total income per FTE in 2012.

Level	(a) Monthly FTE (Jan 2012 – Dec 2012) *	(b) % of Total FTE Population	(c) Annualised Rate 3rd Year 01/08/2011	(d) Average Total Income per FTE (excluding Super)
Level 1/2	1,285	37.6%	$42,926	$62,584
Level 3/4	1,796	52.5%	$44,273	$66,126
Level 5	95	2.8%	$44,105	$61,951
Level 6	126	3.7%	$44,193	$54,379
Level 7	17	0.5%	$44,855	$58,341
Level 8	6	0.2%	$45,954	$61,207
Level 9	15	0.4%	$46,997	$64,666
Level 10	58	1.7%	$47,359	$66,682
Level 11	19	0.6%	$48,911	$64,080
Level 12	1	0.0%	$50,015	$64,778
Level 13	2	0.1%	$51,749	$64,554

* excluding sterilisation technicians because of their unique classification progression.

46 New entitlements in the 2012 Agreement include the following:

(a) commitment to bargaining;

(b) redeployment and redundancy;

(c) new foul linen allowance;

(d) new higher duties allowance;

(e) international sporting leave;

(f) improvement to long service leave;

(g) improved parental leave entitlements and new grandparental leave entitlement; and

(h) witness and jury leave including casual employees no longer being excluded from receiving leave with pay associated with appearing as a witness or serving on a jury.

47 Changes have been introduced in the 2012 Agreement which are of benefit to both support workers and the applicants. The no further claims clause has been clarified by both parties and changes to Clause 11. - Contract of Service have inserted new entitlements and simplified provisions. Changes to the use of fixed term contracts benefits both employees and the applicants. The 2007 Agreement limited the use of fixed term contracts by the applicants to certain specified situations. With the reorganisation of metropolitan health services no permanent employees, including support workers, presently employed will lose their job as a result of these changes. There are more support workers than will be required when Fiona Stanley Hospital and Midland Health Campus initially open. As a result, the applicants need to manage the number of permanent support workers and ensure that support workers who want to stay employed in the public sector, rather than voluntarily resign and move to Fiona Stanley Hospital or Midland Health Campus, are able to be placed in jobs that will not be abolished when these hospitals open. All permanent job vacancies arising in the North and South Metropolitan Health Services and the Child and Adolescent Health Service are quarantined and will be offered to permanent employees who may be affected by the opening of Fiona Stanley Hospital and Midland Health Campus and closure or recommissioning of the other facilities. The applicants are seeking to ensure that the vacancies which exist are not filled by new permanent employees thereby depriving existing employees of the option of filling the vacant positions available. The turnover rate for support workers including resignations, retirements and dismissal is around 10% per year, so a significant number of permanent vacancies arise each year. The applicants can now quarantine permanent vacancies for the benefit of existing support workers and voluntary severance would not be offered to any support workers affected by the changes.

48 Changes to a uniform method of paying ADOs is administratively convenient and does not deliver savings to the applicants. These changes however provide benefits to support workers. Changes to annual leave provisions contain a new requirement for the applicants to respond within fourteen days to annual leave applications which is to the advantage of support workers and the new capacity to require support workers to clear excess leave both benefits support workers and the applicants.

49 The 2012 Agreement contains a number of provisions which standardise support worker entitlements with the public sector generally. These include provisions relating to the recovery of overpayments, personal leave, annual leave travel concessions and donor leave.

50 The 2012 Agreement contains a number of miscellaneous amendments which clarify the operation of the 2012 Agreement, removes clauses that no longer serve a purpose and addresses changes that have occurred over time. These amendments relate to state wage case increases, returning outsourced functions, hours of work relating to rostering arrangements, classifications and wage rates, salary packaging, uniforms for casuals and part time employees, purchased leave and right of entry provisions.

Respondent

51 The respondent relies on the evidence of:

Ms Elaine Madgen, Food Service Attendant;

Mr Mark Hayward, Patient Care Assistant;

Ms Brenda Regan, Cleaner;

Ms Carlene Dawson, Patient Services Assistant;

Mr Jose Ombrasine, Senior Orderly;

Mr Chris Twomey, Director of Social Policy, WACOSS;

Ms Carolyn Smith, Acting Secretary, United Voice WA; and

Dr Timothy Kerswell, Research Economist, United Voice National Office.

52 Support workers gave evidence about the financial impact of living on their current wages and the difficulties they face paying for food, rent, utility costs and costs associated with raising children, transport and parking. Evidence was also given about problems associated with increases to the cost of staff parking.

Chris Twomey

53 Mr Twomey relies on the WACOSS Cost of Living Report 2012 which reviewed the effect of increases on the costs of essential household expenditure on low income families in recent years, including housing and utility cost rises. This report claims that CPI is an inaccurate measure of true living costs of low income families in Western Australia.

Carolyn Smith

54 Ms Smith claims that the applicants gained a number of efficiencies and work value reforms in the 2012 Agreement, as well as direct financial benefits. The greatest benefit to the applicants flows from the change to the use of fixed term contracts. Other benefits arise out of changes to leave arrangements, access to payment of the leading hand allowance, roster changes, information requests and parking. Ms Smith claims that other public sector agreements negotiated under the Wages Policy have not produced efficiencies of the same magnitude as the 2012 Agreement. Furthermore the applicants granted a 14% wage increase to registered nurses with no loss of conditions.

Timothy Kerswell

55 Dr Kerswell provides advice on economic policy to the respondent's national office. Dr Kerswell has a PhD in Political Economy from Queensland University of Technology.

56 In November 2012 the average full time earning in Australia was $1,396 and in Western Australia it was $1,590 per week. This demonstrates that support workers even at the figure of $66,126 provided by the government ($1,271 per week) earn lower wages than both the national and state averages. Support workers paid at the base annual rate of pay (approximately $44,000) earn considerably less than the national and state averages.

57 The lower a worker sits on the pay scale, the more vulnerable they are to changes in the price of essential goods due to the inelastic nature of demand for such goods. Elasticity measures the relationship between a good and its price based on consumer demand, consumer income, and its available supply. The basic requirements of life such as food and shelter have an inelastic demand. Consumers will not reduce their food purchases if food prices rise, although there may be shifts in the types of food they purchase. They will however reduce the purchases of goods that have elastic demand. An employee can cut back on consumption of beer, cinema going, restaurant eating without any real consequences, but the same is not possible for costs related to staple food and shelter. Therefore workers who earn less than the national and the Western Australian average, including support workers, are vulnerable to inflation in a way that the average person is not. The reason for this is that the lower one sits on the income scale, the less discretionary income one is likely to have which could be used to absorb increases to staple costs. The Western Australian economy forecast figures quoted by the applicants suggests that despite budgetary pressures the Western Australian Government is, and is projected to be, in an operating surplus with the capacity to pay an increase up to and including a 13.5% increase or 4.5% per annum for each subsequent year of the 2012 Agreement. While this would make a very small difference to the Western Australian Government's budget, the difference for support workers would be significant.

Consideration

58 Section 42G of the Act provides as follows:

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

59 An arbitrated outcome pursuant to an application under s 42G of the Act gives the Commission a broad discretion to settle the dispute between the parties and to reach conclusions based on the evidence before the Commission. In my opinion when making a decision under s 42G of the Act the Commission can and should also consider the objects of the Act as set out in s 6, the provisions of s 26 and any other relevant matter.

60 The following objects contained in s 6 of the Act are in my opinion relevant:

> (ae) to ensure all agreements registered under this Act provide for fair terms and conditions of employment;
>
> (af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
>
> (ca) to provide a system of fair wages and conditions of employment;

The sections of s 26 of the Act to apply in this instance in my view are as follows:

> **26. Commission to act according to equity and good conscience**
>
> (1) In the exercise of its jurisdiction under this Act the Commission —
>
> (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms;
>
> …
>
> (c) shall 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; and
>
> (d) shall take into consideration to the extent that it is relevant —
>
> (i) the state of the national economy;
>
> (ii) the state of the economy of Western Australia;
>
> (iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;
>
> (iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;
>
> (v) any changes in productivity that have occurred or are likely to occur;
>
> (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
>
> (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.

61 The applicants claim that the terms of the 2007 Agreement no longer applied to support workers after they retired from the agreement on 27 October 2012. The only terms of the 2007 Agreement which the applicants decided to apply to support workers after this date was the payment to employees of their existing wages and allowances. They also honoured employees' leave entitlements. The benefits or changes to the 2007 Agreement included in the 2012 Agreement which the respondent relies on as being concessions made to the applicants are therefore not gains to the applicants. In particular the applicants claim that changes to the use of fixed term contract employees is now a new restriction on the right to manage its workforce.

62 There is no dispute that the applicants retired from the 2007 Agreement on 27 October 2012 prior to the terms of the 2012 Agreement being agreed between the parties. Therefore none of the terms and conditions of the 2007 Agreement applied to support workers from that date except the terms and conditions contained in the award underpinning the 2007 Agreement. Even though the applicants retired from the 2007 Agreement on 27 October 2012 I find that the negotiations between the parties which resulted in the parties agreeing on the terms of the 2012 Agreement did not occur in a vacuum and I find that all of the terms of the 2007 Agreement formed the basis of or benchmark for the negotiations between the parties when reaching agreement on the terms of the 2012 Agreement. In support of this conclusion I note that all of the clauses contained in the 2012 Agreement have the same headings as the headings in the 2007 Agreement and each clause in the 2012 Agreement is in the same or very similar terms to the clauses in the 2007 Agreement. The only clauses where substantial changes have been made are in clauses 32, 39 and 19.9. Clause 52. – Disputes Relating to Redundancy and Redundancy Type Situations is the only clause in the 2007 Agreement excluded from the 2012 Agreement. A number of clauses included in the 2012 Agreement have only been changed to reflect standard public sector conditions. It is within this context that I do not regard the changes to the provision relating to the use of fixed term contracts, which were agreed between the parties and included in the 2012 Agreement after discussions between the parties pre and post 27 October 2012, to be a new restriction on the applicants' right to manage its employees due to the applicants' retirement from the 2007 Agreement on 27 October 2012.

63 I find that the clause relating to redundancy and redeployment in the 2012 Agreement does not contain new benefits for support workers. The applicants claim that only the terms of the *Public Sector Management (Redeployment and Redundancy) Regulations 1994* applied to support workers when the RRR Agreement referred to in the 2007 Agreement ceased to apply from 27 March 2011. I have already found that the parties used the terms of the 2007 Agreement as a benchmark for discussions and formed the basis for their negotiations and reaching agreement on the terms of the 2012 Agreement. There was no evidence before the Commission that the applicants did not apply all of the terms of the RRR Agreement to support workers after 27 March 2011 or that alternative redundancy and redeployment terms and conditions applied to support workers from that date. I therefore find that the RRR Agreement redeployment and redundancy provisions now contained in the 2012 Agreement are not new benefits to support workers.

64 New provisions are included in the 2012 Agreement relating to parental and grandparent leave, witness, jury and personal leave, revised reclassification processes, recovery of overpayments, donor leave and annual leave travel concessions and the Commission understands that these provisions reflect standard public sector entitlements. In my view this standardisation creates efficiencies for both the applicants and support workers due to these terms and conditions being consistent with employees and employers in the public sector. Additionally, I find that changes included in the 2012 Agreement relating to a uniform method of payment for ADOs is of benefit to all parties.

65 I find that a number of new provisions included in the 2012 Agreement that the applicants claim are of benefit to support workers are minor changes and will have little if any direct benefit to most support workers. Changes to Clause 9. - Commitment to Bargaining reinforces the terms of the 2007 Agreement. The new foul linen allowance (clause 24.9), changes to the higher duties allowance (clause 31), the inclusion of international sporting events leave (clause 32) and changes to taking long service leave (clauses 38 and 43.6) only apply to a limited number of employees.

66 I find that the 2012 Agreement contains a number of new initiatives and changes which deliver substantial efficiencies, flexibilities, productivity and savings to the applicants.

Fixed term contracts

67 I find that changes included in the 2012 Agreement to allow the applicants to employ a number of new employees on fixed term contracts instead of employing them on a permanent, ongoing basis will deliver significant savings and efficiencies to the applicants when taking into account that there is an annual turnover of approximately 10% of support workers employed by the applicants. I find that savings will be delivered to the applicants as these fixed term contract employees will not be subject to the 2012 Agreement's redeployment and redundancy provisions and payments. I also find that this provision gives the applicants greater flexibility to manage and deploy its temporary workforce in order to deal with a significant number of bed closures in the Western Australian public health system. The applicants argue that having a greater number of employees on fixed term contracts in what would normally be permanent positions is of benefit to support workers as more permanent positions will be available to them to be redeployed into when bed numbers are reduced. This may be the case, however, the opportunity for support workers to retain permanent employment with the applicants in their current roles will be significantly reduced in any event given the future loss of hundreds of beds and therefore jobs within the Western Australian public sector health system given the impending opening of Fiona Stanley Hospital and the Midland Health Campus. The use of fixed term contract employees therefore will only assist alternative job opportunities for support workers who are permanent employees in a small way.

Clearing excess leave

68 The 2012 Agreement provides the applicants with a revised mechanism to require employees to clear excessive leave balances. I find that this will result in cost savings to the applicants as employees will be required to take leave closer to when it is due to be taken rather than taking leave entitlements at a higher rate of pay in the future.

Paying out of purchased leave

69 The applicants have gained a small financial advantage by limiting the application of purchased leave to blocks of 12 months with no accrual. Any untaken purchased leave must also be cleared within a 12 month timeframe or be paid out at the end of the accrual year. I find that this is a financial advantage to the applicants as leave cannot be accrued and then paid out at a higher rate of pay in the future. These concessions also limit disputation about purchased leave entitlements, which is an efficiency delivered to the applicants.

Roster changes

70 The streamlining of the way in which employee rosters can be changed by the applicants provides greater flexibility for the applicants to implement roster changes. This flexibility and streamlining of the process of roster changes will in my view result in greater efficiencies to the applicants and thereby cost savings.

Information requests concerning the use of fixed term contracts, casuals and agency staff

71 I find that changes included in the 2012 Agreement relating to streamlining and limiting the provision of information to the respondent will result in a more efficient process when dealing with information requests and this will result in time and cost savings to the applicants.

Removal of restrictions on the use of agency staff

72 Changes providing for the greater use of agency staff by the applicants will result in efficiencies being delivered to the applicants as they will have greater discretion to use staff in a more flexible manner thereby saving costs.

73 The applicants claim that the average total earnings of support workers is significantly higher than their annual base salary, based on FTE earnings. Support workers are therefore in the mid-range of wage earners and are not low paid employees and this is a relevant factor to consider when determining the quantum of any wage increase to be awarded to support workers (see paragraph 40).

74 After the hearing the applicants provided tables containing the number of support workers employed in each classification in 2012/2013. The applicants also supplied the hours worked by support workers and the number of employees undertaking weekend shift work in one indicative pay period. Table 1 confirms that approximately 91% of support workers, excluding casual employees and sterilisation technicians, were employed at levels 1/2 and 3/4 in the 2012/2013 financial year. The maximum annual base rate of pay of approximately two thirds of the 91% of support workers classified at level 1/2 third year is $44,714.28 ($859.89 x 52) and level 3/4 third year is $46,117.24 ($886.87 x 52). The remaining one-third of employees earn annual base rates of pay lower than these amounts. Table 2 confirms that approximately half of all support workers work less than full time hours and therefore earn less than the annual base rates contained in the 2012 Agreement. Some support workers work shifts and weekend work thereby increasing their annual income, however the figures provided by the applicants do not specify the number of employees who worked these shifts, the number of shifts worked by each employee and whether the employees working these shifts are full time or part time employees. This information can therefore not be taken into account when reviewing the earnings of support workers.

Table 1

Support Workers 2012/13 Financial Year

(excludes casuals and Sterilisation Technicians)

Classification	Service Increment	Head Count Service Increment	Head Count Classification	Annual Base Rate 5/12/2013 $
Level 1/2	Level 1/2 1st year	485	1,516	43,173.00
	Level 1/2 2nd year	109		43,656.60
	Level 1/2 3rd year	922		44,714.28
Level 3/4	Level 3/4 1st year	501	1,826	44,031.52
	Level 3/4 2nd year	156		45,131.84
	Level 3/4 3rd year	1,169		46,117.24
Level 5	Level 5 1st year	11	53	45,026.80
	Level 5 2nd year	4		45,359.08
	Level 5 3rd year	38		45,942.52
Level 6	Level 6 1st year	52	171	45,266.52
	Level 6 2nd year	14		45,511.96
	Level 6 3rd year	105		46,034.04
Level 7	Level 7 1st year	4	23	45,810.44
	Level 7 2nd year			46,148.96
	Level 7 3rd year	19		46,723.56
Level 8	Level 8 1st year	2	6	46,776.60
	Level 8 2nd year	1		47,205.60
	Level 8 3rd year	3		47,868.08

Table 1—*continued*

Support Workers 2012/13 Financial Year (excludes casuals and Sterilisation Technicians)				
Classification	Service Increment	Head Count Service Increment	Head Count Classification	Annual Base Rate 5/12/2013 $
Level 9	Level 9 1st year	2	15	47,846.24
	Level 9 2nd year	2		48,266.92
	Level 9 3rd year	11		48,955.40
Level 10	Level 10 1st year	5	46	48,464.52
	Level 10 2nd year	2		48,776.00
	Level 10 3rd year	39		49,331.88
Level 11	Level 11 1st year		18	49,770.24
	Level 11 2nd year	1		50,220.56
	Level 11 3rd year	17		50,948.56
Level 12	Level 12 1st year		1	50,877.32
	Level 12 2nd year	1		51,356.24
	Level 12 3rd year			52,098.28
Level 13	Level 13 1st year		1	52,612.56
	Level 13 2nd year			53,133.60
	Level 13 3rd year	1		53,905.28
	Total	3,676	3,676	

Table 2

DoH Table One Pay Data for Pay Period ending 15/07/2012 (excluding sterilisation technicians)		
Total Population excluding casuals	**Headcount**	**%**
Total Full Time	1878	48%
Total Part Time	2024	52%
Total	3902	100%
Part Time Population Breakdown by Hours	**Headcount**	**%**
<10	23	1%
10 to <20	63	3%
20 to <30	89	4%
30 to <40	263	13%
40 to <50	359	18%
50 to <60	333	16%
60 to <76	894	44%
Total Part Time	2024	100%

75 As stated, approximately 91% of support workers are employed at classification levels 1/2 and 3/4, approximately 52% of all support workers (at least 40% of employees in levels 1/2 and 3/4) work less than full time hours and 91% of support workers are paid a base rate of pay of no greater than $46,117.24. As at least 40% of support workers at levels 1/2 and 3/4 work less than full time hours, a significant number of support workers employed at these levels therefore earn less than the annual rates of pay for these levels (see Tables 1 and 2). Average full time earnings of employees in Western Australia in November 2012 was $1,590 per week or $82,680 per annum (see witness statement of Dr Kerswell, Exhibit R8). As at 1 July 2013, Western Australia's annual minimum rate of pay is $33,586.80. As the rates of pay of 91% of support workers are at levels 1/2 and 3/4 and as at least 40% of these employees earn less than the full time rates of pay for these classifications, these employees earn incomes equal to or slightly higher than the Western Australian minimum rate of pay. In the circumstances I find that most support workers can be considered to be low paid employees.

76 I find that the impact of the increased costs of parking, utility costs and charges, and basic costs of living is greater on low paid employees, such as support workers, than those earning higher incomes, given the limited discretionary income of low paid employees. I find that this is a relevant consideration in this instance given the substantial utility as well as fixed charge increases such as parking costs which will apply to many support workers during the life of the 2012 Agreement.

77 The applicants maintain that the Commission should take into account the numerous benefits and the total of the wage increases given to support workers since 2003 which have exceeded CPI by a significant amount. I find that the Wages Policy does not require that previous benefits given to employees should be taken into account when deciding on a wage increase. Even though support workers have received wage increases in the past greater than CPI I have found that notwithstanding this most support workers are low paid employees. I also find that CPI movements and rates are only one factor to take into account when deciding on the quantum of fair, equitable and reasonable pay rates which should be awarded to support workers.

78 In my view it is unhelpful to take into account wage outcomes of other public sector employees under the Wages Policy as each negotiation was discrete and unique and turns on its own facts.

79 I take into account the objects of the Act I have already identified when determining fair and reasonable wage increases to apply to support workers and I apply the relevant s 26 considerations already specified to my conclusions when determining the quantum of the wage increases which should be granted to support workers. I also take into account the efficiencies, productivity and cost savings delivered to the applicants both directly and indirectly, as a result of the inclusion of new provisions in the 2012 Agreement when deciding on any increase. Taking into account the above considerations and when balancing equity and fairness and a just outcome to apply to employees covered by the 2012 Agreement and the interests of both parties I find that it is appropriate that the two wage increases to be included in the 2012 Agreement for 1 August 2013 and 1 August 2014 be 4.25%.

80 The applicants argue that if the respondent's claim is successful this could put a strain on the government's economic outlook and create a precedent for other public sector employees when negotiating wage increases under the Wages Policy. The applicants also argue that SGC increases should be taken into account when determining any wage increase to apply to support workers. I have considered the overall economic impact on the applicants, the Western Australian Government and the Western Australian community of granting the above increase in wages to support workers as well as the impact of the minimal SGC increases to apply to support workers during the life of the 2012 Agreement. I have no reason to believe that the cost of the increases I have determined to be appropriate is not manageable or unreasonable in all of the circumstances or that the cost will cause undue hardship to the Western Australian Government or will flow on to employees in other public sector departments.

81 The parties are to confer within seven days of the date of these reasons for decision on a draft minute of proposed order to amend the terms of the 2012 Agreement to reflect the decision reached in relation to the wage increases to apply from 1 August 2013 and 1 August 2014.

2013 WAIRC 00811

WA HEALTH - UNITED VOICE - HOSPITAL SUPPORT WORKERS INDUSTRIAL AGREEMENT 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS: (A) THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD, THE PEEL HEALTH SERVICES BOARD, THE WA COUNTRY HEALTH SERVICE AND (B) THE WESTERN AUSTRALIAN ALCOHOL AND DRUG AUTHORITY
	APPLICANTS
	-v-
	UNITED VOICE, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	MONDAY, 23 SEPTEMBER 2013
FILE NO/S	AG 51 OF 2012
CITATION NO.	2013 WAIRC 00811

Result	Order issued
Representation	
Applicants	Mr H Dixon (Senior Counsel)
Respondent	Mr M Ritter (Senior Counsel)

Order

HAVING heard Mr H Dixon (of Senior Counsel) on behalf of the applicants and Mr M Ritter (of Senior Counsel) on behalf of the respondent, the Commission, pursuant to the requirements under s 42G of the *Industrial Relations Act 1979* hereby orders:

1. THAT the *WA Health – United Voice – Support Workers Industrial Agreement 2012* provide for salary increases of 4.25% from 1 August 2013 and 4.25% from 1 August 2014.

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

2. THAT to give effect to Order 1 above the *WA Health – United Voice – Support Workers Industrial Agreement 2012* be amended in the terms specified in the following schedule.

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

SCHEDULE

1. Clause 19. – Classification and Wage Rates:

A: Delete clause 19.1 of this clause and insert the following in lieu thereof:

19.1 Employees covered by this Agreement will be paid the weekly base rate of pay set out below:

Column 1	Column 2	Column 3	Column 4	Column 5
Classification	31 July 2012	4.5% 5 December 2012	4.25% 1 August 2013	4.25% 1 August 2014
Level 1/2 1st year	$794.50	$830.25	$865.54	$902.32
Level 1/2 2nd year	$803.40	$839.55	$875.23	$912.43
Level 1/2 3rd year	$822.86	$859.89	$896.44	$934.53
Level 3/4 1st year	$810.30	$846.76	$882.75	$920.26
Level 3/4 2nd year	$830.55	$867.92	$904.81	$943.26
Level 3/4 3rd year	$848.68	$886.87	$924.56	$963.86
Level 5 1st year	$828.61	$865.90	$902.70	$941.07
Level 5 2nd year	$834.73	$872.29	$909.36	$948.01
Level 5 3rd year	$845.46	$883.51	$921.06	$960.20
Level 6 1st year	$833.02	$870.51	$907.51	$946.08
Level 6 2nd year	$837.54	$875.23	$912.43	$951.21
Level 6 3rd year	$847.15	$885.27	$922.89	$962.12
Level 7 1st year	$843.03	$880.97	$918.41	$957.44
Level 7 2nd year	$849.26	$887.48	$925.20	$964.52
Level 7 3rd year	$859.84	$898.53	$936.72	$976.53
Level 8 1st year	$860.81	$899.55	$937.78	$977.64
Level 8 2nd year	$868.71	$907.80	$946.38	$986.60
Level 8 3rd year	$880.90	$920.54	$959.66	$1,000.45
Level 9 1st year	$880.50	$920.12	$959.23	$999.99
Level 9 2nd year	$888.24	$928.21	$967.66	$1,008.78
Level 9 3rd year	$900.91	$941.45	$981.46	$1,023.17
Level 10 1st year	$891.88	$932.01	$971.62	$1,012.91
Level 10 2nd year	$897.61	$938.00	$977.87	$1,019.42
Level 10 3rd year	$907.84	$948.69	$989.01	$1,031.04
Level 11 1st year	$915.90	$957.12	$997.80	$1,040.20
Level 11 2nd year	$924.19	$965.78	$1,006.83	$1,049.62
Level 11 3rd year	$937.59	$979.78	$1,021.42	$1,064.83
Level 12 1st year	$936.28	$978.41	$1,019.99	$1,063.34
Level 12 2nd year	$945.09	$987.62	$1,029.59	$1,073.35
Level 12 3rd year	$958.75	$1,001.89	$1,044.47	$1,088.86
Level 13 1st year	$968.21	$1,011.78	$1,054.78	$1,099.61
Level 13 2nd year	$977.80	$1,021.80	$1,065.23	$1,110.50
Level 13 3rd year	$992.00	$1,036.64	$1,080.70	$1,126.63

B: Delete clause 19.3(e) of this clause and insert the following in lieu thereof:

(e) The weekly rate of pay of a Trainee Sterilisation Technician is 87% of the rate of pay of a Sterilisation Technician (87% of Level 11, 3rd Service Increment).

Effective Date	31 July 2012	5 December 2012	1 August 2013	1 August 2014
Rate	$815.70	$852.41	$888.64	$926.40

C: Delete clause 19.3(i) of this clause and insert the following in lieu thereof:

(i) An employee who was classified as a Sterilisation Technician Grade 1 under Western Australian Government Health Services (ALHMWU) Agreement 2002 will be classified as a Sterilisation Technician provided that the rate of pay of such an employee will be 95% of the rate of pay of a Sterilisation Technician (95% of Level 11, 3rd Service Increment).

Effective Date	31 July 2012	5 December 2012	1 August 2013	1 August 2014
Rate	$890.71	$930.79	$970.35	$1,011.59

2. Clause 23. – Hospital Allowance: Delete clause 23.2 of this clause and insert the following in lieu thereof:

23.2 The Hospital Allowance component of the wage rates specified in Clause 19 - Classification and Wage Rates are:

Effective Date	Level 1/2	Level 3/4
Weekly Wage 5 December 2012	$23.90	$32.01
Weekly Wage 1 August 2013	$24.92	$33.37
Weekly Wage 1 August 2014	$25.97	$34.79

3. Clause 24. – Miscellaneous Allowances:

A: Delete clauses 24.1 to 24.4 inclusive of this clause and insert the following in lieu thereof:

24.1 Overtime - Meal Allowance

Where an employee is required to work overtime and such overtime is worked for a period of at least two hours in excess of the required daily hours of work, the employee will be provided with a meal free of cost, or will be paid the following sum as meal money:

Effective Date	FPOA 5 December 2012
Rate	$11.36

24.2 Orderlies employed on boiler firing duties:

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Rate per day	$2.62	$2.73	$2.85

24.3 A storeperson required to operate a ride-on power operated tow motor, a ride-on power operated pallet truck or a walk-beside power operated high lift stacker in the performance of his/her duties will be paid the following allowance per hour whilst so engaged:

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Rate per hour	$0.55	$0.57	$0.60

24.4 A storeperson required to operate a ride - on power operated fork lift, high lift stacker or high lift stock picker or a power operated overhead traversing hoist in the performance of his/her duties will be paid the following allowance per hour whilst so engaged:

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Rate per hour	$0.72	$0.75	$0.78

B: Delete clause 24.5(c) of this clause and insert the following in lieu thereof:

(c) Prescribed allowance

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Not less than 3 and not more than 10 other employees - rate per hour	$0.68	$0.71	$0.74
More than 10 and not more than 20 other employees - rate per hour	$1.02	$1.06	$1.11
More than 20 other employees - rate per hour	$1.36	$1.42	$1.48

C: Delete clause 24.6(c)(ii) of this clause and insert the following in lieu thereof:

(ii) in lieu of such free laundering the employer may pay the employee the following allowance per week to partly cover the cost of laundering:

Effective Date	FPOA 5 December 2012
Rate per week	$3.91

D: Delete clause 24.7(a)(v) of this clause and insert the following in lieu thereof:

(v) assisting police in removing clothing or taking photographs,

the following allowance will be paid for each occasion of service:

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Rate per occasion	$27.95	$29.14	$30.38

E: Delete clause 24.8 of this clause and insert the following in lieu thereof:

24.8 Ambulance Allowance

All Purpose Orderlies engaged at Derby, Fitzroy Crossing and Halls Creek who are regularly rostered to undertake ambulance duties will be paid the following all purpose allowance per week whilst so engaged:

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Rate per week	$47.84	$49.87	$51.99

F: Delete clause 24.9(b) of this clause and insert the following in lieu thereof:

(b) Prescribed rate:

Effective Date	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Hourly Rate	$1.22	$1.27	$1.33
Daily Rate	$3.76	$3.92	$4.09

4. Clause 25. – Shift, Weekend and Public Holidays Payment and Allowances: Delete this clause and insert the following in lieu thereof:

25.1 Shiftwork Payment

In addition to the ordinary rate of wage prescribed by this Agreement and where consistent with the provisions contained in Clause 17 - Shiftwork the following will apply:

Loading per hour or pro rata for part thereof paid for ordinary time worked on:	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Afternoon or night shift	$2.79	$2.91	$3.03
Permanent afternoon or permanent night shift	$4.18	$4.36	$4.54

25.2 Weekend Work Payment

In addition to the ordinary rate of wage prescribed by this Agreement and where consistent with the provisions contained in Clause 18 - Weekend Work the following will apply:

Loading per hour or pro rata for part thereof paid for ordinary time worked between:	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
Midnight on Friday and midnight on Saturday	$11.16	$11.63	$12.13
Midnight on Saturday and midnight on Sunday	$22.37	$23.32	$24.31

25.3 Public Holiday Payment

(a) In addition to the ordinary rate of wage prescribed by this Agreement and where consistent with the provisions contained in Clause 34 - Public Holidays the following will apply:

Loading payable per hour or pro rata for ordinary time worked on:	4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
A day observed as a public holiday	$34.16	$35.61	$37.13
A day observed as a public holiday if employee elects to observe the holiday on another day mutually acceptable to the employer and employee	$11.16	$11.63	$12.13

b) The additional payments for public holidays specified above, are in substitution for any additional payments for work done on afternoon and/or night shift.

5. Clause 30. – Call Allowance (MPS Sleep Shift): Delete clause 30.8 of this clause and insert the following in lieu thereof:

30.8 The hourly on call rate is:

4.5% FPOA 5 December 2012	4.25% FPOA 1 August 2013	4.25% FPOA 1 August 2014
$7.07	$7.37	$7.68

AWARDS/AGREEMENTS AND ORDERS—Interpretation of—

2013 WAIRC 00224

INTERPRETATION OF CLAUSES 14.5 AND 44.3 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) ENTERPRISE ORDER 2011 (2011 WAIRC 00218)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 15 APRIL 2013
FILE NO.	APPL 13 OF 2013
CITATION NO.	2013 WAIRC 00224

Result	Directions issed
Representation	
Applicant	Mr K Singh
Respondent	Mr R Farrell

Direction

HAVING heard Mr K Singh on behalf of the applicant and Mr R Farrell 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 upon the applicant a notice of answer by 3 May 2013.

(2) THAT the parties file and serve an outline of written submissions by no later than three days prior to the date of hearing.

(3) THAT the parties confer in relation to an agreed statement of facts and any statement agreed be filed no later than three days prior to the date of hearing.

(4) THAT the application be listed for hearing on a date to be fixed.

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

2013 WAIRC 00796

INTERPRETATION OF CLAUSES 14.5 AND 44.3 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) ENTERPRISE ORDER 2011 (2011 WAIRC 00218)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00796
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 12 APRIL 2013, FRIDAY, 9 AUGUST 2013
DELIVERED	**:**	MONDAY, 9 SEPTEMBER 2013
FILE NO.	**:**	APPL 13 OF 2013
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
		Applicant
		AND
		PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		Respondent

Catchwords	:	Industrial law (WA) – Application for an interpretation of clauses of the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011 – Interpretation of cl 44.3 – Principles applied – Public holiday penalties should not be paid to a rail car driver when on sick leave – Declaration issued
Legislation	:	Industrial Relations Act 1979 s 46
Result	:	Declaration issued
Representation:		
Counsel:		
Applicant	:	Mr K Singh
Respondent	:	Mr D Matthews of counsel

Case(s) referred to in reasons:

Amcor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

BHP Billiton Iron Ore Pty Ltd v Australian Workers' Union Western Australian Branch, Industrial Union of Workers (2006) 154 IR 457

In re Shift Workers Case 1972 [1972] AR 633

Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health (2011) 91 WAIG 291

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

Case(s) also cited:

Australian Communication Exchange Ltd v Deputy Commissioner of Taxation (2003) 201 ALR 271

CIC Insurance Limited v Bankstown Football Club Limited (1997) 187 CLR 384

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union (2006) 153 IR 426

City of Wanneroo v Holmes (1989) 30 IR 362

Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia (1981) 147 CLR 297

Geo A Bond and Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498

Kucks v CSR Limited (1996) 66 IR 182

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights' Union (1987) 67 WAIG 1097

Short v F W Hercus Pty Limited (1993) 40 FCR 511

The Metropolitan Gas Company v The Federated Gas Employees' Industrial Union (1925) 35 CLR 449

Reasons for Decision

1 The Union and the Authority are party to the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011. The parties are in dispute in relation to the proper interpretation of cl 44.3 of the Order, in relation to payments to be made to a rail car driver when on sick leave. Specifically, the issue is whether public holiday penalties are included. The Union says they are and the Authority disagrees.

Questions posed

2 Accordingly these proceedings have been brought for an interpretation of the relevant provisions of the Order. In the application, a number of related questions are asked and they are:

Question 1

10. Does clause 44.3 (a) (i) of the Order create an entitlement for an additional payment for shift penalties Monday to Friday inclusive?

Question 2

11. If an employee is rostered or is otherwise required to work on a public holiday, does clause 14.5 (a) of the Order create an entitlement for the employee to be paid public holiday penalties?

Question 3

12. If an employee is rostered or otherwise required to work on a public holiday, does clause 14.5 (b) of the Order create an entitlement for the employee to be paid a sum equal to eight hours pay at base rate, or be granted eight hours' leave with pay (known as leave in lieu)?

Question 4

13. If an employee is unable to attend or remain at their place of employment during their rostered shift, by reason of personal ill health or injury on a public holiday, which falls on or between Monday and Friday, are they entitled to receive the public holiday penalty in accordance with clause 44.3 (a) (i)?

Relevant provisions of the Order

3 It is convenient at this point to set out the relevant provisions of the Order. They are clauses 14.4, 14.5, 24.1, 24.2 and 44.3(a) as follows:

> 14.4 Saturday and Sunday Penalty Rates
>
> (a) All standard hours worked on Saturdays by shift employees shall be paid at time and a half.
>
> (b) All time worked on a Sunday shall be paid at the rate of double time.
>
> (c) For the avoidance of doubt, where a shift commences on one day and concludes on the following day, hours will be paid at the rate applicable to the day on which they were worked.
>
> 14.5 Penalties for Working on Public Holidays
>
> (a) Employees rostered or otherwise required to work on a Public Holiday shall be paid for all time worked at the rate of time and a half for the first 8 hours worked on any shift on that day and at the rate of double time and a half for all time worked in excess of eight hours on any shift.
>
> (b) In addition to payment described in subclause 14.5 (a) an employee rostered or otherwise required to work on a Public Holiday shall either:
>
> (i) be paid a sum equal to eight hours' pay at the base rate of pay; or
>
> (ii) be granted eight hours' leave with pay (to be known as Leave in lieu of Public Holidays) which an employee can elect to be granted and can clear in accordance with clause 33 – Annual Leave.
>
> (c) For the avoidance of doubt, no other penalties, including penalties under sub-clause 14.3 of this clause, are payable for work on a public holiday.
>
> …
>
> **24. SHIFT WORK**
>
> 24.1 Monday to Friday
>
> The Employer may, if the Employer so desires, work any part of its business on shifts in accordance with the following provisions;
>
> (a) On an afternoon shift which commences before 1800 hours and the rostered duration of which concludes at or after 1830 hours, an employee will be paid an allowance of $2.76 an hour on all time paid at the base rate.
>
> (b) On a night shift, which commences at or between 1800 hours and 0359 hours, an employee will be paid an allowance of $3.28 an hour on all time paid at the base rate.
>
> (c) On an early morning shift, which commences at or between 0400 hours and 0530 hours an employee will be paid an allowance of $2.76 an hour on all time paid at the base rate.
>
> (d) In addition to the hourly shift work allowance, an employee will be paid an allowance of $3.28 for any shift where the rostered duration commences or finishes at or between 0101 hours and 0359 hours.
>
> (e) In calculating the allowance under this clause, broken parts of an hour less than thirty minutes on any shift shall be disregarded and thirty minutes to fifty-nine minutes paid as one hour.
>
> 24.2 Saturday and Sunday
>
> The penalties payable on Saturdays and Sundays are specified at sub clause 14.4 Saturday and Sunday Penalty Rates.
>
> …
>
> 44.3 (a) Subject to this subclause, an employee shall be paid sick leave at the employee's base rate of pay. In addition payment shall include:
>
> (i) Shift penalties Monday to Friday inclusive;
>
> (ii) Saturday penalty; and
>
> (iii) Sunday penalty
>
> which the employee would have received had the employee not ceased duty on account of sickness. Provided that no sick leave payment shall be made for additional shifts or overtime which the employee would have worked.

Principles of interpretation

4 The relevant principles to apply in interpreting an industrial instrument are well settled. In *Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health* (2011) 91 WAIG 291 I summarised them and at pars 101-104 I said as follows:

> 101 The Agreement, as a legal instrument, is subject to the usual principles of interpretation. There has been over many years, judicial acceptance that in the case of industrial instruments, such as awards or industrial agreements, a

'generous' approach to interpretation should be applied. In ***George A Bond & Co Ltd (in liquidation) v McKenzie*** [1929] AR (NSW) 498 Street J said at 503 – 504:

> … speaking generally, awards are to be interpreted as any other enactment is interpreted. They lay down the law affecting employers and employees in their relations as such, and they have to be obeyed to the same extent as any other statutory enactment. But at the same time, it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result, as this award in fact did, from an agreement between the parties, couched in terms intelligible to themselves but often framed without careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore, in construing an award, one must always be careful to avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award.

102 As to the interpretation of industrial agreements in this jurisdiction, in ***Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union*** (1987) 67 WAIG 1097 Brinsden J observed at 1098:

> The meaning of a provision in the Agreement is to be obtained by considering the terms of the Agreement as a whole. If the terms are clear and unambiguous it is not permissible to look to extrinsic material to qualify the meaning of the particular provision being considered. Therefore, when the issue is which of two or more possible meanings is to be given a contractual provision it is not permissible to look at actual intentions, aspirations, or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract but to look at only the objective framework of facts within which the contract came into existence, and to the parties presumed intentions in that setting. Should a consideration of the whole terms of this Agreement expose an ambiguity in the construction of Clause 6(9) then resort may be made to extrinsic material and in certain circumstances any trade custom or usage.

103 In the same case, Kennedy J said that in the interpretation of agreements, a broad approach to the meaning of the agreement should be adopted, and too literal adherence to the technical meaning of words should be avoided.

104 More recent expressions of the generous approach to the interpretation of industrial instruments were adopted by Madgwick J in ***Kucks v CSR Limited*** (1996) 66 IR 182, considered and approved by Kirby and Callinan JJ in ***Amcor Limited v CFMEU*** (2005) 222 CLR 241 at 270-271; 282-283.

5 In *Amcor*, Kirby J, at par 67, emphasised that in the final analysis, the process of interpretation is essentially a text based activity. Additionally, I note the observations of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at pars 69-71 and those of Wheeler J (Steytler and Pullin JJ agreeing) in *BHP Billiton Iron Ore Pty Ltd v Australian Workers' Union Western Australian Branch, Industrial Union of Workers* (2006) 154 IR 457 at pars 23-24.

6 I adopt and apply these principles for present purposes.

Position of the parties

7 Having referred to relevant authorities in relation to the construction of industrial instruments, the Union contended that the provisions of the Order were clear and unambiguous. It was submitted that the terms of cl 14.5(a) and (b) create an entitlement for employees to be paid public holiday penalties when rostered to work or otherwise required to work. The Union contended that having regard to the relevant provisions of cl 44 of the Order, in the context of the Order as a whole, where public holidays fall between Monday and Friday in a week, a reasonable person in the position of the employer should regard the entitlements conferred by cl 14.5(a) and (b) as "shift penalties". Accordingly, they should be taken into account for the purposes of an employee's entitlement under cl 44.3(a)(i) of the Order. The Union submitted that adopting a generous approach to construction, which is appropriate, and having regard to the scope and purpose of the Order, this is the true interpretation of cl 44.3(a)(i).

8 On the other hand, the Authority, whilst also contending that the relevant provisions of the Order are clear and unambiguous, submitted that there is no basis to include "public holiday penalties" in payments made to employees under cl 44.3(a)(i). It contended that adopting the usual approach to the interpretation of industrial instruments, the terms of cl 44.3(a) are clear and do not include payments for public holiday penalties. Whilst the terms of cl 44.3(a) was described as being beneficial to employees, by including payments they would not otherwise be entitled to when not working, it is a bridge to far, on the Authorities' submissions, to extend that to public holidays as contended by the Union.

9 In particular, the Authority focused on the language used in cl 44.3(a) and the clear absence of any reference to public holiday penalties, despite the inclusion of other penalties, such as shift penalties Monday to Friday, and Saturday and Sunday penalties. The broad submission was that had the Order intended to make public holiday penalties payable to an employee on sick leave, the clause would have said so. Accordingly, the literal and ordinary meaning of cl 44.3(a) leads to the conclusion that such payments are not included.

Consideration

10 The application of established principles to the interpretation of industrial instruments requires firstly, a consideration of the ordinary and natural meaning of the text used in the contentious provisions of the Order. One should not immediately look to extrinsic materials in an endeavour to divine some hidden meaning of the provision in question. This approach to the construction of the clauses of the Order in question leads to the following.

11 Clause 44.3 sets out the payments an employee is entitled to in the event they are unable to attend or remain at work, by reason of sickness or injury. The draftsperson of the clause has set out, with some particularity, those payments, in addition to base

pay, that are to be included. I agree with the submissions of counsel for the Authority, that the terms of cl 44.3 are beneficial to an employee. It includes payments for work in unsociable hours, in circumstances where no work is actually performed.

12 As a matter of structure, cl 44.3(a) provides for two elements to the payments an employee is entitled to receive when sick. The first is the "base rate of pay". There was no dispute that this is the rate of pay as prescribed for an employee in cl 18 of the Order. The second element, is an extra payment, as prescribed by cl 43(a)(i)-(iii). There was no contest as to the meaning of (ii) and (iii). They plainly refer to the "penalties" payable when an employee works ordinary hours on a Saturday or a Sunday, as prescribed by cl 14.4 of the Order. Furthermore, the draftsperson of the clause has sought to place some limitations on the scope of payments to employees, when on sick leave. Excluded are payments for "additional shifts" and "overtime" which may otherwise have been worked by the employee.

13 I return then to the controversial provision, which is cl 44.3(a)(i). For the Union to succeed, it must be open to conclude that the terms of (i) referring to "Shift penalties Monday to Friday inclusive", includes payments made where an employee is rostered to or otherwise works on a public holiday as provided in cl 14.5 of the Order. For the following reasons, to reach this conclusion would, in my opinion, place an impermissible strain on the ordinary and natural meaning of the language used in the Order, when considered as a whole.

14 Whilst cl 44.3(a)(i) does not refer to it, the reference to "shift penalties" must be a reference to the additional payments prescribed in cl 24.1 of the Order. It was common ground between the parties, that this was so, despite cl 24.1 being headed "Allowances". From the rest of Part 5 of the Order, it is seen why it was so described, because a range of allowances for various conditions of work are set out. Nothing turns on the inclusion of shift penalties in this clause in my view.

15 The first part of cl 44.3(a)(i) refers to "shift penalties". It is trite to observe that in the interpretative process, technical or other terms of art may have a particular meaning. In industrial relations parlance, the term "shift penalties" is one of long standing and accepted meaning. It describes those additional payments made to an employee for working unsociable hours to compensate for the disruption to an employee's domestic and social life, as a result of working shifts: *In re Shift Workers Case 1972* [1972] 72 AR 633. The fact that such clauses impose an additional cost on the employer, and is an additional payment to the employee, is indicated by its description generally, as a "penalty": *Shift Workers Case*. The penalties payable are normally expressed as an allowance, either as a flat payment or a percentage loading on an employee's base rate of pay.

16 The characterisation of "penalty" payments for working unsociable hours, is reflected in the provisions of the Order applicable to work on Saturdays, Sundays and Public Holidays. In clauses 14.4 and 14.5, the respective payments are clearly identified and described as "Saturday and Sunday Penalty Rates" and as "Penalties for Working on Public Holidays", respectively.

17 Carrying forward this approach to the drafting of the Order, when one reaches cl 44.3, it is clear that the same broad descriptions are used. It is important to note that cl 44.3(a)(i) does not just refer to "penalties Monday to Friday inclusive". It specifically refers to the concept of "shift penalties". In my view, as a matter of construction, when read with the terms of cl 24.1, this distinction is significant. As also pointed out by the Authority in its submissions, there is a conceptual distinction between additional payments for working a particular shift, as opposed to working on a public holiday. The former refers to compensation for the disruption to domestic and social life of working a particular shift, whether it is morning, afternoon or night. The latter refers to compensation for working on a particular day i.e. a public holiday, a day on which employees are not generally required to attend for work.

18 Whilst I accept that the Union may say it is unfair to include some penalty payments on sick leave and not others, the Commission's task is to interpret the Order as it finds it, and not to rewrite it according to what the Commission considers may be a fair result. Adopting the approach I have to the interpretation of cl 44.3(a)(i) of the Order, leads to no absurdity or repugnancy with the provisions of the Order as a whole.

19 Having regard to the foregoing, the answers to the questions posed must be: Question 1: Yes, Question 2: Yes, Question 3: Yes, Question 4: No.

20 The Commission declares accordingly.

2013 WAIRC 00805

INTERPRETATION OF CLAUSES 14.5 AND 44.3 OF THE PUBLIC TRANSPORT AUTHORITY (TRANSPERTH TRAIN OPERATIONS RAIL CAR DRIVERS) ENTERPRISE ORDER 2011 (2011 WAIRC 00218)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 9 SEPTEMBER 2013
FILE NO.	APPL 13 OF 2013
CITATION NO.	2013 WAIRC 00805

Result	Declaration issued
Representation	
Applicant	Mr K Singh
Respondent	Mr D Matthews of counsel

Declaration

HAVING heard Mr K Singh on behalf of the applicant and Mr D Matthews of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act 1979 hereby declares –

THAT on the true interpretation of the terms of the Public Transport Authority (Transperth Train Operations Rail Car Drivers) Enterprise Order 2011 answers to the questions posed in this application are Question 1: Yes; Question 2: Yes; Question 3: Yes; Question 4: No

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

NOTICES—Award/Agreement matters—

2013 WAIRC 00862

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 13 of 2013

APPLICATION FOR A NEW AGREEMENT TITLED "DERBARL YERRIGAN HEALTH SERVICES ENTERPRISE AGREEMENT 2013"

NOTICE is given that an application has been made to the Commission by the *Derbarl Yerrigan Health Service Inc* 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, scope and facilitated transition are published hereunder.

4 SCOPE AND PARTIES BOUND

4.1 The parties to this Agreement shall be;

4.1.1 Derbarl Yerrigan Health Services Inc.[DYHS] (the employer); and

4.1.2 Western Australian Municipal, Administrative, Clerical and Services Union of Employees (the Union); and

4.1.3 United Voice.

4.2 This Agreement covers Employees employed by Derbarl Yerrigan Health Services Inc. who are employed in a classification to which this Agreement applies and who are members of or eligible to be members of the Western Australian Municipal, Administrative, Clerical and Services Union of Employees or United Voice.

4.3 This Agreement does not apply to Registered Nurses, Doctors, Dentists and Allied Health Professionals.

4.4 This Agreement covers approximately 100 employees.

5 RELATIONSHIP WITH AWARDS

5.1 This Agreement is comprehensive and replaces the Award(s) in its entirety; the entitlements provided for in this Agreement will operate in lieu of the Award entitlements while this Agreement remains in force.

5.2 This Agreement operates in conjunction with the *Minimum Conditions* of *Employment Act* 1993. Certain provisions of this Agreement may supplement the *Minimum Conditions* of *Employment Act* 1993 but nothing in this Agreement will operate such as to provide a detrimental outcome for employees as compared to an entitlement under the *Minimum Conditions* of *Employment Act 1993.*

7 DEFINITIONS

…

7.2 **Aboriginal Health Worker** is defined in accordance with the following;

7.2.1 '**Aboriginal Community Care Worker**' means an employee who does not possess any relevant qualification or possess any experience in health care services. This employee will gain workplace experience and commence training towards Certification level. The work may include but is not limited to;

7.2.1(a) Aboriginal Health

7.2.1(b) Environmental Health

7.2.1(c) Aged Care

7.2.1(d) Counselling

7.2.1(e) Liaison

7.2.1(f) Mental Health

7.2.1(g) Alcohol Care/Rehabilitation

7.2.2 **'Aboriginal Health Worker Grade l'** shall mean an employee who possesses a relevant Certificate of which the course content is less than 12 months duration in total. The work may be, but is not limited to;

7.2.2(a) Aboriginal Health

7.2.2(b) Environmental Health

7.2.2(c) Aged Care

7.2.2(d) Counselling

7.2.2(e) Liaison

7.2.2(f) Alcohol Care/Rehabilitation

7.2.3 **'Aboriginal Health Worker Grade 2'** shall mean an employee who provides a broad range of direct primary health care services and is able to work without direct supervision and/or an employee who possesses a Certificate with Medical Certification Grade 1 and/or Advanced Certificate of which the course content covered over a 12 month period or equivalent, from an accredited education provider in a relevant field. The work may be, but is not limited to;

7.2.3(a) Aboriginal Health

7.2.3(b) Environmental Health

7.2.3(c) Aged Care

7.2.3(d) Counselling

7.2.3(e) Liaison

7.2.3(f) Alcohol Care/Rehabilitation

7.2.4 **'Aboriginal Health Worker Grade 3'** shall mean an employee who has a highly developed knowledge, skill and capacity for self directed application and is involved in the delivery of primary care, and this may involve supervision of others involved in primary care, and/or possesses a degree by an accredited training provider in the field or Aboriginal Health, and/or a Medication Certificate Grade 2. The work may include but is not limited to;

7.2.4(a) Aboriginal Health

7.2.4(b) Environmental Health

7.2.4(c) Counselling

7.2.4(d) Health Promotion

7.2.4(e) Alcohol Care/Rehabilitation

7.2.4(f) HIV/STD Co-ordination

7.2.4(g) Health Education

7.2.4(h) Alcohol Rehabilitation

7.2.4(i) Mental Health Work

7.2.4(j) Nutritional Health

Such work shall be the provision of primary care or the supervision of work of a manual or domestic nature or of primary care.

7.2.5 **'Aboriginal Health Worker Grade 4, Level l'** shall mean an employee, at a level higher than that at Health Worker Grade 3, who delivers primary care in a specialist health service area which shall include but is not limited to Mental Health, Health Promotion, Health Education, Heart Health or Remote Area Health and who is required to hold a qualification from an accredited training provider in the field of Aboriginal Health.

7.2.6 **'Aboriginal Health Worker Grade 4, Level 2'** shall mean an employee who is principally responsible for regional health co-ordination, or the supervision of others delivering primary care in specific projects and who is required to hold a qualification from an accredited training provider in the field of Aboriginal Health.

7.3 **Aboriginal Health Practitioner** means an Aboriginal or Torres Strait Islander person who has completed a Certificate IV in Aboriginal and/or Torres Strait Islander Primary Health Care (Practice) and is registered with the Aboriginal or Torres Strait Islander Health Practice Board in conjunction with the National Agency (Australian Health Practitioner Regulation Agency).

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

2 October 2013

INDUSTRIAL MAGISTRATE—Claims before—

2013 WAIRC 00808

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2013 WAIRC 00808
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 7 AUGUST 2013, WEDNESDAY, 28 AUGUST 2013
DELIVERED	**:**	THURSDAY, 19 SEPTEMBER 2013
FILE NO.	**:**	M 70 OF 2013
BETWEEN	**:**	PAUL GREGORY DAVIS
		CLAIMANT
		AND
		SHAKESHAFT (WA) PTY LTD A.C.N. 130 452 265
		RESPONDENT

Catchwords	**:**	Claim for $15,374.30; Small Claim under the *Fair Work Act 2009*; Claim for interest; Alleged failure by employer to pay annual leave entitlement upon termination of employment; Alleged failure by employer to provide requisite period of notice or payment in lieu of notice; Whether termination of employment for serious misconduct was appropriate.
Legislation	**:**	*Fair Work Act 2009*
Result	**:**	Claim proven
Representation		
Claimant	**:**	Mr Paul Gregory Davis appeared in person
Respondent	**:**	Ms Eleanor Shakeshaft appeared as Director of the Respondent

REASONS FOR DECISION

Background

1 Prior to 1 May 2008, the Claimant, Paul Gregory Davis was a sole trader accountant. He, together with two other sole trader accountants namely, Michael Freeman and Lorraine Wylie shared office accommodation. They together traded under the firm name of Bain and Associates.

2 In or about April 2008, Mr Davis, Mr Freeman and Ms Wylie agreed to sell their respective businesses to Shakeshaft (WA) Pty Ltd (the Respondent). It was a condition of the contract of sale in each instance that the vendor would work for the Respondent for a period of 12 months following the sale. Each vendor was retained as an employee. Another condition of the contract required the vendor, in the year following the sale, to generate fees that were at least equal to that generated the preceding year. Those arrangements were necessary for the sake of continuity and because the purchaser's Director, Ms Eleanor Shakeshaft did not, at that stage, have a tax agent's licence. Ms Shakeshaft was then a resident of the United Kingdom and had bought the businesses with the intention of relocating to Australia. To facilitate Ms Shakeshaft's requirements at that stage Mr Davis was also appointed a Director of the Respondent. I am unclear as to whether Mr Freeman and Ms Wylie were similarly appointed. Mr Davis has since ceased to be a Director.

3 The employment arrangements were informal. No written contract of employment was created. In Mr Davis' case it was agreed that he would be paid $75,000 per annum. He was to accrue four weeks' annual leave and two weeks' sick leave per annum. Further, it was agreed that he would work Mondays to Fridays with Friday afternoons off. Time taken off on Friday afternoon was in lieu of working Saturday mornings and afterhours. That work pattern was consistent with what he did prior to the sale of his business.

4 Over the years that followed, there was no change in Mr Davis' work pattern and conditions except that his pay increased incrementally over time. As at January 2013, Mr Davis' annual salary was $97,900.00.

5 The issue of taking Friday afternoons off has, in more recent times, been the subject of discussion between Ms Shakeshaft and Mr Davis. Ms Shakeshaft says that an agreement was reached that any time taken off on a Friday afternoon would be made up by time worked on Saturdays. If Saturday hours were insufficient to make up the hours taken off on the Friday afternoon, then those hours that were not set-off against the Saturday work would be treated as annual leave. Mr Davis denies that agreement. He says that the situation remained unchanged. He testified that he discussed the issue with Ms Shakeshaft in January 2013. He told Ms Shakeshaft that he was agreeable to working on Friday afternoons, provided that he would no longer be required to work on Saturdays and/or after hours. With that being unacceptable to the Respondent, no change was made.

6 On 30 January 2013 Mr Davis was, by reason of serious misconduct, summarily dismissed from his employment. It follows that he was not given notice of termination, nor was he paid in lieu of notice. Subsequently, he was paid only part of his accrued annual leave entitlement. Mr Davis now claims payment in lieu of notice and payment of his outstanding entitlements.

Termination

Incident Giving Rise to Termination

7 Mr Davis had the task of maintaining the Respondent's computer systems. His role was to resolve any computer problems that arose from time to time. On 15 January 2013 the computer system failed. At about 11.45am that day Mr Davis was forced to reboot the computers. That caused approximately20 to 30 minutes of downtime. Rather than spending that time waiting for the system to reboot, Mr Davis decided to take his lunch break earlier, which allowed him to then return early for his 1.00pm appointment. He informed Ms Shakeshaft of his intentions. At the time Ms Shakeshaft was in Megan Staal's office. Ms Staal was another accountant employed by the Respondent. When he informed Ms Shakeshaft of his intentions Ms Staal quipped that Mr Davis was always going to lunch early and arriving back from lunch late. Mr Davis was offended by what was said and was particularly sensitive to the remark because he was of the view that Ms Shakeshaft was concerned about staff "stealing time" and had previously made comments to that effect.

8 The following day, on 16 January 2013, Mr Davis went to Ms Staal's office to confront her about what she had said. He told her that he had been offended. It is common ground that the two then argued. Voices were raised, and the result was that Ms Staal yelled at Mr Davis to get out of her office. As Mr Davis walked back to his office, he said to her that she should apologise. The shouting was overheard by other employees but not by Ms Shakeshaft. Ms Shakeshaft was not present at the time, and neither were any clients. No further incident between Mr Davis and Ms Staal followed.

Reasons for Termination

9 On or about 25 January 2013, Ms Staal resigned from her employment. Although she gave Ms Shakeshaft written notice of her resignation she did not indicate within it the reason for resigning. Ms Shakeshaft testified that when she asked Ms Staal why she had resigned she was told that it was because of the incident with Mr Davis. Ms Staal allegedly told her that she could not work with Mr Davis. Concerned with what Ms Staal had told her and having regard to other complaints previously received from other staff members about Mr Davis, Ms Shakeshaft concluded that Mr Davis presented as a risk to the health and safety of her staff. She accordingly decided to commence an investigation into Mr Davis' conduct and the incident that occurred on 16 January 2013.

10 Ms Staal's evidence about what she told Ms Shakeshaft concerning the reasons for her resignation is not in keeping with what Ms Shakeshaft has told the Court. Ms Staal said that she told Ms Shakeshaft that she resigned because she was underpaid, unappreciated and because of other issues within the office.

11 Ms Staal testified that the incident between her and Mr Davis was the only argument that they had had. She conceded that they both became angry. Although the incident had "scared her" Mr Davis had not physically threatened her, stood over her, or otherwise harassed her.

Process of Termination

12 On the morning of 29 January 2013, Ms Shakeshaft sent Mr Davis an email informing him that she wanted to meet with him at 1.00pm to discuss the incident of 16 January 2013.

13 When Mr Davis attended Ms Shakeshaft's office at 1.00pm that day, Ms Shakeshaft gave him a letter explaining why he had been called into her office. She informed him in that letter that the meeting was not a disciplinary proceeding but part of a disciplinary process aimed at establishing the facts and giving him the opportunity respond to allegations made, which concerned harassing staff at the workplace (Exhibit 9). He was also orally informed that in part, the investigation to be undertaken related to the incident on 16 January 2013. At 3.00pm on 29 January 2013, Ms Shakeshaft sent Mr Davis home and told him to return to work at 11.00am the next day.

14 The next day, 30 January 2013 when Mr Davis arrived at work, he went to his computer terminal and attempted to log in. He discovered that his login access had been denied. He remained in his office until called in to participate in the meeting with Ms Shakeshaft. Although Mr Davis was provided with the opportunity to have a support person with him during the meeting, he declined that opportunity. Also at the meeting was Ms Linda Peckham, Office Manager, who took notes. At one point Ms Staal also joined the meeting for a brief period.

15 It is Mr Davis' evidence that after having been called into Ms Shakeshaft's office, she informed him that what he had done with respect to Ms Staal amounted to serious misconduct and that he was to be summarily dismissed. She informed him that as a result of her investigation she had found serious misconduct proven. He was then handed two letters. The letters are Attachments 2 and 3 to the Small Claim. Both letters were dated 30 January 2013.

16 In Attachment 2, Ms Shakeshaft stated that Mr Davis had breached the company's guidelines with respect to grievance procedures. She told him that this was not an isolated incident and that he had made comments to other female staff that were "extremely offensive, of a sexual and racial nature and contravened the laws of Western Australia." He was told that he would be given an opportunity to respond to the allegations and make submissions before she reached a decision.

17 In Attachment 3, Ms Shakeshaft informed Mr Davis that the threats he made to Ms Staal were of a serious nature. She said that he had chosen to take matters into his own hands, rather than follow the procedures the Staff Handbook. Notwithstanding having taken into account his response and remorse, Ms Shakeshaft could not risk the chance of the behaviour recurring. She informed Mr Davis that he was "summarily dismissed forthwith."

18 Ms Shakeshaft denies the sequence of events as described by Mr Davis. She says that on the morning of 30 January 2013, she met with Mr Davis and gave him Attachment 2. She then gave him a further opportunity to make submissions to her. After having made those submissions, Mr Davis was asked to leave Ms Shakeshaft's office. She then considered the matter. Approximately 40 minutes later Ms Shakeshaft called Mr Davis into her office whereupon she provided him with Attachment 3, which informed him of his summary dismissal.

19 Although in the circumstances little turns on it, I find it to be most probable that the events occurred in the sequence described by Ms Shakeshaft. She clearly received advice as to the process to be undertaken and in view of the documentary evidence before me; it appears that she followed the steps described.

Events after Termination

20 Mr Davis did not receive his termination payment immediately. Rather, he was paid in the normal course of the Respondent's pay run on 28 February 2013. His penultimate payslip dated 25 January 2013 showed that he had accrued an entitlement of 226.76 hours of annual leave. However, Mr Davis was only paid for 70.56 hours of that entitlement. Having received only a small portion of what he had expected, Mr Davis sent Ms Shakeshaft an email querying the underpayment. On 27 February 2013, Ms Shakeshaft responded to Mr Davis' email in the following terms:

> *"Hello Paul,*
>
> *So that you are aware of the calculation of your final holiday pay I confirm:-*
>
> *As per the agreement between us, you took hours off on Friday afternoons on the basis that time would either be made up by coming in on Saturdays for appointments and to work, or if the time taken was in excess of time worked, then the Friday time off would be taken as holiday. To date the holiday entitlements have yet to be adjusted and this would have taken effect at the end of the financial year. In particular as the time taken has far exceeded the time made up.*
>
> *I have gone back through from 1st January 2012 and calculated the total hours paid for, I have taken off the hours not worked on Fridays, and adjusted these for the time made up on Saturdays.*
>
> *Although this has gone on for some years, I have only calculated back from January 1st 2012. This is a gesture of goodwill only and for no other reason.*
>
> *Best Regards."*

21 It suffices to say that Mr Davis denies the existence of such agreement.

The Issues

22 The two issues to be determined in this matter are:

- whether Mr Davis was entitled to payment in lieu of notice of the termination of his employment; and
- whether Mr Davis is owed 156.2 hours of accrued holiday leave.

23 In order to resolve the first issue I will need to consider whether Mr Davis' dismissal was justified and in any event lawful.

Notice of Termination

24 Section 117 of the Fair Work Act 2009 (FW Act) requires an employer to give the requisite period of notice of termination of employment, or payment in lieu thereof. In Mr Davis' case, given that he had worked for the Respondent for four years and nine months and that he was over the age of 45 years, section 117 of the FW Act required that he be given four weeks' notice of the termination of his employment. That entitlement would be lost if there was a justified summary dismissal of employment.

25 Mr Davis says there was no justification for his summary dismissal and that it was simply a "ruse" to deny him of his proper entitlements.

Was the Summary Dismissal Justified?

26 When Ms Shakeshaft wrote to Mr Davis on 30 January 2013 (Attachment 3) she gave two main reasons for summarily terminating his employment. They were:

- that Mr Davis had threatened another employee; and
- that Mr Davis had taken matters into his own hands rather than follow company procedures as laid down in the Staff Handbook.

27 An ancillary reason given for the termination of his employment was that the incident on 16 January 2013 was the last in a long line of incidents in which he "regularly caused staff to feel threatened or uncomfortable," and that despite the issue having been previously raised, he had failed to modify his ways.

Did Mr Davis Threaten or Harass Ms Staal on 16 January 2013?

28 One of the reasons why Ms Shakeshaft dismissed Mr Davis was because he had allegedly threatened Ms Staal. In her letter to him dated 29 January 2013 (Exhibit 9) she informed him that she was investigating allegations that he had been harassing staff at the workplace. Then in her letter dated 30 January (Attachment 2) she asserted that Mr Davis had "deliberately and relentlessly verbally harassed Megan (Ms Staal)."

29 Ms Shakeshaft testified that the allegations she had put to Mr Davis in the course of disciplinary proceedings came from what she had been told by Ms Staal. As indicated earlier, what Ms Shakeshaft has told the Court about what Ms Staal told her is not consistent with Ms Staal's evidence. Despite the obvious inconsistency, Ms Shakeshaft did not seriously challenge Ms Staal when she had the opportunity to do so. In her testimony, Ms Shakeshaft asserts that Ms Staal lied under oath.

30 In resolving the conflict between the two accounts of the relevant facts, I accept Ms Staal's evidence, and I reject the evidence of Ms Shakeshaft. I do not accept Ms Shakeshaft's evidence that she was told by Ms Staal that she had been threatened or harassed by Mr Davis. Her contentions are unsupported. Ms Staal was an impressive and truthful witness. Unlike Ms Shakeshaft she has no interest in the outcome of this matter. Indeed, if anything, her evidence is against her own interests given that she continues to be employed by the Respondent. Despite the fact that her evidence is contrary to the Respondent's

interests and that it may well damage the fabric of her employment relationship with the Respondent, Ms Staal nevertheless was prepared to give such evidence. Ms Shakeshaft on the other hand, was an unimpressive witness. She was evasive in answering questions. She often failed to directly answer questions and was simply not credible on this issue. Ms Shakeshaft was equally not credible on a number of other issues, the starkest of which concerned the alleged agreement with Mr Davis regarding his annual leave.

31 Although it cannot be denied that the issue of the incident of 16 January 2013 was brought up and discussed in the meeting held between Ms Staal and Ms Shakeshaft following Ms Staal's resignation, it was clearly not the primary issue expressed by Ms Staal as being the reason for her resignation. I find that Ms Staal was generally unhappy with her working arrangements which related to issues beyond the disagreement she had with Mr Davis on 16 January 2013. There were problems with her pay. Despite the fact she had just received a small pay increase, she was of the view that it was inadequate. She felt she was not appreciated within the workplace and there were other systemic problems there.

32 I find the incident of 16 January 2013 to be that as recounted to the Court by the two protagonists Mr Davis and Ms Staal. It was a one-off incident in which Mr Davis went into Ms Staal's office and challenged her about the comments she made. That led to both of them raising their voices and shouting at each other. Mr Davis at all times stood in the doorway of Ms Staal's office. He did not stand over Ms Staal or otherwise physically threaten her. The incident was such that it was overheard by other staff members. Although unseemly, it was not violent in nature. There had not been any issue between Ms Staal and Mr Davis prior to that date, nor was there or likely to be any incident after it. Although Ms Shakeshaft conveniently used safety and health to justify her actions, the reality was that Ms Staal's safety and health was never at risk. I find that there was no threat made by Mr Davis to Ms Staal. It follows therefore, that the major plank underlying Ms Shakeshaft's decision to terminate Mr Davis' employment did not exist.

Alleged Previous Incidents

33 Ms Shakeshaft asserted that Mr Davis had been the subject of previous disciplinary "involvement". It was alleged that on prior occasions he had caused other staff members to feel threatened or uncomfortable. In her letter to Mr Davis dated 30 January 2013 (Attachment 2), Ms Shakeshaft suggested that Mr Davis had made comments to female staff members which were extremely offensive and of a sexual and racial nature that contravened the laws of Western Australia. It suffices to say, in that regard that there is not one scintilla of evidence produced to this Court to support that allegation, nor is there any evidence to support the contention that Mr Davis had been the subject of previous disciplinary proceedings.

34 I fear that those comments have been made to bolster up Ms Shakeshaft's decision to terminate Mr Davis' employment. Her bare assertion in that regard is not only unsupported by the evidence but is also inconsistent with the evidence given by other staff members such as Ms Sinead Lowe.

Failing to Follow Grievance Procedures in Handbook

35 Another major reason why Ms Shakeshaft chose to summarily dismiss Mr Davis' employment was because he allegedly failed to follow the grievance procedures set out in the Staff Handbook.

36 Sometime prior to the beginning of 2011, Mr Davis was to some extent involved in the creation of the Staff Handbook (Exhibit 10.1). The extent of his involvement is unclear. After its creation, the Staff Handbook was placed on the Respondent's intranet site. According to Ms Shakeshaft, it remained on that site throughout 2011. Thereafter there was a problem with the server causing the site to fail. Although I know that the site is again operational it is unclear as to when it was re-established.

37 Ms Shakeshaft suggests that the terms and conditions contained in the Staff Handbook form part of the conditions of employment for each of the Respondent's employees. For that to be the case, the employer was required not only to have informed each employee of the Handbook's existence, but to also inform each employee of its provisions. Ms Shakeshaft was specifically required to inform employees of the fact that the Handbook's content formed part of the contract of employment. The evidence of Mr Davis, Ms Lowe and Ms Staal establishes that they were never given a hard copy of the Handbook upon commencement, nor were they formally otherwise informed of its existence on the intranet, or that its terms would be incorporated into their contracts of employment. Ms Staal and Ms Lowe professed little or no knowledge of the Handbook. Ms Shakeshaft on the other hand, said that not only did employees know of the Handbook and that it could be accessed on the intranet, but further, that they were expected to access it and have regard to it. The weight of the evidence is against Ms Shakeshaft.

38 It is obvious that the Handbook was created and posted on the Respondent's intranet site. However, I find that it was not in any formal way, or otherwise, brought to the attention of the Respondent's employees. Indeed, some employees did not even know of its existence. Employees were not specifically told of the Handbook and its significance. I find that employees were not told that the conditions contained in the Handbook formed part of the terms and conditions of their employment. The creation of the Handbook and its placement on the intranet was a unilateral act on Ms Shakeshaft's part. In the circumstances, its provisions could not have, and in fact never did form part of the conditions of employment of the Respondent's employees. The Handbook never was an integral part of the employment relationship.

39 The Respondent's approach to the Handbook is illustrative of its lax procedures. Ms Shakeshaft took the view that the Respondent's employees would become bound by the obligations contained in the Handbook by its mere placement on the intranet site. That however, was insufficient. She had an obligation on behalf of the Respondent to bring the Handbook to the attention of each staff member and to specifically inform them that it formed part of their contractual relationship. Not having done that with Mr Davis, and indeed with other staff members, Ms Shakeshaft cannot now rely on its alleged breach as a foundation for Mr Davis' dismissal. There was no breach of the employment agreement. There is no evidence to support the Respondent's contention that the requirement to follow the grievance procedure set out in the Handbook ever formed part of the employment contract.

Conclusion Regarding Termination of Employment

40 In his submissions, Mr Davis suggested that the summary termination of his employment was contrived by Ms Shakeshaft to obtain a financial advantage. In light of the evidence presented to the Court, one can well understand why Mr Davis feels that way. However, it is unnecessary for me to determine whether Ms Shakeshaft has acted in the way she did for that purpose. All that I am required to do is to objectively examine the evidence to ascertain whether the summary termination of Mr Davis' employment was justified.

41 Termination of employment summarily arising from misconduct can arise from a wide range of behaviour including violence, intoxication at work, theft, dishonesty, offensive language and so on. When such misconduct occurs it constitutes a repudiation of the terms of the employment agreement. Each case of course, will turn on its own facts.

42 Had Mr Davis threatened Ms Staal or otherwise wilfully disobeyed his employer's directions, then there may have been grounds for summary dismissal. In this case though, the evidence dictates that he did not do those things. Viewed objectively, there was no serious misconduct by Mr Davis. The evidence is unsupportive of Ms Shakeshaft's conclusion that Mr Davis had been guilty of serious misconduct. In the circumstances, his summary termination was clearly unwarranted.

43 What occurred might well justify Mr Davis' belief that the summary termination of his employment occurred for a collateral purpose. Whilst the proper procedural steps were taken in Mr Davis' disciplinary proceedings, the process may have nevertheless been vitiated by pre-judgement. It is of significance that access to his computer was denied on 30 January 2013, prior to his disciplinary meeting that morning. That enables a conclusion to be drawn that the decision to terminate Mr Davis' employment had been made prior to the meeting.

44 Given that Mr Davis' summary termination was not justified, he is entitled to be paid in lieu of notice.

Annual Leave

45 The payslip issued by the Respondent to Mr Davis in January 2013 showed that he was owed 226.76 hours of accrued annual leave. Following his termination he was only paid for 70.56 hours. Mr Davis says that Respondent is obligated to pay him the balance of his accrued annual leave entitlement, being 156.2 hours at the rate of $50.21 per hour, totalling an amount of $7,842.80.

46 The Respondent denies Mr Davis' claim in this regard for the following two reasons:

- that the payslip showing the accrued leave is incorrect; and
- in any event there was an agreement that time taken off on Friday afternoons would be treated as annual leave unless set-off by time worked on Saturdays. In the circumstances, Mr Davis has used all of his accrued annual leave entitlements.

47 The National Employment Standards in the FW Act require employers to pay accrued leave entitlements upon an employee's termination of employment, unless there is written agreement from the employee to do otherwise. Mr Davis denies any such agreement, let alone a written agreement.

Accrued Annual Leave Entitlement Upon Termination of Employment

<u>Incorrect Entitlement shown on Payslip</u>

48 Ms Shakeshaft contends that Mr Davis' payslips produced by her company are inaccurate for two reasons. Firstly, she says that the 226.76 hours of accrued annual leave as shown on the January 2013 payslip is not correct. She testified that the Respondent's Office Manager, Ms Peckham, recently discovered old payslips evidencing errors. Ms Peckham's evidence supports that of Ms Shakeshaft concerning her discovery of those old pay slips. Secondly, a comparison of leave accrued by Mr Davis, against actual leave taken by him, indicates the figure to be incorrect.

49 Ms Shakeshaft has produced payslips for June and July 2010 (Exhibits 2.1 – 2.3). The payslip for 23 June 2010 shows the entitlement for "Holiday Leave PD and TY" to be 85.54. The 24 July 2010 payslip shows the "Holiday Leave PD and TY" to be minus 179.90. The next payslip, dated 25 July 2010, shows "Holiday Leave Accrual" to be 158.31 hours. It is to be noted that as at 25 July 2010 there was a change in terminology used in the description of the entitlement.

50 Ms Shakeshaft says that the error is obvious on its face and that Mr Davis' annual leave entitlement was inappropriately inflated as at 25 July 2010. She says that the error has continued to flow through to January 2013. She suspects that Mr Davis, who at the time was responsible for the payroll system, may have had a part to play in what occurred.

51 In determining the issue concerning the accuracy of Mr Davis' January 2013 payslip, it suffices to say that there is not a shred of evidence which would support Ms Shakeshaft's contention that Mr Davis has fraudulently or otherwise inflated his annual leave entitlement.

52 Further, the mere production of Exhibits 2.1 – 2.3 does not assist the Respondent. The pay slips alone without source documents do not demonstrate error. The documents on their face do not and cannot explain the reasons for the changes. I do not know what was behind the changes made. For all I know the changes may have been made to correct an earlier error. I do not know whether the change in terminology from "Holiday Leave PD and TY" to "Holiday Leave Accrual" has anything to do with it. Whether the letters "PD and TY" had any particular value later converted, I do not know. Although Exhibits 2.1 – 2.3 appear to show anomalous values, I cannot conclude that the entitlement ultimately settled on in Exhibit 2.3 is wrong.

53 The Respondent's payslip issued on 25 January 2013 with respect to Mr Davis, shows that he had accrued 226.76 hours of annual leave. Prima facie, that is his entitlement unless that prima facie evidence is otherwise displaced. An audit may well have assisted the Respondent but that has not been done. In the end result the prima facie correctness of the Respondent's own payslip has not been displaced.

54 I now move to consider the second limb of Ms Shakeshaft's argument. Ms Shakeshaft has, for the purpose of this hearing, created a document (Exhibit 4) in which she set out details of leave accrued and taken by Mr Davis. She suggests that the

annual leave accrued by him over the entire period of his employment with the Respondent amounted to 712.5 hours, and the leave taken was 563.8 hours. However, she has not produced any source documents which support those statements.

55 Although I have some of Mr Davis' payslips going back to 1 January 2010, I do not have them all. Without all of the payslips, Ms Shakeshaft's calculations cannot be verified and her statements constitute no more than bare assertions. I place no weight on her Exhibit 4.

Alleged Agreement Regarding Friday Afternoons

56 Ms Shakeshaft asserts that there was an agreement to treat time taken by Mr Davis on Friday afternoons as annual leave, unless equivalent time was worked on Saturdays.

57 I do not accept Ms Shakeshaft's evidence in that regard and find her assertion to be untrue. When cross-examined in relation to the terms of the alleged agreement and the circumstances in which it was entered into, Ms Shakeshaft was vague and evasive. She was unable to specifically state the time, place and circumstance of the alleged verbal agreement. Further, there is no documentary evidence which supports the creation or existence of the alleged agreement. There was not, prior to Mr Davis' employment being terminated, any written confirmation of the alleged agreement, nor was there ever any attempt made to enforce its terms. Interestingly, there was no accounting of the leave allegedly taken by Mr Davis on Friday afternoons. These facts all support Mr Davis' position that there was no such agreement. The alleged agreement is a recent invention by the Respondent, aimed at denying Mr Davis his entitlement.

58 Mr Davis is entitled to be paid for the 156.20 hours of accrued annual leave which remains outstanding.

Result

59 The Claimant is entitled to recover $15,374.30 comprised as follows:

Accrued annual leave	$ 7,842.80
	(156.2 hours x $ 50.21)
Payment in lieu of notice	$ 7,531.50
	(37.5 hours x 4 x $ 50.21)
Total	$15,374.30

60 The Respondent is ordered to pay the Claimant $15,374.30. In view of the claim for interest it is appropriate that an order be made, pursuant to section 247 of the FW Act, allowing interest. The Respondent shall also pay interest on $15,374.30 at the rate of 6% per annum, calculated from 1 February 2013 to 19 September 2013, which amounts to $583.80.

G CICCHINI
INDUSTRIAL MAGISTRATE

2013 WAIRC 00831

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2013 WAIRC 00831
CORAM	**:**	INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD	**:**	WEDNESDAY, 11 SEPTEMBER 2013
DELIVERED	**:**	MONDAY, 16 SEPTEMBER 2013
FILE NO.	**:**	M 43 OF 2011
BETWEEN	**:**	FAIR WORK OMBUDSMAN
		CLAIMANT
		AND
		VINCENZO SALVATORE TODARO
		RESPONDENT

CatchWords	**:**	Application for default judgment; Determination of preliminary issue; Whether Claimant is estopped from litigating the issue; Whether an estoppel is established; Abuse of process.
Legislation	**:**	*Fair Work Act 2009*
	:	*Workplace Relations Act 1996*
	:	*Workplace Relations Regulations 2006*
		Industrial Magistrates Courts (General Jurisdiction) Regulations 2005
Instrument	**:**	Restaurant, Tearoom and Catering Workers' Award
		Notional Agreement Preserving the State Award

Result	**:**	Claimant's application for default judgment is granted and judgment is entered against the Respondents. Respondent's application to stay the proceedings for an abuse of process is refused.
Representation:		
Applicant	**:**	Mr A.J. Power, of Counsel, and with him Ms K Thomson, appeared for the Applicant
Respondent	**:**	Mr C. Stokes, of Counsel, appeared for the Respondent

Cases referred to:

Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd (ACN 075 400 529) & Ors [2006] FCA 1427

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485

Carnegie Capital Pty Ltd v Interstyle Building Pty Ltd and Others [2004] WASC 65

Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (Receivers and Managers Appointed) (in liq) (1993) 43 FCR 510

Goldberg v Morrow [2003] VSCA 127

Hunter v The Chief Constable of the West Midlands Police [1982] AC 529

Karam v Palmone Shoes Pty Ltd & Anor [2012] VSCA 97

Neil Pearson & Co Pty Ltd & Anor v The Comptroller-General of Customs (1995) 38 NSWLR 443

Ning Wei Lei; Kenny Meng Wai Ng v VST Pty Ltd 2010 WAIRC 00896

Ramsay v Pigram (1968) 118 CLR 271

Stellec Pty Ltd and Others v Carnegie Capital Pty Ltd [2004] WASCA 268

Walton v Gardiner (1993) 177 CLR 378

Wiedenhofer v The Commonwealth of Australia [1970] 122 CLR 172

REASONS FOR DECISION

(Given extemporaneously at the conclusion of the hearing, extracted from the transcript of proceedings and edited by her Honour)

Background

1 On 16 September 2013, I gave oral reasons for decision refusing the Respondent's application for a stay of proceedings, and granting the Claimant's application for default judgment to be entered against the Respondent. These are my written reasons edited from the transcript. As indicated to the parties I have expanded upon the nature of the Claimant's claim in the written Reasons.

The Claim

2 The Claimant, the Fair Work Ombudsman (FWO), alleges that the Respondent, Mr Todaro, aided, abetted, counselled or procured various contraventions by VST Pty Ltd (VST) and/or was by his acts or omissions, directly or indirectly knowingly concerned in, or party to, the various contraventions by VST in that he was the person responsible for hiring and paying Kenny Meng Wai Ng (Ng) and Ning Wei Lei (Lei), and was aware that they were entitled to be paid in accordance with the *Restaurant Tearoom and Catering Workers' Award* and *Notional Agreement Preserving the State Award* (NAPSA), including higher rates of pay for overtime, and superannuation entitlements, (see section 728 of the *Workplace Relations Act 1996* (WR Act) and section 550 of the *Fair Work Act 2009* (FW Act)).

3 On 13 September 2010, Industrial Magistrate Boon delivered reasons for decision in *Ning Wei Lei; Kenny Meng Wai Ng v VST Pty Ltd* (2010 WAIRC 00896) (the 2010 Decision). Her Honour made a number of findings and ordered VST to pay to Lei and Ng certain entitlements pursuant to the WR Act and the NAPSA.

4 On 22 November 2011, the FWO lodged a claim in this Court alleging that Mr Todaro failed to comply with an award, agreement, instrument or order, was involved in the breaches of the WR Act and the NAPSA by VST, and contravened or failed to comply with another written law. The FWO sought orders that Mr Todaro pay a penalty and for the Court to make declarations that Mr Todaro was involved in the contraventions of VST.

5 The statement of claim lodged with the claim was amended and re-filed on 29 November 2011, where the only amendment made was that the Court makes findings rather than a declaration relevant to Mr Todaro's involvement in the contravention of VST. The findings sought to be made are contained in paragraph A of the amended statement of claim. The orders sought by the FWO included an order that:

- Mr Todaro pay pecuniary penalties pursuant to section 719(1) of the WR Act, regulation 14.4 of the *Workplace Relations Regulations 2006* (Cth) (WR Regulations) and section 546(1) of the FW Act;
- all pecuniary penalties payable by Mr Todaro be apportioned and paid to Ng and Lei within 28 days; and
- other ancillary orders in relation to listing the claim for a penalty hearing.

6 The FWO makes its claim pursuant to section 718(1) of the WR Act.

7 On 27 August 2013, the FWO applied for judgment to be entered against Mr Todaro pursuant to regulation 8(2) of the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (IMC Regulations) on the basis that Mr Todaro failed to file an amended response to the FWO's claim dated 22 November 2011, as required by orders of the Court made on:

- 15 August 2012, where the amended response was to be filed by 3 September 2012;
- 28 November 2012, where the amended response was to be filed by 5 December 2012;
- 6 March 2013, where the amended response was to be filed by 15 March 2013; and
- 12 June 2013, where the amended response was to be filed by 17 June 2013.

8 I note that on that on 12 June 2013, the Court also made orders striking out Mr Todaro's original response filed on 12 December 2011 on the basis that there was no objection to this by him. I also note that from 15 August 2012, Mr Todaro has been represented by the same Counsel and had periodic legal representation prior to that time.

9 The FWO's application was listed for hearing on the first day of the trial of the FWO's claim. On that day, the Respondent also sought to argue a preliminary issue identified by Mr Todaro on 15 August 2012, which was never properly identified by him, but set out in submissions filed with the Court on 28 November 2012. The preliminary issue was originally to be heard on 28 November 2012 but was adjourned on that day and subsequently relisted for hearing in March of 2013. As a result of Mr Todaro's failure to comply with associated Court orders, the hearing of the preliminary issue was vacated.

10 Notwithstanding this, the FWO did not object to the preliminary issues being heard at the same time as its application for default judgment.

11 Mr Todaro raises two preliminary issues. The first is that an issue estoppel arises where the FWO could have, but took no action in respect of VST or Mr Todaro in 2009 and Mr Todaro relied upon representations made by the FWO to his and VST's detriment (referred to as the 'Verwayen estoppel' by Mr Todaro's Counsel and is referred to in *Australian Securities Commission v Marlborough Gold Mines* (1993) 177 CLR 485, [1993] HCA 15 at [41]) (the *Marlborough* decision).

12 The second is that the current proceedings are an abuse of process where it was open to the FWO in 2009, or before, to prosecute VST or Mr Todaro or to bring or join the original proceedings against them, and no explanation has been given why they did not.

13 Mr Todaro submitted that unlike res judicata or issue estoppel, the fact that the 2010 Decision and the current proceedings do not involve the same parties is not a barrier to there being an abuse. Further, unlike the Australian Securities Commission in the *Marlborough* decision, there is no event that changed the legal landscape which, hence, renders it unjust or unconscionable for the FWO to proceed with the current proceedings. The cessation to trade by VST in 2010 is not relevant because this was not contemplated nor could it be contemplated as a possibility by the FWO in 2009-2010.

14 The FWO's response to the two preliminary issues is twofold: Firstly, no res judicata, issue estoppel or *Anshun* estoppel arises where the parties and the cause of action are not the same. Second, Mr Todaro bears the onus of demonstrating an abuse and has not done so by relying upon her Honour's comments in paragraph 6 of the 2010 Decision, which are not findings, but an observation of the history of the proceedings.

15 Further, Mr Todaro's affidavit sworn on 27 November 2012 contains untested assertions and has not been tendered into evidence in the proceedings, and the aspects of Mr Todaro's affidavit relied upon do not make good the propositions referred to in his submissions.

16 Therefore, Mr Todaro has not demonstrated an abuse of process where the FWO is precluded from bringing a claim and where there is no operable estoppel.

Preliminary Issue 1 - does an estoppel arise?

17 In respect of Mr Todaro's first preliminary issue as to whether an estoppel arises, for the following reasons I find that the FWO is not precluded from commencing the current proceedings.

18 Res judicata operates so that once a cause of action between certain parties has been finally determined by a competent tribunal; neither of those parties can challenge the adjudication in subsequent litigation between them.

19 In the original proceedings, which gave rise to the 2010 Decision, the parties were the employees of VST (Ng and Lei) and VST. In the current proceedings, the parties are the FWO and Mr Todaro.

20 Importantly, the cause of action litigated in the 2010 proceedings was the alleged failure by VST, as the employer, to pay various entitlements to its employees, Ng and Lei.

21 In the original proceedings, no issue arose, nor were there any findings or claims made concerning Mr Todaro in any personal capacity for any liability in respect of, or on behalf of, VST. The current proceedings are directed towards the alleged involvement by Mr Todaro in the contraventions by VST (as found and determined by Industrial Magistrate Boon in the 2010 Decision) by allegedly aiding, abetting, counselling or procuring the contraventions by reason of Mr Todaro being the directing mind and will of VST, and a civil penalty is sought.

22 Notwithstanding that there may be some overlap in relation to evidence given in the current proceedings by Ng and Lei, essentially the claim sought to be run by the FWO in the current proceedings is directed towards a different issue requiring a Court to make separate findings in relation to the involvement, if any, of Mr Todaro in the running of the business owned by VST.

23 In terms of privity, the basic requirement of a privy of interest is that a privy must claim under or through the person of whom he is said to be a privy: see *Ramsay v Pigram* [1968] 118 CLR 271 where it is stated:

> "A person is not a privy because he has participated so actively in the first litigation that he has assumed a de facto role of an actual party."

24 Further reference is made to *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd* [1993] 43 FCR 510. Whatever may be the case between VST and Mr Todaro, the FWO is not a privy of the employees who instituted proceedings in 2009. In the first instance, the employees commenced the proceedings in their own right after the workplace inspector declined to pursue the employees' claims in a formal court process.

25 I refer to the observations made by Industrial Magistrate Boon at paragraph 6 of the 2010 Decision. It would appear that the FWO had nothing to do with the progress of the claims from the point that the workplace inspector made a decision at an earlier point in time not to initiate formal Court proceedings. Whatever occurred between the employees and the FWO, action taken by the employees in no way bound the FWO. The employees did not seek a penalty as part of their claim, albeit that they made submissions on penalty against VST either at the conclusion, or during the course of the proceedings.

26 I also refer to issue 4 in paragraph 5 of the 2010 Decision. The Court declined to impose a civil penalty, as it had not been claimed as part of the original proceedings and VST was ordered to back pay a considerable sum of money.

27 Issue estoppel asserts that a relevant issue or matter has been decided by a prior action. The difference between issue estoppel and res judicata lies in whether the issue said to have been resolved constituted the tribunal's formal conclusion or whether the issue is subsidiary to or underlays the conclusion.

28 For the same reasons I've already given in relation to res judicata, an issue estoppel does not arise here. In particular, and importantly, the same question to which the current proceedings are directed has not, and was not, decided as part of the 2010 Decision.

29 Paragraph 5 of the 2010 Decision sets out the questions to be determined, including at question 1 whether the Claimants as employees were ever employed by VST. Industrial Magistrate Boon found that they were. At no stage during the 2010 Decision was the Court required to find that Mr Todaro was involved in the contraventions by VST. While it is true that Mr Todaro took part in the original proceedings, he did so as a director of VST, electing to call no evidence on behalf of the company.

30 Further, Mr Todaro via his Counsel, conceded in these proceedings that the findings of fact made in the 2010 Decision are no longer challenged.

31 Accordingly, the only issue for determination in the current proceedings is Mr Todaro's involvement, if any, in the contraventions by VST.

32 An *Anshun* estoppel, again, is a matter involving the same parties where the second action is so relevant to the subject matter of the first action that it would be unreasonable not to rely upon it; that is, having regard to the pleadings or the nature of the Claimant's claim and its subject matter, it would be expected that the totality of the claim should have been raised and dealt with in the first proceedings.

33 In my view, it is difficult, if not impossible, to see why employees seeking to recover entitlements from an alleged employer company, later found to be their employer, would seek to claim against an individual director, and in doing so resolve the issue of whether the director is the directing mind and will of the employer company, effectively foreshadowing that the company may not be able to meet judgment obligations at some point in the future. Further, for the reasons I have given, the parties are not the same between the original and current proceedings and certainly in the case of the FWO. In my view, the employees are not privies.

Preliminary Issue 2 – are the current proceedings an abuse of process?

34 The IMC Regulations empower this Court to control and manage cases before it and to ensure that those cases are dealt with efficiently, economically and expeditiously. There is also a requirement that the Court ensures that its judicial and administrative resources are used as effectively as possible. The Court has wide powers to achieve those ends.

35 In particular, I refer to regulation 7(1)(c) of the IMC Regulations which provides that the Court may:

> "*stay any case, either generally or until a specific date.*"

36 This can occur when a Court prevents a party from litigating an issue because to do so would amount to an abuse of process.

37 In the first instance, Mr Todaro relies upon the following comments by Acting Chief Justice Kirby in *Neil Pearson and Co Pty Ltd & Anor v The Comptroller-General of Customs* [1995] 38 NSWLR 443, at 451 (where his Honour also referred to *Hunter v The Chief Constable of the West Midlands Police* [1982] AC 529):

> "*The third and most limited form of estoppel by record occurs when a court prevents a party from litigating an issue because to do so would amount to an abuse of process. This mechanism will most often be employed where, although not technically bound by an earlier determination, a party should, in substance, be so adjudged.*"

38 In *Walton v Gardiner*[1] [1993] 177 CLR 378, Mason CJ and Deane and Dawson JJ at 393 said (as it related to the inherent jurisdiction of a superior Court to stay proceedings, although in principle there is no reason why this cannot relate to the Industrial Magistrates Court, provided a written law so empowers the Court to make such an order):

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[1] I note that *Walton v Gardiner* was in reference to a stay of proceedings in a disciplinary context where the Court formulated a balancing act between the public interest in protecting the public from incompetence.

"*Thus, it has long been established that regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail.*

Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them.

Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it sought to litigate a new case which has already been disposed of by earlier proceedings."

39 This, in my view, is similar to Mr Todaro's submissions concerning the FWO's decision in 2009 to not proceed with a prosecution and that to commence the current proceedings is unjust or unconscionable so as to amount to there being an abuse of process.

40 Thus, the question is whether the FWO in not commencing the original proceedings in 2009, but commencing the current proceedings in 2011, amounts to an abuse of process.

41 This question, in my view, is answered by reference to their Honours' decision at page 393 in *Walton v Gardiner*. That is, is the continuance of the current proceedings unjustifiably vexatious and oppressive for the reason that the FWO seeks to litigate a new case which has already been disposed of by earlier proceedings? It can also be answered by reference to whether the apparent change in the FWO's position since 2009 is unjust or unconscionable so as to amount to, in essence, an equitable estoppel.

42 In my view, the answer to both of those questions is no, and accordingly, no abuse of process arises warranting a stay of the proceedings under regulation 7(1)(c) of the IMC Regulations.

43 The following are my reasons why:

- section 718(1) of the WR Act outlines the person who may apply for penalties or remedies under Division 2. This includes an employee or an inspector, amongst others. It does not appear from the WR Act that one or the other is confined by the application;
- in terms of proceedings for contraventions of applicable provisions, Part 14 of the WR Act does not preclude a party from instituting proceedings over and above, or to the exclusion of, any other party;
- the powers of the workplace inspector under Part 6 of the WR Act make no reference to the workplace inspector being required to undertake a particular function, albeit that they have various powers directed to ensuring the observance of various employment instruments;
- whatever the reason for the workplace inspector declining to pursue the original proceedings to a formal Court process (giving rise to the 2010 Decision), purportedly on the basis of there being insufficient evidence to proceed in each case, did not preclude the employees from instituting and proving their own claim, as they did;
- the workplace inspector was not obliged to provide reasons for not proceeding with the original proceedings;
- to the extent that Mr Todaro relies upon the content of his affidavit sworn on 27 November 2012, I note the following: paragraphs 33 to 39 and paragraph 47 notably these paragraphs are numbered in that affidavit as paragraphs 33, 34, 34, 34, 35, 36, 30 and 38) contain information which is untested, hearsay and Mr Todaro's opinion, which in no way supports his submission that the FWO represented to him that it would not, nor never, proceed against him personally. At best, paragraph 47 of Mr Todaro's affidavit supports that the FWO or workplace inspector did not proceed with the employees' claim, which is obvious. Accordingly, I place little weight on the contents of Mr Todaro's affidavit, particularly when the paragraphs referred to do not go to the issues in the current proceedings;
- the latter event whereby VST ceased trading approximately 17 days after judgment was given in the 2010 Decision cannot be overlooked in the manner suggested by Mr Todaro in his submissions. It can be reasonably inferred that if VST continued to carry on the business of Venezia Cafe Restaurant and was able to satisfy the amount awarded in the 2010 Decision, the current proceedings would not have been contemplated by the FWO. I refer specifically to the response to invitation to admit signed by Mr Todaro and lodged in the Industrial Magistrates Court Registry on 30 July 2012. As admitted by Mr Todaro, and also pleaded by the FWO in its amended statement of claim dated 29 November 2011, VCR Pty Ltd took over the operation of the Venezia Restaurant at the same time and Mr Todaro is the sole director of this company;
- what the employees could or could not have done to enforce judgment of the 2010 Decision against VST, who had ceased to trade as Venezia Cafe Restaurant, is not to the point. This is entirely a matter for them and I have no information from either party about that and put it to one side;
- Mr Todaro was the sole director of VST. A competent claim can be brought against him in that capacity and the other party, being the FWO, will be required to demonstrate to the requisite standard the case it alleges;
- there is nothing unjustifiably vexatious or oppressive, in the manner contemplated in *Walton v Gardiner*, in the FWO bringing or continuing the current proceedings where the issues sought to be litigated have not been disposed of nor were they even contemplated, or necessarily should have been contemplated, by the earlier proceedings; and

- further, there have been two significant changes since the FWO's decision not to take formal Court action in 2009. The first is that the 2010 Decision made findings of fact regarding VST being the employees' employer and that it had contravened various provisions relating to the employees' entitlements. Secondly, VST ceased to trade a very short time after the 2010 Decision was delivered ordering VST to repay certain entitlements to the employees.

44 In those circumstances, I consider that the FWO's decision to commence and proceed with the current proceedings is neither unjust nor unconscionable, again, particularly, where the cause of action is not the same nor are the parties the same and where the FWO will be required to demonstrate to the requisite standard different issues to that required to be demonstrated by the employees in the 2010 Decision.

45 While public policy demands that there should be an end to litigation, in this case it is not the same litigation and nor were the issues in the original proceedings fully argued or argued at all to finality, and on that basis I decline to exercise my discretion under regulation 7(1)(c) to stay the proceedings as an abuse of process.

Application for Default Judgment

46 The FWO applied for default judgment on or around 27 August 2013, pursuant to regulation 8(2) of the IMC Regulations, on the basis that Mr Todaro failed to file an amended response to the FWO's claim dated 22 November 2011 as required by orders of the Court made on:

- 15 August 2012 where an amended response was to be filed by 3 September 2012;
- 28 November 2012 where an amended response was to be filed by 5 December 2012;
- 6 March 2013 where an amended response was to be filed by 15 March 2013; and
- 12 June 2013 where an amended response was to be filed by 17 June 2013.

47 I note that on 12 June 2013, the Court also made orders striking out Mr Todaro's original response filed on 12 December 2011, on the basis that there was no objection to this by him. From 15 August 2012, Mr Todaro has been represented by the same Counsel and had periodic legal representation prior to that time.

48 The FWO submitted that default judgment should be entered because there was no explanation by Mr Todaro for his failure to comply with four previous orders by the Court requiring him to file an amended response. Secondly, the document entitled "Substituted Defence" filed by Mr Todaro on 10 September 2013, the day before the trial was scheduled to commence, did not disclose a proper defence or a defence on its merits.

49 The FWO relied on older authorities to submit that without an explanation for the delay and the provision of a document which disclosed no defence, default judgment should be entered in favour of the FWO, notwithstanding Mr Todaro had filed the substituted defence the day before the hearing and notwithstanding that there is capacity for the Court to extend time, but where no application has been made to do so.

50 Mr Todaro submitted that nothing in the substituted defence catches the FWO by surprise and that Mr Todaro has made numerous concessions in a letter [to the FWO] that the findings of fact in the 2010 Decision will no longer be contested. Accordingly, in effect, the issues in dispute between the parties are contained in paragraphs 60 to 63 of the FWO's amended statement of claim and paragraph 2 and paragraphs 3(d), (c), (e) of the substituted defence and amended statement of claim. In addition, the substance of Mr Todaro's defence is contained in his affidavit sworn on 27 November 2012, filed in the Registry on or around 28 November 2012. There has been no prejudice suffered by the FWO.

51 In *Wiedenhofer v The Commonwealth* [1970] 122 CLR 172 at 174, Gibbs J said, in relation to similar High Court rules (some cases removed):

> "*…that the Court has a discretion to refuse to make the order asked for, and that a defence served after the expiration of the prescribed time but before judgment has been given cannot be disregarded.*
>
> *It was, however, submitted on behalf of the plaintiff in the present case that judgment ought to be given for the plaintiff and that an extension of time should be refused because the defendant has failed to file an affidavit showing that it has a good defence on the merits. It was said in reliance on the remarks of the Earl of Selborne L.C., in Gibbings v Strong, that the reason why regard is had to a defence delivered out of time is to avoid the circuity which would result if judgment were given by default and subsequently set aside and that therefore the general principle applicable to the setting aside of default judgments ought to be followed, namely, that a defendant ought not only to explain his default but ought also to file an affidavit of merits - that is an affidavit which shows that he has a prima facie defence.*
>
> *In my opinion, however, the discretion of the Court is not limited in that way. In the present case, where I have before me not only a motion for judgment but also a motion for extension of time for filing the defence, and where a defence has in fact been delivered although out of time, and there is no ground to suggest that this defence is merely frivolous or filed for the purpose of delay and an explanation has been given of the failure to deliver it within time, in my opinion, it would lead to an injustice to take any other course than to grant a reasonable extension of time and to refuse the motion for judgment.*"

52 Therefore, as I understand Gibbs J's comments, the Court's discretion is not limited in determining whether to grant a defendant's application to extend time for delivery of the defence to the principles applicable to consideration of setting aside default judgment; that is, on affidavit the defendant is to set out the merits of the defence and an explanation for the delay.

53 However, before Gibbs J was the following relevant material: a motion for judgment, a motion for extension of time for filing defence, the defence which was delivered out of time, no ground to suggest the defence was merely frivolous or filed for the purpose of delay, and an explanation had been given for the failure to deliver within time.

54 It should be noted that in *Wiedenhofe*r, two days after the defence was due, the defendant wrote to the plaintiff with an explanation for the delay and requested an extension of time. The defendant also requested the plaintiff's statement of claim be amended. On 7 October 1970, the plaintiff took out a motion for judgment, and on 21 October 1970 the defendant delivered the defence to the plaintiff. Thus the delay was 15 days.

55 I note that Gibbs J also stated that a Court has discretion to refuse to make orders asked for and that a defence served after the expiration of the prescribed time, but before judgment is given, cannot be disregarded.

56 The FWO relied upon a decision by Master Sanderson in *Carnegie Capital Pty Ltd v Interstyle Building Pty Ltd and Others* [2004] WASC 65. This decision was reversed by the Full Court in *Stellec Pty Ltd and Others v Carnegie Capital Pty Ltd* [2004] WASCA 268. Relevantly, neither decision advanced any new principle to that stated by Gibbs J in *Wiedenhofer*, but in the Full Court decision the following is relevant.

57 Prior to entering a defence by the due date, the defendants' solicitors wrote to the plaintiff's solicitors requesting an extension of time within which to file a defence to the amended statement of claim, which was due by 23 October 2003. The plaintiff refused, and without notice to the defendant, the plaintiff entered judgment in default of defence against the third defendant on 5 November 2003. The Full Court considered that the amendments to the statement of claim were extensive and significantly different to the claim originally pleaded. This applied to the three defendants.

58 The pleadings against the third defendants were, in part, defective. Each of the three defendants and their solicitors swore an affidavit in support of the defendants' application on the issue of delay. The delay was considered insignificant in the context of the litigation. Notably, the decision related to an application to extend time to file a defence and a refusal to set aside default judgment.

59 Two other cases are worth mentioning, both of which refer to *Wiedenhofer*, and are from the Court of Appeal in Victoria. They are *Goldberg v Morrow* [2003] VSCA 127 and *Karam v Palmone Shoes Pty Ltd* & Anor [2012] VSCA 97.

60 In *Goldberg*, the defence was delivered 20 days late, albeit after an application for default judgment was made. The statement of claim was improper and was subsequently struck out and the Court specifically referred to the waste of time and money entering default judgment in circumstances where it would then be set aside where the nature of the defence or objection to the claim is obvious.

61 In *Karam*, the defence was delivered after 21 days, but before the application for default judgment was made. The fact that a defence was filed late was not necessarily a bar to the entry of judgment in default of defence, but where the defendant had filed a defence out of time, the Court had a discretion to refuse to give judgment, and at [25] stated:

> "*Strictly speaking, it was incumbent on the respondent to provide an explanation for its delay in filing its defence and to seek an extension of time in which to file it. In effect, Magistrate Wright cut short correct procedure, albeit in order to achieve the same result, and in a sense, that was arguably an error*."

62 Further, at [26]:

> "*If so, however, it was an error of law made within jurisdiction and, just as importantly, there is no reason to think that it was productive of substantial injustice. As the rest of their Magistrate Wright's and Macaulay J's reasons serve to show, the appellant has not established that the defence is frivolous or vexatious or is otherwise deficient and, consequently, if an extension of time in which to file the defence had been sought, it is to be assumed that it would have been granted*."

63 Turning now to the facts of the FWO's application before this Court. The FWO provided a chronology of events referenced to, or referable to, the affidavits in support of the FWO's application for default judgment. The FWO's application for default judgment was lodged in the Registry on 29 August 2013 with an affidavit in support affirmed by Keelyann Thomson on 9 August 2013. In that affidavit, Ms Thomson also refers to previous affidavits affirmed by her on 19 February 2013 and 28 May 2013 and refers to matters deposed to in both of those affidavits.

64 At annexure "KT31" is a letter dated 7 August 2013 where Mr Todaro, via his representative, is put on notice of the application for default judgment. Mr Todaro had previously been informed on 30 May 2013 that an application for default judgment was possible. The FWO's application was served on Mr Todaro's representative by pre-paid post on 2 September 2013 and emailed to the same person on 30 August 2013. The application was listed for hearing on 11 September 2013, being the first day of the trial. Accordingly, the FWO's application accords with the requirements in regulations 61 and 62 of the IMC Regulations.

65 The FWO's application is predicated on Mr Todaro's failure to lodge an amended response within time, or at all, at the time the application was lodged and served. On 10 September 2013, Mr Todaro lodged a document entitled "Substituted Defence" in the Registry. However, no application was lodged within time, or at all, seeking an extension of time to file and serve an amended response, nor was there any supporting affidavit outlining the merits of the defence or giving an explanation for what can only be described as an extraordinary delay and Mr Todaro's repeated failure to comply with the Court orders.

66 The history of the proceedings is outlined in the FWO's chronology of events and the key dates are as follows:

- 22 November 2011, proceedings were filed by the FWO;
- 30 November 2011, an amended application and statement of claim was filed by the FWO;
- 8 December 2011, the amended statement of claim was personally served on Mr Todaro;
- 12 December 2011, Mr Todaro filed a response to the amended statement of claim. The nature of the response was, in essence, a bare denial and a dispute of the 2010 Decision;
- 18 June 2012, a notice of trial was sent to the parties for a trial listed on 12, 13 and 19 September 2012;

- 15 August 2012, orders were made to vacate the trial and for Mr Todaro, amongst other things, to file an amended response by 3 September 2012. There was an identification of a preliminary issue by the respondent at that stage;
- 28 November 2012, orders were made for Mr Todaro to file an amended response. This was also the date where the preliminary issue was scheduled to be heard;
- 28 November 2012, the hearing of the preliminary issue was adjourned and the respondent was ordered to file an amended response by 5 December 2012;
- 20 February 2013, the FWO filed an application for orders to be made requiring Mr Todaro to file an amended response;
- 6 March 2013, orders were made requiring Mr Todaro to file an amended response by 15 March 2013 (in terms of the orders sought). Further, springing orders were made to vacate the hearing of the preliminary issue if Mr Todaro failed to file submissions on the preliminary issue. He did fail to do so;
- 29 April 2013, the current proceedings were listed for hearing on 11, 12 and 18 September 2013;
- 28 May 2013, the FWO filed an application to strike out Mr Todaro's response filed on 12 December 2011;
- 30 May 2013, the FWO informed Mr Todaro' solicitor that it would reserve the right to apply for default judgment in the event of further non-compliance;
- 1 June 2013, Mr Todaro's solicitor sent to the FWO a letter advising that Mr Todaro did not object to the orders sought;
- 12 June 2013, the Court made orders in terms of the orders sought, and not objected to, including that the respondent file an amended response by 17 June 2013;
- 7 August 2013, Mr Todaro was informed that the FWO intended to apply for default judgment; and
- 10 September 2013, a document entitled "Substituted Defence" was filed by Mr Todaro in the Registry.

67 Notably, save for the letter dated 1 June 2013, Mr Todaro did not respond to the FWO's inquiries concerning the whereabouts of the amended response.

68 I note that on 17 September 2012 a telephone call was made to Mr Todaro's solicitors and the FWO was informed that the amended response would be filed on 19 September 2012. It was not.

69 Mr Todaro says that his defence is outlined in his affidavit sworn on 27 November 2012 and filed with the Court on the same day; that is, one day prior to the hearing of the preliminary issue and directions hearing listed on 28 November 2012. There are two issues in relation to this. The first is that is it not for the Court or a Claimant to fossick through an affidavit filed in response to orders for the parties to file evidence in a claim. This is not the same as a party filing an amended response, clearly setting out the nature and particulars of the party's case.

70 Secondly, if the content of the affidavit represented Mr Todaro's defence, then it could have been of little difficulty to have filed an amended response, given the affidavit was sworn on 27 November 2012. Accordingly, Mr Todaro's response was known to him for some nine to 10 months, at least.

71 The following is relevant in respect of the Court's discretion whether or not to enter judgment against Mr Todaro:

- the delay in providing an amended response is extraordinary; that is, approximately 12 months;
- Mr Todaro was ordered to file an amended response on four occasions and complied with none;
- Mr Todaro has failed to comply with other orders of the Court in relation to the filing of documents relevant to the claim;
- this is indicative, in my view, of Mr Todaro's attitude to defending the claim, which is that he will file what he wants, when he wants, with the outcome being that the claim has been delayed by almost two years, of which the vast majority of the delay, if not all of the delay, is attributable to Mr Todaro's failure to comply with the Court orders;
- the substituted defence, save for the paragraphs in relation to the preliminary issue, which was to be heard on 28 November 2012 and in March of 2013, is nothing more than a series of admissions, denials and non-admissions. He does not in any way outline a defence to the claim. The FWO is no better off than the Court in understanding the nature of Mr Todaro's defence or response or its merits;
- at the absolute last minute, Mr Todaro filed a document entitled "Substituted Defence" and it is open to infer that the document's purpose was to further delay the proceedings;
- no accompanying application was filed by Mr Todaro requesting an extension of time to file the defence, much less a supporting affidavit outlining the merits of his defence and an explanation for the considerable delay; and
- Mr Todaro was on notice of an impending application for default judgment approximately one month prior to the application being made.

72 Having regard to the above, the circumstances of this case are substantially different to, and distinguishable from, the cases I have referred to.

73 There are two further issues to be noted: firstly, Mr Todaro says the FWO has suffered no prejudice by reason of the late filing of the substituted defence, given that it is aware of the content of Mr Todaro's affidavit sworn on 27 November 2012. As

stated previously, Mr Todaro's affidavit is not his response to the claim and is untested evidence filed late in compliance with Court orders.

74 The prejudice suffered by the FWO is that the claim has taken almost two years to be heard and it still does not know the content of Mr Todaro's amended response, save for a series of denials, admissions and non-admissions made the day before the hearing.

75 Secondly, the purported concessions made by Mr Todaro in a letter with the substituted defence, conceding the findings of fact made in the 2010 Decision, as it related to the failure by VST to pay certain entitlements, are not concessions at all. Findings of fact and contraventions by VST made by Industrial Magistrate Boon have not been challenged on appeal or in any other forum. To challenge those findings in these proceedings would amount to a collateral attack of the very kind referred to by Kirby ACJ in *Neil Pearson* when he referred to *Hunter v The Chief Constable of West Midlands Police* [1982] AC 529.

76 Thus, in all the circumstances, and having regard to the factors I have referred to, in my view, my discretion should be exercised in favour of the FWO and judgment be entered against Mr Todaro pursuant to regulation 8(2) of the IMC Regulations on the basis of Mr Todaro's failure on four occasions to file an amended response as ordered by the Court.

Findings and Orders

77 Having regard to *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427, I make the following findings and orders.

78 Upon the admission which the Respondent is taken to have made consequent upon his noncompliance with orders of the Court, the Court FINDS that:

- The Respondent was involved in the contraventions of VST Pty Ltd (ACN 101611072) as found by the Industrial Magistrates Court in Lei and *Ng and Lei v VST Pty Ltd* [2010] WAIRC 896 and is, therefore, taken pursuant to section 72(8) of the *Workplace Relations Act 1996* (Cth) and section 550 of the *Fair Work Act 2009* (Cth) to have contravened:
  - (a) section 182 of the *Workplace Relations Act 1996* in that he was involved in VST Pty Ltd's (VST) failure to pay Kenny Meng Wei Ng (Ng) and Ning Wei Lei (Lei) the basic periodic rate of pay pursuant to the *Restaurant Tearoom and Catering Workers' Award 1979 (WA)* as it continued to operate pursuant to item 31 of schedule 8 of the *Workplace Relations Act 1996* as a *Notional Agreement Preserving the State Award*;
  - (b) section 235(1) of the *Workplace Relations Act 1996* in that he was involved in VST's failure to pay Ng and Lei annual leave at an hourly rate no less than the basic periodic rate of pay for annual leave taken;
  - (c) section 235(2) of the *Workplace Relations Act 1996* in that he was involved in VST's failure to pay Ng and Lei accrued but untaken annual leave entitlements on termination of employment;
  - (d) clause 18(1)(a) of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to pay Ng and Lei annual leave at their ordinary rate of wage paid for annual leave taken;
  - (e) clause 18(2) of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to pay Ng and Lei a loading of 17 and a half per cent of their ordinary rate of wage for annual leave taken;
  - (f) clause 18(6)(b) of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to pay Ng and Lei their accrued but untaken annual leave entitlement on termination of employment;
  - (g) clause 9(1) of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to pay Ng and Lei additional rates for ordinary hours worked after 7 pm;
  - (h) clause 9(2) of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to pay Ng and Lei additional rates at time and a half for ordinary hours worked on Saturdays and Sundays;
  - (i) clause 10 of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to pay Ng and Lei at the correct overtime rates for work performed outside of the rostered ordinary hours of work; and
  - (j) clause 37 of the *Notional Agreement Preserving the State Award* in that he was involved in VST's failure to make superannuation contributions on behalf of Ng and Lei.

79 And the Court ORDERS that:

- Judgment for the Applicant be entered against the Respondent pursuant to regulation 8(2) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005*;
- Pursuant to 719(1) of the *Workplace Relations Act 1996*, regulation 14.4 of the Workplace Relations Regulations and section 546(1) of the *Fair Work Act 2009*, the Respondent pay pecuniary penalties for breaching the provisions and civil remedy provisions in order 1;
- Pursuant to section 841(b) of the *Workplace Relations Act 1996* and section 546(3) of the *Fair Work Act 2009* that all pecuniary penalties payable by the Respondent be apportioned and paid to Ng and Lie within 28 days of the date ordered by the Industrial Magistrates Court;

- The hearing on 18 September be vacated;
- That this matter be adjourned to a date to be fixed for further hearing with respect to the Applicant's claim for penalties to be imposed on the Respondent;
- The Applicant file and serve any submissions on which it relies in relation to penalty on a date to be fixed by the Court;
- The Respondent file and serve any submissions and evidence on which it relies in relation to penalties seven days following the service of the Applicant's submissions, such evidence being limited to the Respondent's present circumstances; and
- The parties have leave to apply.

D. SCADDAN
INDUSTRIAL MAGISTRATE

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2013 WAIRC 00839

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK ANTONINO POLIZZI
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 3 OCTOBER 2013
FILE NO/S	APPL 27 OF 2013
CITATION NO.	2013 WAIRC 00839

Result	Application to tender new evidence dismissed
Representation	
Appellant	Ms K Vernon, of counsel and Mr D Jones, of counsel (by written submission)
Respondent	Ms R Siddique, of counsel (by written submission)

Order

WHEREAS on 19 August 2013 the appellant filed an application for leave to tender new evidence;

AND WHEREAS on 17 September 2013 the respondent advised that it did not oppose the application;

AND WHEREAS on 18 September 2013 the appellant advised that he wished to withdraw the application,

NOW THEREFORE the I, pursuant to the powers conferred on it under s 33S of the *Police Act, 1892*, and by consent hereby order –

THAT the application to tender new evidence be dismissed.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

2013 WAIRC 00847

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK ANTONINO POLIZZI
	APPELLANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 8 OCTOBER 2013
FILE NO/S	APPL 27 OF 2013
CITATION NO.	2013 WAIRC 00847

Result Order issued

Order

WHEREAS conciliation in this appeal is unavailing and the appeal is to be set down for hearing;

AND WHEREAS in the opinion of the Commission the following orders are necessary for the orderly programming of the hearing;

NOW THEREFORE I, pursuant to s 33S of the *Police Act 1892* and s 27(1)(o) of the *Industrial Relations Act 1979* hereby order:

1. THAT the appeal be heard on Thursday 5 December 2013 commencing at 10.30 am.
2. THAT the date by which the respondent is to comply with r 91(1) of the *Industrial Relations Commission Regulations 2005* be no later than Monday 28 October 2013.
3. THAT on or before Monday 18 November 2013 the appellant file and serve on the respondent an outline of submissions.
4. THAT on or before Monday 25 November 2013 the respondent file and serve on the appellant an outline of submissions.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 00845

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00845
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	FRIDAY, 20 SEPTEMBER 2013
DELIVERED	**:**	TUESDAY, 8 OCTOBER 2013
FILE NO.	**:**	U 140 OF 2013
BETWEEN	**:**	BROOKE FONTANILLE
		Applicant
		AND
		SASSY DIVA'S
		Respondent

CatchWords	:	Industrial Law (WA) - Alleged harsh, oppressive, unfair dismissal - Application filed outside time - Applicaton for extension of time - Principles applied - Application dismissed.
Legislation	:	Industrial Relations Act 1979 (WA) s 29(3)
Result	:	*Claim of unfair dismissal made out of time dismissed*
Representation:		
Applicant	:	Ms B Fontanille
Respondent	:	Ms C Trigwell

Case(s) referred to in reasons:

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683

Reasons for Decision

and

Supplementary Reasons for Decision

(Given at the conclusion of the hearing, and edited subsequently)

1 On 30 August 2013 Ms Fontanille referred a claim of unfair dismissal to the Commission. The Act requires such claims to be referred within 28 days of the employee's termination. In this case Ms Fontanille's employment ended on 29 or 30 May 2013 – it is not necessary to decide which of those two days is correct. Accepting for these purposes 30 May 2013, a claim of unfair dismissal would be able to be referred by her before 27 June 2013, however 30 August 2013 is 92 days after her employment terminated. Ms Fontanille's claim is therefore 64 days out of time.

2 The Act allows the Commission to accept a claim of unfair dismissal that is out of time if the Commission considers that it would be unfair not to do so. The claim was listed for hearing to determine whether it would be accepted out of time. Ms Fontanille made submissions from the bar table. Ms Trigwell, the owner of the business, gave evidence under oath.

3 Considerations which usually are relevant in considering whether it would be unfair not to do so are discussed in the decision of the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683. I have found the following to be particularly relevant in this matter.

Length of the Delay

4 The time limit for referring a claim of unfair dismissal to the Commission, and the length of the delay in this claim, are set out above. I consider the length of the delay in this claim is significant in that it is three times longer than the time limit set by Parliament.

Reasons for the Delay

5 As to the reasons for the delay, Ms Fontanille says that when she was dismissed she was told it was because the business was being put up for sale. She thought it would not be a "permanent" dismissal in that when the business did not sell she would be re-employed; this had happened before and past experience suggested it would happen again; however Ms Trigwell hired another person instead. This other person was seen by Ms Fontanille on a Saturday, and that was when Ms Fontanille thought Ms Trigwell was not going to re-hire her, and that caused her to lodge the claim. She thinks now that the reason for her dismissal was not valid. Since the time she referred her claim to the Commission, the job has been advertised.

6 In her Notice of Application, Ms Fontanille wrote that at the time of her termination she was renovating and she waited until family visitors had left before referring the claim, although she did not press these reasons in the hearing. She also wrote that she was unaware of the 28 day limit, and she apologised for the lateness of her claim.

The Merits of the Claim

7 As to the merits of Ms Fontanille's claim that her dismissal was unfair, in the sense of whether she has a sufficiently arguable case, Ms Fontanille writes in her Notice of Application that she had been employed since 22 February 2010 as a sales assistant on a permanent part-time basis, and had been promoted to a supervisor role. Her husband had decreased his hours to enable her to help Ms Trigwell by closing the shop at the end of the day. She says she was given no notice prior to termination. The reason given was that the business was being put up for sale and Ms Trigwell would be working her hours to get everything in order for the sale. The business was not sold and Ms Trigwell hired another person to cover her position.

8 In the hearing, Ms Fontanille said she had thought the business would not sell quickly and, hopefully, Ms Trigwell would need her again. She thought that Ms Trigwell would not be able to work her hours because Ms Trigwell had another job. Ms Fontanille said she was shocked at the time when she was dismissed and thought she would be kept on as a casual. She did not say anything at the time because she thought Ms Trigwell would re-hire her. She was offended by the employer hiring someone else when she had always put herself out to be easily available to work, and Ms Trigwell had been happy with her work. She could not understand why she was not re-hired. Ms Fontanille thinks now that the reason given to her for her dismissal is no longer a valid reason.

9 Ms Trigwell's evidence was that business was so quiet that she decided that she could not afford to keep Ms Fontanille on anymore. Ms Trigwell had to return to work in the shop herself to work the hours worked by Ms Fontanille because her business was going backwards. She did give Ms Fontanille the correct notice period although Ms Fontanille's last two weeks were on significantly reduced hours. Since then Ms Trigwell herself has worked, and generally is still working, the hours that Ms Fontanille would have worked. Ms Trigwell's evidence is that she has not employed anyone to replace Ms Fontanille. She

did employ another person for two Saturdays in August 2013 when she had a sale but it was only for a few hours on each of those days. The shift advertised on 7 September 2013 is not for the hours worked by Ms Fontanille, but for the hours worked by another employee.

10 On the limited evidence before me, I tend to the view that Ms Fontanille's claim that her dismissal in May 2013 was unfair is not strong. If this case was to go to a full hearing, Ms Trigwell's evidence that at the time business was quiet, that she has worked the hours worked by Ms Fontanille and that she has not replaced Ms Fontanille would establish a justification for reducing her employment costs by dismissing Ms Fontanille. Even if the incorrect notice period was given, as Ms Fontanille submits but which Ms Trigwell denies, that by itself would not mean there was valid reason for her dismissal or that the dismissal was unfair.

11 I have the impression that at the time she was dismissed, Ms Fontanille largely accepted the dismissal – if she was shocked about it, she was not sufficiently shocked for her to contest it. The timing of her claim of unfair dismissal shows that her complaint really is not the dismissal which occurred but that she was not re-employed three months later when in her view she could have been, when she saw another person employed in the shop. That is not a strong reason why the dismissal three months earlier was unfair.

Action Taken by the Applicant to Contest the Dismissal, Other than Making the Claim of Unfair Dismissal

12 This can be a relevant consideration because it will show that the decision to dismiss was actively contested and therefore may favour accepting the claim out of time because the employer would have known the dismissal was to be challenged.

13 I find that Ms Fontanille did not take any steps at the time of the dismissal that showed she did not accept her dismissal and that she would be contesting it. I accept that the first Ms Trigwell knew of any suggestion of Ms Fontanille contesting the dismissal was when she was served with the claim. This is a factor which does not support accepting the claim out of time.

Prejudice to the Respondent, Including Prejudice Caused by Delay, Will Go Against Accepting the Claim Out of Time

14 I take into account that if this claim were to go ahead, Ms Trigwell would be prejudiced because she would have to defend the claim, with all that is involved in doing so, when she is herself running her business.

Conclusions

15 The starting position is that the time limit of 28 days should be complied with unless there is an acceptable explanation for the delay which makes it unfair not to accept the claim out of time. Each case will turn upon its own individual facts and circumstances and none of these factors has been necessarily decisive in themselves, but there is not anything positively to satisfy me that it would be unfair not to accept the referral out of time.

16 The claim is a long period out of time and I am not persuaded there is an acceptable reason for the delay. I do not regard Ms Fontanille's submissions regarding the dismissal which occurred in May as tending to show that it was unfair at the time, and she has not persuaded me that it would be unfair not to accept her claim. The employer was unaware of any issue until served with the claim and will be prejudiced if it goes ahead. For those reasons, I will issue an order dismissing Ms Fontanille's claim.

Supplementary Reasons for Decision

17 After I had given the above Reasons for Decision at the conclusion of the hearing, but before I had adjourned the hearing, Ms Fontanille spoke and raised some further matters; Ms Trigwell responded to her. It was too late for Ms Fontanille to raise matters after the hearing had finished and after the decision had been given. Nevertheless, I think the matters Ms Fontanille raised were meant genuinely, and that I should respond to them. What follows relates to those matters.

18 First, Ms Fontanille referred to a newspaper she was holding and said that the job advertised is for the exact hours she had worked and she cannot see how Ms Trigwell can say she is not replacing her; Ms Trigwell responded that they are the hours worked by another person as well. Ms Fontanille replied that the advertisement says applicants must be over 18 and the other person is not over 18; Ms Trigwell responded that she is not keeping the other person.

19 When Ms Fontanille was making her submissions, she had referred to the job being advertised. If the hours in the advertisement were important, she should have referred to them then and asked me to look at the advertisement. She did not do so and therefore the Commission does not know what is in the advertisement and its contents could not be taken into account.

20 During the hearing Ms Fontanille was given every opportunity to ask questions of Ms Trigwell on the evidence Ms Trigwell gave, but she did not do so. Ms Fontanille could have shown the advertisement to Ms Trigwell and asked Ms Trigwell how she could say she is not replacing her. Depending upon the answer, Ms Fontanille could then have asked me to not to accept the answer, and I would have had to take that into account in the decision I was required to make.

21 On what is before me, I have no reason to disbelieve Ms Trigwell. She gave her evidence under oath. Ms Trigwell's evidence included that the other person now has a full-time job and is leaving. On the face of it, Ms Fontanille has not shown that the advertisement related to her position.

22 Further, the evidence that the state of the business now is significantly different from when Ms Fontanille was dismissed might provide another, valid, reason for advertising a position. If the advertisement had been in May, that would have strengthened Ms Fontanille's submission that her dismissal in May was unfair; however, it was not advertised in May. The business has apparently improved since May so an advertisement in September does not necessarily support an argument that the dismissal of Ms Fontanille in May was unfair.

23 Second, Ms Fontanille said that the reason given to her for terminating her employment was that the business was going to be put up for sale, now Ms Trigwell says it was not for sale, therefore Ms Fontanille had been given incorrect information: she was not told the real reason for her termination, and she thinks that is unfair.

24 It is important to remember that this hearing is not about whether Ms Fontanille's dismissal was unfair. It is about whether her claim that it was unfair should be accepted 64 days out of time. Therefore this issue of being given incorrect information is only one factor to take into consideration. The Commission does not know what was said by Ms Trigwell to Ms Fontanille because it has not heard the claim of unfair dismissal.

25 If I accept for present purposes that when she was dismissed, Ms Fontanille was told it was because the business was to be sold when it was not going to be sold, does that indicate, at this preliminary stage, that Ms Fontanille has a sufficiently arguable case that her dismissal was unfair?

26 Whether a dismissal is unfair does not depend upon only what was said to the employee at the time; it will depend upon a consideration of all of the circumstances, including what was said to the employee at the time. If a consideration of all of the other circumstances tends to suggest the dismissal was not unfair, is it made unfair because the employee was given incorrect information? It is wrong for an employer knowingly to give incorrect information to an employee; whether it is sufficiently serious that doing so will make the dismissal unfair is another matter.

27 In the circumstances of this case so far as the Commission has heard it, Ms Trigwell's evidence under oath that the business was so quiet that she could not afford to keep Ms Fontanille on any more, and that Ms Trigwell had to return to cover Ms Fontanille's hours because her business was going backwards, and that she is still doing so, are reasons why Ms Fontanille's dismissal might not have been unfair even if she was given incorrect information. If this matter were to go to a full hearing, it would be expected that Ms Trigwell would produce sufficient financial material to support the evidence she has given – she does not need to produce it now for this hearing, it is sufficient for her to indicate what her evidence will be.

28 If that evidence is produced, the fact that Ms Trigwell did not tell her that but chose to tell her she intended to sell the business and work in it herself for that to occur (if that is what happened) does not leave Ms Fontanille with a strong case that her dismissal at that time was unfair, because an employer is likely to be able to justify dismissing an employee if the business cannot continue with existing staff numbers.

29 Any suggestion made in the hearing by Ms Trigwell about a lack of enthusiasm on the part of Ms Fontanille was not known to Ms Trigwell at the time of the dismissal – it only became apparent to Ms Trigwell when she herself returned to work in the shop. So an argument that Ms Fontanille was not told this and given an opportunity to improve is not a strong argument that her dismissal was unfair when that was not a reason for her dismissal.

30 For those reasons, the matters raised by Ms Fontanille in court after I had given my Reasons for Decision have not persuaded me that it would be unfair not to accept her claim out of time, and the order now issues which dismisses Ms Fontanille's claim of unfair dismissal.

2013 WAIRC 00846

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	BROOKE FONTANILLE
	APPLICANT
	-v-
	SASSY DIVA'S
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 8 OCTOBER 2013
FILE NO/S	U 140 OF 2013
CITATION NO.	2013 WAIRC 00846

Result	Claim of unfair dismissal made out of time dismissed
Representation	
Applicant	Ms B Fontanille
Respondent	Ms C Trigwell

Order

HAVING heard Ms B Fontanille on her own behalf and Ms C Trigwell on her own behalf as owner of the respondent;

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

THAT this claim of unfair dismissal made out of time be dismissed.

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

2013 WAIRC 00800

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHEREEN GOMES
	APPLICANT
	-v-
	ERNIE PIRONE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 11 SEPTEMBER 2013
FILE NO/S	U 95 OF 2013
CITATION NO.	2013 WAIRC 00800

Result	Application discontinued.
Representation	
Applicant	Mr L Martin of counsel
Respondent	Ms S Owen as agent

Order

HAVING heard Mr L Martin of counsel on behalf of the applicant and Ms S Owen 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 application be and is hereby discontinued.

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

2013 WAIRC 00855

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KEVIN LANGE
	APPLICANT
	-v-
	C2CE PTY LTD
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 11 OCTOBER 2013
FILE NO/S	B 197 OF 2012
CITATION NO.	2013 WAIRC 00855

Result	Application dismissed
Representation	
Applicant	Mr K Lange on his own behalf
Respondent	Ms J Knoth of counsel

Order

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

WHEREAS the matter was listed for hearing for mention on the 10th day of September 2013 at which time the applicant indicated that he would seek advice as to whether to proceed with the application, and would advise the Commission within 14 days; and

WHEREAS on the 25th day of September 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 dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00824

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00824
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 30 APRIL 2013, WEDNESDAY, 1 MAY 2013, FRIDAY, 21 JUNE 2013
DELIVERED	**:**	THURSDAY, 26 SEPTEMBER 2013
FILE NO.	**:**	U 114 OF 2012
BETWEEN	**:**	LORRAINE MALONE Applicant AND LEEMAN AND GREEN HEAD COMMUNITY RESOURCE CENTRE INC Respondent

Catchwords	**:**	Industrial Law (WA) - Termination of employment - Claim of harsh, oppressive or unfair dismissal - Principles applied - Applicant denied procedural fairness - Applicant not unfairly dismissed - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(i) *Associations Incorporations Act 1987*
Result	**:**	Dismissed
Representation:		
Applicant	**:**	Mr J Richardson (as agent)
Respondent	**:**	Mr K Trainer (as agent)

Case(s) referred to in reasons:

Byrne v Australian Airlines (1995) 61 IR 32

Shire of Esperance v Mouritz (1991) 71 WAIG 891

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

Reasons for Decision

1 On 22 May 2012 Lorraine Malone (the applicant) lodged this application in the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (the Act) claiming that she was unfairly dismissed on 18 May 2012 by Leeman and Green Head Community Resource Centre Inc (the respondent) (the CRC).

Background

2 The applicant was employed by the respondent as the CRC's coordinator between 1 July 2009 and 18 May 2012. She worked approximately 27 hours per week and was paid $23 per hour. The applicant was terminated after the respondent held an extraordinary committee of management meeting on 2 May 2012 to deal with issues concerning the applicant's conduct. The minutes of this meeting are as follows:

MINUTES TO Extra-Ordinary Meeting WED 2nd May

Meeting Opened 5.00 pm

Attendance; Gaynor Lindsay, Gloria Litchfield, Glenys Reynolds,

Lyn Luen, Hiria Pol, Stewart Hammond

Apologies; Yolande Thorpe & Aggy Hall

Discussions – RE Lorraine Malone

Gloria read Incoming Letters and Statements

Lorraine Malone

Shannon Boyle

Ellie Hammond

All Attached

Gaynor Lindsay read Report to Committee from Chair person

Attached

Lorraine Malone Entitlement hours for Leave Sorted

Workplace agreement not signed by Lorraine Malone.

Gaynor Lindsay to speck (sic) to Celia Loot about concerns Coordinators Behaviour towards work colleagues and citizens using the CRC facilities.

Committees (sic) decided to terminate Lorraine Malone position as CRC Coordinator for

*Gross misconduct and refusing reasonable direction.

Letters Attached explaining complaints. All previous complaints are also filed.

Meeting Closed 5.45 pm

(Exhibit R12.16)

3 The following documents were attached to the minutes:

(1) A letter from the applicant to the committee dated 26 April 2012 requesting holidays as from the end of her medical certificate. The letter also referred to an incident on 26 April 2012 and the stress the applicant was suffering.

(2) A letter from Ms Boyle to the committee dated 24 April 2012 expressing her concerns about the actions of the applicant and advising that if the applicant returns to the workplace Ms Boyle would have no choice but to resign from her position.

(3) A report from Ms Hammond about events that occurred between 23 and 26 April 2012.

(4) A statement written by Ms Lindsay dated 26 April 2012 presented at the committee meeting on 2 May 2012. She stated that she could no longer remain in her position as President of the CRC with the applicant as coordinator. The letter refers to Ms Lindsay and others, including fellow employees and members of the public being, abused by the applicant.

4 After this meeting the respondent terminated the applicant by letter dated 4 May 2012 effective 18 May 2012. This letter is as follows (formal parts omitted):

We regret to inform you that your employment with the Leeman and Green Head CRC is being terminated, effective 18/05/2012. Your termination is the result of the following violations of company policy.

- Gross misconduct
- Refusing reasonable direction

A committee meeting was held on Wednesday 2/05/2012 and the above matters were discussed. You were spoken to by the Chairperson about your conduct and the committee have agreed that there has been minimal improvement in your behaviour.

You will be paid your outstanding leave of 92.12 hours plus sick leave 34 hours that you are entitled to.

Please find attached a new dated cheque for $2218.76.

Cheque 227 has been cancelled with the bank and you have been issued a new dated cheque no 228 and this needs to be presented within 5 working days.

(Exhibit R12.17)

5 A number of witnesses gave evidence in these proceedings. The applicant gave evidence and summonsed the following people to give evidence: Mr Rodney Stewart Hammond, Ms Hiria Pol, Ms Glenys Reynolds and Ms Lyn Luen. These witnesses were all members of the CRC and they attended the meeting where the respondent decided to terminate the applicant.

6 The following persons gave evidence on behalf of the respondent: Ms Gaynor Lindsay, Ms Gloria Litchfield, Ms Shannon Boyle, Ms Naomi Shipway, Ms Megan Campbell, Ms Ellie Hammond and Ms Laura Gilbertson. When the applicant was terminated Ms Lindsay was the respondent's chairperson and Ms Litchfield was the respondent's secretary. Ms Boyle commenced employment with the respondent in February 2010 as its Youth Coordinator and she then became the Assistant Coordinator. Ms Boyle changed her role and commenced a traineeship with the respondent in Information Technology and Digital Media in February 2012. Ms Campbell undertook a traineeship with the respondent between September 2010 and March 2011, Ms Hammond undertook volunteer work for the respondent and edited the Snag Island News (SIN) and Ms Gilbertson was the respondent's secretary in 2011. Ms Naomi Shipway is a community member.

Applicant's evidence

7 The applicant confirmed that a series of emails sent between herself and Ms Gilbertson in March and April 2010 was accurate (Exhibit R12.2). She denied being obstructive and abrasive towards Ms Gilbertson in this exchange.

8 The applicant maintained that she did not cause the cessation of Ms Campbell's traineeship with the CRC. The applicant had not seen an incident report prepared by Ms Lindsay on 1 March 2011 about her conduct towards Ms Campbell and the applicant denied being warned by Ms Lindsay about her actions concerning Ms Campbell or being asked to apologise to her. However she apologised to Ms Campbell after this incident of her own accord.

9 The applicant denied that she made the comments attributed to her in an incident report prepared by Ms Boyle on 8 December 2011. This report contains comments the applicant was alleged to have made to community members Mr Ross Crake and Mr Peter McKay, which Ms Boyle claimed was witnessed by Ms Hammond. The applicant claimed she asked Mr Crake why he was at the meeting as he had been banned from attending CRC meetings. The applicant maintained that Ms Lindsay did not verbally warn her about her behaviour during this incident.

10 The applicant disputed that she was given any directive to complete activities for Anzac Day in 2012. The applicant also denied that the minutes of the committee of management meeting held on 19 April 2012, which discussed activities for Anzac Day, were given to her even though she was normally given copies of these minutes.

11 The applicant had not seen a statement made by Ms Litchfield dated 9 February 2012 about the applicant opening registered mail from Mr McKay on 8 January 2012. The applicant stated that when she was told by the committee not to have any further dealings with Mr McKay she blocked his emails. The applicant conceded opening a registered letter from him but she claimed that she was not directed not to do so. When she discussed this issue with Ms Litchfield she agreed not to do it again and she was not given any warning at the time about her conduct with respect to this issue.

12 The applicant denied verbally abusing Ms Lindsay during the Easter Extravaganza in April 2012.

13 The applicant had not seen a letter written by Ms Boyle to the committee dated 26 April 2012 which contained a number of complaints about the applicant's behaviour just prior to her termination. The applicant stated that on 24 April 2012 she was stressed as she needed to complete the respondent's business plan with the assistance of Ms Boyle before going on leave. Ms Boyle was working on documents for the Anzac Day ceremony with Ms Hammond and the applicant asked Ms Boyle what she was doing as the applicant had not received a directive from the committee that the CRC was to be involved in Anzac Day activities. The applicant denied Ms Boyle's claim that she said Ms Mitch Shipway 'is getting F*** all from Me' in relation to printing Anzac Day flyers. The applicant agreed that Ms Boyle was upset and walked out of the respondent's office after having a discussion with her about completing Anzac Day activities. The applicant stated that at the time she was trying to stress to her the importance of completing her traineeship and not work on Anzac Day activities. After Ms Boyle walked out of the office the applicant apologised to her and they finished the day working productively together. The applicant claimed this was a one-off incident.

14 The applicant claimed she rang and sent texts to Ms Lindsay on a number of occasions on 26 April 2012 because the CRC keys and her work laptop had been taken by Ms Hammond and Ms Boyle and she was not sure what was going on.

15 The applicant maintained that she was not abusive towards any staff members or members of the public during her employment. However, she then conceded that she was abusive to Ms Campbell. The applicant disputed Ms Hammond's claim that she shouted and swore at Mr Crake on 7 December 2011 and the applicant denied shouting at Ms Hammond on 8 April 2012 during the Easter Extravaganza. The applicant conceded that on 23 April 2012 when Ms Hammond was at the CRC she questioned her about why she was at work that day. The applicant stated that the papers she threw on Ms Boyle's desk on 24 April 2012 related to information she researched about Ms Boyle's traineeship. The applicant agreed that when she attended the CRC on 17 May 2012 to collect her personal items after her termination, she called Ms Hammond a 'back stabbing bitch' but in her defence she said that she had just been accused of stealing items from the CRC and she was distraught at the time.

16 The applicant gave a medical certificate to Ms Boyle for sick leave she took in the period 26 April 2012 to 4 May 2012 inclusive and the applicant gave a second medical certificate to Ms Boyle on or about 8 May 2012 covering the period 7 May 2012 to 18 May 2012.

17 The applicant only became aware that she was terminated when she received her letter of termination on or about 5 May 2012. The applicant maintained that Ms Lindsay did not speak to her about her conduct and no warnings were given to her about her behaviour.

18 The applicant is not seeking reinstatement. She is seeking six months compensation as well as entitlements she would have received if she continued to work for the respondent including superannuation and money to undertake training. The applicant looked for work between May and December 2012 however opportunities are limited in the area. The applicant obtained employment in December 2012 working casually at a roadhouse and she earns less in this position than what she was paid by the respondent.

19 Under cross-examination the applicant stated that on 4 May 2012 she sent a text to Ms Lindsay asking whether she would be required to continue working at the CRC as her work keys and computer had been taken from her and she wanted to find out what was happening. She was not coping at the time so she visited her medical practitioner. The applicant stated that she did not tell the respondent on 4 May 2012 that she was obtaining a further medical certificate and she could not recall the date she made the doctor's appointment on 8 May 2012.

20 The applicant conceded that some of her conduct whilst working at the CRC was inappropriate but she denied yelling at Ms Campbell. The applicant agreed that when she spoke to Ms Campbell on one occasion she said words to the effect of 'do I need to smash the computer and shove it down her throat'. The applicant accepted that her words were threatening and was inconsistent with her role as coordinator. The applicant reiterated that Ms Lindsay did not discuss her conduct towards Ms Campbell with her after this incident.

21 The applicant was unaware that she spoke to Mr Crake in an aggressive tone on 7 December 2011 and the applicant could not recall Ms Lindsay warning her about her behaviour in relation to this incident. After this incident the applicant agreed that she was told by the committee not to have any dealings with Mr McKay so she blocked his emails. The applicant denied telling Ms Litchfield that Ms Boyle had opened the registered mail sent by Mr McKay.

22 The applicant agreed that the respondent was usually involved in Anzac Day activities but she was adamant that no direction was given to her by the committee in 2012 about Ms Boyle assisting with these activities. The applicant maintained that she did not throw any papers into Ms Boyle's face on 24 April 2012 and she claimed she threw them on the desk and not at her. The applicant later apologised to Ms Boyle. The applicant agreed that after this incident Ms Boyle left the office crying but she said that the morning had been tense and both of them were upset and on edge because the day before Ms Boyle had told the applicant that Ms Lindsay and Ms Litchfield were 'on the warpath'.

23 The applicant was going to complete the respondent's business plan on 24 April 2012 but Anzac Day activities interrupted this and when she attended the office on 25 April 2012 to complete the business plan Ms Lindsay told her to leave. Ms Lindsay did not tell her on 23 April 2012 that her behaviour at the Easter Extravaganza was inappropriate and the applicant denied saying that she would have nothing more to do with the committee if Ms Litchfield was involved. Ms Lindsay also did not mention referring the applicant's behaviour to the committee after the Easter Extravaganza. The applicant maintained that on 8 April 2012 she did not yell at Ms Hammond and the applicant denied that she 'flew off the handle' on 24 April 2012 as claimed by Ms Hammond.

24 Ms Luen has been a CRC member for 10 years and a CRC committee member for approximately three years. Ms Luen was unaware that the applicant had failed at any time to undertake direction from the respondent's committee and she was unaware of any warnings given to the applicant until the meeting of 2 May 2012. Ms Luen was surprised about the issues raised at this meeting concerning the applicant and she was unaware of the applicant's dealings with Mr McKay and the applicant opening correspondence from him. Ms Luen stated that the community support of the CRC was constant during the applicant's employment with the respondent and she believed the applicant was a good coordinator. Ms Luen could not recall seeing any letters or statements being presented at the meeting on 2 May 2012 however she said it was possible that she saw the letter from Ms Boyle. Ms Luen was aware that Ms Lindsay and Ms Litchfield were considering resigning at the time of the meeting.

25 Ms Reynolds was a CRC member for four years. When she was on the committee she was unaware that the applicant had committed any misconduct, that she had been given any verbal or written warnings by the committee or did not carry out her duties. Ms Reynolds described the applicant as being well prepared for meetings and efficient. Ms Reynolds stated that at the committee meeting on 2 May 2012 she abstained from voting about the applicant's termination. She did not read any documents during this meeting but she was told about warnings given to the applicant. Ms Reynolds could not recall any letters or Ms Lindsay's report being read out at the meeting. Ms Reynolds stated that she was told at the meeting that the applicant had committed gross misconduct and she 'needed to go'. Ms Reynolds was aware that the applicant had a disagreement with Ms Boyle and it was her view that this issue should have been dealt with by the applicant and Ms Boyle attending a committee meeting to sort the issue out. Ms Reynolds claimed that Ms Lindsay was appointed coordinator at this meeting but she may have been confused and this may have happened at a later committee meeting. Ms Reynolds stated that the meeting was underhand and too quick.

26 Ms Pol has been a member of the CRC for nine years and she has been on the committee since 2011. She was aware that the applicant had been given a warning in early April 2012. Ms Pol only became aware of written complaints about the applicant around the time she was terminated. Ms Pol stated that she heard the applicant swear at two people at the 2011 Annual General Meeting (AGM). The applicant was abusive and loud towards them and told them they should not be there. At the committee meeting held on 2 May 2012 documents containing complaints about the applicant were read out and committee members were then asked to vote about whether or not the applicant should be dismissed. Ms Pol voted to terminate the applicant based on the complaints made against her. Ms Pol was unaware that the applicant was on sick leave at the time of the meeting and she believed that the only person who abstained from voting at the meeting was Mr Hammond.

27 Mr Hammond has been a member of the CRC committee since December 2011. He is currently the CRC's secretary. Prior to the meeting held on 2 May 2012 he was unaware of any allegations of misconduct against the applicant, that she had been given any verbal or written warnings and he was unaware if the applicant had failed to carry out committee directions. Mr Hammond had not lost trust in the applicant at the time of this meeting and he had no problems with the applicant. Mr Hammond abstained from voting at the meeting on 2 May 2012 and he was aware that the applicant was on sick leave when the meeting took place. Mr Hammond stated that at the meeting statements from Ms Hammond, Ms Boyle and Ms Litchfield were read out and the majority of those attending decided to terminate the applicant. Mr Hammond stated that there was no discussion about appointing anyone to the position of coordinator at this meeting.

Respondent's evidence

28 Ms Lindsay is currently the respondent's coordinator. She became its chairperson in June 2011. Prior to that she was a committee member from 2009. Ms Lindsay stated that after the applicant abused Mr Crake and Mr McKay at the AGM on 7 December 2011 she told the applicant her behaviour was unacceptable. In March 2011 the respondent's trainee Ms Campbell contacted her. She was upset and she told her what had occurred with the applicant. Ms Lindsay intended to mediate between the applicant and Ms Campbell however she could not do so as the applicant cancelled Ms Campbell's traineeship. When she spoke to the applicant she admitted to her that she had 'lost it'. Ms Lindsay told the applicant her behaviour was unacceptable and she prepared an incident report soon after about her discussions with Ms Campbell and the applicant (Exhibit R12.4).

29 The day before the Easter Extravaganza the applicant was agitated and angry about setting up the art exhibition. The applicant ridiculed Ms Litchfield throughout the day and made derogatory comments about the way Ms Litchfield had set up the exhibition. When she referred to children's art work on display she said '[w]hat the f*** is that s*** up there?'. At that point Ms Lindsay felt she could no longer work with the applicant. The applicant abused Ms Hammond on the day of the Extravaganza when she told her in a very loud and nasty voice that she should not to be in the kitchen. People nearby were horrified by what she was saying. The applicant was unpleasant when she and Ms Lindsay counted the takings for the day. Soon after the Easter Extravaganza the applicant visited Ms Lindsay. Ms Lindsay told the applicant that she was upset and offended by the way she spoke to her when they were counting the money at the Extravaganza and Ms Lindsay told the applicant that she would raise this and the applicant's ongoing rude behaviour with the committee. Ms Lindsay said the applicant then told her she would not have anything further to do with Ms Litchfield.

30 The next incident concerning the applicant occurred about a week before Anzac Day 2012. Ms Hammond contacted Ms Lindsay to say that she had approached the applicant about the Anzac Day flyers and the applicant told her that Ms Mitch Shipman, the organiser of the Anzac committee, 'was going to be getting f*** all from her'. On 24 April 2012 Ms Hammond was undertaking volunteer work in the CRC making tickets for wreaths for the Anzac Day ceremony and Ms Boyle was

undertaking last minute jobs relating to the printing of the Anzac Day flyer. Ms Lindsay understood that the applicant became upset about Ms Hammond and Ms Boyle working on Anzac Day activities. Ms Lindsay understood that the applicant had also abused Ms Boyle that day.

31 After these incidents Ms Lindsay spoke to Ms Litchfield about holding a committee meeting to discuss the applicant's behaviour, and this meeting was held on 2 May 2012. A number of documents were given to committee members and were read out at the meeting, including the applicant's letter to the committee dated 26 April 2012 and statements completed by Ms Boyle, Ms Hammond and Ms Lindsay. Ms Litchfield suggested that a vote be taken about whether or not the applicant should remain as an employee and there was a discussion about what was contained in the documents. Ms Lindsay, Ms Litchfield, Ms Boyle and Ms Hammond stated that they would resign if the applicant remained as the CRC coordinator.

32 Ms Lindsay recalled a discussion with the applicant on the evening of 25 April 2012 when the applicant told her that the business plan needed finishing. Ms Lindsay told her at the time that there would be a meeting about her abusing Ms Boyle and she told her the situation was out of her hands.

33 Under cross-examination Ms Lindsay said that the applicant was told in June 2011 not to correspond with Mr McKay and to direct any correspondence from him to the committee but the applicant opened registered mail from Mr McKay contrary to this direction. Ms Lindsay stated that Ms Boyle completed an incident report about the applicant's interactions with Mr Crake and Mr McKay on 7 December 2011 because she witnessed this incident and Mr Crake made a complaint after this altercation.

34 Ms Lindsay agreed that it was her role to assist the applicant to complete the business plan as the committee allocates funds contained in the business plan. Ms Lindsay disputed that the applicant was stressed on or about 24 April 2012 because of issues to do with Anzac Day, the Easter Extravaganza and the business plan and Ms Lindsay could not recall telling the applicant not to complete the business plan on 25 April 2012. Ms Lindsay stated that the main problem with the applicant was her poor attitude towards community members and CRC staff.

35 Ms Boyle stated that Ms Litchfield told the applicant that any mail addressed to the committee or its members was not to be opened and on 8 January 2012 the applicant opened a registered letter from Mr McKay contrary to this instruction. The applicant initially told Ms Litchfield that Ms Boyle had opened the letter. After the applicant admitted she opened the letter Ms Boyle recalled that Ms Litchfield gave the applicant a verbal warning about her conduct.

36 Ms Boyle stated that several weeks before Anzac Day Ms Hammond asked the applicant if the CRC would print Anzac Day flyers and the applicant asked her if Ms Mitch Shipway was involved. The applicant then said to Ms Hammond that 'Mich Shipway is getting f*** all off of me'. Ms Boyle was at work on 23 April 2012 and she was being given orders by the applicant and she felt uncomfortable. The applicant also told her to write down everything she was doing that day. On 24 April 2012 Ms Boyle was completing the Anzac Day flyers in between her normal duties and the applicant again wanted information about what she was doing the day before. She stated that the atmosphere in the office was tense. During a discussion about Ms Boyle's traineeship the applicant threw papers at her from a distance of about 1.5 metres and they hit her in the face which resulted in a small cut to her lip.

37 Ms Boyle attended the Easter Extravaganza and when Ms Hammond was assisting her in the kitchen the applicant abused Ms Hammond and told her that she should have been helping the applicant instead of working in the kitchen.

38 Under cross-examination Ms Boyle stated that she visited the applicant after the Easter Extravaganza because she was concerned about her. When asked if she needed to apologise to Ms Litchfield the applicant said she had not done 'anything f***ing wrong'.

39 Ms Campbell made a note of what occurred on 1 and 2 March 2011 about her interactions with the applicant and other things that were troubling her at work (Exhibit R12.5). Ms Campbell became scared when the applicant was angry and loud and threatened to shove a computer down her throat. Ms Campbell contacted Ms Lindsay after her altercation with the applicant who told her to have lunch then return to work. Even though she returned to work things did not go well with the applicant so she left her job with the respondent.

40 Ms Litchfield was the CRC secretary when the applicant was terminated. She held the position for approximately six to eight months. Prior to this she was a committee member for 12 months. Ms Litchfield stated that after a committee meeting held in December 2011 the applicant was instructed to only pick up mail addressed to the CRC coordinator, not the secretary. Mr McKay contacted Ms Litchfield and asked if his registered mail had been received, so Ms Litchfield visited the CRC. The applicant denied opening Mr McKay's letter and she stated that Ms Boyle had done so. The applicant then told her that she had opened his letter.

41 At the Easter Extravaganza Ms Litchfield was responsible for setting up the art exhibition and stallholders as she was the event organiser. She had organised this event for many years. The applicant helped her set up but by the end of the day the applicant was upset and she was making negative comments about Ms Litchfield to others.

42 Ms Litchfield stated that the meeting held on 2 May 2012 took place because the respondent's staff were upset and committee members were going to resign. Ms Litchfield stated that the applicant was terminated because she was rude and abusive towards staff and committee members and she was not doing what the committee asked her to do.

43 Ms Hammond has been involved with the CRC since November 2011. Ms Hammond witnessed the applicant abusing Mr Crake and swearing at him at the respondent's AGM held on 7 December 2011. At the Easter Extravaganza the applicant was upset with Ms Hammond not helping her to set up. When she saw her in the kitchen she said to her '[w]hat the fuck are you doing here? You're supposed to be helping me'. Other community members were around at the time. On 23 April 2012 she was in the CRC helping with Anzac Day tasks before doing her SIN duties. The applicant was nasty towards her and told her it was not her job to complete Anzac Day work. The applicant also swore at her at the time. On 24 April 2012 she was undertaking her SIN duties in the CRC. The applicant asked Ms Boyle what she was doing working on the Anzac Day flyers, she told her she should be doing traineeship duties and that she was unhappy with her doing this work. Ms Hammond said the

applicant's tone towards Ms Boyle was 'horrible' and that the applicant threw papers in Ms Boyle's face. Ms Boyle was upset and left the office but she later returned. On 17 May 2012 Ms Hammond was at the CRC when the applicant abused her and Ms Boyle's son.

Submissions

Applicant

44 The applicant complains that she was terminated after she wrote to the committee about her concerns and the stresses involved in undertaking her role because of lack of support. She was not given any prior warning of her termination, nor did the CRC consult her about it. The applicant was not given any opportunity to respond to issues relied upon to terminate her and no explanation was given to her about the gross misconduct she was alleged to have committed and which direction/s she had unreasonably refused to comply with. The applicant never received warnings about any unsatisfactory performance and she was treated unfairly as she was on sick leave when she was terminated.

45 The applicant did not commit gross misconduct as defined in the *Associations Incorporations Act 1987* and some of the incidents reports relied upon by the respondent as the basis for terminating the applicant were raised after the applicant was terminated. The applicant maintains that her conduct during the Easter Extravaganza cannot be taken into account as this event was not related to her employment. Furthermore, Ms Boyle did not lodge a complaint alleging that she had been assaulted after her altercation with the applicant.

46 Ms Litchfield did not comply with the respondent's rules when she called the meeting where the applicant was terminated and this meeting was not conducted in accordance with the rules for special general meetings. The minutes of the meeting were inaccurate and there was conflicting evidence about what occurred at this meeting. The meeting was short, all of the issues surrounding the applicant's conduct could not possibly have been explored and two CRC members had no opportunity to vote as they did not attend the meeting. Also a majority of the committee of management, of which there are eight members, did not vote in favour of the applicant's dismissal.

47 The applicant is seeking compensation based on working approximately 30 hours per week at $23 per hour. She is also seeking superannuation entitlements and long service leave entitlements for this period. The applicant has mitigated her loss. After she was dismissed she was unable to look for work due to stress. From 6 July 2012 she was on annual leave for four weeks and from August to November she undertook volunteer work on an arts project. In August 2012 the applicant enquired about work at Leeman Country Club and Leeman Hardware. Between 10 November 2012 and 12 December 2012 the applicant cared for her mother in Melbourne. From September 2012 to the present the applicant has been working at Halfway Mill Road House on a part time casual basis. The applicant's gross income for this period was $9,400.

Respondent

48 The respondent maintains that the applicant has been given a fair go all round notwithstanding procedural defects in the manner in which she was terminated (*see* ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891). Notwithstanding these procedural defects with respect to her termination if the applicant had been given an opportunity to address the committee it would not have changed the outcome. The applicant could have been terminated without notice given her gross misconduct however the respondent decided that the applicant should be terminated with notice being paid to her. Whilst the applicant should have been invited to respond to the CRC's view that she had misconducted herself the applicant should have been aware after her discussion with Ms Lindsay on 23 April 2012, that she would be putting issues about the applicant's conduct to the CRC.

49 The respondent maintains that a number of warnings were given to the applicant during her employment, the applicant knew or ought to have known that her conduct was not acceptable and that her employment was in jeopardy and she was warned about her conduct by both Ms Litchfield and Ms Lindsay. The respondent was facing the prospect of losing staff because of the applicant's behaviour and other employees had left the CRC because of the applicant's actions. The respondent maintained that if it did not terminate the applicant the CRC would not be able to continue functioning because its secretary and president were going to resign. Ms Boyle also stated that she could no longer work with the applicant. The events leading to the applicant's termination were not isolated and were part of a pattern of poor behaviour and the applicant frequently used inappropriate language to both staff members and others. The applicant behaved inappropriately in public in her role as a senior officer of the respondent and she admitted verbally abusing Ms Campbell. On that basis alone the applicant committed misconduct sufficient to warrant dismissal.

50 The respondent disputes that the applicant was terminated while on sick leave. The only medical certificate the respondent was given by the applicant when she was terminated went to 4 May 2012 and the applicant was terminated on this date. The subsequent medical certificate she obtained was after she was terminated. When the applicant sent a text message on 4 May 2012 she sought advice about whether she was to return to work on the following Monday which confirms that she was fit to return to work as at 4 May 2012.

51 The meeting where the applicant was terminated was not an extraordinary meeting, it was conducted in accordance with the respondent's rules and a quorum was present at this meeting.

52 The evidence of the respondent's witnesses should be preferred to that given by the applicant where there is any inconsistency given the weight of the evidence against the applicant. Evidence given by the respondent's witnesses was consistent. Where there was any inconsistency in the evidence given by Ms Luen and Ms Reynolds the evidence of the respondent's witnesses should be preferred as their evidence was vague.

53 The respondent had a number of concerns about the applicant's conduct. The incident report prepared by Ms Boyle about the applicant's behaviour towards Mr Crake and Mr McKay is supported by the evidence of Ms Lindsay, Ms Boyle, Ms Hammond and Ms Pol. When Mr Crake and Mr McKay attended the 2011 AGM the applicant abused them in a public area using profanities. After this incident she was told by the CRC chairperson that her conduct constituted misconduct. Despite the

applicant being given a direction not to open mail addressed to the secretary or to deal with matters involving Mr McKay she intentionally opened a registered letter from Mr McKay on 8 January 2012 addressed to the secretary. The applicant also lied to Ms Litchfield about opening this letter. The applicant's actions constituted disobedience of a lawful directive and misconduct by intentionally lying to the secretary. The applicant was aggressive and abusive towards Ms Campbell. The applicant admits that she told Ms Campbell that she would shove a computer down her throat and this incident was witnessed by Ms Boyle. The applicant was warned about her behaviour during this incident because she threatened Ms Campbell when in a position of authority. At the Easter Extravaganza the applicant abused Ms Hammond. At a meeting at Ms Lindsay's home after this event the applicant was told about her concerns about her actions and the applicant was told that Ms Lindsay would raise this issue with the committee. Even though this was a community event, there was sufficient connection for the events to be related to the applicant's contract of employment with the respondent. The applicant assaulted Ms Boyle on 24 April 2012 when she threw papers in her face which resulted in a small cut on her face. The applicant should have been aware that Anzac Day fliers were going to be generated by the CRC and she admitted to saying words to the effect that 'she's getting f*** all from me' about Ms Mitch Shipway.

54 The respondent maintains that the applicant did not take appropriate steps to mitigate her loss.

Consideration

55 The test for determining whether a dismissal is unfair or not is well settled. The question is whether the employer acted harshly, unfairly or oppressively in dismissing the applicant as outlined by the Industrial Appeal Court in ***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch*** (1985) 65 WAIG 385. The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason within the meaning of the Act may still be unfair if, for example, it is effected in a manner which is unfair. However, terminating an employment contract in a manner which is procedurally irregular may not of itself mean the dismissal is unfair (*see* ***Shire of Esperance v Mouritz*** and ***Byrne v Australian Airlines*** (1995) 61 IR 32). In ***Shire of Esperance v Mouritz***, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

56 Paragraphs two to four set out the background to the applicant's employment with the respondent and correspondence related to the applicant's termination.

57 The respondent claims that the applicant misconducted herself on a number of occasions. The respondent relies on the applicant's inappropriate conduct towards its employees Ms Campbell and Ms Boyle, the applicant disobeying an instruction given to her by CRC officeholder Ms Litchfield about opening mail not addressed to her and the applicant's unprofessional conduct towards and abuse of Ms Hammond, Mr Crake and Ms Litchfield. The respondent claims that the applicant had been given verbal warnings about her inappropriate behaviour and she was aware in April 2012 that the CRC would consider her ongoing employment with the respondent. The applicant denied behaving inappropriately during her employment with the respondent. The applicant claimed she either did not behave in the manner alleged or her behaviour during the incidents relied on by the respondent did not amount to misconduct. The applicant argues that she was not warned about her behaviour nor was she aware that her ongoing employment with the respondent was in jeopardy. The applicant also claims she was unfairly terminated because she was terminated whilst on sick leave.

58 I have carefully considered the evidence given by each witness and I closely observed each witness. In my opinion all of the respondent's witnesses gave their evidence in a clear and forthright manner and their evidence, where relevant was consistent. In contrast I find that the applicant was unconvincing at times when giving her evidence. Furthermore, the weight of evidence was against the application with respect to her conduct. Witnesses called by the applicant to give evidence, except Ms Pol, did not give any evidence corroborating the applicant's claims about her behaviour concerning the incidents relied on by the respondent to terminate the applicant. It is also the case that Ms Pol gave evidence corroborating the respondent's claim that at the 2011 AGM the applicant abused both Mr McKay and Mr Crake. Where there is any inconsistency in the evidence I therefore prefer the evidence given by the respondent's witnesses to the evidence given by the applicant.

59 Apart from a complaint about the applicant's failure to complete the respondent's 2012 business plan there was no evidence that during the period the applicant worked as the respondent's coordinator she did not complete the day to day tasks required of her by the CRC. Notwithstanding this I find that on a number of occasions when managing staff and when interacting with CRC members, officeholders and community members the applicant's behaviour was inappropriate, unprofessional and unacceptable.

60 I find that the applicant behaved in an aggressive and uncalled-for manner towards Ms Campbell on 1 March 2011 when she threatened to shove a computer down her throat. I find that in doing so the applicant failed her duty of care towards Ms Campbell who was employed as a trainee. I find that because of this unprovoked altercation, Ms Campbell did not feel safe working with the applicant and this resulted in Ms Campbell ceasing her traineeship with the respondent. I find that when Ms Lindsay became aware of the applicant's mistreatment of Ms Campbell she told the applicant that her behaviour was unacceptable.

61 I find that the applicant abused and swore at Mr Crake, a member of the local community, at the respondent's AGM on 7 December 2011. I find that after this incident Ms Lindsay told the applicant that her behaviour during this incident was unacceptable. I find that soon after this meeting the applicant breached an instruction given to her by Ms Litchfield not to open mail addressed to her as the respondent's secretary. When Ms Litchfield confronted the applicant about opening a registered letter sent to her by Mr McKay the applicant initially denied that she opened this letter contrary to Ms Litchfield's instruction and I find that she dishonestly claimed that Ms Boyle had opened this letter. I find that the applicant's dishonest conduct and

disobeying a lawful direction given to her by Ms Litchfield not to open correspondence from Mr McKay was unacceptable and constituted a serious breach of her contractual obligations to the respondent.

62 I find that the applicant misconducted herself during events related to the Easter Extravaganza. I find that the applicant ridiculed and made derogatory comments about Ms Litchfield when she was setting up the art exhibition the day before the Easter Extravaganza. I accept Ms Lindsay's evidence that during this event the applicant said '[w]hat the f*** is that s*** up there?' when referring to children's art work put on display by Ms Litchfield. I find that this comment was unnecessary and disparaging of Ms Litchfield, a CRC officeholder, and I find that following this event the applicant told Ms Lindsay that she would have nothing more to do with Ms Litchfield. I find that the applicant was abusive towards Ms Hammond at the Easter Extravaganza. Ms Hammond was working at this event helping Ms Boyle in the kitchen and I find that the applicant said to her '[w]hat the fuck are you doing here? You're supposed to be helping me' which was uncalled for and abusive. I find that Ms Lindsay was upset about the applicant's rudeness to her when counting the day's takings at the end of this event and she told the applicant that her poor conduct that day was going to be considered by the CRC. To that extent I find that the applicant was on notice that the respondent had concerns about her conduct and intended to discuss her behaviour. Even though this was a community event I find that the applicant's role at this function was sufficiently connected to her employment to enable the respondent to rely on her inappropriate conduct during this event as the CRC assisted in conducting the Easter Extravaganza.

63 The next incidents where I find that the applicant behaved inappropriately and in an unacceptable manner related to her dealings with Ms Boyle and Ms Hammond who were assisting with Anzac Day preparations in the CRC office. I find that approximately a week before Anzac Day the applicant told Ms Hammond, who was in the CRC office, that a community member on the Anzac Day committee, Ms Mitch Shipway, was getting 'f*** all' from the applicant. In my view this was inappropriate language to use in a work place. I find that the applicant was unhappy about the CRC trainee Ms Boyle being involved in the Anzac Day preparations so she abused her for completing tasks associated with the Anzac Day ceremony. I also find that the applicant assaulted Ms Boyle at work on 24 April 2012 by throwing papers in her face causing a small wound, and that her behaviour in this regard constituted misconduct.

64 There was no plausible evidence that the meeting where the respondent decided to terminate the applicant was not properly called, that it lacked a quorum and that an insufficient number of committee members voted at this meeting. I also reject the applicant's claim that she was terminated whilst on sick leave as her initial medical certificate was up to and including 4 May 2012 and she was terminated on or about this date and before she obtained a further medical certificate on 8 May 2012 effective 7 May 2012 onwards.

65 In conclusion I find that on numerous occasions the applicant behaved contrary to the appropriate standards of behaviour required of a senior employee and was in breach of her contractual obligations towards the respondent. The respondent therefore had sufficient reason to terminate her.

66 I find that the applicant was denied procedural fairness given the manner of her termination. The applicant was terminated after the CRC meeting held on 2 May 2012 whereby the respondent decided that the applicant had committed gross misconduct and had refused reasonable direction. The applicant was then informed of her termination by letter dated 4 May 2012. Prior to her termination the applicant was not formally warned about her conduct and she was not given any opportunity to respond to the conclusions reached by the respondent that she had behaved inappropriately and that she had refused to comply with a reasonable direction/s and therefore should be terminated. Even though the applicant was verbally notified that the respondent had concerns about her behaviour over a period of 12 months prior to her termination and that the CRC would be considering her conduct at a forthcoming CRC meeting in April 2012 I find that the applicant was not given specific warnings that her ongoing employment with the respondent was in jeopardy prior to her termination. It is only to this extent that I find that the applicant was treated unfairly.

67 Even though the applicant was denied procedural fairness given the manner of her termination I find that in all the circumstances of this case that the applicant was not unfairly terminated. I have found that over a lengthy period of time the applicant was abusive towards employees and CRC volunteers whom she managed, including two trainees, and she behaved inappropriately towards members of the community. The applicant knowingly disobeyed a lawful direction given to her by Ms Litchfield not to open mail addressed to her and she was dishonest when confronted about this issue. Furthermore, the applicant was told on a number of occasions that her conduct was inappropriate and unacceptable. I am therefore of the view that even if the applicant had been given the opportunity to respond to the behaviour relied on by the respondent to terminate her prior to her termination, the applicant had no prospect of convincing the respondent that her employment should be continued or of re-establishing an ongoing employment relationship with the respondent.

68 If I am wrong in reaching this conclusion, which I do not concede, I find that even if the applicant was unfairly terminated the applicant would not have remained employed with the respondent for a period any longer than an additional two weeks after her second medical certificate expired on 18 May 2012. In my view this would be a sufficient period to give the applicant an opportunity to respond to the respondent's concerns about her behaviour and for the respondent to consider any issues raised by the applicant by way of response.

69 This application will be dismissed.

2013 WAIRC 00823

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRAINE MALONE
	APPLICANT
	-v-
	LEEMAN AND GREEN HEAD COMMUNITY RESOURCE CENTRE INC
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 26 SEPTEMBER 2013
FILE NO/S	U 114 OF 2012
CITATION NO.	2013 WAIRC 00823

Result	Dismissed
Representation	
Applicant	Mr J Richardson (as agent)
Respondent	Mr K Trainer (as agent)

Order

HAVING HEARD Mr J Richardson as agent own behalf of the applicant and Mr K Trainer 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 application be and is hereby dismissed.

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

2013 WAIRC 00834

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MIKAIA NORTHEY
	APPLICANT
	-v-
	DEPARTMENT OF EDUCATION WA
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 2 OCTOBER 2013
FILE NO/S	U 121 OF 2013
CITATION NO.	2013 WAIRC 00834

Result	Application dismissed

Order

HAVING heard the applicant on her own behalf and there being no appearance for the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00856

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JO ROALFE
	APPLICANT
	-v-
	GOLDFIELDS INDIGENOUS HOUSING ASSOC.
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 11 OCTOBER 2013
FILE NO/S	U 124 OF 2013
CITATION NO.	2013 WAIRC 00856

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 9th day of September 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 dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00848

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00848
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 4 OCTOBER 2013
DELIVERED	**:**	FRIDAY, 4 OCTOBER 2013
FILE NO.	**:**	B 89 OF 2013
BETWEEN	**:**	CHRISTINA SCHULTZ
		Applicant
		AND
		ANTHONY ASPHAR (ASPHAR SURVEY PTY LTD)
		Respondent

Catchwords	**:**	Industrial law (WA) – Contractual benefits claim – Notice claim in excess of the employee collective agreement – Applicant's claim for notice is enforceable under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA) – Order issued
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	**:**	Order issued
Representation:		
Applicant	**:**	In person
Respondent	**:**	No appearance

Case(s) referred to in reasons:

Mason v Bastow (1990) 70 WAIG 19

Roberts v Groome (1984) 64 WAIG 774

Steele v Tardiani (1946) 72 CLR 386

Reasons for Decision

Ex Tempore

1 These proceedings are an application by Christina Schultz against Anthony Asphar (Asphar Survey Pty Ltd). It is plain that whilst the applicant has described an individual and a corporation as the respondent, the proceedings are against the corporation, Asphar Survey Pty Ltd. The application is brought under s 29(1)(b)(ii) of the Act by which the applicant seeks the recovery of certain contractual entitlements in the gross sum claimed of $4,322.72.

2 Ms Schultz's evidence was that she commenced employment with Asphar Survey as a survey draftsperson on or about 25 June 2012. In accordance with her particulars of claim as a survey draftsperson, Ms Schultz was engaged in duties, amongst others, of computerised drafting. Ms Schultz testified that she remained employed until on or about 1 March 2013. She was employed on a full-time basis at a salary of $60,000 per annum.

3 In evidence before the Commission is a copy of Ms Schultz's contract of employment as exhibit A1. The contract of employment dated 13 June 2012 refers to various entitlements in relation to her employment, including salary, leave and, importantly for present purposes, notice of termination of employment.

4 The contract of employment also refers to a document described as an "Employee Collective Agreement." It would appear from Ms Schultz's evidence that a document known as the Asphar Survey Pty Ltd Employee Collective Agreement 2009, an agreement registered with the Fair Work Commission, was an agreement which covered her terms and conditions of employment and is the agreement referred to in exhibit A1, her written letter of employment.

5 It is trite to observe in these proceedings that the Commission can only enforce a common law contract which does not involve the enforcement of an award or industrial agreement of this Commission. Insofar as an award or agreement of the Fair Work Commission is concerned, similarly, an enforcement of those instruments cannot be pursued before this Commission.

6 However, having regard to Ms Schultz's evidence in terms of her employment, it would seem that the period of one month's notice set out in her contract of employment is in excess of the terms of the Employee Collective Agreement 2009, which at clause 25.2 requires a minimum period of notice of at least two weeks' notice given by the employee. Therefore, on the basis of that evidence and exhibit A1, in particular, I am satisfied that Ms Schultz's claim for notice is a common law claim which is enforceable under s 29(1)(b)(ii) of the Act: *Steele v Tardiani* (1946) 72 CLR 386; *Roberts v Groome* (1984) 64 WAIG 774; *Mason v Bastow* (1990) 70 WAIG 19.

7 Insofar as the circumstances surrounding the termination of her employment are concerned, Ms Schultz testified that she gave notice of termination of employment by letter of 27 February 2013. That letter, which is exhibit A2, provides that her last working day will be 27 March 2013 and in accordance with her contract, Ms Schultz was giving four weeks' notice of termination to her employer.

8 Shortly thereafter it seems there was correspondence between her and the management of Asphar Survey, the net effect of which, as set out in exhibit A3, a series of email exchanges between Ms Schultz and her manager, was that she was released from working out her period of notice at the direction of the employer and her employment ceased on her last day, which was 1 March 2013. Accordingly, Ms Schultz claims the balance of her period of notice as a common law contractual entitlement from 4 March to 27 March 2013 inclusive.

9 In evidence before the Commission are pay sheets (exhibit A4). Those documents cover the pay periods 11 February to 24 February 2013 and 25 February to 10 March 2013. Ms Schultz's evidence was, and those documents reflect, that she was paid a gross hourly rate of $28.85 per hour. Her evidence was that over the period of 4 March to 27 March 2013 inclusive, her ordinary hours of work would have been 136.8 hours.

10 Ms Schultz's evidence was and I find that after she left her employment she received no further payment by way of salary for the period of 4 March to 27 March 2013. Therefore, I am satisfied that Ms Schultz has been denied a contractual benefit in terms of the balance of her period of notice which she gave under her contract, being four weeks, over that period of time.

11 Calculating the hours of work that Ms Schultz would have worked over that period, being 136.8 hours, at her gross hourly rate of $28.85, leads to a total sum of $3,946.68 gross which has been denied to her as a contractual benefit. This being the period of notice she otherwise would have worked had she been allowed to remain in employment to the end of the notice period on 27 March 2013.

12 Accordingly, to that extent, I am satisfied the applicant has established her contractual claim to the balance of her period of notice in that sum. Part of Ms Schultz's claim, that being for annual leave, cannot be pursued in this jurisdiction. I order accordingly.

2013 WAIRC 00851

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CHRISTINA SCHULTZ
	APPLICANT
	-v-
	ANTHONY ASPHAR (ASPHAR SURVEY PTY LTD)
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 4 OCTOBER 2013
FILE NO/S	B 89 OF 2013
CITATION NO.	2013 WAIRC 00851

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Ms C Schultz on her own behalf and there being no appearance by the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the respondent pay to the applicant the sum of $3,946.68 as a denied contractual benefit less any amount payable to the Commissioner of Taxation pursuant to the Income Tax Assessment Act 1997 and actually paid within 21 days of the date of this order.

(2) THAT otherwise the application be and is hereby dismissed.

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

2013 WAIRC 00819

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00819
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	MONDAY, 24 JUNE 2013, TUESDAY, 5 FEBRUARY 2013, WEDNESDAY, 10 APRIL 2013
DELIVERED	**:**	TUESDAY, 24 SEPTEMBER 2013
FILE NO.	**:**	B 246 OF 2012
BETWEEN	**:**	GORDON JAMES SMITH
		Applicant
		AND
		PASTORALISTS AND GRAZIERS ASSOCIATION OF WA (INC)
		Respondent

CatchWords	**:**	Industrial law (WA) – Denied contractual benefit claim – Entitlement under contract of employment – Additional annual leave in lieu of a pay increase. Application dismissed – Costs claimed – Costs claim dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 29(1)(b)(ii)
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	On his own behalf
Respondent	**:**	Mr S Kemp of counsel

Reasons for Decision

1 The applicant says that the respondent has not allowed him a benefit to which he is entitled under his contract of employment, namely an amount of additional days of annual leave under an arrangement said to have been initiated in 2009.

2 The respondent is a membership organisation and the applicant is its membership director.

3 Jennifer Pamela Stawell is a senior director of the respondent with responsibility for staff matters. According to Ms Stawell, in around December 2008, she notified staff that the office would close from Wednesday, 24 December 2008 and reopen on Monday, 14 January 2009 (See Exhibit R1, Affidavit of Jennifer Pamela Stawell [2]). (I note that in fact the Monday was 12 not 14 January in 2009). The 10 working days in that period would be paid leave in lieu of a pay increase for that financial year. She says that during 2009, a number of staff members asked what was to happen regarding the office closure and leave for Christmas 2009. Therefore she convened a meeting on 11 August 2009 to discuss that matter. There is no contention that that meeting was attended by most of the staff of the respondent but not the applicant who was away working. Ms Stawell says that she told the staff that the office would be closed from 24 December 2009 and would reopen on Monday, 11 January 2010. There would be a skeleton staff in the first week back, being the week commencing Monday, 11 January 2010, and that

staff had two options. They could either take that week off as annual leave or they could work two days of the week and get the remaining three days as extra paid leave. There would also be an extra paid day off on 25 January, 2010, the day before the Australia Day holiday.

4 In her witness statement, Ms Stawell says that she also informed staff 'that the office closure includes the 10 extra days holidays that had been granted in lieu of a wage increase in 2008/2009' (Exhibit R1, Affidavit of Jennifer Pamela Stawell [5]). She denies telling them that they were to get the extra 13 days leave in lieu of a wage increase in the 2009/10 financial year, saying that she pointed out that firstly, that 10 days represented the extra leave that had been granted in the 2008/09 tax year. Secondly, the three further days was a trial and would apply to the 2009/10 closure only.

5 Ms Stawell says that she prepared a file note in anticipation of that meeting and read from it in the meeting. The file note reads:

> Meeting with staff on Christmas Closure for 2009/2010:
>
> - Staff Christmas Lunch will be held on the 23rd Dec and the office will close early that day.
> - The PGA office will be officially closed on 24th Dec and will reopen on Mon 11th Jan 2010
> - We are planning to have a limited "skeleton" staff for this first week back, and if you work 2 days of that week you will get the rest off as paid. If you don't want to work and want the week off as annual leave (like Sandy) you will not get this week paid as a working week.
> - We have also decided to close on the Mon 25th Jan – the day prior to the Australia Day holiday on Tues 26th Jan.
> - This means you will be getting 10 days of paid holidays. This equates to 2 weeks leave in lieu of any wage increases in 2008/09.
>
> We need to agree on a ROSTER for the week of the 11th to 15th Jan
>
> Please see me regarding what days you will work
>
> We will need a minimum of 2 staff on per day – and at least 1 Director on per day.
>
> Need to complete the AGM mailing that week so will need to get Chris in that week for 2 days after Anthea has finalised everything.

6 Sonya Dee Shanahan, a native title officer employed by the respondent, attended the meeting on 11 August 2009. She says she does not recall exactly what was said at the meeting but remembers that the days off when the office was to work related to leave granted the previous year in lieu of a wage increase; staff could not work during the Christmas closure and take time off at a different time in the year; there would be a skeleton staff roster in the first week after the Christmas break and those who participated in that roster would work two days but be paid for the entire week. Ms Shanahan says 'we were not told that we would be given an extra 13 days of annual leave in lieu of a wage increase in that financial year.' (Exhibit R3, affidavit of Sonya Dee Shanahan [5]). She says that she understood that these three days, in addition to the 10 days, was being made available on a trial basis for that year only.

7 Dr Henry Wyman Esbenshade gave evidence of his recollection of the meeting however, it is fair to say that he did not have a clear recollection of what was actually said during the meeting. Dr Esbenshade thought the offer for 2009 was a new, different, offer from that which applied in 2008. He was unclear whether for 2009 there had been an additional 13 days or 10 days from 2008 and three extra days, so he sought clarification. Dr Esbenshade wrote an email to Ms Stawell (and to a Sandy Hayter) dated 23 September 2009 at 10.11 am in which he said as follows:

> Dear Jenni and Sandy,
>
> To help me with planning for later this year and next with my family, I will appreciate your clarifying the points raised in the staff meeting held on August 11th. As I understand it, due to financial issues, staff are required to take extra days off as paid annual leave in exchange for no salary increases.
>
> From what I heard, the office will be closed from COB Wednesday 23 December 2009 through Friday January 8th 2010. Then the office re-opens on Monday 11 January, and staff are to come into work for two days during that week which ends on Friday 15th January. There will be one additional day off on Monday 25 January.
>
> From my calculations, there are nine days** of non-public holidays between Thursday 24/12/09 and…
>
> (Exhibit R2)

8 I note that the copy of this email in the exhibit is incomplete.

9 Ms Stawell responded to Dr Esbenshade's email at 11.16 am on that day in the following terms, formal parts omitted:

> Thank you for your email.
>
> You are correct with your summary below, in regards to the annual leave bonus offered by the PGA in lieu of any salary increase this financial year.
>
> As discussed, the PGA is not in a position to offer a salary increase to staff this year.
>
> The PGA has however offered staff time off over the Christmas period that is equivalent to a 5% increase in salaries. This is through offering a total of 13 extra paid days annual leave over the periods you have outlined below.
>
> Salaries are reviewed annually, and will therefore not be reviewed until next Financial Year.
>
> Please speak with either Sandy or me should you require any further information.
>
> (Exhibit R2)

10 The evidence also indicates that following some questions being raised about calculations and entitlements to annual leave arising from this arrangement, Ms Stawell sent a memorandum to all staff dated 3 December 2012. A copy of this memorandum was addressed to the applicant in the following terms, formal parts omitted:

> After my email to staff about our Christmas / End of Year closure, and staff being required to take leave in January 2013, Zak raised with me on the 28 October the issue of the days that the PGA had offered staff in lieu of a salary increase in October 2008. Gordon has also asked about this since then.
>
> As it was not our intention to reduce what staff had already been offered, over the past few weeks I have gone back and reviewed the arrangements for Christmas and 2008/009 salary increase in the form of 2 weeks (10 working days) additional paid annual leave per year.
>
> Unfortunately (or fortunately for all of us staff) I have identified that we have not been consistent with the leave granted to staff since that salary increase came into effect.
>
> To summarise the situation, staff were offered 10 days paid annual leave from 2008/09.
>
> The actual time that has been given is as follows:
>
> 2008/09 Christmas holidays – time given was 10.5 days
>
> 2009/10 Christmas holidays – time given was 9.5 days
>
> 2010/11 Christmas holidays – time given was 8.5 days
>
> 2011/12 Christmas holidays – time given was 7.5 days
>
> 2012/13 Christmas holidays – time given will be 7.5 days
>
> To further clarify the previous year's Christmas and return to work periods, all staff were offered the opportunity to participate in a roster for the first week back to work in January. This meant full-time staff who agreed, could return and work at the PGA office for 2 out of the 5 days in the first week that the office reopened in January each year. These additional 3 days off were not included as part of the "in lieu of a salary increase". Staff who did not participate in the roster had to take annual leave for that week. This has been clearly outlined in emails and memos to staff. This will not be the case for the first week back in January 2013, the PGA office will be closed and PGA will require staff to take Monday 7 to Friday 11 January 2013 as annual leave.
>
> In summary, all of the above means that all full-time staff are owed 4.5 days leave in lieu of salary increases and a further 2.5 days for the coming 2012/13 Christmas period. These 7 days will be credited to your individual holiday entitlements.
>
> To alleviate any confusion in the future, all staff will be credited 10 days additional annual leave (in lieu of a salary increase) on 1 October each year. The PGA will continue to require staff to take leave over the Christmas and New Year period, and as the number of public holidays fluctuate this will allow us to overcome any problems in the future.
>
> Please feel free to speak with me personally if you have any further questions.
>
> (Attachment to Exhibit A2, Affidavit of Gordon James Smith)

Consideration

11 I found Mr Smith's attempts to explain his claim somewhat confusing. It appeared at one stage that he was claiming 52 days of additional annual leave not having been given to him and when clarification was sought he seemed to be suggesting some other calculation. Further, he also seems to suggest that what he is seeking is an order for the future as to what his entitlement is rather than that he has been denied the entirety of the entitlement to this point. The best I can make of Mr Smith's claim is that he says that the arrangement made in 2009/10 for 13 days, not merely the 10 days, leave was to apply for each year into the future. He was asked if on his version, he should have received 23 days extra leave over the Christmas break in each year since then. His reply was "No, because it is to be credited to my annual leave account and then deducted from it. So it wasn't 23 days over Christmas". He was then asked "It was an extra 23 days per year?" His response was "Correct. In '08, 10 days and in '09, 13 days". (t 21). Later, he appeared to suggest that additional leave in subsequent years was to be 23 days. That is said to be because the additional leave was to be in lieu of a pay rise, and pay increases cumulatively. Therefore, leave amounts ought to increase cumulatively each year while they are in lieu of a pay rise each year. I found Mr Smith to be pedantic and yet not comprehending some important aspects of his claim and the respondent's position.

12 A number of emails are attached to the various witness statements. Those in the first bundle I wish to deal with are marked HWE 1, 2 and 3 which are treated as attachments to the original witness statement of Gordon James Smith (Exhibit A2). These are emails between Dr Esbenshade and Ms Stawell. They relate only to Dr Esbenshade's own entitlements in particular to sick leave, annual leave or long service leave. Without more, they are of little assistance in determining what the contractual entitlement was for the applicant in respect of additional annual leave granted for the Christmas close down periods and additional days relating to public holidays.

13 Likewise, attachments to Ms Stawell's affidavit, JPS 2 and 3, deal with Dr Esbenshade's leave accrued and taken. They provide very little, if any, assistance in determining what the applicant's or any other member of staff's entitlements were in respect of the additional annual leave, the subject of this claim.

14 Dr Esbenshade's emails to Ms Stawell do not suggest that he believed he was entitled an extra 10 days leave, however, it is clear that due to his illness and other issues around that time, his memory of those matters is very unclear. In those circumstances, it is not my intention to rely on his evidence in determining the amount of leave that was due to the applicant.

15 In a claim of denied contractual benefits, it is necessary for the applicant to demonstrate that the employer has offered, and the employee has accepted, a particular condition under the contract of employment and that the employer has not allowed the employee that benefit (*Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307).

16 The applicant was not present when Ms Stawell advised the staff of the respondent's intentions to provide, for 2009/10, a total of 13 days additional leave. This was to be the period of the close down plus, for those who worked 2 days in the week following the close down, an additional three days. There was also the day before the Australia Day holiday.

17 I find that it was the respondent's intention to provide as a benefit to all of the employees, 10 days additional leave in lieu of a pay rise for that year. I find that the additional three days was as part of an incentive for staff to participate in a skeleton staff roster for the first week back in 2010.

18 As to any entitlement in subsequent years, Ms Stawell's memorandum to all staff dated 3 December 2012, a copy of which was addressed to the applicant, makes clear that the 10 days' paid annual leave from the years 2008/09 applied each subsequent year but that it had not been granted consistently to all staff. During 2008/09, 10.5 days had been given; 2009/10, 9.5 days; 2010/11, 8.5 days; 2011/12, 7.5 days and 2012/13, 7.5 days. This meant that there was a deficit owing to the applicant of seven days. Ms Stawell's memorandum makes clear that seven days would be credited to his individual holiday entitlements.

19 Because of previous difficulties, the memorandum advised:

> To alleviate any confusion in the future, all staff will be credited 10 days additional annual leave (in lieu of a salary increase) on 1 October each year. The PGA will continue to require staff to take leave over the Christmas and New Year period, and as the number of public holidays fluctuate this will allow us to overcome any problems in the future.

20 In those circumstances, I find that the intention of the respondent in 2008/09 was to provide 10 days additional leave. In 2009/10 it was to provide a total of 13 days, three of which were contingent upon staff working within the skeleton staffing for the first week back. For the remaining years a period of 10 days per year was allowed. Where there has been a deficit, the respondent says that that deficit will be credited to the individual holiday entitlements and that from 1 October each year there will be 10 days credited and that staff will be required to take leave during the Christmas close down.

21 There is no evidence as to what leave the applicant has been granted and taken and what leave he has been denied. For example, in January 2010, it is not clear whether the applicant worked two days as part of the skeleton roster entitling him to the additional three days leave during that week. The evidence is that the additional three days leave for that week was for that week only. There is no suggestion that this was to be an accrual to be taken at a future time. In fact Ms Shanahan's evidence is of being paid for the entire week if the staff participated in working two days as part of the skeleton staff roster. Further, there is no evidence that there was an entitlement on an ongoing basis to 13 days additional annual leave. I am unable to find that there was such an entitlement for the applicant. The evidence is clear, that the arrangement for the 10 days, being the period between Christmas and the return to work, was to be available to the applicant.

22 The respondent says in its submissions that there was never an express acceptance of the alleged offer by the applicant. I find that there was an acceptance by the applicant of the 10 days per annum in each of the years plus the three days for 2009/10. However, the applicant disputed that that was the limit of the contractual entitlement. In any event, I think Ms Stawell's memorandum of 3 December 2012 makes clear that this was a condition of employment and it cannot reasonably be argued that it was not.

23 In all of those circumstances, I am not satisfied that the applicant has actually been denied any benefit to which he is entitled under his contract of employment. He seeks an order for the future. I appreciate that he may have had some frustration in dealing with this matter in the past. Part of that frustration is associated with the disagreement between the parties which in itself was partly due to the applicant appearing to claim that the 10 days given one year in lieu of a pay rise ought to become, say, 20 days the next year if a pay rise was not provided in that next year, due to the cumulative effect of pay rises. The disagreement was also due to a lack of understanding on both parties part of the other's position. I do not intend to order the respondent to do something, which according to the evidence, it is already doing. In those circumstances, I intend to order that the application be dismissed.

24 The respondent seeks costs other than legal costs on the basis that the claim has no merit. The general policy in industrial jurisdictions is that costs ought not to be awarded, except in extreme cases (*Denise Brailey v Mendex Pty Ltd t/a Mair and Co Maylands* (1992) 73 WAIG 26 at 27). I find that this case has arisen partly because of a lack of understanding by each side of the other's position. Some of that lack of understanding comes from the confusion caused by the way the additional leave was instituted and administered. In those circumstances, the matter was not argued and costs incurred solely due to the applicant. This is not an extreme case which warrants an award of costs.

25 Finally, given the ongoing nature of the employment, I think it may be of assistance to that relationship if I comment on Mr Smith's assertion that the respondent has not readily responded to queries or rectified errors. This is not supported by the evidence of the responses to Dr Esbenshade's emails. When he emailed Ms Stawell for clarification of the meeting in August 2009, and when he sought to reconcile his leave via emails, Ms Stawell's responses were prompt. Mr Smith complains that his application for special leave which he appears to have left on Ms Stawell's desk on 19 November 2012, was not given a timely or adequate response. However, Ms Stawell acknowledged its receipt by email the same day, advising him that she was seeking advice and would respond in due course. On 26 November 2012, one week later, he followed up with an email in quite demanding terms. Ms Stawell responded in less than 24 hours, including warning him about the rude tone of his email, but ultimately saying that she was still awaiting the finalisation of the advice she had sought and would reply once that was received.

26 Although Mr Smith says he never received an answer to his query, I find that the memorandum dated 3 December 2012, answered his query, including that it set out the entitlement and the future action the respondent intended to take to rectify some inconsistent application of the additional leave. It was not that Mr Smith did not receive a response or a timely response – he simply did not receive the response he wanted.

27 In conclusion, I reject Mr Smith's claim that he is entitled to 10 days in 2008 and 13 days in 2009, and 23 days each year thereafter as additional leave. I find that he was entitled to 10 days in 2008, 13 days in 2009 and 10 days each year thereafter. Therefore, I reject his claim as to the total amount of leave due to him.

28 Secondly, s 29(1)(b)(ii) of the Act requires that he demonstrate that the respondent has denied him a benefit under his contract. There is no evidence that Mr Smith has been denied the benefit to which I have found that he is entitled. Rather, he seeks an order to protect future benefits. These have not yet accrued, so there is no entitlement to enforce.

29 Thirdly, it appears that Mr Smith is suggesting that the respondent had failed to credit his account with the leave entitlement. He may or may not be correct in that assertion, however there is no evidence of the lack of the recording of the leave. However, the recording per se is not the issue – it is the entitlement and whether the entitlement has been met.

30 Ms Stawell's memorandum of 3 December 2012, appears to resolve all issues other than the quantum of the entitlement. I have found that the quantum of the entitlement was not as Mr Smith claims, and I am unable to find that he has not been allowed the entitlement which is due to him.

31 An order will issue dismissing the application.

2013 WAIRC 00821

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GORDON JAMES SMITH
	APPLICANT
	-v-
	PASTORALISTS AND GRAZIERS ASSOCIATION OF WA (INC)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 24 SEPTEMBER 2013
FILE NO/S	B 246 OF 2012
CITATION NO.	2013 WAIRC 00821

Result Application dismissed

Order

HAVING heard Mr G Smith on his own behalf and Mr S Kemp of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

CONFERENCES—Matters arising out of—

2013 WAIRC 00807

DISPUTE RE SHIFT BREAKS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	APPLICANT
	-v-
	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WESTERN AUSTRALIAN BRANCH
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 16 SEPTEMBER 2013
FILE NO/S	C 20 OF 2012
CITATION NO.	2013 WAIRC 00807

Result	Application discontinued
Representation	
Applicant	Mr P Robinson
Respondent	Mr R Farrell

Order

HAVING heard Mr P Robinson on behalf of the applicant and Mr R Farrell 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 discontinued.

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

2013 WAIRC 00793

DISPUTE RE PERFORMANCE MANAGEMENT POLICY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 4 SEPTEMBER 2013
FILE NO/S	C 195 OF 2013
CITATION NO.	2013 WAIRC 00793

Result	Application discontinued
Representation	
Applicant	Mr P Robinson and with him Mr K Singh
Respondent	Mr R Farrell and with him Mr S Lawton

Order

HAVING heard Mr P Robinson and with him Mr K Singh on behalf of the applicant and Mr R Farrell and with him Mr S Lawton 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 discontinued.

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

2013 WAIRC 00782

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	WA POLICE COMMISSIONER KARL O'CALLAGHAN
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 2 SEPTEMBER 2013
FILE NO/S	C 212 OF 2013
CITATION NO.	2013 WAIRC 00782

Result	Application discontinued
Representation	
Applicant	Mr D Wayda
Respondent	Mr T Clark

Order

WHEREAS HAVING heard Mr D Wayda on behalf of the applicant and Mr T Clark 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 discontinued.

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

CONFERENCES—Matters referred—

2013 WAIRC 00836

LEVEL OF DUTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00836
CORAM	**:**	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 7 NOVEMBER 2012, THURSDAY, 8 NOVEMBER 2012, TUESDAY, 27 NOVEMBER 2012, WEDNESDAY, 28 NOVEMBER 2012, THURSDAY, 29 NOVEMBER 2012, MONDAY, 3 DECEMBER 2012, TUESDAY, 4 DECEMBER 2012, THURSDAY, 6 DECEMBER 2012
DELIVERED	**:**	THURSDAY, 3 OCTOBER 2013
FILE NO.	**:**	PSACR 21 OF 2010
BETWEEN	**:**	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD Applicant AND THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Respondent

CatchWords	**:**	Public Service Arbitrator – Level of classification – Reclassification – Public Hospital Sector – Frontline clerical positions – Waitlist Clerks – Increased work value – Work value test - BiPERS Assessment – 'Conditions under which the work is performed' – Technological change – Increased violence - Information technology and process changes – Four Hour Rule Programme – Broadbanded Classification Structure
Legislation	**:**	*Industrial Relations Act 1979* s 44, s 80E(2)(a) *Hospital Salaried Officers Award* *WA Health – Health Services Union – PACTS – Industrial Agreement 2011*
Result	**:**	Application granted in part
Representation:		
Applicant	**:**	Mr J Ross
Respondent	**:**	Mr S Millman of counsel

Reasons for Decision

1 This is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979* (the Act). The parties are in dispute about the level of classification appropriate to 'frontline' clerical positions (FLCPs) including Emergency Department Clerks, Ward Clerks, Clinic Clerks and Admissions Clerks employed in public hospitals in this State.

2 The Health Services Union of Western Australia (Union of Workers) (HSU) seeks that the positions be reclassified on the basis of increased work value. It says that there has been a significant net addition to the work requirements of the positions in respect of the nature of the work, skill and responsibility required, or the conditions under which the work is performed such as to warrant upgrading them to a higher classification. The HSU seeks an order reclassifying the positions from Level G2 to G3.

3 The employer says that the level of work value of the positions is recognised in the current level of classification and that a reclassification of the positions is not appropriate.

4 The current industrial instrument that covers the FLCPs' employment is the *WA Health – Health Services Union – PACTS – Industrial Agreement 2011*.

5 The parties requested that Waitlist Clerks at Sir Charles Gairdner Hospital (SCGH) be dealt with separately and first. This was at least partly due to the basis of their claim being somewhat different to the remainder of the positions under review, in that they rely in part on comparative positions at other hospitals which were classified to Level G3. As I have progressed in consideration of these matters, it has become clear that consideration of one group before the others would require significant repetition of a number of issues and principles. Also, it is said that a number of positions within the main groups of FLCPs also undertake waitlist duties as part of their role, for example, the Booking Clerk, Imaging Services at Royal Perth Hospital (RPH); the Admission Clerk at Osborne Park Hospital (OPH) and the Clinic Clerk at RPH Orthopaedic Clinic. Also, it is important to look at the Waitlist Clerk position in context, not just of other Waitlist Clerk positions, but by reference to other Level G2 positions as they currently stand and as they seek reclassification. Further, some aspects of the claim in the main groups contain a significant element of flow-on from the Waitlist Clerks already at Level G3 and cite those positions as relevant comparison positions. The issue of flow-on is very prominent in this matter. In the circumstances, I concluded that it is more appropriate to deal with all groups at the same time, albeit that each group has some unique features which justifies separate consideration as part of the overall review.

6 I have had the benefit of inspections of indicative FLCPs at King Edward Memorial Hospital (KEMH), Princess Margaret Hospital (PMH), OPH, Fremantle Hospital (FH), SCGH and RPH for the purpose of understanding the context in which these positions perform their duties and to observe the environment and the work.

7 At FH, the work observed was that of the Bed Allocation Clerk in Patient Flow and Ward Clerk in the Intensive Care Unit; at KEMH, Patient Information Management Systems (PIMS) Administration Clerks; at PMH, Ward Clerk in the Orthopaedics Ward; at OPH, Admission Clerk (HIMS); at SCGH, the Waitlist Clerk, Ward Clerk Surgical, Emergency Clerk HIMS and Liaison Officer Emergency Department, and at RPH, Booking Clerk for CT Scans, Ward Clerk – Health Records, Emergency Clerk – Emergency Department, Ward Clerk, Geriatric Department and Outpatient Clinic Clerk – Orthopaedic (Outpatient Clinic, Goderich Street).

8 Following the inspections, copies of manuals, policies and guidelines relating to the various positions were provided at my request.

9 For the HSU, evidence was given by Richard Andrew Barlow, Senior Industrial Organiser with the HSU; Josephine Ellen Ganfield, Waitlist Clerk at SCGH; Margaret Christina Metcalfe, Emergency Department Clerk at SCGH; Margaret Ann Thwaites, Emergency Department Clerk at RPH; Gillian Mary Byrne, Ward Clerk at RPH, currently in Geriatric Medicine; Vicki Lee Chamberlain, Booking Clerk in Nuclear Medicine at RPH; Julie Ann Elshaw, Clinic Clerk in the Orthopaedic Clinic in the Surgical Division of RPH; Vicki Patterson Thompson-Davies, PIMS Officer, Emergency Department Admissions at KEMH; Fiona Mairi Murray, Admissions Clerk at OPH; Kaye Frances Crothers, Ward Clerk, Intensive Care Unit, FH; Lesley Ann Smith, Ward Clerk, Total Care Burns Unit, PMH; Jodee Lyn Dawson, Bed Allocation Clerk, FH; Paola Marie Bannon, Ward Clerk, SCGH and Carole Ann Elizabeth Pritchard, Liaison Officer, Emergency Department, SCGH.

10 The employer called evidence from Dr Robyn Ann Lawrence, Executive Director of SCGH; Lynda Joan Harrison, Nurse Co-Director, SRN 10 of the Surgical Division of SCGH; Mitchell Sydney Jesson who gave evidence about the computer systems and software used in respect of patient administration in the various hospitals; Alan Michael Davies, employed in 2008 by Austral Human Resources to review reclassification requests and who prepared various reports on the review; John Philip Holland, a director of Austral Human Resources and currently an officer of the applicant, involved in the reclassification assessments in these matters.

BACKGROUND

11 In 1995, Waitlist Clerk positions at FH, and subsequently those at RPH, were reclassified to Level G3. From late 2006 to 2009, the HSU and its members lodged numerous group claims with the employer in respect of a significant number of FLCPs classified at Level G2, seeking reclassification to Level G3. The employer instigated a review of the Waitlist Clerk position at SCGH in 2007, engaging SWY Consulting to provide a report. It later reviewed the other FLCPs engaging consultants for the purpose of the review including Dillenger Group Development and Austral Human Resources. Ultimately, the employer's Classification Review Committee rejected the claims on the basis that a significant net addition to work value had not been demonstrated. According to the application filed by the employer for a conference pursuant to s 44 on 20 July 2010, as a consequence of that decision by the CRC, the frontline clerical officers intended to instigate industrial action in support of their reclassification claims. The employer sought the intervention of the Public Service Arbitrator (the Arbitrator). The Arbitrator convened numerous conferences with a view to attempting to resolve the matter by conciliation, however, ultimately the parties agreed that arbitration of the reclassification claims was the most appropriate course of action. The parties agreed that these are matters, which would normally be the subject of reclassification appeals pursuant to s 80E(2)(a) of the Act and should be dealt with in accordance with the Practice Direction for Reclassification Appeals, with modifications to take account of the significant number of positions concerned and of the desirability of inspections and witness evidence. The process of undertaking the inspections and the hearing was delayed on a number of occasions for various reasons generally associated with the availability of the representatives of the parties. Inspections and the hearing of the matter commenced in November 2012.

12 In addition to the inspections and witness evidence, there were more than 10 volumes of documents submitted. I have found the inspections, witness evidence and the documentation provided by the parties to be of considerable assistance.

13 The evidence demonstrates that the FLCPs generally were last reviewed and reclassified in approximately 1989. Some have been reviewed subsequently.

THE EMPLOYER'S CASE

14 The employer says that the fundamental functions of the positions remain as they were, that technology and processes have changed but not the essence of the skill or responsibility of the positions.

15 The employer relies on evidence of the reviews of the positions undertaken by the consultants. It also refers to the requirements of the positions as they existed prior to the last review, including job descriptions as they existed at that time. It also refers to previous claims for reclassifications of these positions to demonstrate that some of the current claimed changes are not new and were previously used to justify reclassification from Level G1 to Level G2.

16 The employer also says that the indicative duties of these positions fall within the range applicable to Level G2 positions generally.

17 The establishment of the broad-banded structure in 1989 is said to have enabled employees to undertake a broader range of duties and functions within the same level, without it constituting an increase in work value.

18 The Four Hour Rule Programme (FHRP) is said by the employer to be about the organisation of work and reducing repetition and unproductive processes. Of itself, it did not change the level of skills or responsibilities of these positions.

THE HSU'S CASE

19 The HSU says that the evidence demonstrates that the employer's reviews were flawed. It says that the consultants undertook desktop reviews rather than an independent assessment of the positions and the employer ought to have conducted a more thorough and careful review. The HSU says that the consultants confined their examination of the positions under review to merely analysing the Job Description Forms (JDFs) and the skills and responsibilities, and ignored the conditions under which the work is performed. In this context, the HSU says that the employer has erred.

20 Secondly, there has been significant change in duties and responsibilities. The HSU says that the material provided demonstrates that there has been significant change in those measures which constitute the criteria for a work value increase. Issues such as developments in information technology, the FHRP, work volume and the devolution of functions are all significant changes to these positions.

21 Thirdly, the conditions under which the work is performed have changed and the employer's evidence is said to support this, including that Mr Holland and Dr Lawrence acknowledge that there has been significant change including via technology and policy over a significant time period.

22 In summary, the HSU relies on changes in technology, work volume, the training and mentoring of clinical and clerical staff, the diversity of stakeholders with whom they deal, policy changes increasing skill level and responsibility, the performance of higher level functions, increased auditing compliance and the environment in which the work is performed, namely a 'technologically-advanced, patient-focussed, expeditious health system' (t 435) which bears little resemblance to the circumstances under which the work was performed 20 or so years ago.

THE HSU'S EVIDENCE

(a) Specified callings work value review Introductory Paper

23 Richard Andrew Barlow, Senior Industrial Organiser with the HSU, gave evidence of the process undertaken by the HSU in dealing with the claim by the frontline clerks. Mr Barlow has been with the HSU since 1996. He noted that the changes upon which the frontline clerks rely include the FHRP, significant technological change and the nature of the work due to the changing health environment. Mr Barlow also gave evidence of the Specified Callings Work Value Review dealt with in P18 of 2003 and he attached to his witness statement the *Introductory Paper: To accompany Work Value Submissions from the Specified Calling Groups* (the Introductory Paper) of February 2005.

24 Mr Barlow also noted that behind the Introductory Paper there were 20 health professional groups' work value documents which provided specific and detailed evidence regarding changes affecting their particular professional groups. Those included changes to the medical model, changes in registration and education requirements and clinical changes. There was also significant change in work volume.

25 Mr Barlow says that the Introductory Paper was illustrative of the significant changes across the health industry and assists in an understanding of the context of this matter.

(b) Technology

26 Ellen Ganfield, Fiona Murray, Margaret Metcalfe, Margaret Thwaites and others gave evidence of the changes to computer programmes utilised by them including TOPAS, EDIS and others. The requirement to train others in this technology and to assist others in problem solving is also relied upon. Lesley Smith's evidence included the changes applicable to her work due to the use of the Telehealth system, Jodee Dawson regarding CHAnnEL and Vicki Chamberlain regarding nuclear medicine.

27 There was other evidence of the various information technology systems and software utilised within the public health sector for patient records over time including:

- PMAS – Patient Management and Administration System.

- EDIS – Emergency Department Information System, a global system applied throughout the sector. Ms Metcalfe gave evidence of issues of linking patient information from TOPAS to EDIS and the requirement for timely linking of that information (t 132).
- TOPAS – The current system which is in the process of being replaced by webPAS. Clerks use this system to register all presenting patients onto the global computer network which has been in operation since the mid 1990s.
- webPAS is being rolled out through the system, starting at Fremantle and Swan District Hospitals, and was envisaged as being implemented at SCGH within 2013, with people commencing training at the time of hearing. This will supersede a number of other programmes.
- MERITS – a Medical Records Tracking System referred to by Ms Metcalf (t 135) in particular.
- TMS – Theatre Management Schedule used by for Waitlist Clerks at SCGH.

28 Ms Metcalfe also gave useful evidence of the way in which her work used to be undertaken and comparing the old computer system called Cyber (t 137). Ms Metcalfe also gave evidence of linking the Emergency Department's systems with St John Ambulance systems for information relating to patients arriving by ambulance.

29 There was also other reference to earlier computer programmes and systems such as EBS and Crystal.

(c) Increased Work Flow

30 The FHRP was cited by many witnesses as a major factor affecting and reflecting the need for more patients to move more quickly through the system. Evidence of its effect in Bed Allocation, Emergency and on the wards was given.

31 Lesley Smith, Margaret Metcalfe and Margaret Thwaites amongst others, dealt with the increasing work volume. Lesley Smith also noted that the quantity and complexity of patient admissions had increased. A number of witnesses addressed the impact of the significant increase in the volume of patients being dealt with by these positions, as a consequence of the FHRP as well as the necessary efficiencies across the health system which have increased pressure on doctors, nurses and others who are said to ultimately delegate further tasks to the clerical staff.

(d) Mentoring and Training

32 This is said to be of clinical and clerical staff in the performance of clerical functions: see the evidence of Carole Pritchard. Ms Metcalfe gave evidence as to the removal of a position of Training Officer at Level 4, now done by the Emergency Department Clerks on the floor. It usually takes approximately three to four weeks to train an Emergency Department clerk, with ongoing support. Gillian Byrne gave evidence as to the requirement for Ward Clerks to train new members of the team in the complete admission and discharge procedures as well as the various computer systems, including the requirement to provide relief for coverage of other wards and Ms Murray gave evidence regarding her role as a trainer for TOPAS.

(e) The conditions under which the work is performed

(i) Increased violence and problematic behaviour. A number of witnesses gave evidence of patients and visitors attending under the influence of drugs. Some years ago, it was alcohol, heroin and marijuana. More recently, drugs which commonly cause increased aggression and other problematic behaviour include ice and ecstasy. A higher number of patients with mental illness contributed to this environment. FLCPs were still required to deal with these people to obtain the necessary information, answer queries, admit them to Emergency and the like.

(ii) Increased cultural and language issues due to a greater range and diversity of population.

(iii) Structural issues. The physical location and the changed structures such as Bed Allocation joining Patient Flow Unit at Fremantle Hospital; the Booking Clerk in Nuclear Medicine at RPH being physically isolated from the rest of the work area and having a broad range of functions, and the reception, admission and emergency functions at KEMH, were all cited as examples. Ms Murray gave evidence of the situation at OPH where the Admissions Clerks are said to often be without supervision or clinical help.

(f) Admission and Emergency Clerks gathering more information including:

(i) About patient funding arrangements, such as private health fund details and identifying different types of visa holders, to obtain increased funds for the hospitals. A number of witnesses gave evidence of the Emergency Department Clerks at RPH and SCGH undertaking the work normally performed by Level G4 clerks in registering private patients when the Level G4 clerks are not available after hours (Ms Metcalfe and Ms Byrne).

(ii) Identifying patients with infectious diseases and alerting clinic staff.

(g) Increased exposure due to trauma patients

33 This is said to be the creation of a Trauma Centre, air ambulance arrivals, and other circumstances particularly those confronting Emergency Department Clerks and OPH Admission Clerks.

(h) Increased accuracy and auditing

34 Most witnesses gave evidence of there being increased emphasis on the accuracy of the records they establish and maintain, and of the requirement to audit existing records. An increased level of knowledge of medical terminology, anatomy and diseases, as part of creating and updating the patient records is said to be required.

(i) Patient contact

35 Ms Murray referred to triaging patients, Ms Thompson-Davies and Ms Chamberlain said they were required to monitor patients' conditions and Ms Ganfield says that Waitlist Clerks determine the length of stay where the doctor has not filled this in in the admission form. Some witnesses referred to the need for increased knowledge, not only of medical terminology, but of anatomy and diseases.

THE EMPLOYER'S EVIDENCE

36 From 1997 to 2005, Mr Jesson was a manager, Health Information Management Service at SCGH. Approximately 260 FTE came under his supervision and control, including Clinical Coders, Medical Records Staff, Medical Secretaries, Waitlist Clerks, Emergency Clerks, Freedom of Information, Clerical Relief, Ward Clerks, and Outpatient/Clinic Clerks (exhibit A[5]). He described the use of a medical records tracking system, through an electronic mode instead of filing cards and scanning records. The computerised programme enables the information to be put directly into the system and enables interrogation of data by looking at the screen rather than by pulling out a piece of cardboard. He described it as '[y]ou put information in, you get information out' (t 301). The employer relies on Mr Jesson's evidence as to the transition from PMAS, the patient administration system, to TOPAS, the current system which is currently in the process of being superseded by webPAS. Mr Jesson says that there are many downstream applications attached to the existing patient administration system, making accurate data entry more important.

37 Mr Jesson also gave evidence that he was the PMAS Replacement Business Manager on the project that customised and implemented TOPAS to public metropolitan hospitals in Western Australia. In this role he led a team of health business experts to confirm that TOPAS could meet the requirements of the hospital.

38 Mr Jesson's current role is as project manager for the implementation of webPAS and webPAS Emergency into the Country Health Service sites in the Great Southern and South West Health Regions and he was responsible for the oversight of a team of health business analysts. He was responsible for running the project schedule including training, configuration, testing, deployment and transition to post 'go-live' support (exhibit A5 [1]).

39 Mr Jesson says that probably the biggest change in the use of technology for FLCPs was going from a manual recording system to PMAS but that was before his time. Then there was the change from PMAS to TOPAS, with the use of a mouse, and some members of staff had not previously utilised computers to a great extent to that point (t 300). He says the basic business process stays the same in performing the job - the biggest change was people getting used to computers rather than the particular system. The step from TOPAS to webPAS will be relatively smaller (t 308).

40 Mr Jesson noted the progress towards the webPAS system to upgrade the Patient Administration System to 'unify the metropolitan and rural health services onto a single system enabling a common identifier to be used state-wide for the first time' (exhibit A [11]). He says that this new system does not require added responsibility or additional tasks and that 'the basic business flows are very similar' to the existing system (exhibit A [12]).

41 Mr Jesson noted that there are many, what he called, 'Down Stream Applications' that feed from the patient administration system, frequently used to replace manual or stand-alone systems, which are increasingly part of the day-to-day activities of many clerical positions. Frontline clerical staff use a range of systems in their daily work and with each new or replacement system, training and assistance in the use of the system may be required and is provided. In his view, '[w]orking with new or replacement computer systems has not … added to the complexity of the role of [sic] the level of responsibility of these positions' (exhibit A [18]).

42 In respect of the question of the application of more rigour in respect of quality assurance, and accuracy, Mr Jesson says that applies to all the staff including 'from cleaning to medicos' (t 309). Mr Jesson noted the importance of accurate data entry regardless of the type of record system.

43 As to the evidence of front line clerical staff auditing their own work, Mr Jesson described that as just checking the quality of their work as opposed to conducting or 'running actual audit programmes', which he said was presenting data and doing work at a different level (t 301). He said that the electronic systems are merely a replacement of a manual function. The information is merely in a different format and instead of having to look at physical manuals or making telephone calls, where assistance is needed, access is via clicking an icon to obtain the information, and help is available. In attempting to find a patient record Mr Jesson says he would previously have made a phone call and talked to someone at the end of the phone as opposed to finding the information on the electronic record (t 302).

44 Mr Jesson said that in comparing the previous and current systems, there is a balance between some things within the process being easier to undertake and other things more complex.

45 John Holland, a director of Austral Human Resources, and Alan Davies, a consultant with Austral Human Resources, both gave evidence of their roles in the reviews of these positions. Mr Holland also gave evidence of his involvement in the creation, within the public service, of the broadbanded classification structure in the late 1980s and the subsequent modification for the Hospital Salaried Officers classification structure.

46 Mr Holland also gave evidence of the work undertaken to identify indicative duties and responsibilities for Levels G1, G2 and G3, and their equivalents in the public service in the early 1990s. He says that an examination of the claims in this case and the duties as they were performed prior to the last reclassification shows no substantive change, albeit that the way in which the work is performed has been modified, as it has for all clerical positions, by the application of technology and other measures for improved efficiency. The work value may have increased but not significantly.

47 Mr Holland says that all of the FLCPs, including the Waitlist Clerks at SCGH and those Waitlist Clerks at other hospitals which were reclassified to Level G3, are properly within the Level G2 range of duties and responsibilities.

48 Mr Holland says the reviews did not take account of the circumstances under which the work is performed, as it was not clearly identified in the claims.

49 Dr Robyn Lawrence, Executive Director, Sir Charles Gairdner Osborne Park Health Care Group gave evidence of the reforms at SCGH under what she described as 'the former Four Hour Rule Programme' (exhibit A6). Its aim was to have patients dealt with and out of the Emergency Departments within four hours. The FHRP was 'designed to look at the workflow right across the hospital, from a patient presenting to the Emergency Department all the way through, and it was about streamlining work to minimise duplication and complexity so that the patient's flow time was lessened by doing so. That, in itself, should not have resulted in any increase in complexity of the work per se or any increase in work value. It should have lessened it, if anything.' (t 312). She noted that those reforms had resulted in the system-wide redesign of the patient pathway, to remove waste and rework from job roles. She used the word *former* to describe the FHRP because the programme itself has ceased but the outcomes continue without a special name. However, the purpose is still to get patients out of the Emergency Department within four hours which, Dr Lawrence said, improves patient safety and outcomes.

50 Dr Lawrence says there have been no fundamental changes to task allocation of any clinical or non-clinical roles as a result of the FHRP. The volume of patients treated at the hospital had increased, as a result of community demand and not as a result of the FHRP. She was not aware of any increase in the scope or complexity of the tasks allocated to FLCPs. She said that the 'core tasks of clerical and administrative staff have always centred around the accurate entry of patient information into the appropriate IT platform, and these core duties remain unchanged' (exhibit A6[3]).

51 Dr Lawrence described the auditing requirements within the hospital, noting that they did not strictly relate to the FHRP but were required by the Department of Health and by the Auditor-General. She identified that it was part of the standard audit for hospitals to check their performance against key performance indicators as part of quality management. Generally, though, Dr Lawrence said, there was a requirement for accurate record keeping to ensure the safe management of the patient (t 312).

52 As to the various IT platforms, Dr Lawrence noted that programmes such as TOPAS, MERITS and EDIS have been operating for some time but some of them had reached the end of their useful life, were not able to be upgraded or were being replaced and combined (t 318).

53 In respect of administrative tasks previously fulfilled by nurses now being undertaken by somebody else, Dr Lawrence said that this occurs in a range of situations including that administrative tasks have gone the other way also (t 316).

54 In her role in the North Metropolitan Classification Review Committee, Dr Lawrence said she did not recall that any claims had come before the CRC based on the FHRP and that '[t]he four hour rule did not change work value as a whole and therefore any claim that would have come before us would have been required to put forward some concrete evidence of the change of work value' (t 321).

CONSIDERATION

The Work Value Test

55 In the Statement of Principles arising from the State Wage Case, the Commission has set out the test to be applied for a claimed reclassification based on increased work value as being:

> 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 the changes in relative positions.
>
> 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 Change 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 When 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.
>
> …
>
> 7.10 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.

56 This test has not changed for many years. It reflects the work value test which has applied for many years prior to its inclusion in the Statement of Principles arising from the State Wage Case decision (see *Health Services Union of Western Australia (Union of Workers) and Director General of Health* (2008 WAIRC 00253; (2008) 88 WAIG 475, [7] – [15]).

57 Therefore, to satisfy their claim of increased work value, the FLCPs and HSU need to demonstrate that since the positions were last reviewed, in around 1989, the work, skill or responsibility of these positions or the conditions under which the work is performed have changed, and that such change constitutes a significant net addition to work value such as to warrant

upgrading to a higher classification. It should be noted, too, that change of itself is not sufficient. It is change which brings a higher level of work, skill or responsibility or changes to the work environment which make it work of a higher level. It is a test to be strictly applied.

58 In *Re Public Hospital Nurses (State) Award* (No 4) (2003) 131 IR 17 (NSW), the New South Wales Industrial Commission made the following comments regarding the work value test.

> [18] These requirements under the work value principle impose a significant burden on an applicant, particularly because of the strict test requiring the applicant to demonstrate a "significant net addition to work requirements so as to warrant the creation of a new classification or upgrading to a higher classification". It might be asked how such a burden exists in a decade or more of rapid and continuing workplace change and the almost universal impact that phenomenon has had on employees. But as the principle makes clear, changes in work by themselves may not justify an increase in wages. Some changes bring about a net *reduction* in work requirements. Others merely reflect the evolving nature of the particular occupation where skills or responsibilities are lost and new ones gained without producing a net addition to work requirements. In many occupations, particularly professional occupations, change, and the requirement to cope with it by coming to terms with new methods and new technology, is an inherent and accepted characteristic of the employment and rarely will this evolutionary process attract extraordinary wage increases under the work value principle. In this respect, we note the observations of Fisher P in *Re Medical Officers – Hospital Specialists (State) Award* (1990) 33 IR 79 at 84 where, after referring to the work value principle, his Honour said:
>
> > One of the problems with the application of the 'strict test' to professional or managerial employment lies in the nature of the change. Change must be accommodated, being an essential part of what professional practice is all about. It does not follow therefore without more, that changes even spectacular changes, necessarily fall within the work value principle.
> >
> > Secondly it is to be understood that new techniques and procedures being with them their own advantages. For every new technological advance there is likely to be somewhere an inferior technology in part or in whole abandoned. Superior technologies give superior results and tend to free practitioners from laborious, uncertain and stressful practice. Changes, subject to habitation, do not necessarily make things more difficult or more demanding. They may, but equally they may remove problems, decrease anxieties and uncertainties and as well be more rewarding and more productive.

59 In *Australian Liquor, Hospitality and Miscellaneous Workers Union re: Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 – re: Wage rates*, the Full Bench of the Australian Industrial Relations Commission (AIRC) said at [190]:

> [190] Previous decisions of the Commission suggest that a range of factors may, depending on the circumstances, be relevant to the assessment of whether or not the changes in question constitute the required '*significant net addition to work requirements*'. The following considerations are relevant in this regard:
>
> - Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds. But progressive or evolutionary change is insufficient.
> - An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.
> - The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required. However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.
> - A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase. But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds. Such a change may be demonstrated by a requirement to work with less supervision.
> - The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.
> - The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.
> - The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work. But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.
> - Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.

60 In *Australian Municipal, Administrative, Clerical and Services Union v Sydney Water Corporation T/A Sydney Water* [2011] FWA 734, Sams DP noted the definition of 'significant' for the purposes of the work value change measurement. His Honour noted:

> [195] It seems to me that the word 'significant' is the key to whether the 'strict test' has been satisfied. The Macquarie Dictionary's definition is 1. Importance: consequence. 2. Expressing a meaning; indicative. 3. Having a special or covert meaning; suggestive.
>
> [196] *Liddy* J in *Mineral Sands (State) Award* at 114, described the word as follows:
>
> > '…Significant' does not necessarily mean 'major', but 'to a meaningful degree, not insignificant, not immaterial, not trivial'. To be significant a factor does not have to be dramatic, sudden or eye-catching. A change, as in this case, may occur subtly, gradually, even covertly but on examination prove to be significant.
>
> [197] *Hungerford* J in *BHP Steel (AIS) Pty Ltd – Hot Strip Mill Restructured Ironworker Award*, noted that changes may be 'cumulatively significant' but individually incremental in nature. I am satisfied that this description is appropriate to describe the many changes in work identified and agreed upon in this case. In addition, I note that Mr Vickers described some of the changes as 'subtle'.

61 These matters are relevant to the consideration of this case along with comments by the Commission in Court Session in such cases as the Clinical Psychologists work value case and the Specified Callings Work Value Case referred to later in these Reasons.

62 In this case, issues of flow-on and leap-frogging need to be considered. The impact of reclassification of a small number of Waitlist Clerk positions at FH and RPH led indirectly to claims in respect of the hundreds of FLCPs throughout the major tertiary hospitals, all relying on a comparison with those Waitlist Clerk positions. I think it is reasonable to assume that there are many more FLCPs in other hospitals and health services awaiting the outcome of these claims to decide whether to go to the starting gate.

63 There are a number of important matters of a general nature which require comment before I deal with the particular case put forward in the whole FLCPs review. The first thing to note is that it is very important that each position be viewed and assessed in context. That context is the whole of the classification structure within, in this case, the Western Australian public hospital sector. It is not the personal qualities and skills or diligence of the occupant, it is the objective requirements of the position, which are the basis of the assessment of the classification.

64 One matter of note is that the witnesses have been performing these jobs for many years. Mr Millman noted that there are four increments within the Level G2 classification, and the top of the level could be achieved within three years of commencement. He said:

> Part of the conundrum, perhaps – I don't know, but part of the basis upon which this application may have been made is the fact that the vast majority of people who are performing these functions have probably achieved three years' worth of service 10 times over. And so they're all stuck at the particular level.
>
> Now, I don't think that there's any power under these instant proceedings to do anything about that, except reclassify them to level 3 (t 436).

65 This proposition misconceives the notion of classifying positions, not people. It is the requirements of the position, not the skills, abilities, experience or competence of the person who fills the position which is relevant. There are four increments in the level, reflecting that the incumbent will be fully competent by the time they reach the top of the level. The evidence is of a person being trained within four weeks and then continuing to develop their competence with support. This does not suggest that the position requires any significant period of training or experience to meet the required level, certainly not many years of training and experience.

66 Further, it is the job the employer requires to be performed, and the way the employer has structured the arrangements under which the work is performed, which are the bases of assessment.

67 Within the public sector, positions are established and their classification determined by reference to objective factors. It is to be assumed that the classification as established by the employer is correct, and it is for the person who challenges the correctness of that classification to prove otherwise. This may be done in one of two ways. The first and most common is to demonstrate that since the position was last classified, it has been the subject of changes which constitute a significant addition to work value. This is done by reference to the nature of the work, the skills and responsibilities of the position or the circumstances under which it is performed. This is the basis of the great bulk of the claim in this case.

68 The second way is to demonstrate that the position is wrongly classified by reference to like positions. The Waitlist Clerks at SCGH rely in part on this ground, in particular by reference to other Waitlist Clerk positions within the public health sector.

69 However, the position must ultimately fit within the overall classification structure, by reference to the levels of other positions.

70 There are some overarching issues which can be dealt with. I intend to deal initially with the background to group reclassifications in the public health sector which set the scene.

Specified Callings Work Value Review – Introductory Paper

71 The HSU has relied, to some extent, on the review of specified callings, or allied health professionals, in the public health sector as setting the scene for these claims. However, I think it is important to go back a step further and look at the Clinical Psychologists work value case.

Clinical Psychologists Case and Work Value

72 The Commission in Court Session dealt with a claim by the Hospital Salaried Officers Association of Western Australia, now the HSU, regarding the classification structure as it applied to clinical psychologists, on the basis of a claim of increased work value ((2003) 83 WAIG 23; 2002 WAIRC 07218). This case was the precursor to the specified callings review, it being the first of the callings to be reviewed. In the clinical psychologists' case the Commission set out some useful guidance regarding work value claims. They said:

> 144. From time to time, the Commission has noted that particular matters can or cannot be considered as part of a Work Value assessment. Those changes which are evolutionary and apply to the workforce generally, such as changes from the manual to automated or computerised systems are not indicative of an increase in work value (*The Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Honourable Minister for Education* CR 49 of 1997 (79 WAIG 648)). 'Mere changes in volume of work or mere changes in technology will not always be sufficient to warrant a new rate of pay … it is a plain fact of life that technology changes and employees must expect to adapt to meet those changes as and when necessary'. (*Hamersley Iron Pty Limited v The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch and Others* (1994) 74 WAIG 926).
>
> 145. As to the degree of change required for there to be an increase in work value, it matters not whether changes have been evolutionary or revolutionary. Evolutionary change can be just as substantial and significant as revolutionary change. (*Hospital Salaried Officers Association of Western Australia (Union of Workers) v Royal Perth Hospital and Others* (1987) 76 WAIG 554 at 557). Incremental or cumulative change, when taken as a whole, may constitute such a level of change that developments have exceeded those which would reasonably be expected.
>
> …
>
> 148. Importantly the Work Value Changes Principle stipulates that the time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the September 1989 State Wage Decision (1989) 69 WAIG 2917. Under that State Wage Decision the structural efficiency principle enabled parties to undertake a 'fundamental review of the award with a view to implementing measures to improve efficiency of industry and to provide employees with access to more varied, fulfilling and better paid positions' (op. cit. at 2917). The wage system comprehends classifications based on skill acquisition and training within the framework of a career structure.
>
> 149. With the second structural efficiency increase to this Award, in October 1989, (69 WAIG 3290) the classification structure was changed. The classifications were broad banded to create the structure as it applies today. Subsequently, the HSOA obtained industrial and award coverage of clinical psychologists in the public health sector, the vast majority of whom had previously been covered by the Public Service Award 1992 (No. PSAA 4 of 1989). The new amalgamated clinical psychologists group then had access to classification criteria progression, which enabled movement from level 6 through to level 7 and level 8 upon satisfying the appropriate professional progress criteria.
>
> 150. The questions to be determined are:
>
> > 1. What changes have occurred in the requirements of clinical psychologists in the public health sector since the structural efficiency adjustment?
> >
> > 2. Do the changes apply across the sector?
> >
> > 3. Do those changes constitute a net addition to the work value?
>
> …
>
> 155. It is true that not all of these developments apply equally to each area of work, or at each level. For example, level 6 Registrars are required to spend an additional year in supervised training on account of the increased demands, complexity and body of knowledge, but would not be involved in specialisation. The more senior levels have increased supervision responsibilities. However, there is sufficient change across the board, and in the various sectors, such as in regional services, in youth services, in gerontology, surgical areas, and all others, to enable a conclusion that there is a high level of change across all of the public health sector clinical psychologist positions before the Commission. It is a matter of how those changes ought be reflected at the various levels.
>
> 156. As to the claim that changes to the work environment of community-based work rather than the previous hospital based focus, and the use of multi-disciplinary teams, these are common across the mental health sector. The clinical psychologist operating within that system is no different from the mental health nurse, occupational therapist, psychiatrist, or medical practitioner in that respect. The clinical psychologist may head the multi-disciplinary team, but so might other professionals. That does not mean that there is no increase in work value. We conclude that the change to the community based approach has lead to increased efficiency and cost effectiveness of treatment, by the significant reduction of in-patient bed days and by the use of the multi-disciplinary approach. Other professions may contribute to this and any such contribution would need to be weighed with any other changes to the professions should they make a similar claim.

73 These findings are of significance in what followed in the review of the classification of health professionals, or specified callings ((2006) 86 WAIG 279; 2006 WAIRC 03473). As part of that claim, an Introductory Paper dealing with the changes

said to have occurred across the whole of the public health sector as they affected health professionals, was submitted to the Commission.

74 The Introductory Paper, at section 2. Changes in Scope, notes that there were a number of common areas of change across all specified callings which had been grouped as service delivery, demographic or structural changes. In respect of service delivery changes, these were identified as including:

- The impact of a greater number of diseases making treatment more complex and increasing the number of patients with co morbidities.
- Pressure from shorter length of hospital stay for many conditions creating increased liaison between health professionals and community based health care including general practitioners and other external organisations.
- Patient treatment being initiated in acute stage of recovery in ICU and in emergency departments requiring increased skills for management of the complex and diverse caseloads.

(Introductory Paper, page 4)

75 The Introductory Paper also notes that:

> Less time in hospital does not mean that services are reduced. Instead health professionals must provide the same services in very different conditions, either during a greatly reduced hospital admission or in at-home and community services.
>
> To meet this change in the nature of their work, health professionals constantly increase skills and responsibilities to ensure that the appropriate level of care is provided. Health professionals have built up a comprehensive knowledge that incorporates both the overarching DOH changes and the regional health service internal directorates. Outside the tertiary hospitals, the evolution of population health units from the previous community centres is an example of DOH and regional change that has created change:
>
> - In the community based multidisciplinary teams that the health professionals work in.
> - To a focus on priority groups such as very young children.
> - In skills required in the health professional positions.

(Introductory Paper page 6)

76 Emphasis on an intersectoral approach to care planning was said to have increased the complexity of work, increased liaisons and increased knowledge of external bodies.

77 There is also reference to programme development and involvement in planning committees, requiring higher levels of skill and responsibility, including increased professional autonomy.

78 Under 2.1.1 Alternative Models of Care, it is said that alternative models of care have been developed in the last 15 years due to the changed health care environment which has resulted in:

> a recognised shift from medically directed care to more collaborative interdisciplinary care, where the team members are the case managers for the patients. Case management is a system for delivering care that coordinates interdisciplinary care services, plans care, identifies expected outcomes, and helps facilitate the patient and family toward those outcomes. This new model of care is dependent on early assessment of the patient by the relevant members of the team and means changes in the nature of work and in skills and responsibilities for health professionals.

(Introductory Paper page 7)

79 The Introductory Paper goes on to refer to the greater autonomy of members of the treatment and intervention teams and the change in the arrangement from the medically headed system to different models including the team based approach.

80 At page 8 of the Introductory Paper, there is a list of issues which set out how health professionals work in alternative models of health service delivery including early intervention; linkages between hospital and community services; shorter average stays in hospital; diverting patient admissions at the Emergency Department to such services as social work, physiotherapy and occupational therapy of elderly people and referral for in-home services; collaboration and liaison between health service providers to support integrated care; home based care such as Homelink which was introduced in late 1990s; palliative care at home, and self-management of chronic diseases requiring the health professionals to educate and support the patients in this model of care.

81 The Introductory Paper also deals with changes in technology and gives examples of increased knowledge, for example, of surgical procedures by health professionals and its impact on early discharge of patients. Change in diagnostic technology requires an increase in skills to undertake procedures. The development of new drugs increasing longevity and life expectancy requires increased knowledge for certain of the specific callings. Medical imaging technology and teleradiology replaced the need to physically transport films to radiologists, and increased the required level of the medical imaging technologist's skills.

82 The use of Telemedicine requires the health professionals to develop new skills for education, clinical and management use as well as adapting their service provision to ensure best use of technology.

83 Changes in information technology were said to have expanded the scope of practice and greatly increased the competencies required by health professionals. Internet access is said to have increased community access to health information creating new levels of awareness and sophistication in patients in relation to the management of their health, and this information may not be reliable. Health professionals are said to have a new role in interpreting web-based information for clients (Introductory Paper page 14).

84 There are also references in the Introductory Paper to changes such as through Evidence Based Practice, demographic and population changes, health and morbidity trends and many other changes relating to models of care.

85 In terms of structural change, there is reference to the clustering of metropolitan health boards and the development of the Western Australian Country Health Service. These are said to have a major impact on health services and health practitioners. The focus, from the late 1990's, on bed management, waiting lists and discharge programmes affected the way patients were managed, requiring increased skills and devolution of coordination and direction of health professionals (pages 23, 24).

86 Issues of clinical governance and devolution of responsibility including registration requirements, professional standards, fitness to practise issues and accountability are all matters which have increased the responsibilities of health professionals. Professional education has significantly increased for many of the individual health professions and examples were given of higher standards of academic requirements for particular programmes. The Introductory Paper deals with increased levels of responsibility for health professionals and changes in the nature of work arising from clinical governance requirements, legislation, financial management and human resources management.

Conclusions Regarding the Introductory Paper

87 It is fair to say that the Introductory Paper is merely that, an introduction. The substance of the particular work value claims of the health professionals is contained within 23 volumes, one for each of the health professions covered by the HSU. Some of those are very detailed in the descriptions of the requirements of the positions, for example, that relating to the profession of occupational therapy is some 300 pages and that for dietitians is 160. Others are significantly shorter such as that relating to audiology which is 29 pages.

88 Each of the volumes addresses the requirements of the particular profession by reference to:

- Definition and scope of practice of the profession;
- Changes in the scope of practice, training, qualifications, standards and registration of the professions;
- Areas of specialisation; and
- Impact and effectiveness in respect of the changes.

89 In this context, the Introductory Paper is to be seen just as an introduction. The 'meat' is in the individual professional submissions.

90 Most significantly, where the Introductory Paper refers to changes in for example, service delivery, it is not that change of itself which is significant, but the effect it has on the work, skills and responsibilities of the position and the conditions under which the work is performed.

91 One of the most significant aspects in terms of providing any degree of comparison between frontline clerks and health professionals is set out at '3.1.4 Changes in the conditions under which the work is carried out' at page 36 of the Introductory Paper. Those changes, as far as health professionals were concerned, dealt with changes in traditional managerial and professional health cultures, risk management and accountability. The circumstances of multidisciplinary teams and rural and remote organisational changes were some of those changed conditions under which the work is performed.

92 The HSU relies upon the Introductory Paper as being illustrative of changes across the public health sector. Some of those changes may also be applicable to FLCPs, however, their effect has been quite different. Having examined both the Introductory Paper and the multiplicity of specific health profession claims, I am unable to find that there is a significant degree of commonality between the effect of those changes on specified callings and the FLCPs. By this I mean that the changes affecting the FLCPs may include shorter stays in hospital which may affect, for example, the work volume of ward clerks, and increased presentations of patients in Emergency Departments requiring speedier attention to comply with the FHRP. The impact for clerical staff is on workload and work pressure whereas its impact on the professions also required increased skill and responsibility.

93 The issues affecting FLCPs, generally speaking, perhaps with the exception of Clinic Clerks, relate to hospital-based services. The health professionals were required to take on added responsibility for the patient and in a context going beyond the hospital setting. The health professionals also relied on significant professional qualifications and practice issues.

94 Not only did the work context change from only being hospital based and medically led to community based and in a team arrangement, but it required increased professional skill, education and accountability. The FLCPs have undergone change but its magnitude, scope or effect are different. Whether the change to FLCPs is of a significant net addition to work value requires assessment of the work of FLCPs. I find that reference to the Introductory Paper does little to assist in identifying the effect of the changes on the work of FLCPs.

Broadbanding and the Public Health Sector

95 The current classification of these positions as Level G2 within the Hospital Salaried Officer classification structure needs to be seen in the context of the review and rationalisation of classifications and career structures within a number of awards including the *Hospital Salaried Officers Award* No 39 of 1968 (the Award) which took place in 1989 as part of the implementation of the Structural Efficiency Principle. Following lengthy negotiations, the parties to the Award, having observed the creation and implementation of the public service broadbanded structure and its implications, agreed on a range of measures for the Award. At the hearing before Fielding C on the 10 October 1989 ((1989) 69 WAIG 3290), the parties submitted a Memorandum of Agreement (the Memorandum) which said amongst other things that:

> The union and the employers agree to amend the above awards to include career structures and multiskilled classifications.

96 Under Clause 2 – OBJECTIVES, it noted that one of those objectives was to '[p]rovide better and more fulfilling jobs with varied skills within a band enabling more mobility within that band and between bands (Vertical and Horizontal Mobility).

97 Appendix 2 – BROADBANDING PROPOSAL FOR HOSPITAL SALARIED OFFICERS, under the heading DEVELOPMENT OF PROPOSAL, noted that in 1987 the Office of Industrial Relations conducted a feasibility study into the relevance of broadbanding, as it had been applied in the public service, for hospital salaried officers. It said:

> Cognisant of the organisational and occupational group problems which resulted from the introduction of broadbanding in the public service, the Office of Industrial Relations developed a slightly different model for the hospital industry. This new model was designed to retain existing hierarchical and reporting structures wherever possible, whilst at the same time providing increased flexibility in the utilisation of human resources.

98 The Memorandum went on to note the advantages of the proposed model of broadbanding, including the rationalisation of 142 classifications and 398 salary points into 11 classifications and 43 salary points, resulting in appointments and salary administration being simplified. There were also advantages of reducing minor promotions, particularly in clerical grades, because of the extension of the existing limited salary table range to a greater range. There was flexibility to transfer staff within their level because they were no longer appointed to a specific post and there would be the capacity for 'staff rotation through a variety of work areas, thereby enhancing succession planning and multi-skilling'. The expansion of salary ranges was to provide more logically incremental patterns and career structures.

99 The new Level G1 was to be a combination of the former classifications A1.L1-L3, A3, A1.L4, B1.1 and B6.

100 Level G2 in the new broadbanded structure was a promotional grouping combining the old A1.L5, A4.1-3, B1.2 and 3, A2.1, B2.1.

101 Level G3 was a new promotional grouping of A4.4, 5 and 6, A2.2 and 3, B2.2 and 3.

102 When dealing with the issue of broadbanding in respect of the public service, Fielding C said:

> In the case of the broadbanded classifications, it must be understood and accepted that bands are broad and within each band the range of duties will be wider than under the former scheme of multiple classifications and hence not any change in duties justifies reclassification from one band to another.
>
> …
>
> The object of dealing with reclassification applications in the Commission is so that they will be resolved in accordance with its wage and salary fixing principles. There has undoubtedly been an increase over time in the level of classification for many in the Service; a 'reclassification creep', with the only apparent justification being the effluxion of time or a newly acquired grandiose title ((1988) 68 WAIG 2008-9).

103 These comments, firstly as to the broadening of the range of duties within each new level, and the need to ensure that change of itself, particularly by the broadening of the scope of duties which fit within the particular levels, will not lead to 'reclassification creep', are as pertinent to hospital salaried officers as they were to public service officers.

104 Therefore, in considering these claims, two particular principles need to be borne in mind: firstly, broadbanding means where a job previously had a limited range of duties, it could now take on a broad range of duties at the same level. This means that an increase in the range of duties of the same level does not necessarily increase the work value of the position. This is what is meant by multiskilling. Secondly, it is necessary to examine the skills and responsibilities of a position to ascertain if there has been change, and if so, what is the level of change and does it constitute a significant net addition to work value?

Historical Level of FLCP Duties

105 The positions the subject of this application are Level G2 positions. The respondent has included within its documents at Volume 1, Tab 5 a bundle of job description forms or duty statements for FLCPs dating back, in some cases, to the 1980s. There are also job descriptions contained in Reclassification Requests in the Employers' Volumes 2A and 2B. These job descriptions are very helpful in ascertaining the requirements of the FLCPs at the time from which change is said to have occurred and to enable comparison with the positions as they are at the time of this assessment.

106 The first such document in Volume 1 tab 5 is for a Medical Records Clerk in the Emergency Centre of RPH. It had a classification of A1.L5, equivalent to a Level G2 position. The way in which the document has been photocopied has resulted in the last digit of the date being absent, however, what is clear is that it applied in the 1980s. The duties set out for that position were as follows:

1. Participates in a rotating roster (24hr. shifts)
2. Provision of a reception and enquiry service for patients attending the Emergency Centre covering all areas, reception counter, treatment, assessment and resuscitation areas. Completes emergency attendance documentation for patients requesting to see a doctor. Also for patients admitted by ambulance or private car. Identifies patient in Hospital Patient Master Index and arranges update if necessary. Responsible for the initiation of new file, no hard copy, or flagged records. Arranges registration of new files, new information, or changes to current information. Responsible for calling all medical records.
3. Completes admission documentation, including financial classification forms, for patients admitted through the Emergency Department, clinics and doctors private rooms. Arranges bed location via Bed Allocation Centre. Provides a country list for The Friends/Social Work Dept.
4. Maintains attendance/admission register. Answers telephone enquiries from both medical staff, and patients. Responsible for patient identification labels, on all patients attending Emergency Centre, Recording of Emergency Centre statistics. Maintains the files held in Emergency Centre, including the filing of all loose reports, loose filing, and latest documentation written by medical staff. Returns Medical Record to filing room after completion.

5. Attends to duties of 'Liaison Clerk' which include distribution of documentation to relevant areas. The making of outpatient appointments, booking ultrasounds, holter monitors etc., or any investigations that are required. Ensuring adequate stationery is provided for all areas of the Emergency Department, including the re-ordering, each week.

6. Responsible for press calls concerning patients being treated in the Emergency Department. Provides daily admitting rosters for the Emergency Department. Redirects all phone calls which are received through the Liaison's Access phone. Responsible for the taking down of laboratory results, for Emergency Centre patients, and relaying them to the appropriate doctor.

7. Responsible for booking in and paying out of patient's cash and valuables, after normal working hours, public holidays and weekends. This includes deceased property. Provides relief for booked admission clerk during lunch breaks, annual leave, provides a 24 hour service for all the above duties.

107 The next duty statement is for a Clinic Clerk position, number 781, at RPH. This position was classified at Level A1 under the pre-broadbanding system and it bears a stamp indicating that it was registered on 21 May 1990. Its duties were as follows:

Maintain Out-patient appointment books and arrange appointments for new and review patients referred both from within and outside the Hospital.

Arrange bookings for various medical tests and procedures as required by the Doctors and pass on any instructions that may be required for those tests and to direct patients to various Departments.

The collation of patients loose reports within the medical record in a pre-determined order on the day of attendance for readiness at the Clinic.

Intercept all telephone calls, evaluate and initiate any action required.

Responsible for the collection and disposal of all medical records, x-rays and dictation to appropriate departments within the Hospital.

Liaise with Doctors, Nursing Staff and other Departmental staff regarding the day to day running of the Clinic.

Copy, collate and distribute daily clinic lists.

Initiate action on all incoming mail.

Statistical analysis of outpatients daily attendances.

Forward written and verbal information to Documentation Centre for all new hospital cases and change or update of patient information.

Train and orientate new staff.

The organisation of transport for inpatients and outpatients using orderlies, St John Ambulance and other voluntary transports, liaising with the Social Worker.

Ordering and maintaining stationery supplies for the Clinic.

Completion of such other clerical tasks as may be allocated.

I note that this position, at level A1, may have been an equivalent to either Level G1 or Level G2 under the current classification structure.

108 The next is for a Ward Clerk at RPH, position number 1876, and was classified at A1.5, equivalent to Level G2. This was registered on 9 March 1989. The duties for this position were:

1. Filing of all medical results and reports relating to inpatient stay.

Collation of patient records in a pre-determined order on discharge and arrange completion of Morbidity Coding, Interim Discharge Letter and Summary.

Checking of ward census and liaison with Bed Allocation Centre re: notification of discharges, transfers and condition changes.

Requesting of x-rays and returning them to the X-ray Department after discharge.

Completing patient admission and classification forms for patients unable to elect at admission point.

2. Advise shift co-ordinator and medical staff regarding patients admission.

Prepare all necessary ward forms associated with admission and enter on bed list.

Intercept all telephone calls, screen intelligently, and direct visitors to appropriate patients' rooms.

Arrange inpatient, outpatient and general appointments and transport.

Record telephoned laboratory results and notify medical staff.

Advise relatives of discharge (when required).

Advise shift co-ordinator of theatre lists and pre-meds for following day.

Liaise with social worker.

3. Ordering stationery.

Distribute mail and telephone messages to patients and staff.

Writing up Nurses Roster.

Keeping pre-admission notes made up and ready for admission.

Responsible for the completion of acute care forms and return to Patients Fees Department.

109 The next position is a Ward Clerk at SCGH, registered in November 1988, classified as A1.L4. However, according to the notations, I conclude that its reclassification to A1.L5 (Level G2) was approved by the Classification Review Committee in 1990. Its duties in 1988 were:

1. Liaise with Medical, Nursing, Allied Health and Hotel Services staff regarding the day to day organisation of the ward.
2. Quality Control – Ensure set standard is maintained for the ward area.
3. Notification to ward staff of an admission.
4. Receive all phone calls and screen intelligently.
5. Admit patients and liaise with patients and relatives.
6. Arrange transport for patients movements.
7. Arrange outpatient appointments.
8. Record medical test results that come through by telephone.
9. Arrange appointments for patients tests, etc.
10. Keep patient bed board up to date.
11. Take messages from Medical, Nursing, Allied health and Hotel Services staff to relay to telephone caller.
12. Arrange notes and x-rays for various meetings that are conducted on the ward area. Send notes to appropriate areas for outpatient clinics.
13. Distribute mail to patients, Medical and Nursing staff.
14. Relay telephone message to patients, Medical, Nursing, Allied Health and Hotel Services staff at Ward Clerks discretion.
15. Documentation of admission papers as necessary.
16. Follow-up incomplete admission papers as necessary.
17. Update the ward census of all patient admissions, transfers, discharges and deaths. Notify Bed Allocation of the above.
18. Notify Bed Allocation of the bed state.
19. Notify nursing staff of possible infectious patients requiring isolation.
20. Ensure medical records and x-rays are available on admission of patient.
21. Liaise with patients or relatives regarding bed availability.
22. Take pre-med time orders from theatre and notify nursing staff immediately.
23. Orientate new nursing and medical staff to clerical/ward requirements.
24. Train relief clerks to cover ward area for sick and annual leave.
25. Notify nursing staff if aware of patient in medical difficulties.
26. Request supply items and stock ward with stationery.
27. Photocopy as necessary.
28. Keep ward stocked with sufficient amount of starter packs.
29. Complete minor work requests and forward to Engineering.
30. Arrange connection, maintain record and organise disconnection of private telephones.

<u>MEDICAL RECORDS</u>

31. Maintenance of patients medical records on ward area e.g. all filing checking of labels, general tidying up etc.
32. Obtaining and monitoring movements of the patients medical record and x-ray from admission to completion of inpatient summary.
33. Maintain a daily outstanding summary list. Totals to be submitted on a weekly basis.
34. Ensure medical staff complete summaries and coding.

110 The next is for a Ward Clerk position at Armadale Kelmscott Memorial Hospital which is not one of the hospitals under the current claim.

111 The following job description is for a Ward Clerk at PMH. This was classified at Level G1 in March 1991. The duties of this position were:

1. Co-ordinates (without direct supervision) the daily administrative requirements of the ward.

Liaises with Medical, Nursing, Allied Health and other Hospital and Support Services Staff, patients and visitors to ensure effective functioning of the ward.

2. Arranges patient admissions, transfers and discharges.

3. Maintains ward bed availability information and advises Bed Allocation Centre of patient movements.

Liaises with shift co-ordinator and advises relevant medical staff of patient admission details.

4. Arranges all appointment schedules for all inpatients and outpatients, internally and externally.

5. Records, collates and directs the distribution of diagnostic investigation results (pathology, radiology etc) and other patient data for Medical, Nursing Staff and patient's Medical Records.

6. Advises medical and nursing staff of ward procedures and co-ordinates same (eg: Lady Lawley Cottage discharge).

7. Maintains patient's medical records from admission to discharge, being responsible for accuracy of order and tidiness. Requests and returns patient related documentation and x-rays.

8. Assesses needs and arranges patient requirements with regard to transport, Interpreter Services, P.A.T.S.

9. Trains new/relief Ward Clerks.

10. Maintains filing systems. Policy Manuals and all stationery requirements for the ward.

11. Monitors and screens all telephone calls, mail and visitors to the ward and initiates appropriate action.

12. Types cases summaries and correspondence from tapes/long hand as required.

13. Other duties related to this position approved by the Head of Department.

112 There is a further job description form for PMH part-time Ward Clerk at Level G2. This one is effective from September 1991. The duties are identical to the one above, classified at Level G1, indicating the reclassification of the Ward Clerk position at that time.

113 The next is a job description form for a Ward Clerk, item No. BL125 at Bentley classified at A1-L3 in 1989 equivalent to the current Level G1. There is a Reclassification Request form for that position. That claim relied on a number of duties said to have been taken over from nursing staff. The introduction of computers and non-nursing duties had changed the structure of the ward clerk position. It is not my intention to recite each claim but I note that many of the items referred to in this Reclassification Request form have a great similarity with those currently before the Commission including the interception and screening of telephone calls from family members of patients which was previously a nursing duty; arranging appointments for tests; ensuring the accuracy of patient records; dealing with people from diverse cultures; identifying patients with infectious diseases. The summary is of particular note. It says:

> In summing up I would say that the most significant change in the ward clerk duties is that she/he has become a member of the medical/nursing team, rather than just a clerical worker. This new role requires much greater responsibility in decision making and oral and written communication skills and having the ability to have input in decisions with regard to the improvement efficiencies in coping with an ever increasing need with a reduced budget.

114 The comparison positions relied upon in that case were Ward Clerks, Level G2, at Armadale Kelmscott Hospital and at PMH. According to the correspondence contained on the file, as of 15 August 1989, this position was reclassified to A1.L4 which was also in the Level G1 classification.

115 The next document is a duty statement, as at January 1990, for a Bed Allocation/Main Reception Clerk at PMH and was classified at A1.L5, equivalent to Level G2. The duties for that position are as follows:

1. <u>Bed Allocation Duties</u>

1.1 Allocate beds for all admissions arising from booked admissions, Emergency Department, Outpatient clinics, liaising with nursing/clerical staff.

1.2 Receive and input all information regarding Transfers between wards, Separations, Leave and Specialty Transfer. Advise nursing/clerical staff of all patient movement.

1.3 Update patients' condition, medical insurance details and all other relevant details in respect of patients' admissions.

1.4 Operate the computerised Patient Care System in functions available to this department.

1.5 Responsible for checking and distribution of Booked Admission List, Patient Master Index and producing other computer reports for departmental and ward use.

1.6 Maintenance and updating of computerised Patient Master Index function, including amendments to personal details, address changes, insertion of medical particulars and cross-referencing.

1.7 Maintenance of Bed Board and responsibility for maintenance of back-up system by manual means.

1.8 Telephone enquiries from parents of patients regarding availability of beds for booked admissions.

2. Main Reception Duties

2.1 Reception, registration, admission and discharge of patients from the Emergency Department, Primary Care Clinic and Admission Bureau.

2.2 Input new registrations and update existing data on the computerised Patient Care System.

2.3 Generate computerised patient attendance documents and identification labels from printers.

2.4 Prepare new records for patients and process existing records as necessary.

2.5 Prepare downtime registration documentation.

2.6 Deal with personal and telephone enquiries relating to whereabouts and condition of patients.

2.7 Maintain report and label printers.

2.8 Relieve in the Emergency Department and Primary Care Clinic as required.

3. Other Duties

3.1 Perform other duties relating to this post as required.

116 The next is a job description, as at 28 September 1989, for a Clerk PMI (Patient Master Index)/ATS, in the Admission and Discharge Services of SCGH, position number 508/034 classified A1-L4, which is the equivalent of the current Level G1, had the following duties:

1. A.T.S.

- To find and allocate beds for elective and emergency admissions.
- To maintain the accuracy of the bed control board.
- To record the presence and movement of patients.
- To update and record patient bookings.
- To input all information supplied to the waiting and booking lists.
- To ensure the production, collation and distribution of computer reports as directed.
- Telephone enquiries and liaising with medical staff and patients on admissions and cancellations.

2. P.M.I.

To maintain the accuracy of the Patient Master Index by:

- registering new patients
- updating index records with new information

To perform Master Index search when requested via computer and microfiche.

To receive requests for medical records and handle as appropriate.

To maintain organ donor registers.

3. GENERAL

To assist in maintaining the accuracy of computer records.

To maintain daily work controls.

To handle enquiries as appropriate.

To assist with operation of facsimile machine and log, then notify departments.

To assist in on-the-job training of new recruits.

The prime function of this position was:

1. Responsible for the maintenance and update of computerised Patient Master Index system including allocation of unit medical record number and amendments to patient personal details.

2. Responsible for the maintenance and update of the Patient Care System including allocation of beds and recording of patient bed movements.

117 A position of Assistant (Bed Control) at SCGH, in December 1981, was classified by the CRC at A1-5, equivalent to Level G2, and had the following duties:

1. To deputise for the Bed Control Officer as required.
2. To be aware of all procedures and processes within the Centre.
3. To handle all telephone requests for admissions i.e. less than 48 hours and arrange the allocation of beds with the Bed Control Officer.
4. To ensure that all documents are sent out to elective patients at the appropriate time.
5. To ensure that all inpatient bed request forms are complete before being sent to PMS/ATS.

6. To liaise with patients regarding:

(a) Details on admission advice form;

(b) Arranging admission if there is no time to arrange this by mail;

(c) Cancellation or postponement of admission.

7. To liaise with secretarial staff in consultant's private rooms as required.

118 Other duty statements from the late 1980s and early 1990s contained in the Reclassification Requests cover the Clinic Clerks, Radiology at RPH in 1992, Level 1, Clinic Clerks Medical Records, RPH in 1990; Clerks, Emergency Centre, RPH, in late 1980s and others.

Indicative Duties for Levels 2 and 3

119 I also note Mr Holland's evidence about the identification of the duties carried out by Level G2 positions which included the former A1.L5 and the former A2.L1 prior to broadbanding. As Mr Holland says, the A1.L5 level reflected the low end of the HSU level G2 classification, and A2.L1 reflected the high end of the classification. Those indicative duties for A1.L5 included:-

Arranging patient admissions, transfers and discharges.

Completing emergency attendance documentation.

Obtaining, maintaining and monitoring all medical records.

Determining patient's financial classification through interview.

Arranging beds via the Bed Allocation Centre.

Recording statistics.

Making outpatient appointments, including those for various medical tests and procedures, images and other investigations.

Recording medical test results.

Arranging transport for patients.

Liaising with medical, nursing and allied health staff.

Ensuring the maintenance of quality standards for the work area.

Screening patients for identification of infectious diseases e.g. MRSA, Hepatitis B.

Notifying nursing staff of possible infectious patients requiring isolation.

Orientating new nursing and medical staff to clerical requirements.

Training and orientating new and relief staff.

Notifying nursing staff of patients in medical difficulties.

Completing minor works requests.

Arranging the completion of summaries and coding.

(exhibit A8)

120 The duties at A2.L1 are not described in Mr Holland's statement, however they also form part of the Level G2 classification.

121 Mr Holland also says that during 1999 and 2000, SCGH carried out a comprehensive analysis of duties and associated skills and other attributes for Medical Records Clerks at Levels G1 and G2. He says that this process involved extensive consultation with position holders, supervisors and the HSU. As a result, in October 2000, SCGH published a detailed document titled 'Competency Assessment Package – Progression of Medical Records Clerks to HSOA Level 1/2'. Mr Holland says that the job descriptions and documents referred to enabled the development of a list of common duties which characterised Level G2 and Level G3 respectively. He says:

> The duties for Level 2 cover areas such as scheduling, records, collating and related duties, administrative support and related duties, liaising, and finance and maintenance. The duties for Level 3 cover areas of coordination, liaising, supervision and mentoring, finance, maintenance, research/projects, and policies, procedures and quality assurance.

(exhibit 4 *Waitlist Clerks)[13] Witness Statement of John Holland (Appendix D to the applicant's outline of submissions and statement regarding Wait List Clerks L2 Inpatient Booking Service – Patient Flow Unit, Sir Charles Gairdner Hospital).

Classification Tool

122 Mr Holland also referred to a tool prepared as part of a review of FLCPs called the 'Classification Tool' which set out the background to the development of the classification tool and the historical relationships between various levels. This document also notes the list of common duties for positions as Level G2 having been developed, including Appendix 1 Level 2 HSU List of Common Duties and Appendix 2 Characteristics of Level 3. (See Employer's Volume 1, Tab 3). (I note for completeness that these two appendices have some other appendix numbers on them and I surmise that that is because they have been used as appendices, within different numbers, for other purposes. For the purposes of this case they are Appendix 1 and 2.) The Level 2 duties are listed below. The duties marked with an asterisk are said to align with 'lower PSA Level 1 duties', which equals HSU Level 1, contained in the Public Service Classification Benchmark Manual.

Scheduling, records, collating and related duties

- Co-ordinates all clinical appointments via TOPAS for all clinics.
- Collates medical records including all reports and documentation for patient appointments.
- Processes arrivals and discharges for patients attending clinics.
- Maintains a suitable medical record tracking system in keeping with policies and guidelines.
- Maintains patient filing.
- Receives and processes all incoming mail. *
- Maintains patient medical records being responsible for accuracy of order and tidiness as necessary.
- Arranges bookings for Diagnostic procedures.
- Monitors and screens all telephone calls, mail and visitors to the ward and initiates appropriate action. *
- Liaises with patients, verbally and/or by correspondence, regarding waiting list inquiries/admission arrangements/hospital requirements.
- Collects documents and despatches medical records * to and from the Health Record Management Service and Outpatients Clinics.
- Performs data entry as required * on departmental systems including PSOLIS.
- Arranges outpatients clinics and subsequent liaison with patients on computerised patient information system TOPAS.
- Prepares and maintains medical records ensuring all relevant results and reports are available and appropriate filed, together with other paper work relating to the outpatient attendance.
- Arranges diagnostic tests and procedures, providing instructions and directions to patients. Ensures relevant x-rays are available for outpatient clinics.
- Organises patient transport and orderly services as required.
- Allocates beds for emergency admissions and elective admissions.
- Records new patients attending the Hospital and issue new medical records for those patients.
- Records patient admissions, discharges and movements on the Patient Administration System.
- Amends/updates patient identification details * on the Central Patient Index.
- Provides patient labels for wards and various departments.
- Receives patients to the ward, allocates bed and ensures patient data is complete and correct.
- Coordinates procedures and processes for the Section.
- Organises pre admission and pre anaesthetic and advises patients accordingly.
- Ensures medical and other records are filed, retrieved and prepared for patient attendances.
- Organises the culling archiving and destruction of medical records.
- Utilises computer systems to identify patients, processing of patient examinations, register and update patient information, and to identify and rectify data discrepancies.
- Collates monthly workload statistics.
- Maintains Coordinates complaints database and assists with producing complaint reports.
- Maintains Coordinates patient feedback and compliments databases.
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- Maintains Coordinates complaints database and assists with producing complaint reports.
- Maintains Coordinates patient feedback and compliments databases.
- Schedules patient appointments in consultation with Clinicians and provides assistance about waiting lists and bookings procedures, and alerts clinicians to discrepancies.
- Schedules efficient theatre lists in consultation with clinician

Admin support and related duties

- Carries out full range of administrative duties, including reception *, word processing *, data entry *, mail collection and delivery *, and maintenance of filing systems * including archiving.
- Assists with the operation of various meetings, * teleconferences and videoconferences, including arranging catering, booking of rooms and equipment and providing technical support.
- Coordinates monthly staff meetings * including development of agenda and taking of minutes.
- Screens telephone calls and initiate appropriate action. *
- Orders relevant medical records.

- Undertakes the handling of the mail distribution and telephone calls as required. *
- Maintains office records and filing system. *
- Maintains office stationery stock levels.
- Provides comprehensive administration and clerical systems support (including data processing *).
- Undertakes receptionist duties and operates switchboard * and is responsible for triaging calls to staff.
- Acts as a confidential medical receptionist.
- Handles all enquiries inter-hospital and public, via phone and in person and directs queries to appropriate personnel. *
- Manages appointment diary, Provides reception service, Coordinates client service, Maintains Head of Department's diary. *
- Maintains staff training programme, Maintains department statistics.
- Maintains intradepartmental files. *
- Performs confidential administrative and secretarial support.
- Prepares manuals and documents such as agendas, minutes, report production, overhead and presentations.
- Maintains register for incoming and outgoing mail. *
- Provides data entry * and variations to administration roster for Rostar/HCN. Performs data entry for Compu store for archiving of records.
- Provides clerical services for outpatient's clinics including reception duties, telephone interception and liaison duties. *
- Provides a reception service * to the virtual ward and clinic area.
- Receives visitors (patients, staff or members of the public) and phone calls and responds, informs or directs appropriate. *
- Researches and reports on matters under consideration as directed.

Liaising

- Liaises with staff to distribute and respond to all confidential and general correspondence, memorandums and reports.
- Liaises with patient service agencies, e.g. Transport, Interpreter, to ensure appropriate services for patient.
- Provides information regarding procedures and protocols to patients.
- Screens medical record enquiries and process general requests for information from doctors, specialists' rooms, DCD and Centrelink.
- Liaises with medical staff to obtain tests results prior to scheduling patients.
- Liaises with patients, consultants, registrars, medical imaging technologists, nurses, residents, booked admission and other hospital staff, departments and clinics, as well as external clinics.
- Liaises with clinical and infrastructure support staff to ensure optimum service is provided at all times.
- Liaises with senior officials in the public and private sectors and with Senior Management.
- Liaises with complainants by phone and in person, and makes appointments for complainants.

Finance and Maintenance

- Raises purchase orders, receives goods and services, and prepares invoices for payment.
- Follows up account and payment enquiries. *
- Processes vehicle log books and fuel receipts, including monthly FBT reporting.
- Arranges staff travel and accommodation bookings. *
- Responsible for receiving accounts payable * including cost centre coding.
- Provides facilities support for visiting health practitioners and specialists. Maintains security of all monies held patient private property and PATS and performs reconciliations.
- Responsible for balancing and receipting of all monies received. *
- Prepares banking. Provides month end figures for management report. Prepares private medical officers accounts for payment and batches all creditors' accounts in a timely manner.
- Maintains petty cash advance and balance at end of each month.
- Responsible for coding and batching of invoices with Purchase Orders.
- Accounts receivable processing including generation of debtor invoices. *

- Worker's compensation, Ineligible outpatients, Tenants' electricity/water consumption, Customs, Reconciliation of Petty Cash, Flexi purchase statements, EFTPOS, meal ticket receipts, Pay phone receipts, PathWest statements, Australia Post and Telstra statements.
- Calculation and processing of staff air conditioning subsidies. Journal entries and record keeping for patients' morbidity aids, patients' valuables and maintenance of monetary forms register.
- Maintains the office supplies system.
- Arranges maintenance of equipment and buildings and prepares the maintenance requisitions.
- Arranges servicing, cleaning and maintenance of service vehicles.

123 Appendix 2 – Characteristics of Level 3 provides:

Reporting lines:

The Level 3 clerical positions which were examined typically report to a Level 4 Coordinator or similar position. Administration Assistant positions often report to a Manager.

Duties which characterise Level 3:

Coordination and related duties

- Analyses/manipulates/interrogates computer systems to identify and rectify data discrepancies.
- Coordinates and administers health statistical collection for the Health Service including interrogating and analysing data for reports and presentation.

Liaising, internally and externally

- Deals with enquiries from lawyers, the family court, police, DCD and external agencies related to access to personal information and health service documents.
- Deals with contentious and sensitive external enquiries.

Supervision and mentoring

- Supervises and coordinates the activities of Departmental secretarial and clerical staff including implementation of new systems, procedures and work methods, determine priorities and work allocation within the Department.
- Undertakes recruitment and selection, and implements and maintains performance management for staff under supervision.
- Organises relief staff and rosters for positions under supervision.

Finance and Maintenance

- Assists in monitoring and maintaining the budget and finances for the unit, and assists in the preparation of the annual budget.

Research/Projects

- Carries out investigation and research related to special projects, and prepares reports.

Policies/Procedures/QA

- Develops and maintains administrative and clerical policies and procedures.
- Implements and monitors continuous quality improvement programs and completes project work.
- Reviews and initiates changes to policy and/or procedure manuals.

Selection Criteria:

- Supervisor skills and knowledge of contemporary human resource management principles including Employment Equity.
- Demonstrated experience in the supervision of staff, including allocating and prioritising work effectively.
- Ability to provide leadership within a multi-disciplinary team framework.
- Well developed written and presentation skills for the preparation of correspondence, minutes, reports and presentations.
- High level of organisational, problem solving and analytical skills.
- Proven ability to exercise discretion and initiate, including in issues of a highly sensitive and confidential nature.
- Ability to analyse and evaluate problems, develop solutions and make decisions.
- Experience in interrogating computer applications and systems.
- Advanced IT skills.
- Understanding of accounting procedures.
- Demonstrated competence in book-keeping and financial reporting procedures.

- Extensive administrative and clerical experience.
- Significant experience providing secretarial and/or administrative support to senior level officers.
- Knowledge of recruitment and rostering processes.
- Knowledge of OS&H principles, including maintaining a Duty of Care.
- Knowledge and understanding of Quality Improvement principles and their practical application.

124 I have quite deliberately set out in detail the contents of historical duty statements and the indicative duties for the various levels rather than merely making reference to them in the hope that the individuals concerned will take the opportunity to read them and see for themselves the work set out for FLCPs over this period.

Performing Duties at a higher or lower level

125 Each position is made up of a bundle of duties and responsibilities, some of which fall squarely within the level allocated to the position. They should be the vast bulk of duties and responsibilities and they are the basis for determining the level of the position. However, some duties and responsibilities may, for the sake of convenience or for historical reasons, be at a higher or lower level than the bulk of duties and responsibilities upon which the position's classification is set. The fact that a position contains some higher level duties and responsibilities does not justify the position being at a higher level. The position may lose those duties and responsibilities without the position being reclassified downwards if the bulk of the remaining duties and responsibilities are appropriate to the position's classification level. Likewise, a position may lose some lower level duties and responsibilities without affecting the level of classification of that position.

126 This re-arrangement of duties and responsibilities is pertinent to these claims. A number of examples of duties and responsibilities which were previously allocated to higher level positions have been taken on by the FLCPs. Examples include the ED Clerks obtaining financial and insurance fund information from patients after hours and encouraging privately insured patients to claim on their health fund, a duty undertaken by a higher level position during ordinary business hours. However, this duty of itself requires no higher level of skill or responsibility to be exercised by the FLCPs than they exercise in obtaining other information from patients presenting to ED. It is also a duty which was performed by the Medical Records Clerk in the Emergency Centre of RPH in the 1980s and the Bed Allocation/Main Reception Clerk at PMH in January 1990. They may not have taken the next step, beyond obtaining the information, of encouraging the use of the private health fund but that is a matter of providing an explanation to the patient. It fits within the context of their other work at Level G2. When that work is performed by the higher level position, it is only a small part of the job where the other duties and responsibilities are generally at a higher level.

127 The same can be said of the FLCPs taking over telephone call answering from nurses – this is not a new or higher level duty and as noted earlier, formed part of the claim for a reclassification for the Ward Clerk at Bentley, which appears to have been reclassified in 1989. The Ward Clerk, RPH and SCGH performed this duty in 1988 and 1989. However, one would not expect that a Level G2 position would be conveying sensitive or detailed information of a clinical nature to a family member. Likewise, the evidence of some FLCPs being required to make telephone calls to arrange replacements for leave is not a higher level duty merely because it might otherwise be undertaken by a supervisor.

128 Therefore, firstly, these are not actually new duties. Secondly, the mere fact that new duties, formerly undertaken by a higher level position, have been taken on by the FLCPs does not necessarily, and in this case does not actually, mean that the duty or responsibility is of a higher level justifying a claim of increased work value. I conclude that the evidence of duties and responsibilities taken on from higher level positions does not, in this case, demonstrate higher work value.

129 As to the broadening of the scope of duties as envisaged in broadbanding, in PSA 36-42 of 2007, it was claimed that an increased number of tasks being performed within a shorter rotation period required greater flexibility and a broader knowledge of functions. In that case, I said that:

> It is important to note that particular skills and responsibilities are assessed as being at particular levels. A combination of two such skills or responsibilities at that same level still constitutes the same level of work value. A combination of five of them still constitutes the same level. The question is whether the work itself is significantly more complex and requires greater *levels* of skill and responsibility, justifying a higher level of classification (emphasis added).

130 As to the background to the classification structure and indicative duties for Levels 1, 2 and 3 in the HSU structure, Mr Holland's evidence was largely unchallenged. Having examined the duty statements and JDFs provided to me, I accept that Appendix 1 and Appendix 2 are indicative Level G2 and G3 duties and responsibilities respectively, and that this evidence is an appropriate basis upon which to examine these claims.

131 I have considered not only the old and existing JDFs and position descriptions in what might be called a desktop review. I have also looked at what the employees have written in the Reclassification Request Forms and the Position Evaluation Questionnaires, what they have said in their witness statements and in their viva voce evidence, and I have seen them at their work places where they have described and demonstrated the work they perform. That demonstrates and I find that the duties and responsibilities of positions of Admissions Clerk, Emergency Department Clerk, Clinic Clerk, Ward Clerk, Bed Allocation Clerk, PMI/ATS Clerk, Bed Control Clerk and Bookings and Waitlisting at around the time of the broadbanding were not discernibly different to the duties and responsibilities of the Level G2 FLCPs the subject of this matter. In fact, it is arguable that there may have been some aspect of classification creep.

132 For example, the Clinic Clerk, RPH, duty statement for May 1990 aligns well with the current requirements of the job as described by Ms Elshaw in her evidence (see Employer's Volume 2A, Tab 6, Duty Statement for Clinic Clerk, Item No 781). Even though the wording for the old and the proposed Statement of Duties is not the same, the effect is not significantly different.

133 A number of Booking Clerk, Radiology, Level G2 positions in the MRI Unit, RPH as at 31 July 1992, had duties of a similar nature to those included as part of the claim for all Booking clerks in the Division of Imaging Services at RPH (see Employer's Volume 2A, Tab 2). For example, the 1992 job required 'Prepares and forwards instructions and preparation for M.R.I./C.T. examinations' and 'Completes M.R.I./C.T. pre-examination documentation'. These duties are merely differently described in the Reclassification Request Form, for example, 'liaise with ward staff to determine if specific tasks need to be followed ie what preparation, contrast, medication is required? Is Cannulating required?' It seems that the requirements remain much as they were.

134 The Booking Clerk needs a general but basic understanding of what is to happen in the process the patient is to go through, not in terms of the clinical aspects but of the practical requirements. A basic knowledge of anatomy was a desirable criteria in 1989. However, as Ms Chamberlain says in her evidence, she is dealing with the clerical functions, and the Nuclear Medicine Administrative Procedures Manual (Frontline Clerks Policies and Procedures Volume 2, Tab 17) 'fairly well details every action clerical – clerically you have to take on the system, does it not? Yes?' (t 187).

135 Due to restrictions of staff positions and of the physical layout of the Department, Ms Chamberlain keeps an eye on patients and deals with them, not clinically, but in the same way as the Ward Clerk at SCGH in 1988, where the duties included '[n]otify nursing staff if aware of patient in medical difficulty'.

136 The JDF for the Clerk Radiology Level 1 at Diagnostic Radiology at RPH (position number P0559416) effective from 1 April 1992 also has some aspects which tend to indicate that the position continues to carry out the same level of duties albeit that the Booking Clerk is Level G2. For example, in 1992 the duties included:

> 2. Answers requests for x-rays and reports by phone and FAX. Carries out search for all requested packets and reports notifying requestee of results. Reads reports as required.
>
> 3. Responsible for scrutinising all x-ray requests to ensure relevant details are provided. Follow-up as necessary to ensure completeness.
>
> 4. Determines from clinical diagnosis which x-ray requests are urgent and refers these to Casualty for X-ray.
>
> …
>
> 7. Organises and arranges appointments for patients referred for special prepared examinations.
>
> 8. Prepares patient preparation instructions and notifications and distributes to wards or patients.
>
> (Employer's Volume 2A, Tab 2, Position No. P0559131 – P0559416)

137 Again, basic anatomy knowledge was a desirable criteria.

138 As to the issue of problem solving, I note that in the Position Evaluation Questionnaire attached to the Reclassification Request Form for Booking Clerk, the Imaging Services Division at RPH, it is said that if there is no appointment slot available for a particular patient who needs to be dealt with urgently, the Booking Clerk discusses the matter with the Radiologist, to resolve the issue. (Employer's Volume 2A, Tab 2, Position Evaluation Questionnaire, p4.) This is an appropriate level of problem solving for a Level G2 position - to seek assistance from a more senior person if they are unable to resolve it themselves.

139 I find that the FLCPs in these circumstances are performing the clerical, that is recording and information, functions according to standard procedures and directions. Those procedures are set out in physical and electronic manuals, guidelines and policies (See two volumes of documents provided at my request). One of the features of this case is that all of the witnesses have done their jobs for many years, so they have an excellent understanding of the procedures and guidelines. In those circumstances, they do not need to frequently refer to the manuals as I suspect they have encountered almost every possible issue over their many years' of experience.

140 Not only are the functions largely unchanged, but the level of duties and responsibilities required have not increased.

141 Taking into account the duties and responsibilities of the FLCPs as they were in 1989 and the early 1990s, by reference to the duty statements of the time, to the current job descriptions, the indicative duties for Levels G1, 2 and 3, the purpose and object of broadbanding and, most particularly, the inspections and the witness evidence, I find that, save for the application of technology and increased workflow and efficiency, the FLCPs perform work of roughly the same nature and level of responsibility as they did at the time of broadbanding. They may, as was intended with broadbanding, perform a broader range of duties at the same level.

142 This is particularly so for Emergency Department Clerks, Admission Clerks and Ward Clerks. The position of Bed Allocation and Waitlist Clerks are not dissimilar in levels of skill and responsibility.

143 However, I find that the evidence demonstrates that there have been changes in the way the work is performed. Those changes include greater use of information technology and increased work flow. It is also said that there is increased complexity.

Technology

144 The use of information technology has long been accepted as part of the development in the method of clerical and administration staff performing their function. I referred to earlier decisions that changes from manual to automated or computerised systems are not indicative of increased work value.

145 Also in 1993, Public Service Arbitrator Negus in PSA 130 of 1993 noted that:

> The introduction of the Materials Management System (hereinafter called M.M.S.) has caused a remarkable improvement in the productivity of the requisition, storage and supply section located at Armadale Kelmscott Hospital. The same could no doubt be said of every other location at which the computerised system had been introduced. Management is now able to have access regularly and frequently to statistical summaries which were formerly beyond the capacity of clerks to produce, using manual record systems.

> The officers who learn to use the new information technology systems obviously acquire a raft of new skills and abilities associated with those systems. It does not follow logically that the work value of the prime function has automatically increased. The farmer in 1935 who learnt to drive a tractor so as to plough three times the area than that which could be covered each day by his team of horses was at the end of the day performing the same function i.e. tilling the soil.

146 In 2004, in PSA 6 to 14 of 2004 regarding Information Technology Support Officers seeking reclassification from Level 4 to Level 5, I noted that:

> In this case, it is clear and incontrovertible that there has been a significant change over the years in the whole area of information technology including since broadbanding occurred. The degree of change in the work, skill and responsibilities of these positions to encompass two levels of reclassification would need to be substantial indeed. Having considered the evidence before me, I am of the view that these positions have increased in work value over time, however, that increase in work value is met by the Level 4 reclassification. Much of the change in the area of information technology can be said to apply to the whole workforce which utilises information technology in the process of performing other work. It is not merely limited to those who specialise in providing support in the implementation of those systems and keeping them operating. Albeit that there are particular aspects of information technology which might affect these sorts of positions more than others, nonetheless changes in technology, changes in developments in programmes from one to another, can probably be compared with the sorts of changes that might have occurred to the job of an administrative person where once that person used a typewriter or a comptometer to now utilising the computer system to do that same work.

147 In June 2006, the decision in PSA 1 of 2006 where the applicant in that matter was seeking reclassification of the TOPAS Trainer HSU Level 4 to HSU Level 5, noted:

> In respect of the issue of an increased number of packages required to be trained in, the realities of the computer-age work environment mean that that of itself is nothing new. If it were that the typist of 30 years ago, who has become the operator of various computer packages today, could claim to have significantly enhanced her or his work value according to the number of packages learned and operated over the years, an unrealistic situation would arise across the workforce. Those sorts of changes in technology are quite normal in today's workforce.

148 As to the issue of changes to and increases in the number of computer packages, in PSA 36-42 of 2007, it was said that:

> [t]hese positions require the application of a range of different packages and familiarity with particular processes within their workplace. This of itself is no different from the clerical work environment generally. The pen was replaced by the typewriter which has been replaced by a variety of different computer packages and clerical offices throughout Perth both in the public and private sectors now require entry level positions to operate and manipulate information and to enter data in a variety of different packages that years ago would never have been contemplated. That of itself does not satisfy the test of increased work value (see also PSA 8 of 1999).

149 For the FLCPs, there has been change in the way they perform their work by the application of technology by various computer programmes to enable greater efficiency and productivity. There has also been the replacement of old technology, such as record cards, the pen, electric typewriters, gestetners and microfiche. However, that is no different to any other clerical position throughout the modern world, where computers with expanded applications have gradually increased the scope of work which may be performed on those computers. Ms Metcalfe's evidence of the method of making labels and about the current computer system which enables tracking of records, data entry and the production of files and labels for patients, was most illustrative of that change, as was Mr Jesson's comparison of manual completion of records as compared with computerised records.

150 There has been a change in the skill requirements but those skill requirements overall are not necessarily of a higher level.

151 Many of the witnesses relied upon an increased number of computer programmes and software for the purpose of demonstrating increased knowledge. In fact, it would seem that the current introduction of webPAS may replace a number of computer programmes. The mere number of computer applications is not indicative of any increased level of skill. Rather, it may be a broadening of skill at the same level. This was envisaged in the broadbanding of the classification structure by reference to multiskilling and the removal of the requirement for promotion beyond the limited tasks that were originally allocated to a position and the transferability of skills from one area to another. (See also *Hamersley Iron Pty Limited v The CMETSWU*, Supra.)

152 Therefore, I conclude that both the application of computer technology to the performance of work and the changes in the computer programmes have not led to a significant increase in work value. They simply allow more of the same level of work, more efficiently.

153 I am unable to conclude, on the basis of the evidence that there has been an increased skill level or complexity in the work due to the use of technology.

154 I note the evidence of witnesses who deal with technology such as that used in Telehealth, CHAnnEL and nuclear medicine. It is clear that while there is computer and audiovisual equipment involved, the responsibility of these positions is to deal with the aspects relating to the clerical functions. In that respect, their duties, skills and responsibilities are at Level G2.

Work Volume or Workload

155 The reclassification appeal process is not to be treated as a moving feast. By that I mean that when an employee makes a request of the employer for a reclassification, or when the employer instigates a review, the time for consideration of the level of the duties, skills and responsibilities and the conditions under which the work is performed is the time when a sufficiently detailed request for review has been submitted, not the time of the hearing of the appeal by the Arbitrator. Where, subsequent to the Request for Reclassification or the employer's review, the employee submits further information or the employer gathers further information, that time is also relevant. However, changes which have occurred in the job between the instigation of the

review, whether instigated by the employee or by the employer, and the Arbitrator deciding the matter, are not to be taken into account. That is because the reclassification appeal is against the employer's decision. The Practice Direction has as one of its objectives, to clarify that it is not a matter of the parties providing additional information to support their case during the appeal process, which information has not already been considered by the other party. This is to prevent the appeal process simply becoming an ambush of the other party, but also to ensure that there is a particular point in time at which the requirements of the position are to be considered.

156 Therefore, in this case, the appropriate time for consideration of these jobs is the time when the employer considered the requests for reclassification or undertook its review. This means that the FHRP, which was instigated in 2009 is not, strictly speaking, within this appeal process. However, in the circumstances of this case, I have considered the FHRP on the basis that any reclassifications resulting from that particular change ought to apply, not from the date of the original Reclassification Requests but from the date when the FHRP was implemented.

157 There is no doubt or dispute that the number of patients attending public hospitals has increased significantly causing delays in patients being attended to and able to leave. FHRP was 'a programme of clinical service redesign (CSR) that focused on improving the quality of patient care and patient flow' (Four Hour Rule Programme – Progress and Issues Review – Professor Bryant Stokes AM, December 2011 page 1). The growth in demand in emergency, elective and outpatient services across major hospitals was one of the major factors in the creation of the FHRP which commenced in April 2009 (see Figure 1, page 2). In Professor Stokes' report, he notes the pressures on senior nurses to 'push and pull patients along the care continuum' (page 4), and that '[t]here is a substantial flow-on to the support staff related to administrative, cleaning and transport processes along a truncated length of stay.' He also says:

> The implementation of the FHRP has seen the advent of a range of short stay type units in EDs. These include Short Stay Units, Emergency Medical Wards, Observation Wards, Clinical Decision Units, etc. Although inpatient admission rates have not increased, the creation of such wards has driven up the overall admission rate technically, and thus the burden of work across all staffing groups. This has caused increased pressure on support services to process the admission and discharge transactions (page 4).

158 In respect of administrative staff, Professor Stokes notes 'particularly ward, ED and coding clerks, … have an enormous workload with more units of work per unit time occurring and with apparent duplication of forms for admission and discharge' (page 5). Those matters were identified as matters to be addressed in the future as part of this review.

159 A number of the HSU witnesses gave evidence regarding the FHRP and its impact upon their work. Some of these aspects are also dealt with in other parts of these Reasons. Ms Pritchard, a Liaison Officer in the Emergency Department of SCGH, gave evidence that the FHRP had created greater work volume. Prior to the FHRP, nurses were taking calls. As part of the review and re-organisation, it was decided that taking calls interfered with nurses undertaking other work to meet the four hour deadline. The Liaison Officers now deal with phone calls from relatives, some of whom may be dissatisfied with the hospital system, and they required a lot more skill in understanding and empathy (t 389). She said that there is a time management skill in dealing with the pressure of work. Ms Pritchard described the requirement to deal with patients' relatives who want to speak to a doctor and that rather than automatically putting calls through to a doctor, the Liaison Officer needs to screen the calls and find out exactly what the caller is seeking to direct them to the right person.

160 Ms Pritchard also gave evidence that due to the FHRP, pressures now exist in the Emergency Department requiring a higher level of accuracy and a self-directed work arrangement (t 403). There has also been a requirement to collect data for management, prepare that in an Excel spreadsheet and deal with discrepancies, for example if a clinician has not entered the diagnosis in the data.

161 Ms Metcalfe said that one of the biggest changes in her role arises from the FHRP because in order for it to work a significant amount of work has to be done under pressure (t 133).

162 Ms Thwaites noted that the requirement to deal with the increased volume of work had been exacerbated by the introduction of the FHRP and also there was now a requirement for more detailed and accurate data which is monitored by the Health Department (t 159).

163 Ms Chamberlain gave evidence of the impact of the Four Hour Rule on imaging. She noted that 'the people in ED are under pressure to either admit patients or make sure that they are fit to be discharged, so they rely heavily on the Imaging Department to either confirm a diagnosis or confirm that the patient is, in fact, fit to go home. So we are doing a lot more emergency scans.' (t 181). Ms Chamberlain also noted the increased workload and responsibilities of the Nuclear Medicine Booking Clerk arising from the increase of workload of the clinicians, technology and nursing staff within the department (t 182).

164 Ms Thompson-Davies gave evidence of the requirements to accurately record data in the various software packages in the Emergency Department and the requirement to work 'much quicker', and 'to have a lot of knowledge about what is going on'... to move the patients quickly (t 200).

165 Ms Crothers gave evidence of the requirements for accurate filing and recording in the MERIT System which had increased due to the FHRP (t 241), in getting patients in and out quickly, requiring her to get the notes together and out as quickly as possible, to contact family members and let them know the patient has been transferred out of Intensive Care to the ward. She noted that Intensive Care has a lot of direct admissions and this affects her work in creating records.

166 Ms Smith gave evidence that, because of the requirement to utilise any spare beds, different types of patients are received in the Burns Ward other than just those with burns conditions. This added complexity to her work.

167 Ms Dawson gave evidence that the FHRP had the impact of requiring them to approve people a lot quicker on CHAnnEL (t 258), to meet certain key performance indicators to place patients within a certain period of time, and that the bed managers are audited against the key performance indicators.

168 Ms Dawson also gave evidence that as a result of the FHRP, new roles were developed, such as the Emergency Department Navigators whose role, I understand, is a clinical one, to move patients out of Emergency as quickly as a bed can be provided for them. Ms Dawson's role is to liaise with the Emergency Department Navigators regarding patient movements (t 258).

169 Ms Bannon gave evidence of what she says is the additional responsibility for Ward Clerks to ensure that patients are transferred to the Discharge Lounge as quickly as possible, to free up the bed in the ward.

170 On 4 December 2012, during the course of the hearing, I raised with the parties whether the evidence and submissions in respect of the FHRP in particular related to that aspect of the work value test dealing with 'the conditions under which the work is performed', as in the environment, and whether the FHRP, not of itself but because of the conditions to which it responded, creates greater pressure on employees undertaking their work; that issues such as antisocial and aggressive behaviour of patients and their visitors has an impact on the work environment also and possibly requires enhanced communication skills which might mean enhanced work value. The HSU noted that this was the point they were seeking to make, not that work volume or technological change in themselves had changed the work value, but for the conditions under which the work was performed constitutes a significant net addition to work value.

171 In these circumstances, I note firstly that it is difficult to separate these components, that they are heavily interelated. However, I intend to deal with the issue of work volume or workload by reference to two considerations: firstly, whether the FHRP, or the conditions which led to its implementation, has led to an increase in work value by reference to the increase in workload itself and then, secondly, by reference to the issue of the work environment.

172 In respect of the first aspect, the issue of work flow, this is a largely a matter of workload. It is well established that increased workload of itself does not constitute an increase in work value (see PSA 8 of 1999 and others).

173 The increased workload brought about by higher patient numbers requires increased efficiency and this has been dealt with by restructuring work flows, and in some cases, duties. It requires working more effectively by removing duplication and repetition, to free up staff time and resources. The work of the FLCPs has been reorganised in such cases. However, it seems that the bulk of changes in skill and responsibility have fallen to the nurses in particular, and this has resulted in the creation of new positions to "push and pull" patients through the system.

174 Managers have worked with their clerical staff to find ways to combine the paperwork or recording processes to reduce duplication, complexity and to increase flexibility to cope with increased workload. Ms Pritchard described how the Liaison Officers, with their manager, initiated a new document which brought together all of the pieces of paper which were normally referred to the Liaison Officers. This resulted in greater efficiency. Ms Thwaites noted that the FHRP had had an impact not only on the medical and clinical staff but also on the ancillary staff, and in the case of clerks, they had to develop different strategies to deal with the limited time factor, gathering of information and changing reporting methods (t 153). She described the system of bed allocation clerks, bed managers and patient flow coordinators being implemented as a consequence of the FHRP (t 154).

175 There is no evidence that the increased work load or volume has generally increased the level of skill required for time management beyond those applicable to Level G2. However, I will deal separately later with the situation regarding Liaison Officers at SCGH.

176 Therefore, I conclude that the increased workload, work flow and the FHRP have not generally resulted in a significant net addition to work value. They have resulted in increased efficiency and productivity, not new higher level skills, complexity or responsibilities, which are work value matters. Those issues of increased efficiency and productivity may well be the basis for separate consideration at another time.

177 I will deal separately with the impact of the FHRP on the question of the work environment as part of consideration of the conditions under which the work is performed,

Mentoring and Training

178 I have set out earlier, in general terms, the work which the witnesses say supports this ground. I note that the Clinic Clerk position at RPH, classified Level A.1 in May 1990 contained the duty of '[t]rain and orientate new staff'. The Ward Clerk position at RPH in March 1989, Level A1.5 was required to '[t]rain relief clerks to cover ward areas for sick and annual leave'. The Ward Clerk at PMH, Level G1 in March 1991 'advise(s) medical and nursing staff of ward procedures and co-ordinated same' and 'trains new/relief Ward Clerks'. The Clerk (PMI) at SCGH, A1-4, in 1989, assisted in on-the-job training of new recruits.

179 According to Mr Holland's evidence, the former A1.5 duties included 'training and orientating new and relief staff', that is, it was a Level G2 duty.

180 There is nothing unique or of a higher skill or responsibility level in employees, at every level, training and orientating new staff members, be that at their own level or higher, as to the requirements of their own positions. Once a person has become familiar with the requirements of their own job, it is not difficult to show a suitably qualified person how that job is done. Further, when a person is familiar with a particular computer package, it requires no higher level of skill to help someone who is having difficulty. If they are unable to resolve the problem, there are specialist IT staff to assist. There is no real difference between the ordinary training and orientation of a new person of the same level or the orientation of, for example, a nurse, in the clerical aspects of the use of a particular computer programme. These situations apply to FLCPs whether training new or relief FLCP holders or clinical staff about computer records access. This does not constitute a real change, nor is it beyond the requirements of Level G2.

181 There is no evidence of what is said to constitute the mentoring which the FLCPs are said to undertake. Mentoring is more than training a person in the skills which the trainer holds.

Conditions under which the work is Performed

182 The 'conditions under which work is performed' relates to the environment in which the work is done.

183 The original Reclassification Requests, made in 2006 and 2007, did not rely on the FHRP, as it had not been introduced then. Nor did they rely on changes to the conditions under which the work was performed, or at least they did not do so explicitly. They relied on claims of increased skills and responsibility and structural changes including taking on duties from other positions.

184 Those requests made in 2009 (and some earlier) refer to the changed work environment, with claims of increased complexity and work volume. (Employers Volume 2A, Tabs 5 – 10, Attachment A, re Clinic Clerks, and 2B, Tab 13 ED Clerks (2009) Tab 15, Ward Clerks (2007), Tab 17, various positions PMH.) However, they are described under the heading dealing with changes to responsibilities.

185 I note that the BiPERS assessment tool including the Position Evaluation Questionnaire and the Reclassification Request form do not provide for specific reliance on changes to the conditions under which the work is performed.

186 The BiPERS system is used within the public sector as a tool in the classification process. Part of that system involves the employee who seeks a reclassification completing a Position Evaluation Questionnaire. This deals with the minimum requirements of the position by reference to specified factors: education level, experience, scope of activities, interpersonal skills, kinds of problems, instructions received, influence on results, personnel supervised/controlled, size of organisation unit, and subordination level. There is no particular factor for identifying the circumstances under which the work is performed.

187 The employer's own Reclassification Request Form, which is also completed by the employee has a number of questions for the employee to answer. These deal with the prime functions of the position; changes to that prime function; changes in the work performed; the skills and abilities required to undertake the duties, and changes in responsibilities. There are other questions about any duties or responsibilities which may have been removed from the position, the reporting relationships, and the identification of comparative positions. Again, there is no question which addresses changes to the conditions under which the work is performed.

188 During his evidence, Mr Holland conceded that the issue of the conditions under which the work is performed was not specifically included as part of the assessment reports of these positions (t 369). It is clear that a thorough assessment ought to have also expressly considered the final part of the Work Value test. I suggest, too, that the assessment tool requires some adjustment where the work value of the position is to be assesed.

189 There are no cases to which the parties have referred me, nor I am aware of, any authorities, which give any guidance as to how this aspect of the Work Value test is to be applied. In days gone by, employees may have been granted 'disability' allowances to compensate them for particular conditions in which they had to work.

190 In this case, the employees are said to work under particular circumstances, which are said to have changed, and the changes are said to constitute part of the significant net addition to work value. The changes to the work environment are said to include the workload and work flow pressures brought on by increased hospital attendances, resulting in the FHRP; increased violence and aggression from patients and visitors requiring 'increased qualitative contacts with patients, family and carers' and more sophisticated communication and negotiating skills; increased cultural and language diversity also requiring better communication skills; increased exposure to trauma patients. It is clear that in considering how these aspects relate to the circumstances in which the work is performed, that there is a cross-over with claimed higher level skills, responsibility and complexity.

191 Work Flow/Workload and the FHRP

In respect of increased work flow and workload, and the pressure and complexity arising from this I find without reservation, that this constitutes change to the work environment in that it is busier and there is increased pressure to meet deadlines. However, systems and procedures are in place to ensure that work is handled in a planned and reasonably well controlled way, to cope with the pressures which the environment brings.

I have also noted earlier, that where this case makes reference to the work environment relied upon by the health professionals, that the effects on each group are different and not generally comparable.

Further, FLCPs are not alone. The same work environment of work flow, work load, pressure and complexity also applies to nurses, medical practitioners, allied health professionals, patient care assistants and others working in public hospitals. The evidence suggests that it is the creation of new nursing led positions and new ward arrangements which have borne the brunt of this change. In any event, it is part of the normal working conditions in busy public hospitals. If this aspect of this claim were accepted as being an appropriate consideration as part of a work value review, the flow-on potential would be enormous, well beyond FLCPs.

I am not satisfied that this circumstances as it applies to the bulk of FLCPs constitutes a significant net addition to work requirements such as, either alone or together with other factors, to represent an increase in work value. Even if that were the case, the flow on potential is significant and militates against the granting of such a claim.

192 Increased violence due to drug abuse and societal changes

The HSU says there is an increased level of violence and aggression within many of the patients and their friends and relatives with whom they have to deal. In PSA 53 of 1997, Senior Commissioner Fielding said:

> I even accept that regrettably persons in the community tend to be more aggressive than was once the case and take out the ill feelings towards Government on those who have the misfortune to serve on the counters. However, overall I am far from convinced that there has been any change in the fundamental function of these positions. The occupants are still

> dealing with customers either by telephone or at the counter or by a combination of both on the basis of predetermined and standard data. This is typically the role of a Level 1 position.

193 I also note my own reasons for decision in Sean Thoms and Others in PSA 4 to 21 of 2010 that:

> There is in reality increased aggression and violence in the way some people present in hospitals, but that has been the case for some years and there has not been any demonstration since the positions were last reviewed this has actually resulted in a significant net addition to the work value of the positions. The positions still exercise the same level of skill and responsibility that they have done for some time and they do so now in a broader context, including the implementation of the Non-smoking Policy.

194 There are a number of aspects of the Admission Clerks, OPH, position which appear to be somewhat different from those applying in the major hospitals, particularly those where there is an Emergency Department. I acknowledge the evidence of Ms Murray as to the circumstances faced by the Admissions Clerk there when members of the public attend expecting to be able to see a doctor as they might in a hospital where there is an Emergency Department. This requires the Admissions Clerk to redirect the person or, in particular circumstances to call the Clinical Nurse Manager to attend. Some of the circumstances described by Ms Murray in which she has been faced with demanding and sometimes emotional situations must be quite confronting, particularly if there is no immediate assistance from the Clinical Nurse Manager who may be at another part of the hospital. It seems to me that this is an issue of a structural nature which requires addressing by the hospital to ensure that those Admission Clerks are not placed in circumstances of unreasonable demands. Otherwise, I am not satisfied that this position is of a higher level than other admissions, emergency or other FLCPs.

195 I also acknowledge the circumstances described by Ms Metcalfe where Emergency Department Clerks are faced with families in distress and she has also described the other circumstances of violent and mentally ill patients attending. She says that some new Emergency Department Clerks are unable to cope with these circumstances and that ED Clerks need to have a lot of fortitude to undertake their work. I accept that this is so. However, it does not necessarily constitute a significant net addition to work value.

196 Having noted the above comments, I do not intend to, in any way, diminish the significance to those FLCP employees of the stress and difficulty in dealing with those situations. In particular, I note the evidence of the Emergency Department Clerks and the Admission Clerks. However, they are not required to deal with them alone. Where necessary, there is a team able to respond to situations of danger and aggression.

197 It is also a situation facing all staff who have direct contact with the public whether they are in public hospitals or other government agencies, albeit that I recognise the concentration of those circumstances in Emergency Departments at particular times. It is not, of itself, a matter of increased work value for this group of positions. Also I am not satisfied that it requires them to exercise significantly higher communications or negotiation skills than were exercised previously in dealing with a variety of people in a variety of conditions and circumstances although it may be more frequent. I think there is a tendency to reflect on the work circumstances of the past and fail to recognise the difficulties which faced those dealing with the public. In the past, there were not the organised response teams available to deal with extreme situations.

198 Increased cultural and language issues

Throughout the history of this State, there have been waves of migrants from different parts of the world. Over the years, FLCPs have been faced with changing and growing diversity of cultural groups. This requires patience and maturity in communication. They are now performing the same work, utilising the same level of communication skills, but in dealing with a broader range of people. This is nothing new to these positions. It was part of the successful claim for reclassification for the Ward Clerk at Bentley Hospital in 1992.

199 Structural issues

Some of the evidence was of FLCPs working in isolation of other members of staff and without direct supervision or support. Some of the circumstances included relocation and reorganisation of departments such as amalgamation and splits.

200 In 1992, Public Service Arbitrator Negus dealt with the issue of re-arrangement of work within an organisation in PSA 200 and 204 of 1992, in relation to clerical functions at Edith Cowan University and noted:

> The work value assessment comes from an overview -: the same group of people are doing the same overall function that they previously did. It is organised in a different way, the same tasks being performed in a new sequence. None of the tasks has been transformed into a higher level duty. There is no increase in work value. A new recruit at the base level would need to be trained in several of the tasks before becoming as useful to the team as his more experienced co-workers. Perhaps that is why there are 9 incremental steps in the Level 1 broad band?
>
> The principle of logic remains intact – if the whole work of the section is broken into variously shaped or redesigned parts – no matter how many times one performs the experiment, the sum of the parts can never exceed the original whole.

201 With respect, I endorse those comments as they relate to the work and organisation arrangements for FLCPs.

202 Firstly, I note that some FLCPs work in busy departments and wards, surrounded by others. Some of those co-workers are of the same calling, for example Emergency Department Clerks at RPH and Waitlist clerks. Some of the co-workers are other callings such as nurses, allied health professionals, medical practitioners, etc, for example, Ward Clerks, Waitlist Clerks, Bed Allocation Clerks. Some have no co-workers in the immediate location eg Booking Clerk in Nuclear Medicine at RPH. Some FLCPs have supervisors close by, others do not.

203 Where that change has expanded duties and responsibilities, the evidence is that the changed duties are not of a higher level. I refer back to the situation which broadbanding provided for a broader range of duties, all within the same level.

204 There is no evidence that the re-arrangement of departments or work of itself brings increased work value. It is simply change, and reorganisation of work will continue to occur as efforts are made to sustain the work of the organisation.

Other Issues

205 Gathering More Information.

Firstly, I acknowledge that as time has passed, Admissions and ED Clerks in particular have been required to gather more information from patients. However, this is simply more of the same type of work, rather than increased complexity. The officers know what information they are required to obtain, they interview the patient and, if necessary as in the past, deal with the answers sometimes by seeking clarification or speaking with relatives, where available.

'Determining patient's financial classification through interview' and 'completes admission documentation, including financial classification forms' was a duty of the A1.L5 position in the pre-broadbanded structure (see duties of Medical Records Clerk in the Emergency Centre at RPH, in the late 1980s).

Identifying patients with infectious diseases and notifying clinical staff was a duty of the Ward Clerk at SCGH in 1988, at the former A1.L5 classification.

206 Increased exposure to trauma patients.

It is said that this is due to patients arriving via air ambulance and other circumstances where, in particular, ED Clerks encounter severely injured patients.

The evidence does not actually identify any changed circumstances which may mean that FLCP staff are dealing with patients whose conditions are more traumatic or distressing than those patients who have attended in the past.

The circumstances Ms Murray faces at OPH appear to be similar, however, in those circumstances, clinical staff are not always immediately to hand. However, I have dealt with that circumstance earlier.

In all of the circumstances, I am not able to reach a conclusion that FLCP staff generally do face increased trauma compared with 25 years ago.

207 Accuracy and auditing.

The evidence demonstrates, and I accept, that over time, there has been an increased focus on the accuracy of the patients' records, both in their creation and updating, and by way of checking records already in the system. Also, the developments in the electronic systems means that records can be reviewed and reports created with greater ease.

I accept, too, that, as Ms Metcalfe says, the apparent scrutiny of their work adds to the pressure the FLCPs officers feel.

Part of the auditing requirements referred to by Ms Ganfield include a change from telephoning patients to confirm their details and whether or not they had yet had their surgery, then updating the patient's records and the waitlist. This process is now undertaken by a form letter being sent to the patient.

As Mr Jesson says, the quality assurance focus applies across the staff, and no more or less on the FLCPs. Accuracy in the patients' records is and always has been important.

Many of the aspects of the work referred to by the witnesses as auditing are simply checking the accuracy of their own work or the work of others, correcting obvious errors and filling in incomplete information by reference to manuals and guidelines.

Quality assurance systems are common within organisations and this has been a development since at least the 1990s. They ensure safe treatment of patients and are a useful tool in assessing efficiency. They provide means for analysis of processes to find better and more efficient ways of arranging work.

As noted in *ALHMWU re: Child Care Industry (ACT) Award* (supra), the requirement to exercise care or the exercise of a quality control function is not sufficient. There needs to be an increased level of responsibility, which is not evident in this case.

I conclude that, of themselves, the requirements to perform work accurately, to run computer programmes designed to audit processes and accuracy and to create automatic reports of the level required of the FLCPs, is not a higher level skill or responsibility. Accuracy and efficiency in the performance of work is an inherent requirement of any job. There is no increased work value arising from it. There may be other positions, whose role is the analysis of the audit reports, which have higher level functions, but that is not the level of responsibility or skill required of the FLCPs. Further, there does not appear to be any added responsibility or accountability rising from the FLCPs' involvement in quality control work.

208 Increased knowledge of medical terminology, anatomy and diseases.

These positions require a familiarity with medical terminology. The evidence was that with developments in the medical field comes the requirement for FLCPs to have greater knowledge of medical terminology. However, there is little evidence to demonstrate the nature and effect of such changes. I am unable to conclude that this constitutes a higher level skill. The requirement is still to be able to accurately record information. Certainly the correct spelling of terms such as diseases and treatments is essential. However, the extent of actual knowledge and understanding of meaning is limited. Where Waitlist, Booking and Admissions positions are required to deal with terminology, which affects what they do beyond the recording stage, they have access to manuals and procedures, as well as in the case of Waitlist Clerks, access to two senior officers including a Coordinator Inpatient Booking Services and the Waitlist Nurse Manager. Others such as the Booking Clerk in Nuclear Medicine at RPH have access to clinicians with whom they liaise on a regular basis to clarify information, booking arrangements and coordination issues.

209 There has been no real explanation as to any requirement on FLCPs to have a more detailed knowledge of anatomy than has applied for many years. A basic knowledge has always been a desirable selection criteria. These are not clinical positions.

The requirements of the positions are for recording and updating information. They may need to know what to do in making bookings for such things as tests, and may need to provide patients with information about the pre-test routines to be followed. However, that information is available to the Clerk, and they convey it.

210 Given the lack of evidence to support a claim that this requirement has changed to become something other than more of the same level of skill being required, I am unable to find that this constitutes a significant net addition to work requirements.

211 Patient Contact

The HSU made clear in its submissions that the FLCPs in the circumstances described in [36] of triaging and monitoring patients, are not undertaking any clinical function, and they do not rely on such claims. I trust that this also applies to Ms Elshaw's evidence that a few weeks prior to her evidence, one of the clinicians had to cancel one of his clinics due to an emergency. As a consequence Ms Elshaw had to go through the files of the patients whose appointments were affected. Her evidence suggests that she was the one to decide which of those patients needed to see another doctor, and which could be re-scheduled for another later time and if so, how long they would need to wait. She said she needed an understanding of medical terminology associated with that specialty to enable her to make those decisions (t 190-1).

212 I have examined the procedures manual for Outpatient Clinics, which suggests that the level of urgency attached to patients' appointments is already contained in the patients' records. Those procedures indicate that the CPAN nurse determines whether referrals are flagged 'urgent or ASAP'. There are procedures for dealing with patients who request that their appointments be brought forward, including checking with the doctor first. There is also a procedure for handling unexpected patients, who are referred to the Nurse in Charge or the doctor for assessment. It also notes that any difficulties are to be referred to the Nurse in Charge.

213 If the circumstances are as Ms Elshaw described, then there is the appearance of the performance of a clinical function. If however, there are either guidelines in place, or clear priorities within the patients' notes, or there is more senior or clinical oversight, then the duty is not of a higher level. If those things are not present, then I strongly suggest that hospital management needs to examine the situation and rectify the deficiency.

WAITLIST CLERKS – SCGH

214 In March 2007, SWY Consulting undertook a review of the classification of the Central Admission Services Waitlist Officer position at RPH and recommended that it be classified HSU Level G3. This conclusion appears to have been based primarily on the classification of Waitlist Clerks HSU Level G3 at FH and accordingly the RPH Waitlist Clerk positions were reclassified to Level G3.

215 The Waitlist Clerks at SCGH seek reclassification of their positions from Level G2 to Level G3, based largely on the reclassification of Waitlist Clerks at FH and RPH. It is also noted that there are Waitlist Clerks at Swan Districts Hospital, Rockingham Hospital, KEMH, PMH and Armadale Hospital. The positions were reclassified from Level G1 to Level G2 in 1988.

216 The original Reclassification Request Form also listed the changes in level of responsibility as being the basis of the claimed increase in work value rather than any change in function.

217 It is said that the changes in the work include:

> Substantial knowledge and adherence to current:
>
> - Standard procedures (North Metro Health Services Guidelines);
> - State and SCG Hospital Waitlist Policy (Health Department Guidelines); and
> - Management strategies of electronic data system entry (TOPAS, Word, Excel, -MERITS and IBS online).
> - Increased responsibility in liaison with the Coordinator Pre-admission Bookings regarding appointment rescheduling and cancellations;
> - Continuous updating of the electronic appointment schedule details on the waitlist booking (TOPAS) and manual internal office data entry;
> - Prompt communication to patients, advising of changes to admission arrangements (cancellations and rescheduling).

218 In respect of booked admissions, it is said that the requirement is:

> To liaise with multi-disciplinary staff including the ward and theatre staff, G Block Admissions and Bed Manager regarding acute admissions, cancellations and rescheduling.
>
> - Efficient organisation of inter-hospital/agency transfers including liaison with other hospitals/agency staff; and
> - Maintenance of number of elective admissions using internal office processes and TOPAS data entry.

219 There are also said to be quality performance activities including efficient and accurate data entry, dispatching referral and cancellation letters to patients; other advice to patients; organisation and management of forward scheduling admission processes, and maintenance of other daily tasks.

220 The level of change in skill and responsibility is said to relate to medical terminology; patient diagnosis coding; legal responsibilities; accurate documentation; standard procedures and policies; accurate and clear communication with patient; well developed negotiation and problem solving skills; the ability to organise and prioritise workloads and meet timelines, and the ability to communicate accurately and clearly with medical personnel.

221 I have had the benefit of attending the work place and observing the Waitlist Clerks in their work as well as viewing the processes involved in that work. Ms Ganfield gave evidence of having been a Waitlist Clerk since approximately 2001. Ms Ganfield also refers to having a bed board to allocate patients and update daily. The Waitlist Clerks also now book onto the Theatre Management System as well as booking waitlist patients into other hospitals such as Osborne Park and Swan Districts.

222 It is said that the Waitlist Clerks are now required to have a greater knowledge of medical and surgical procedures as patients can be booked into five different wards. It is also said that there is an increased requirement for communication skills due to the need to liaise with consultants and anaesthetists with regard to their preferences and procedures.

223 The requirement to perform audits, collate results and advise management of those results as part of quality assurance processes is also said to be an increased responsibility.

224 All of the Waitlist Clerks have to be flexible and become familiar with specialties other than their own particular allocation. The waitlist procedures for each specialty are the same, however, things such as terminology and personnel, in particular the clinicians, differ.

225 Ms Ganfield clarified the work undertaken in audits. She said that a few years ago, when the Waitlist Clerks initially sought reclassification, they were undertaking audits a couple of times a year. During less busy periods they would be asked by the manager to ring every patient to confirm that they have the correct details and whether or not they had had their procedures, to ensure that the waitlist was up to date. Now, this is done by letter. All of the records are then checked to ensure they are correct. The computer records are then annotated to record changes and status of patients.

226 As to the issue of legal requirements referred to in the Request for Reclassification, Ms Ganfield says that most likely relates to privacy requirements regarding patient information.

227 Ms Ganfield gave evidence of the process involved in waitlisting a patient for surgery. The Waitlist Clerk receives a Request for Admission/Waitlist Inclusion form (the Form) from the medical practitioner which the practitioner is required to have completed. It is not uncommon for essential information to be incomplete. Ms Ganfield noted that some doctors do not tend to fill in that section of the Form indicating the expected length of the patient's stay in hospital. In her witness statement, Ms Ganfield says that Waitlist Clerks 'now determine from the procedure they are having that the patient is suitable for one night stay ward, a two night ward, a day ward or multi day ward, as these wards are managed by the amount of patients per day they can take' (Witness statement of Josephine Ellen Ganfield [22]).

228 Lynda Joan Harrison, Nurse Co-director, SRN10, of the Surgical Division at SCGH gave evidence of her role providing leadership and management of the medical, nursing and clerical staff. The Waitlist Nurse Manager, SRN3, and the Coordinator Inpatient Booking Services, Level G5, to whom the Waitlist Clerks report, report directly to her. She described the responsibilities of the Coordinator as including 'coordinating and supervising the activities of the Waitlist Clerks, evaluating work practices, maintaining, monitoring and auditing the operational functionality of key systems supporting the Elective Waitlist, coordinating the effective management of patients on waiting lists, complying with technical bulletins and operational circulars, and implementing scheduled reporting and analysis' (Witness statement of Linda Joan Harrison [3]).

229 Ms Harrison says that the registrars, consultants and other medical practitioners are responsible for the completion of the Forms, which the Waitlist Clerks work from in the waitlisting process. These set out the nature of the operation, the location of the operation and the anticipated length of stay. She described the responsibility of the Waitlist Clerks as being 'to ensure these are accurately logged' [6]. Decisions regarding the admitting team and doctor to be assigned to a patient, the hospital at which the patient will undergo the surgery, the clinical urgency and the anticipated length of stay are made by medical staff, not by clerical staff. In the case of category 1 patients, whose surgery is urgent, if the surgeon has not completed all aspects of the Form, the Waitlist Clerk phones the surgeon to try to get the Form completed so that the surgery is not delayed by the return of the Form. According to proper procedure the Waitlist Clerk ought to send the Form back to have the surgeon complete it, however, both Ms Ganfield and Ms Harrison confirm that this would probably take another week to get back to the Waitlist Clerk and the person may have missed their surgery. So the Waitlist Clerks refer to the various categories of surgery in the manual appropriate to the particular specialty to ascertain the particular anticipated length of stay, or contact the doctor for advice.

230 Depending upon what information the doctor has not completed in the Form, the Waitlist Clerk may contact the doctor seeking further information or if they have indicative information within their manuals they may refer to that information.

231 Ms Harrison says the Waitlist Clerks require an understanding of terminology but not of medical and surgical procedures and associated instrumentation requirements or of diseases or anatomy - they are clinical matters.

232 Ms Harrison is supportive of the Waitlist Clerks being on the same level of classification as Waitlist Clerks in other hospitals.

233 Mr Holland gave evidence that the Waitlist Clerk positions were reclassified in 1989, however, they were also reviewed in 1998 and 1999 but insufficient change was found to warrant a further reclassification. The positions were found to be at the low end of the Level G2 range. He examined the proposed job description prepared for the Waitlist Clerk position should it be reclassified to Level G3 and found that the role and function was very consistent with that which applied in 1989. Comparisons were made with the allocation of duties and roles as they were in 1989. Mr Holland also referred to the documents contained within section 3 of the employer's folder of documents. Mr Holland says '[t]he tables will show there's a high correlation between the proposed duties and the claimed changes to the role of the position and to duties that occurred in a variety of positions at the low end which transferred across at the low end of the G2 scale back around about 1989' (t 83). He says this means that the duties have been around for a long time. Some degree of change would be expected for the positions to then better fit within Level 2 of the broadbanded classification structure. He also says that there has been subsequent development as anticipated, but, ultimately, the alignment of the duties is with the Public Service Level 1, at the lower end of that level, which actually equates to HSU Level G1.

234 Mr Davies concluded that there had not been such a significant increase in work value to satisfy the requirements of the Work Value Principle sufficient to warrant the reclassification of the position to Level G3.

235 He found:

> The duties proposed in the review position are consistent with the duties undertaken by the comparative positions in the other teaching hospitals classified at Level 3. However a work value assessment of the comparative positions does not clearly demonstrate that they are of the equivalent work value to other positions classified at Level 3 across the Health Industry. The duties and responsibilities are more closely aligned to common Level 2 functions.
>
> (Statement of Alan Davies [5])

236 Mr Davies noted the particular arguments in favour of the higher level of classification, including that the Waitlist Clerks were now required to ensure all category 1 patients have dates for their surgery included on the spreadsheet and the complexity of patients' details. The clerks now send letters to patients and are required to enter patient's details on the template letter. They are also required to contact the patient to determine their preference of hospital as the theatre lists for SCGH and OPH are included on the same sheet. He also took account of the auditing requirements on consent forms and that there is a higher number of patients waiting for elective surgery than the waitlists at Fremantle or RPH, which requires the clerks to have very effective organisational and management skills.

237 The assessment of Waitlist Clerks was put on hold when what Mr Davies described as a flood of HSU applications across the board in respect of the FLCPs.

238 Mr Davies acknowledged that the positions consist of a combination of duties normally attributed to a Level G1, Level G2 or Level G3 but said that the majority of the duties fitted within Level G2 and this was the basis of the recommendation that the positions remain at Level G2. He said that within government employment, no matter what the role is, the person sometimes performs duties ranging from Level 1 to Level 10.

CONSIDERATION REGARDING WAITLIST CLERKS

239 The primary function of this position is to coordinate the patient waitlist in liaison with clinicians from the relevant medical specialties. The Waitlist Clerks' work is to maintain the additions and deletions and urgency codes on waitlists and booked pre-admission clinic appointments. As part of this role, there is a requirement to liaise with patients and clinicians which has been a very longstanding duty for a Level G2.

240 They are supervised by the Coordinator Inpatient Bookings Clerk Level G5 and a Nurse Manager SRN3. Each Waitlist Clerk works on particular surgical specialties and becomes familiar with the medical personnel and terminology. They also relieve each other, so gain a familiarity with more than their own medical specialty.

241 I have observed the workplace and the performance of this work, have heard the witness evidence and examined the SCGH Standard Operating Procedures for Waitlist Clerks and the Department of Health Waitlist Policy. I note that there are Standard Operating Procedures which set out in 18 pages the processes to be undertaken in making inpatient bookings on the waitlist, file the waitlist booking forms, undertake the daily write up of the bed allocation board, undertake daily and weekly reports on the various types of admissions and surgery, the processes for cancellations and deferrals, and the processes for OPH – Orthopaedics bookings, SCGH - cardiology bookings and SCGH urology. The Elective Surgery Access policy details the processes for managing the waitlist for elective surgery. This includes an identification of the categories of surgery, as to whether they are urgent, semi-urgent or non-urgent. The Elective Surgery Access policy also sets out the recommended prioritisation of various surgical procedures, for example, whether they are priority one (within 30 days), priority two (within 90 days) or priority three (within 365 days). There are sample letters to patients and other sample documents for use by staff.

242 The booking process starts with the Form, which the medical practitioner is required to complete, requesting a patient be placed on the waitlist. The Waitlist Clerk receives the Form, checks that it is complete, and if not returns it to the doctor for completion. The Waitlist Clerks are aware of the need for expeditious work, particularly for urgent cases, and, instead of returning incomplete forms to the doctors in such cases, might telephone or otherwise contact the doctor for direction in completing those incomplete sections of the forms. Alternatively, they can refer to the lists available to them which set out the standard information such as the indicative length of stay for the particular type of surgery.

243 Although it is said that the Waitlist Clerks 'determine' the length of hospital stay for the patient where the doctor has not completed that section of the Form, this is not so. There are standards already determined. The Waitlist Clerk refers to a manual which provides that information according to the nature of the surgery. In fact, the scope for the exercise of any discretion by the Waitlist Clerks is quite limited. They do not perform any work which might be classified as clinical. Their role and function is clerical.

244 Many of the issues claimed by Waitlist Clerks as reflecting a significant increase in work value are the same as those claimed by other FLCPs. The work of Waitlist Clerks has a lot in common with Booking Clerks and Bed Allocation Clerks. By this I mean that there is a requirement to receive, check and record information, and make verbal and written contacts to achieve that purpose. The process includes allocating each patient into a vacant slot for surgery, and rearranging those placements according to changed circumstances. The placements are to be according to the prioritisations set out in the Form and the documentation available to Clerks, in particular the Elective Surgery Access Policy, and as noted above there is a guide to the length of stay for each type of surgery.

245 To perform this role, there is a need to be familiar with terminology, process, locations, resources and medical personnel. All of this is done under supervision and assistance of a higher level clerical coordinator and senior nurse, with the capacity to refer to and liaise with the medical specialists.

246 Having observed the workplace and the performance of the work, having heard the evidence and examined the documents, I am unable to discern that the work value of this position is at a higher level than the remainder of the FLCPs generally,

including those positions which have similar functions such as Bed Allocation Clerks and Booking Clerks. I note that those positions are not the same but the same types of processes are involved even if the technology is slightly different for each. Like Ward Clerks, who are allocated to particular wards and become familiar with the particular requirements of their ward, the Waitlist Clerks become familiar with particular allocations for surgery. However, like Ward Clerks who have to relieve Ward Clerks in other wards, Waitlist Clerks also relieve Waitlist Clerks from other specialties. It is, however, work of the same nature and level of skill.

247 Whilst on a cursory examination, the Waitlist Clerks' work may appear to be more complex than for some other jobs, when broken down into its elements, those elements are at the same level as those for other Level G2 positions. The combination of the elements and the circumstances under which they are performed does not, in this case, make the job more complex. The manuals, procedures and training, together with the familiarity which comes with regular performance of this work means that this is not beyond the scope of work which would be expected of a Level G2 position. In those circumstances, I find that, notwithstanding that some other Waitlist Clerk positions have been classified at Level G3, from the evidence before me the position of Waitlist Clerks at SCGH is not generally higher than Level G2.

248 I have also taken into account the evidence of Fiona Murray as to what she says is the increased complexity in the waitlisting process she is involved with, due to surgicentre and ambulatory initiatives resulting in increased responsibility including the need for inter-hospital liaison for waitlist bookings. The difference which might be said to have occurred is that over time, where once each hospital was quite separate with separate processes and procedures, and had its computer programmes, there is now a greater interlinking of hospitals and transferring of patients between them. For example OPH and SCGH have a greater interconnection. All of the hospitals are now moving towards the same information technology programmes and those programmes have been integrated across the sector. Whilst this might add a level of complexity, it is not so great as to significantly increase the work value of these positions.

LIAISON OFFICERS – EMERGENCY DEPARTMENT, SCGH

249 Having considered all of the other FLCPs and comparing them with the position of the Liaison Officer in the Emergency Department at SCGH, I note that on a strict assessment of the duties and responsibilities, this position performs many of the same type of functions, utilising the same skills and abilities as, for example, the Emergency Department Clerks and the Ward Clerks. There is one difference which struck me as quite significant when I undertook the inspections. This position has a higher level of complexity than those other positions because of the multiplicity of functions being performed and the reports, files, and other documentation all being dealt with at the same time by this position as it acts as a coordinating role for the patient records and information within a busy Emergency Department. This is the only context within which I observed this significantly higher level of complexity and pressure. The liaison duties require this position to be at the hub of the Emergency Department, in ensuring that patients flow efficiently from the Emergency Department. The requirement for organisational and time management skills and to be able to work effectively both unsupervised and as part of a team is, in my observation, at a higher level in this position than in the remainder of the FLCPs.

250 The Liaison Officer performs duties and has responsibilities which are very similar to those of a Ward Clerk however, the working environment requires them to be exercised at a higher level. Their communication, negotiation, organisational and time management skills need to be of a higher level, particularly after hours. The range of internal and external communications is broad and more complex than applies to other Level G2 positions, and is more aligned with Level G3 skills and responsibilities. The same level of complexity is not evident in the other FLCPs. I make this point quite strongly that this is the only position which I would contemplate being at a higher level than the remaining FLCPs.

251 As with the other positions, it is not simply an examination of the list of duties or of the essential and desirable criteria for appointment, which is important. It is an observation of the work being undertaken in the work environment. Accordingly, because of that higher level of skill and because of the circumstances under which the work is performed, I would grant a reclassification to Level G3 for the Liaison Clerk in the Emergency Department at SCGH.

252 There may be flow-on implications to this conclusion, however, I note that there are a very limited number of tertiary hospitals with Emergency Departments of the same size and complexity as SCGH. Mr Radici's original report and his Addendum report noted that the Liaison Officer position at SCGH is not the same as the same titled positions at RPH and FH, and, as he recommended Level G3 for the SCGH Liaison Officer, there should be no flow-on to those other positions (see Employer's Volume 3, Tab 11).

253 In those circumstances, I would anticipate that if there is any potential flow-on at all, it would be very limited indeed.

CONCLUSION

254 The FLCPs are essential to the smooth and efficient operation of our public hospitals and the records they establish and maintain, and the bookings and scheduling they undertake, are essential to the speedy and safe treatment of patients within the health system. The nature of the work and responsibilities have not changed to any significant degree since they were last reviewed. However, the way they perform those functions, including the skills utilised, the organisation of the work, the means they utilise and the work environment have all changed, for some positions more than others. There is a commonality of some duties across various groups.

255 Technology, particularly in the form of utilisation and continuous development of computerised record keeping has also changed both the way the work is performed and the particular skills required. Some packages and systems have replaced others to enable more to be done, more efficiently. This has required training. However, the level of skill required is not significantly higher than it was in the management of that information via the previous manual means. The other significant change, in some areas more than others, is the work environment. However, generally, that change has not added significantly to the work value of these positions except in respect of the Liaison Officer at SCGH.

256 Overall, the work of the FLCPs is appropriately classified at Level G2. A reasonably well trained and competent person will perform the work with only limited and indirect supervision.

257 These positions do not perform the duties nor do they require the levels of skills and responsibility appropriate to Level G3. The only exception to these conclusions is the Liaison Officer in the Emergency Department at SCGH, and this is due largely to the complexity of the working environment.

258 An order will issue reclassifying the Liaison Officer position at SCGH, otherwise the matter will be dismissed.

2013 WAIRC 00842

LEVEL OF DUTIES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S.7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD
	APPLICANT
	-v-
	THE HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 8 OCTOBER 2013
FILE NO	PSACR 21 OF 2010
CITATION NO.	2013 WAIRC 00842

Result	Application granted in part
Representation	
Applicant	Mr J Ross
Respondent	Mr S Millman of counsel

Order

HAVING heard Mr J Ross on behalf of the applicant and Mr S Millman of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the position of Liaison Officer in the Emergency Department of Sir Charles Gairdner Hospital be classified at Level G3.
2. THAT the matter otherwise 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
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection	Mayman C	PSAC 33/2012	29/11/2012 29/01/2013	Dispute re work relocation	Concluded

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 00859

DISPUTE RE INVESTIGATION OF EMPLOYEE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

DIRECTOR-GENERAL OF THE DEPARTMENT OF EDUCATION AND TRAINING

RESPONDENT

CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 11 OCTOBER 2013
FILE NO/S	C 197 OF 2013
CITATION NO.	2013 WAIRC 00859

Result	Name of respondent amended
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr D Matthews of counsel

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS at a conference convened on the 9th day of October 2013 the applicant sought to amend the name of the respondent to "Director-General of the Department of Education"; and

WHEREAS the respondent agreed to the name of the respondent being amended;

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

THAT the name of the respondent in the application be amended to "Director-General of the Department of Education".

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00835

DISPUTE RE TRANSFER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)

APPLICANT

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM	COMMISSIONER J L HARRISON
DATE	WEDNESDAY, 2 OCTOBER 2013
FILE NO/S	CR 216 OF 2013
CITATION NO.	2013 WAIRC 00835

Result	Interim order issued
Representation	
Applicant	Mr M Amati
Respondent	Ms S Young

Order

This is a matter referred for hearing and determination pursuant to s 44 of the *Industrial Relations Act 1979* (the Act).

This application relates to a dispute between the State School Teachers' Union of WA (Incorporated) (the applicant) and the Director General, Department of Education (the respondent) about the applicant's member Mr Lava Naidoo being transferred from Kalgoorlie Boulder Community High School (KBCHS) to a primary school in Kalgoorlie at the end of 2012.

Mr Naidoo is currently not at work but is being paid his normal salary and the applicant is seeking an interim order that Mr Naidoo return to his substantive role at KBCHS undertaking his pre-injury duties, that of a physical education teacher, in accordance with his physical limitations pending the hearing and determination of this application.

Given Mr Naidoo's physical limitations and the lack of suitable work for Mr Naidoo to undertake at high schools in and around Kalgoorlie and as Mr Naidoo is trained as a primary school teacher the respondent is seeking an interim order that Mr Naidoo be placed at Kalgoorlie Primary School in a supernumerary position pending the hearing and determination of this application.

The background to this application is as follows:

(a) Mr Naidoo trained as a primary school teacher;

(b) Mr Naidoo commenced full time employment with the respondent in 2008 as a physical education teacher at KBCHS;

(c) Mr Naidoo sustained a work-related shoulder injury on 11 February 2008 and has not worked as a physical education teacher since that date;

(d) Mr Naidoo has since suffered an exacerbation of this injury and he has suffered a knee injury;

(e) since February 2008 Mr Naidoo has undertaken alternative teaching duties in a high school setting;

(f) at the end of 2012 the respondent transferred Mr Naidoo from KBCHS to a teaching role at North Kalgoorlie Primary School on the basis that the respondent considers him to be a redeployee as he is incapable of fulfilling his pre-injury role as a physical education teacher;

(g) Mr Naidoo submitted a grievance under Clause 40. – Grievance Resolution Procedure of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2011* contesting this transfer;

(h) in March 2013 the committee investigating this grievance referred Mr Naidoo to Dr John Pearce, Consulting Occupational Physician for the respondent for assessment as to his capacity to work as a high school physical education teacher. The committee also decided that if Mr Naidoo is determined to be fit to work in a primary school he do so with a range of specified supports;

(i) on 19 November 2012 a workers' compensation progress medical certificate certified Mr Naidoo as being fit to return to his pre-disability duties, but requiring further treatment;

(j) on 7 December 2012 a workers' compensation progress medical certificate certified Mr Naidoo as being fit to return to his pre-disability duties; and

(k) in April 2013 Dr Pearce determined that Mr Naidoo could not safely perform the full duties of a high school physical education teacher. A subsequent determination by Dr Pearce cleared Mr Naidoo to perform the duties of a primary school teacher with minimal exposure to physical education duties.

Consideration

On the limited information currently before the Commission, and when taking into account the submissions made by the parties at a conference held on 23 September 2013 and information supplied by the applicant and the respondent after this conference I make the following observations:

(1) given the conflicting information contained in the medical certificates/reports I am not convinced at this point that Mr Naidoo is fit to undertake the full duties of a physical education teacher at KBCHS;

(2) no alternative positions appear to be available for Mr Naidoo to undertake at a high school in or around Kalgoorlie;

(3) there is an alternative position for Mr Naidoo to undertake as a supernumerary at Kalgoorlie Primary School pending the hearing and determination of this application; and

(4) Mr Naidoo has been certified medically fit to undertake primary school teaching duties with minimal exposure to physical education duties.

The Commission is of the view that this application relates to an industrial matter as it concerns the employment status of Mr Naidoo.

The Commission is of the view that it has jurisdiction to issue the interim orders being sought by the applicant and the respondent as s 44(6) of the Act enables the Commission to issue orders which the Commission is otherwise authorised to make under this Act in relation to an industrial matter.

When taking into account equity and fairness, s 26 considerations and my observations with respect to this matter the Commission formed the view that an interim order that Mr Naidoo work at Kalgoorlie Primary School on an interim basis pending the hearing and determination of this application should issue.

On 25 and 26 September 2013 the Commission issued Minutes of Proposed Orders. After considering the submissions made by the parties and by consent the Commission included a date for Mr Naidoo to return to work. The Commission also included an order giving the parties liberty to apply to vary or rescind the order.

As the respondent opposed the inclusion of the parties being granted liberty to apply a speaking to the minutes was held on 2 October 2013. At this hearing the respondent stated that it no longer pursued its objection to the inclusion of an order giving the parties liberty to apply.

NOW THEREFORE having heard Mr M Amati on behalf of the applicant and Ms S Young on behalf of the respondent, the Commission having regard for the interests of the parties directly involved and pursuant to the powers vested in it by the Act, hereby orders

1. THAT Mr Lava Naidoo work at Kalgoorlie Primary School in a supernumerary position on an interim basis pending the hearing and determination of this application, commencing 14 October 2013.
2. THAT liberty to apply is granted to the parties to vary or rescind this order.

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

2013 WAIRC 00858

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HENRY TURLINSKI
	APPELLANT
	-v-
	KELLY LUSKAN, HUMAN RESOURCES MANAGER
	PILBARA INSTITUTE
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MS G HUSK - BOARD MEMBER
	MR G SUTHERLAND - BOARD MEMBER
DATE	FRIDAY, 11 OCTOBER 2013
FILE NO	PSAB 12 OF 2013
CITATION NO.	2013 WAIRC 00858

Result	Name of respondent amended
Representation	
Appellant	Mr H Turlinski on his own behalf
Respondent	Mr D Anderson of counsel and with him Ms K Jack

Order

WHEREAS this is an appeal pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS at the Directions hearing on the 4th day of October 2013 the appellant sought to amend the name of the respondent to "Governing Council of Pilbara Institute"; 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 "Governing Council of Pilbara Institute".

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00815

DISPUTE RE PROCEDURAL FAIRNESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 23 SEPTEMBER 2013
FILE NO	PSAC 30 OF 2013
CITATION NO.	2013 WAIRC 00815

Result	Directions issued
Representation	
Applicant	Mr S Harben of counsel
	Ms M Kuhen as agent
Respondent	Mr R Andretich of counsel
	Mr S Gregory as agent

Direction

WHEREAS on Wednesday, 4th September 2013 the applicant filed an application pursuant to s 44 of the *Industrial Relations Act 1979* (the Act); and

WHEREAS on Monday, 23rd September 2013 at 10.30 am the Public Service Arbitrator (the Arbitrator) convened a conference for the purposes of conciliating between the parties; and

WHEREAS at the conclusion of that conference the Arbitrator formed the view that issuing directions would encourage the parties to exchange or divulge attitudes or information which in the opinion of the Arbitrator would assist in the resolution of the matter in question.

HAVING heard Mr S Harben and with him, Ms M Kuhen behalf of the Australian Medical Association (WA) Incorporated and Mr R Andretich and with him, Mr S Gregory for the respondent, and by consent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the applicant is to particularise a claim for damages arising from Mr Duncan-Smith's suspension from duty in February 2013 (the suspension) within 14 days.
2. THAT the respondent advise the applicant of its attitude towards putting in writing to Mr Duncan-Smith the following information:
    (a) The status of any potential disciplinary action arising from the suspension;
    (b) Confirmation that Mr Duncan-Smith is able to return to work without there being any adverse findings or conclusions arising from the suspension;
    (c) Confirmation as to his status as Head of Department or otherwise, and the reasons for that status;
    (d) Details of the review of the position of Head of Department and the outcome of that review; and
    (e) An apology in writing for the treatment of Mr Duncan-Smith arising from the suspension,

    within 14 days.
3. THAT the applicant is to advise the respondent within 7 days whether Mr Duncan-Smith is willing to return to work as a clinician and Head of Department or Interim Head of Department on a without prejudice basis and if so the date upon which he is willing to return to work.
4. THAT the conference be reconvened at 9.00 am on Monday, 14th October 2013.
5. THAT there be liberty to apply at short notice.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2013 WAIRC 00854

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEFAN LYTWYNIW
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 10 OCTOBER 2013
FILE NO.	U 113 OF 2013
CITATION NO.	2013 WAIRC 00854

Result	Direction amended
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Mr R Bathurst (of counsel)

Direction

WHEREAS on 4 September 2013 the Commission issued directions ([2013] WAIRC 00792) for the filing and serving of documents in preparation for the hearing of this matter; and

WHEREAS the parties have reached an agreement on the terms of an amended directions; and

WHEREAS the Commission is of the opinion that it is appropriate to amend the directions;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby directs:

THAT the directions dated 4 September 2013 are hereby cancelled and the following directions are made:

1. THAT the hearing be set down for 17 and 18 December 2013;
2. THAT discovery is to be informal;
3. THAT the parties draw up an agreed statement of facts;
4. THAT the applicant file in the Commission and serve on the respondent any signed witness statements upon which he intends to rely by close of business on 22 October 2013;
5. THAT the respondent file in the Commission and serve on the applicant any signed witness statements upon which it intends to rely by close of business on 20 November 2013;
6. THAT the applicant file in the Commission and serve on the respondent an outline of submissions by close of business on 27 November 2013;
7. THAT the respondent file in the Commission and serve on the applicant an outline of submissions by close of business on 4 December 2013;
8. THAT the parties have liberty to apply at short notice.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Department of Corrective Services Prison Officers' Enterprise Agreement 2013 AG 14/2013	27/09/2013	Department of Corrective Services on behalf of the Minister for Corrective Services	Western Australian Prison Officers' Union of Workers	Commissioner S J Kenner	Agreement Registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00833

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT MADE ON 1 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00833
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER J L HARRISON - CHAIRPERSON MR G SUTHERLAND - BOARD MEMBER MR J STEEDMAN - BOARD MEMBER
HEARD	**:**	MONDAY, 12 AUGUST 2013
DELIVERED	**:**	WEDNESDAY, 2 OCTOBER 2013
FILE NO.	**:**	PSAB 9 OF 2013
BETWEEN	**:**	IRFAN FARID Appellant AND PUBLIC TRANSPORT AUTHORITY Respondent

Catchwords	**:**	Public Service Appeal Board – Appeal against decision to terminate employment – Appeal filed outside of 21 day time limit - Application for extension of time in which to file appeal - Board satisfied applying principles that discretion should not be exercised - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 27(1)(n), s 80I and s 80J *Industrial Relations Commission Regulations 2005* r 107(2)
Result	**:**	Dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr S Lawton and Ms J Allen-Rana

Case(s) referred to in reasons:

Glen James Ross v Peter Conran, Director General, Department of the Premier and Cabinet (2011) 91 WAIG 411

Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others (2006) 86 WAIG 3310

Reasons for Decision

1 These are the unanimous reasons for decision of the Public Service Appeal Board (the Board).

2 On 25 March 2013 Mr Irfan Farid (the appellant) lodged an appeal to the Board under s 80I of the *Industrial Relations Act 1979* (the Act) claiming that he was unfairly dismissed from his employment as a Desktop Support Analyst by the Public Transport Authority (the respondent) on 1 February 2013.

3 Section 80J of the Act provides that an appeal under s 80I of the Act is to be lodged within the prescribed time. Regulation 107(2) of the *Industrial Relations Commission Regulations 2005* provides that an appeal may be commenced within 21 days after the date of the decision, determination or recommendation relating to the appeal. Section 27(1)(n) of the Act allows the Board to extend the prescribed time for lodging such an appeal (see ***Maureen Dehnel v Dr Neale Fong, Director General, Department of Health and Others*** (2006) 86 WAIG 3310).

4 This application is 31 days outside of the required timeframe for lodging an appeal.

5 The appellant commenced employment with the respondent on 24 September 2012 and was subject to a period of six months' probation under the terms of the *Public Transport Authority Salaried Officers Agreement 2011*. Prior to this he worked for the respondent under a fixed term contract for approximately four months. The appellant's employment was terminated during his probationary period on 1 February 2013 with the payment of one week's pay in lieu of notice.

6 The appellant's letter of termination is as follows (formal parts omitted):

> **RE: TERMINATION OF PROBATIONARY PERIOD**
>
> I refer to your performance during your probationary period which is due to conclude on 24 March 2013, and I wish to advise you of the following.

> Following regular review of your performance conducted with Russell Taylor during your probationary period you have been advised that your performance has not met the expectations required of this role within the Public Transport Authority.
>
> I regret to confirm that in accordance with clause 9.1.5 your contract of employment will be terminated by payment of one week's pay in lieu of notice and your employment with the PTA will end effective from 1 February 2013.
>
> I wish you the very best in your future endeavours.
>
> (Exhibit R1)

7 The tests to apply to determine whether to receive an appeal out of time are set out in ***Glenn James Ross v Peter Conran, Director General, Department of the Premier and Cabinet*** (2011) 91 WAIG 411.

Consequences of the granting or refusal of the application for an extension of time

8 If an extension of time is refused the appellant will be unable to challenge the respondent's decision to terminate him which he maintains was unfair. The respondent states that the only prejudice to it if this application is accepted is defending a claim that lacks merit.

Prospects of success of the appeal

9 The appellant gave evidence that his performance was satisfactory during his probationary period. However, on the limited information before the Board, we find that there may be substance to the respondent's claim that the appellant's performance during his probationary period did not meet the required standard. The appellant confirmed that he attended fortnightly meetings with his supervisor Mr Russell Taylor and that notes were taken of some of these meetings. The appellant's letter of termination refers to a 'regular review of [the appellant's] performance' by Mr Taylor. The Board finds that the respondent gave the appellant feedback about his performance on a regular basis and prior to the end of his employment this feedback was documented. The Board has reviewed the meeting notes tendered by the respondent which confirms Mr Taylor's discussions with the appellant at meetings held on 28 December 2012, 4 January 2013 and 22 January 2013 (see Exhibit R2). The notes confirm that the appellant was given clarification about the tasks required of him and he was given feedback and assistance to complete these tasks when deficiencies were identified. Issues of concern raised by Mr Taylor about the appellant included his poor time keeping, the appellant being counselled about being late for work and he was counselled about his handling of two incidents in Bunbury and Northam. The minutes of the meeting held on 22 January 2013 also confirm that the appellant was informed that the manner in which he conducted his work was unacceptable and he was told that as a result his ongoing employment with the respondent was in question.

10 As the appellant was given regular feedback about his performance deficiencies, he was given assistance to improve his performance and he was on notice his poor performance could affect his ongoing employment with the respondent prior to his termination of employment, the Board is satisfied and we find that the appellant has limited prospects of success on appeal with respect to the issue of merit.

History of the proceedings

11 The Board finds that the appellant has not demonstrated that he had a reasonable explanation for the delay in lodging this application. The appellant confirmed that he became aware of his right to appeal his termination in the first or second week of February 2013 but he was unaware at the time that there was a timeframe within which to lodge this appeal. The appellant was therefore aware that he could lodge an appeal during the required timeframe but he failed to do so and it is our view that being unaware of a timeframe to lodge an application is insufficient to justify extending time within which to file this application. The appellant maintained that he was unwell as a result of what he described as the shock and trauma of his sudden termination and this contributed to him being unable to file his appeal. The Board is not satisfied however that the extent of the appellant's illness rendered him incapable of filing an appeal within the prescribed timeframe. Furthermore, the appellant was aware that the respondent had concerns about his performance during his probationary period.

12 When taking into account the above findings, equity, good conscience and merit considerations and fairness the Board is of the opinion that the time within which to lodge this appeal should not be extended. This application will be dismissed.

2013 WAIRC 00832

APPEAL AGAINST DECISION TO TERMINATE EMPLOYMENT MADE ON 1 FEBRUARY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	IRFAN FARID
	APPELLANT
	-v-
	PUBLIC TRANSPORT AUTHORITY
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER J L HARRISON - CHAIRPERSON
	MR G SUTHERLAND - BOARD MEMBER
	MR J STEEDMAN - BOARD MEMBER
DATE	WEDNESDAY, 2 OCTOBER 2013
FILE NO	PSAB 9 OF 2013
CITATION NO.	2013 WAIRC 00832

Result	Dismissed
Representation	
Appellant	In person
Respondent	Mr S Lawton and Ms J Allen-Rana

Order

HAVING HEARD the appellant on his own behalf and Mr S Lawton and Ms J Allen-Rana on behalf of the respondent the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00857

APPEAL AGAINST TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS SVJETLANA SAKIC
	APPELLANT
	-v-
	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
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR P HESLEWOOD - BOARD MEMBER
	MR B DODDS - BOARD MEMBER
DATE	FRIDAY, 11 OCTOBER 2013
FILE NO	PSAB 11 OF 2013
CITATION NO.	2013 WAIRC 00857

Result	Appeal dismissed
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 to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS the appeal was set down for a Directions hearing on the 23rd day of May 2013; and

WHEREAS the parties agreed to enter into discussions with a view to resolving the matter; and

WHEREAS the appeal was listed for hearing and determination on the 17th and 18th days of September 2013; and

WHEREAS by email dated the 10th day of September 2013 the appellant advised that she no longer wished to pursue 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.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2013 WAIRC 00852

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2013 WAIRC 00852
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	THURSDAY, 12 SEPTEMBER 2013, FRIDAY, 27 SEPTEMBER 2013
DELIVERED	**:**	THURSDAY, 10 OCTOBER 2013
FILE NO.	**:**	OSHT 2 OF 2013
BETWEEN	**:**	MARGARET MORRISON
		Applicant
		AND
		PATHWEST KEMH
		Respondent

Catchwords	**:**	Occupational Safety and Health law - whether matters referred are within the jurisdiction of the Occupational Safety and Health Tribunal - principles applied - Tribunal has no jurisdiction
Legislation	**:**	*Occupational Safety and Health Act 1984* s 19, 21B, 23K, 24, *Industrial Relations Act 1979* s 51G(1)
Result	**:**	Application dismissed for want of jurisidiction
Representation:		
Applicant	**:**	Ms M Morrison
Respondent	**:**	No appearance

Decision

1 On 15 August 2013, Ms Morrison lodged a Notice of Referral to the Occupational Safety and Health Tribunal claiming psychiatric workplace injury. The grounds on which the referral are made are as follows:

(1) Section 19, 21B. Suffered workplace psychiatric injury due to bullying. Considered to be an unsafe work environment for myself, which is confirmed by several medical reports.

(2) Section 23K. Employer was not impartial or transparent in investigation of the report. No notification given of determination made to myself.

(3) Section 24. Workplace OSH procedures not followed regarding my workplace incident.

2 Ms Morrison's application does not refer to a matter that is within the jurisdiction of the Tribunal to hear and determine. Accordingly, the application was listed for mention only in order to give Ms Morrison an opportunity to show how the Tribunal has the jurisdiction to deal with the matters to which she refers. The employer was not required to attend the hearing. Ms Morrison attended and represented herself.

3 The Occupational Safety and Health Tribunal is created under the *Occupational Safety and Health Act 1984* (the OSH Act). It is the Act which sets out the jurisdiction of the Tribunal to hear and determine matters. The Tribunal is not able to decide for itself whether it will hear or determine any matter referred to it. The Tribunal is only able to hear and determine the matters which the OSH Act says it may hear and determine.

4 The mattes which may be referred to the Tribunal, and which the Tribunal has the jurisdiction to hear and determine, are set out in section 51G(1) of the *Industrial Relations Act 1979*. That provides as follows:

51G. Industrial Relations Commission to be called Occupational Safety and Health Tribunal when exercising jurisdiction under this Act

(1) By this subsection the Commission has jurisdiction to hear and determine matters that may be referred for determination under sections 28(2), 30(6), 30A(4), 31(11), 34(1), 35(3), 35C, 39G(1), (2) and (3), 51A(1) and 61A.

5 It is apparent that none of the sections relied upon by Ms Morrison in her notice of application are contained in section 51G(1). Nothing put by Ms Morrison suggests that the Act gives jurisdiction to the Tribunal to hear and determine the matters to which she referred. In a statement which she read to the Tribunal, Ms Morrison submits that her employer has admitted liability for causing a psychiatric workplace injury. She says that her medical specialist has stated that her workplace is unsafe and her health would deteriorate if she returns to the workplace. She alleges that OSH policy and procedure have not been followed in her case.

6 Whatever may be the case, Ms Morrison is only able to refer to the Tribunal matters which the OSH Act states are within the jurisdiction of the Tribunal to hear and determine.

7 The Tribunal is satisfied that Ms Morrison's notice of application does not refer to the Tribunal a matter which is within its jurisdiction to hear and determine and accordingly an order will issue that the application be dismissed for want of jurisdiction.

2013 WAIRC 00853

REFERENCE OF DISPUTE

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	MARGARET MORRISON
	APPLICANT
	-v-
	PATHWEST KEMH
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 10 OCTOBER 2013
FILE NO/S	OSHT 2 OF 2013
CITATION NO.	2013 WAIRC 00853

Result	Dismissed for want of jurisdiction
Representation	
Applicant	Ms M Morrison
Respondent	No appearance

Order

HAVING HEARD Ms M Morrison on her own behalf and there being no appearance for the respondent;

AND HAVING given a decision;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred under the *Occupational Safety and Health Act 1984*, hereby order –

THAT this application be, and is hereby dismissed for want of jurisdiction.

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

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2011 WAIRC 00781

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MTM TRANSPORT & LOGISTICS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	RFT 14 OF 2011
CITATION NO.	2011 WAIRC 00781

Result	Application Stayed
Representation	
Applicant	Mr A Dzieciol
Respondent	No Appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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

THAT this application be and is hereby stayed.

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

2013 WAIRC 00786

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** MTM TRANSPORT & LOGISTICS (WA) PTY LTD **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 SEPTEMBER 2013
FILE NO/S	RFT 14 OF 2011
CITATION NO.	2013 WAIRC 00786

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

THERE being no compulsion for the applicant or the respondent to attend, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00782

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH **APPLICANT** **-v-** MTM TRANSPORT & LOGISTICS (WA) PTY LTD **RESPONDENT**
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	RFT 15 OF 2011
CITATION NO.	2011 WAIRC 00782

Result	Application Stayed
Representation	
Applicant	Mr A Dzieciol
Respondent	No Appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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

THAT this application be and is hereby stayed.

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

2013 WAIRC 00787

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MTM TRANSPORT & LOGISTICS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 SEPTEMBER 2013
FILE NO/S	RFT 15 OF 2011
CITATION NO.	2013 WAIRC 00787

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

THERE being no compulsion for the applicant or the respondent to attend, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00783

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MTM TRANSPORT & LOGISTICS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	RFT 16 OF 2011
CITATION NO.	2011 WAIRC 00783

Result	Application Stayed
Representation	
Applicant	Mr A Dzieciol
Respondent	No Appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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

THAT this application be and is hereby stayed.

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

2013 WAIRC 00788

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MTM TRANSPORT & LOGISTICS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 SEPTEMBER 2013
FILE NO/S	RFT 16 OF 2011
CITATION NO.	2013 WAIRC 00788

Result	Application discontinued
Applicant	No appearance
Respondent	No appearance

Order

THERE being no compulsion for the applicant or the respondent to attend, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2011 WAIRC 00784

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MTM TRANSPORT & LOGISTICS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 26 JULY 2011
FILE NO/S	RFT 17 OF 2011
CITATION NO.	2011 WAIRC 00784

Result	Application Stayed
Representation	
Applicant	Mr A Dzieciol
Respondent	No Appearance

Order

WHEREAS the respondent is under administration pursuant to the Corporations Act 2001 (Cth);

AND WHEREAS pursuant to s 440D of the Corporations Act 2001 (Cth) proceedings cannot be commenced or proceeded with against a company under administration, unless certain exceptions apply;

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

THAT this application be and is hereby stayed.

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

2013 WAIRC 00789

REFERRAL OF DISPUTE RE PAYMENT OF OWNER-DRIVER BY EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	MTM TRANSPORT & LOGISTICS (WA) PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 3 SEPTEMBER 2013
FILE NO/S	RFT 17 OF 2011
CITATION NO.	2013 WAIRC 00789

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

THERE being no compulsion for the applicant or the respondent to attend, the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

2013 WAIRC 00825

REFERRAL OF DISPUTE RE CONTRACT

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	TRANSPORT WORKERS' UNION OF AUSTRALIA, INDUSTRIAL UNION OF WORKERS, WESTERN AUSTRALIAN BRANCH
	APPLICANT
	-v-
	TOLL TRANSPORT PTY LTD T/AS TOLL IPEC
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 26 SEPTEMBER 2013
FILE NO/S	RFT 2 OF 2013
CITATION NO.	2013 WAIRC 00825

Result	Order
Representation	
Applicant	Mr A Dzieciol of counsel
Respondent	Ms C Vinciullo of counsel

Order

HAVING heard Mr A Dzieciol of counsel on behalf of the applicant and Ms C Vinciullo 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 discontinued.

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