Western Australian

Industrial Gazette

PUBLISHED BY AUTHORITY

Sub-Part 7 WEDNESDAY 27 NOVEMBER, 2013 Vol. 93—Part 2

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

93 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2013 WAIRC 00887

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. B 162 OF 2012 GIVEN ON 20 MAY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2013 WAIRC 00887
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WEDNESDAY, 16 OCTOBER 2013
DELIVERED	:	MONDAY, 21 OCTOBER 2013
FILE NO.	:	FBA 5 OF 2013
BETWEEN	:	CARMIKE NOMINEES PTY LTD T/AS WEST COAST VACUUM TRUCKS Appellant AND DAVID PRATT Respondent

ON APPEAL FROM:

Jurisdiction	:	**Western Australian Industrial Relations Commission**
Coram	:	**Commissioner S J Kenner**
Citation	:	**[2013] WAIRC 00293; (2013) 93 WAIG 538**
File No	:	**B 162 of 2012**

Catchwords	:	Industrial law (WA) - appellant's agent medically unfit to prepare appeal - whether any right to representative of choice considered - application to strike out appeal listed for hearing
Legislation	:	*Industrial Relations Act 1979* (WA) s 22B, s 31(1)(b) *Industrial Relations Commission Regulations 2005* (WA)
Result	:	Order made
Representation:		
Appellant	:	Mr P King, as agent, by telephone link
Respondent	:	Mr A Dzieciol (of counsel)

Case(s) referred to in reasons:

Hakimi v Legal Aid Commission (ACT) (2009) 227 FLR 462

Tey v Optima Financial Group Pty Ltd [No 2] [2012] WASCA 68

Williams v Official Trustee in Bankruptcy (1994) 122 ALR 585

Reasons for Decision

FULL BENCH:

1 On 13 June 2013, the agent for Carmike Nominees Pty Ltd t/as West Coast Vacuum Trucks, Mr Paul King, filed a notice of appeal to the Full Bench against the decision of the Commission given on 20 May 2013 in application No B 162 of 2012: [2013] WAIRC 00293; (2013) 93 WAIG 538. The notice of appeal was lodged three days out of time. An application for an order for extension of time to file a notice of appeal to the Full Bench was also filed on 13 June 2013.

2 On 17 September 2013, the respondent to the appeal filed an application seeking orders that the appellant's appeal be dismissed for want of prosecution and, in the alternative, that the Full Bench impose such conditions as it deems appropriate on the appellant in relation to the conduct of the appeal. The grounds of the application are that the appellant was required to file and serve the appeal books by 26 June 2013, however, the appellant has not done so, or taken any steps to comply with the *Industrial Relations Commission Regulations 2005* (WA) relating to the conduct of the appeal.

3 On 19 September 2013, the Commission sought to list the application to strike out the appeal for hearing. A letter was sent by the associate to the acting President to the parties asking for unavailable dates during the months of October and November 2013.

4 On 20 September 2013, the appellant's agent, Mr King, telephoned the chambers of the acting President and advised that he was currently medically unfit and has since June 2013 been unable to work.

5 On 24 September 2013, the application to strike out was listed for mention only before the Full Bench. On the same day a letter was sent to Mr King with a copy to the appellant at its address in O'Connor, Western Australia, in which it was stated:

> The members of the Full Bench have been informed that you are at this time and have been for some time in ill health. They have instructed me to inform you that if you are unable to represent your client in these proceedings your client should either attend the hearing date for mention of the application to strike out in person or alternatively take steps to brief another agent or legal representative to attend on behalf of the appellant. In light of your ill health, a copy of this letter and the attachments have been forwarded directly to your client.

6 On 11 October 2013, the appellant's agent filed an application which appeared to be an amended application for an order for an extension of time to file the notice of appeal to the Full Bench. In the schedule to the application, it is stated:

> Ground 1: The Appellants representative was in the process of preparing the appeal when due to circumstances well beyond his control and means he became of ill health.
>
> (a) The Representative was and has been declared medically unfit from the 22 June 2013 up to and including the 16 day of October 2013.
>
> (b) The representative holds in his possession medical certificates for the whole of the period of time referred to herein Ground 1(a)
>
> (c) It is not likely that the appellant's representative will be declared medically fit by his treating doctor and specialists after the 16 October 2013. The Representative he has a medical appointment on the 15 October 2013
>
> Ground 2: It would be unrealistic and unreasonable to expect the Appellants representative to work on the appeal whilst declared medically unfit. [Edited by Full Bench]
>
> (a) The Appellants Representative prior to becoming of ill health had made arrangements to attend upon the Commission to view the transcript of proceedings however as a direct result of his health this could not occur.
>
> (b) It is not within the Appellants financial capacity to be able to purchase the transcript of proceedings hence the requirement for the Representative having to attend upon the Commission in person to view and peruse the whole of the transcript of proceedings.
>
> Ground 3: The matter has already occasioned the Appellant a severe financial detriment as on three occasions he has had to fly from Queensland where he was based to attend the conciliation conference, the trial which in the first instance was adjourned due to the applicant's sickness then the actual trial.
>
> (a) The Appellants representative works alone and does not have a colleague who could take over the carriage of the appeal from him.
>
> (b) Enquiry has been made of legal firms regarding the appeal and what the costs would be involved in taking it on. All costs were extremely high and well outside the Appellants financial range. It would be unreasonable for the Appellant to incur further such costs which he cannot afford given the cost of the matter to the Appellant thus far.
>
> Ground 4: There is an arguable case that the appeal would on balance have a reasonable prospect of success.
>
> Ground 5: It would be an injustice to the Appellant if the Full Bench did not exercise the discretion available to it and dismissed the application. The Appellant contends that strict compliance with the legislation will work an injustice upon him. The public has an interest in the attainment of justice.

Ground 6: The appellant would be denied natural justice/procedural fairness if the Full Bench exercised its discretion not to grant an extension of time and dismissed the application given all the circumstances.

7 On 14 October 2013, Mr King spoke to the associate to the acting President and made a request to the Full Bench to participate in the hearing on 16 October 2013 by telephone. The Full Bench granted this request.

8 When this matter came on for mention before the Full Bench on 16 October 2013, Mr King informed the Full Bench that he was still unwell and had been certified unfit until 30 October 2013. He also advised the Full Bench that he was unsure as to when he would be fit for work and that he was seeing his doctor on Friday, 18 October 2013 and he was hopeful that he could obtain some information about how long it could be anticipated that his unfitness for work is to continue.

9 Mr King made a submission to the Full Bench that the appeal and the application to strike the appeal out should not be listed for hearing as to do so would be to deny his client natural justice as he was currently unable to carry out work to prosecute the appeal. He informed the Full Bench that he had carried out work in preparation for the hearing of the appeal prior to becoming ill and that his clients had insufficient means to pay for alternative representation.

10 Mr Dzieciol, on behalf of the respondent, informed the Full Bench as there was some prospect that Mr King could be fit for work after 30 October 2013 it was not unreasonable to list the application to strike out the appeal for some time in early November 2013. Mr Dzieciol also indicated to the Full Bench that if the appellant were to take steps to progress the appeal that there may not be a need for the application to strike out the appeal to proceed.

11 After hearing the parties, the Full Bench informed the parties' representatives that it intended to list the application to strike out the appeal for hearing on 14 November 2013. The Full Bench informed Mr King that, if in the event he is not fit to attend the hearing on that date, his clients should either attend the hearing in person, or, alternatively, if they wish to be represented by a solicitor or an industrial agent they should take steps to brief the representative to appear at the hearing.

12 The reasons why we formed the view that the application to strike out the appeal should be listed for hearing on 14 November 2013 and the matters we had regard to when making this decision were as follows:

(a) Whilst it is unfortunate that the appellant's agent Mr King is ill and has been so at least since 22 June 2013, he is not the principal in this matter.

(b) Although there is a public interest in a party being afforded an opportunity of being represented, the due administration of justice requires that appeals to the Full Bench should be dealt with expeditiously. The requirement of expedition is expressly set out in s 22B of the *Industrial Relations Act 1979* (WA) (the Act).

(c) The rules of procedural fairness require that where a person has a right to be heard by a representative, that the person is to be afforded a reasonable opportunity to engage a representative to represent them in the proceedings in question. However, there is no general right to choose a particular representative: see the discussion in ***Hakimi v Legal Aid Commission (ACT)*** (2009) 227 FLR 462 [85] - [90]; ***Williams v Official Trustee in Bankruptcy*** (1994) 122 ALR 585; ***Tey v Optima Financial Group Pty Ltd [No 2]*** [2012] WASCA 68 [13] - [14].

(d) Whilst the appellant has a right to appear and be heard by an agent pursuant to s 31(1)(b) of the Act, this provision does not confer on any party a right to be heard by an agent of choice.

(e) If Mr King is unable to act as an agent for the appellant, he has an obligation to both advise his client and to withdraw from the matter. The time set for hearing for the application to strike out the appeal is of a sufficient length to enable the appellant to seek representation by another industrial agent or lawyer. If in the event the appellant chooses to represent itself, the appellant will be required to appear in person in Perth but it is open to the appellant to make a request to appear by video link from Queensland.

2013 WAIRC 00904

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CARMIKE NOMINEES PTY LTD T/AS WEST COAST VACUUM TRUCKS
	APPELLANT
	-and-
	DAVID PRATT
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 23 OCTOBER 2013
FILE NO/S	FBA 5 OF 2013
CITATION NO.	2013 WAIRC 00904

Result	Order made
Appearances	
Appellant	Mr P King, as agent, by telephone link
Respondent	Mr A Dzieciol (of counsel)

Order

This matter having come on for hearing before the Full Bench on 16 October 2013, and having heard Mr P King, as agent, by telephone link on behalf of the appellant and Mr A Dzieciol (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 21 October 2013, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders —

THAT the application to strike out the appeal be listed for hearing at 111 St Georges Terrace, Perth on Thursday, 14 November 2013 at 10:30 o'clock in the forenoon.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

2013 WAIRC 00872

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. RFT 13/2012 GIVEN ON 20 MAY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
FULL BENCH

CITATION	**:**	2013 WAIRC 00872
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER S J KENNER COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 20 AUGUST 2013 AND BY WRITTEN SUBMISSIONS FILED ON 3 SEPTEMBER 2013 AND 11 SEPTEMBER 2013
DELIVERED	**:**	FRIDAY, 18 OCTOBER 2013
FILE NO.	**:**	FBA 4 OF 2013
BETWEEN	**:**	SHACAM TRANSPORT PTY LTD Appellant AND DAMIEN COLE PTY LTD Respondent

ON APPEAL FROM:		
Jurisdiction	**:**	**Road Freight Transport Industry Tribunal**
Coram	**:**	**Acting Senior Commissioner P E Scott**
Citation	**:**	**[2013] WAIRC 00294; (2013) 93 WAIG 637**
File No.	**:**	**RFT 13 of 2012**

CatchWords	**:**	Industrial Law (WA) - Appeal against decision of single Commissioner sitting as the Road Freight Transport Industry Tribunal - Whether binding agreement made to vary contract between parties considered - Whether terms of agreement uncertain considered - Price not agreed - Agreement to vary not binding - Whether requirement for signage on appellant's truck an essential term (condition) or intermediate term of contract considered - Removal of signage did not entitle respondent to terminate contract without notice
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 49(5) *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) s 43(1), s 47
Result	**:**	Appeal allowed
Representation:		
Appellant	**:**	Mr A Dzieciol (of counsel)
Respondent	**:**	Mr J Uphill, as agent

Case(s) referred to in reasons:

Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd [1999] WASC 218; (1999) 21 WAR 425

Anderson v Rogers Seller & Myhill Pty Ltd [2007] WAIRC 00218; (2007) 87 WAIG 289

Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19; (2011) 274 ALR 731

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

Browning v The Great Central Mining Co of Devon Ltd [1860] 5 H & N 856

Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1

Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

Council of the Upper Hunter County District v Australian Chilling & Freezing Co Ltd [1968] HCA 8; (1968) 118 CLR 429

Donut King Australia Pty Ltd v Wayne Gardner Racing Pty Ltd [2001] NSWCA 275

Dura (Aus) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2013] VSCA 179

Godecke v Kirwan [1973] HCA 38; (1973) 129 CLR 629

Hall v Busst (1960) 104 CLR 206

Hill v Canberra Centre Holdings Ltd (1995) 122 FLR 434

Hillas & Co Ltd v Arcos Ltd [1932] All ER Rep 494

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26; [1962] 2 WLR 474; [1962] 1 All ER 474

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61; (2007) 233 CLR 115; (2007) 82 ALJR 345; (2007) 241 ALR 88

Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623

Lewandowski v Mead Carney-BCA Pty Ltd [1973] 2 NSWLR 640

Luna Park (NSW) Ltd v Tramways Advertising Proprietary Limited (1938) 61 CLR 286

Malago Pty Ltd v A W Ellis Engineering Pty Ltd [2012] NSWCA 227

May and Butcher Ltd v R [1929] All ER Rep 679

Meehan v Jones (1982) 149 CLR 571

Poussard v Spiers and Pond (1876) 1 QBD 410

Shevill v Builders Licensing Board (1982) 149 CLR 620

Thorby v Goldberg [1964] HCA 41; (1964) 112 CLR 597

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165

Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd [1994] 2 VR 106

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632

WMC Resources Ltd v Leighton Contractors Pty Ltd [1999] WASCA 10; (1999) 20 WAR 489

Case(s) also cited:

Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd [2000] WASCA 27; (2000) 22 WAR 101

Appleby v Johnson (1874) LR 9 CP 158

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd [1982] HCA 53; (1982) 149 CLR 600

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266; (1977) 16 ALR 363; (1977) 52 ALJR 20

Byrne & Frew v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410; (1995) 131 ALR 422

G Scammell & Nephew Ltd v HC & JG Ouston [1941] AC 251

Reasons for Decision

SMITH AP:

The appeal and the order appealed against

1 This is an appeal under s 43(1) of the *Owner-Drivers (Contracts and Disputes) Act 2007* (WA) (the Owner-Drivers Act), against an order made by the Road Freight Transport Industry Tribunal (the Tribunal). The order appealed against was made pursuant to s 47 of the Owner-Drivers Act on 20 May 2013.

2 The matter came before the Tribunal as two disputes in RFT 13 of 2012 and RFT 3 of 2013. RFT 3 of 2013 was a claim by the respondent seeking loss and damage in respect of a breach of contract by the appellant. Although the two referrals were heard concurrently RFT 3 of 2013 was not finally disposed of by the Tribunal in its order made on 20 May 2013.

3 In RFT 13 of 2012 the appellant sought damages of $41,700 against the respondent trading as Damien Cole Group, for pay in lieu of reasonable notice, on grounds that the respondent had terminated a contract between them. The appellant also claimed the amount of $2,420 which was said to have been wrongly deducted from a final payment.

4 The respondent claims that the appellant breached the contract between them in a manner which entitled it to terminate the contract without notice. The respondent in its application, RFT 3 of 2013, sought damages for the costs incurred as a result of the appellant's breach.

5 Whilst the notice of appeal does not specify whether the appeal is against the whole or part of the order given on 20 May 2013, it is clear that the appeal is against part of the order. The first paragraph of the order states that Damien Cole Pty Ltd (the respondent) is to pay to Shacam Pty Ltd (the appellant) the amount of $2,420 no later than seven days from the date of the order. The second paragraph of the order is that the referral otherwise be and is hereby dismissed. The appellant does not take issue with the first paragraph of the order. The grounds of appeal go solely to the second paragraph of the order.

Background

6 The respondent undertakes a cartage business. It operates with 21 contractors, all owner-drivers. Part of its business is the carriage of offal and waste products from three abattoirs in the south-west of the state at Balingup, Cowaramup and Dardanup, and from retail outlets around Perth under a contract with the Craig Mostyn Group. The respondent also collects offal from a plant in Gingin and another in Linley Valley, both of which are close to Perth.

7 Edward Gregory Richardson and Carol Anne Richardson, who are husband and wife, are the directors of the appellant.

8 In 2010, the respondent was in the process of taking over a contract from another transport company, Fertal Holdings Pty Ltd. In late 2010, Mr Richardson was advised by a friend who was working for the respondent as a sub-contract truck driver that the owner of the respondent, Mr Damien Cole, was pursuing the Fertal Holdings Pty Ltd run and would need several trucks and drivers. Mr Richardson contacted the respondent and later spoke to Mr Cole. As a consequence of those discussions the parties entered into an agreement. There was no written contract between the parties. The terms of the agreement were that the appellant would purchase a truck and make the truck and Mr Richardson available to do a daily run to collect offal from the three abattoirs in the south-west. It was also agreed that the contract would involve between 55 and 65 hours per week, depending upon conditions and circumstances and that the appellant would be paid $7,400 per week. Under this arrangement the appellant worked exclusively for the respondent. The day-to-day management of the south-west run was managed by the respondent's joint transport managers, Mr John Vassiliou Phatouros and Mrs Nolita Renee Phatouros.

9 In accordance with the agreement, Mr Cole arranged for the appellant to directly purchase a 2007 Volvo prime mover from Fertal Holdings Pty Ltd. Once the truck was available and transferred to the appellant, Mr Richardson commenced sub-contract driving work for the respondent. His first three trips were undertaken with a person from Fertal Holdings Pty Ltd, who showed him the requirements of the job.

10 After the appellant purchased the truck the respondent arranged and paid for the appellant's truck to be sign written in the same manner as the other trucks hauling its trailers. A few months after the appellant commenced the south-west run until shortly before the contract between the parties came to an end, the appellant's 2007 Volvo prime mover was sign written in livery which clearly designated the truck as part of the Damien Cole Group. The name Damien Cole Group was in two places on the front of the prime mover and the prime mover had a number of plastic or vinyl stickers which was part of an integrated pattern of leaves on the side and front of the prime mover. The pattern on the prime mover was designed to be part of a pattern of leaves which continued across a substantial part of each trailer attached to the prime mover. The trailers were owned by the respondent. Each trailer also had affixed on them a Craig Mostyn Group logo.

11 When not in use, the appellant's truck was usually parked at the respondent's yard in South Guildford. At the commencement of each day, Mr Richardson drove to the yard, left his car and took the truck to Talloman in Hazelmere to collect a trailer and travel to an abattoir. At the abattoir, the empty trailer was dropped off and a full trailer was picked up and brought back to Talloman in Hazelmere, where it would be left. After Mr Richardson finished his daily run he drove the prime mover back to the respondent's yard in South Guildford and collected his car to go home. From time to time, Mr Richardson would take the prime mover home for cleaning and maintenance work. It appears Mr Richardson was meticulous about the appearance of the prime mover as it is common ground that each time Mr Richardson took the prime mover home for cleaning and maintenance Mr Phatouros saw an improvement in the condition of the truck.

12 Until late 2011, the pick-up of offal from the abattoir in Gingin was undertaken by one owner-driver employed by the respondent, Mr Brad Willis. This arrangement was, however, unprofitable. The respondent was paying Mr Willis $580 per round trip, to assist Mr Willis to cover his costs and keep going. As the arrangement was not sustainable, the respondent wanted to integrate the Gingin run into the south-west roster and redeploy Mr Willis. This required the respondent to take one of his trucks off the south-west run, for Mr Willis to purchase a new prime mover and the agreement of the other drivers to take on the Gingin run in addition to the south-west roster. Under the new arrangement there would be a three week roster of two trips to Gingin in week one, two trips to Gingin in week two and one trip to Gingin in week three.

13 Mr Phatouros spoke to Mr Richardson about the proposal to incorporate the Gingin run into the south-west work. Both Mr Richardson and Mr Phatouros gave evidence about their discussion. Having heard the evidence given by Mr Richardson and Mr Phatouros the Tribunal preferred the evidence of Mr Phatouros where it conflicted with Mr Richardson. There is no appeal against this finding.

14 Mr Phatouros gave evidence that they needed four trucks to do the south-west and trips to Gingin each week. He told Mr Richardson they were trying to get Mr Willis into the south-west to give him full pay, but he needed all trucks involved in it otherwise they could not do it. He did not discuss a rate of pay for the Gingin run with Mr Richardson. Mr Phatouros gave evidence that Mr Richardson asked about the rate and Mr Phatouros told him it had not been set yet and that 'we don't know where it's gonna go. We were going to try it out and see what's going to be fair for us' (ts 80, AB 113). Mr Phatouros also gave evidence that there was no discussion about the rate that was paid to Mr Willis and that Mr Richardson told them that they would be 'in the work' and said that 'Well, we'll discuss the rate when we start doing it' (ts 81, AB 114).

15 Mr Phatouros also gave evidence that the Gingin work was going to be a fixed arrangement but they were going to work out the rate for the run and could not do so until they had done it to see what hours were required to carry out the work. He also told Mr Richardson that they needed to put hydraulics on the appellant's truck to fit the trailers for the Gingin work. There was no discussion about the cost of that work, but Mr Richardson did not object to having the hydraulics fitted to the appellant's prime mover. The appellant's prime mover then had new hydraulics fitted to enable it to do the Gingin run. After the appellant commenced carrying out the Gingin run Mr Phatouros and Mr Cole determined that the appropriate rate for the Gingin run would be $400. By this time Mr Richardson had done three runs to Gingin.

16 On Friday, 16 March 2012, Mrs Richardson received a payslip for the period which covered two of the three Gingin trips already undertaken by the appellant. She noted that the rate was $400. She telephoned Mr Richardson and told him that the rate was $400. Mr Richardson then telephoned Mr Phatouros and told him that 'he's not doing Gingin anymore because there was not enough fat in it' (ts 82, AB 115). Mr Phatouros asked Mr Richardson, '[W]hy can't we just work it out?' and told Mr Richardson he could not take one truck off the road and he needed all trucks in otherwise they were going to muck around the workshop to obtain a spare driver. He also told Mr Richardson he would speak to Mr Cole and 'we'll try and work it out'. Mr Richardson told Mr Phatouros that he was not interested, there was not enough fat and until there was enough money in it he was not touching it. Over the weekend Mr Phatouros arranged for the spare driver from the workshop to do the Gingin run on Monday afternoon, 19 March 2012.

17 Mr Phatouros arranged for Mr Richardson and Mr Cole to meet on Monday, 19 March 2012. At that meeting Mr Richardson informed Mr Cole that he was not interested in doing the Gingin run at the rate of $400. Mr Cole undertook to consider reviewing the rate and he told Mr Richardson that he needed to be part of the team and work in the arrangement including Gingin. It was Mr Cole's view that all of the truck drivers who were carrying out the south-west run were recovering their overheads from the south-west and that the Gingin run was 'virtually an extra on top' so it could be done at the same rate as the south-west per kilometre per hour. Thus, he was of the opinion it was unlikely that they would change the rate for the Gingin work. However, he undertook to look at it overnight and get back to Mr Richardson.

18 Mr Cole and Mr Phatouros had fixed the rate at $400 for the Gingin run by looking at the $7,400 rate paid for the south-west run, divided that by 55 (to get an hourly rate) and came up with a figure of about $130 per hour. They then multiplied the approximate rate of $130 by three for the three hour Gingin run (ts 60, AB 93).

19 On Tuesday, 20 March 2012, Mr Cole sent Mr Richardson and Mrs Richardson an email stating as follows (AB 14);

1) The position here is that we need 4 trucks to manage GinGin, not 3.

   When we re-arranged the logistics, which was driven by my lack of confidence in the viability or sustainability of Willis's job, we planned around giving more work to each of 4 trucks (one of which is yours).

   That logistics need still exists. Our 4 prime movers need to do GinGin.

   I have revisited the rate and it seems more than fair, and we will not be reviewing it any time soon.

   The position we have is that we need your (or our 4th) truck to be part of this new arrangement.

   I understand your concerns about an extra 7 hours work affecting your lifestyle, but at present I have no option but to require your truck to do its share of our total long distance operation. I would also respect your decision not to work it the extra hours. However if not I would have to engage another Contractor in your place, in our complete long distance system. Please get back to me on this.

2) We also need a key left near your truck, for obvious reasons as explained.

3) Please look into your insurance as promised for maximum flexibility.

4) We need your dockets to assist our Admin by 8:00am Mondays. Late dockets hold us up no end.

5) Get back to us on GinGin.

20 Mr Richardson replied on the same day as follows (AB 14 - 15):

In response to your email, I advise the following.

1. The verbal contract between Shacam Transport and Damien Cole Group in December 2010 was for the South/West runs in your long distance operation. Additional runs were never discussed.

2. The Gin Gin run extends the hours and that is both, unacceptable and unwanted. I am currently working in excess of 60 hours per week.

3. The rate offered for the Gin Gin run does not cover the costs of an owner driver for wages/ super /fuel/ maintenance.

4. Further to the meeting 19th March 2012 - I have liaised with my Insurance company. They advise that prior to driving, any intended driver is to complete a Driver's Declaration for approval by the insurance company. If this is not complied to, and information is not disclosed, it could prejudice the outcome of any claims.

5. In keeping with the Heavy Haulage Accreditation for my truck and the Occupational Health and Safety Act – Prior to driving the truck, any driver must provide a current medical certificate, copy of driver's licence and complete/or have proof of completion of the Driver Fatigue Management Online Assessment. Non compliance can result in fines of $5000 for the driver, $25000 for Owner/Driver and in excess of $60000 for companies.

6. Taking the above reasons into consideration, I stand by my decision not to undertake in the additional Gin Gin run.

7. You state in your email that if my decision is to not participate in the Gin Gin run, that you will engage another contractor to take my place in the complete long distance system. I believe this action contradicts your Company Philosophy, Values and Business Model that you gave me a copy of on commencement of my contract.

21 Sometime after Tuesday, 20 March 2012 and prior to Monday, 26 March 2012 Mr Willis was at the home of Mr Richardson and Mrs Richardson. Mr Richardson told Mr Willis that he did not think the Gingin run was worthwhile and that Mr Cole had told him that he would get another contractor to do it (ts 123, AB 156). Mr Richardson then said to Mr Willis that if he had to go and get another job he would remove the 'leaves' off the truck as he would not be able to get work with the leaves on the truck.

22 On Monday, 26 March 2012, Mr Phatouros received telephone calls from two callers who informed him that there was no signwriting on the appellant's truck. One telephone call was from a contractor and the other one was from Talloman where they deliver the offal. Mr Phatouros had noticed that morning that the appellant's truck and car had not been in the yard. Mr Phatouros telephoned Mr Cole and told him the signwriting had been removed from Mr Richardson's prime mover. Mr Cole instructed Mr Phatouros to contact Mr Richardson and ask why he had removed the signwriting. Mr Phatouros also told Mr Cole that the appellant's truck and car were not in the yard on that morning and that he had heard whispers that Mr Richardson had found other work and was possibly leaving. At that time Mr Cole had arranged to meet with Mr Richardson and Mrs Richardson the next day.

23 When Mr Richardson gave evidence he said he had removed the stickers because he wanted to paint, cut and polish the prime mover because there were a few minor dents from stone damage across the front (ts 17 and 33, AB 50 and 66).

24 Mr Phatouros gave evidence that there was no reason to remove the stickers from the roof unless one is spray painting the whole cab and that this was done when the truck was sold. Otherwise the stickers would generally not be removed unless there was major damage (ts 84, AB 117). However, not all trucks carrying out work for the respondent have Damien Cole signwriting. Mr Phatouros with his wife own two trucks; one is sign written, the other is not. Mr Phatouros explained the reason why one is not is because he does work at the wharf and other 'bits of work here and there' and it is desirable not to have the truck 'standing out' (ts 79, AB 112).

25 On Monday, 26 March 2012 Mr Cole sent an email to Mr Richardson and Mrs Richardson about the meeting that was proposed for the following day. In the email he said (AB 15 - 16):

> I believe the communication between us has been either lost, not working or been unclear from the start.
>
> The reason for the meeting tomorrow is to communicate better. If I have failed to communicate the values of this organisation to you, then I re-iterate them to you, and my expectations of our people and our contractors.
>
> Put simply, this is how we work, how we want to work and how we will work.
>
> I do understand that there could be some dissonance between our value systems and yours here. If we have that dissonance it does not make one of us right or wrong. It simply means we should not be working together because of value dissonance. I understand that not everyone can work here under this organisations conditions, and values.
>
> Before the meeting your good self and Greg need to decide whether you want to work with us as a team, with trust and with total cooperation. To me it looks simple, our organisation has an expectation, you need to decide whether you wish to meet it. If you choose not to work with us because of our values etc, then we can meet and discuss an orderly finalisation of your time with us.
>
> We will always uphold our 'fairness to all concerned' tradition in any circumstances.
>
> What we won't be doing at the meeting is discussing the (6) items one by one. That is a committee based approach, and cannot work in a trust based organisation, which works for the better good.
>
> We will see you on Tuesday.

26 On Tuesday, 27 March 2012 Mr Phatouros telephoned Mr Richardson and asked him why had the stickers been removed. Mr Richardson said that he would not speak to him and that he would talk to Mr Cole about why the stickers were removed. At the time of that conversation a meeting with Mr Richardson and Mr Cole had been arranged for later that day.

27 When Mr Cole gave evidence he said that the removal of the signwriting from the appellant's truck was in his opinion significant. It had never happened before and he expected Mr Richardson to leave. Mr Cole said (ts 62, AB 95):

> In the light of the events that were current at the time it seems to me that we - well, at the time when I'd found out that they were removed I had thought that he'd found other work elsewhere and he was sooner or later going to hang us out to dry and go and get the other work. It - it - clearly taking the brand off the truck is an issue of, I think, finalisation of - of the contract between us really and I had expected him to leave shortly after - after I'd found that out.

28 When asked by Monday, 26 March 2012 what assessment did he make about the relationship between himself and Mr Richardson and his company he said (ts 62, AB 95):

> [I]t seemed at that time to be deteriorating. He had refused to do Gingin flatly and – and - and said he - he - he wouldn't do it although he had said to John Phatouros and he'd relayed that to me that he'd do it for - for - for extra money. At that point on that Monday he had virtually refused to talk to John Phatouros or to take any instruction from Nolita or John who were co-Transport Managers and he'd - I could see the deterioration in the relationship there and it led me to believe that he was leaving but hadn't actually come out and said so. I'd asked John to repeatedly ring him and talk to him, ask him why the sign writing had gone, why the vehicles were gone and get some explanation to the matter and clearly there was no communication there. So I saw it deteriorating.

29 Mr Cole then went on to say that he was not working full-time at the business at that time and had left the running of the business to the transport managers and did not have any contact with day-to-day operation of the truck drivers or any of the other contractors and had had nothing to do with them in almost 12 months prior to that.

30 On Monday, 26 March 2012 Mr Cole had decided to arrange a meeting with Mr Richardson and Mrs Richardson because he thought that there might be some hope that they could come to some agreement, but he decided the contractual relationship with the appellant should come to an end when Mrs Phatouros rang him on the Tuesday morning. Mrs Phatouros when giving evidence recounted the conversation she had with Mr Cole on Tuesday 27 March, 2012 as follows (ts 91, AB 124):

> I'd actually had numerous phone calls with Mr Cole so - and it was brought to my attention that the stickers had been removed on Mr Richardson's truck and I spoke to Damien about that as well as other matters that are not - pertaining to this and he asked me to get John to ring Mr Richardson and ask why they had been removed. John had his conversation with Mr Richardson, rang me back and told me the outcome. I then relayed that outcome to Damien Cole and the outcome of that was basically he refused to answer and then my phone conversation with Damien was with - he said, 'Well, if he cannot communicate with you guys as Transport Managers, why should - you know, I think the communication's broken down, tell him today is his last day,' and that was the phone conversation.

31 Mr Cole did not attend the meeting scheduled for the afternoon on Tuesday, 27 March 2012 as he was ill. Mrs Phatouros met with Mr Richardson and Mrs Richardson. Mrs Richardson asked why Mr Cole was not coming and Mrs Phatouros explained that he was ill. Mrs Phatouros told Mr Richardson and Mrs Richardson that because the signs had been removed and Mr Richardson refused to speak to the manager, this would be his last day. Mrs Richardson asked if they were Mr Cole's exact words and she confirmed that they were. Mrs Phatouros then asked Mr Richardson for the keys and for the dockets. Mr Richardson refused to hand over the keys, saying that 'if Damien wants the keys he can contact me'. Mrs Richardson told Mr Richardson to hand over the keys. He said no, and left (ts 91, AB 124).

32 After considering the evidence given by Mr Cole and Mrs Phatouros about what occurred on Tuesday, 27 March 2012, the Tribunal found that around the middle of the day on Tuesday, 27 March 2012 Mr Cole decided to bring the contract to an end because the relationship with Mr Richardson and Mrs Richardson had broken down due to the refusal to participate in the Gingin run, the removal of the signwriting and the failure to answer Mr Phatouros' question about that, and the coincidence of the absence of both the prime mover and Mr Richardson's car from the yard.

The decision of the Tribunal

33 The material findings made by the Tribunal were as follows:

(a) The issue was whether the appellant breached the contract with the respondent such as to enable the respondent to bring the contract to an end without notice, or whether reasonable notice was due.

(b) Whilst the appellant was a separate corporate entity to the respondent and operated under a contract, part of that relationship was the integration of the appellant with other owner/drivers into the respondent's operation. There was a significant level of goodwill, trust and co-operation required and existing between them. The appellant was involved in a roster for the south-west run and the evidence of Mr Cole, Mr Phatouros and Mrs Phatouros established that there was a need for regular communications and flexibility. There was a level of co-operation amongst them all exemplified by the decision of the respondent to subsidise the Gingin run to enable Mr Willis to remain and to cover his overheads. Mr Willis was not earning a good income, it was not profitable for the respondent and Mr Cole wanted to remedy this. All drivers agreed to work the new arrangement to integrate the Gingin run and Mr Willis into the work. The level of trust and regard amongst them all was reflected in the way in which Mr Richardson agreed to take on the Gingin run.

(c) Mr Richardson agreed to do the Gingin run, not on a conditional basis, but on a permanent basis. The evidence of Mr Phatouros establishes that Mr Richardson trusted that an appropriate rate would be paid in due course. The arrangement between all of the drivers and the respondent was such that, as Mr Cole indicated, there should not have been 'cherry-picking of jobs amongst them' but a co-operative arrangement. As a consequence of the agreement to do the Gingin run, new hydraulics were installed on the appellant's truck.

(d) In those circumstances, the appellant agreed to take on the Gingin run, not as part of a trial, not to see how things went, but on the basis that it was part of that new arrangement and that the rate would be worked out. When Mr Richardson was advised that the rate was less than expected, the appellant withdrew from that agreement.

(e) In the circumstances, the appellant's refusal to continue in that arrangement constituted a breach of a condition of the contract as it existed at the time: ***Poussard v Spiers and Pond*** (1876) 1 QBD 410. The respondent was not prepared to accept part performance of the contract. In the context of the arrangement and the relationships, the respondent was entitled to elect to accept the breach and bring the contract to an end (***Shevill v Builders Licensing Board*** (1982) 149 CLR 620 and ***Hill v Canberra Centre Holdings Ltd*** (1995) 122 FLR 434), and to indicate that if the appellant was not prepared to participate in the whole roster then the respondent would need to consider replacing the appellant in the entire roster.

(f) It was a condition of the contract that, once the signwriting was put onto the truck by the respondent, the appellant not remove that signwriting without the agreement of the respondent. It was essential that the truck be branded as part of the fleet of the Damien Cole Group. It is noted that the respondent's truck, which did regular trips to the port, was not branded for good commercial reasons.

(g) Even if it was not a term of the contract that the signwriting not be removed without consent, the decision to remove the signwriting was significant. Its significance was that it integrated the vehicle with the trailer, indicating the integration within the Damien Cole Group of the appellant's vehicle, branding it with the trailer, as Damien Cole Group's fleet. The significance of the removal of the branding is exemplified by two comments

being made to Mr Phatouros when the vehicle undertook its run on Monday, 26 March 2012 with the stickers removed. The removal was not merely of a few stickers to be later reinstated, but was a clear indication that the appellant was separating itself from the Damien Cole Group. Thus, it was an expression of an intention to no longer be bound by the contract during a period when the parties were negotiating about the future of the relationship, given the appellant's refusal to perform part of the contract.

(h) The evidence given by Mr Richardson as to the reason for removing the signwriting is improbable. Given the timing of the removal of the signwriting, coming as it did after Mr Richardson had refused to further undertake the work on the Gingin run, it seems to be quite a logical extension to, and expression of, the deterioration in the relationship between the parties. The appellant was either preparing to end the relationship with the respondent, or it was protesting at not being offered a higher rate for the Gingin work and the removal of the stickers was a means of attempting to negotiate a higher rate. It was not merely an innocent act undertaken for the purpose of maintaining and upgrading the appearance of the truck. It is not plausible that Mr Richardson would have taken the signwriting off without first discussing it with anyone from the respondent and then indicate, for the first time during the hearing, that it was his intention to replace it at his own cost at a later time once some repairs were done.

(i) The significance of the evidence of Mr Willis is that when he and Mr Richardson discussed the possible end of the appellant's contract after the refusal to continue with the Gingin run, Mr Richardson said words to the effect that he would have to remove the leaves, meaning the signwriting, from the truck to enable him to look for other work. That is what Mr Richardson did in the time between receiving the letter or email from Mr Cole about the need to do the Gingin run or that the respondent would need to replace the appellant in the entire system. In that context, it is too much of a coincidence to conclude that the signwriting was removed to do some minor repairs and to replace the signwriting soon after.

(j) The removal of the signwriting constituted a serious breach of a condition of the contract. It also entitled the respondent to bring the contract to an end. In addition, the removal of the signwriting was a sign of Mr Richardson's withdrawal from the co-operation necessary for the operation of the contract.

(k) Mr Richardson's response to Mr Phatouros, who was the respondent's transport manager, by declining to explain why the stickers had been removed indicates a refusal to explain in circumstances which confirms that Mr Richardson was either separating the appellant from the Damien Cole Group or would be utilising the issue of the signwriting as a negotiating tactic in his discussions with Mr Cole that day. It was also indicative of a breakdown in communications between the parties or a refusal to speak to the person in the position of transport manager, to whom Mr Cole had left much of the management of the business following his semi-retirement some time earlier.

(l) The appellant breached the contract with the respondent by refusing to perform part of the contract. Secondly, in removing the signwriting from the truck, the appellant confirmed an intention to no longer be bound by the contract, entitling the respondent to bring the contract to an end without notice. Whilst Mr Cole's email to Mr Richardson and Mrs Richardson indicated that if the appellant was not prepared to participate in the Gingin run then he would need to replace the appellant in the entire operation, he also indicated that they would need to discuss an orderly end to the arrangement. An orderly end would have involved sufficient time for both parties to make alternative arrangements, including the appellant continuing to participate in the roster. Mr Richardson's refusal to do the Gingin run and the removal of the signwriting meant that this was not practicable and the relationship had broken down beyond the point where there could have been a co-operative working arrangement to enable them to part ways amicably and to bring the arrangement to an orderly conclusion. In removing the signwriting, Mr Richardson jumped the gun and prevented the contract coming to an orderly conclusion.

Application to amend grounds of appeal

34 On the day before the appeal was listed for hearing the appellant filed an amended notice of appeal and at the hearing of the appeal counsel for the appellant made an application to amend the grounds of appeal as set out in an amended notice filed on 19 August 2013. The appellant also filed amended written submissions which addressed the proposed amendments to the grounds of appeal. In the amended notice the appellant sought to amend ground 4, by correcting one minor typographical error and deleting the words 'breach by it of an implied condition' and substituting the words 'repudiation by it'. The reason why the amendment of substance was sought was that counsel for the appellant had formed the opinion whilst preparing for the appeal that the grounds did not adequately cover all of the arguments that the appellant sought to make. Whilst putting the argument for the amendment, counsel sought to re-amend the grounds of appeal by retaining ground 4 as it stood and adding a new ground 5 in the form of the amendments proposed to ground 4 as set out in the proposed amended grounds of appeal.

35 The respondent opposed the application to amend on grounds that the addition of a new ground 5 would be a significant change to the grounds of appeal and that the respondent had insufficient time to prepare a case that would meet an argument that the Tribunal erred in finding that the removal of the signage by the appellant was a repudiation of the owner-driver contract between the parties.

36 After considering the submissions made on behalf of the parties the Full Bench granted leave to amend to add a new ground of appeal. The Full Bench then directed the appellant to orally put its submissions in respect of each ground, including ground 5. The respondent was not required to respond at that time to the matters raised by the appellant in respect of ground 5. At the conclusion of the hearing the Full Bench granted the respondent 14 days to provide written submissions on ground 5. The Full Bench also informed the respondent that if it formed the opinion that it required an opportunity to make an oral submission in support of its written submission the Full Bench would reconvene to hear those submissions. The appellant was granted seven days from the date of receipt by it of the respondent's submissions to file any submissions in reply. The respondent filed its

written submissions on 3 September 2013 and did not seek an opportunity to put an oral submission to the Full Bench. The appellant filed its written submissions in reply to the respondent's written submissions on 11 September 2013.

37 The reasons why I was of the opinion that the Full Bench should grant the application to amend the grounds of appeal was as follows. In ***Anderson v Rogers Seller & Myhill Pty Ltd*** [2007] WAIRC 00218; (2007) 87 WAIG 289 Ritter AP and Scott C set out a number of factors to consider when considering an application to amend an appeal [106]:

(a) The time when notice was first given to the Full Bench and the respondent of the intention to apply for the amendment.

(b) The explanation, if any, for seeking the amendment including why it is sought at the hearing of the appeal.

(c) Whether the proposed amendment constitutes a reasonably arguable ground of appeal.

(d) The consequences to the appellant of the non-granting of leave to amend.

(e) The extent of any prejudice to the respondent.

(f) Any measures which may be taken to eliminate or reduce the prejudice to the respondent.

(g) Issues of delay and costs.

38 In the present case the issue sought to be raised in proposed ground 5 it was clearly arguable. Whilst the amendment sought was very late, the issue is discrete and could be dealt with separately from the other grounds of appeal. Thus, the prejudice to the respondent in granting leave to amend could be overcome by allowing the respondent time to answer the amended ground in written submissions.

Grounds of appeal

39 The re-amended grounds of appeal are as follows:

1. The learned Acting Senior Commissioner erred in law in finding that there was a binding contract between the Appellant and the Respondent that the Appellant would do the Gingin run, notwithstanding that there was no agreement between the parties in relation to the amount that the Appellant would be paid for undertaking that work. In this regard the learned Senior Commissioner failed to have regard to the principles of formation of a valid contract which require that the agreement must be supported by consideration.

2. The learned Acting Senior Commissioner erred in law in finding that the refusal by the Appellant to undertake the Gingin run amounted to a breach of the owner-driver contract between the Appellant and the Respondent in that the learned Acting Senior Commissioner failed to have proper regard for the fact that the parties had not finally agreed on all of the terms upon which the Appellant would undertake that work.

3. The learned Acting Senior Commissioner erred in law and in fact in finding that the requirement for the Appellant to have the Respondent's signwriting on its truck was an implied condition of the owner-driver contract between the Appellant and the Respondent, in that there was insufficient evidence to support a finding that this term was so important that the Respondent would not have entered into the contract without it.

4. The learned Acting Senior Commissioner erred in law in finding that the removal by the Appellant of the Respondent's signage from its truck amounted to a breach by it of an implied condition of the owner-driver contract between the Appellant and the Respondent which enabled the Respondent to terminate that contract without notice. In that regard that action on the part of the Appellant was not such as allowed the Respondent to terminate the owner-driver contract without notice in any event.

5. The learned Acting Senior Commissioner erred in law in finding that the removal by the Appellant of the Respondent's signage from its truck amounted to a repudiation by it of the owner-driver contract between the Appellant and the Respondent which enabled the Respondent to terminate that contract without notice. In that regard that action on the part of the Appellant was not such as allowed the Respondent to terminate the owner-driver contract without notice in any event.

The central issues in the appeal

40 The central issues in this appeal before the Full Bench were as follows:

(a) Was the contract between the parties varied to include a term to undertake the 'Gingin' run?

(b) Was the requirement for signage on the appellant's truck a condition of the contract or a non-essential term?

(c) Was the respondent entitled to terminate the contract between the parties without notice?

Was the contract varied to incorporate the Gingin run?

(a) The parties' submissions

41 The appellant's arguments are as follows:

(a) A contract that leaves an essential matter for later determination by one of the contracting parties will be unenforceable as it is either incomplete or uncertain or because the promises contained in the agreement are illusory: ***Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*** (1991) 24 NSWLR 1.

(b) The Tribunal erred in fact in finding that Mr Richardson trusted that the respondent would 'come up with a fair rate' for the Gingin work. The evidence at its highest established that there was a conditional agreement to carry out the work subject to agreement being reached on the rate to be paid.

(c) No binding contract was entered into to carry out the Gingin run as there was no agreement about the amount the appellant would be paid. Thus, there was no certainty of terms. Without there being an agreement on the critical

issue of the amount the appellant was to be paid for the Gingin run, one of the essential requirements for the formation of a contract was missing.

(d) In certain cases courts have been prepared to find that terms of a contract are sufficiently certain where, although the parties may not have agreed on an important issue, the agreement includes a mechanism by which that issue can be determined. In this matter, there was no agreement about the amount that the appellant would be paid for the Gingin run, or a mechanism to determine this.

(e) Even if there was an agreement that the respondent would provide appropriate remuneration for the Gingin work, there could be no binding contract because the terms of the contract would be too vague and uncertain. If the appellant did not consider the new rate to be fair and reasonable, a court or tribunal could not determine the appropriate remuneration for the work on the basis of what had been agreed between the parties.

(f) In any event, the finding that the respondent was able to set the remuneration for the Gingin run is a finding that the respondent was able to unilaterally determine the rate of remuneration which is not permissible.

42 The respondent's arguments are as follows:

(a) A verbal agreement was made between the parties to carry out the Gingin run which satisfied the necessary criteria to establish a valid contract; that is, there was an intention to create a legal relationship, an offer and acceptance and valuable consideration passed between the parties.

(b) Starting work in response to an offer will generally be accepted as acceptance of an offer by implication: ***Browning v The Great Central Mining Co of Devon Ltd*** [1860] 5 H & N 856.

(c) In ***Council of the Upper Hunter County District v Australian Chilling & Freezing Co Ltd*** [1968] HCA 8; (1968) 118 CLR 429, 436 - 437 Barwick CJ observed:

> But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it. … So long as the language employed by the parties, to use Lord Wright's words in *Scammell (G.)* & *Nephew Ltd.* v. *Ouston* [1941] AC 251 is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved.

(d) In this matter the intention of the parties was clearly to create a contract to carry out the Gingin run and the deliberations were not so obscure or unclear so as to be devoid of meaning.

(e) An offer must be in sufficiently definite terms for it to be capable of acceptance although the courts do not insist on formality. Informal contracts may be enforceable at law. All that is required is that the terms must be sufficiently clear and must be accepted: ***Lewandowski v Mead Carney-BCA Pty Ltd*** [1973] 2 NSWLR 640.

(f) The parties were clear about what was being accepted and decided to leave the precise amount to be paid for the Gingin run to be later determined. The evidence of Mr Phatouros was that the rate would be determined once the work was undertaken and it was clear what hours were necessary to complete the task. When Mr Phatouros told Mr Richardson that 'they needed to work the rate out' what Mr Phatouros was saying was that the rate would be dependent upon knowing how much time was involved in doing the work. There was knowledge between the parties that Mr Willis was being paid a rate of $580 to do the work. There was also some knowledge about the duration of the work, how long it would take to drive to the location, to unhitch an empty trailer and hitch up a full trailer. Thus, the parties were not considering this arrangement as novices. They had a sufficient understanding of the arrangement.

(g) The evidence was that Mr Willis bought a new truck to do the south-west work, the respondent removed one truck from the road so as to share the work among contract drivers and hydraulics were fitted to the appellant's truck. None of these things would have been done had a contract not been entered into for the appellant to do the Gingin run.

(h) It is clear from the evidence that it was agreed that the respondent could set the rate. Thus, the respondent had the unilateral right to set the rate and there was no appeal mechanism. The question of fairness of setting the rate was not an issue. The appellant had waived any right to challenge the rate by giving the respondent the discretion to set the rate without attaching any conditions to it. Mr Richardson may have had some expectation about what the rate may be, but he made a conscious decision to allow the respondent to determine an appropriate rate for that work once it was clear what hours and other aspects were required to do that particular work with not one truck but three trucks doing that work.

(i) The evidence indicates that Mr Willis was previously paid $580 for the Gingin run because it was necessary to provide him with a reasonable income and to cover his fixed costs. The rate of $400 for the Gingin run was below the rate previously paid to Mr Willis because it was only designed to cover the variable costs. The fixed costs were covered in the payment of $7400 per week to each contractor who undertook south-west runs including the appellant.

(j) When the appellant was advised of the rate it decided it was insufficient but it was not able to renege on the arrangement to do the Gingin work because it had given the respondent the sole right to determine the rate for the trip.

(k) Once the rate of $400 for the Gingin run was determined it is able to be enforced in the same manner that the other terms of the contract are able to be enforced.

(l) The Tribunal's finding that the appellant's refusal to undertake the Gingin run amounted to a breach of contract was supported by the evidence and was sufficient in itself for the entire appeal to fail.

(b) Consideration – ascertainment of the terms to carry out the Gingin run

43 The ascertainment of the terms of a contract whether oral or in writing always turns on the words used by the parties and the construction of the words used by the parties are to be judged objectively. In ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 the Full Court of the High Court said [40]:

> This Court, in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* at 461-462 [22]).

44 Whilst regard can be had to surrounding circumstances, to understand the subject matter of the contract, evidence of subjective intention is not admissible. In ***Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd*** [1999] WASC 218; (1999) 21 WAR 425, Owen J said [46]:

> If extrinsic evidence of the surrounding circumstances is admitted, it can be used only for an objective assessment of what a reasonable person, armed with the knowledge that the parties actually had, would have understood the words to mean.

45 The finding that the evidence of Mr Phatouros established that Mr Richardson trusted that an appropriate rate would be paid in due course is not a surrounding circumstance but, at its highest, evidence of the subjective intention of Mr Richardson. Thus, regard should not have been had to what Mr Phatouros thought Mr Richardson's expectations were.

46 The surrounding circumstances were that:

(a) Although Mr Willis had in the past carried out all of the Gingin run, when the respondent made the decision to integrate the Gingin run with the south-west run, the respondent required four prime movers to carry out the south-west and Gingin work each week.

(b) The new arrangement would have to be implemented by the appellant, the respondent and the other owner-drivers before a rate of pay for the Gingin work could be worked out.

(c) Mr Willis would purchase a new prime mover for the work and Mr Cole would take one of his trucks off the south-west run.

47 It is clear from the evidence given by Mr Phatouros that Mr Richardson on behalf of the appellant agreed to work the new arrangement of work which would include some work on the Gingin run. He also agreed that prior to the commencement of the new arrangement a price for the Gingin run would not be determined.

48 It is also clear that prior to the commencement of the new arrangement all material terms to incorporate the Gingin run into the south-west work were agreed by the appellant and the respondent other than the price to be paid for the additional work.

49 The appellant says the evidence establishes there was no agreement about the price to be paid for carrying out the Gingin run and that this was a matter that was to be agreed after the new arrangement had been implemented. Thus, there was a conditional agreement to carry out the work subject to agreement being reached on the rate to be paid. As no agreement on the rate was agreed the agreement to carry out the Gingin run or incorporate it into the south-west run was unenforceable.

50 The respondent says it was agreed that the price for the run would be fixed by the respondent unilaterally.

51 The law does not recognise a bargain as enforceable or binding unless the essential terms or critical terms have been agreed: ***Thorby v Goldberg*** [1964] HCA 41; (1964) 112 CLR 597, 607 (Menzies J). A contract is incomplete if the parties have deliberately left some essential term to be settled by their future agreement: ***Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd*** [1994] 2 VR 106, 130 (Brooking J).

52 Where further agreement between the parties is required to conclude an agreement uncertainty arises. In some matters a term requiring the parties to engage in negotiations reasonably to conclude the bargain may be implied: see observations of Kitto J in ***Thorby v Goldberg*** (603). However, such a term will not be implied where the parties have not agreed on an essential term of their bargain: ***Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*** at 39(B) (Handley JA). Justice Finkelstein in ***Australian Securities and Investments Commission v Fortescue Metals Group Ltd*** [2011] FCAFC 19; (2011) 274 ALR 731 explained why such a term will not assist when no price is agreed [223] - [227]:

> 223. In this case the problem is of a different order: if an arrangement is incomplete it may be impossible to find that a contract has come into existence notwithstanding the intention of the parties. For a contract to be valid the agreement must be sufficiently definite and explicit so that the parties' intention can be ascertained with a reasonable degree of certainty. Put another way, a court cannot enforce a contract unless it can determine what the

contract is, applying all applicable rules of formation and interpretation. Otherwise the court would be imposing its own perception of what the bargain is rather than implementing what has been agreed by the parties.

224. Often the problem of incompleteness arises when the parties have left an aspect of their bargain for later agreement. In recent years some court have, by a process of implication by law, supplied a term requiring parties to a commercial contract to exercise 'good faith' in the performance of their contractual rights and obligations. And there are cases which hold that when parties to a commercial contract have reached a preliminary agreement but have left a term of their contract open for future negotiation the parties are under an obligation to negotiate the open issues in good faith in an attempt to reach agreement on the open terms. This obligation does not mean that a final agreement will be reached. Good faith negotiations will not necessarily bridge all gaps that stand in the way of a concluded agreement. The obligation does, however, bar a party from walking away from the preliminary agreement without a legitimate attempt at negotiation.

225. Imposing an obligation (whether expressly or by implication) to negotiate open terms will not overcome all cases of incompleteness. It will not, for example, deal with the problem created where parties have not agreed on the important (some might say the essential) terms of their bargain. A good faith obligation to negotiate cannot make a fatally incomplete contract valid and enforceable.

226. This case is a good example. The projects contemplated by the agreements were, on any view, complex multi-million dollar projects. The construction of port facilities would likely cost in excess of $1 billion. The construction of a railway line would cost around $1 billion. The construction of mines would cost several hundreds of millions of dollars. Yet almost nothing was agreed about the nature and extent of those projects. One would expect that it would require significant time, effort and expertise to resolve these matters and arrive at the appropriate terms.

227. One missing element of each agreement is the price to be paid for the works. In construction contracts the price is of fundamental importance. If it is not agreed, or there is no agreed method of ascertaining it, there can be no bargain.

53 Where an agreement does not specify a price to be paid for the work or benefits that accrue under the contract, unless the contract is for the sale of goods, the court will not imply a term that the price is to be a reasonable price. In ***Hall v Busst*** (1960) 104 CLR 206, Fullagar J said (222):

> So far as contracts for the sale of goods are concerned, there may or may not be a general rule, applicable in respect of executory, as distinct from executed, contracts, that, where the price is not otherwise determined, a promise to pay a reasonable price is to be implied: see *Acebal v. Levy* (1834) 10 Bing. 376, esp. at p. 382 [131 E.R. 949, esp. at p. 952], *Hoadly v. M'Laine* (1834) 10 Bing. 482 [131 E.R. 982], *Sale of Goods Act* 1896 (Q.), s. 11, *Chalmers* on *Sale of Goods*, 11th ed. (1931), p. 27, note *(c)*. But such a rule, if it exists, is anomalous. The contract contemplated here is not a contract for the sale of goods: it is a contract for the sale of 'land and improvements.' In such a case there cannot, I think, be held to be a binding contract unless the three essential elements are the subjects of concluded agreement. The three essential elements are the parties, the subject matter and the price. If, but only if, these are fixed with certainty, the law will supply the rest. When it is said that the price must be fixed with certainty, it is not, of course, meant that it must be fixed at a specified figure. It will be sufficient if the sale is expressed to be for a price or value to be fixed by a named or described person. In such a case, if the named or described person dies or cannot or will not fix the price or value, the contract cannot, as a general rule, be enforced, but, if and when he does fix the price or value, there is a concluded contract. If, however, the parties are silent as to price, there can be no implication of a term that a reasonable price is to be paid. And it is not, in my opinion, sufficient if the sale is expressed to be 'for the value of the land' or 'for the fair value of the land' or 'for a reasonable price.' For, in such a case, the actual price payable can only be arrived at in one of two ways-either by further agreement between the parties or by the court in an action or suit. If the price is fixed by further agreement, *cadit quaestio*. If it is not so fixed, the party who brings an action or suit comes into court without a complete cause of action. He is saying to judge or jury: 'Complete our contract for us, and then enforce it.' It is the same as if the 'contract' had said: 'for a price to be fixed by a judge or a jury.' And clearly a contract in those terms could not be enforced, for no breach antecedent to litigation could be assigned.

(See also Dixon CJ at 216 - 217 and Menzies J at 231 - 235).

54 When the brief evidence given by Mr Phatouros of the conversation he had with Mr Richardson (out of which the terms of the agreement can only be drawn) is analysed, it is apparent that no agreement was reached about the price. The effect of what Mr Phatouros said was that the respondent was going to try the work out; that is, carry out the Gingin run and 'see what's going to be fair for us'. In saying that he intended to see what is 'fair for us', Mr Richardson was not clear whether the respondent intended to strike a rate that was fair to the respondent or a rate that was fair to the respondent and to the owner-drivers, including the appellant, who were carrying out the Gingin run. However, Mr Richardson did not agree that the rate could be set in this way. Mr Phatouros simply said that Mr Richardson said, 'We'll discuss the rate when we start doing it.' It is clear from this statement that Mr Richardson agreed to discuss what the rate should be after the new arrangement had commenced. It is also implicit in what Mr Phatouros says, Mr Richardson said, that it was agreed that it would be necessary to work the new arrangement to make an assessment of a price for that work. Nor was any formula or ascertainable standard agreed for striking a price for the work.

55 Even if it could be found on the evidence that the appellant had agreed to leave the respondent unilaterally to determine the price for the Gingin run, the arrangement to do the work may not be enforceable.

56 In ***May and Butcher Ltd v R*** [1929] All ER Rep 679 the parties had agreed that the prices to be paid and the dates of payment for old tentage shall be agreed from time to time. After considering the arguments, the House of Lords rejected the argument that a reasonable price should be implied. Lord Warrington found (684):

> In my opinion, the decision of this case depends on the application of a well-known and elementary principle of the law of contracts, which is that, unless the essential terms of the contract are agreed on, there is no binding and enforceable obligation. In the present case, we have a document which purports to be an agreement for the sale by one party to the other party of certain specified goods at a price to be hereafter agreed on between them. If that price is thereafter agreed, then there is a binding contract within the principle to which I have alluded; each of the essential terms of the contract has then been agreed. If the parties fail to arrive at an agreement, then the price has not been ascertained in the way in which the parties stipulated that it should be ascertained, and there is, therefore, no binding agreement.

57 Viscount Dunedin was also of the opinion that there was no concluded contract unless a bargain settles everything necessary to be settled. His Lordship then went on to say (684):

> [Y]ou may very well agree that a certain part of the contract, if you take sale, such as price, may be settled by somebody else. As a matter of the general law of contract, as I have said, you have to have all the essentials settled. What are the essentials may vary according to the particular contract with which you are dealing. We are here dealing with sale, and, undoubtedly, price is one of the essentials of sale, and, if it is left still to be agreed between the parties, then it is no contract. It may be left, as I say, to the determination of a certain person, and, if it was so left, and that person either would not or could not act, I have no doubt also that there would be no contract because the price was provided between the parties to be settled in a certain way, and it has become impossible to settle it in that way, and, therefore, there is no settlement. No doubt in the matter of goods, the Sale of Goods Act, 1893, says that, if no price is mentioned and settled in the contract in any way, it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point, and here there is no silence, because there is the provision that the two parties are to agree. As long as you have something certain it does not matter. For instance, it is a perfectly good contract as to price to say that the price is to be settled by the buyer.

58 Whilst ***May and Butcher*** stands as good law for the point that a bare agreement to agree will have no legal effect on grounds of uncertainty, the observation of Viscount Dunedin that an enforceable contract could leave the price to be settled by one party was regarded as doubtful by Gibbs J in ***Godecke v Kirwan*** [1973] HCA 38; (1973) 129 CLR 629 when his Honour said, after observing that a contract is not bad for uncertainty if it is agreed that a third party may unilaterally settle essential terms, that (646 - 647):

> I should perhaps make it clear that it does not necessarily follow from what I have said that an agreement which left further terms to be settled by one of the parties, rather than by his solicitors, would be treated as a concluded contract. In *May and Butcher Ltd. v. The King* [1934] 2 KB, at p. 21, Viscount Dunedin suggested that a sale of land which left the price to be settled by the buyer himself would be good. With great respect, it seems to me that there would be no binding contract in such a case, which would fall within the principle that 'where words which by themselves constitute a promise are accompanied by words which show that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought': *Thorby v. Goldberg* (1964) 112 C.L.R. 597, at p. 605, citing *Loftus v. Roberts* (1902) 18 T.L.R. 532, at p. 534; *Placer Development Ltd. v. The Commonwealth* (1969) 121 C.L.R. 353, at pp. 359-361. It might be suggested that the same principle would not apply if the determination of the price were left to the seller, for then it would be the promisee, not the promisor, who was left with the discretion as to performance. However, in *Beattie v. Fine* [1925] V.L.R. 363, Cussen J. drew no such distinction and held that an option for renewal 'at a rental to be agreed upon by the lessor' did not give rise to any contractual obligation. He based his decision on the principle of *Loftus v. Roberts* (1902) 18 T.L.R. 532, but the same conclusion might have been reached by holding that there can be no concluded bargain if a vital matter (such as price or rental) has been left to the determination of one of the parties (see also the dicta in *Foster v. Wheeler* (1888) 38 Ch. D. 130, at pp. 132-133). Perhaps it may be different where agreement has been reached on all essential terms but the determination of subsidiary matters has been left to one of the parties.

59 The contrasting views of Gibbs J in ***Godecke*** and Lord Dunedin in ***May and Butcher*** have been noted in a number of decisions of Australian courts, but the issue whether an agreed arrangement to allow one party to unilaterally determine a vital term remains unresolved: see the observations of Kirby P in ***Biotechnology Australia Pty Ltd v Pace*** (1988) 15 NSWLR 130, 136 and more recently Macfarlan JA in ***Malago Pty Ltd v A W Ellis Engineering Pty Ltd*** [2012] NSWCA 227 [40] - [46].

60 However, there is authority in cases that deal with construction contracts where it has been expressly agreed that the value of work to be done under a contract is to be assessed in the sole discretion of one party that uncertainty may not arise. In ***WMC Resources Ltd v Leighton Contractors Pty Ltd*** [1999] WASCA 10; (1999) 20 WAR 489 a mining contract provided that if the value of a variation to the scheduled rates and prices could not be agreed between the parties, WMC could determine the value in its sole discretion. Such a clause is not uncommon in construction contracts. It was not argued that the provision was uncertain. Justice Ipp, with whom Kennedy and White JJ agreed, found that, in any event, such a submission would be untenable. At [46] he said:

> Any uncertainty would be cured by the implication of terms requiring the appellant to value by reference to objective criteria. The appellant accepts that those criteria are that it should act honestly, *bona fide*, and reasonably. The respondent does not dispute that terms to this effect should be implied in the contract. In my view, it is indeed implicit in the contract that, in carrying out a valuation in terms of cl 14.2(b)(iv), the appellant is obliged to act honestly, *bona fide*, and reasonably: see *Sandhu v Ferizis*, unreported; SCt of NSW (Young J); 4630 of 1990; 11 March 1994, and cases such as *Perini Corporation v Commonwealth* [1969] 2 NSWR 530. It was not suggested by the respondent that the appellant should act with due care and skill in performing the valuation. Ordinarily, when a third party carries out such a valuation, the value determined cannot be challenged because of negligence on the part of the valuer: *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (at 335). That rule may not apply when the valuer is not a third party but a party to the contract itself. As there was no argument on the question, I express no concluded opinion as to it. I merely observe that the mere fact that a party to a contract is appointed as a valuer of a thing, which is to pass as consideration under the

contract, does not mean that that party is at large to determine any value it wishes. Conditions will be implied in the contract which will govern the performance of the valuation function. For the purposes of this appeal, having regard to the way in which the matter was argued, I shall assume that those conditions are solely that the appellant is obliged to act honestly, *bona fide*, and reasonably.

61 Although the decision of the Full Court in ***WMC Resources*** has been criticised by some academics: Professor I N D Wallace QC, '"In its Sole Discretion": An Unpersuasive Interpretation?' (2000) 16 BCL 243; T Thomas, 'The value is whatever I say it is: Determinations by the principal under construction contracts' (2009) 25 BCL 246, the decision has consistently been applied in a number of authorities involving construction contracts: see, for example, the recent decision of the Full Court of the Supreme Court of Victoria in ***Dura (Aus) Constructions Pty Ltd v Hue Boutique Living Pty Ltd*** [2013] VSCA 179. The approach of the Full Court in ***WMC Resources***, however, does not seem to have been considered by any authorities in any analysis of the opposing opinions of Gibbs J in ***Godecke*** and Lord Dunedin in ***May and Butcher***.

62 It is not necessary, however, to determine this issue, in particular whether an agreement that left the determination of the price to the respondent would be binding in this matter, as the evidence of Mr Phatouros was that Mr Richardson did not agree to such a term. At its highest, the effect of the statements made by Mr Phatouros on behalf of the respondent was that after the Gingin work was incorporated into the south-west run the price would be determined. There was no clear statement as to who would determine the price and, in any event, Mr Richardson made it plain to Mr Phatouros that he would discuss the price to be paid after the new arrangement commenced.

63 For these reasons, I am of the opinion that there was no legally enforceable agreement between the parties to incorporate the Gingin run into the south-west run. Thus, I am satisfied that ground 1 and ground 2 of the appeal have been made out.

Did the removal by the appellant of the respondent's signage from the truck enable the respondent to terminate the contract without notice?

(a) The parties' submissions

64 The appellant makes the following submissions:

(a) The Tribunal erred in finding that the requirement for the appellant to have the respondent's signwriting on its truck was an implied condition of the owner-driver contract between the appellant and the respondent. The appellant concedes that it was an implied term of the contract between the appellant and respondent that the appellant's truck would be sign written with the respondent's livery. However, the appellant importantly contends that this term was not a condition of the owner-driver contract between the parties.

(b) Contractual terms are classified as warranties, innominate (intermediate) terms, or conditions: ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*** [2007] HCA 61; (2007) 233 CLR 115; (2007) 82 ALJR 345; (2007) 241 ALR 88. A warranty is a 'non-essential term' of the contract, and a 'condition' is an 'essential term', which if breached allows the innocent party to terminate the contract. An 'innominate' or intermediate term is one where the consequences of a breach of the term depend on the seriousness of the breach.

(c) The accepted test for determining whether a term of a contract is an essential term, and therefore a condition, is the test set out in the judgment of Jordan CJ in ***Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*** (1938) 38 SR (NSW) 632, 641 - 642:

> The test of essentiality is whether it appears from the general nature of the contract ... or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

(d) The primary object of the owner-driver contract between the parties was to cart offal from abattoirs to a processing plant. In that context the issue of signwriting on the appellant's truck was a secondary matter. It was the evidence of the respondent's witnesses that not all of the respondent's trucks have signwriting. Also, there was no evidence before the Tribunal from which the Tribunal could have made a finding that the respondent would not have entered into the contract with the appellant unless it had been assured of a strict performance of the requirement relating to the signwriting. In these circumstances, the term of the owner-driver contract regarding signwriting was a warranty, or at most, an intermediate term. Thus, the removal of the signage was not a serious matter that went to the core of the contract, and that, therefore, did not provide the respondent with a valid ground for the termination of the contract. Further, removal of the signwriting from the truck by the appellant did not deprive the respondent of the benefit for which it had contracted, and, therefore, the action on the part of the appellant in removing the signwriting did not justify termination of the owner-driver contract by the respondent.

(e) In finding that the term of the contract between the parties regarding the signwriting was a 'condition' of the owner-driver contract between the parties, the Tribunal failed to correctly apply the test in ***Tramways Advertising*** regarding essential terms of a contract.

(f) The Tribunal also wrongly found that in removing the signwriting from the truck the appellant confirmed an intention to no longer be bound by the contract, entitling the respondent to bring the contract to an end without notice. To establish a repudiation of a contract it has to be shown that the party that is in breach evinces an intention to no longer be bound by the contract or that they intend to fulfil the contract only in a manner substantially inconsistent with its obligations and not in any other way: ***Shevill v Builders Licensing Board*** (625 – 627) (Gibbs CJ).

(g) In ***Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*** (1989) 166 CLR 623, the High Court upheld the termination of a lease agreement by the lessee following the failure by the lessor to deliver a registrable lease, on the basis that the provision of a registrable lease was central to that contract. The appellant says that the

requirement for it to have the respondent's signage on its truck, under the owner-driver contract between the parties, is not as important in the context of the contract as a whole, as was the requirement that the lessor provide a registrable lease in ***Laurinda***. In any event, in ***Laurinda*** the lessee made several demands to the lessor for the provision of a registrable lease before it finally terminated the contract. In this case, the appellant was not given any, or any reasonable opportunity to reinstate the signage on its truck before the contract was terminated by the respondent.

(h) From the decided cases it is clear that for conduct to amount to a repudiation of a contract it has to relate to some important aspect of the contract, and has to have the effect of substantially depriving the other party of the benefit of the contract. That is, the breach must be of such magnitude as to entitle the innocent party to treat the contract as at an end: ***Hill v Canberra Centre Holdings Ltd***.

(i) The conduct of the appellant in removing the signwriting from the truck falls well short of being a continued refusal to perform a fundamental obligation under the contract, or being 'substantially inconsistent with' the appellant's obligations under the contract. The removal of the signwriting did not deprive the respondent of a significant benefit under the contract, namely the cartage of offal from abattoirs to a processing plant. In any event, after the signage was removed, the appellant did, on several occasions, undertake runs to abattoirs, whereby he drove to the designated site, collected the offal, and brought it up to the processing plant. Further, the respondent failed to give the appellant any warning that it would terminate the contract if the signage was not reinstated.

(j) Statements made by Mr Richardson to Mr Willis to the effect that he would need to remove the signwriting from his truck in order to look for other work, is a statement of fact that hirers do not like having other companies' livery on their sub-contractors' trucks, and, that, therefore, if the appellant did have to find work elsewhere it would have to remove the signage. Such a statement cannot be said to be an indication on the part of the appellant that it intended to no longer be bound by the contract.

(k) The respondent also seeks to rely on the removal by the appellant of its truck and motor vehicle from the respondent's yard, and the failure of Mr Richardson to communicate with the respondent's transport managers, as an indication on the part of the appellant that it intended to no longer be bound by the contract, and thereby justifying the lawful termination of the contract by the respondent. This cannot be the case. After the removal of the signage the appellant was still turning up at the designated places and times that the respondent required in order to collect the offal, and brought the offal back to the processing plant. That is, the appellant continued to perform the work that it was obliged to do under the contract.

(l) In the circumstances, the appellant says that the respondent could only lawfully terminate the owner-driver contract between it and the appellant by giving the appellant reasonable notice.

65 The respondent makes submissions that:

(a) The evidence of Mr Cole, Mr Phatouros and Mr Willis establishes that the signwriting was a crucial requirement of the contract and not a minor part. It was an essential part of the implied terms of the contract and without it the respondent would not have entered into a contract with the appellant: ***Tramways Advertising***.

(b) The evidence of Mr Phatouros was that there was one truck which did not have signwriting on it so that it would not 'stand out' as it was required to do work at the wharf.

(c) Removal of the signwriting on the appellant's truck deprived the respondent of a benefit, namely the identification and positive branding and marketing of the company. The contract between the respondent and the Craig Mostyn Group required the vehicles to have their name on them.

(d) In the same way that the failure to produce a registrable lease in ***Laurinda*** was determined to be crucial, the respondent submits that the removal of the signwriting from the appellant's truck was an absolutely crucial part of the implied terms of the contract between the parties.

(e) Actions by the appellant which indicated the relationship had broken down and that the appellant repudiated the contract are as follows:

(i) The refusal by the appellant to continue to undertake the Gingin run.

(ii) Discussions with Mr Willis in March 2012 prior to the end of the contract where the appellant said that he would need to remove the signwriting from his truck in order to look for other work.

(iii) The action of the appellant in removing the signwriting from his truck.

(iv) Removal of the appellant's truck and motor vehicle from the respondent's yard.

(v) The failure of the appellant to communicate with the respondent's transport managers.

(f) The respondent contends the Tribunal was correct in finding that in removing the signwriting from the truck the appellant confirmed its intention to no longer be bound by the contract, entitling the respondent to bring the contract to an end without notice and in removing the signwriting, Mr Richardson jumped the gun and prevented the contract coming to an orderly conclusion.

(g) The respondent says the appeal should fail as the weight of material before the Tribunal leads to the conclusions that:

(i) The failure to do the Gingin run was a breach of the contract (ground 2).

(ii) The removal of signwriting was a significant breach of the contract that allowed the respondent to end the contract without notice (ground 3 and ground 4).

(iii) The removal of the signwriting amounted to a repudiation of the contract (ground 5).

In the respondent's opinion, a positive finding on any of the above three matters is sufficient to uphold the decision at first instance and dismiss the appeal.

(b) Consideration – was the respondent entitled to terminate without notice?

66 As the learned authors of Sneddon N C, Bigwood R A and Ellinghaus M P, *Cheshire & Fifoot Law of Contract* (10th Aust ed, 2012) point out at 21.11, the law confers a right on an innocent party to terminate a contract for breach in three circumstances:

1. Repudiation. This consists of a manifestation of unwillingness or inability to perform the contract, in substance or at all, before or at the time when performance is due: see 21.12-21.15, 21.20.

2. Breach of essential term (or condition). This consists of failure to perform, at the time when performance is due, a term regarded as essential by the parties or by the law: see 21.16-21.19.

3. Breach of an 'intermediate' term causing substantial loss of benefit. This consists of a failure to perform an intermediate term, at the time when performance under that term is due, that deprives the injured party of the substantial benefit of the contract: see 21.21-21.22.

Each of these categories of breach focuses on a different rationale for the creation of a right to terminate the contract. Repudiation focuses on the *attitude* of the contract-breaker before or at the time of performance. Breach of an essential term or condition focuses on the *relative importance* of obligations under a contract, as determined by the parties or the law. Breach of an intermediate term causing substantial loss focuses on the *effect* of the breach in question.

However, it is clear that these categories are not entirely mutually exclusive, but rather can overlap in their application. A breach may simultaneously be a failure to perform an essential term, a manifestation of unwillingness or inability to perform, and result in a substantial loss of benefit.

67 The Tribunal found termination was justified on three grounds, repudiation and breach of two essential conditions of contract.

68 The first breach of a condition found was the refusal by the appellant to continue in the arrangement of work that included the Gingin run. As set out in these reasons, I am of the opinion that there was no binding agreement to continue the arrangement to include the Gingin run. It follows therefore that the refusal to continue that new arrangement cannot constitute a breach of a condition of contract.

69 The second breach of a condition of contract found by the Tribunal was the removal of the signwriting from the truck. The appellant contends that the term of contract requiring the appellant's truck to have on it leaves and writing which identified the truck as part of the Damien Cole Group was not a condition of contract. The test enunciated by Jordan CJ in ***Tramways Advertising*** requires an objective assessment to determine whether a term of a contract is a condition. It requires an assessment of the relevant circumstances to determine whether the respondent would not have entered into the contract unless it had been assured of strict or substantial performance. The test in ***Tramways Advertising*** was recently modified by the majority of the High Court in ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd***. At [48] Gleeson CJ, Gummow, Heydon and Crennan JJ observed:

> What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination.

70 Whether a court or tribunal should conclude that a term is essential requires an assessment not only of the terms of the contract itself, but also the evidence of events that occurred prior to the termination of the contract and any damages that flow from the breach of the term. Thus, in each case the resolution of this issue will turn on its own facts. This is illustrated by the relevant matters considered by the Court of Appeal of the New South Wales Supreme Court in ***Donut King Australia Pty Ltd v Wayne Gardner Racing Pty Ltd*** [2001] NSWCA 275. In 1997, Donut King entered into a sponsorship agreement with Wayne Gardner Racing. One of the terms of the contract between the parties was that Wayne Gardner Racing was to display a 'Donut King' logo on the bonnet of its racing vehicles. The words in the logo were to be written in pink on a white background. In 1999, Wayne Gardner Racing obtained a new car and sought to discuss the colour of the bonnet with two employees of Donut King. After some delay, each employee suggested the other deal with the issue and one informed Wayne Gardner Racing they would approve the change once they received photos of the car. In the meantime, the car was painted red with Donut King written in white and the car was used by Wayne Gardner Racing in the Melbourne Grand Prix. Shortly afterwards Donut King communicated its displeasure at the colour of the logo and advised they considered the sponsorship arrangement to be at an end. The trial judge found the term specifying the logo colour was not an essential term. The Full Court dismissed an appeal against the decision of the trial judge. They found that the term that the logo be in pink on a white background was not so essential that Donut King would not have entered into the agreement because:

(a) The contract did not provide for an express right of termination for breach of this term. Where the parties intended to make strict and literal performance of a promise essential they expressly provided for it, such as for a failure to pay the sponsorship amount.

(b) The non-essential nature of the term was indicated by the fact that Donut King had approved white lettering on a red background on the Pantech (van).

(c) There was evidence that the response by Donut King to the change in logo colour was leisurely. There was no evidence that the breach caused damage and there was evidence accepted by the trial judge that Donut King wanted to exit the sponsorship agreement for marketing reasons.

71 In this matter, as counsel for the appellant pointed out, the primary object of the contract between the parties was the carting of offal and the removal of the signwriting from the appellant's truck did not deprive the respondent of any benefit accruing or accrued under the contract. Nor was there any evidence of damage caused by the breach. Whilst the respondent argues that it was under a contractual obligation with the Craig Mostyn Group to have the name of the Craig Mostyn Group on the vehicles engaged in carting of offal, the evidence given on behalf of the respondent does not support such a contention. The evidence of Mr Cole was that the respondent had entered into an agreement with the Craig Mostyn Group to sign write all logistic vehicles and trailers used to carry out the work for the Craig Mostyn Group with the name of the Craig Mostyn Group (ts 58, 68 - 69, AB 91, 101 - 102). There was no evidence upon which a finding could be made that the respondent was under a contractual obligation with the Craig Mostyn Group to ensure the prime movers used to carry out the Craig Mostyn Group work were sign written.

72 Also of importance is the fact that the respondent did not require all trucks of subcontractors to be sign written with the respondent's signage. One of the trucks owned by Mr Phatouros was not sign written (ts 79, AB 112). Nor were all the owner-driver trucks and the trailers acquired when the respondent took over the contract from Fertal Holdings Pty Ltd immediately sign written (ts 58, AB 91). Mr Cole said the reason for the signwriting was 'branding' to promote image and uniformity (ts 58, AB 91). Yet, even in the absence of the removal of the signwriting by the appellant, the 'branding' of vehicles was not at all material times uniform.

73 When all these circumstances are considered, it is clear that the requirement for signage was not a term requiring strict or substantial performance but an intermediate term. This is because there was no evidence that the effect of the breach made further commercial performance of the contract impossible.

74 A right to terminate for breach of an intermediate term will only arise if the breach and the consequences of the breach are sufficiently serious to go to the root of the contract: ***Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*** [1962] 2 QB 26; [1962] 2 WLR 474; [1962] 1 All ER 474 (484) (Upjohn LJ) (All ER). In ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*** Gleeson CJ, Gummow, Heydon and Crennan JJ pointed out [52] - [55]:

> 52 … First, the interests of justice are promoted by limiting rights to rescind to instances of serious and substantial breaches of contract. Secondly, a just outcome is facilitated in cases where the breach is of a term which is inessential.
>
> 53 As will appear later in these reasons, we rest our decision in the appeal not upon the ground of breach of an essential obligation, but upon application of the doctrine respecting intermediate terms.
>
> 54 We add that recognition that, at the time a contract is entered into, it may not be possible to say that any breach of a particular term will entitle the other party to terminate, but that some breaches of the term may be serious enough to have that consequence, was taken up in *Ankar Pty Ltd v National Westminster Finance (Aust) Ltd* [1987] HCA 15; (1987) 162 CLR 549 at 561-562. Breaches of this kind are sometimes described as 'going to the root of the contract' (For various synonyms used see Treitel, *Remedies for Breach of Contract*, (1988) at 350-351), a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract (Carter, *Breach of Contract*, 2nd ed (1991) at 199-200).
>
> 55 A judgment that a breach of a term goes to the root of a contract, being, to use the language of Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 at 380; [1971] 2 All ER 216 at 232, 'such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract', rests primarily upon a construction of the contract. Buckley LJ attached importance to the consequences of the breach and the fairness of holding an injured party to the contract and leaving him to his remedy in damages. These, however, are matters to be considered after construing the agreement the parties have made. A judgment as to the seriousness of the breach, and the adequacy of damages as a remedy, is made after considering the benefit to which the injured party is entitled under the contract.

75 Thus, the nature of the breach, the consequences of the breach, the foreseeable consequences of the breach and the effect of each of these on the contract as a whole are matters which must be considered to determine whether the breach is sufficiently serious to give rise to a right to terminate: Lawbook, *The Laws of Australia* (at 15 July 2012) 7 Contract: General Principles, '6 Breach' [7.6.1030].

76 Even if it were established by the evidence that the removal of the signage by the appellant deprived the respondent of uniformity in its branding on one truck of its fleet, there appeared to be little if any consequence that flowed from the breach of contract. No evidence of any damage that flowed or could have flowed was adduced. The evidence of Mr Cole was that the respondent's contractual obligation to the Craig Mostyn Group only required signage on the trailers and logistic vehicles (ts 58, AB 91). Thus, it cannot be said that the removal of the signage was serious enough to give rise to a right to terminate the contract on grounds of a breach of an intermediate term.

77 For these reasons, I am of the opinion that grounds 3 and 4 of the grounds of appeal have been made out.

78 The respondent, however, did not terminate the contract solely on the ground that the appellant had removed the signwriting from the truck. The Tribunal found that the appellant had repudiated the contract. In particular, the appellant evinced an intention to no longer be bound by the contract by the following conduct:

(a) Mr Richardson refused to perform part of the contract (by refusing to continue the Gingin run).

(b) The removal of the signwriting. This was a sign of Mr Richardson's withdrawal from the co-operation necessary for the operation of the contract which meant that an orderly end to the relationship was not practicable.

(c) When Mr Phatouros asked Mr Richardson why the stickers had been removed, Mr Richardson declined to respond saying that he would explain why when he met with Mr Cole. This action was indicative of a breakdown in communications between the parties or a refusal to speak to the person in the position of transport manager, to whom Mr Cole had left much of the management of the business following his semi-retirement some time earlier.

79 The finding that Mr Richardson had refused to perform part of the contract must necessarily fall away as the parties had not reached a concluded agreement to incorporate the Gingin run. Although Mr Richardson may have refused to communicate with the respondent's transport managers, he did communicate with Mr Cole.

80 Whilst Mr Cole may be semi-retired, it is clear from the evidence he gave to the Tribunal in this matter that he negotiated the terms of the owner-driver contract with Mr Richardson, he made the decision to incorporate the Gingin run into the south-west run and determined the rate that would be paid for the Gingin run. He also engaged directly with Mr Richardson in discussions about the terms of the Gingin run and made the decision to terminate the contract between the appellant and the respondent. Although Mr Cole wished to leave the management of the work to Mr Phatouros and Mrs Phatouros and formed the opinion that one of the reasons the contract should be terminated was because communications had broken down between Mr Richardson and Mr Phatouros and Mrs Phatouros, that reason cannot at law form the basis of a finding that the appellant had repudiated the contract. Such conduct may be a reason why the respondent may wish to terminate by giving notice of termination, but it cannot form the basis of a finding of repudiation entitling the respondent to terminate without notice.

81 In this matter there is no basis for a finding of repudiation to stand as there must be a renunciation of the contract as a whole or a fundamental obligation under it. This is repudiation in the first sense discussed by Gleeson CJ, Gummow, Heydon and Crennan JJ in ***Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*** at [44] where their Honours said:

> First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations (*Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* [1989] HCA 23; (1989) 166 CLR 623 at 634 per Mason CJ). It may be termed renunciation (*Heyman v Darwins Ltd* [1942] AC 356 at 397). The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it (*Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* [1989] HCA 23; (1989) 166 CLR 623 at 659).

82 As discussed in these reasons, after removal of the signage, the appellant continued to cart offal in accordance with the roster for the south-west work. Thus, it cannot be said that the appellant had renounced the contract as a whole or a fundamental obligation under the contract. Whilst Mr Richardson had removed the signage to look for other work, it is apparent from the evidence given by Mr Willis and from the emails Mr Cole sent to Mr Richardson on 20 March 2012 and 26 March 2012 that it was plain that if the appellant did not reach agreement to continue the Gingin run, the respondent would terminate the contract. In the circumstances, when the contract was under threat of termination, the fact that Mr Richardson took steps to prepare the truck to look for other work is not unreasonable. The appellant did not, however, cease to carry out the contract or otherwise evince an intention not to carry out the contract. Nor can the nature of the obligation of signage be described as fundamental.

83 For these reasons, I am of the opinion that ground 5 has been made out.

Conclusion

84 I am of the opinion that the respondent was not entitled to terminate the owner-driver contract without notice and that an order should be made by this Full Bench to suspend the operation of the decision of the Tribunal and remit the case to the Tribunal for further hearing and determination.

KENNER C:

85 The respondent, the Damien Cole Group conducts the business of the transport of offal and abattoir waste from abattoirs in the South West of the State and from retail outlets in the Perth metropolitan area, for disposal at designated sites. The appellant, Shacam Transport Pty Ltd, through its director Mr Richardson, was party to an owner driver contract made under the Owner-Drivers (Contracts and Disputes) Act 2007 with DCG. Under the contract, Shacam purchased a prime mover to undertake haulage of DCG's trailers, in providing the services. The work performed by DCG is undertaken on behalf of its client, the Craig Mostyn Group, a company engaged in the agricultural business.

86 Mr Richardson commenced work under the contract in February 2011. All seemed to proceed well for about a year or so. In early 2012, a change to the work arrangements for the owner drivers was proposed by DCG. This change involved the incorporation of additional work, in the form of a regular trip to an abattoir in Gingin. This work was, to that time, performed separately by another owner driver. It was proposed that Mr Richardson, and the other owner drivers, agree to include this as a part of their regular work. The previous owner driver was being paid the rate of $580 for each trip for the work concerned. This rate was not going to continue. There was no rate agreed between Mr Richardson and DCG at the time, rather it was to be "worked out" at a later time.

87 After undertaking a couple of trips only, when Mr Richardson discovered the rate that DCG was paying for this work, he declined to continue with it. As a result, DCG contended that Shacam was in breach of its contract, and along with the decision by Mr Richardson to remove DCG's signage from his truck, DCG considered there were grounds to terminate the contract without notice which it did. Subsequently Shacam commenced proceedings in the Tribunal claiming damages in the sum of $41,700 for payment in lieu of reasonable notice on termination of the contract, and also another amount said to be wrongly deducted from final payments made to Shacam by DCG.

88 A threshold issue raised by Shacam before the Tribunal was whether there was a valid contract in relation to the Gingin work, by reason of there being no agreement as to what remuneration would be payable. What the rate was proposed to be was the central issue in the proceedings at first instance. In the end, the Tribunal found on the evidence, that no rate was agreed at the time. Rather, the Tribunal found that an "appropriate rate" would be paid "in due course" and that the rate "would be worked out": AB 18. It was common ground at first instance, that there was no negotiation or agreement between Mr Richardson and DCG, as to the remuneration for the Gingin work before he undertook any of the work. Also, despite there being some discussion between Mr Richardson and Mr Cole of DCG, after Mr Richardson discovered the rate he was being paid for this work, it was clear on the evidence before the Tribunal, that DCG was not going to change its mind about the rates it had determined for this particular work: AB 14.

89 A second issue also arose at this time. That issue was Mr Richardson's removal of some signage on his truck bearing the DCG name. The Tribunal concluded that it was an implied condition of the contract that the signage be maintained. Accordingly, on Mr Richardson's removal of the signage from his truck, the Tribunal concluded that this was a "serious breach of a condition of the contract": AB 20. It was held by the Tribunal that this conduct by Mr Richardson also constituted a repudiation of the contract with DCG, and accordingly, his claim for damages was dismissed.

90 Shacam now appeals against the Tribunal's decision. Following an amendment granted by leave of the Full Bench, there are five grounds of appeal. Two issues arise for consideration on the appeal grounds. The first relates to grounds 1 and 2. The second relates to grounds 3, 4, and 5. The issues can be posed as questions as follows:

(a) Did the Gingin work constitute a valid variation of the owner driver contract between Shacam and DCG; and

(b) Was the signage on Shacam's truck an essential condition of the contract and did its removal give rise to a right in DCG to terminate the contract for breach and/or constitute a repudiation of the contract?

91 If the answer to these questions is no, then the appeal must be allowed. For the following reasons, I would answer these questions in the negative, and accordingly, allow the appeal.

Gingin work – a valid contract?

92 In the proceedings at first instance, the Tribunal posed the question for resolution as follows at par 40 of its reasons (AB 17) as:

> The question in this matter is whether Shacam breached the contract with DCG such as to enable DCG to bring the contract to an end without notice, or whether reasonable notice was due.

93 Despite the issue of the validity of the purported variation of the contract between Shacam and DCG to incorporate the Gingin work being put in issue, the Tribunal proceeded on an assumption, without determining the matter, that there was a valid contract and determined the issue of whether it had been breached. With respect, the Tribunal was in error in doing so. The Tribunal, the validity of the variation having been put in issue as a threshold point, was required to determine that issue, as a necessary step in determining whether Shacam had breached its contract with DCG (see AB 40; 82-83; 129-130; 137-138).

94 The Tribunal found on the evidence, which is not challenged on this appeal, that Mr Richardson agreed to include the Gingin run "not on a conditional basis, but on a permanent basis" (par 44 reasons AB 18). Based on the evidence and indeed it was common ground, that the question of remuneration payable to Mr Richardson was not then agreed, but was to be resolved some time later. In this respect, the Tribunal made the findings I have referred to earlier.

95 Whether a contract (or a variation) is validly made, requires the presence of four essential elements of offer and acceptance; valuable consideration; an intention to create legal relations; and certainty of terms (see generally Seddon NC and Ellinghaus MP, *Cheshire and Fifoot's Law of Contract* (8th ed, 2002) 10-24). An issue arising on this appeal relates to the latter element, that being whether the contract was sufficiently certain to be enforceable. A further, and related question, is whether the contract was complete, in the sense that all of the essential terms for its effective operation, were agreed. DCG maintains that the "Gingin contract" was complete and certain. Shacam contended it was not. In my view, for the following reasons, Shacam's position on this issue is to be preferred.

96 As a general proposition, courts and tribunals will endeavour, as far as possible, to uphold contracts, in particular commercial contracts: ***The Council of the Upper Hunter County District v Australian Chilling and Freezing Co. Limited*** (1968) 118 CLR 429; ***Meehan v Jones*** (1982) 149 CLR 571; ***Hillas & Co Ltd v Arcos Ltd*** [1932] All ER 494.

97 In relation to the principle of incompleteness of agreements, LexisNexis, *Carter on Contract* (at 11 September 2013) [04-120] states as follows:

> **3. INCOMPLETENESS**
>
> ***General principle:***
>
> An agreement is void for incompleteness where an essential part of the agreement is incomplete.
>
> **[04-120] Agreement incomplete**
>
> The guiding principle in relation to incomplete agreements was stated by Gibbs CJ, Murphy and Wilson JJ in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*[footnote 1 omitted] in the following terms:
>
> > It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future.
>
> Although this statement places the rule as to incompleteness in the context of agreements which amount to agreements to agree, it is applicable both to preliminary agreements and agreements which have simply not been fully negotiated. Accordingly, a contract will fail for incompleteness where, even though the language used may be quite clear in its

meaning, if some essential, material or important part of the bargain has not been agreed upon.[footnote 2 omitted] For example, in *May and Butcher Ltd v R* [footnote 3 omitted] an agreement was incomplete where it referred to a sale of goods at prices to be agreed. More recently, in *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [footnote 4 omitted] an agreement in principle was incomplete where essential terms were still to be agreed. It therefore did not constitute a valid partnership contract.

Equally, however, whenever an essential or material term is uncertain, the effect is to make the agreement incomplete. To this extent at least, the analytical distinction between uncertainty and incompleteness is illusory. Thus, the agreement in *Whitlock v Brew* [footnote 5 omitted] for a lease 'upon such reasonable terms as commonly govern such a lease', was not only uncertain, it was also incomplete where both the term and the rent were still to be agreed. Again, in *Tern Minerals NL v Kalbara Mining NL* [footnote 6 omitted] a joint venture agreement was incomplete where a provision required agreement to 'usual' terms. It could not be said that the wording of any particular clause was 'usual' and the term was also meaningless until there was agreement on the particular terms contemplated.

Although the applicable rule is frequently stated in terms of 'essential', 'vital' or 'material' terms, these are relative concepts and therefore, when taken in the abstract, somewhat ambiguous. [footnote 7 omitted] It is impossible to apply the rule without determining what terms are necessary to the particular contract. Such necessity may arise on four main bases.

> *First*, an agreement cannot be binding as a contract unless the parties have reached agreement on those terms which are legally necessary to constitute a contract.[footnote 8 omitted]

In the nature of things, every contract has a minimum content. Obvious illustrations are the price, duration of the contract, and the parties to the contract. For example, in *Custom Credit Corp Ltd v Gray* [footnote 9 omitted] a term stating the dates for payment of instalments under a credit contract was regarded as an essential provision for that type of contract.

> *Second*, a rule of law or statute may make agreement on a particular term essential.

An illustration is the rule which requires the price payable for land under a sale of land contract to have been the subject of agreement. Thus, in *Hall v Busst* [footnote 10 omitted] an option to purchase land was void where it provided for the price to be a specific sum plus a reasonable sum for improvements and minus a reasonable sum for deficiencies in chattels and depreciation of property.

> *Third*, a market custom or usage may make agreement on a particular term essential.

An illustration is *CPC Consolidated Pool Carriers GmbH v CTM Cia Mediterranea SA (The CPC Gallia)*, [footnote 11 omitted] where the relevant custom or practice was that an agreement for charterparty was presumed to be incomplete by reason of being 'subject to details'.

> *Fourth*, the parties may have stamped a particular term with the character of essentiality, by agreeing that there is to be no contract unless and until the term is agreed.

For example, in *Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd (The Gladys) (No 2)* [footnote 12 omitted] although only matters of 'detail' were outstanding in negotiations for the sale of a vessel as scrap, the parties did not intend to be bound unless and until these had been resolved.

However, care must be taken when applying this categorisation. For example, although the price payable under an executory sale of goods must be regarded as an essential term, [footnote 13 omitted] the absence of agreement may not be fatal. Any contract which is otherwise incomplete may contain a machinery provision which allows the contract to be completed.[footnote 14 omitted] In certain cases it will be possible to imply a term[footnote 15 omitted] to complete the contract. Severance may also be possible.[footnote 16 omitted] Moreover, even if an agreement for the sale of goods or supply of services is incomplete, where the agreement is partially performed there may be a liability under statute or in restitution.[footnote 17 omitted]

98 It is not in all cases where an essential term is absent, that a contract will fail for uncertainty or incompleteness. In the case where an essential or important term may not be finally agreed, but the parties have included a mechanism to determine it, the contract will be upheld: ***Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*** (1991) 24 NSWLR 1 at 19 per Kirby P (Waddell A-JA agreeing); ***Upper Hunter County District*** per Barwick CJ at 437. Similarly, in cases where there exists some objective external standard by which an otherwise incomplete term could be ascertained, the contract may be upheld. Thus, in ***Hall v Busst*** (1960) 104 CLR 206, by a majority (Dixon CJ, Fullagar and Menzies JJ; Kitto and Windeyer JJ dissenting) a contract providing for the payment of "fair value" was held to be effective, in circumstances where there existed a recognised standard of value to measure the price (at 216; 222-223 and 231-235).

99 In the case of contracts of employment or in owner-driver contracts such as presently under consideration, the price or remuneration to be paid for the provision of the services under the contract, is arguably one of, if not the most important term. In the case at hand, there was no agreement as to this crucial term. There was also no mechanism agreed, on the evidence, or an external standard, contained in the contract, by which such a term could be made certain. The "appropriate rate" or the rate "to be worked out", which were the findings of the Tribunal at first instance, could not be resolved between the parties, by an agreed mechanism. Indeed, on the evidence, it seems that the rate was determined unilaterally by DCG, without any input from Shacam at all. There was evidence that Shacam accepted that DCG would strike an appropriate rate. As I have already noted above, the evidence and the finding of the Tribunal also was, that the rate determined by DCG was not going to be reviewed. There clearly was no negotiation or consensus as to this important issue. The parties to the contract were not *ad idem* on the issue of remuneration for the Gingin work.

100 Accordingly, there was no contractual obligation on Shacam to perform the Gingin run. As such, there could be no breach of the contract in Shacam declining to perform this work. The Tribunal was, therefore, in error in concluding that Shacam's refusal to continue to do this work, constituted a breach of the contract, entitling DCG to terminate the contract without notice.

Signage

101 No issue is taken by Shacam on this appeal, that the contract between it and DCG contained an implied term in relation to signage on Shacam's truck. There was a finding by the Tribunal at first instance on the evidence, that it was an implied term for the signwriting on Shacam's truck not to be removed: AB 18. Put another way, it was an implied term of the contract between Shacam and DCG that Shacam's truck have DCG's signwriting on it. The Tribunal concluded that the requirements for implication, as set out in ***Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales*** (1982) 149 CLR 337 were met in this case: AB 18.

102 Having come to this conclusion, the Tribunal then found that the signage "was a condition of the contract that, once the signwriting was put onto its truck by DCG, Shacam not [sic] remove that signwriting without the agreement of DCG. It was essential that the truck be branded as part of DCG's fleet": AB 18-19. The Tribunal then concluded that the removal of the signage by Shacam was, in the circumstances, "a serious breach of a condition of the contract" and "… it also entitled DCG to bring the contract to an end": AB 20. In addition to a serious breach of contract, the Tribunal also concluded that the removal of the signage constituted a repudiation by Shacam of the contract "by refusing to perform part of the contract" and by showing "an intention to no longer be bound by the contract": AB 20.

103 Consideration of this issue on the appeal requires an analysis of relevant legal principle in relation to the classification of terms of a contract and the doctrine of repudiation, in the context of the evidence and the facts as found by the Tribunal.

Condition of the contract?

104 Shacam contended that the term was not an important condition, giving rise to right in DCG to terminate the contract for breach. Shacam submitted that the term was either a less important warranty, or an intermediate term.

105 Whether a term of a contract can be regarded as a condition, and therefore give rise to the right of termination of the contract, was considered in ***Tramways Advertising Pty Ltd v Luna Park (N.S.W.) Ltd*** (1938) 38 SR (NSW) 632. In this case, Jordan CJ said at 641-642:

> The nature of the promise broken is one of the most important of the matters. If it is a condition that is broken, i.e., an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and to recover damages for loss of the contract, or else to keep the contract on foot and recover damages for the particular breach. If it is a warranty that is broken, i.e., a nonessential promise, only the latter alternative is available to the innocent party: in that case he cannot of course obtain damages for loss of the contract: *A.H. McDonald* & *Co. Pty. Ltd.* v. *Wells.*[footnote 1 omitted]
>
> The question whether a term in a contract is a condition or a warranty, i.e., an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor: *Flight* v. *Booth*[footnote 1 omitted]; *Bettini* v. *Gye* [footnote 2 omitted]; *Bentsen* v. *Taylor Sons* & *Co. (No.* 2) [footnote 3 omitted]; *Fullers' Theatres Ltd.* v. *Musgrove* [footnote 4 omitted]; *Bowes* v. *Chaleyer* [footnote 5 omitted]; *Clifton* v. *Coffey.* [footnote 6 omitted] If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge. In some cases it is expressly provided that a particular promise is essential to the contract, e.g., by a stipulation that it is the basis or of the essence of the contract: *Bettini* v. *Gye*[footnote 7 omitted]; but in the absence of express provision the question is one of construction for the Court, when once the terms of contract have been ascertained: *Bentsen* v. *Taylor Sons* & *Co. (No.* 2) [footnote 8 omitted]; *Clifton* v. *Coffey.* [footnote 9 omitted]

106 On appeal to the High Court in ***Luna Park (N.S.W.) Limited v Tramways Advertising Proprietary Limited*** (1938) 61 CLR 286, Latham CJ said at 302:

> I agree with the Full Court that the guarantee clause was a condition and not a warranty in the sense in which those words are used by *Fletcher-Moulton* L.J. in *Wallis, Son & Wells v. Pratt & Haynes*[footnote 1 omitted]. It was a term of the contract which went so directly to the substance of the contract or was so "essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all." The breach of such a term by one party entitles the other party not only to obtain damages but also to refuse to perform any of the obligations resting upon him.

107 Further, at 303, Latham CJ continued:

> the question is whether a promise is a condition or a warranty, "there is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out" (per *Bowen* L.J. in *Bentson v. Taylor, Sons & Co. (No. 2)* [footnote 1 omitted]); and see *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 333.

108 It is necessary therefore, to examine the evidence at first instance in relation to the requirement to maintain signage on the truck, in the context of the owner-driver contract between Shacam and DCG and the relevant conduct of the parties in relation to this issue.

109 Mr Richardson's evidence was that he understood that it was DCG's signage that was put on his truck. The signage, which were "stickers" were made out of vinyl. Mr Richardson accepted that he removed them: AB 50. He said he did so to undertake some repairs on the cab of the truck in order that the paintwork may be "cut and polished". As to the issue of signage and the association with DCG, Mr Richardson testified that he did not remove the stickers because he no longer wished to work for DCG. He said that he wore a uniform each day with a name tag on it and that the trailers on his truck had DCG signage "all over them" and they "come two metres high": AB 51 and 70. As to the signage on the trailers, exhibit R2, a photograph of the truck and trailer of the type driven by Mr Richardson, revealed that the trailers are well covered with DCG logos and a maple leaf pattern of signage is prominently displayed all over the trailer. The trailer is also painted with green trim, the same colour as the maple leaf signage.

110 In relation to the question of whether it was ever communicated to him by DCG, that the signage on the truck was a requirement, Mr Richardson responded that this was never put to him: AB 53. In cross-examination, Mr Richardson testified that he was not told of any requirement to have signage, but when DCG requested it he had no objection, and after a discussion with the workshop manager, when he went to work one morning, he found the stickers were attached to his truck: AB 59-60. Whilst Mr Richardson said that he probably should have informed DCG that he had removed the signage to undertake the repairs to the paintwork on his truck, he said that he could not understand how the removal of some stickers from his truck, would suggest that he did not wish to work for DCG any longer. Mr Richardson testified that he regarded the stickers as "a trivial matter" and that his truck was still presented each day for work, in a clean and tidy state, and he wore his uniform each day: AB 67-68.

111 As to the DCG position on this issue, Mr Cole, the proprietor of the business, testified that he first heard of Mr Richardson's removing the signage from his truck, from his manager, a few days prior to the termination of the contract. Mr Cole said that he was not aware of the reason given by Mr Richardson for removing the signage, until he had given his evidence in the proceedings at first instance: AB 94. Mr Cole testified that he had heard "whispers" and he "thought" that the removal of the signwriting by Shacam from the truck was an indication that Mr Richardson was going to leave: AB 95. Mr Cole admitted however, that his view that Shacam had other work and was going to leave was based on hearsay: AB 104. There was no evidence that these beliefs were ever put to Mr Richardson by Mr Cole or anyone else from DCG.

112 In terms of the time at which the contract was entered into between Shacam and DCG, Mr Cole said in cross-examination, that he could not remember it even being specified that the signage on the truck was a requirement. He considered that it would have been "mentioned in conversation": AB 101. Importantly as to this issue, when asked in cross-examination about Mr Richardson's testimony that he intended to cut and polish his truck, and the signage on it, Mr Cole responded at AB 102 as follows:

> – Mr Richardson's evidence was that he was going to cut and polish – wanting to cut and polish the truck?---I – I find that strange that he was going to cut and polish the truck. We – we run 20, 30, 40 pieces of equipment with the – the same signage on them; when we tried to – when we asked Richardson to sign write the truck, he started in January I think or February and he had – he told us then he couldn't have it sign written immediately because his son was a panel beater and he was cut and polishing his truck and refurbing it before the signs went on and I don't think the signs went on his truck until June, July as I recalled and I find it strange how they had to come off again less than 12 months later but, yeah.

113 This testimony is completely at odds with the assertion of DCG that the signage on the truck was of such importance that a failure to maintain it, constituted a breach of the contract. The uncontested evidence was that Shacam operated its truck without the DCG signage on it for about the first six months of the contract, with the knowledge and acquiescence of DCG. This evidence alone is, in my view, fatal to the proposition that signage on Shacam's truck was of such importance as to constitute an essential term, non-compliance with which would give rise to a right in DCG to terminate the contract without notice for fundamental breach. If signage was as important as DCG maintained, Shacam's truck would not have been allowed on the road without it.

114 Even if the term in relation to signage could be classified as an intermediate term, to give rise to the right of DCG to terminate the contract, "depend[s] entirely upon the nature of the breach and its foreseeable consequences": ***Hong Kong Fir Shipping Company Limited v Kawasaki Kisen Kaisha Limited*** [1962] 2 QB 26. It is only if a breach of such a term is serious, that a right to terminate the contract arises (see generally Lindgren KE, Carter JW and Harland DJ, *Contract Law in Australia* (1986) 205-206). In this case, for the reasons already mentioned, it could not be concluded on the evidence, that the removal of the signage by Shacam had any such serious consequences.

115 Accordingly therefore, in my view, the Tribunal was in error in concluding that the removal of the signage by Shacam constituted a serious breach of the contract.

Repudiation of the contract

116 At first instance, the Tribunal concluded that by removing the signwriting from the truck, Shacam evinced an intention to no longer be bound by the contract. This, according to the Tribunal, entitled DCG to terminate the contract without notice: AB 32.

117 For the reasons that I have already outlined above in relation to the alleged breach of a condition, the conduct of Shacam could not be regarded as a repudiation of the contract. It is well settled that the principle of repudiation of a contract by a party, is based on the proposition that a party evinces an intention to no longer be bound by the contract, or to perform the contract in a fundamentally different way to that originally intended: ***Shevill v The Builders Licencing Board*** (1982) 149 CLR 620; ***Laurinda Pty Limited v Capalaba Park Shopping Centre Pty Limited*** (1989) 166 CLR 623. Not only was the removal of the signage by Shacam from its truck, not related to an important condition of the contract, but there was no evidence that the

removal of the signage had any material impact on the performance of the contract between the parties. The removal of the signage, as Shacam correctly pointed out in its submissions, did not in any sense deprive DCG of the benefit of the contract or substantially alter the basis of the contract originally entered into between the parties.

118 The evidence was that after he removed the signage from the cab of the truck, Mr Richardson continued to undertake his trips to the Southwest, carting offal as usual, for at least two days on 26 and 27 March 2103 without any difficulty: AB 103; 141. As already noted above, Mr Richardson presented at work with his truck, in a clean and tidy condition, dressed in his uniform ready for work: AB 68; 139. In any event, given that Shacam worked for about the first six months of its contract with DCG without the signage on its truck, it is difficult to see how the removal of it at the time, could give rise to a right to terminate the contract. Accordingly, there was no repudiation of the contract by Shacam in this case, entitling DCG to terminate the contract without notice.

Conclusions

119 In the circumstances, the appropriate order to make under s 49(5) of the Act is to suspend the operation of the decision at first instance, and remit the case to the Tribunal for further hearing and determination.

MAYMAN C:

120 I have had the benefit of reading a draft of 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 00908

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHACAM TRANSPORT PTY LTD
	APPELLANT
	-and-
	DAMIEN COLE PTY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 23 OCTOBER 2013
FILE NO.	FBA 4 OF 2013
CITATION NO.	2013 WAIRC 00908

Result	Appeal allowed
Appearances	
Appellant	Mr A M Dzieciol (of counsel)
Respondent	Mr J Uphill, as agent

Order

This appeal having come on for hearing before the Full Bench on 20 August 2013 and having heard Mr A M Dzieciol (of counsel) on behalf of the appellant and Mr J Uphill, as agent, on behalf of the respondent and reasons for decision having been delivered on 18 October 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 in order 2 made by the Commission sitting as the Road Freight Transport Industry Tribunal on 20 May 2013 in matter No RFT 13 of 2012, [2013] WAIRC 00294; (2013) 93 WAIG 637 is suspended.
3. Order 2 in RFT 13 of 2012 is remitted to the Commission sitting as the Road Freight Transport Industry Tribunal at first instance for further hearing and determination.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS—Application for—

2013 WAIRC 00874

CIVIL SERVICE ASSOCIATION WESTERN AUSTRALIA POLICE AUXILIARY OFFICERS' AWARD 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 18 OCTOBER 2013
FILE NO/S	PSAA 1 OF 2010
CITATION NO.	2013 WAIRC 00874

Result	Award issued
Representation	
Applicant	Mr M Shipman and Ms S Van Der Merwe
Respondent	Mr B Entrekin

Order

HAVING HEARD Mr M Shipman and Ms S Van Der Merwe on behalf of the applicant and Mr B Entrekin on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and by consent, hereby orders –

THAT the *Civil Service Association Western Australia Police Auxiliary Officers' Award 2013* be made in accordance with the following schedule and that such award shall have effect from the first pay period commencing seven (7) days after the date the award issues.

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

SCHEDULE

1. AWARD STRUCTURE

1.1 - TITLE

This award shall be known as the Civil Service Association Western Australia Police Auxiliary Officers' Award 2013.

1.2 – ARRANGEMENT

Schedule E – Annual Leave Travel Concession Boundaries

1.3 – AREA OF OPERATION

This award shall apply throughout the State of Western Australia.

1.4 – SCOPE

This award shall apply to Police Auxiliary Officers appointed under Part IIIB of the *Police Act 1892* by the Commissioner of Police who are of a class of employee to which representational rights has been extended to The Civil Service Association of Western Australia Incorporated by the decision FBM 10 of 2010.

1.5 – TERM OF AWARD

This award shall remain in force until such time as it is cancelled or replaced.

1.6 – DEFINITIONS

In this award, the following expressions shall have the following meaning:

"Agency" means the Western Australia Police.

"Award" means the Civil Service Association Western Australia Police Auxiliary Officers' Award 2013.

"Casual" means an employee engaged by the hour as determined by the employer.

"Commissioner" means the Commissioner of Police appointed pursuant to the provisions of the *Police Act 1892.*

"Commercial accommodation" includes, but is not limited to, hotels, motels, serviced apartments, bed and breakfasts, road house or self-contained accommodation.

"De facto partner" means a relationship (other than a legal marriage) between two persons, of either different sexes or the same sex, who live together in a "marriage-like" relationship, as provided for by the *Interpretations Act 1984* as amended from time to time.

"Dependant" in relation to an employee (other than for the purpose of district allowance) means:

1. partner,
2. child/children; or
3. other dependant family

who reside with the employee and who rely on the employee for main support.

"Emergency" means:

1. an unforseen urgent crisis;
2. serious public disorder; and
3. searches

but shall not include normal Police Auxiliary Officer activity or the prevention of payment of any penalty provision covered by this award in normal Police Auxiliary Officer duty or a requirement to attend Court outside a rostered shift.

"Employee" means any person appointed as a Police Auxiliary Officer.

"Employer" means the Commissioner of Police.

"Family" in relation to an employee means the employee, partner and all dependant children living with the employee.

"Fixed Term Contract" means the appointment to a position whereby the dates of commencement and termination of employment are specified in writing to the employee.

"Headquarters" means the place in which the principal work of an employee is carried out, being either the Perth Watch House or an assigned district/division/portfolio, as defined by the employer.

"Irregular Part-time Employee" means a part-time employee who is employed to work on an irregular basis, a set amount hours over a prescribed period (e.g. 200 hours over 6 months).

"Known Situations" for the purposes of Clause 3.1 – Hours of Duty means operational circumstances which are not 'emergency' or 'public interest' as defined but situations where it is anticipated in advance that additional employees will be needed on a particular shift.

"Medical Practitioner" has the same meaning as it has in the *Health Practitioner Regulation National Law (WA) Act 2010.*

"Metropolitan Area" means the area within a 50 kilometre radius of the Perth City Railway Station.

"Motor Vehicle Allowance" – the following expressions shall have the following meaning in respect to Motor Vehicle Allowance:

1. "A year" means 12 months commencing on 1 July and ending on 30 June next following.
2. "Metropolitan Area" means that area within a 50 kilometre radius from the Perth City Railway Station.
3. "South West Land Division" means the South West Land Division as defined by Schedule One of the *Land Administration Act 1997* excluding the area contained within the Metropolitan Area.
4. "Rest of State" means that area south of 23.5 degrees south latitude, excluding the Metropolitan Area and the South West Land Division.

"Normal Wages" for the purposes of Clause 5 means wages as provided at Clause 5.1 and does not include overtime or other additional allowances.

"North West" means all that part of the State north of the 26$^{th\circ}$ south parallel of latitude and shall be deemed to include Shark Bay.

"Officer in Charge" means an employee who is the Officer in Charge of a police station in the Metropolitan Area, a police station located outside the Metropolitan Area and who resides in that locality, or an employee relieving in such position.

"Part-time Employee" means an employee who is regularly employed to work less than 40 hours per week.

"Partner" means an employee's spouse or de facto partner.

"Police Auxiliary Officer in Training" means an employee undertaking Academy based initial training.

"Practicable" means practicable in the fair and reasonable opinion of the employer. Provided that if any dispute shall arise as to whether in any case such opinion is fair and reasonable, the dispute shall be determined in accordance with the dispute settlement procedure contained herein.

"Public Event" shall be deemed to include the following:

1. The Christmas/ New Year Road Safety Campaign;
2. Easter Road Safety Campaign;
3. Channel 7 Christmas Pageant;
4. Royal Agriculture Society Show;
5. Australia Day Skyshow;
6. Anzac Day Services and Marches;
7. City to Surf Fun Run;

and similar such events.

"Public Holiday" shall be deemed to include the following:

1. New Year's Day;
2. Australia Day;
3. Good Friday;
4. Easter Monday;
5. Christmas Day;
6. Boxing Day;
7. Anzac Day;
8. Sovereign's Birthday;
9. Western Australia Day (formerly Foundation Day); and
10. Labour Day;

"Public Interest" means:

1. protection of life or property caused by extraordinary events; and
2. security of Heads of State/ Public Figures and special events; and
3. searches

but shall not include normal Police Auxiliary Officer activity or the prevention of payment of any penalty provision covered by this award in normal Police Auxiliary Officer duty or a requirement to attend Court outside a rostered shift.

"Public Transport" means any means of public transport approved by the employer.

"Region" means region of the State within the meaning of section 39(2) of the *Police Act 1892*.

"Special Area" means:

1. any portion of the State that is:
   (i) east of longitude 119 degrees east; or
   (ii) north of the 26 degrees of south latitude;
2. Yalgoo, Mount Magnet, Cue and Meekatharra; and
3. any area outside the State designated a special area by the employer.

"Specific Managerial Requirements" means any specific requirement in relation to the Code of Conduct, Occupational Safety and Health, Operational Requirements and/or Diversity.

"Spouse" means a person who is lawfully married to that person.

"Union" means the Civil Service Association of Western Australia Incorporated.

"WAIRC" means the Western Australian Industrial Relations Commission.

1.7 – COPIES OF AWARD

Every employee shall be entitled to have access to a copy of this award. Sufficient copies shall be made available, either in hard copy or by modern electronic means by the employer for this purpose. Where a hard copy is requested it shall be made available.

2. CONTRACT OF SERVICE

2.1 – CERTIFICATE OF SERVICE

On request, the employer shall issue to an employee upon redundancy, retirement, resignation or where contracts of service expire through the effluxion of time, a Certificate of Service containing full information as to the periods of service and nature of duties performed by the employee.

2.2 – PROBATION

(1) All employees appointed to the position of Police Auxiliary Officer will be subject to a probationary period of nine months.

(2) At any time during the period of probation the employer may annul the appointment and terminate the services of the employee by the giving of one week's notice or payment in lieu thereof.

(3) At any time during the period of probation the employee may annul the appointment and terminate their services by the giving of one week's notice or the payment or forfeiture of one week's wages in lieu thereof.

(4) Prior to the expiry of the period of probation, an assessment will be made of the employee's performance, efficiency and conduct. The employer shall have a report completed in respect to these matters; and

(a) confirm the appointment; or

(b) extend the period of probation and provide the employee with the necessary support and remedial action to assist the employee to meet the requirements of the position. The maximum period of probation shall not exceed 12 months; or

(c) terminate the services of the employee by giving one week's notice or payment in lieu thereof.

2.3 – TERMINATION OF EMPLOYMENT

(1) An employee shall give the employer written notice of intention to resign of not less than:

(a) four weeks; or

(b) such other period as specified in the employee's contract of service, where applicable.

(2) An employee who fails to give the required notice forfeits the sum of $500, unless agreement is reached between an employee and the employer for a shorter period of notice than that specified.

(3) Where an employee's services are terminated for any reason other than dismissal, that employee shall be given written notice of:

(a) four weeks; or

(b) such other period as specified in the employee's contract of service, where applicable.

(4) The period of notice for an employee, who at any time of being terminated is over 45 years of age and has completed at least two years continuous service with the employer, shall be increased by one week.

(5) The employment of a casual employee may be terminated at any time by the casual employee or the employer giving to the other, one hour's prior notice. In the event of an employer or casual employee failing to give the required notice, one hour's wages shall be paid or forfeited.

3. HOURS OF WORK

3.1 - HOURS OF DUTY

For the purpose of this clause "Work Area" refers to an employee's current work area, sub district or district (or parts thereof) as determined by the employer.

(1) Ordinary Hours of Duty

(a) The ordinary hours of duty are 38 hours per week or 76 hours per fortnight.

(b) Notwithstanding subclause (a) above, the actual hours of duty are 40 hours per week or 80 hours per fortnight and the additional hours worked are compensated for in the established wage rates as specified in Clause 5.1 – Wages.

(c) The actual hours of duty of 40 hours per week shall be used as the divisor for all purposes of this award.

(d) A work area's permanent roster pattern may be changed by the employer provided a minimum of one month's notice is given to all employees affected by the change (except in accordance with subclause (8) - Posting and Varying a Roster).

(3) All rosters shall have weekly leave days off rostered together where practicable.

(2) Termination of a roster pattern

Any roster may be terminated in any of the following circumstances:

(a) there is mutual agreement between the employer and the affected employees; or

(b) there is a bona fide health and safety issue; or

(c) the roster is failing to meet the operational objectives of the work area.

(3) Standard Rosters

40 hours per week is to be worked as 5 x 8 hour shifts or 4 x 10 hour shifts as rostered.

(a) Employees may be rostered on a Standard Roster to perform duties on more than one category of shift during any weekly period. However such a combination of shifts shall be subject to the following provisions:

(i) An employee may be rostered to work on day and afternoon or day and evening shifts in any weekly period.

(ii) An employee may be rostered to work on afternoon and evening shifts in any weekly period.

(iii) Except as provided in subclause (3)(b) of this clause, any combination of day/night or afternoon/night shifts shall not be rostered.

(iv) An employee may be rostered to work evening and night shifts in any weekly period, provided that the shift start times do not vary more than two hours.

(v) The combination of shifts will not be alternated on a daily basis eg day-afternoon-day-afternoon or afternoon-day-afternoon-day-afternoon.

(vi) Where as a result of attendance at Court, from matters arising during the course of an employee's duties, a combination of afternoon and day shift or evening and day shift or, in the case of a flexible roster, night and day shift is rostered in any week an amount equivalent to the shift allowance provided under Clause 6.2 – Shift Allowance shall be paid for each day shift rostered due to the attendance at Court.

(b) Shifts on Standard Rosters shall be worked as required by local conditions provided that:

(i) such changes as prescribed in this subclause, shall be indicated in advance on rosters when rosters are posted in accordance with subclause (8) of this clause; and

(ii) in accordance with Occupational Safety and Health principles, additional employees may be rostered on particular days from day shift on to afternoon, evening or night shift in any week to cover "Known Situations".

(c) Shifts on Standard Rosters shall be distributed equally between all shift working employees, with the exception of part-time employees, during a three month roster cycle or such other cycle as agreed between the supervisor and majority of affected employees.

(4) Alternative working arrangements to a Standard Roster

(a) Notwithstanding the above, where it is considered necessary to provide more efficient operations, the employer may authorise the operation of alternative working arrangements in the work area.

(b) The continuing operation of any alternative working arrangements, so approved, will depend on the employer being satisfied that the efficient functioning of the work area is being enhanced by its operation.

(c) Such alternative working arrangements shall be deemed to be Flexible Rostering Arrangements.

(5) Flexible Rostering Arrangements

The average of 40 hours per week is to be worked in any combination of between 6 to 12 hour shifts over an agreed period, as determined by the employer.

(a) All rosters:

(i) must be developed in consultation with affected employees;

(ii) must meet operational and service delivery requirements; and

(iii) must comply with relevant Occupational Safety and Health legislation and guidelines.

(6) Shift Work Provisions

(a) Employees shall be designated to work prescribed hours of duty in the category of shifts as set out below:

(i)	Day Shift:	Any shift which commences on or between the hours of 6.00 am and 10.30 am each day.
(ii)	Afternoon shift:	Any shift which commences on or between the hours of 11.00 am and 4.30 pm each day.
(iii)	Evening shift:	Any shift which commences on or between the hours of 5.00 pm and 7.30 pm each day.
(iv)	Night shift:	Any shift which commences on or between the hours of 8.00 pm and 05.30 am each day.

(7) Shifts shall be worked as required by local conditions provided that:

(a) in accordance with Occupational Safety and Health principles, additional employees may be rostered on particular days from day shift onto afternoon, evening or night shift in any week to cover "Known Situations";

(b) such changes as prescribed in subclause (7)(a) of this clause, shall be indicated in advance on rosters when rosters are posted in accordance with subclause (8) of this clause;

(c) shifts shall be distributed equally between all shift working employees, with the exception of part-time employees, during a three month roster cycle or such other cycle as agreed between the supervisor and majority of affected employees.

(8) Posting and Varying a Roster

(a) Unless a permanent roster is in place in accordance with subclause (3) or (5) of this clause, a roster shall be posted at each place of employment not later than 1.00 pm on the Tuesday preceding the week to be worked, except fortnightly rosters which shall be posted at each place of employment no later than 1.00 pm on the Tuesday preceding the fortnight to be worked. The roster will show hours of duty and rest days for the ensuing week or fortnight. Such rosters may be varied or suspended by the Officer in Charge in an "emergency", where such action is in the "public interest", or where such action represents "Specific Managerial Requirements".

(b) Subject to any arrangements under subclause (5) of this clause or any arrangements under subclause (8)(c) of this clause, the starting times of shifts may be varied daily. An employee shall where practicable be given 24 hours notice of any alteration to the start time of his or her rostered shift. The variation shall be to starting times only, within the parameters of the rostered shifts as specified in subclause (7) of this clause.

(c) The shift type, that is day, afternoon, evening or night shift, may not be altered after the roster is posted except as provided in subclause (7)(a) of this clause.

(d) Weekly leave days off shall be rostered together where practicable.

(9) Broken Shifts

Notwithstanding the provisions of this clause the daily hours may be worked as a broken shift:

(a) if the employee applies in writing for permission to work such shifts; and

(b) if the employer agrees.

(10) Meal Breaks

(a) Each ordinary shift shall include a meal period of 30 minutes, which shall commence at a time within the 4th, 5th or 6th hour of the commencement of an eight hour shift or within the 5th, 6th or 7th hour of the commencement of a 10 hour shift. This meal period shall be considered as time worked.

(b) Should circumstances arise whereby an employee is prevented by continuous duty from partaking a meal as provided in subclause (10)(a) of this clause, such employee shall be reimbursed in accordance with the rate prescribed by Item (15) of Schedule C – Travelling, Transfer and Relieving Allowance, provided that an employee shall only be entitled to one claim per shift.

(c) The employee's total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item (16) of Schedule C – Travelling, Transfer and Relieving Allowance. The employer may grant the payment of this allowance in excess of five days per pay period if satisfied the claim is warranted. The provisions of this subclause shall not apply to an employee in receipt of any entitlement prescribed under Clause 6.7 - Travelling Allowance or Clause 6.6 - Relieving Allowance or Clause 6.3 - Camping Allowance.

(d) Where shifts of other than eight hours are worked, meal periods, commencement time of meal periods and shift penalties provided under subclause (2) of Clause 6.2 - Shift Allowance shall be allowed on a pro-rata basis according to the number of hours in the shift.

(e) Where nine hour shifts are worked, employees are entitled to a paid meal break of 35 minutes. Where 10 hour shifts are worked, employees are entitled to a paid meal break of 40 minutes. Where 12 hour shifts are worked, employees are entitled to a paid meal break of one hour. At the election of the employee and with the approval of the Officer in Charge the paid meal period for nine, 10 and 12 hour shifts may be taken as two breaks. If the paid meal break is not able to be taken only one meal claim under subclause (10)(b) of this clause is payable.

(11) 10 Hour Break Between Shifts

(a) Subject to the provisions of this clause an employee shall, where practicable, be allowed a break between shifts in the following terms:

(i) Other than in an "emergency" or in the "public interest" as defined an employee shall be allowed at least 10 consecutive hours off duty between the end of one ordinary shift and the commencement of the next ordinary hours shift.

(ii) Where an employee who has not had at least 10 consecutive hours off duty since the completion of his or her last ordinary shift is fatigued due to authorised overtime and there is four hours or more of the next rostered shift remaining to be worked, the employee may, with the approval of his or her Officer in Charge, be excused from such part of the shift to allow the designated break and shall be deemed to have commenced that shift at the rostered start time. Where a part shift is worked a shift penalty, if appropriate, will be paid.

(iii) Where an employee who has not had at least 10 consecutive hours off duty since the completion of his or her last ordinary shift is fatigued due to authorised overtime and there are less than four hours of the rostered shift remaining to be worked, the employee may, with the approval of his or her Officer in Charge, be excused from duty and shall be deemed to have worked the shift. However in these circumstances, a shift penalty will not be paid.

(iv) Overtime is to be documented as directed by the Officer in Charge.

(v) An employee seeking to be excused from his or her next rostered shift or part shift must personally contact his or her Officer in Charge or another Officer in authority for approval prior to the commencement of the shift. Such approval shall not be withheld except in an "emergency" or in the "public interest" as defined.

(12) Weekends Off Duty

Where practicable, an employee should be allowed four rostered weekends off duty over each period of 12 weeks.

(13) Christmas/New Year

(a) Where practicable, an employee should be allowed one Christmas Day and one New Year's Eve off duty in each three year period.

(b) For the purposes of this subclause, Christmas Day means 0:00 hours 25 December to 23:59 hours 25 December and New Year's Eve means 18:00 hours 31 December to 17:59 hours 1 January.

3.2 - OVERTIME

(1) The provisions of this clause do not apply to Police Auxiliary Officers in Training.

(2) For the purposes of this clause, the following terms shall have the following meanings:

"Overtime" means all work performed only at the direction of the employer or a duly authorised Officer outside the prescribed hours of duty.

"Prescribed hours of duty" means an employee's normal working hours as prescribed by the employer in accordance with Clause 3.1 – Hours of Duty.

"Duly authorised officer" means an officer or officers appointed in writing by the employer for the purpose of authorising overtime.

"A day" shall mean from midnight to midnight.

"Ordinary travelling time" means time that an employee would have ordinarily spent in travelling once daily from the employee's home to the employee's usual Headquarters and home again.

"Excess travelling time" means all time travelled on official business outside prescribed hours of duty and away from the employee's usual Headquarters in accordance with subclause (7) of this clause.

"Fortnightly wages" means an employee's substantive wages exclusive of any allowances such as temporary special allowance and/or higher duties allowance unless otherwise approved by the employer. Provided that a special allowance or higher duties allowance shall be included in "fortnightly wages" when overtime is worked on duties for which these allowances are specifically paid.

"Commuted Allowance" means an allowance in lieu of overtime, on call or shift allowance which is to be negotiated between the relevant parties.

(3) Reasonable Hours of Overtime

(a) The employer may require an employee to work reasonable overtime at overtime rates as specified in this clause.

(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:

(i) any risk to employee health and safety;

(ii) the employee's personal circumstances including any family responsibilities;

(iii) the needs of the workplace;

(iv) the notice (if any) given by the employer of the overtime and by the employee of his or her intention to refuse it; and

(v) any other relevant matter.

(4) Overtime

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

(b) Time off in lieu

(i) An employee who performs authorised overtime may elect to be paid for such overtime or alternatively be allowed time off in lieu thereof.

(ii) Where the employee's election is for time off in lieu of overtime such time off in lieu is to be taken at a time which is mutually agreed by the employee and a duly authorised Officer. Such an application will not be unreasonably refused.

(iii) As soon as is practicable after the completion of each period of authorised overtime the employee shall submit a claim in a form directed by the employer in which he or she shall elect to be either paid for the overtime duty or be given time off in lieu thereof.

(iv) The employee is required to clear accumulated time off in lieu within two months of the overtime being performed. Provided that by agreement between the employee and the duly authorised Officer, time off in lieu of payment for overtime may be accumulated beyond two months from the time the overtime is performed so as to be taken in conjunction with periods of approved leave.

(v) If the employee is not released to clear leave within two months of the overtime being performed, and no further agreement prescribed in subclause (4)(b)(iv) of this clause is reached, the employee shall be paid for the overtime worked.

(vi) Time off in lieu shall be calculated at the ordinary hours of pay and the arrangements contained in subclause (4) of this clause, shall apply.

(c) Payment for Overtime

(i) For the first three hours worked outside the prescribed hours of duty on any one day at the rate of time and one half:

$$\frac{\text{Weekly Wages}}{40} \times \frac{3}{2}$$

(ii) After the first three hours worked outside the prescribed hours of duty on any one day at the rate of double time:

$$\frac{\text{Weekly Wages}}{40} \times \frac{2}{1}$$

(d) Annual Leave/ Long Service Leave

An employee directed to return to duty during periods of annual or long service leave shall be deemed to be no longer on leave for the duration of that period of duty.

(i) If the employee is directed to return to duty during a period of leave during prescribed hours of duty, then that employee shall be re-credited with that leave for the same number of hours of duty performed.

(ii) If the employee is directed to return to duty during a period of leave outside of prescribed hours of duty, then that employee shall be entitled to payment of overtime in accordance with subclause (4) of this clause.

(e) Time Worked Past Midnight

Where an employee is required to work a continuous period of overtime which extends past midnight into the succeeding day the time worked after midnight shall be included with that worked before midnight for the purpose of calculation of payment provided for in this subclause.

(f) Minimum Period for Return to Duty

(i) An employee, having received prior notice, who is required to return to duty:

(aa) on any weekly leave day, other than during prescribed hours of duty, shall be entitled to payment at the rate in accordance with paragraph (c) of this subclause for a minimum of three hours;

(bb) before or after the prescribed hours of duty on any day shall be entitled to payment at the rate in accordance with paragraph (c) of this subclause for a minimum period of one and one half hours.

(ii) For the purposes of this subclause, where an employee is required to return to duty more than once, each duty period shall stand alone in respect to the application of minimum period payment except where the second or subsequent return to duty is within any such minimum period.

(iii) The provisions of this sub-paragraph shall not apply in cases where it is customary for an employee to return to the place of employment to perform a specific job outside the prescribed hours of duty, or where the overtime is continuous (subject to a meal break) with the completion or commencement of prescribed hours of duty.

(g) Overtime at a Place Other than Usual Headquarters

(i) When an employee is directed to work overtime at a place other than usual Headquarters, and provided that the place where the overtime is to be worked is situated in the area within a radius of 50 kilometres from usual Headquarters, and the time spent in travelling to and from that place is in excess of the time which an employee would ordinarily spend in travelling to and from usual Headquarters, and provided such travel is undertaken on the same day as the overtime is worked, then such excess time shall be deemed to form part of the overtime worked.

(ii) Except as provided in paragraph (b) and (e) of subclause (7) of this clause, when an employee is directed to work overtime at a place other than usual Headquarters, and provided that the place where the overtime is to be worked is situated outside the area within a radius of 50 kilometres from usual Headquarters and the time spent in travelling to and from that place is in excess of the time which the employee would ordinarily spend in travelling to and from usual Headquarters, then the employee shall be granted time off in lieu of such excess time spent in actual travel in accordance with subclause (7) – Excess Travelling Time of this clause.

(h) 10 Hour Break

(i) When overtime is worked, a break of not less than 10 hours shall be taken between the completion of work on one day and the commencement of work on the next, without loss of wages for ordinary working time occurring during such absence.

(ii) Provided that where an employee is directed to return to or continue work without the break provided in sub-paragraph (i) of this paragraph then the employee shall be paid at double the ordinary rate until released from duty, or until the employee has had 10 consecutive hours off duty without loss of wages for ordinary working time occurring during such absence.

(5) Meal Allowances

(a) Except in the case of emergency, an employee shall not be compelled to work more than five hours overtime duty without a meal break. At the conclusion of a meal break, the calculation of the five-hour limit recommences.

(b) An employee required to work overtime of not less than two hours, and who actually purchases a meal, shall be reimbursed in accordance with Schedule A – Overtime Meal Rates, in addition to any payment for overtime to which that employee is entitled.

(c) An employee working a continuous period of overtime who has already purchased one meal during a meal break, shall not be entitled to reimbursement for the purchase of any subsequent meal in accordance with Schedule A – Overtime Meal Rates until that employee has worked a further five hours overtime from the time of the last meal break.

(d) If an employee, having received prior notification of a requirement to work overtime, is no longer required to work overtime, then the employee shall be entitled, in addition to any other penalty, to reimbursement for a meal previously purchased.

(6) Emergency Duty

(a) Where an employee is required to return to duty to meet an emergency at a time when he or she would not ordinarily have been on duty, and no notice of such recall was given prior to completion of usual duty on the last day of work prior to the day on which recalled on duty, then if recalled to duty:

(i) on any weekly leave day, otherwise than during prescribed hours of duty, he/ she shall be entitled to payment at the rate in accordance with subclause (4) of this clause for a minimum period of three hours;

(ii) before or after the prescribed hours of duty on any day other than a weekly leave day he/ she shall be entitled to payment at the rate in accordance with subclause (4) of this clause for a minimum period of two and a half hours.

(b) Time spent in travelling to and from the place of duty where the employee is actually recalled to perform emergency duty shall be included with actual duty performed for the purpose of overtime payment.

(c) An employee recalled for emergency duty shall not be obliged to work for the minimum period if the work is completed in less time, provided that an employee called out more than once within any such minimum period shall not be entitled to any further payment for the time worked within that minimum period.

(d) Where an employee is required to work beyond the minimum period on the first or subsequent recall for emergency duty, the additional time worked at the conclusion of that minimum period shall be paid in accordance with the appropriate rate in subclause (4) of this clause.

(e) Where an employee is recalled for a second or subsequent period of emergency duty outside of the initial minimum period, the employee shall be entitled to payment for a new minimum period, and the provisions of this subclause shall be re-applied.

(f) For the purpose of this subclause, no claim for payment shall be allowed in respect of any emergency duty, including travelling time, which amounts to less than 30 minutes.

(7) Excess Travelling Time

An employee eligible for payment of overtime, who is required to travel on official business outside normal working hours and away from usual Headquarters shall be granted time off in lieu of such actual time spent in travelling at equivalent or ordinary rates on weekdays and at time and one half rates on any weekly leave day, other than during prescribed hours of duty, provided that:

(a) such travel is undertaken at the direction of the employer;

(b) such travel shall not include:

(i) time spent in travelling by an employee on duty at a temporary Headquarters to the employee's home for weekends for the employee's own convenience;

(ii) time spent in travelling by plane between the hours of 11.00pm and 6.00am;

(iii) time spent in travelling by train between the hours of 11.00pm and 6.00am;

(iv) time spent in travelling by ship when meals and accommodation are provided;

(v) time spent in travel resulting from the permanent transfer or promotion of an employee to a new location;

(vi) time of travelling in which an employee is required by the department to drive, outside ordinary hours of duty, a departmental vehicle or to drive the employee's own motor vehicle involving the payment of a mileage allowance, but such time shall be deemed to be overtime and paid in accordance with subclause (4) of this clause. Passengers, however, are entitled to the provisions of subclause (7) of this clause;

(vii) time spent in travelling to and from the place at which overtime or emergency duty is performed, when that travelling time is already included with actual duty time for the payment of overtime.

(c) For the purpose of this clause Police Auxiliary Officers based in the 'metropolitan area' – as part of their regular job requirements – may be required to perform overtime duties anywhere within the District to which they are appointed and the Perth Watch House. Time spent travelling to and from the place in which overtime duties are to be performed, at either of the aforementioned locations, will not be deemed as time worked nor will time off in lieu of such travel be granted.

(d) Time off in lieu will not be granted for periods of less than 30 minutes.

(e) Where such travel is undertaken on a normal working day, time off in lieu is granted only for such time spent in travelling before and/or after the usual hours of duty, which is in excess of the employee's ordinary travelling time.

(f) Where the urgent need to travel compels an employee to travel during the employee's usual lunch interval such additional travelling time is not to be taken into account in computing the number of hours of travelling time due.

(g) In the case of an employee absent from usual Headquarters, not involving an overnight stay, the time spent by that employee, outside the prescribed hours of duty, in waiting between the time of arrival at the place of duty and the time of commencing duty, and between the time of ceasing duty and the time of departure by the first available transport, shall be deemed to be excess travelling time.

(h) In the case of an employee absent from usual Headquarters that does involve an overnight stay, the time spent by that employee, outside the prescribed hours of duty, in waiting between the time of ceasing duty on the last day and the time of departure by the first available transport shall be deemed to be excess travelling time.

(8) Special Conditions

Any group of employees whose duties necessarily entail special conditions of employment shall not be subject to the prescribed hours of duty as defined in Clause 3.1 – Hours of Duty if the employer so determines.

3.3 - POLICE AUXILIARY OFFICERS IN TRAINING

(1) On-Road Training and Non Operational Training – Recruits in Training

(a) For the purpose of this clause:

(i) "On-Road Training" is defined as supervised deployment scheduled during and part of Academy training to Districts/Divisions for operational police auxiliary duties as determined by the employer; and

(ii) "Non-Operational Training" is defined as administrative duties and functions, including Perth Watch House placements, but not training undertaken on the Academy site.

(iii) "Adequate Supervision" means direct supervision by an employee who has completed probation and/or been deemed competent to perform police auxiliary duties without the direct supervision of another.

(iv) "Police Auxiliary Officers in Training" has the same meaning as Clause 1.6 – Definitions of this award that is an employee undertaking Academy based initial training.

(b) Police Auxiliary Officers in Training undertaking Academy based initial training may be rostered to work a combination of shifts on any weekly or fortnightly period for the purpose of conducting supervised On-Road Training and Non Operational Training and may be rostered the same shifts as the supervising employee.

(c) The restriction on the payment of shift allowance contained in Clause 6.2 – Shift Allowance and the restriction on the payment of overtime contained in Clause 3.2 – Overtime do not apply where recruits in training are undertaking On-Road Training or Non-Operational Training as defined in paragraph (a) of this subclause.

(d) Shift Allowance and Overtime shall not be paid where Police Auxiliary Officers in Training are undertaking initial training at the Academy or at other external training venues utilised by the employer.

(e) (i) Employees who are Police Auxiliary Officers in Training shall work a shift in accordance with local rostering arrangements in operation at the locality at the time they are undertaking On-Road Training or Non Operational Training. Any hours in excess of the rostered shift shall be compensated at overtime rates.

(ii) Employee safety remains a paramount consideration and prior to deployment employees undertaking On-road Training or Non-Operational Training shall undertake and be deemed competent in

Operational Safety and Tactics training before fulfilling the requirements of the particular deployment.

(iii) Employees are to be provided with adequate supervision for the duration of the shift.

4. PART-TIME AND CASUAL EMPLOYMENT

4.1 – PART-TIME EMPLOYMENT

(1) Hours

(a) Notwithstanding other provisions contained in this clause, a part-time employee may be employed to work less than 40 hours per week either on a regular or irregular basis. The provisions of Clause 3.1 – Hours of Duty shall apply on a pro rata basis with the exception of clause 3.1(3)(c).

(b) An employee's regular or irregular part-time hours may be varied by the employer with the consent of the employee. Where this occurs, time worked up to 10 hours on any day or a total of less than 40 hours in a week or any arrangement under subclause (5) of Clause 3.1 – Hours of Duty is not overtime but an extension of the contract hours for that day or week.

(c) Where an employee does not consent to vary their hours, the additional hours worked are to be paid at overtime rates.

(2) Overtime

(a) All time worked in excess of eight hours in a day constitutes overtime unless nine or 10 ordinary hours have been rostered, in which case, all hours in excess of nine or 10 hours in a day constitute overtime.

(b) All time worked in excess of 40 hours in a week constitutes overtime.

(c) Where an employee does not consent to vary their hours as provided in subclause (1)(b) of this clause the additional hours worked are to be paid at overtime rates. This clause does not apply where a part-time employee has been rostered to work a New Year or Christmas shift in accordance with clause 3.1(13) – Christmas/New Year.

(d) The provisions of paragraphs (a) and (b) of this subclause shall not apply in cases where other ordinary hours shift arrangements are being worked pursuant to clause 3.1(5) – Flexible Rostering Arrangements. In such cases, overtime shall be paid for periods in excess of the ordinary hours being worked on a shift.

(3) Wages

(a) A part-time or irregular part-time employee shall be paid a proportion of the appropriate full-time wages contained in subclause (1) of Clause 5.1 – Wages dependent on the number of hours worked. The wages shall be calculated in accordance with the following formula:

$$\frac{\text{Hours Worked Per Week}}{40} \times \frac{\text{Full-Time Weekly Wages}}{1}$$

(b) A part-time or irregular part-time employee shall be entitled to all available wages increments, on the same basis as a full-time employee, on a pro-rata basis by calculating the hours worked by the part-time employee each fortnight as a proportion of 40.

(4) Shift Allowance

A part-time or irregular part-time employee working ordinary hours shifts of other than eight hours shall be paid a proportion of the appropriate allowance contained in subclause (2) of Clause 6.2 – Shift Allowance.

(5) Other Provisions

Other provisions apply on a pro-rata basis.

(6) Accommodation of Requests to Work Part-Time

The employer shall, where practicable, accommodate reasonable requests from employees to work part-time hours or to vary part-time hours.

4.2 – CASUAL EMPLOYMENT

(1) Wages

A casual employee shall be paid for each hour worked at the appropriate classification contained in Clause 5.1 – Wages in accordance with the following formula:

$$\frac{\text{Weekly Wages}}{40}$$

With the addition of 20 percent in lieu of annual leave, sick leave and payment for public holidays.

(2) Conditions of Employment

(a) Conditions of employment, leave and allowances shall not apply to a casual employee with the exception of bereavement leave. However, where expenses are directly and necessarily incurred by a casual employee in the ordinary performance of their duties, he/she shall be entitled to reimbursement in accordance with these provisions.

(b) The employment of a casual employee may be terminated at any time by the causal employee or the employer giving to the other, one hour's notice. In the event of an employer or casual employee failing to give the required notice, one hour's wages shall be paid or forfeited.

(c) The provisions of Clause 3.2 - Overtime do not apply to casual employees who are paid by the hour for each hour worked. Additional hours are paid at the normal casual rate.

(d) A casual employee shall be informed that their employment is casual and that they have no entitlement to paid leave, with the exception of bereavement leave, before they are engaged.

(e) A casual employee is entitled to a minimum payment of three hours per shift, regardless of time actually worked.

(f) Shift penalties are paid if the type of shift the employee is working attracts a penalty.

5. WAGES

5.1 – WAGES

(1) Rates of Pay

Year of Service	$ Per Week	Rates of Pay expressed as annualised wages ($)
Police Auxiliary Officer in Training	866.55	45,205
BAND 1		
AP1.1	1,036.76	54,084
AP1.2	1,064.32	55,522
AP1.3	1,091.87	56,959
AP1.4	1,119.43	58,397
AP1.5*	1,146.98	59,834
BAND 2		
AP2.1	1,181.41	61,630
AP2.2	1,205.02	62,862
AP2.3	1,229.12	64,119
AP2.4	1,253.71	65,402
AP2.5	1,278.79	66,710
BAND 3		
AP3.1	1,325.68	69,156
AP3.2	1,352.17	70,538
AP3.3	1,379.24	71,950
AP3.4	1,406.82	73,389
AP3.5	1,434.94	74,856

*Key classification rate

(2) An employee's wages shall be paid by direct funds transfer to the credit of an account nominated by the employee at a Bank, Building Society or Credit Union approved by the Under Treasurer or an Accountable Officer; provided that where such form of payment is impracticable or where some exceptional circumstances exist, and by agreement of the employer, payment by cheque may be made.

(3) Salary Packaging

(a) An employee may, by agreement with the employer, enter into a salary packaging arrangement in accordance with the Western Australia Police Flexible Remuneration Packaging Arrangement or any similar salary packaging arrangements offered by the employer.

(b) Salary packaging is an arrangement whereby the entitlements under this award, contributing toward the Total Employment Cost (as defined) of an employee, can be reduced by and substituted with another or other benefits.

(c) For the purposes of the clause, Total Employment Cost (TEC) is defined as the cost of salary and other benefits aggregated to a total figure or TEC, less the cost of Compulsory Employer Superannuation Guarantee contributions.

The TEC for the purposes of salary packaging is calculated by adding:

(i) the base wage;

(ii) other cash allowances, e.g. annual leave loading, commuted shift allowances, commuted overtime allowance;

(iii) non-cash benefits, e.g. superannuation, motor vehicles etc;

(iv) any Fringe Benefit Tax liabilities currently paid; and

(v) any variable components, e.g. performance based incentives (where they exist).

(d) Where an employee enters into a salary packaging arrangement, the employee will be required to enter into a separate written agreement with the employer that sets out the terms and conditions of the arrangement.

(e) The salary packaging arrangement must be cost neutral in relation to the total cost to the employer.

(f) The salary packaging arrangement must comply with relevant taxation laws and the employer will not be liable for additional tax, penalties or other costs payable or which may become payable by the employee.

(g) In the event of any increase or additional payments of tax or penalties associated with the employment of the employee under the salary packaging agreement or the provision of employer benefits under the salary packaging agreement, such tax, penalties and any other costs shall be borne by the employee.

(h) In the event of significant increases in Fringe Benefit Tax liability or administrative costs relating to arrangements under this clause or any other reason as agreed between the employee and the employer, the employee may vary or cancel a salary packaging arrangement.

(i) The salary of the employee prior to the application of the salary packaging arrangement will be utilised for the purposes of calculating overtime and annual leave loading.

(j) The employer shall not unreasonably withhold agreement to salary packaging on request from an employee.

(4) Formula Rates

(a) For the purposes of ascertaining the rate per fortnight the total annual wage shall be multiplied by 12 and divided by 313.

(b) For the purpose of ascertaining the rate per day the rate per fortnight shall be divided by 10.

(c) For the purpose of ascertaining the rate per hour the annual wages prescribed in subclause (1) of this clause shall be divided by 313, multiplied by 12 and divided by 80.

5.2 – ANNUAL INCREMENTS

(1) Employees shall progress to the maximum of their wages band by annual increment, subject to a satisfactory report on the employee's level of performance and conduct.

(2) The following procedure will apply prior to the payment of an increment:

(a) Their Officer in Charge will produce a report on the employee's performance and conduct no later than 12 months since the employee's last incremental advance.

(b) The employee will be provided with an opportunity to comment in writing.

(c) Where the report is unsatisfactory:

(i) The employee will be shown the report which shall include details of previous warnings and counselling and shall be required to initial it.

(ii) The employee will be provided with an opportunity to comment in writing.

(iii) The employer will immediately consider an employee's comments and make a decision as to whether to approve the payment of the increment or withhold the payment of the increment for a specific period.

(iv) Where the increment is withheld, a performance management plan will be established, including regular monitoring of the employee's compliance. The employer will, prior to the expiry of the specified period, complete a further report in which the above provisions will apply.

(3) The non-payment of an increment will not change the normal anniversary date of any further increment payments.

5.3 – MINIMUM ADULT AWARD WAGE

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

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

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

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

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

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

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

(8) Subject to this clause the minimum adult award wage shall –

(a) Apply to all work in ordinary hours.

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

(9) Minimum Adult Award Wage

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

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

(10) Adult Apprentices

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

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

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

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

6. ALLOWANCES

6.1 – AVAILABILITY - ON CALL - CLOSE CALL - STANDBY ALLOWANCE

(1) For the purposes of this clause:

"Availability" shall mean a written instruction or other authorised direction by the employer or a duly authorised officer to an employee to remain contactable, but not necessarily immediately contactable by telephone or other means, outside the employee's normal hours of duty and be available and in a fit state at all such times for recall to duty. Availability will not include situations in which employees carry telephones or other means of communication or make their telephone numbers or other contact details available only in the event that they may be needed for casual contact or recall to work.

"On call" shall mean a situation in which an employee is rostered, or directed by a duly authorised Senior Officer, to be available to respond forthwith for duty outside of the employee's ordinary working hours or shift. An employee placed on call shall remain contactable by telephone or paging system for all of such time unless working in response to a call or with the consent of his or her appropriate Senior Officer.

"Close call" shall mean a situation in which an employee is rostered, or directed by a duly authorised Senior Officer, that they are or may be required to attend for extra duty sometime before their next normal time of commencing duty and that the employee is to remain at his or her residence and be required to be available for immediate recall to duty.

"Standby" shall mean a situation in which an employee is rostered or directed by a duly authorised Senior Officer to remain in attendance at his or her place of employment at that time, overnight and/or over a non-working day, and may be required to perform certain tasks periodically or on an ad hoc basis. Such employees shall be provided with appropriate facilities for sleeping if attendance is overnight, and other personal needs, where practicable.

(2) An employee who is authorised by the employer or a duly authorised Senior Officer to hold themselves available under any of the conditions contained in subclause (1) of this clause, shall be paid the appropriate allowance in accordance with the following scale:

Availability						
$\frac{10}{100}$	x	$\frac{1}{40}$	x	$\frac{6}{313}$	x	Annualised wage prescribed for a Police Auxiliary Officer Band 1.5, for each hour or part thereof they are rostered for availability.
On-Call						
$\frac{20}{100}$	x	$\frac{1}{40}$	x	$\frac{6}{313}$	x	Annualised wage prescribed for a Police Auxiliary Officer Band 1.5, for each hour or part thereof they are rostered for on-call.
Close-Call						
$\frac{30}{100}$	x	$\frac{1}{40}$	x	$\frac{6}{313}$	x	Annualised wage prescribed for a Police Auxiliary Officer Band 1.5, for each hour or part thereof they are rostered for close-call.
Standby						
$\frac{40}{100}$	x	$\frac{1}{40}$	x	$\frac{6}{313}$	x	Annualised wage prescribed for a Police Auxiliary Officer Band 1.5, for each hour or part thereof they are rostered for standby.

(3) Payment in accordance with subclause (2) of this clause shall not be made in respect to any period for which payment is otherwise made in accordance with the provisions of Clause 3.2 – Overtime when the employee is recalled to work.

(4) An employee, whilst in a restricted situation specified in subclause (1) of this clause, shall receive a minimum payment of four hours regardless of the actual specified period.

6.2 – SHIFT ALLOWANCE

(1) Subject to clause 3.3(1)(c), the provisions of this clause do not apply to Police Auxiliary Officers in Training.

(2) (a) Saturday and Sunday Shift Penalties

Police Auxiliary Officers shall be paid an allowance of $32.91 for each ordinary eight hour day shift worked on Saturdays and Sundays.

(b) Afternoon Shift Penalties

Police Auxiliary Officers shall be paid an allowance of $37.48 for each ordinary eight hour afternoon shift worked.

(c) Evening Shift Penalties

Police Auxiliary Officers shall be paid an allowance of $47.81 for each ordinary eight hour evening shift worked.

(d) Night Shift Penalties

Police Auxiliary Officers shall be paid an allowance of $56.21 for each ordinary eight hour night shift worked.

(3) Police Auxiliary Officers who work shifts of other than eight hours duration under the provisions of Clause 3.1 – Hours of Duty or Clause 4.1 – Part-time Employment shall be paid the shift allowance prescribed in subclause (2) of this clause where appropriate on a pro-rata basis.

(4) Pro Rata Arrangements for 12, 10 and Nine Hour Shifts

(a) Where an eight hour block of a 12 hour shift is worked within the night shift span of hours (8pm to 5.30am), a night shift allowance will be paid in conjunction with a 50% entitlement to the evening shift allowance. For example, an employee commencing a 12 hour shift at 7pm will be entitled to four hours at the evening shift allowance and eight hours at the night shift allowance.

(b) For all other 12 hour shifts, the shift penalty to apply is based on commencement time for the first eight hours and the following shift type for the remaining four hours. For example, an employee commencing a shift at 7.00am will be considered to have worked a day shift (no penalty unless weekend) and will be paid 50% of the afternoon shift penalty.

(c) For a 10 hour evening shift, penalties will be applied as follows, depending on the start time:

5.00pm hours to 5.30pm hours start time: shift allowance payable = 1.25 evening shift.

6.00pm hours to 7.30pm hours start time: shift allowance payable = 0.25 evening shift + 1.00 night shift.

(d) For a nine hour evening shift, allowances will be applied as follows, depending on the start time:

5.00pm hours to 5.30pm hours start time: shift allowances payable = 1.125 evening shift.

6.00pm hours to 7.30pm hours start time: shift allowance payable = 0.125 evening shift + 1.00 night shift.

(e) For all other applicable nine or 10 hour shifts, the shift allowance is based on commencement time and is paid pro rata. For example, a 10 hour shift will incur a 1.25 of the applicable shift penalty; a nine hour shift will incur a 1.125 of the applicable shift penalty.

6.3 – CAMPING ALLOWANCE

(1) For the purposes of this clause, the following expressions shall have the following meaning:

"Camp of a permanent nature" means single room accommodation in skid mounted or mobile type units, caravans, or barracks type accommodation where the following are provided in the camp:

• water is freely available;

• ablutions including a toilet, shower or bath and laundry facilities;

• hot water system;

• a kitchen, including a stove and table and chairs, except in the case of a caravan equipped with its own cooking and messing facilities;

• an electricity or power supply; and

• beds and mattresses except in the case of caravans containing sleeping accommodation.

For the purpose of this definition caravans located in caravan parks or other locations where the above are provided shall be deemed a camp of a permanent nature.

"House" means a house; duplex or cottage including transportable type accommodation, which is self-contained and in which the facilities prescribed for "camp of a permanent nature" are provided.

"Other than a permanent camp" means a camp where any of the above is not provided.

(2) An employee, who is stationed in a camp of a permanent nature, shall be paid the appropriate allowance prescribed by Item (1) or Item (2) of Schedule B – Camping Allowance for each day spent camping.

(3) An employee, who is stationed in a camp – other than a permanent camp – or is required to camp out, shall be paid the appropriate allowance prescribed by Item (3) or Item (4) of Schedule B – Camping Allowance for each day spent camping.

(4) Employees who occupy a house shall not be entitled to allowances prescribed by this clause.

(5) Employees accommodated at a government institution, hostel or similar establishment shall not be entitled to allowances prescribed by this clause.

(6) Where an employee is provided with food and/or meals by the department free of charge, then the employee shall only be entitled to receive half the appropriate allowance to which the employee would otherwise be entitled for each day spent camping.

(7) (a) An employee shall not be entitled to receive an allowance for periods in excess of 91 consecutive days unless the employer otherwise determines. Provided that where an employee is reimbursed under the provisions of Clause 6.7 – Travelling Allowance, then such periods shall be included for the purposes of determining the 91 consecutive days.

(b) Any determination by the employer under this subclause will be in accordance with Schedule B - Camping Allowance.

(8) When camping, an employee shall be paid the allowance on weekly leave days if available for work immediately preceding and succeeding such days and no deduction shall be made under these circumstances when an employee does not spend the whole or part of the weekend in camp, unless the employee is reimbursed under the provisions of Clause 6.7 – Travelling Allowance.

(9) This clause shall be read in conjunction with Clauses 6.6 – Relieving Allowance, 6.7 – Travelling Allowance and 6.10 – Transfer Allowance for the purpose of paying allowances, and camping allowance shall not be paid for any period in respect of which travelling; transfer or relieving allowances are paid. Where portions of a day are spent camping, the formula contained in Clause 6.7 – Travelling Allowance shall be used for calculating the portion of the allowance to be paid for that day.

For the purposes of this subclause arrival at Headquarters shall mean the time of actual arrival at camp. Departure from Headquarters shall mean the time of actual departure from camp or the time of ceasing duty in the field subsequent to breaking camp, whichever is the latter.

(10) Employees in receipt of an allowance under this clause shall not be entitled to receive the incidental allowance prescribed by Clause 6.7 – Travelling Allowance.

(11) Whenever an employee provided with a caravan is obliged to park the caravan in a caravan park he or she shall be reimbursed the rental charges paid to the authority controlling the caravan park, in addition to the payment of camping allowance.

(12) Where an employee, who is not supplied with camping equipment by the department, hires such equipment as is reasonable and necessary, he or she shall be reimbursed such hire charges, in addition to the payment of camping allowances.

6.4 – HIGHER DUTIES ALLOWANCE

(1) An employee who is directed by the employer to act in a position which has a minimum rate of pay higher than the ordinary rate of pay of his or her own substantive position and who performs the full duties and accepts the full responsibility of the higher position for a continuous period of 40 or more consecutive working hours, shall, subject to the provisions of this clause, be paid an allowance equal to the difference between the employee's own wages and the wages he or she would receive if he or she was permanently appointed to the position in which he or she is so directed to act.

(2) An employee who is directed by the employer to perform the duties of a higher classification which has a minimum rate of pay higher than the ordinary rate of pay of his or her own substantive position and who performs the full duties and accepts the full responsibility of the higher classification for a continuous period of 40 or more consecutive working hours, shall, subject to the provisions of this clause, be paid a Temporary Special Allowance equal to the difference between the employee's own wages and the wages he or she would receive if he or she was permanently appointed to the classification in which he or she is so directed to perform.

(3) Where an employee who has qualified for payment of higher duties allowance or temporary special allowance under this clause is required to act in another position or other positions which have a minimum rate of pay higher than the ordinary rate of pay of the employee's own substantive position and he or she performs the full duties and accepts the full responsibility of the higher position for periods less than 40 consecutive working hours without any break in acting service, such employees shall be paid a higher duties allowance for such periods; provided that payment shall be made at the highest rate the employee has been paid during the term of continuous acting or at the rate applicable to the position in which he or she is currently acting – which ever is the lesser.

(4) Where an employee, who is in receipt of an allowance granted under this clause and has been so for a continuous period of 12 months or more, proceeds on a period of approved leave of absence of not more than 240 hours, he or she shall continue to receive the allowance for the period of leave. Provided that this subclause shall also apply to an employee who has been in receipt of an allowance for less than 12 months if during his or her absence no other employee acts in the position in which he or she was acting immediately prior to proceeding on leave and he or she resumes in the position immediately on return from leave.

(5) Where an employee, who is in receipt of an allowance granted under this clause proceeds on a period of approved leave of absence of more than 240 hours, he or she shall not be entitled to receive payment of such allowance for the whole or any part of the period of such leave.

6.5 – MOTOR VEHICLE ALLOWANCE

(1) An employee who is required to use his or her motor car or motorcycle for the performance of Police Auxiliary Officer duties shall be paid an allowance at the appropriate rate prescribed in Schedule D – Motor Vehicle Allowance. In addition he or she shall be paid an allowance of $10.00 per month for each calendar month he or she is so required.

(2) An employee may request to his or her Officer in Charge to use his or her motor car or motorcycle when travelling, in lieu of utilising the mode of transport that would have been provided by the employer and the Officer in Charge may approve such request. Such request and approval shall be in writing. In these circumstances, the employee shall be paid an allowance at the appropriate rate prescribed in Schedule D – Motor Vehicle Allowance, provided that reimbursement is not to exceed the cost of the fare for the mode of transport that would have been provided by the employer.

(3) The provisions of subclause (2) do not apply to employees travelling within the Metropolitan Area.

6.6 – RELIEVING ALLOWANCE

An employee, who is required to take up duty away from Headquarters on relief duty or to perform special duty, and necessarily resides temporarily away from the employee's usual place of residence, shall be reimbursed reasonable expenses on the following basis:

(1) Where the employee:

(a) is supplied with accommodation and meals free of charge, or

(b) is accommodated at a government institution, hostel or other similar establishment and supplied with meals, reimbursement shall be in accordance with the rates prescribed in Column A, Items (1), (2) or (3) of Schedule C – Travelling, Transfer and Relieving Allowance.

(2) Where employees are fully responsible for their own accommodation, meals and incidental expenses and hotel or motel accommodation is utilised:

(a) For the first 42 days after arrival at the new locality reimbursement shall be in accordance with the rates prescribed in Column A, Items (4) to (8) of Schedule C – Travelling, Transfer and Relieving Allowance.

(b) For periods in excess of 42 days after arrival in the new locality reimbursement shall be in accordance with the rates prescribed in Column B, Items (4) to (8) of Schedule C – Travelling, Transfer and Relieving Allowance for employees with dependants or Column C, Items (4) to (8) of Schedule C – Travelling, Transfer and Relieving Allowance for other employees: Provided that the period of reimbursement under this subclause shall not exceed 49 days without the approval of the employer.

(3) Where employees are fully responsible for their own accommodation, meal and incidental expenses and other than hotel or motel accommodation is utilised reimbursement shall be in accordance with the rates prescribed in Column A, Items (9), (10) or (11) of Schedule C – Travelling, Transfer and Relieving Allowance.

(4) If an employee whose normal duties do not involve camp accommodation is required to relieve or perform special duty resulting in a stay at a camp, the employee shall be paid camping allowance for the duration of the period spent in camp, and in addition, shall be paid a lump sum of $189.00 to cover incidental personal expenses: Provided that an employee shall receive no more than one lump sum of $189.00 in any one period of three years.

(5) Reimbursement of expenses shall not be suspended should an employee become ill whilst on relief duty, provided leave for the period of such illness is approved in accordance with the provisions of this award and the employee continues to incur accommodation, meal and incidental expenses.

(6) When an employee who is required to relieve or perform special duties in accordance with the preamble of this clause is authorised by the employer to travel to the new locality in the employee's own motor vehicle, reimbursement for the return journey shall be as follows:

(a) Where the employee will be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by subclause (1) of Clause 6.5 – Motor Vehicle Allowance.

(b) Where the employee will not be required to maintain a motor vehicle for the performance of the relieving or special duties, reimbursement shall be in accordance with the appropriate rate prescribed by subclause (2) of Clause 6.5 – Motor Vehicle Allowance. Provided that the maximum amount of reimbursement shall not exceed the cost of the fare by public conveyance which otherwise would be utilised for such return journey.

(7) Where it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred, an appropriate rate of reimbursement shall be determined by the employer.

(8) The provisions of Clause 6.7 – Travelling Allowance shall not operate concurrently with the provisions of this clause to permit an employee to be paid allowances in respect of both travelling and relieving expenses for the same period: Provided that where an employee is required to travel on official business which involves an overnight stay away from the employee's temporary Headquarters the employer may extend the periods specified in subclause (2) of this clause by the time spent in travelling.

(9) An employee who is directed to relieve another employee to perform special duty away from the employee's usual Headquarters and is not required to reside temporarily away from his or her usual place of residence shall, if the employee is not in receipt of a higher duties or special allowance for such work, be reimbursed the amount of additional fares paid by the employee travelling by public transport to and from the place of temporary duty.

(10) For the purposes of this clause, Police Auxiliary Officers based in the 'metropolitan area' – as part of their regular job requirements – may be directed to relieve another employee or to perform special duty anywhere within the District to which they are appointed and the Perth Watch House. Duties performed at either of these locations will not attract Relieving Allowance.

6.7 – TRAVELLING ALLOWANCE

An employee who travels on official business shall be reimbursed reasonable expenses on the following basis:

(1) When a trip necessitates an overnight stay away from Headquarters and the employee is supplied with accommodation and meals free of charge reimbursement shall be in accordance with the rates prescribed in Item (1), (2) or (3) of Schedule C - Travelling, Transfer and Relieving Allowance. Such accommodation and meals shall be of an acceptable standard of at least single room accommodation with private toilet and bathroom facilities, where available.

Where meals are supplied the standard of such meals shall be reflective of the values in Items (12) and (13) of Schedule C - Travelling, Transfer and Relieving Allowance, where available.

(2) When a trip necessitates an overnight stay away from Headquarters and the employee is fully responsible for his or her own accommodation, meals and incidental expenses and "Commercial Accommodation" is utilised reimbursement shall be in accordance with the rates prescribed in Items (4) to (8) of Schedule C - Travelling, Transfer and Relieving Allowance.

(3) When a trip necessitates an overnight stay away from Headquarters and the employee is fully responsible for his or her own accommodation, meals and incidental expenses and accommodation other than camping or "Commercial Accommodation" is utilised reimbursement shall be in accordance with the rates prescribed in Item (9), (10) or (11) of Schedule C - Travelling, Transfer and Relieving Allowance.

(4) To calculate reimbursement under subclause (1), subclause (2) and subclause (3) of this clause for a part of a day, the following formula shall apply:

(a) If departure from Headquarters is:

before 8.00am – 100% of the daily rate

8.00am or later but prior to 1.00pm – 90% of the daily rate

1.00pm or later but prior to 6.00pm – 75% of the daily rate

6.00pm or later – 50% of the daily rate

(b) If arrival back at Headquarters is:

8.00am or later but prior to 1.00pm – 10% of the daily rate

1.00pm or later but prior to 6.00pm – 25% of the daily rate

6.00pm or later but prior to 11.00pm – 50% of the daily rate

11.00pm or later – 100% of the daily rate

(c) The rate to be applied is that applicable for the locality/ town in which the employee stays overnight, except for the final day or part thereof which is calculated at the rate for the previous overnight location.

(5) When a trip necessitates an overnight stay away from Headquarters and the employee is provided with accommodation free of charge but only some or no meals free of charge, reimbursement shall be at the rate prescribed in Item (1), (2) or (3) of Schedule C - Travelling, Transfer and Relieving Allowance or for part of a day as proportioned in subclause (4) of this clause and reimbursed for the appropriate breakfast, lunch or dinner rates prescribed in Items (12), (13) or (14) of Schedule C - Travelling, Transfer and Relieving Allowance.

(6) (a) (i) When an employee stationed in the Metropolitan Area travels to a place outside of that area or an employee stationed outside the Metropolitan Area travels to a place outside a radius of 24 kilometres measured from the employee's Headquarters and the trip does not involve an overnight stay away from Headquarters, reimbursement for all meals claimed shall be at the rates set out in Item (12), (13) or (14) of Schedule C - Travelling, Transfer and Relieving Allowance, subject to the employee's certification that each meal claimed was actually purchased and consumed over a recognised meal period and the employee was outside the respective area for the whole of the recognised meal period.

(ii) Provided that when an employee departs from Headquarters before 8.00am and does not arrive back at Headquarters until after 11.00pm on the same day the employee shall be paid at the appropriate rate prescribed in Items (4) to (8) of Schedule C - Travelling, Transfer and Relieving Allowance.

(b) For the purpose of this subclause:

(i) Where an ordinary hours shift is being worked the recognised meal break in that shift shall be 40 minutes in the case of an eight hour shift and on a pro-rata basis where an ordinary hours shift of other than eight hours is being worked. Such meal period to be authorised by the Officer in Charge to commence at some time within the 4^{th}, 5^{th} or 6^{th} hour of the shift for an eight hour shift and on a pro rata basis for ordinary shifts of other than eight hours. For an ordinary hours shift only one meal may be purchased and consumed over the shift; and

(ii) Where the travel extends beyond an ordinary hours shift;

(aa) an employee travelling a minimum of 10 hours shall be entitled to a further meal break; and

(bb) for each further five hours travelled from the completion of the previous meal break, a further meal break.

(iii) In determining the appropriate rate for the meal where the meal period falls between the span of hours in Column 1 the appropriate rate prescribed in Column 2 shall apply.

Column 1	Column 2
6.00am or later but before 11.00am	Breakfast
11.00am or later but before 4.00pm	Lunch
4.00pm or later but before 10.00pm	Dinner
10.00pm or later but before 6.00am	Supper

(7) (a) An employee stationed in the Metropolitan Area who is disadvantaged financially by additional travelling costs incurred due to a requirement to attend an Academy course for a period of five days or more may be paid a special allowance.

(b) Each claim is to be dealt with on its individual merits with the maximum allowable reimbursement being the rate prescribed in Item (1) of Schedule C - Travelling, Transfer and Relieving Allowance.

(8) In addition to the rates contained in Schedule C - Travelling, Transfer and Relieving Allowance an employee shall be reimbursed reasonable incidental expenses such as train, bus and taxi fares, official telephone calls, laundry and dry cleaning expenses, on production of receipts.

(9) If on account of lack of suitable transport facilities an employee necessarily engages reasonable accommodation for the night prior to commencing travelling on early morning transport the employee shall be reimbursed the actual cost of such accommodation.

(10) Reimbursement of expenses shall not be suspended should an employee become ill whilst travelling, provided such illness is recognised and approved in accordance with the provisions of this award.

(11) Reimbursement claims for travelling in excess of 14 days in one month shall not be passed for payment by a certifying officer unless the employer or his or her nominee has endorsed the account.

(12) An employee stationed in the Metropolitan Area who is relieving at, or temporarily transferred to, any place within that area shall not be reimbursed the cost of meals purchased, but an employee travelling on duty within that area who for operational reasons is unable to return to Headquarters for a scheduled meal and as a consequence is absent from his or her Headquarters over the specified meal period shall be paid at the rate prescribed by Item (15) of Schedule C - Travelling, Transfer and Relieving Allowance for each meal necessarily purchased, provided that:

(a) a requirement to return to Headquarters for a scheduled meal break would lead to additional travelling costs or cause lost working time due to travel which is in excess of the rate prescribed in Item (15) of Schedule C - Travelling, Transfer and Relieving Allowance; and

(b) such travelling is not within the suburb in which the employee resides; and

(c) the employee's total reimbursement under this subclause for any one pay period shall not exceed the amount prescribed by Item (16) of Schedule C - Travelling, Transfer and Relieving Allowance.

A specified meal period for the purposes of this subclause shall be a meal period authorised by the Officer in Charge to commence at some time within the 4th, 5th or 6th hour of the employee's ordinary eight hour shift.

(13) An employee travelling on an aircraft (fixed or rotary wing) which travels outside a radius of 50 kilometres measured from the employee's Headquarters and returns to the place of departure without landing at another place shall not be entitled to any allowance under this clause unless the trip extends for a period in excess of four hours and the employee certifies he or she purchased a meal for consumption on the trip. Where the aircraft lands at other than the departure point and the employee purchases and consumes a meal the provisions of this clause apply.

(14) Where interstate travel is involved the time differences are to be disregarded for the purposes of calculating travelling allowances and Western Australian time is to be used in claiming allowances involving an overnight stay.

(15) Where an employee claims reimbursement for meals or the daily rate specified for hotel or motel in Items (4) to (14) of Schedule C - Travelling, Transfer and Relieving Allowance the employee shall certify that the meals were purchased or hotel or motel accommodation was actually utilised. An employee may be required to produce receipts or other evidence to substantiate any claim. Meal allowances shall not apply where a meal is supplied without charge to an employee.

(16) An employee shall only be paid one allowance for any one meal period.

(17) When it can be shown to the satisfaction of the employer by the production of receipts that reimbursement in accordance with Schedule C - Travelling, Transfer and Relieving Allowance does not cover an employee's reasonable expenses for a whole trip the employee shall be reimbursed the excess expenditure.

(18) (a) An employee stationed in the Metropolitan Area who attends a training course at the Police Academy may request to be provided with accommodation at the Police Academy and the employer may provide such accommodation, where practicable.

(b) In such circumstances, employees are fully responsible for their own meals and incidental expenses and are not entitled to the allowances prescribed by this clause.

6.8 – DISTRICT ALLOWANCE

District allowance shall be paid in accordance with the applicable rates in force from time to time in the Public Service of Western Australia.

6.9 – PROPERTY ALLOWANCE

(1) For the purposes of this clause the following expressions shall have the following meanings:

(a) "Agent" means a person carrying on business as an estate agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under that law.

(b) "Dependant" in relation to an employee means:

(i) partner;

(ii) child/children; or

(iii) other dependant family;

who resides with the employee and who relies on the employee for support.

(c) "Expenses" in relation to an employee means all costs incurred by the employee in the following areas:

(i) Legal fees paid to a solicitor, or in lieu thereof fees charged by a settlement agent, for professional costs incurred in respect of the sale or purchase, the maximum fee to be claimed shall be as set out in the Solicitors Cost Determination for non contentious business matters made under section 275 of the *Legal Profession Act 2008.*

(ii) Disbursements duly paid to a solicitor or a settlement agent necessarily incurred in respect of the sale or purchase of the residence.

(iii) Real Estate Agent's Commission in accordance with that fixed by the Real Estate and Business Agents Supervisory Board, acting under section 61 of the *Real Estate and Business Agents Act 1978*, duly paid to an agent for services rendered in the course of and incidental to the sale of the property, the maximum fee to be claimed shall be 50 percent as set out under Items 1 or 2 – Sales by Private Treaty or Items 1 or 2 – Sales by Auction of the Maximum Remuneration Notice.

(iv) Stamp Duty.

(v) Fees paid to the Registrar of Titles or to the employee performing duties of a like nature and for the same purpose in another State or Territory of the Commonwealth.

(vi) Expenses relating to the execution or discharge of a first mortgage.

(vii) The amount of expenses reasonably incurred by the employee in advertising the residence for sale.

(d) "Locality" in relation to an employee means:

(i) within the metropolitan area, that area within a radius of 50 kilometres form the Perth City Railway Station; and

(ii) outside the metropolitan area, that area within a radius of 50 kilometres from an employee's Headquarters when they are situated outside of the metropolitan area.

(e) "Property" shall mean a residence as defined in this clause including a block of land purchased for the purpose of erecting a residence thereon to the extent that it represents a normal urban block of land for the particular locality.

(f) "Residence" includes any accommodation of a kind commonly known as a flat or a home unit that is, or is intended to be, a separate tenement including dwelling house, and the surrounding land, exclusive of any other commercial property, as would represent a normal urban block of land for the particular locality.

(g) "Settlement Agent" means a person carrying on business as settlement agent in a State or Territory of the Commonwealth, being, in a case where the law of that State or Territory provides for the registration or licensing of persons who carry on such a business, a person duly registered or licensed under the law.

(h) "Transfer" or "Transferred" means a permanent transfer or permanently transferred.

(2) When an employee is transferred from one locality to another in the public interest or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be entitled to be paid a property allowance for reimbursement of expenses incurred by the employee –

(a) In the sale of residence in the employee's former locality, which, at the date on which the employee received notice of transfer to a new locality:

(i) the employee owned and occupied; or

(ii) the employee was purchasing under a contract of sale providing for vacant possession; or

(iii) the employee was constructing for the employee's own permanent occupation, on completion of construction; and

(b) In the purchase of a residence or land for the purpose of erecting a residence thereon for the employee's own permanent occupation in the new locality.

(3) An employee shall be reimbursed such following expenses as are incurred in relation to the sale of a residence:

(a) if the employee engaged an agent to sell the residence on the employee's behalf – 50 percent of the amount of the commission paid to the agent in respect of the sale of the residence;

(b) if a solicitor was engaged to act for the employee in connection with the sale of the residence – the amount of the professional costs and disbursements necessarily incurred and paid to the solicitor in respect of the sale of the residence;

(c) if the land on which the residence is created was subject to a first mortgage and that mortgage was discharged on the sale, then an employee shall, if, in case where a solicitor acted for the mortgagee in respect of the discharge of the mortgage and the employee is required to pay the amount of professional costs and disbursements necessarily incurred by the mortgagee in respect of the discharge of the mortgage – the amount so paid by the employee;

(d) if the employee did not engage an agent to sell the residence on his or her behalf – the amount of the expenses reasonably incurred by the employee in advertising the residence for sale.

(4) An employee shall be reimbursed such following expenses as are incurred in relation to the purchase of a residence:

(a) if a solicitor or settlement agent was engaged to act for the employee in connection with the purchase of the residence – the amount of the professional costs and disbursements necessarily incurred are paid to the solicitor or settlement agent in respect of the purchase of the residence;

(b) if the employee mortgaged the land on which the residence was erected in conjunction with the purchase of the residence, then an employee shall, if, in a case where a solicitor acted for the mortgagee and the employee is required to pay and has paid the amount of the professional costs and disbursements (including valuation fees but not a procuration fee payable in connection with the mortgage) necessarily incurred by the mortgagee in respect of the mortgage – the amount so paid by the employee;

(c) if the employee did not engage a solicitor or settlement agent to act for the employee in connection with the purchase or such a mortgage – the amount of the expenses reasonably incurred by the employee in connection with the purchase or the mortgage, as the case may be, other than a procuration fee paid by the employee in connection with the mortgage.

(5) An employee is not entitled to be paid a property allowance under subclause (2)(b) of this clause unless the employee is entitled to be paid a property allowance under subclause (2)(a) of this clause, provided that the employer may approve the payment of a property allowance under subclause (2)(b) of this clause to an employee who is not entitled to be paid a property allowance under subclause (2)(a) of this clause if the employer is satisfied that it was necessary for the employee to purchase a residence or land for the purpose of erecting a residence thereon in the employee's new locality because of the employee's transfer from the former locality.

(6) For the purpose of these provisions it is immaterial that the ownership, sale or purchase is carried out on behalf of an employee who owns solely, jointly or in common with:-

(a) the employee's partner; or

(b) a dependant relative; or

(c) the employee's partner and a dependant relative.

(7) Where an employee sells or purchases a residence jointly or in common with another person – not being a person referred to in subclause (6) of this clause, the employee shall be paid only the proportion of the expenses for which the employee is responsible.

(8) An application by an employee for a property allowance shall be accompanied by evidence of the payment by the employee of the expenses, being evidence that is satisfactory to the employer.

(9) Notwithstanding the foregoing provisions, an employee is not entitled to the payment of a property allowance –

(a) In respect of a sale or purchase prescribed in subclause (2) of this clause which is effected –

(i) more than 12 months after the date on which the employee took up duty in the new locality; or

(ii) after the date on which the office received notification of being transferred back to the former locality;

Provided that the employer may, in exceptional circumstances, grant an extension of time for such period as is deemed reasonable.

(b) Where the employee is transferred from one locality to another solely at the employee's own request or on account of misconduct.

6.10 – TRANSFER ALLOWANCE

(1) Subject to subclauses (2) and (5) of this clause an employee who is transferred to a new locality in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, shall be paid at the rates prescribed in Column A, Item (4), (5) or (6) of Schedule C – Travelling, Transfer and Relieving Allowance for a period of 14 days after arrival at new Headquarters within Western Australia or Column A, Items (7) and (8) of Schedule C – Travelling, Transfer and Relieving Allowance for a period of 21 days after arrival at a new Headquarters in another State of Australia: Provided that if an employee is required to travel on official business during the said periods, such period will be extended by the time spent in travelling. Under no circumstances, however, shall the provisions of this subclause operate concurrently with those of Clause 6.7 – Travelling Allowance to permit an employee to be paid allowances in respect of both travelling and transfer expenses for the same period.

(2) Prior to the payment of an allowance specified in subclause (1) of this clause, the employer shall:

(a) require the employee to certify that permanent accommodation has not been arranged or is not available from the date of transfer. In the event that permanent accommodation is to be immediately available, no allowance is payable; and

(b) require the employee to advise the employer that should permanent accommodation be arranged or become available within the prescribed allowance periods, the employee shall refund the pro-rata amount of allowance for that period the occupancy in permanent accommodation takes place prior to the completion of the prescribed allowance periods.

Provided also that should an occupancy date which falls within the specified allowance periods be notified to the employer prior to the employee's transfer, the payment of a pro rata amount of the allowance should be made in lieu of the full settlement.

(3) If an employee is unable to obtain reasonable accommodation for the transfer of his or her home within the prescribed period referred to in subclause (1) of this clause and the employer is satisfied that the employee has taken all possible steps to secure reasonable accommodation, such employee shall, after the expiration of the prescribed period, be paid in accordance with the rates prescribed by Column B, Items (4), (5), (6), (7) or (8) of Schedule C – Travelling, Transfer and Relieving Allowance as the case may require, until such time as the employee has secured reasonable accommodation: Provided that the period of reimbursement under this subclause shall not exceed 77 days without the approval of the employer.

(4) When it can be shown by the production of receipts or other evidence that an allowance payable under this clause would be insufficient to meet reasonable additional costs incurred by an employee on transfer, an appropriate rate of reimbursement shall be determined by the employer.

(5) An employee who is transferred to employer accommodation shall not be entitled to reimbursement under this clause: Provided that:-

(a) where entry into employer accommodation is delayed through circumstances beyond the employee's control an employee may, subject to the production of receipts, be reimbursed actual reasonable accommodation and meal expenses for the employee and dependants less a deduction for normal living expenses prescribed in Column A, Items (17) and (18) of Schedule C – Travelling, Transfer and Relieving Allowance.

and provided that –

(b) if any costs are incurred under subclause (2) of Clause 6.11 – Disturbance Allowance they shall be reimbursed by the employer.

6.11 – DISTURBANCE ALLOWANCE

(1) An employee who is transferred in accordance with subclause (1) of Clause 6.10 – Transfer Allowance and incurs expenses in the areas referred to in subclause (2) of this clause as a result of that transfer shall be reimbursed the actual expenditure incurred upon production of receipts or such other evidence as may be required.

(2) The disturbance allowance shall include:

(a) Costs incurred for the installation/ connection/ reconnection of a telephone at the employee's new residence provided a telephone had been installed at the employee's former residence. Save that reimbursement shall also be made where an employee is transferred and leaves the residence in which he or she had installed a telephone and returns to the former locality on subsequent transfer.

(b) Costs incurred with the connection or reconnection of water, gas and/or electricity services to the employee's household.

(c) Costs incurred with the re-direction of mail for a period of three months.

6.12 – REMOVAL ALLOWANCE

(1) When an employee is transferred in the public interest, or in the ordinary course of promotion or transfer, or on account of illness due to causes over which the employee has no control, the employee shall be reimbursed:

(a) The actual reasonable cost of conveyance of the employee and dependants.

(b) The actual cost (including insurance) of the conveyance of an employee's household furniture effects and appliances up to a maximum volume of 45 cubic metres provided that a larger volume may be approved by the employer in special cases.

(c) An allowance of $557.00 for accelerated depreciation and extra wear and tear on furniture, effects and appliances for each occasion that an employee is required to transport their furniture, effects and appliances provided that the employer is satisfied that the value of household furniture, effects and appliances moved by the employee is at least $3342.00.

(d) Reimbursement of reasonable expenses in kennelling and transporting of domestic pet or pets up to a maximum amount of $188.00.

Pets are defined as dogs, cats, birds or other domestic animals kept by the employee or the employee's dependants for the purpose of household enjoyment.

Pets do not include domesticated livestock, native animals or equine animals.

(2) An employee who is transferred solely at their own request or on account of misconduct must bear the whole cost of removal unless otherwise determined by the employer prior to removal.

(3) An employee shall be reimbursed the full freight charges necessarily incurred in respect of the removal of the employee's motor vehicle.

(4) An employee shall, before removal is undertaken obtain quotes from at least two carriers which shall be submitted to the employer, who may authorise the acceptance of the more suitable: Provided that payment for a volume amount beyond 45 cubic metres shall not occur without the prior written approval of the employer.

(5) The employer may, in lieu of conveyance, authorise payment to compensate for any loss in any case where an employee, with prior approval of the employer, disposes of their household furniture effects and appliances instead of removing them to the new headquarters: Provided that such payments shall not exceed the sum which would have been paid if the employee's household furniture effects and appliances had been removed by the cheapest method of transport available and the volume was 45 cubic metres.

(6) Where an employee is transferred to government owned or private rental accommodation, where furniture is provided, and as a consequence the employee is obliged to store furniture, the employee shall be reimbursed the actual cost of such storage up to a maximum allowance of $1037.00 per annum. Actual cost is deemed to include the premium for adequate insurance coverage for the value of the furniture stored. An allowance under this subclause shall not be paid for a period in excess of 4 years without the approval of the employer.

(7) Receipts must be produced for all sums claimed.

(8) New appointees shall be entitled to receive the benefits of this cause if they are required by the employer to participate in any training course prior to their respective positions with Western Australia Police. This entitlement shall only be available to employees who have completed their training and who incur costs when moving to their first posting.

(9) The employer may agree to provide removal assistance greater than specified in this award and if in the event that the employee to whom the benefit is granted elects to leave the position, on a permanent basis, within 12 months, the employer may require the employee to repay the additional removal assistance on a pro rata basis. Repayment can be deducted from any monies due to the employee.

(10) For the purposes of this subclause, "elects to leave the position" means the employee freely chooses to leave the position in the ordinary course of promotion, transfer or resignation and this necessitates the employer obtaining a replacement employee.

7. LEAVE ARRANGEMENTS

7.1 - SICK LEAVE

(1) Entitlement

(a) The employer shall credit each permanent employee with the following sick leave credits, which shall be cumulative:

	Sick Leave on full pay	Sick Leave on half pay
On the day of initial appointment	40 hours	16 hours
On completion of 6 months continuous service	40 hours	24 hours
On the completion of 12 months continuous service	80 hours	40 hours
On the completion of each further period of 12 months continuous service	80 hours	40 hours

(b) An employee employed on a fixed term contract for a period greater than 12 months, shall be credited with the same entitlement as a permanent employee. An employee employed on a fixed term contract for a period less than 12 months, shall be credited with the same entitlement on a pro rata basis for the period of the contract.

(c) A part-time employee shall be entitled to the same sick leave credits, on a pro rata basis according to the number of hours worked each fortnight. Payment for sick leave shall only be made for those hours that would normally have been worked had the employee not been on sick leave.

(d) The provisions of this clause do not apply to casual employees.

(2) Evidence

(a) An application for sick leave exceeding two consecutive working days shall be supported by evidence to satisfy a reasonable person.

(b) The amount of sick leave granted without the production of evidence to satisfy a reasonable person required in paragraph (a) of this subclause shall not exceed, in the aggregate, five working days in any one credit year.

(3) Where the employer has occasion for doubt as to the cause of the illness or the reason for the absence, the employer may arrange for a registered medical practitioner to visit and examine the employee, or may direct the employee to attend the medical practitioner for examination. If the report of the medical practitioner does not confirm that the employee is ill, or if the employee is not available for examination at the time of the visit of the medical practitioner, or fails, without

reasonable cause, to attend the medical practitioner when directed to do so, the fee payable for the examination, appointment or visit shall be paid by the employee.

(4) If the employer has reason to believe that an employee is in such a state of health as to render a danger to fellow employees or the public, the employee may be required to obtain and furnish a report as to their condition from a registered medical practitioner nominated by the employer. The fee for any such examination shall be paid by the employer.

(5) Where an employee is ill during the period of annual leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that as a result of the illness the employee was confined to their place of residence or a hospital for a period of at least seven consecutive calendar days, the employer may grant sick leave for the period during which the employee was so confined and reinstate annual leave equivalent to the period of confinement.

(6) Where an employee is ill during the period of long service leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that as a result of illness the employee was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the employer may grant sick leave for the period during which the employee was so confined and reinstate long service leave equivalent to the period of confinement.

(7) An employee who is absent on leave without pay is not eligible for sick leave during the currency of that leave without pay.

(8) No sick leave shall be granted with pay, if the illness has been caused by the misconduct of the employee in the course of the employee's employment or in any case of absence from duty without sufficient cause.

(9) Where an employee who has been retired by the employer on medical grounds resumes duty therein, sick leave credits at the date of retirement shall be reinstated. This provision does not apply to an employee who has resigned and is subsequently reappointed.

(10) Workers' Compensation

Where an employee suffers a disability within the meaning of section 5 of the *Workers' Compensation and Injury Management Act 1981*, which necessitates that employee being absent from duty, sick leave with pay shall be granted to the extent of sick leave credits. In accordance with section 80(2) of the *Workers' Compensation and Injury Management Act 1981* where the claim for worker's compensation is decided in favour of the employee, sick leave credit is to be reinstated and the period of absence shall be granted as sick leave without pay.

(11) War Caused Illnesses

(a) An employee who produces a certificate from the Department of Veterans' Affairs stating that the employee suffers from war caused illness may be granted special sick leave credits of 120 hours (15 standard hour days) per annum on full pay in respect of that war caused illness. These credits shall accumulate up to a maximum credit of 360 hours (45 standard hour days), and shall be recorded separately to the employee's normal sick leave credit.

(b) Every application for sick leave for war caused illness shall be supported by a certificate from a registered medical practitioner as to the nature of the illness.

(12) Portability

(a) The employer shall credit an employee additional sick leave credits up to those held at the date that employee ceased previous employment provided:

(i) immediately prior to commencing employment in the Western Australia Police the employee was employed in the service of:

- The Commonwealth Government of Australia, or
- Any other State of Australia, or
- In a State body or statutory authority prescribed by Administrative Instruction 611;

(ii) the employee's employment with Western Australia Police commenced no later than one week after ceasing previous employment.

(b) The maximum break in employment permitted by subparagraph (a) (ii) of this subclause, may be varied by the approval of the employer provided that where employment with the Western Australia Police commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro rata annual leave paid out at the date the employee ceased with the previous employer.

7.2 - CARERS LEAVE

(1) An employee is entitled to use, each year, up to 10 days of the employee's sick leave entitlement per year to provide care and support to a member of the employee's family or household who is ill or injured, or an unexpected emergency affecting the member.

(2) Employees shall, wherever practical, give the employer notice of the intention to take carers leave and the estimated length of absence. If it is not practicable to give prior notice of absence employees shall notify the employer as soon as possible on the first day of absence.

(3) Employees shall provide, where required by the employer, evidence to establish the requirement to take carers leave. An application for carers leave exceeding two consecutive working days shall be supported by evidence that would satisfy a reasonable person of the entitlement.

(4) The definition of "family" shall be the definition contained in the Western Australian *Equal Opportunity Act 1984*. That is, a person who is related to the employee by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependant on, or is a member of the household of, the employee.

(5) Carers leave may be taken on an hourly basis or part thereof.

7.3 - SHORT LEAVE

(1) (a) The employer may, upon sufficient cause being shown, grant an employee short leave on full pay not exceeding 16 consecutive working hours, but any leave granted under the provisions of this clause shall not exceed, in the aggregate, 24 hours in any one calendar year.

(b) Part-time employees are eligible for short leave in accordance with this clause, on a pro rata basis calculated in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{80} \times \frac{24 \text{ hours}}{1}$$

(c) An employee employed on a fixed term contract of less than 12 months shall be eligible for pro rata short leave in accordance with this clause.

(2) Subject to the prior approval of the supervisor, employees located outside a radius of 50 kilometres from the Perth City Railway Station shall be allowed Short Leave where pressing personal matters can only be dealt with within the required hours of duty.

7.4 - ANNUAL LEAVE

(1) (a) (i) Each employee shall be granted annual leave of 240 hours on full pay for each year of service.

(ii) Annual leave shall be calculated on a calendar year basis commencing on January 1 in each year. Provided that such employee stationed in the North West shall be granted an additional 40 hours leave on full pay for each year of service in the North West.

(b) With the consent of the employer, annual leave may be taken in more than one period. Such periods may be single days. The number of hours deleted shall be subject to the number of ordinary hours the employee is rostered to work on such single day.

(c) Where annual leave is taken in more than one period as provided in subclause (1)(b) of this clause, the travelling time allowed under subclause (10) of this clause shall only apply to one period of annual leave per annum.

(2) (a) For the purposes of compiling the annual leave roster showing the commencing and finishing date of annual leave prescribed by subclause (1) of this clause each employee shall by no later than 30 June each year give notice to the employer of the dates that the employee prefers to commence and finish the employee's annual leave in the year immediately following.

(b) The notice referred to in subclause (2)(a) of this clause shall be submitted to the employee's Officer in Charge.

(3) (a) An employee shall only take annual leave in accordance with the dates indicated in relation to the employee on the roster of annual leave applicable in that year unless the dates on the roster are altered.

(b) The employer or the Officer in Charge concerned may alter the dates indicated on the roster of annual leave either in relation to a particular employee or generally.

(4) An employee is not entitled to accumulate annual leave except with the written permission of the employer.

(5) Where the employer is of the opinion that special circumstances exist in a particular case the employer may grant an employee leave (not being annual leave) with or without payment during that period.

(6) (a) Where an employee on annual leave is recalled to attend at Court from matters arising during the course of the employee's duties or to perform other duties the employee shall be paid or be entitled to receive for each day or part thereof additional payment at ordinary rates for the period of the recall including travelling time plus one shift added to his or her annual leave. Alternatively, the employee may elect to have two shifts added to his or her annual leave.

(b) Where an employee is required to attend Court or to perform other duties on an additional day granted for previous attendance under subclause (6)(a) of this clause, the employee shall be entitled to receive an additional one shift for attending Court or performing other duties, plus an additional two shifts, a total entitlement of three shifts. The additional shifts under this subclause shall be taken at a time mutually agreed between the employee and the employer.

(c) Where an employee has had to leave a holiday destination to travel for Court and then advised prior to starting work that his or her attendance is no longer required he or she shall be entitled to the additional annual leave days as provided in paragraph (a) of this subclause.

(d) Where an employee is ill or injured during his or her period of annual leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that he or she was as a result of illness confined to his or her place of residence or a hospital for at least seven days, he or she may with the approval of the employer be granted, at a time convenient to the employer, additional leave equivalent to the period during which he or she was so confined unfit.

(7) Notwithstanding the provisions contained in this clause the wages payable to a part-time employee during the period of leave shall be calculated, based on the fortnightly wages at the time the leave is taken, in accordance with the following formula:

$$\frac{\text{Hours worked per fortnight}}{80} \times \frac{\text{Full time fortnightly wages}}{1}$$

(8) A loading of 17.5% shall be paid to employees in December in the calendar year in which the leave accrues, calculated on the award rate of pay with respect to a maximum of five weeks annual leave. Provided that in no case shall the loading exceed the amount set out in the "Average Weekly Total Earnings of all Males in Western Australia", as published by the Australian Bureau of Statistics for the September quarter immediately preceding the date the leave became due.

In respect to part-time employees the loading is to be proportioned according to the average number of hours worked in that calendar year.

(9) Annual Leave loading shall not be paid for any pro rata leave to which an employee is entitled on resignation.

(10) Annual Leave Travel Concessions

(a) Employees Stationed in Remote Areas

(i) The travel concessions contained in the table immediately following are provided to an employee, partner and dependant children when proceeding on annual leave to either Perth, Geraldton or other place outside of the employee's district which is approved by the employer, from Headquarters situated in the Annual Leave Travel Concession Areas 3, 5 and 6, and in that portion of Area 4 located north of 30^0 South latitude as provided by Schedule E – Annual Leave Travel Concession Boundaries.

(ii) Employees are required to serve a year in these areas before qualifying for travel concessions. However, employees who have less than a year's service in these areas and who are required to proceed on annual leave to suit the employer's convenience or who are unable to complete the required 12 months service in the special area due to causes beyond the employee's control will be allowed the concessions. The concession may also be given to an employee who proceeds on annual leave before completing the year's service provided that the employee returns to the area to complete the year's service at the expiration of the period of leave.

(iii) The mode of travel is to be at the discretion of the employer.

(iv) Provided the concession does not exceed the value of the fully refundable return economy airfare from his or her Headquarters to Perth an employee may elect to use the concession to purchase a return economy airfare or equivalent motor vehicle allowance to any destination of his or her choice. Should the cost of the chosen return economy airfare be less than the value of the fully refundable return economy airfare to Perth the lesser amount shall be paid. Accommodation costs of any travel package arrangement will not be paid as part of this concession.

(v) Travel concessions not utilised within 12 months of becoming due will lapse.

(vi) Where special circumstances exist the employee's partner and/or dependant children may utilise the concession provided in the clause at a different time to the employee. Special circumstances shall include circumstances where the leave roster precludes the employee from taking leave during school holidays or at the same time as his or her partner and/or dependants.

(vii) Part-time or irregular part-time employees are entitled to travel concessions on a pro rata basis according to the average number of hours worked per week. Travelling time shall be calculated on a pro rata basis according to the number of hours worked.

Table

Approved Mode of Travel	Travel Concession	Travelling Time
(aa) Air	Fully refundable return economy airfare for the employee, partner and dependant children.	One day each way
(bb) Road	Full motor vehicle allowance rates, but reimbursement not to exceed the cost of the fully refundable return economy airfare.	North of 20 degrees South Latitude - two and one half days each way. Remainder - two days each way.

Table—*continued*

Approved Mode of Travel		Travel Concession	Travelling Time
(cc)	Air and Road	Full motor vehicle allowance rates for car trip, but reimbursement not to exceed the cost of the fully refundable return economy air fare for the employee, dependant partner and dependant children.	North of 20 degrees South Latitude - two and one half days each way. Remainder - two days each way.

(b) Employees stationed in special areas:

(i) The travel concessions in the table immediately following are provided to an employee, and the employee's family as defined in Clause 1.6 – Definitions, when proceeding on annual leave to either Perth or other place outside of the employee's district which is approved by the employer from Headquarters other than those designated in subclause (10)(a) of this clause but within a special area as defined in Clause 1.6 – Definitions.

(ii) The travel concessions are only payable to an employee who has completed 12 months service in the special area or, if the employee has not completed 12 months service in the special area before proceeding on annual leave, does so on the employee's return from annual leave before the employee again takes annual leave.

(iii) The travel concession shall be repaid to the Western Australia Police by the employee if the employee fails to complete 12 months service in the special area unless that failure is due to causes beyond the employee's control.

Approved Mode of Travel		Travel Concession
(aa)	Public Transport	Free return passes to Perth or other place approved by the Commissioner on public transport for the employee and the employee's family as defined in Clause 1.6 – Definitions.
(bb)	Private Vehicle	Full motor vehicle allowance rates but reimbursement not to exceed the cost of public transport specified in (aa), above.
(cc)	Public Transport and a Private Vehicle	Free return passes to Perth or other place approved by the Commissioner and the full motor vehicle allowance rate provided that reimbursement is not to exceed the cost of public transport specified in (aa), above.

(c) Employees other than those designated in subclause (10)(a) of this clause, whose Headquarters are situated outside a radius of 240 kilometres from Perth City Railway Station and who travel to Perth for their annual leave shall be granted by the employer reasonable travelling time to enable them to complete the return journey.

To standardise the entitlement the following criteria is to be used:

(i) 240 kms to 499 kms - half day travelling each way but taken as one additional day;

(ii) 500 kms to 1000 kms - one day's travelling time each way;

(iii) in excess of 1000 kms and north of the 26th parallel - two and one half day's each way, and all stations south of the 26th parallel but in excess of 1000 kms shall be allowed the equivalent of a counterpart north of the 26th parallel.

(11) Notwithstanding the foregoing provisions in this clause, the employer may direct an employee to take accrued annual leave and may determine the date of which such leave shall commence.

(12) (a) Where the employer and employee have not agreed when the employee is to take his or her annual leave the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time.

(b) The employee is to give the employer at least two weeks notice of the period during which the employee intends to take his or her leave which accrued more than 12 months before that time.

(13) The provisions of this clause do not apply to casual employees.

7.5 – PURCHASED LEAVE

(1) The employer and an employee may agree to enter into an arrangement whereby the employee can purchase up to eight weeks additional leave.

(2) The employer will assess each application for a 44/52 wages arrangement on its merits and give consideration to the personal circumstances of the employee seeking the arrangement.

(3) Where an employee is applying for purchased leave of between five and eight weeks the employer will give priority access to those employees with carer responsibilities.

(4) Access to this entitlement will be subject to the employee having satisfied the agency's accrued leave management policy.

(5) The employee can agree to take a reduced wage spread over the 52 weeks of the year and receive the following amounts of purchased leave:

Number of Weeks Wages Spread Over 52 Weeks	**Number of Weeks Purchased Leave**
44 weeks	8 weeks
45 weeks	7 weeks
46 weeks	6 weeks
47 weeks	5 weeks
48 weeks	4 weeks
49 weeks	3 weeks
50 weeks	2 weeks
51 weeks	1 week

(6) The purchased leave will not be able to be accrued. The employee is to be entitled to pay in lieu of the purchased leave not taken. In the event that the employee is unable to take such purchased leave, his/her wages will be adjusted on the last pay period in January to take account of the fact that time worked during the year was not included in the wages.

(7) Where an employee who is in receipt of an allowance provided for in Clause 6.4 - Higher Duties Allowance proceeds on any period of additional purchased leave the employee shall not be entitled to receive payment of the allowance for any period of additional purchased leave. When not on a period of purchased leave the employee shall receive the full entitlement to Higher Duties Allowance in accordance with Clause 6.4 – Higher Duties Allowance.

(8) In the event that a part-time employee's ordinary working hours are varied during the year, the wages paid for such leave taken will be adjusted on the last pay in January to take into account any variations to the employee's ordinary working hours during the previous year.

7.6 – DEFERRED WAGES SCHEME

(1) With the written agreement of the employer, an employee may elect to receive, over a four year period, 80% of the wages they would otherwise be entitled to receive in accordance with Clause 5.1 – Wages.

(2) The employer will assess each application for deferred wages on its merits and give consideration to the personal circumstances of the employee seeking the leave.

(3) On completion of the fourth year, an employee will be entitled to 12 months leave and will receive an amount equal to 80% of the wages they were otherwise entitled to in the fourth year of deferment.

(4) Where an employee completes four years of deferred wages service and is not required to attend duty in the following year, the period of non-attendance shall not constitute a break in service and shall count as service on a pro-rata basis for all purposes.

(5) An employee may withdraw from this scheme prior to completing a four year period by written notice. The employee will receive a lump sum payment of wages forgone to that time but will not be entitled to equivalent absence from duty.

(6) The employer will ensure that the superannuation arrangements and taxation effects are fully explained to the employee by the relevant Authority. The employer will put any necessary arrangements into place.

7.7 – LONG SERVICE LEAVE

(1) Employees shall qualify for long service leave in the following terms:

(a) An employee who has completed 10 years of continuous service with the employer shall be entitled to 520 hours long service leave on full pay.

(b) For each subsequent period of seven years of continuous service an employee shall be entitled to an additional 520 hours long service leave on full pay.

For recording purposes and to facilitate flexible working arrangements where other than eight hours is worked in a day and/or 40 hours in a week, long service leave will be debited at the actual number of hours rostered during the period of leave.

(c) Subject to the employer's approval, an employee may elect to take the leave in periods of single days or more.

(d) For the purposes of determining an employee's long service leave entitlement under the provisions of subclause (1)(a) and (b) of this clause, the expression "continuous service" includes any period during which the employee is absent on full pay but does not include:

(i) any period exceeding two weeks during which an employee is absent on leave without pay or unpaid parental leave, except where leave without pay is approved for the purpose of fulfilling an obligation by the Government of Western Australia to provide staff for a particular assignment external to the Public Sector of Western Australia;

(ii) any period during which an employee is taking a long service leave entitlement or any portion thereof except in the case of subclause (8) of this clause when the period excised will equate to a full entitlement of 13 weeks;

(iii) any service by an employee who resigns, is dismissed or whose services are otherwise terminated other than service prior to such resignation, dismissal or termination when his or her prior service had actually entitled the employee to the long service leave provided under this clause;

(iv) any period of service that was taken into account in ascertaining the amount of a lump sum payment in lieu of long service leave.

(e) Payment made for long service leave granted to an employee who has been employed on a part-time basis or on both a full-time and part-time basis during a qualifying period shall be adjusted according to the hours worked by the employee, subject to the following:

(i) If an employee consistently worked on a part-time basis for a regular number of hours during the whole of the employee's qualifying service, the employee shall continue to be paid the wages determined on that basis during the long service leave.

(ii) A part-time or irregular part-time employee shall have the same entitlement to long service leave as full-time employees. However, payment made during such periods of long service leave shall be adjusted according to the hours worked by the employee during that accrual period.

(2) (a) Long Service leave shall be taken at any time within six years of it becoming due, at the convenience of the employer. Provided that the employer may approve the deferment of the taking of long service leave beyond six years in exceptional circumstances. Provided further that such exceptional circumstances shall include retirement within seven years of the date of entitlement.

(b) Approval to defer the taking of long service leave may be withdrawn or varied at any time by the employer giving the employee notice in writing of the withdrawal or variation.

(c) Subject to the approval of the employer, an employee may clear a long service leave entitlement by taking double time at half pay or compacting a long service leave entitlement to half time at double pay. The excised period of continuous service when an employee has elected to compact a long service leave entitlement will be 13 weeks. The excised period of continuous service when an employee has elected to take double time at half pay will be 26 weeks.

(d) Subject to the approval of the employer, an employee may cash out any portion of an accrued entitlement to long service leave, provided that the employee proceeds on a minimum of 10 days annual leave in that calendar year. Where an employee cashes out any proportion of an accrued entitlement to long service leave, the entitlement accessed is excised for the purpose of continuous service.

(3) On application to the employer a lump sum payment for the money equivalent of any:

(a) long service leave entitlement for continuous service as provided in subclause (1)(a) and (b) of this clause, shall be made to an employee who resigns, retires, is retired or is dismissed or in respect of an employee who dies;

(b) pro-rata long service leave based on continuous service of a lesser period than that provided in subclause (1)(a) and (b) of this clause, for a long service leave entitlement shall be made:

(i) to an employee who retires at or over the age of 55 years or who is retired on the grounds of ill health if the employee has completed not less than 12 months continuous service before the date of retirement;

(ii) to an employee who, not having resigned is retired by the employer for any other cause, if the employee has completed not less than three years continuous service before the date of retirement; or

(iii) in respect of an employee who dies, if the employee has completed not less than 12 months continuous service before the date of death.

(c) In the case of a deceased employee, payment shall be made to the estate of the employee unless the employee is survived by a legal dependant approved by the employer, in which case payment shall be made to the legal dependant.

(4) The calculation of the amount due for long service leave accrued and for pro-rata long service leave shall be made at the rate of wages of an employee at the date of retirement or resignation or death, whichever applies.

(5) (a) An employee who desires to be granted a period of long service leave shall give at least two months notice in writing of the fact and shall make application to the employer. The application shall state the amount of leave required and the date from which the leave is to commence. In case of emergency and for reasons to be stated in writing, an employee may at any time apply to the employer for any long service leave due.

(b) An employee may prior to commencing long service leave request approval for the substitution of another date for commencement of long service leave and the employer may approve such substitution.

(6) Recognition of Pro Rata Service with other Government Employers:

Interstate:

(a) Where an employee was, immediately prior to being employed under the provisions of the *Police Act 1892*, employed in the service of the Commonwealth or any other State of Australia and the period between the date

when the employee ceased previous employment and the date of commencing employment does not exceed one week, that employee shall be entitled to long service leave determined in the following manner:

(i) The pro-rata portion of long service leave to which the employee would have been entitled up to the date of appointment under the provisions of the *Police Act 1892* shall be calculated in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro rata long service leave, any long service leave taken or any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(ii) The balance of the long service leave entitlement of the employee shall be calculated upon appointment under the provisions of the *Police Act 1892* in accordance with the provisions of this clause.

(b) The maximum break in employment permitted by subclause (6)(a) of this clause, may be varied by the approval of the employer provided that where employment under the provision of the *Police Act 1892* commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro-rata annual leave paid out at the date the employee ceased with the previous employer or in the case of defence forces the employee applied to join the Western Australia Police before ceasing the previous employment and was inducted into police training in the first available Police Auxiliary Officer Training Course. This matter must be negotiated and documented as part of the recruitment process.

(c) An employee previously employed by the Commonwealth or by any other State of Australia shall not proceed on any period of long service leave until the employee:

(i) has served a period of not less than three years continuous service with the employer; and

(ii) is entitled to 520 hours long service leave on full pay.

(d) The employer may approve of an employee proceeding on long service leave prior to the employee completing three years continuous service.

(e) Nothing in this subclause shall be deemed to confer on any employee previously employed by the Commonwealth or by any other State of Australia any entitlement to a complete period of long service leave that accrued in the employee's favour prior to the date on which the employee commenced employment under the provisions of the *Police Act 1892*.

Intrastate:

(f) Where an employee was, immediately prior to being employed under the provisions of the *Police Act 1892*, an employee in:

(i) the Public Service of Western Australia established pursuant to the *Public Sector Management Act 1994*;

(ii) a statutory authority listed in Schedule 1 of the *Financial Management Act 2006*;

(iii) either of the Houses of the Parliament of the State under the separate control of the President or Speaker or under their joint control;

(iv) the Health Education Council (or its predecessor); or

(v) the Nurses Board of WA

and the period between the date when the employee ceased previous employment and the date of commencing employment under the provisions of the *Police Act 1892* does not exceed one week, that employee shall be entitled to 520 hours of long service leave on full pay on which ever is the earliest date of:

(vi) the date on which the employee would have become entitled to long service leave had the employee remained in the former employment; or

(vii) the date determined by:

(aa) calculating the pro-rata portion of long service leave to which the employee would have been entitled up to date of appointment under the *Police Act 1892*, in accordance with the provisions that applied to the previous employment referred to, but in calculating that period of pro-rata long service leave, any long service leave taken or any benefit granted in lieu of any such long service leave during that employment shall be deducted from any long service leave to which the employee may become entitled under this clause; and

(bb) by calculating the balance of the long service leave entitlement of the employee upon appointment under the provisions of the *Police Act 1892* in accordance with the provisions of this clause.

(g) The maximum break in employment permitted by subclause (6)(f) of this clause, may be varied by the approval of the employer provided that where employment under the provisions of the *Police Act 1892* commenced more than one week after ceasing the previous employment, the period in excess of one week does not exceed the amount of accrued and pro-rata annual leave paid out at the date the employee ceased with the previous employer. This matter must be negotiated and documented as part of the recruitment process.

(h) An employee who was not paid out for accrued and pro-rata annual leave held at the date of ceasing previous employment shall comply with the provisions of subclause (6)(f) of this clause.

(i) In addition to any entitlement arising from the application of subclause (6)(f) of this clause, an employee previously employed by a prescribed State body or statutory authority may, on approval of the employer, be credited with any period of long service leave to which the employee became entitled during the former employment but had not taken at the date of appointment under the provisions of the *Police Act 1892* provided the employee's former employer had given approval for the employee to accumulate the entitlement.

(7) An employee who has elected to retire at or over the age of 55 years and who will complete not less than 12 months continuous service before the date of retirement may make application to take pro-rata long service leave before the date of retirement.

(8) (a) A full-time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on both a full and part-time basis, may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full-time service.

(b) A full-time employee who, during a qualifying period towards an entitlement of long service leave was employed continuously on a part-time basis, may elect to take a lesser period of long service leave calculated by converting the part-time service to equivalent full-time service.

(9) Notwithstanding the foregoing provisions in this clause, the employer may direct an employee to take accrued long service leave and may determine the date of which such leave shall commence.

(10) Where an employee is ill during the period of long service leave and produces at the time, or as soon as practicable thereafter, medical evidence to the satisfaction of the employer that as a result of the illness the employee was confined to their place of residence or a hospital for a period of at least 14 consecutive calendar days, the employer may grant sick leave for the period during which the employee was so confined and reinstate long service leave equivalent to the period of confinement.

(11) (a) An employee shall, when recalled from long service leave to attend at Court from matters arising during the course of their duties or to perform other duties, be paid or be entitled for each day or part thereof additional payments at ordinary hour rates for the period of the recall including travelling time plus one shift added to their long service leave or at the option of the employee two shifts added to their long service leave.

(b) Where an employee is required to attend Court or to perform other duties on an additional day granted for previous attendance under subclause (11)(a) of this clause, the employee shall be entitled to leave of an additional one shift for attending Court or performing other duties and leave equal to a further two shifts, a total entitlement of three shifts. Such additional shifts as defined under this clause shall be taken at a time mutually agreed between the employee and the employer.

(c) Where an employee has had to leave a holiday destination to travel back for Court and then advised prior to starting work that their attendance is no longer required they shall be entitled to the additional days added to their long service leave as provided in subclause (11) of this clause.

(12) The provisions of this clause do not apply to casual employees.

7.8 – BEREAVEMENT LEAVE

(1) Employees shall on the death of:

(a) the partner of the employee;

(b) the child or step child or grandchild of the employee (including an adult child, step child or grandchild of the employee);

(c) the parent, step parent, or grandparent of the employee or their partner's parent;

(d) the brother, sister, step brother or step sister of the employee; or

(e) any other person who, immediately before the person's death, lived with the employee as a member of the employee's household;

be eligible for up to two days paid bereavement leave.

(2) Provided that at the request of an employee, the employer may exercise discretion to grant bereavement leave to an employee in respect of some other person with whom the employee has a special relationship.

(3) The two days need not be consecutive.

(4) Bereavement leave is not to be taken during any other period of leave.

(5) Payment of such leave may be subject to the employee providing evidence of the death or relationship to the deceased, satisfactory to the employer.

(6) An employee requiring more than two days bereavement leave in order to travel overseas in the event of the death overseas of a member of the employee's immediate family may, upon providing adequate proof, in addition to any bereavement leave to which the employee is eligible, have immediate access to annual leave and/or accrued long service leave and/or leave without pay provided all accrued leave is exhausted.

(7) Subject to prior approval from the employer, a regional employee entitled to bereavement leave and who as a result of that bereavement travels to a location within Western Australia that is more than 240 kilometres from their workplace will be granted paid time off for the travel period undertaken in ordinary hours up to a maximum of 16 hours per bereavement.

(8) The employer may approve additional paid travel time within Western Australia where the employee can demonstrate to the satisfaction of the employer that more than two days travel time is warranted.

7.9 – PARENTAL LEAVE

(1) Definitions

"Employee" includes full-time, part-time, permanent and fixed term contract employees.

"Partner" means a person who is a spouse or de facto partner.

"Primary Care Giver" is the employee who will assume the principal role for the care and attention of a child/children. The employer may require confirmation of primary care giver status.

"Public sector" means an employing authority as defined in Section 5 of the *Public Sector Management Act 1994*.

"Replacement Employee" is an employee specifically engaged to replace an employee proceeding on parental leave.

(2) Entitlement to Parental and Partner Leave

(a) An employee is entitled to a period of up to 52 weeks unpaid parental leave in respect of the:

(i) birth of a child to the employee or the employee's partner; or

(ii) adoption of a child who is not the child or the stepchild of the employee or the employee's partner; is under the age of 16; and has not lived continuously with the employee for six months or longer.

(b) An employee identified as the primary care giver of a child and who has completed 12 months continuous service in the Western Australian public sector shall be entitled to 14 weeks paid parental leave which will form part of the 52 week entitlement provided in subclause (2)(a) of this clause.

(c) An employee may take the paid parental leave specified in paragraph (2)(b) at half pay for a period equal to twice the period to which the employee would otherwise be entitled.

(d) A pregnant employee can commence the period of paid parental leave any time up to six weeks before the expected date of birth and no later than four weeks after the birth. Any other primary care giver can commence the period of paid parental leave from the birth date or for the purposes of adoption from the placement of the child but no later than four weeks after the birth or placement of the child.

(e) Paid parental leave for primary care purposes for any one birth or adoption shall not exceed the period specified in subclauses (2)(b) and (2)(c) above.

(f) The paid and unpaid parental leave entitlement up to a maximum of 52 weeks may be shared between partners assuming the role of primary care giver.

(g) Parental leave may only be taken concurrently by an employee and his or her partner as provided for in subclause (3) or under special circumstances with the approval of the employer.

(h) Where less than the standard parental leave is taken the unused portion of the period of paid or unpaid leave cannot be preserved in any way.

(i) An employee may elect to receive pay in advance for the period of paid parental leave at the time the parental leave commences, or may elect to be paid the entitlement on a fortnightly basis over the period of the paid parental leave.

(j) An employee is eligible, without resuming duty, for subsequent periods of parental leave in accordance with the provisions of this clause.

(3) Partner Leave

(a) An employee who is not a primary care giver shall be entitled to a period of unpaid partner leave of up to one week at the time of the birth of a child/children to his or her partner. In the case of adoption of a child this period shall be increased to up to three weeks unpaid leave.

(b) The employee may request to extend the period of unpaid partner leave up to a maximum of eight weeks.

(4) Birth of a child

(a) An employee shall provide the employer with a medical certificate from a registered medical practitioner naming the employee, or the employee's partner, confirming the pregnancy and the estimated date of birth.

(b) If the pregnancy results in other than a live child or the child dies in the six weeks immediately after the birth, the entitlement to paid parental leave remains intact.

(5) Adoption of a child

(a) An employee seeking to adopt a child shall be entitled to two days unpaid leave to attend interviews or examinations required for the adoption procedure. Employees working or residing outside the Perth metropolitan area are entitled to an additional day's unpaid leave. The employee may take any paid leave entitlement in lieu of this leave.

(b) If an application for parental leave has been granted for the adoption of a child, which does not eventuate, then the period of paid or unpaid parental leave is terminated. Employees may take any other paid leave entitlement in lieu of the terminated parental leave or return to work.

(6) Other leave entitlements

(a) An employee proceeding on unpaid parental leave may elect to substitute any part of that leave with accrued annual leave or long service leave for the whole or part of the period of unpaid parental leave.

(b) Subject to all other leave entitlements being exhausted an employee shall be entitled to apply for leave without pay following parental leave to extend their leave by up to two years.

(c) The employer shall only refuse such a request on reasonable grounds related to the effect on the workplace or the employer's business. Such grounds might include:

(i) cost;

(ii) lack of adequate replacement staff;

(iii) loss of efficiency; and

(iv) the impact on customer service.

(d) Any period of leave without pay must be applied for and approved in advance and will be granted on a year-by-year basis. Where both partners work for the employer the total combined period of leave without pay following parental leave will not exceed two years.

(e) An employee on parental leave is not entitled to paid sick leave and other paid absences other than as specified in paragraphs (6)(a) and (6)(f).

(f) Should the birth or adoption result in other than the arrival of a living child, the employee shall be entitled to such period of paid sick leave or unpaid leave for a period certified as necessary by a registered medical practitioner. Such paid sick leave cannot be taken concurrently with paid parental leave.

(g) Where a pregnant employee not on parental leave suffers illness related to the pregnancy or is required to undergo a pregnancy related medical procedure the employee may take any paid sick leave to which the employee is entitled or unpaid leave for a period as certified necessary by a registered medical practitioner.

(7) Notice and Variation

(a) An employee shall give not less than four weeks notice in writing to the employer of the date the employee proposes to commence paid or unpaid parental leave stating the period of leave to be taken.

(b) An employee seeking to adopt a child shall not be in breach of subclause (7)(a) by failing to give the required period of notice if such failure is due to the requirement of the adoption agency to accept earlier or later placement of a child, or other compelling circumstances.

(c) An employee proceeding on parental leave may elect to take a shorter period of parental leave and may at any time during that period elect to reduce or extend the period stated in the original application, provided four weeks written notice is provided.

(8) Transfer to a Safe Job

Where illness or risks arising out of pregnancy or hazards connected with the work assigned to the pregnant employee make it inadvisable for the employee to continue in her present duties, the duties shall be modified or the employee may be transferred to a safe position at the same classification level until the commencement of parental leave.

(9) Communication during Parental Leave

(a) Where an employee is on parental leave and a definite decision has been made to introduce significant change at the workplace, the employer shall take reasonable steps to:

(i) make information available in relation to any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave; and

(ii) provide an opportunity for the employee to discuss any significant effect the change will have on the status or responsibility level of the position the employee held before commencing parental leave.

(b) The employee shall take reasonable steps to inform the employer about any significant matter that will affect the employee's decision regarding the duration of parental leave to be taken, whether the employee intends to return to work and whether the employee intends to return to work on a part-time basis.

(c) The employee shall also notify the employer of changes of address or other contact details which might affect the employer's capacity to comply with subclause (9)(a).

(10) Replacement Employee

Prior to engaging a replacement employee the employer shall inform the person of the temporary nature of the employment and the entitlements relating to the return to work of the employee on parental leave.

(11) Return to Work

(a) An employee shall confirm the intention to return to work by notice in writing to the employer not less than four weeks prior to the expiration of parental leave.

(b) An employee on return to work from parental leave will be entitled to the same position or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities as the substantive position held immediately prior to proceeding on parental leave. Where the employee was transferred to a safe job the employee is entitled to return to the position occupied immediately prior to transfer.

(c) An employee may return on a part-time or job-share basis to the substantive position occupied prior to the commencement of leave or to a different position at the same classification level in accordance with Clause 4.1 – Part-Time Employment.

(12) Effect of Parental Leave on the Contract of Employment

(a) An employee employed for a fixed term contract shall have the same entitlement to parental leave; however the period of leave granted shall not extend beyond the term of that contract.

(b) Paid parental leave will count as qualifying service for all purposes of this award. During paid parental leave at half pay all entitlements will accrue as if the employee had taken the entitlement to paid parental leave at full pay.

(c) Absence on unpaid parental leave shall not break the continuity of service of employees but shall not be taken into account in calculating the period of service for any purpose of this award.

(d) An employee on parental leave may terminate employment at any time during the period of leave by written notice in accordance with Clause 2.3 – Termination of Employment.

(e) An employer shall not terminate the employment of an employee on the grounds of the employee's application for parental leave or absence on parental leave but otherwise the rights of the employer in respect of termination of employment are not affected.

7.10 – CULTURAL/CEREMONIAL LEAVE

(1) Cultural/ceremonial leave shall be available to all employees.

(2) Such leave shall include leave to meet the employee's customs, traditional law and to participate in cultural and ceremonial activities.

(3) Employees are entitled to time off without loss of pay for cultural/ceremonial purposes, subject to agreement between the employer and employee and sufficient leave credits being available.

(4) The employer will assess each application for cultural/ceremonial leave on its merits and give consideration to the personal circumstances of the employee seeking the leave.

(5) The employer may request reasonable evidence of the legitimate need for the employee to be allowed time off.

(6) Cultural/ceremonial leave may be taken as whole or part days off. Each day or part thereof shall be deducted from:

(a) the employee's annual leave entitlements;

(b) the employee's accrued long service leave entitlements, but in full days only; or

(c) short leave when entitlements under subclauses (a) and (b) have been fully exhausted.

(7) Time off without pay may be granted by arrangement between the employer and the employee for cultural/ceremonial purposes.

7.11 – BLOOD/ PLASMA DONORS LEAVE

(1) Subject to operational requirements, employees shall be entitled to absent themselves from the workplace in order to donate blood or plasma in accordance with the following general conditions:

(a) prior arrangements with the supervisor has been made and at least two days' notice has been provided; or

(b) the employee is called upon by the Red Cross Blood Centre.

(2) The notification period shall be waived or reduced where the supervisor is satisfied that operations would not be unduly affected by the employee's absence.

(3) The employee shall be required to provide proof of attendance at the Red Cross Blood Centre upon return to work.

(4) Employees shall be entitled to two hours of paid leave per donation for the purpose of donating blood to the Red Cross Blood Centre.

7.12 – LEAVE FOR INTERNATIONAL SPORTING EVENTS

(1) Special leave with pay may be granted by the employer to an employee chosen to represent Australia as competitor or official, at a sporting event which meets the following criteria:

(a) it is a recognised international amateur sport of national significance; or

(b) it is a world or international regional competition; and

(c) no contribution is made by the sporting organisation towards the normal wages of the employee.

(2) The employer shall make enquiries with the Department of Sport and Recreation as to:

(a) whether the application meets the above criteria;

(b) the period of leave to be granted.

(3) The provisions of this clause do not apply to casual employees.

7.13 – DEFENCE FORCE RESERVES LEAVE

(1) The employer must grant leave of absence for the purpose of Defence service to an employee who is a volunteer member of the Defence Force Reserves or the Cadet Force. Defence service means service, including training, in a part of the Reserves or Cadet Force.

(2) Leave of absence may be paid or unpaid in accordance with the provisions of this clause.

(3) Application for leave of absence for Defence service shall, in all cases, be accompanied by evidence of the necessity for attendance. At the expiration of the leave of absence granted, the employee shall provide a certificate of attendance to the employer.

(4) Paid leave

(a) An employee who is a volunteer member of the Defence Force Reserves or the Cadet Force is entitled to paid leave of absence for Defence service, subject to the conditions set out hereunder.

(b) Part-time employees shall receive the same paid leave entitlement as full-time employees but payment shall only be made for those hours that would normally have been worked but for the leave.

(c) On written application, an employee shall be paid wages in advance when proceeding on such leave.

(d) Casual employees are not entitled to paid leave for the purpose of Defence service.

(e) An employee is entitled to paid leave for a period not exceeding 112 hours on full pay in any period of 12 months commencing on 1 July in each year.

(f) An employee is entitled to a further period of leave, not exceeding 16 calendar days, in any period of 12 months commencing on July 1. Pay for this leave shall be at the rate of the difference between the normal remuneration of the employee and the Defence Force payments to which the employee is entitled if such payments do not exceed normal wages. In calculating the pay differential, pay for Saturdays, Sundays, Public Holidays and rostered days off is to be excluded, and no account is to be taken of the value of any board or lodging provided for the employee.

(5) Unpaid leave

(a) Any leave for the purpose of Defence service that exceeds the paid entitlement prescribed in subclause (4) of this clause shall be unpaid.

(b) Casual employees are entitled to unpaid leave for the purpose of Defence service.

(6) Use of other leave

(a) An employee may elect to use annual or long service leave credits for some or all of their absence on Defence service, in which case they will be treated in all respects as if on normal paid leave.

(b) The employer cannot compel an employee to use annual leave or long service leave for the purpose of Defence service.

7.14 – LEAVE WITHOUT PAY

(1) Subject to the provisions of subclause (2) of this clause, the employer may grant an employee leave without pay for any period and is responsible for the placement of that employee on his or her return.

(2) Every application for leave without pay will be considered on its merits and may be granted provided:

(a) the work of the Western Australia Police is not inconvenienced; and

(b) all other leave credits of the employee are exhausted.

(3) An employee shall, upon request be entitled to two days unpaid personal (caring) leave.

(4) Any period that exceeds two weeks during which an employee is on leave of absence without pay shall not, for any purpose, be regarded as part of the period of service of that employee.

7.15 – WITNESS AND JURY SERVICE

Witness

(1) An employee subpoenaed or called as a witness to give evidence in any proceeding shall as soon as practicable notify the Officer in Charge who shall notify the employer.

(2) Where an employee is subpoenaed or called as a witness to give evidence in any official capacity that employee shall be granted by the employer leave of absence with pay, but only for such period as is required to enable the employee to carry out duties related to being a witness. If the employee is on any form of paid leave, the leave involved in being a witness will be reinstated, subject to the satisfaction of the employer. The employee is not entitled to retain any witness fee but shall pay all fees received into the Consolidated Fund. The receipt for such payment with a voucher showing the amount of fees received shall be forwarded to the employer.

(3) An employee subpoenaed or called as a witness to give evidence in an official capacity shall, in the event of non-payment of the proper witness fees or travelling expenses as soon as practicable after the default, notify the employer.

(4) An employee subpoenaed or called as a witness on behalf of the Crown, not in an official capacity, shall be granted leave with full pay entitlements. If the employee is on any form of paid leave, this leave shall not be reinstated as such witness

service is deemed to be part of the employee's civic duty. The employee is not entitled to retain any witness fees but shall pay all fees received into the Consolidated Fund.

(5) An employee subpoenaed or called as a witness under any other circumstances other than specified in subclauses (2) and (4) of this clause shall be granted leave of absence without pay except when the employee makes an application to clear accrued leave in accordance with these provisions.

Jury

(6) An employee required to serve on a jury shall as soon as practicable after being summoned to serve, notify the Officer in Charge who shall notify the employer.

(7) An employee required to serve on a jury shall be granted by the employer leave of absence on full pay, but only for such period as is required to enable the employee to carry out duties as a juror.

(8) An employee granted leave of absence on full pay as prescribed in subclause (6) of this clause is not entitled to retain any juror's fees but shall pay all fees received into the Consolidated Fund. The receipt for such payment shall be forwarded with a voucher showing the amount of juror's fees received to the employer.

7.16 – LEAVE TO ATTEND UNION BUSINESS

(1) The employer shall grant paid leave at the ordinary rate of pay during normal working hours to an employee:

(a) who is required to attend or give evidence before any Industrial Tribunal;

(b) who as a Union-nominated representative is required to attend any negotiations and/or proceedings before an Industrial Tribunal and/or meetings with Ministers of the Crown, their staff or any other representative of Government;

(c) when prior arrangement has been made between the Union and the employer for the employee to attend official Union meetings preliminary to negotiations and/or Industrial Tribunal proceedings; and

(d) who as a Union-nominated representative is required to attend joint union/management consultative committees or working parties.

(2) The granting of leave is subject to convenience and shall only be approved:

(a) where reasonable notice is given for the application for leave;

(b) for the minimum period necessary to enable the union business to be conducted or evidence to be given; and

(c) for those employees whose attendance is essential.

(3) The employer shall not be liable for any expenses associated with an employee attending to union business.

(4) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours.

(5) An employee shall not be entitled to paid leave to attend union business other than as prescribed by this clause.

(6) The provisions of this clause shall not apply to:

(a) special arrangements made with the Union which provide for unpaid leave for employees to conduct union business;

(b) when an employee is absent from work without the approval of the employer; and

(c) casual employees.

7.17 – TRADE UNION TRAINING LEAVE

(1) Subject to the employer's convenience and the provision of this clause:

(a) The employer shall grant paid leave of absence to employees who are nominated by the Union to attend short courses relevant to the public sector or the role of the Union workplace representative, conducted by the Union.

(b) The employer shall grant paid leave of absence to attend similar courses or seminars as from time to time approved by agreement between the employer and the Union.

(2) An employee shall be granted up to a maximum of five days paid leave per calendar year for trade union training or similar courses or seminars as approved. However, leave of absence in excess of five days and up to 10 days may be granted in any one calendar year provided that the total leave being granted in that year and the subsequent year does not exceed 10 days.

(3) (a) Leave of absence will be granted at the ordinary rate of pay and shall not include shift allowances, penalty rates or overtime.

(b) Where a public holiday or rostered day off falls during the duration of a course, a day off in lieu of that day will not be granted.

(c) Subject to subclause (3)(a) of this clause, shift workers attending a course shall be deemed to have worked the shifts they would have worked had leave not been taken to attend the course.

(d) Part-time employees shall receive the same entitlement as full-time employees, but payment shall only be made for those hours that would normally have been worked but for the leave.

(4) (a) Any application by an employee shall be submitted to the employer for approval at least four weeks before the commencement of the course unless the employer agrees otherwise.

(b) All applications for leave shall be accompanied by a statement from the Union indicating that the employee has been nominated for the course. The application shall provide details as to the subject, commencement date, length of course, venue and the authority, which is conducting the course.

(5) A qualifying period of 12 months service shall be served before an employee is eligible to attend courses or seminars for more than a half-day duration. The employer may, where special circumstances exist, approve an application to attend a course or seminar where an employee has less than 12 months service.

(6) (a) The employer shall not be liable for any expenses associated with an employee's attendance at trade union training courses.

(b) Leave of absence granted under this clause shall include any necessary travelling time in normal working hours immediately before or after the course.

8. MISCELLANEOUS PROVISIONS

8.1 – INTRODUCTION OF CHANGE

(1) Employer's Duty to Notify

(a) Where the employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on the employee, the employer will notify the employee who may be affected by the proposed changes and the Union.

(b) "Significant effects" include termination of employment, major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of the employee to other work locations and restructuring of jobs. Provided that where provisions are provided for alteration of any of the matters referred to herein an alteration will be deemed not to have significant effect.

(2) Employer's Duty to Discuss Change

(a) The employer shall discuss with the employee affected and the Union, amongst other things, the introduction of the changes, the effects the changes are likely to have on the employee, measures to avert or mitigate the adverse effects of such changes on the employee and will give prompt consideration to matters raised by the employees and/ or the Union in relation to the changes, unless by prior arrangement, the Union is represented on the body formulating recommendations for change to be considered by the employer.

(b) The discussion will commence as early as practicable after a firm decision has been made by the employer to make the changes.

(c) For the purposes of such discussion, the employer will provide to the employees concerned and the Union, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on the employee and any other matters likely to affect the employee provided that the employer will not be required to disclose confidential information, the disclosure of which would be inimical to the employer's interest.

8.2 – UNION FACILITIES

(1) The employer recognises the rights of the Union to organise and represent its members. Union representatives in the agency have a legitimate role in assisting the Union in the tasks of recruitment, organising, communication and representing members' interests in the workplace, agency and Union electorate.

(2) The employer recognises that, under the Union's rules, Union representatives are members of an Electorate Delegates Committee representing members within a Union electorate. A Union electorate may cover more than one agency.

(3) The employer will recognise Union representatives in the agency and will allow them to carry out their role and functions.

(4) The Union will advise the employer in writing of the names of the Union representatives in the agency.

(5) The employer shall recognise the authorisation of each Union representative in the agency and shall provide them with the following:

(a) Paid time off from normal duties to perform their functions as a Union representative such as organising, recruiting, individual grievance handling, collective bargaining, involvement in the Electorate Delegates Committee and to attend Union business in accordance with Clause 7.16 – Leave to Attend Union Business.

(b) Access to facilities required for the purpose of carrying out their duties. Facilities may include but shall not be limited to, the use of filing cabinets, meeting rooms, telephones, fax, email, internet, photocopiers and stationery. Such access to facilities shall not unreasonably affect the operation of the organisation and shall be in accordance with normal agency protocols.

(c) A noticeboard for the display of Union materials including broadcast email facilities.

(d) Paid access to periods of leave for the purposes of attending Union training courses in accordance with Clause 7.17 – Trade Union Training Leave.

(e) Notification of the commencement of new employees, and as part of their induction, time to discuss the benefits of Union membership with them.

(f) Access to awards, agreements, policies and procedures.

(g) The names of any Equal Employment Opportunity and Occupational Health, Safety and Welfare representatives.

(6) The employer recognises that it is paramount that Union representatives in the workplace are not threatened or disadvantaged in any way as a result of their role as a Union representative.

9. DISPUTE SETTLEMENT PROCEDURE

(1) Any questions, disputes or difficulties arising between the employer and the employees concerning their employment will be dealt with in accordance with the following procedures:

(a) Stage 1

(i) Any employee or group of employees with a question, dispute or disagreement should discuss the matter with his or her immediate supervisor or representative in the first instance.

(ii) The supervisor or representative is to investigate the matter. If the matter cannot be resolved or an authoritative answer given on the day the issue is raised, then a response should be provided within three days.

(iii) Should a response require time to establish an answer, the supervisor shall keep the employee(s) informed of his or her progress in resolving the matter.

(b) Stage 2

(i) If the employee(s) continue to be aggrieved or the issue is still in dispute, the matter is to be discussed between the employee's representative and the employer's nominated representative and an attempt made to resolve the matter. Notification of any question or disagreement may be made verbally or in writing.

(ii) At any stage, the parties may individually or collectively seek advice from any appropriate organisation or person in an attempt to resolve the matter.

(iii) If the matter is not resolved within five working days of the date of notification in (i) hereof, either party may notify their representative (or his or her nominee), or the employer (or his or her nominee) of the existence of a dispute or disagreement.

(iv) The representative (or his or her nominee) and the employer (or his or her nominee) shall confer on the matters notified by the parties within five working days and:

(aa) where there is agreement on the matters in dispute the parties shall be advised within two working days;

(bb) where there is disagreement on any matter it may be referred by any party to this award to the Western Australian Industrial Relations Commission.

(2) At all stages of the procedure the employee may be accompanied by a Union representative.

10. PARTIES TO THE AWARD

The parties to this award shall be:

The Civil Service Association of Western Australia Incorporated.

Western Australia Police.

SCHEDULE A – OVERTIME MEAL RATES

Meals	
Breakfast	$10.30 per meal
Lunch	$12.65 per meal
Evening Meal	$15.20 per meal
Supper	$10.30 per meal

SCHEDULE B – CAMPING ALLOWANCE

South of 26° South Latitude			**Rate per Day**	**Item**
Permanent Camp	–	Cook provided by Department	$40.60	1
Permanent Camp	–	No cook provided	$54.10	2
Other Camping	–	Cook provided by Department	$67.65	3
Other Camping	–	No cook provided	$81.15	4
North of 26° South Latitude				
Permanent Camp	–	Cook provided by Department	$58.55	1
Permanent Camp	–	No cook provided	$72.10	2
Other Camping	–	Cook provided by Department	$85.60	3
Other Camping	–	No cook provided	$99.15	4

SCHEDULE C - TRAVELLING, TRANSFER AND RELIEVING ALLOWANCE

Item	Particulars	Column A DAILY RATE First 42 days after arrival at new locality	Column B DAILY RATE Period of Relief in excess of 42 days EMPLOYEE WITH DEPENDANTS	Column C DAILY RATE Period of Relief in excess of 42 days EMPLOYEE WITHOUT DEPENDANTS
		$	$	$
ALLOWANCE TO MEET INCIDENTAL EXPENSES				
(1)	WA - South of 26°South Latitude	14.55		
(2)	WA - North of 26°South Latitude	21.70		
(3)	Interstate	21.70		
ACCOMMODATION INVOLVING AN OVERNIGHT STAY IN A HOTEL OR MOTEL				
(4)	WA – Metropolitan Hotel or Motel	305.45	152.70	101.80
(5)	Locality South of 26° South Latitude	208.55	104.30	69.50
(6)	Locality North of 26° South Latitude			
	Broome	456.70	228.35	152.25
	Carnarvon	255.15	127.55	85.05
	Dampier	366.70	183.35	122.25
	Derby	342.20	171.10	114.05
	Exmouth	292.70	146.35	97.55
	Fitzroy Crossing	370.20	185.10	123.40
	Gascoyne Junction	291.70	145.85	97.25
	Halls Creek	247.20	123.60	82.40
	Karratha	445.70	222.85	148.55
	Kununurra	331.70	165.85	110.55
	Marble Bar	271.70	135.85	90.55
	Newman	338.95	169.50	113.00
	Nullagine	256.70	128.35	85.55
	Onslow	273.30	136.65	91.10
	Pannawonica	192.70	96.35	64.25
	Paraburdoo	259.70	129.85	86.55
	Port Hedland	367.15	183.55	122.40
	Roebourne	241.70	120.85	80.55
	Shark Bay	240.20	120.10	80.05
	Tom Price	320.20	160.10	106.75
	Turkey Creek	235.70	117.85	78.55
	Wickham	508.70	254.35	169.55
	Wyndham	254.70	127.35	84.90
(7)	Interstate - Capital City			
	Sydney	304.90	152.45	101.60
	Melbourne	288.55	144.30	96.15
	Other Capitals	270.10	135.05	89.95
(8)	Interstate – Other than Capital City	208.55	104.30	69.50

Item	Particulars	Column A DAILY RATE First 42 days after arrival at new locality	Column B DAILY RATE Period of Relief in excess of 42 days EMPLOYEE WITH DEPENDANTS	Column C DAILY RATE Period of Relief in excess of 42 days EMPLOYEE WITHOUT DEPENDANTS
		$	$	$
ACCOMMODATION INVOLVING AN OVERNIGHT STAY AT OTHER THAN A HOTEL OR MOTEL				
(9)	WA - South of 26° South Latitude	93.65		
(10)	WA - North of 26° South Latitude	128.25		
(11)	Interstate	128.25		
TRAVEL NOT INVOLVING AN OVERNIGHT STAY OR TRAVEL INVOLVING AN OVERNIGHT STAY WHERE ACCOMMODATION ONLY IS PROVIDED.				
(12)	WA - South of 26° South Latitude:			
	Breakfast	16.30		
	Lunch	16.30		
	Dinner	46.50		
	Supper	26.36		
(13)	WA - North of 26° South Latitude			
	Breakfast	21.20		
	Lunch	33.20		
	Dinner	52.20		
	Supper	35.53		
(14)	Interstate			
	Breakfast	21.20		
	Lunch	33.20		
	Dinner	52.20		
MIDDAY MEAL				
(15)	Rate per meal	6.35		
(16)	Maximum reimbursement per pay period	31.75		
DEDUCTION FOR NORMAL LIVING EXPENSES				
(17)	Each adult	26.25		
(18)	Each child	4.50		

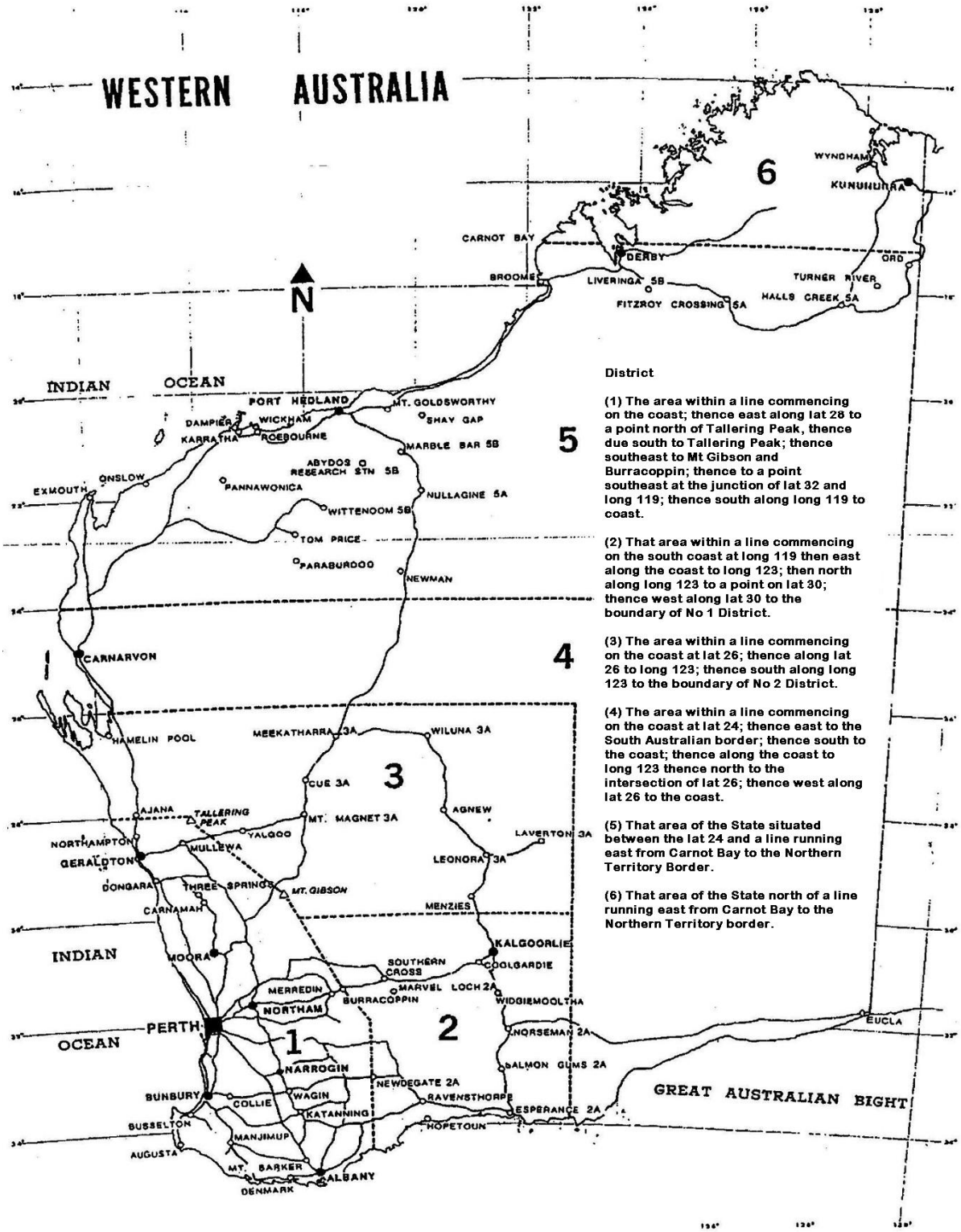
SCHEDULE D – MOTOR VEHICLE ALLOWANCE

AREA AND DETAILS	Rate (cents) per kilometre ENGINE DISPLACEMENT (In Cubic Centimetres)		
RATE PER KILOMETRE	**Over 2600cc**	**Over 1600cc to 2600cc**	**1600cc and under**
Metropolitan Area	89.5	64.5	53.2
South West Land Division	91.0	65.4	54.0
North of 23.5 Degree South Latitude	98.6	70.6	58.3
Rest of the State	94.3	67.5	55.6

MOTOR CYCLE ALLOWANCE

Distance travelled during a year on official business	Rate Cents per Kilometre
Rate per kilometre	31.0

SCHEDULE E – ANNUAL LEAVE TRAVEL CONCESSION BOUNDARIES



POLICE ACT 1892—APPEAL—Matters Pertaining To—

2013 WAIRC 00969

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARK ANTONINO POLIZZI
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
	COMMISSIONER S J KENNER
	COMMISSIONER S M MAYMAN
DATE	THURSDAY, 14 NOVEMBER 2013
FILE NO/S	APPL 27 OF 2013
CITATION NO.	2013 WAIRC 00969

Result Order varied

Order

WHEREAS an order was made in this matter on 8 October 2013 ([2013] WAIRC 00847);

AND WHEREAS the parties have agreed to the following amendments being made to the order programming the appeal;

NOW THEREFORE I, pursuant to s 33S of the *Police Act 1892* and s 27(1)(o) of the *Industrial Relations Act 1979*, and by consent, hereby order:

1. THAT in order 3, the date "Monday 18 November 2013" be amended to read "Wednesday 20 November 2013".
2. THAT in order 4, the date "Monday 25 November 2013" be amended to read "Wednesday 27 November 2013".

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.] On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2013 WAIRC 00966

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WENDY DEANNA ARMSTRONG
	APPLICANT
	-v-
	MRS SUZANNE BALL
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 11 NOVEMBER 2013
FILE NO/S	U 72 OF 2013
CITATION NO.	2013 WAIRC 00966

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 7th day of June 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider her position; and

WHEREAS on the 17th day of October 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 00917

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRAINE ANDERSON
	APPLICANT
	-v-
	THE PUNTUKURNU ABORIGINAL MEDICAL SERVICES ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	B 110 OF 2013
CITATION NO.	2013 WAIRC 00917

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 27 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00916

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LORRAINE ANDERSON
	APPLICANT
	-v-
	THE PUNTUKURNU ABORIGINAL MEDICAL SERVICES ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	U 110 OF 2013
CITATION NO.	2013 WAIRC 00916

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

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

AND WHEREAS on 27 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00902

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00902
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	WEDNESDAY, 7 AUGUST 2013
DELIVERED	**:**	WEDNESDAY, 23 OCTOBER 2013
FILE NO.	**:**	U 130 OF 2012
BETWEEN	**:**	MR CHARLES BRETT
		Applicant
		AND
		MS SHARYN O'NEILL
		DIRECTOR: STANDARDS AND INTEGRITY
		DEPARTMENT OF EDUCATION
		Respondent

CatchWords	**:**	Unfair dismissal – Termination of Employment – Child-related employment – Interim Negative Notice – Negative Notice – Interim Negative Notice issued – Provision of non-child-related employment – Working With Children Card
Legislation	**:**	*Criminal Code* (WA)
		Industrial Relations Act 1979 s 29(1)(b)(i), s 23A
		School Education Act 1999 s 238, s 240
		Working With Children (Criminal Record Checking) Act 2004 s 3, s 4, s 6, s 13, s 22, s 22(1), s 23, s 41, s 41(1), s 41(2), s 41(3), s 41(3)(a), s 41(3)(b)
		Teachers (Public Sector Primary and Secondary Education) Award 1993 cl 12
Result	**:**	Application dismissed
Representation:		
Counsel:		
Applicant	**:**	Mr J Birman of counsel
		Ms C Sun of counsel
Respondent	**:**	Ms R Young of counsel

Reasons for Decision

1 Charles Brett (the applicant) claims that he was harshly, oppressively or unfairly dismissed from his employment.

2 The Statement of Agreed Facts sets out that the applicant had been a teacher employed by the respondent since 1982. The parties agree that the applicant was employed in child-related employment as defined in s 4 of the *Working With Children (Criminal Record Checking) Act 2004* (WWC Act). For the last 23 years of his employment, he had been employed at a government secondary school where children under 18 years of age attend.

3 On 3 May 2012, the applicant was charged with offences under the *Criminal Code* (WA). The respondent became aware of the charges, and by letter dated 10 May 2012, directed the applicant to leave school premises pursuant to s 240 of the *School Education Act 1999* (SE Act), to remain at home, to remain available and contactable during his normal hours of employment, and that the school's principal may provide him with appropriate work. He was invited to make any submission as to why the order, pursuant to s 240 of the SE Act, should be revoked. He appears to have complied with these directions but made no submission.

4 Where charges which constitute Class 2 offences under the WWC Act have been laid, the Chief Executive Officer (CEO) of the Department for Child Protection (DCP) must issue an Interim Negative Notice (INN), which prohibits a person being employed in child-related employment, unless the CEO is satisfied that there are exceptional circumstances (s 13 of the WWC Act).

5 On 16 May 2012, the DCP issued an INN pursuant to s 13 of the WWC Act, prohibiting the applicant from being employed in child-related employment, and directing him to return his Working With Children Card (WWC Card).

6 The parties agree that under s 22 of the WWC Act, it was an offence for the respondent to continue to employ the applicant in child-related employment once he had been issued with an INN. An employer who does so once they are aware of the INN is liable for a penalty of $60,000 and five years' imprisonment.

7 By letter dated 22 May 2012, the respondent terminated the applicant's employment. The respondent did not offer, nor did the applicant request, a position not involving contact with children pursuant to s 238 of the SE Act, suspension without pay or the opportunity to take long service or any accrued annual leave.

8 On 24 January 2013, the applicant was acquitted of the charges. On 3 April 2013, the DCP cancelled the INN and reissued the applicant with a WWC Card.

9 The applicant filed this claim citing the following grounds:

1. Employees of the Department of Education ('the Department') are required to obtain a Working With Children Clearance ('WWCC').
2. The WWCC is issued by the Department of Child Protection ('DCP').
3. DCP has issued an interim negative notice in respect of the Applicant.
4. DCP has provided a copy of the interim negative notice to the Department.
5. The Applicant will seek a review of the decision to issue the interim negative notice.
6. The decision by the Department to terminate the employment relationship in reliance on the interim negative notice is premature in those circumstances.
7. Additionally the Department has abdicated its responsibility.
8. As a result of the matters pleaded herein, the Applicant submits that the decision to terminate the employment relationship was harsh, unjust and unreasonable in all the circumstances.
9. See attached letter of termination.

10 There is nothing before the Commission to indicate whether or not the applicant sought a review of the decision to issue the INN as foreshadowed in ground 5 above.

The Evidence

11 Sharyn Anne O'Neill, the Director General of the Department of Education, gave evidence. She says she signed the letter which terminated the applicant's employment 'because I considered it would be an offence for me to continue to employ [the applicant] in his role as a teacher under the WWC Act as he had an interim negative notice. In order to comply with the WWC Act and avoid committing an offence, I signed the letter, terminating his employment' (exhibit R1 – Witness Statement of Sharyn O'Neill [8]). Ms O'Neill also says that the Department's policy, Working With Children Checks (the policy), is consistent with the requirements of the WWC Act and reiterates the requirements of the WWC Act in relation to non-employment of persons in child-related work if they have been issued with an INN. She refers in particular to page 8 of the policy and APPENDIX D – PROCESS FOR NOTIFICATION OF ADVERSE WWCC OUTCOMES AND APPEALS (EXCLUDING TAFE COLLEGES) at page 34 under D.2.1.2.

12 Ms O'Neill says that the letter dated 22 May 2012, which terminated the applicant's employment, was drafted for her and was in accordance with the WWC Act and the policy.

13 Ms O'Neill says that a substantial majority of teachers are employed to work in schools. The Department employs approximately 35,000 employees, 20,000 of whom are teachers. There may be 30 to 40 staff members with a teaching background who are employed in Head Office, and a total of about 20 in regional offices. Previously, there were significantly more of those staff members located at Head Office and in regional offices. However, approximately three to four years ago, a policy decision was taken by Government to locate in the schools many school advisers who were previously located in regional offices. That has significantly reduced the number of people employed at Head Office and regional offices who may otherwise be teachers. Further, many of the teachers' roles in regional and Head Offices have a requirement to go to schools on a regular basis. An employee under an INN could not do so. Therefore, there was no opportunity to redeploy or transfer the applicant to a regional office or Head Office.

14 Ms O'Neill said that there is no capacity to find other work for the applicant and she did not need other work to be undertaken (ts 25). If she had, it would have been advertised and people could apply for the job. She did not consider suspending the applicant.

15 Ms O'Neill said that the provisions of the WWC Act meant that the applicant could not be employed in child-related employment, but that the WWC Act did not go so far as to say he could not be employed in other work – that was a matter for her judgment (ts 15). She conceded that the WWC Act did not require her to sack the applicant (ts 15), and that he could have undertaken non-child related work as a teacher (ts 17). However, the applicant was employed as a teacher but due to the INN, he was unable to undertake his duties as a teacher, which was his role. There were no other positions available for teachers, and, as she understood it, she was not obliged to consider other positions, or whether he could be employed as a teacher in a non-child related role (ts 18).

16 Ms O'Neill compared the situation where the applicant was directed to remain at home following her becoming aware that the charges had been laid and the situation which applied after the INN had issued. In the former situation, she had to assess the risk on facts then available to her and to investigate before making any further decision. In the latter situation, the INN had issued, meaning the applicant was unable to work in child-related work. In this situation, there was no obligation to find other work for him. She made the judgment to terminate his employment because he was unable to undertake the work for which he was employed, and there was 'no obligation on me to go out and find him another … job to do' (ts 22). Child-related work was that for which he was employed.

17 Ms O'Neill said that in dismissing the applicant she was also following the policy. She said the first part of the decision about the applicant was his not being able to undertake his job in schools due to the WWC Act. The second part was her decision, (ts 24) that is, to terminate his employment. Further Ms O'Neill said there was no capacity to find another role. She did not need to investigate whether there was another role to be undertaken because such roles, when available and needing to be filled, were advertised (ts 26).

18 Ms O'Neill said that part of the policy provides that where an INN has been issued, the employee will 'be immediately removed from child-related work pending a final assessment outcome' (ts 27). However, she also says that the reference in the policy regarding an INN, to removal from child-related work 'pending the final assessment outcome' enables a dismissed employee to be re-employed should the INN be lifted (ts 34). In the applicant's case, when the charges were dismissed and his WWC Card was reinstated, he was not automatically reinstated. Rather he was able to apply for employment (ts 35).

Submissions

19 The respondent says that in the case of a teacher, the very nature of the work is child-related. The terms of the WWC Act mean that where a person is employed under a contract of employment to teach children, there is no option for the employer when an INN is issued but to cease the contract of employment. It requires the termination from a position in child-related employment. The WWC Act cannot be read as to require the respondent to employ people in positions for which they were not employed, which is inconsistent with the nature of the job for which they were employed.

20 Further, the respondent says that the definition of child-related work, containing the phrase 'contact with a child in connection with an educational institution for children' (ts 39), potentially includes persons who work in offices, particularly if they go to schools from time to time.

21 The respondent says that even if the respondent were not required by the WWC Act to terminate the employment, and s 41 of the WWC Act does not deny the Commission jurisdiction, then the dismissal was not unfair in all of the circumstances. A teacher's role is a dedicated and specialist role. Where the applicant had been exclusively employed in that role for such a lengthy period, there should be no obligation to redeploy or transfer him to another role. As to whether the applicant could have been suspended, the respondent says this would have maintained him in employment and this would be contrary to s 22 of the WWC Act, that is, he would still be in child-related employment.

22 The applicant says that the starting point for consideration of this matter is whether, but for the WWC Act, the dismissal was unfair. While he recognises that he could not be employed in child-related employment pending the resolution of the charges, that did not automatically require dismissal. He says that the respondent was obliged to consider all of the options available including removing the applicant from child-related work into other work, or suspension.

23 The applicant says that the WWC Act is silent on any requirement as to whether the person to whom an INN has been issued must be dismissed, rather they cannot be employed in child-related employment. The objects of the WWC Act do not require dismissal. There might be other consequences, such as a lesser paid or undesirable job.

24 The applicant also says that it is neither a fundamental nor a necessary element of being a teacher that they be available to teach in a classroom. He says that there is no written contract of employment that limits his role to those functions of being in a classroom. Rather, he is to perform whatever work the respondent directs him to do – he could be transferred to administrative work. The respondent failed to consider that prospect. The applicant also says that natural justice required the respondent to at least ask him to show cause before dismissing him.

25 Further, the applicant says Ms O'Neill's evidence demonstrates that she did not dismiss him because the WWC Act required her to do so, but that she was exercising discretion. She did so unfairly.

The WWC Act

26 The long title of the WWC Act provides that it is:

> An Act –
>
> - to provide for procedures for checking the criminal record of people who carry out, or propose to carry out, child related work;
> - to prohibit people who have been charged with or convicted of certain offences from carrying out child-related work, and to provide for related matters.

27 Section 3 of the WWC Act provides:

> **3. Principle that best interests of children are paramount**
>
> In performing a function under this Act, the CEO or the State Administrative Tribunal is to regard the best interests of children as the paramount consideration.

28 Child related employment is defined by section 4 as follows:

> **4. Terms Used**
>
> child-related employment means –

(a) child-related work carried out by an individual under a contract of employment or training contract (whether written or unwritten); or

(b) child-related work carried out on a voluntary basis by an individual under an agreement (whether written or unwritten) with another person; or

(c) child-related work carried out by an individual as a minister of religion or in any other capacity for the purposes of a religious organisation;

29 Child related work has the meaning given to that term in section 6 which is:

(1) Subject to subsection (3), work is **child-related work** if –

(a) the usual duties of the work involve, or are likely to involve, contact with a child in connection with –

…

(iii) an educational institution for children: or

Subsection (3) is not relevant for current purposes.

30 An 'educational institution for children' includes any school as defined in the SE Act, with specified exceptions which are not relevant here.

31 Section 22 – Employers not to employ certain people in child-related employment (WWC Act), provides that in this section, '***employer*** means a person who employs, or proposes to employ, another person in child-related employment.' It also provides in sub-section 3:

(3) An employer must not employ a person in child-related employment if the employer is aware that a negative notice or an interim negative notice has been issued to the person and is current.

32 Section 23 provides that a person issued with a negative notice (NN) or INN must not be employed in child-related employment.

33 The most significant part of this matter relates to the terms of s 41 – Employer to comply with Act despite other laws etc. This provides:

(1) If it would be a contravention of a provision of this Act for a person (the **employer**) to employ another person in child-related employment, the employer is to comply with the provision despite another Act or law or any industrial award, order or agreement.

(2) The employer does not commit an offence or incur any liability because, in complying with the provision, the employer does not start or continue to employ the person in child-related employment.

(3) Nothing in this section operates to affect a person's right to seek or obtain a remedy under the *Industrial Relations Act 1979* unless –

(a) the remedy is for the dismissal of the person by the employer: and

(b) the reason the employer dismissed the person was to comply with this Act; and

(c) the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

The Policy

34 The policy (Attachment SON1 to the witness statement of Sharyn O'Neill), at page 30 in Appendix C – Applying for a WWCC, deals with what is to occur in the circumstances of a NN or an INN being issued. It provides:

C.8.2 UNSUCCESSFUL APPLICATIONS

C.8.2.1 NEGATIVE NOTICE

If a WWCC application is unsuccessful, a Negative Notice will be issued and has effect unless it is cancelled under the Act.

A Negative Notice immediately prohibits a person from being in child-related work and as such they will be immediately removed from child-related work.

If an employee is issued with a Negative Notice their contract will come to an end.

C.8.2.2 INTERIM NEGATIVE NOTICE

The WWC Screening Unit may also issue an Interim Negative Notice which prohibits a person from being in child-related work until the WWC Screening Unit makes a decision on the application and either issues a Negative Notice, an Assessment Notice, or the application is withdrawn.

An Interim Negative Notice immediately prohibits a person from being in child-related work and as such they will be immediately removed from child-related work pending the final assessment outcome.

35 Appendix D sets out a process for Notification of Adverse Outcomes and Appeals, including in respect of an INN and a NN. At page 34, in step 6 of the process dealing with a NN, the Manager, Labour Relations, would send the employee an 'end of contract letter' and there is a template for such letter. In respect of INNs, the process is set out at pages 34 and 35. At point 6 the Manager, Labour Relations 'send[s] employee end of contract letter'. Therefore, whilst the policy itself indicates that there

are different considerations dependent upon whether there is an INN or a NN, the processes set out at the end of the policy are the same, both resulting in termination of employment.

36 As the applicant points out, the respondent's policy is inconsistent in that in one section it distinguishes between what is to occur when a NN is issued compared with when an INN is issued and in another it treats them as the same.

37 Therefore, the respondent's policy and its checklist of actions are inconsistent. Whether the policy reflects the WWC Act is another matter, and it is not necessary to deal with that matter to resolve this application.

CONSIDERATION

38 The objects of the WWC Act are to provide procedures for checking the criminal records of people who carry out or propose to carry out child-related work, and to prohibit people charged with or convicted of certain offences from carrying out child-related work.

39 Section 22 prohibits an employer from employing a person in child-related employment if the employer is aware that a NN or INN has been issued.

40 The definition of child-related employment is child-related work carried out under any of a number of arrangements. These are: under a contract of employment or training contract; on a voluntary basis under an agreement with another person; by an individual as a minister of religion or in any other capacity for the purposes of a religious organisation; or by a student as part of the student's course of study (s 4). In accordance with s 6, child-related work is that where the usual duties of the work involve, or are likely to involve, contact with a child in connection with a school.

41 Therefore, child-related work is the actual usual duties which involve, or are likely to involve, contact with a child. Child-related employment does not merely encompass the usual meaning associated with the employment relationship, as in one performed under a contract of employment or service. Rather, child-related employment is the child-related work carried on under a contract of employment, or by a volunteer, or as part of a religious organisation, or as part of a study programme. In any event, it includes child-related work under a contract of employment. Further, the legislation distinguishes between child-related work and child-related employment.

42 In this context, employer is defined as a 'person who employs, or proposes to employ, another person in child-related employment' (s 22(1) WWC Act). It is important to note in this context that this is not limited to an employer-employee relationship.

43 The issue in this case, I believe, boils down to whether, in accordance with s 41 of the WWC Act, the reason the employer dismissed the employee was to comply with the WWC Act.

44 It is beyond contention that because an INN had been issued to the applicant, the applicant must not be employed in child-related employment (s 23 WWC Act) that is, to undertake child-related work under a contract of employment, and the employer is prohibited from employing him in child-related employment if the employer is aware that an INN has been issued to him (s 22 WWC Act). The prohibition is on employing him in child-related employment not merely in child-related work.

45 Further, the employer is to comply with the provision despite another Act or law or any industrial award, order or agreement (s 41(1) WWC Act).

46 Section 41(2) says that the employer does not commit an offence or incur a liability because, in complying with the provision (referred to in s 41(1) requiring the employer to not employ a person in child-related employment), the employer does not start or continue to employ the person in 'child-related employment'.

47 I note a number of things arising from this provision. Firstly, there are two circumstances covered, both starting to employ and continuing to employ. Secondly, it deals with start or continue to employ in child-related employment.

48 The meanings of start and continue are not controversial. However, the WWC Act contemplates removing liability from the employer for the employer not taking a person on, or not continuing to employ the person. The thing for which they are not liable is the not starting or continuing to employ in child-related employment. It is not limited to child-related work, that is the duties, but from the employment, under a contract of employment.

49 Therefore, if the respondent did not continue to employ the applicant under a contract of employment, to comply with the legislation, then the employer is not liable.

50 This concept is also applied to a claim of unfair dismissal, in s 41(3). It provides that a person's right to obtain a remedy is maintained provided that the three conditions do not apply. The first is that the remedy the person seeks is for the dismissal. The second is that the reason for the dismissal was to comply with the WWC Act. The third is that the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason. When all three conditions are met, the person has no right to seek or obtain a remedy under the *Industrial Relations Act 1979* (IR Act).

51 In summary, s 41 of the WWC Act says that where the employee claims he or she has been unfairly dismissed and seeks the remedies provided under the IR Act of reinstatement or compensation, the reason for dismissal was for the employer to comply with the WWC Act, and the grounds for the claim relate to the fact that the dismissal was for that reason, the employee cannot seek or obtain a remedy.

The Remedy is for the dismissal (s 41(3)(a))

52 The application in this case seeks a remedy of 'reinstatement or compensation in respect of a harsh, oppressive or unfair dismissal for the reasons set out in the attached statement' (Form 2 – Notice of Application). Form 2 – Notice of Application is for a claim made under s 29(1)(b)(i) of the IR Act. Section 29(1)(b)(i) provides for an employee to refer to the Commission a claim that they have been harshly, oppressively or unfairly dismissed. Section 23A of the IR Act sets out the Commission's powers to provide remedies in respect of a claim by an employee that their dismissal was harsh, oppressive or unfair. Therefore, as the claim is for a remedy for unfair dismissal, the provision of s 41(3)(a) of the WWC Act has been met.

The Reasons for the dismissal (s 41(3)(b))

53 As the parties agree, the applicant was employed in child-related employment. The evidence demonstrates, and I find that Ms O'Neill's decision to terminate the applicant's employment was, firstly, because he could not be employed in child-related employment after he had been issued with an INN. As a teacher he was required to undertake child-related work. The duties and responsibilities of a teacher involve, or are likely to involve, contact with a child (see *Teachers (Public Sector Primary and Secondary Education) Award 1993*, cl 12 – Teachers – Duties, Responsibilities and Attendance Hours). Due to the INN, he could not undertake that work.

54 Secondly, as the applicant was employed as a teacher and he could not continue in that employment, the respondent exercised her judgment or discretion to not place him in another role, saying that there was no other work which was required to be performed. Further, she did not consider suspending him.

55 Prior to the INN being issued, the respondent, being aware of the charges being laid against the applicant, issued him with a direction to remain away from the school. Notwithstanding Mr Birman's efforts to have her concede that she did this because she expected an INN to be issued, it was not for the Director General to anticipate whether or not an INN would or would not issue. At that point, she was obliged to remove him from the school while further information was gathered. It also was prudent in light of the nature of the charges, to remove him from the school.

56 However, the situation changed as soon as the INN was issued, and the respondent was then compelled by the WWC Act to not employ the applicant in child-related employment. Although the respondent says whether the applicant could have been employed in other non-child-related employment was a secondary consideration, for the purposes of the WWC Act, she was obliged to no longer employ him under a contract of employment to perform the work he was contracted to perform.

57 I note the conflict between the respondent's submission that dismissal was required by the WWC Act and Ms O'Neill's evidence that it was a two stage process, the first being to comply with the WWC Act by removing the applicant from child-related employment and the second being an exercise of discretion based on his being unable to undertake the work for which he was employed.

58 However, I find that, under the provisions of s 41(3)(b) of the WWC Act, the reason for the dismissal was to comply with the WWC Act. Even if there were other reasons, the cause of those other reasons coming into play was the prohibition on his employment in child-related employment, that is, but for the INN, and the requirements of the WWC Act, the applicant's employment would not have been terminated.

The grounds on which the applicant seeks the remedy (s 41(3)(c))

59 The grounds on which the applicant seeks the remedy are those contained in the Schedule to the Notice of Application and are set out in [9] above. It is clear that these grounds 'relate to the fact that (he) was dismissed for that reason'.

60 As the three conditions set out in s 41(3) have been met, the applicant is not able to seek or obtain a remedy under the IR Act.

61 I note that the WWC Act's requirements prevail over any other Act or law. Under the usual principles surrounding unfair dismissals, it may be considered that a decision to dismiss taken without procedural fairness, and taken without consideration of alternatives, is unfair. It is clear from the terms of the WWC Act that, as McLure JA noted in *Chief Executive Officer, Department for Child Protection v Scott* [No 2] [2008] WASCA 171 at [109]:

> [T]he civil rights of applicants who are issued with a negative notice will be affected adversely and, in some circumstances, those applicants with, for example, non-conviction charges may suffer serious or even irretrievable damage to their reputations or a significant diminution in their earning capacity.

62 Those comments apply equally to a person issued with an INN as the requirements regarding their employment are the same. The requirements of the WWC Act prevail over the right to bring a claim of unfair dismissal and to seek a remedy where the reason for the dismissal was compliance with the WWC Act.

63 In circumstances where a person is charged with an offence which results in an INN being issued, and the charges are subsequently withdrawn or, as in this case, the person is found at trial to be not guilty, the damage to reputation, but also to employment, is significant. It seems to me that even though there is provision for the person to whom an INN applies to apply to the CEO to not issue or withdraw the INN due to exceptional circumstances (s 13 of the WWC Act), and has certain rights of appeal to the State Administrative Tribunal, the requirement to not be employed in child-related employment at all, and to remove all industrial appeal rights against dismissal in those circumstances is harsh indeed. It allows for employees to be dismissed from their employment when charges are laid, which may ultimately have no foundation. It does not allow or require the employer to consider other options until the charge is dealt with.

64 In this case, after the charges were dismissed the applicant was not immediately able to return to work, but had to apply for employment. I can envisage that even if the employment contract were not brought to an end due to the INN, should an employer decide to offer alternative, non-child-related, employment or suspension pending the outcome of the INN, that, in circumstances such as this, the employee may not be automatically returned to the child-related employment. The CEO would consider whether the WWC Card would be re-issued, and the employer decide, based on the circumstances, whether to allow the employee to return to child-related employment. However, the requirements of the WWC Act seem to remove the element of fairness to the employee. I recognise that the WWC Act provides that the best interests of children are paramount to the considerations of the CEO and of the State Administrative Tribunal. However, the legislation could have provided for a fair process for employees, which is not inconsistent with that priority, but has not done so.

65 In all of these circumstances, though, the application must be dismissed because of the provision of s 41(3) of the WWC Act.

66 If I am wrong and the reason for the dismissal was not to comply with the WWC Act, then it is clear that the respondent has denied the applicant procedural fairness. Whether procedural fairness would have altered the situation, by allowing the applicant to go on leave, be suspended or transferred may affect whether and the type of remedy he would be entitled to. I note

though, that the respondent may, if she considers 'it is in the interests of the department to do so, determine that a person who is a member of the teaching staff is to become an officer of [another] class' (s 238 of the SE Act). The other classes include public service officers (s 235). Such a determination to transfer requires the consent of the person to be transferred. Most importantly, it must be in the interests of the department to do so. Those interests may include whether there is necessary work to be done.

67 Although the respondent says that suspension would not have been in compliance with the WWC Act, this matter was not argued in any detail by either party and I draw no conclusion. In any event, the respondent did not consider any alternatives to dismissal and did not give the applicant an opportunity to be heard.

68 In all of the circumstances, an order of dismissal will issue.

2013 WAIRC 00903

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR CHARLES BRETT
	APPLICANT
	-v-
	MS SHARYN O'NEILL
	DIRECTOR: STANDARDS AND INTEGRITY
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 23 OCTOBER 2013
FILE NO/S	U 130 OF 2012
CITATION NO.	2013 WAIRC 00903

Result	Application dismissed
Representation	
Applicant	Mr J Birman of counsel
	Ms C Sun of counsel
Respondent	Ms R Young of counsel

Order

HAVING HEARD Mr J Birman of counsel and with him Ms C Sun of counsel on behalf of the applicant and Ms R Young 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.

2013 WAIRC 00926

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR CHARLES BRETT
	APPLICANT
	-v-
	MS SHARYN O'NEILL
	DIRECTOR: STANDARDS AND INTEGRITY
	DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 29 OCTOBER 2013
FILE NO.	U 130 OF 2012
CITATION NO.	2013 WAIRC 00926

Result	Correction Order issued

Correction Order

WHEREAS on the 23rd day of October 2013 Reasons for Decision and an Order were deposited in the office of the Registrar; and

WHEREAS on the 23rd day of October 2013 the respondent informed the Commission that there was an error in the respondent's name and sought that it be corrected; and

WHEREAS on the 25th day of October 2013 the applicant advised that he did not object to such an order issuing; and

WHEREAS the Commission is of the opinion that the Reasons for Decision and Order ought to be corrected;

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

THAT the Reasons for Decision and Order issued on the 23rd day of October 2013 be corrected by amending the respondent's name to "Director General, Department of Education".

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00893

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLINTON ROSS CANN
	APPLICANT
	-v-
	ARDA SLOAN
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 22 OCTOBER 2013
FILE NO/S	U 148 OF 2013
CITATION NO.	2013 WAIRC 00893

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance required

Order

WHEREAS this matter was set down for hearing in order for the applicant to show cause why his application should not be dismissed for want of prosecution;

AND WHEREAS at the hearing on Monday, the 21st day of October 2013 there was no appearance on behalf of or by the applicant;

AND WHEREAS there was no contact from the applicant by the close of business on Monday, the 21st day of October 2013;

NOW THEREFORE, I the undersigned, having given reasons for decision extemporaneously and pursuant to the powers conferred on me under section 27(1)(a) of the *Industrial Relations Act 1979*, hereby order –

THAT this application be, and is hereby discontinued for want of prosecution.

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

2013 WAIRC 00921

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELODIE ROSE CARO
	APPLICANT
	-v-
	THE TRUSTEE FOR: THE BALMORAL HARTS TRUST (OPERATING AS "CHOUX CAFE")
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	B 70 OF 2013
CITATION NO.	2013 WAIRC 00921

Result	Application discontinued
Representation	
Applicant	Ms E R Caro
Respondent	Mr B Hart

Order

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

AND WHEREAS on 5 August 2013 and 19 August 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference on 19 August 2013 an agreement was reached between the parties;

AND WHEREAS on 11 October 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2013 WAIRC 00920

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ELODIE ROSE CARO
	APPLICANT
	-v-
	THE TRUSTEE FOR: THE BALMORAL HARTS TRUST (OPERATING AS "CHOUX CAFE")
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	U 70 OF 2013
CITATION NO.	2013 WAIRC 00920

Result	Application discontinued
Representation	
Applicant	Ms E R Caro
Respondent	Mr B Hart

Order

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

AND WHEREAS on 5 August 2013 and 19 August 2013 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference on 19 August 2013 an agreement was reached between the parties;

AND WHEREAS on 11 October 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00940

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00940
CORAM	**:**	COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS	**:**	
FINALISED		WEDNESDAY, 24 JULY 2013
HEARD		FRIDAY, 18 OCTOBER 2013
DELIVERED	**:**	FRIDAY, 1 NOVEMBER 2013
FILE NO.	**:**	U 62 OF 2013
BETWEEN	**:**	MARTIN CROFT
		Applicant
		AND
		ECL GROUP AUSTRALIA PTY LTD
		Respondent

Catchwords	**:**	Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal - Whether Commission has jurisdiction - Trading activities of respondent considered - Commission satisfied respondent is a trading corporation - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* s 29(1)(b)(i)
		Fair Work Act 2009 s 12, s 13, s 14(1)(a) and s 26
Result	**:**	Dismissed
Representation:		
Applicant	**:**	In person
Respondent	**:**	Mr J O'Brien (as agent)

Reasons for Decision

(Given extemporaneously at the conclusion of the proceedings,

as edited by the Commissioner)

1 This application was lodged on 23 April 2013 by Martin Croft (the applicant) under s 29(1)(b)(i) of the *Industrial Relations Act* (the Act). Mr Croft claims that he was unfairly dismissed on 12 April 2013 by ECL Group Australia Pty Ltd (the respondent). The respondent disputes that the Commission has the power to deal with this application as the respondent is a constitutional corporation and subject to the jurisdiction of the *Fair Work Act 2009* (the FW Act).

2 Section 14(1)(a) of the FW Act defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the Act. If the respondent is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.

3 The issues to be determined in this matter when deciding whether the respondent is a trading corporation is whether it is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.

4 The respondent's general manager, Mr Craig Allison, submitted a sworn statutory declaration dated 18 June 2013. Attached to this affidavit are two documents. An Australian Securities and Investment Commission Current and Historical Company Extract in the name of ECL Group Australia Pty Ltd dated 14 June 2013 confirming that the respondent is incorporated and a sworn copy of a Certificate of Registration on Change of Name certifying that Fuelquip (Australia) Pty Ltd changed its name to ECL Group Australia Pty Ltd on 10 October 2011.

5 On the undisputed information and documentation presented by the respondent I am satisfied and I find that the respondent is an incorporated entity. I also find that its main purpose is to trade with the aim of generating a profit. Mr Allison's statutory declaration confirms that the respondent provides a range of technical services across Australia, it performs maintenance on completed installations and it sells items to entities such as Caltex and BP. The respondent's core services are primarily provided by its employees, which number approximately 130. The respondent's primary focus is to trade with a view to making a profit.

6 In the circumstances I find that the respondent is a trading corporation and the applicant is therefore an employee of a national system employer employed pursuant to the FW Act and the Commission does not have jurisdiction to deal with the applicant's claim for unfair dismissal.

7 An order will issue dismissing this application for want of jurisdiction.

2013 WAIRC 00941

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARTIN CROFT
	APPLICANT
	-v-
	ECL GROUP AUSTRALIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 1 NOVEMBER 2013
FILE NO/S	U 62 OF 2013
CITATION NO.	2013 WAIRC 00941

Result	Dismissed
Representation	
Applicant	In person
Respondent	Mr J O'Brien (as agent)

Order

HAVING HEARD the applicant on his own behalf and Mr J O'Brien 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 00971

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOEL RAYMOND DICKINSON
	APPLICANT
	-v-
	NORTHSTYLE GLASS
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 15 NOVEMBER 2013
FILE NO/S	B 21 OF 2013
CITATION NO.	2013 WAIRC 00971

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (WA);

The Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT the application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00915

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MAUREEN DRUMMOND
	APPLICANT
	-v-
	NGUNGA GROUP WOMENS ABORIGINAL CORPORATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	U 88 OF 2013
CITATION NO.	2013 WAIRC 00915

Result	Application discontinued
Representation	
Applicant	Ms M. Drummond
Respondent	Mr J Ruddell (as agent)

Order

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

AND WHEREAS on 23 July 2013 and 25 July 2013 conferences between the parties were convened;

AND WHEREAS at the conclusion of the conference held on 25 July 2013 agreement was reached between the parties;

AND WHEREAS on 20 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2013 WAIRC 00864

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00864
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	THURSDAY, 5 SEPTEMBER 2013
DELIVERED	**:**	TUESDAY, 15 OCTOBER 2013
FILE NO.	**:**	U 45 OF 2013, B 45 OF 2013
BETWEEN	**:**	JEREMY FREEMAN
		Applicant
		AND
		MIDWEST TOP NOTCH TREE SERVICES
		Respondent

Catchwords	:	Termination of employment - Claim of harsh, oppressive or unfair dismissal - Acceptance of referral out of time - Application referred outside of 28 day time limit - Relevant principles applied - Commission satisfied applying principles that discretion should be exercised - Acceptance of referral out of time granted
		Termination due to redundancy - Principles applied - Applicant unfairly dismissed - Compensation ordered
		Contractual benefits claim - Entitlements under contract of employment - Provision of payslips and access to eight hours leave to attend job interviews - Application dismissed
Legislation	:	*Industrial Relations Act 1979* s 7, s 26(1)(a), s 27(1), s 29(1)(b)(i) and (ii), s 29(2) and s 29(3)
		Minimum Conditions of Employment Act 1993 s 5, s 41 and s 43
Result	:	Orders issued
Representation:		
Applicant	:	In person
Respondent	:	Ms A Griffiths

Case(s) referred to in reasons:

Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd (1987) 67 WAIG 733

Belo Fisheries v Froggett (1983) 63 WAIG 2394

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor [1991] 173 CLR 231

Byrne v Australian Airlines (1995) 61 IR 32

Gilmore v Cecil Bros and Ors (1996) 76 WAIG 4434

Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch (1992) 73 WAIG 220

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

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Rai v Dogrin Pty Ltd (2000) 80 WAIG 1375

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Tranchita v Wavemaster International Pty Ltd (1999) 79 WAIG 1886

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

WA Access Pty Ltd v Vaughan (2000) 81 WAIG 373

Waroona Contracting v Usher (1984) 64 WAIG 1500

Reasons for Decision

1 On 25 March 2013 Jeremy Freeman (the applicant) lodged applications in the Commission under s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979* (the Act) against Midwest Top Notch Tree Services (the respondent). The applicant claims that he was unfairly dismissed on or about 18 December 2012. The benefits the applicant claims he was denied were the non-provision of wage slips and the opportunity to take time off work to search for another job after the respondent told him he was terminated.

2 During the proceedings it became apparent that the respondent had been incorrectly named. Given the Commission's powers under s 27(1) of the Act and having formed the view that it is appropriate for the respondent to be correctly named, I will issue an order that Midwest Top Notch Tree Services be deleted as the named respondent in these applications and be substituted with Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services (see ***Rai v Dogrin Pty Ltd*** (2000) 80 WAIG 1375 and ***Bridge Shipping Pty Ltd v Grand Shipping SA and Anor*** [1991] 173 CLR 231).

Background

3 The applicant commenced employment with the respondent in early May 2012 and his last day of work was 18 December 2012. He was employed on a full time basis and paid $27 per hour. The applicant undertook grounds person duties which included cutting trees and feeding them into a chipper. The applicant's terms and conditions of employment were contained in a written contract of employment (Exhibit A1). Clause 16. – Termination of Employment of this contract states that either the applicant or the respondent may terminate the applicant's employment by giving two weeks' notice during the applicant's first year of employment or payment in lieu of notice. The respondent could also pay the applicant's wages for the notice period or require him to work either part or none of the notice period.

4 The applicant was informed by one of the respondent's owners Mr Marcus Griffiths on or about 18 December 2012 that he was terminated. The respondent claimed that it had decided that after the two week Christmas close down commencing on 20 December 2012, it would cease to operate or continue trading after restructuring its operations. Either way the applicant's services would no longer be required in 2013. If the respondent was to continue trading other employees were to be retained by the respondent who were more skilled than the applicant and therefore more flexible with respect to the work that they could undertake. During the Christmas close down period the respondent decided to continue operating in 2013 and to employ all of its permanent employees except the applicant and Mr Malcolm McIntyre, who no longer wished to work for the respondent. The employees who remained working for the respondent included Mr Brett Marendez, Mr Caleb Dumitro and Mr Mark Rulyanich. Even though Mr Rulyanich had less service than the applicant as a permanent employee, he was more multi-skilled than the applicant.

5 The applicant stated that Mr Griffiths told him that the respondent was closing down in December 2012 and not re-opening in January 2013. When he was terminated he therefore had no issue with being dismissed.

Evidence

Applicant

6 The applicant said that after he had worked 17 days for the respondent on a job in Southern Cross he returned to work on 17 December 2012. The next day he spoke to Mr Griffiths about returning to New Zealand during the respondent's Christmas close down. In response Mr Griffiths told him that he did not have a job next year as the respondent was closing down. He was also told that the respondent would give him a positive reference. On 19 December 2012 Mr Griffiths rang the applicant to invite him to the respondent's Christmas 'break-up' function. Mr Griffiths also sent him a text message saying he 'couldn't go about it [the applicant's termination] the way I have' (ts21) and he told the applicant to return to work for two weeks in January 2013 and he would then be terminated. As the applicant had already been dismissed and his job would not continue after the two weeks he was asked to work in January 2013 he decided to use the two week notice period in January 2013 to look for other work.

7 The applicant spoke to Mr Dumitro in February 2013 about obtaining a reference from the respondent and he discovered that the respondent was still trading and continued to employ all of its other permanent employees except him. The applicant then contacted the Fair Work Commission on or about 27 February 2013 and the Commission about his options including lodging an unfair dismissal claim. The applicant said that he had phone records confirming these calls. This application was then lodged on 25 March 2013 after the applicant was advised that the Commission was the correct place to lodge his application. The applicant believed he should have continued to be employed by the respondent because he had completed all of the tasks required of him by the respondent, including working away from Geraldton.

8 Except for a pay slip given to him when he first started employment, the applicant said that he was not given any other wage slips. He was therefore unsure if he had been paid all of his entitlements. In particular his worker's compensation payments and his annual leave entitlements.

9 After he was terminated the applicant was unsuccessful in obtaining other employment. He applied for a number of jobs including concreting, joinery, gardening and work at the local bowling club. The applicant is due to commence employment in Brisbane in October 2013 working in the building industry. The applicant is not eligible to receive Centrelink benefits because he is a New Zealand national.

Respondent

10 Ms Griffiths understood that on 17 December 2012, and in order to give as much notice as possible to its employees, all of them were told by Mr Griffiths that the respondent would be reducing the number of its employees or closing after Christmas. This notice was to allow employees to look for alternative work. However, they were still required to work the remainder of that week. The respondent then received advice that employees could not be given notice of their termination during a Christmas close down period so she understood that Mr Griffiths left a message on the applicant's telephone telling him that he was required to return to work for two weeks in January 2013 to work out his notice period. When the applicant did not return to work for the rest of that week or for two weeks in January 2013 the respondent assumed he had abandoned his employment so he was not paid the two weeks' notice due to him.

11 Ms Griffiths stated that the respondent was unaware that the applicant was unhappy about his termination or that he would be contesting his termination until it received a copy of his application in the mail.

Should time be extended to accept application U 45 of 2013?

12 Application U 45 of 2013 was lodged in the Commission on 25 March 2013. The applicant claims he was terminated on 18 December 2012 so this application is 69 days outside of the required timeframe.

13 Section 29(2) of the Act requires that applications pursuant to s 29(1)(b)(i) of the Act be lodged within 28 days after the day on which an employee is terminated.

14 Section 29(3) of the Act reads as follows:

> (3) The Commission may accept a referral by an employee under subsection (1)(b)(i) that is out of time if the Commission considers that it would be unfair not to do so.

15 In reaching a decision in this matter as to whether it would be unfair not to accept this application out of time I take into account the factors outlined in the Industrial Appeal Court decision in ***Malik v Paul Albert, Director General, Department of Education of Western Australia*** (2004) 84 WAIG 683 (***Malik***) as follows:

'1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.

2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.

3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.

4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.

5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.

6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion [26].'

16 When considering the issue of fairness, Heenan J also observed the following in ***Malik***:

> I accept that the concept of fairness is central to a decision whether or not to accept an application under s 29 which is out of time but, with all respect, I cannot accept the submission which was put in this case that it is fairness to the applicant which is either the sole or principal concern. Fairness in this situation involves fairness to all, obviously to the applicant and to his or her former employer, but also to the public interest and to the due and efficient administration of the jurisdiction of the Commission which should not be burdened with unmeritorious stale claims [74].

17 In applying these guidelines I am mindful that there is a 28 day timeframe to lodge an application and the Commission's discretion in relation to a matter of this nature should not be exercised unless it would be unfair not to do so.

18 In my view the applicant gave his evidence honestly and to the best of his recollection. I therefore accept his evidence.

19 I find that there was an acceptable reason for the delay of 69 days in lodging this application. The applicant was the only person who gave direct evidence about what Mr Griffiths told him on 18 December 2012. I find that when the applicant was terminated by Mr Griffiths on that date he was unaware that the respondent may continue trading in 2013 and when he found out that this was the case in February 2013 he took steps to clarify the correct jurisdiction to lodge this application and did so within a reasonable timeframe.

20 I have had the benefit of hearing all of the evidence with respect to the applicant's claim that he was unfairly terminated and determined that the applicant was unfairly dismissed. I therefore find that when considering the issue of merit as a factor to extend time to file this application there is sufficient evidence to establish that the applicant had an arguable case that he was unfairly dismissed.

21 I find that the prejudice suffered by the applicant would be greater than that suffered by the respondent if this application is not accepted. The applicant would not have the opportunity to prosecute his claim, which has some merit. Furthermore, apart from the time delay and responding to a claim of this nature no disadvantage was highlighted by the respondent in meeting this application because of the delay in lodging it.

22 When taking into account the above findings and the relevant factors to consider with respect to extending time to file this application and the issue of fairness to both parties, I find that it would be unfair for the Commission not to exercise its discretion to grant an extension of time within which to file application U 45 of 2013. An extension of time in order to lodge this application is therefore granted.

Was the applicant unfairly dismissed?

23 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*** (1991) 71 WAIG 891 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.

24 Redundancy is itself a sufficient reason for dismissal (***Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd*** (1987) 67 WAIG 733). When an employer reduces its workforce due to an excess of employees reasonably required to perform the work available this constitutes a redundancy situation (***Gromark Packaging v Federated Miscellaneous Workers Union of Australia, WA Branch*** (1992) 73 WAIG 220 (224)).

25 By virtue of s 5 of the *Minimum Conditions of Employment Act 1993* (MCE Act), Part 5 of that act is implied into the applicant's contract of employment and a failure to comply with the mandatory requirements under this section is a factor to be taken into account in deciding whether a dismissal is unfair (see ***Gilmore v Cecil Bros and Ors*** (1996) 76 WAIG 4434 (4445); ***WA Access Pty Ltd v Vaughan*** (2000) 81 WAIG 373 (378)).

26 Part 5 of the MCE Act reads in part as follows:

Part 5 — Minimum conditions for employment changes with significant effect, and redundancy

40. Terms used

(1) In this Part —

employee does not include a casual employee or an apprentice;

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

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

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

(i) composition, operation or size of; or

(ii) skills required in,

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

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

(i) a job opportunity; or

(ii) a promotion opportunity; or

(iii) job tenure,

for the employee; or

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

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

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

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

41. Employee to be informed

(1) Where an employer has decided to —

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

(b) make an employee redundant,

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

(2) The matters to be discussed are —

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

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

as the case requires.

43. Paid leave for job interviews, entitlement to

(1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.

(2) The 8 hours need not be consecutive.

(3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

(4) Payment for leave under subsection (1) is to be made in accordance with section 18.

27 Section 41 of the MCE Act requires that an employee is to be informed by the employer of the decision to make him or her redundant in a timely manner and an employer is required to discuss the effect of the redundancy on the employee and measures that may be taken to minimise the impact of the effect of the redundancy. Section 43 of the MCE Act provides that an employee is entitled to paid leave of up to eight hours to attend interviews for other employment and the eight hours need not be consecutive.

28 I find that the applicant was unfairly terminated.

29 The applicant was not given any notice of his termination prior to being terminated by Mr Griffiths on 18 December 2012 nor was he given a payment in lieu of notice when he was terminated and told his services were no longer required. The respondent then sent the applicant a text message on or about 19 December 2012, after his termination, asking him to return to

work in January 2013 for two weeks to work out his notice, effectively reinstating him. In my view sending a text message to an employee to reinstate him in this instance was inappropriate when taking into account that the applicant had been terminated without notice the day before.

30 I find that the applicant was treated unfairly when he was not told by the respondent that it may continue trading in 2013 when he was terminated. I accept the applicant's evidence that when he was terminated he was not told that the respondent may continue trading in 2013 and that if it was to do so the applicant's services would not be required. The respondent had decided in December 2012 that it would possibly cease operating or if it continued in 2013 the applicant was excess to its requirements as he was less skilled than its other employees. I find that as the applicant was not told that the respondent may continue trading in January 2013 he was denied the opportunity to have discussions with the respondent about the impact of its decision to make him redundant as provided by Part 5 of the MCE Act. The applicant was also unable to access the entitlement to paid leave to attend job interviews prior to his termination as he was terminated without notice. It was common ground that the applicant did not return to work in January 2013 to work his notice period of two weeks. I find that this was not unreasonable in the circumstances as the applicant had been terminated on 18 December 2012, without the payment of two weeks' notice provided for under his contract of employment.

Compensation

31 The applicant is not seeking reinstatement and it is clear there is no position available for the applicant as the respondent has reduced its workforce. The applicant has also not provided any evidence that any other employee should have been made redundant in his place. I therefore find that the applicant's reinstatement or re-employment is impracticable.

32 I now turn to the question of compensation. I apply the principles set out in ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635 and ***Tranchita v Wavemaster International Pty Ltd*** (1999) 79 WAIG 1886. On the evidence, I am satisfied the applicant took reasonable steps to mitigate his loss by seeking out alternative employment.

33 I find that the applicant would not have had a lengthy and ongoing expectation of employment with the respondent given the respondent's decision to downsize its operations at the start of 2013 and the uncontested evidence that the applicant was not as skilled as the employees retained by the respondent. I find that the applicant should have continued his employment with the respondent for a further one week after his termination which would have been a sufficient period for the applicant to have discussions with the respondent about possible alternatives to termination and for the applicant to access leave to attend job interviews in accordance with his entitlement under the MCE Act. The applicant would then have been entitled to two weeks' notice of his termination under his contract of employment with the respondent. When taking into account s 26(1)(a) of the Act considerations and the duty on the Commission to consider the relief being sought on the basis of equity, good conscience and the substantial merits, I will order that the applicant be paid three weeks' remuneration as compensation for his unfair dismissal.

34 I calculate that the applicant is due the following amount as compensation for his unfair dismissal. The applicant was paid $27 per hour and he was employed full time. His contract of employment states that his ordinary hours are eight hours per day. I will therefore order that the applicant be paid $3,240 gross as compensation for his unfair dismissal less applicable taxation ($27 x 40 hours = $1,080 x 3 weeks = $3,240).

Denied contractual benefits claim

35 The benefits the applicant claims he was denied under his contract of employment with the respondent was the non-provision of wage slips and the ability to access eight hours leave to attend job interviews, which did not occur given the manner of his termination

36 In determining whether or not a contractual entitlement is due to the applicant the onus is on the applicant to establish that the claim is a benefit to which he is entitled under his contract of employment. The Commission must determine the terms of the contract of employment and decide whether the claim constitutes a benefit which has been denied under this contract having regard to the obligations on the Commission to act according to equity, good conscience and the substantial merits of the case (***Belo Fisheries v Froggett*** (1983) 63 WAIG 2394; ***Waroona Contracting v Usher*** (1984) 64 WAIG 1500; ***Perth Finishing College Pty Ltd v Watts*** (1989) 69 WAIG 2307).

37 There is no issue in this matter and I find that the applicant was employed by the respondent under a contract of service. I find that these claims relate to industrial matters for the purposes of s 7 of the Act as they are entitlements due to the applicant. The applicant's terms and conditions of employment with the respondent are contained in his written contract and as previously stated implied into this contract are the terms of the MCE Act. I have already found that the applicant was denied the opportunity to access paid leave to search for other work once the respondent decided to make him redundant, which contributed to the applicant being unfairly terminated, and that he is due one week's pay in compensation, in part, for this omission. As this benefit is covered by this payment I find that the applicant is not due any further payment for this claim. The respondent provided the applicant's payslips to him as part of discovery for the hearing so this claim is not made out.

38 Application B 45 of 2013 will be dismissed.

2013 WAIRC 00871

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEREMY FREEMAN
	APPLICANT
	-v-
	MARCUS JOHN GRIFFITHS AND ANGELINE GRIFFITHS TRADING AS MIDWEST TOP NOTCH TREE SERVICES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 17 OCTOBER 2013
FILE NO/S	U 45 OF 2013
CITATION NO.	2013 WAIRC 00871

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms A Griffiths

Order

HAVING HEARD the applicant on his own behalf and Ms A Griffiths on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby:

1. ORDERS THAT the name of the respondent be deleted and that Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services be substituted in lieu thereof.
2. ORDERS THAT application U 45 of 2013 be and is hereby accepted out of time.
3. DECLARES THAT the dismissal of Jeremy Freeman by the respondent was unfair and that reinstatement or re-employment is impracticable.
4. ORDERS THAT the respondent pay Jeremy Freeman compensation in the sum of $3,240 gross within 14 days of the date of this order.

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

2013 WAIRC 00870

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JEREMY FREEMAN
	APPLICANT
	-v-
	MARCUS JOHN GRIFFITHS AND ANGELINE GRIFFITHS TRADING AS MIDWEST TOP NOTCH TREE SERVICES
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 17 OCTOBER 2013
FILE NO/S	B 45 OF 2013
CITATION NO.	2013 WAIRC 00870

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms A Griffiths

Order

HAVING HEARD the applicant on his own behalf and Ms A Griffiths on behalf of the respondent, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the name of the respondent be deleted and that Marcus John Griffiths and Angeline Griffiths trading as Midwest Top Notch Tree Services be substituted in lieu thereof.

2. THAT the application is dismissed.

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

2013 WAIRC 00914

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID GLEESON
	APPLICANT
	-v-
	KALGOORLIE-BOULDER URBAN LANDCARE GROUP INC
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	U 17 OF 2013
CITATION NO.	2013 WAIRC 00914

Result	Application discontinued
Representation	
Applicant	Mr D Gleeson
Respondent	Ms A Petz

Order

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

AND WHEREAS on 20 March 2013 and 2 May 2013 conferences between the parties were convened;

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

AND WHEREAS on 26 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00970

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANNE-MARIE GUNTON
	APPLICANT
	-v-
	ACCORD SECURITY
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 15 NOVEMBER 2013
FILE NO/S	U 59 OF 2013
CITATION NO.	2013 WAIRC 00970

Result	Application discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS an application was filed in the Commission pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on the 6 August 2013 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS on the 21 August 2013 a further conference was convened with the parties;

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

AND WHEREAS on the 11 November 2013 this matter was listed for hearing for the applicant to show cause why this application should not be dismissed;

AND WHEREAS the applicant's representative failed to attend the hearing;

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

THAT the application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2013 WAIRC 00919

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUU NGOC HUYNH
	APPLICANT
	-v-
	RAY CVITAN HAIR DESIGN FOR MEN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	B 102 OF 2013
CITATION NO.	2013 WAIRC 00919

Result	Application discontinued
Representation	
Applicant	Ms L N Huynh and Ms K Maddern
Respondent	Mr Z Bajic, Mrs S Bajic and Mr P Poncini

Order

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

AND WHEREAS on 27 August 2013 a conference between the parties was convened;

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

AND WHEREAS on 3 October 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) S M MAYMAN,
Commissioner.

2013 WAIRC 00918

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LUU NGOC HUYNH
	APPLICANT
	-v-
	RAY CVITAN HAIR DESIGN FOR MEN
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	U 102 OF 2013
CITATION NO.	2013 WAIRC 00918

Result	Application discontinued
Representation	
Applicant	Ms L N Huynh and Ms K Maddern
Respondent	Mr Z Bajic, Mrs S Bajic and Mr P Poncini

Order

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

AND WHEREAS on 27 August 2013 a conference between the parties was convened;

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

AND WHEREAS on 3 October 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00891

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL JAMES MEHAFFY
	APPLICANT
	-v-
	MARK A STEWART
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 22 OCTOBER 2013
FILE NO/S	U 81 OF 2013
CITATION NO.	2013 WAIRC 00891

Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	No appearance

Order

THERE having been no appearance on behalf of the applicant and there being no compulsion for 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 dismissed for want of prosecution.

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

2013 WAIRC 00950

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DANIEL ERIC MERREY
	APPLICANT
	-v-
	RAINBOW COAST NEIGHBOURHOOD CENTRE
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 6 NOVEMBER 2013
FILE NO/S	U 117 OF 2013
CITATION NO.	2013 WAIRC 00950

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 27th day of September 2013 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the parties reached an agreement in principle in respect of the application; and

WHEREAS on the 21st day of October 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 00865

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00865
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	WEDNESDAY, 25 SEPTEMBER 2013
DELIVERED	**:**	TUESDAY, 15 OCTOBER 2013
FILE NO.	**:**	U 83 OF 2013
BETWEEN	**:**	DESIREE MIDDLETON
		Applicant
		AND
		CARL CASSETTAI
		Respondent

CatchWords	**:**	Industrial Law (WA) - Termination of employment - Alleged harsh, oppressive and unfair dismissal
Legislation	**:**	Industrial Relations Act 1979 (WA) s 29(1)(b)(i)
Result	**:**	*Claim of unfair disimssal dismissed*
Representation:		
Applicant	**:**	Ms D Middleton
Respondent	**:**	Mr C Cassetai

Reasons for Decision

1 Ms Middleton had been employed as a men's hairdresser at Mr Cassettai's shop since 21 May 2012. She claims that her dismissal on 1 May 2013 was harsh and unjust and therefore unfair.

Ms Middleton's Evidence

2 Ms Middleton says that her dismissal was unfair because while she was on a three-week holiday in February 2013, Mr Cassettai had advertised for a replacement to fill her position. On her return to work on 5 March 2013 Mr Cassettai told her that her hours had been reduced from five days to three days per week. Ms Middleton says she asked Mr Cassettai why none of the other employees, who are all males, had had their hours reduced. She says he replied that it was because of her holidays.

3 She responded that her taking holidays had been agreed to when she had been employed. She said to him "Well, I thought it was a little bit unfair while I was holiday you made this decision without coming to me first. You just sort of went behind my back and did it." She said it started getting a little bit heated and she says Mr Cassettai said, "Well, that is how it is. If you don't like it, find another job." Ms Middleton felt she had to accept the reduction in her hours and did so.

4 Ms Middleton's evidence is that approximately eight weeks later, on 1 May 2013, Mr Cassettai spoke to her saying 'There's too many of us now' and he gave her four weeks' notice. Ms Middleton continued working that day. Ms Middleton attended work on 2 May with every intention of working that day, however she became sufficiently upset that she told Mr Cassettai she was not feeling very well and was unable to continue the rest of the day. She asked if she could be paid for the days that she had worked, meaning 1 and 2 May. Mr Cassettai agreed and paid her her wages. Ms Middleton then went home.

5 She made an appointment to see the doctor on the Friday (3 May) because she was not feeling very well and the doctor gave her three or four weeks' leave from work. She informed Mr Cassettai that she was taking time off work due to the emotional stress that she was experiencing. Ms Middleton's evidence is that her anxiety progressively got worse just having to think about having to find another job when she knew there would not be a job for her because of the time of year. In fact she did not return to Mr Cassettai's shop. Her employment ended with the expiry of the four weeks' notice given to her, which Ms Middleton accepts was 28 May 2013.

6 Ms Middleton asks if, as Mr Cassettai states, there was insufficient work for her, why did he employ somebody else to do exactly the same work as she was doing while she was on holidays? If there was insufficient work then there was not the basis to employ another person. She is seeking to be paid for the four weeks' notice for which she was unable to work due to the stress and anxiety placed upon her by the dismissal.

Mr Cassettai's Evidence

7 Mr Cassettai's evidence is that he works in his shop as a hairdresser. He was involved in a car accident on 18 December 2012 and as a result could not work. He employed another hairdresser for two days a week, and yet another for three days a week, to take his position. Their employment had nothing to do with Ms Middleton being on annual leave.

8 When Mr Cassettai felt better and was back to work himself, on 20 April 2013 he "put off" the employee who had been working two days per week. His evidence is that he "put the other fellow off as well the week before Ms Middleton left", but "there were too many of us again".

9 He says that he spoke to Ms Middleton outside and said "There is not enough work for everybody now I am feeling better. I am not making any money. I want you to look for another job". Mr Cassettai's evidence is that he gave Ms Middleton the newspaper where there were five persons looking for work and said look, there are five persons here looking for work I want you to ring up and see if you can get a job somewhere else and you can stay here another four weeks until you find another job".

10 Mr Cassettai says that Ms Middleton said that he should instead dismiss one of the others first (I note Ms Middleton denies saying this), and he replied that he will not do that because one of the other employees "starts early and finishes late" and Mr Cassettai said he needs somebody to come in early and to help him late at night; a second employee has been with him a long time and is 73 years old; and he did not want to dismiss the third employee because he "wants to buy the shop".

11 Mr Cassettai emphasised that Ms Middleton was a casual employee and, in his view, could have been dismissed without any notice. Nevertheless, he gave her four weeks' notice and in evidence said that if she had been unable to find employment after that time, he would have given her a further two weeks' notice.

The Commission's Consideration of the Issues Raised in the Hearing

Whether Ms Middleton Has Made out her Claim

12 Ms Middleton, as the applicant, has the task of showing that her dismissal was unfair. Ms Middleton gave her evidence under oath, as also did Mr Cassettai. Each was given the opportunity to ask questions of the other's evidence. On some issues, Ms Middleton's and Mr Cassettai's evidence is similar. For example, their evidence regarding the conversation about the dismissal, and the reasons given for the dismissal, are similar. I find that Ms Middleton was dismissed because there was not enough work for the number of hairdressers, including Mr Cassettai himself, working in the shop.

13 On other issues, Ms Middleton's evidence is opposed by Mr Cassettai's evidence. For example, Ms Middleton agrees that Mr Cassettai had a car accident, but says that afterwards he continued working in the shop; he was not supposed to be working but he did work. However Mr Cassettai's evidence that he was not able to work as he had previously worked is supported by a medical report from the Cottesloe Medical Centre of the 8 August 2013 (exhibit A). This is a report from Mr Cassettai's doctor to a firm of personal injury lawyers. It confirms the date of the accident; it confirms that Mr Cassettai had missed work on the days following the accident and it states that Mr Cassettai was "barely able to work more than a few hours per day". By 23 April Mr Cassettai was able to work three hours a day and, until late April, three to four hours a day with frequent breaks. There is no reason why I should prefer Ms Middleton's evidence over Mr Cassettai's evidence on this issue. I therefore find that it is as likely as not that after his motor vehicle accident, Mr Cassettai was not able to work as he usually did in the shop.

14 Ms Middleton claims her dismissal was unfair on the basis that if there was insufficient work why did Mr Cassettai employ someone else while she was on holidays? Mr Cassettai's evidence, that he employed two people (one for two days per week and one for three days per week) due to his being unable to work after his accident, follows logically from the finding that he was not able to work as he usually did during that time.

15 Ms Middleton referred to an advertisement from Mr Cassettai while she was away on holidays, however Mr Cassettai stated that the advertisement occurred after his accident. Mr Cassettai says that the advertisement was in January and had nothing to do with Ms Middleton being on holidays. Ms Middleton has not been able to show that this is not correct. It is up to Ms Middleton to show that her evidence should be preferred. Where it is Ms Middleton's word against Mr Cassettai's word, in the absence of, for example, Ms Middleton providing proof of the date of the advertisement, she is not able to show that it is her evidence which should be accepted by the Commission. As it is, the Commission simply does not know the date of the advertisement.

16 Mr Cassettai's evidence that Ms Middleton's dismissal occurred when Mr Cassettai resumed work when he was feeling better is supported by the medical report of him returning to work, although with frequent breaks, in late April. It is as likely as not that Mr Cassettai was returning to work as he had worked previously, and he had employed two persons to work in his position, and it seems likely that he would need to reduce staff. That is a valid reason for the dismissal of an employee.

17 Ms Middleton's evidence is that when she returned from holidays, her hours were reduced. Mr Cassettai agrees that this was so, but says it was in the context of needing to reduce staff and he had stated to the staff that either somebody would need to go, or if everyone lost one day's employment, it would be shared amongst them. Ms Middleton does not show that this is incorrect. When assessing whether it is likely that Mr Cassettai would reduce Ms Middleton's hours because she had taken leave, I note that evidence is that she had also taken leave between 18 August 2012 and 11 September 2012. There is no suggestion that when she returned from leave on that occasion Mr Cassettai had reacted by reducing her hours, which suggests that Mr Cassettai accepted that Ms Middleton would be absent on leave. It makes it less likely he would reduce her hours on this occasion merely because Ms Middleton had taken leave.

18 If there are employees to be made redundant, the employer must make a choice. In this case, Mr Cassettai did so after having already terminated the employment of the employee working two days per week. In relation to his remaining employees, one of his other employees is long serving and approximately 70 years of age. A second employee works hours such that he is there early in the morning and late in the evening and this is of assistance to Mr Cassettai. A third employee is a person who may purchase Mr Cassettai's business.

19 Ms Middleton has not shown that any of these reasons is not true, although she disputes the timing of the termination of the employment of the two-hour per week employee.

Whether Ms Middleton was "Casual" or "Full-time"

20 Ms Middleton queries whether she was in reality a "casual" employee or whether she was a "full-time" or "part-time" employee due to her having a regular start and finish time and regular rostered days. Mr Cassettai says that Ms Middleton was a casual.

21 Ms Middleton is correct to say that simply being called a casual employee does not mean that one is a casual employee. However, whether Ms Middleton's dismissal was unfair will rest upon considering all of the circumstances of the case, the same as considering whether the dismissal of any employee was unfair. That is not to say that whether Ms Middleton was in reality a "casual" employee or whether she was a "full-time" or "part-time" employee might not be important; for some issues, it might be very important. Ms Middleton raised the issue in the context of holiday pay and sick leave; however, this case is about her dismissal on 1 May 2013, not about holiday pay or sick leave.

22 Whether Ms Middleton was unfairly dismissed does not depend upon whether she was in reality a "casual" employee or whether she was a "full-time" or "part-time" employee. Even if she had been a "full-time" employee, it was still open to Mr Cassettai as the employer to choose to terminate her employment if he needed to reduce staff. Provided he did so fairly, then it would be difficult for Ms Middleton to show that the dismissal was unfair just because she had been "full-time". Therefore, whether Ms Middleton was in reality a "casual" employee or whether she was a "full-time" or "part-time" employee is not important.

Conclusion

23 Ms Middleton has not shown that her dismissal was unfair because Mr Cassettai didn't like her going away on holidays and had advertised for a replacement to fill her position while she was on holidays. Ms Middleton's evidence is more than matched by Mr Cassettai's evidence and she has not shown that her evidence about what happened should be preferred over Mr Cassettai's evidence.

24 The Commission also takes into account that Mr Cassettai gave a longer period of notice to Ms Middleton than the minimum required for an employee with just less than one year's employment. It is to Mr Cassettai's credit that he did so and it is properly part of his submission that her dismissal was not unfair.

25 Therefore Ms Middleton has not made out her claim and it will be dismissed. An order now issues dismissing the claim.

2013 WAIRC 00866

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DESIREE MIDDLETON
	APPLICANT
	-v-
	CARL CASSETTAI
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 15 OCTOBER 2013
FILE NO/S	U 83 OF 2013
CITATION NO.	2013 WAIRC 00866

Result	Name of respondent amended; Claim of unfair dismissal dismissed
Representation	
Applicant	Ms D Middleton
Respondent	Mr C Cassettai

Order

HAVING HEARD Ms D Middleton, on her own behalf and Mr C Cassettai, on behalf of the respondent;

AND HAVING given Reasons for Decision;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order -

1. THAT the name of the respondent "Carl Cossetle" be deleted and "Carl Cassettai" be inserted in lieu thereof, by consent.
2. THAT this claim of unfair dismissal be, and is hereby dismissed.

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

2013 WAIRC 00151

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK MORETTI
	APPLICANT
	-v-
	H J HEINZ CO AUSTRALIA LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 21 MARCH 2013
FILE NO.	B 19 OF 2013
CITATION NO.	2013 WAIRC 00151

Result	Direction issed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr M Rodgers as agent

Direction

HAVING heard Mr P Mullally as agent on behalf of the applicant and Mr M Rodgers as agent on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the applicant file and serve on the respondent further and better particulars of his claim by no later than 4 April 2013.

(2) THAT the respondent file and serve on the applicant further and better particulars of its notice of answer and counter proposal no later than 14 days from service of the applicant's further and better particulars of claim.

(3) THAT the parties file and serve on one another a written outline of submissions no later than three days prior to the date of hearing.

(4) THAT the application be listed for hearing for two days on dates to be fixed.

(5) THAT the parties have liberty to apply on short notice.

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

2013 WAIRC 00287

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK MORETTI
	APPLICANT
	-v-
	H J HEINZ CO AUSTRALIA LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 16 MAY 2013
FILE NO/S	B 19 OF 2013
CITATION NO.	2013 WAIRC 00287

Result	Direction issued
Representation	
Applicant	Ms P Mullally as agent
Respondent	Mr M Rodgers of counsel

Direction

HAVING heard Ms P Mullally as agent on behalf of the applicant and Mr M Rodgers of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

THAT the respondent be granted leave to take evidence from Ms S Beard and Mr T Ockleshaw by video link at a venue approved by the Commission.

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

2013 WAIRC 00387

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00387
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 21 MARCH 2013, TUESDAY, 4 JUNE 2013, MONDAY, 26 AUGUST 2013, TUESDAY, 27 AUGUST 2013
DELIVERED	**:**	TUESDAY, 2 JULY 2013
FILE NO.	**:**	B 19 OF 2013
BETWEEN	**:**	FRANK MORETTI
		Applicant
		AND
		H J HEINZ CO AUSTRALIA LTD
		Respondent

Catchwords	:	Industrial law - Contractual benefits claim - Application for costs thrown away - Applicant's agent unable to appear due to illness - Commission's power to award costs under s 27(1)(c) of the *Industrial Relations Act 1979* (WA) - Relevant principles applied - Application dismissed.
Legislation	:	Industrial Relations Act 1979 (WA) s 27(1)(c)
Result	:	Application for costs dismissed
Representation:		
Applicant	:	In person
Respondent	:	Mr M Rodgers as agent and with him Ms J Tiffin

Case(s) referred to in reasons:

Brailey v Mendex Pty Ltd (1993) 73 WAIG 26

Case(s) also cited:

Edwards v Turner & Townsend Pty Ltd [2011] WAIRC 01148

Klemm v Darg Pty Ltd (1996) 76 WAIG 2019

McGlone v Alvic Pty Ltd (1986) 66 WAIG 1753

Shaw v City of Wanneroo [2012] WAIRC 00088

Reasons for Decision

1 The substantive application in this matter is a claim by Mr Moretti that he was denied contractual benefits by way of redundancy payments. Mr Moretti claims the sum of $74,888.

2 The application was listed for hearing on 4 June 2013. On the morning of the hearing Mr Moretti's agent, Mr Mullally, advised my Associate that he had taken ill and was unable to appear on behalf of his client. A medical certificate accompanied an email to my Associate. Mr Mullally had also alerted the agent for Heinz that he was unwell and had hoped that medication would enable him to continue to appear. That was prior to attending his doctor who certified him as totally unfit for work. Accordingly Mr Moretti appeared in person before the Commission and sought an adjournment of the application.

3 In the circumstances, the agent for Heinz did not oppose the adjournment but however, has made an application for costs thrown away by it. This is because both he and a representative of his client travelled to Perth from Brisbane for the hearing. Additionally, video conferencing arrangements had been made for the taking of evidence from witnesses for Heinz from Melbourne. Having due regard to these matters the Commission granted the adjournment and directed Heinz to file a bill of costs claimed. It has done so and claims costs in the total sum of $2,386. The costs claimed include two return airfares Brisbane – Perth – Brisbane; accommodation; car hire; and Brisbane parking and cab charges. It was ultimately unnecessary to claim costs for the video link.

4 In response to the application for costs, Mr Moretti was afforded an opportunity to file written submissions which he has done. The submissions of Mr Moretti are to the effect that the adjournment, although regrettable, was necessary due to no fault of either Mr Moretti or Heinz. The reason for the adjournment was a genuine and sudden substantial illness of Mr Moretti's agent, which was supported by a medical certificate certifying Mr Mullally as being totally unfit for work until 7 June 2013. A reference was made in Mr Moretti's written submissions to the relevant principles in relation to the awarding of costs in the Commission's jurisdiction. In particular, the decision of the Full Bench in *Brailey v Mendex Pty Ltd* (1992) 73 WAIG 26. In *Brailey*, the Full Bench referred to the Commission's power to award costs under s 27(1)(c) of the Act, but observed however, that given the general policy in industrial jurisdictions, costs should not be awarded except in extreme cases. Of course, costs may not be awarded for the services of a legal practitioner or industrial agent. Accordingly, Mr Moretti submitted that the principle is that it is only in extreme or exceptional circumstances will cost be awarded.

5 In the present circumstances, Mr Moretti contended that the adjournment, although very regrettable, was not caused by any conduct of the applicant himself, or any intentional or negligent conduct of his agent, such that costs should be awarded.

Consideration

6 It is the case as Mr Moretti has submitted that the Commission's jurisdiction to award costs under s 27(1)(c) of the Act is discretionary, however the discretion is to be exercised only in circumstances where there is an exceptional and compelling reason to do so. In this matter, it is most regrettable that the application had to be adjourned at very short notice, after Heinz's agent and representative arrived in Perth and incurred travel and accommodation costs. However, it must also be taken into consideration by the Commission, that the reason for the adjournment was an unanticipated and genuine incapacitating illness of Mr Moretti's agent. It would obviously have been unfair on Mr Moretti, for the hearing of the application to have proceeded in the absence of Mr Moretti's agent. That being so, in my view, the circumstances giving rise to the adjournment, do not cause the Commission in this case, to conclude that the circumstances are exceptional or extreme, to warrant the imposition of a costs order on Mr Moretti. To do so in the present case, would be tantamount to punishing him, for circumstances over which he had no control.

7 Accordingly, the application by Heinz for costs is refused.

2013 WAIRC 00388

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK MORETTI
	APPLICANT
	-v-
	H J HEINZ CO AUSTRALIA LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 JULY 2013
FILE NO/S	B 19 OF 2013
CITATION NO.	2013 WAIRC 00388

Result	Application for costs dismissed
Representation	
Applicant	In person
Respondent	Mr M Rodgers as agent and with him Ms J Tiffin

Order

HAVING heard Mr F Moretti on his own behalf and Mr M Rodgers 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 by the respondent for costs be and is hereby dismissed.

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

2013 WAIRC 00956

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00956
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 4 JUNE 2013, MONDAY, 26 AUGUST 2013, TUESDAY, 27 AUGUST 2013
DELIVERED	**:**	THURSDAY, 7 NOVEMBER 2013
FILE NO.	**:**	B 19 OF 2013
BETWEEN	**:**	FRANK MORETTI
		Applicant
		AND
		H J HEINZ CO AUSTRALIA LTD
		Respondent

Catchwords	**:**	Industrial law – Contractual benefits claim – Redundancy policy – Claim for denied redundancy payments –Applicant unfairly dismissed and an order for reinstatement made – Timing of the sales management restructuring – Roles merged – Principles applied – Applicant was not made redundant – Application dismissed
Legislation	**:**	*Fair Work Act 2009* (Cth); *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii); *Long Service Leave Act 1958* (WA) ss 4, 8
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr P Mullally as agent
Respondent	**:**	Mr M Rodgers as agent and with him Ms J Tiffin

Case(s) referred to in reasons:

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Moretti v HJ Heinz Co Australia Ltd (2012) 92 WAIG 266

Mr Frank Moretti v HJ Heinz Company Australia Ltd [2012] FWA 1016

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

The Queen v The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited (1977) 16 SASR 6

Simons v Business Computers International Pty Ltd (1985) 65 WAIG 2039

Case(s) also cited:

Anthony Smith & Associates Pty Limited v Sinclair (1996) 67 IR 240

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539

Smith & Kimball v Moore Paragon Australia Ltd [PR942856]

Reasons for Decision

1 This is the third case involving Mr Moretti and HJ Heinz Co Australia Ltd. The first case came before me in November 2011, in which Mr Moretti claimed that he had been denied a contractual benefit by way of a salary continuance plan under his contract of employment: *Moretti v HJ Heinz Co Australia Ltd* (2012) 92 WAIG 266. The Commission found in that case, that Mr Moretti had no entitlement to the benefit he claimed under his contract of employment.

2 A second case involving the dismissal of Mr Moretti from his employment in August 2011 went before the then Fair Work Australia: *Mr Frank Moretti v HJ Heinz Company Australia Ltd* [2012] FWA 1016. In this case, McCarthy DP in a decision of 7 February 2012 found that Mr Moretti had been unfairly dismissed by Heinz. An order was made that Mr Moretti be reinstated by Heinz to a position on terms and conditions of employment no less favourable to those he enjoyed in his former position. Heinz appointed Mr Moretti to a position of "Territory Sales Manager" on the same salary and conditions as applicable to his prior position. However, Mr Moretti did not return to his employment with Heinz. He went on workers' compensation. Mr Moretti settled his workers' compensation claim with Heinz and resigned from his employment effective 6 March 2013.

3 Mr Moretti has commenced these proceedings for a contractual benefit. Mr Moretti contended that the real reason for his dismissal in August 2011 was a desire by Heinz to avoid paying him redundancy benefits under the company's policies and procedures for termination of employment on the grounds of redundancy (Redundancy Policy). This relates to a restructuring in the sales management area of the company that took effect after Mr Moretti's dismissal, in May 2012. A consequence of the restructuring was that Mr Moretti's former position of State Field Sales Manager (WA) was merged with the State Field Sales Manager for SA/NT into one position of State Field Sales Manager SA/WA/NT. In essence, the Western Australian position was enlarged and absorbed the other role. The person in the Western Australian State Field Sales Manager position at the time of this restructuring, Mr Burwin, was appointed to the new position.

4 As a consequence of these events, according to Mr Moretti, is that he was deprived of the benefit of the Redundancy Policy. Mr Moretti claims that his dismissal in August 2011, was at a time when Heinz was involved in the decision making process in relation to the restructuring. Mr Moretti further claimed that the alleged misconduct issues at the time, leading to his dismissal, was a pretext used by Heinz to avoid their obligations to Mr Moretti under the Policy, given that Mr Moretti had nearly 30 years of service with the company by this time.

5 Mr Moretti now claims, as a consequence of these events, that he has been denied a benefit under his contract of employment, in the form of redundancy payments. He claims some $97,014. Mr Moretti also claims an additional sum of $18,539.43 said to arise by including a car allowance and superannuation contributions in his long service leave payments, payable on termination of employment.

6 As noted, Heinz did not take issue with the fact that the Redundancy Policy formed part of Mr Moretti's contract of employment. It simply said that Mr Moretti was not made redundant from his original position to trigger any entitlement.

7 It is necessary to consider a number of issues in determining Mr Moretti's claim. The first issue is the circumstances of Mr Moretti's dismissal, his reinstatement and surrounding events. The second is the restructuring of the sales management of Heinz. Finally, is the issue of the terms of the Redundancy Policy and in what circumstances it would apply.

Dismissal in August 2011 and the challenge

8 As foreshadowed earlier, in these proceedings, Mr Moretti contended that his dismissal in August 2011 was the culmination of a process put in place by Heinz to remove him from the Heinz business to avoid redundancy payments. Mr Moretti contended that the process commenced on 9 June 2011, in a meeting between himself and Mr Patterson, the then General Manager Retail Sales for Heinz. This meeting took place in Perth and followed a performance review process put in place for Mr Moretti by Heinz, in May 2011. Ultimately, as a consequence of events between Mr Moretti and Heinz, Mr Moretti was dismissed by Heinz on 19 August 2011. Heinz contended Mr Moretti had refused to engage in the performance management process with it, thereby engaging in misconduct.

9 As noted, Mr Moretti challenged his dismissal in FWA. On 7 February 2012, FWA upheld Mr Moretti's unfair dismissal claim and found that his dismissal was not for a valid reason. FWA found that his dismissal was harsh, unjust or unreasonable. Mr Moretti's case before FWA was put by him on the basis that no issues had been raised by Heinz previously, with his performance. Notably, it was not part of Mr Moretti's case that he was dismissed as a pretext for Heinz to avoid paying

severance pay following restructuring, under the Redundancy Policy. This was consistent with the evidence led by Heinz in these proceedings that at no time prior to August 2011, was the issue of a possible restructuring or redundancy in the field sales management area, raised with Mr Moretti. However, in Mr Moretti's testimony, he said he had a discussion with a manager, Mr Beattie, as to what may happen in future decisions by senior management.

10 In the FWA decision, McCarthy DP considered the issue of whether Heinz had a valid reason for dismissing Mr Moretti and said at pars 32-33 and 37-38 as follows:

> **[32]** The stated basis for Heinz dismissing Moretti was their assertion that he refused to participate in discussions or sign documentation for a performance management plan that had been developed for him. Moretti was clearly suspicious about the need for the plan and what its real purpose was. Moretti's view was conveyed concisely in his evidence that "They just wanted me to sign the bit of paper which, as far as I'm concerned, it was the first step out the door. And in view of what Scott Patterson had told me" [footnote iii omitted]. In my view Moretti had good reason for that suspicion. He had not been subjected to any performance plans of this nature in the past, no other managers were being subjected to a performance plans, his experience was that when employees were subjected to performance plans it was because of poor performance, and importantly Patterson had told him he was going to be performance managed out of Heinz.
>
> **[33]** I find that Moretti's conduct did amount to a refusal to participate in discussions about the expectations of him and performance improvements Heinz expected of him. However that refusal is unsurprising given the background to the discussions sought.
>
> …
>
> **[37]** Heinz seem to have regarded Moretti's conduct as insubordination when in my view it was not. His requests were reasonable in the circumstances.
>
> **[38]** I find that there was not a valid reason for dismissing Moretti.

11 McCarthy DP then considered whether Mr Moretti was warned as to his unsatisfactory performance and continued at pars 41-43 as follows:

> **[41]** Heinz asserted that the termination of employment was not because of unsatisfactory performance but rather conduct in refusing to discuss performance and expectations regarding performance. Heinz was unconvincing in its explanations about the distinction it was making in this regard. For example Ockleshaw gave evidence that he was concerned about performance yet he based his concerns on discussions with other Managers, his observations (yet he met Moretti only once before forming his opinion), and an analysis of Moretti's last performance review, where he appears to have misunderstood the basis for some of the ratings.
>
> **[42]** There is a degree of disingenuousness in the approach of Heinz. Ockleshaw formed an adverse view about Moretti's performance based on questionable grounds and rather than identify the areas he thought Moretti was not performing satisfactorily in, he, and others, tried to portray those performance issues as some type of improvement programme that Heinz considered mandatory to be mutually agreed upon.
>
> **[43]** I am not prepared to accept Heinz's explanation that the termination was solely because of Moretti's conduct rather than his performance. I consider the termination was related to a view formed that his performance should be improved. It is pedantic to then describe the Employer's response to the Applicant's refusal to participate in discussions sought about implementing the plan and areas of performance to be addressed as a dismissal solely for misconduct. The performance grounds were imperfectly, if not carelessly, formed for an employer of Heinz's size. The performance issues were not conveyed to Moretti because he, and reasonably in my view, wanted the views about his performance to be appropriately identified as performance issues.

12 Subsequently, on 23 February 2012, McCarthy DP made an order that Mr Moretti be reinstated by Heinz into "a position on terms and conditions no less favourable than those on which the applicant was employed immediately before the termination". FWA rejected Heinz's contention that the remedy of reinstatement was impracticable. McCarthy DP (at par 49) of his reasons found that Heinz had filled Mr Moretti's former position by an external recruitment process. There was no suggestion in the reasons for decision of FWA, that it was contended by Mr Moretti at any time, that the appointment of another person into his former position by Heinz, was in some way a sham or device, to avoid its obligations to him under the Redundancy Policy.

13 Furthermore, whilst it seemed that Mr Moretti complained to Heinz that the position that it reinstated him into was a demotion, there was no challenge made by Mr Moretti that Heinz had failed to comply with the order of FWA. Nor did he seek to enforce the order under the Fair Work Act 2009 (Cth). It is not open to Mr Moretti to seek to go behind the FWA order in these proceedings.

Restructuring – 2012

14 As at the time of his dismissal in August 2011, Mr Moretti accepted in his testimony that the State Field Sales Manager (WA) position was still in existence, and was critical to the Western Australian operations of the company. Mr Moretti also accepted when it was put to him, that Heinz needed to fill the position and a recruitment process was commenced for this process. A copy of the "Request to Recruit" document (exhibit R1 pp 2-3) was put to Mr Moretti by Heinz. Mr Moretti accepted the statement on p 3 of the document, that his former position had ten positions reporting to it. He further accepted the statement in the document "3 full time and 7 part time employees – and is critical to the training and development of these employees as well as the delivery of commercial plans in-stores". This evidence was also generally consistent with Mr Moretti's acceptance of the broad proposition put to him, that there was no indication at or around the time of his dismissal in August 2011, that his then position was to be abolished.

15 Heinz's evidence as to Mr Moretti's dismissal and the restructuring that followed in 2012, was led principally from Mr Ockleshaw, the then National Field Sales Manager for Heinz. Mr Ockleshaw testified that he had a discussion with his superior, Mr Patterson, about Mr Moretti. Some concerns had been raised about the management of the sales team in Western Australia by Mr Moretti. Mr Ockleshaw testified that there was no discussion with him about any possible redundancy for Mr Moretti. Mr Ockleshaw said he took advice from human resources, as to how best to handle the situation with Mr Moretti. What then took place led ultimately to the dismissal of Mr Moretti and which circumstances were dealt with fully in the FWA proceedings.

16 Mr Ockleshaw testified that he initiated the recruitment process referred to in exhibit R1 at pp 2-3. This process was endorsed in late August 2011. A little later, in December 2011, Mr Ockleshaw gave a presentation to Heinz sales managers in which he was proposing to increase resources in the field sales area. One part of this was to create a new position, a "Field Implementation Manager", to help implement necessary changes in the field operations. Mr Ockleshaw confirmed that there was no plan "whatsoever", to merge the Western Australian and South Australian Field Sales Manager positions at this time. A copy of Mr Ockleshaw's presentation was in exhibit R1 at pp 4-33. The content of this presentation document is generally consistent with Mr Ockleshaw's evidence. It refers to the need to recruit a State Field Sales Manager for Western Australia, and the continued existence of separate State Field Sales Manager positions for Western Australia and South Australia. The document also makes no reference to any possible changes to the structure of the sales management positions in a timeline through to August 2012.

17 Mr Ockleshaw did accept at the time he authorised the recruitment process for Mr Moretti's replacement, that he was aware Mr Moretti was challenging his dismissal and that he may have been reinstated.

18 Subsequently, in early March 2012, Mr Ockleshaw said he was told by the Managing Director of Heinz, that the company would not be providing additional funding for the field sales operations. Accordingly, he would have to revise the structure of the sales operations, to appoint the new Field Implementation Manager position he wanted. Mr Ockleshaw reviewed the State Field Sales Manager positions in Western Australia and South Australia, compared to the eastern states positions. The eastern states Field Sales Manager positions had about 20 staff each reporting to them, as opposed to 10 in Western Australia and South Australia respectively. This led Mr Ockleshaw to restructure the management of field sales. He said he spoke to human resources about the proposed changes and set them out in an email of 6 March 2012 (exhibit R1 at p 34). This proposal involved the abolition of the South Australian Field Sales Manager position and its responsibilities being taken over by an expanded State Field Sales Manager SA/WA/NT based in Western Australia. The revised structure for the field sales management was set out in exhibit R1 at p 35, and is dated 13 April 2012. On 27 April 2012, Mr Ockleshaw said that he spoke to the State Field Sales Manager (SA) to inform him that his position was to be abolished and that he was being retrenched, as a part of this restructuring.

19 Mr Burwin was appointed to the expanded SA/WA/NT State Field Sales Manager position. In an email dated 15 May 2012 (exhibit R1 p 37), Mr Ockleshaw announced to all relevant staff the restructuring, and the abolition of the SA/NT position and its responsibilities being merged into a combined State Field Sales Manager SA/WA/NT position, to be undertaken by Mr Burwin. Mr Burwin also gave evidence. He confirmed that he was contacted and asked to take on the expanded job, the day prior to Mr Ockleshaw speaking to the South Australian manager. Mr Burwin testified that there had been no discussion with him prior to this, about any restructuring of the sales management area. Mr Ockleshaw also confirmed in his testimony, that the first time a combination of the WA and SA/NT positions was proposed, was after he was told in March 2012 by the Managing Director of Heinz, that there would be no extra funding for the area. Mr Ockleshaw also confirmed in his evidence, that Mr Burwin's revised position in Western Australia, did not receive any salary increase for the increased responsibilities.

20 Further evidence was given on behalf of Heinz by Ms Beard, who at the time was the company's Employee Relations Manager. She testified that the first she became aware of the restructuring was the day prior to the email to her from Mr Ockleshaw, of 6 March 2012. Ms Beard testified that she had to be involved from a process point of view, to determine whether the changes involved a genuine redundancy. Ms Beard also said that at this time, the business was under some pressure and there was a range of restructuring occurring across the company's operations.

Redundancy Policy

21 As noted earlier, it was not contested that the terms of the Heinz policies in relation to redundancy, were a term and condition of Mr Moretti's employment at the material time. An extract of the Heinz policies in relation to termination of employment, and specifically on the grounds of redundancy, was set out in exhibit A1, at pp 21-25. The document is in two parts. The first part deals with what is described as "Policy". The second part deals with what is described as "Procedure". In the section dealing with Policy, cl 11.3 provides as follows:

11.3 Redundancy

Redundancy refers to a situation where an employee's employment is liable to be terminated by Heinz Australia, the termination being attributable, wholly or mainly, to the fact that the position is, or will become, superfluous to the needs of the company.

In the event of possible redundancy, the manager concerned should in the first instance notify and discuss the situation with the Human Resources Director.

In the event of redundancy for all salaried employees, reference should be made to the relevant employment contract and the Procedures manual for Redundancy:

11.3.1 Relocation

For the purposes of clarification, any change to an employee's present position resulting in a requirement to relocate their household (e.g. change of city) will constitute a substantial change to the terms and conditions of employment.

Where a position requires an individual employee to transfer to another state or overseas and the employee chooses not to do so and Heinz Australia has no other option available for the employee, then the situation will be treated as a redundancy.

11.3.2 Sale, transfer or lease of the business

No redundancy will arise by reason of the sale, contracting out, transfer or lease of the business of Heinz Australia or part thereof, where the new owner of the business offers continued employment on substantially the same terms and conditions of employment.

11.3.3 Process and Compensation

Heinz Australia recognises the impact that redundancy can have on an employee and endeavours to provide a process and a range of entitlements to minimise the impact, should redundancy become inevitable.

Waged employees should refer to the relevant Collective Employment Contracts / Agreements.

The following applies to all salaried employees:

I. In the event that Heinz Australia proposes to declare your position redundant Heinz Australia shall:

a) Consult with you a reasonable time in advance over its intentions (including the operational reason for such intention and possible redeployment) and its reasons for selecting you, before arriving at a final decision to give notice of termination of employment on the grounds of redundancy;

b) In the event that a decision is reached to declare your position redundant, Heinz Australia shall:

- Arrange professional outplacement advice (if you desire), at the expense of Heinz Australia to a maximum amount to be determined;
- Use its best endeavours to redeploy you in any other suitable work which becomes available within Heinz Australia business;
- Provide you with at least one months' written notice of termination of your employment, or payment in lieu calculated on base salary. If you are over 45 years old and have completed at least two years of continuous service at the end of the day notice is given, you will receive an additional one week written notice or payment in lieu calculated on base salary;
- Provide you with reasonable time off during the period of notice to enable you to seek alternative employment;
- Pay to you redundancy compensation according to the Heinz Australia formula as follows:
  - 6 weeks base salary for the first year of employment or part thereof;
  - 2 weeks base salary for each subsequent year, or part thereof, up to a maximum of 22 years;
  - Your start date with the company will be the point from which redundancy calculations will be made.

c) The payments made to you in accordance with this policy will cover all severance payments, including any additional payment in lieu of notice.

II. No right to redundancy compensation shall arise where Heinz Australia requires you to accept an alternative position with Heinz Australia on substantially the same terms and conditions at employment.

22 The next section, dealing with Procedure, provides, at cl 11.8, as follows:

11.8 Redundancy

In the event of possible redundancy, the manager concerned should in the first instance notify and discuss the situation with the Human Resources Director.

For waged employees, the relevant Collective Employment Contract or Agreement outlines the process, which Heinz Australia must follow in the case of redundancy.

In the event of redundancy for all salaried employees, reference should be made to the relevant employment contract and the process outlined below:

i. As redundancy must be a final option after all other possibilities have been explored, it is imperative that prior to making a final decision regarding redundancy, the manager responsible must consult with the employee(s) affected.

ii. In doing so, the manager must provide the employee with the business rationale behind the possible redundancy, and seek, and then seriously consider, the employee(s) thoughts / opinions about other options rather than redundancy. (It should be kept in mind that the employee(s) may provide a solution which Heinz Australia has not previously thought of, for example, reduced hours, reduction in pay etc.)

iii. The manager must also explore whether there are any other same or substantially similar vacancies within Heinz Australia, which would be suitable for the employee(s) concerned. *It should be noted that where a same or substantially similar position is offered to the employee within the same location, and they reject the offer, redundancy compensation will not be payable.*

iv. In the event that there are no other suitable vacancies, the employee must be provided with notice of redundancy in accordance with their employment contract. If the employee has a grievance in relation to the outcome of this process, the employee has the right to approach the Human Resources Director for an independent review.

v. Redundancy compensation will be paid in accordance with this Company Policy. The final amounts owing and paid must be checked and approved by Human Resources before payment is made. The employee will be provided with a reasonable amount of time to seek alternative employment at the discretion of Human Resources and their manager.

vi. Professional outplacement advice (if desired) will also be provided at the expense of Heinz Australia. The amount of time allocated to the employee for professional outplacement advice will be pre-arranged by Human Resources.

23 Whilst the distinction between the Policy and the Procedure aspects of the document is not entirely clear and there is considerable overlap, it appears from its terms that there are a number of discrete stages to be followed in a particular redundancy situation. Before considering these stages however, it is to be noted that the Policy introductory parts, refers to a "redundancy" as a circumstance where a position is, or will be, "superfluous to the needs of the company".

24 In its ordinary and natural sense, "superfluous" means "1. That exceeds what is sufficient … 2. That is not needed or required …" (*Shorter Oxford English Dictionary* (3rd ed, 1977))." It is also well settled that industrial tribunals across Australia have regarded a circumstance of redundancy, as one where a person's employment is lost through no fault of their own, and the relevant work is no longer required to be performed by anyone: *The Queen v The Industrial Commission of South Australia*; *Ex parte Adelaide Milk Supply Co-operative Limited* (1977) 16 SASR 6.

25 The first stage of the Policy in relation to a redundancy situation is the "proposal" stage. This requires consultation with the company's Human Resources Director, followed by a discussion with the affected employee. This discussion is to include the reasons for the proposed redundancy, and the consideration of other options. The next stage is the "decision", where Heinz formally declares a position redundant. Once a formal decision is made, the next stage is the provision of notice, payment of severance pay, and time off for seeking other employment. Notably, there is no right to severance pay in circumstances where Heinz requires an employee to accept an alternate position, on substantially the same terms and conditions of employment.

Was the Redundancy Policy enlivened for Mr Moretti?

26 The nature of the Commission's contractual benefits jurisdiction is essentially judicial. It involves the ascertainment and the enforcement of existing legal rights, generally applying relevant principles of the law of contract. It does not involve arbitral or legislative functions, exercised within a broad discretionary framework, as does the creation of new rights or obligations: *Simons v Business Computers International Pty Ltd* (1985) 65 WAIG 2039; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307. For Mr Moretti to succeed in his claim, he needs to establish that he was an employee; the claim is an industrial matter; the subject of the claim was a "benefit" under his contract of employment; it was not under an award, order or industrial agreement; and that the benefit was denied: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704.

27 Mr Moretti urges the Commission to have regard to the whole sequence of events that commenced in May 2012, culminating in the implementation of the restructuring of the sales management area of Heinz in May 2012. Mr Moretti contended that by looking at the overall conduct of Heinz over this period of time, it is open to infer that Mr Moretti was being denied a contractual benefit of the redundancy provisions of the policy. Mr Moretti contended that after nearly 30 years of service with Heinz, the company acted in such a way as to deny him his contractual rights.

28 For the following reasons, in my view, as a matter of contractual entitlement, Mr Moretti has not established on the balance of probabilities, that he has been denied the benefit of the Redundancy Policy. Whilst Mr Moretti referred to a discussion with a senior manager, Mr Beattie, in May 2011, that some changes may occur in the future, it was at best second hand and speculative. In my view, a statement to this effect, even if it were said, could not constitute a trigger under the Redundancy Policy, in terms of a proposal for a particular position to be made redundant. There was no evidence that any particular position was then identified.

29 Of more significance however, is the fact that at no stage leading up to the dismissal of Mr Moretti in August 2011, was there any suggestion of Mr Moretti's then position of State Field Sales Manager (WA) becoming surplus to requirements. On the contrary, all the evidence points the other way. In particular, reference is made to the evidence of Mr Ockleshaw, that Mr Moretti's position was regarded as important and that it needed to be filled. Further, following Mr Moretti's dismissal, Mr Ockleshaw was seeking to expand the resources of the sales management area of the company, and not contract it. Mr Moretti's former position, occupied then by Mr Burwin, was still a part of the formal management structure of the sales area of Heinz up to May 2012, some nine months after Mr Moretti's dismissal. Tellingly, Mr Moretti himself admitted that his position was still required, after his dismissal.

30 Also, Mr Moretti's case as put to FWA in his unfair dismissal claim was not put on the basis that the company dismissed him to avoid its obligations under the Redundancy Policy. Whilst it is the case that Heinz did appoint Mr Burwin to Mr Moretti's former position, this course was open to Heinz in the circumstances. The order of FWA of 23 February 2012 required Heinz to

reinstate Mr Moretti to another position, on substantially the same terms and conditions of employment. This was plainly not his former position of State Field Sales Manager (WA).

31 Accordingly, it cannot be said in my view, that immediately prior to his dismissal, by reason of the events that had occurred to that time, Mr Moretti had a contractual benefit to redundancy pay. There was not then, or in my view, any time later, an entitlement to such a benefit. The facts to do not support a finding that the Policy terms were triggered in the manner required, which I have referred to above. Similarly, on Mr Moretti's reinstatement by FWA, it was to a separate and new position. Mr Moretti was not made redundant from this position, as he resigned from his employment with Heinz, on the settlement of his workers' compensation claim.

32 In any event, on the implementation of the restructuring, it was the State Field Sales Manager SA/NT position that was abolished and the incumbent of that position was retrenched. It is strongly arguable, that the change to the State Field Sales Manager (WA) position, by adding the responsibilities of the SA/NT position, was not a redundancy circumstance. The position then occupied by Mr Burwin, was not surplus to the needs of Heinz. It was the South Australian position that was superfluous to the needs of the company. It seemed on the evidence that the duties that Mr Moretti was formerly performing and were then subsequently performed by Mr Burwin, were still required to be performed.

Long service leave claim

33 Mr Moretti amended his claim by alleging that Heinz had failed to include in calculations for his long service leave, Mr Moretti's car allowance of $20,500 per annum and an allowance for a superannuation contribution of 14%. The total sum claimed is $18,539.43.

34 This issue was not the subject of evidence or written or oral submissions by Mr Moretti. However, a long service leave benefit under the Long Service Leave Act 1958 (WA) cannot be the subject of a claim for a denied contractual benefit. The enforcement of the Long Service Leave Act is a matter within the exclusive jurisdiction of the Industrial Magistrate's Court. The only exception to this may be in the case where the provisions for long service leave, are expressly incorporated into a contract of employment. There was no evidence before the Commission that that was the position in this case.

35 In any event, irrespective of these issues, as contended by Heinz, by s 8 of the Long Service Leave Act, long service leave benefits, including pro rata entitlements, are calculated on an employee's "ordinary pay". By s 4 of the Long Service Leave Act, this means the employee's "remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him." The "ordinary pay" specifically excludes allowances etc. Whilst it is not necessary to finally decide the matter, it is arguable that neither Mr Moretti's car allowance, nor his superannuation contributions, would be included as "ordinary pay" for long service leave purposes.

Conclusion

36 On the basis of all of the evidence, it cannot be concluded that Mr Moretti has established on balance, that he has been denied a benefit under his contract of employment, in the form of redundancy benefits.

37 Whilst I have considerable sympathy for the situation Mr Moretti found himself in, and for the reasons identified by FWA, I consider Mr Moretti was harshly and unfairly treated by Heinz when he was dismissed, he was successful in obtaining a remedy by an order of reinstatement. That order cannot be called into question in these proceedings.

38 Accordingly, for the foregoing reasons, the application must be dismissed.

2013 WAIRC 00952

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	FRANK MORETTI
	APPLICANT
	-v-
	H J HEINZ CO AUSTRALIA LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 7 NOVEMBER 2013
FILE NO/S	B 19 OF 2013
CITATION NO.	2013 WAIRC 00952

Result	Application dismissed
Representation	
Applicant	Mr P Mullally as agent
Respondent	Mr M Rodgers as agent and with him Ms J Tiffin

Order

HAVING heard Mr P Mullally as agent and Mr M Rodgers as agent and with him Ms J Tiffin on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2013 WAIRC 00962

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELISSA MORTON
	APPLICANT
	-v-
	PARADOR TRUST TRADING AS CORNERS ON KING ACN 162902963
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 11 NOVEMBER 2013
FILE NO/S	B 114 OF 2013
CITATION NO.	2013 WAIRC 00962

Result Application dismissed

Order

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

WHEREAS by a Notice of Hearing dated the 22nd day of October 2013, the Commission advised the applicant that a hearing would be convened on the 11th day of November 2013 at 9.00 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 11th day of November 2013 there was no appearance for or by the applicant; and

WHEREAS the Commission took account of the history of the filing of the application and other matters and decided to dismiss 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 00961

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MELISSA MORTON
	APPLICANT
	-v-
	PARADOR TRUST TRADING AS CORNERS ON KING ACN 162902963
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 11 NOVEMBER 2013
FILE NO/S	U 114 OF 2013
CITATION NO.	2013 WAIRC 00961

Result Application dismissed

Order

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

WHEREAS by a Notice of Hearing dated the 22nd day of October 2013, the Commission advised the applicant that a hearing would be convened on the 11th day of November 2013 at 9.00 am for the applicant to show cause why the application should not be dismissed; and

WHEREAS at the hearing on the 11th day of November 2013 there was no appearance for or by the applicant; and

WHEREAS the Commission took account of the history of the filing of the application and other matters and decided to dismiss 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 00886

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00886
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 11 OCTOBER 2013
DELIVERED	**:**	FRIDAY, 18 OCTOBER 2013
FILE NO.	**:**	B 91 OF 2013
BETWEEN	**:**	LEO FRANCIS O'HAGAN
		Applicant
		AND
		JOHN R WEBB
		Respondent

Catchwords	**:**	Industrial law (WA) – Contractual benefits claim – Notice claim in excess of the Printing Award – 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) ss 27(1), 29(1)(b)(ii), 83(3)
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 By this application the applicant Mr O'Hagan claims he has been denied certain contractual entitlements by his former employer described as John R Webb. The applicant was employed in the position of a graphic designer / web designer. The respondent business is in the industry, as it has been described in the evidence, of events and exhibitions.

2 The applicant Mr O'Hagan says he was denied certain contractual benefits in the form of firstly 17 days' annual leave in the sum of $3,393 and secondly four weeks' pay in lieu of notice in the sum of $3,992. The total sum claimed being $7,385.

3 The applicant refers in his notice of application, to the applicability of the Printing Award, applying to graphic designers, described in particular 19, which is an issue to which I shall return shortly in these reasons.

4 The respondent employer has filed no answer in defence of the claim and in any event has failed to appear this morning. The Commission has already determined that under s 27(1) of the Act, it will proceed to hear and determine the matter in the absence of the respondent employer.

5 Also at this point it needs to be observed that an application under s 29(1)(b)(ii) of the Act can only be for a benefit under a contract of employment that does not arise under an award or order of the Commission. Those matters by way of enforcement of awards and orders are within the sole jurisdiction of the Industrial Magistrate's Court under s 83(3) of the Act.

6 The relevant facts in this matter are as follows. Mr O'Hagan testified that he started work on or about 26 March 2012. Exhibit A1 is a written contract of employment entered into between the employer and the applicant. That letter is dated 26 March 2012. It refers to Mr O'Hagan's appointment as a graphic and web design position with a commencement date of 26 March 2012. Relevantly the contract provides for a base salary of $65,000 plus superannuation paid weekly by electronic transfer. Secondly, that Mr O'Hagan would accrue 20 days' paid leave per annum which accrues pro rata. Thirdly, in terms of termination of employment after the completion of an initial probationary period of one month, either party may terminate the employment by the giving of one months' notice.

7 Mr O'Hagan testified that in the course of his employment he took some six days' annual leave that covered the period of his entire engagement from March 2012 to May 2013. Mr O'Hagan testified that he received an email from his employer Mr Webb, dated 31 May 2013, to the effect that the respondent was terminating the contract of employment with immediate effect from that day, without notice or pay in lieu of notice to be provided. The respondent in that communication asserts that Mr O'Hagan owed the respondent some two weeks' annual leave. However, that is contrary to sworn evidence before the Commission. The Commission has no reason to not accept the applicant's evidence and rejects the assertion set out in the email from the respondent employer.

8 On this basis the Commission is therefore satisfied and finds that the applicant was not provided notice or pay in lieu of notice under his contract of employment. In this case also, the Commission has to have regard to the relevant provisions of the Award, in clause 3 – Scope as it applies to employees in the classifications set out in clause 11 – Rate of Wages. In clause 11 of the Award is a position described as Artist/Designer. I am satisfied from the evidence of Mr O'Hagan that the work performed by him satisfies the description of an Artist/Designer for the purposes of clause 11 of the Award. Importantly as the Award applies to persons employed in those classifications and is not controlled by the industry of the business of the employer, I am therefore satisfied on balance that the Printing Award had application during the course of Mr O'Hagan's employment.

9 Even if an employee's employment is covered by an award or order of the Commission, if the benefit claimed is in excess of that prescribed by the relevant award or order, the entire sum may be recovered as a single debt due. In that respect I refer to *Steele v Tardiani* (1946) 72 CLR 386, *Roberts v Groome* (1984) 64 WAIG 774 and *Mason v Bastow* (1990) 70 WAIG 19. The latter two are decisions of this Commission, and the first is a decision of the High Court of Australia.

10 On the basis of the evidence in this matter the Commission however, cannot be persuaded that Mr O'Hagan's claim for annual leave is within the Commission's jurisdiction. The Award in clause 23 – Annual Leave provides for four weeks' annual leave per annum and pro rata annual leave is payable on termination of employment. Therefore it is the case, in my view, that Mr O'Hagan's claim for annual leave does no more than seek the enforcement of the Award. That part of the applicant's claim must fail. It is only pursuable before the Industrial Magistrate's Court, within its exclusive jurisdiction.

11 As to payment in lieu of notice, that element of the claim in my view is to be treated differently. Clause 8 – Terms of Employment of the Award subclause 3 provides for notice of termination by an employee or an employer of two weeks in the case of an employee with 1-3 years' service, which is the circumstance applying to Mr O'Hagan's employment. In this case the applicant's contract of employment provided for four weeks' notice, irrespective of length of service. Therefore the Commission is satisfied that the applicant's claim for payment in lieu of notice may be recoverable as a single debt due.

12 Based on Mr O'Hagan's evidence that he was paid $987 per week net, the Commission will order that the respondent pay to the applicant the sum of $3,948 net, as a denied contractual benefit, within seven days of today.

2013 WAIRC 00860

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LEO FRANCIS O'HAGAN
	APPLICANT
	-v-
	JOHN R WEBB
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 11 OCTOBER 2013
FILE NO/S	B 91 OF 2013
CITATION NO.	2013 WAIRC 00860

Result	Order issued
Representation	
Applicant	In person
Respondent	No appearance

Order

HAVING heard Mr O'Hagan on his 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 $3,948.00 net as a denied contractual benefit by 18 October 2013.

(2) THAT otherwise the application be and is hereby dismissed.

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

2013 WAIRC 00769

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIRI PRICE
	APPLICANT
	-v-
	ABNOTE AUSTRALASIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 27 AUGUST 2013
FILE NO/S	B 82 OF 2013
CITATION NO.	2013 WAIRC 00769

Result	Order issued
Representation	
Applicant	Ms K Price
Respondent	Ms H Christo

Order

HAVING HEARD Ms K Price on her own behalf and Ms H Christo on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent be granted leave to appear by video link subject to the venue being approved by the Commission.

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

2013 WAIRC 00843

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00843
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 26 SEPTEMBER 2013
DELIVERED	**:**	TUESDAY, 8 OCTOBER 2013
FILE NO.	**:**	B 82 OF 2013
BETWEEN	**:**	KIRI PRICE
		Applicant
		AND
		ABNOTE AUSTRALASIA PTY LTD
		Respondent

Catchwords	:	Industrial law (WA) – Contractual benefits claim – Claim for a bonus under a sales incentive scheme – Changes to the applicant's position – Onus on the applicant to establish the contractual entitlement claimed – Sales budget did not entitle the applicant to the bonus – Application dismissed
Legislation	:	*Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Ms H Christo

Case(s) referred to in reasons:

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

Reasons for Decision

1 The applicant, Ms Price, was employed by the respondent ABnote Australasia Pty Ltd in July 2010 in the position of Account Manager Commercial WA. The company is involved in the manufacturing of various plastic card products including identification and security cards. In her position, Ms Price was responsible for managing sales accounts assigned to her and developing new business. Ms Price was employed in accordance with a written contract of employment dated 15 July 2010 which, as a part of the terms and conditions, provided for a sales incentive program based on sales performance.

2 In November 2011, Ms Price's position changed to that of Account Manager/Customer Service Support WA. The amended terms and conditions of employment were set out in a letter dated 15 November 2011. The changes were effective from 1 January 2012. The amended conditions of employment included Ms Price's incentive structure under the sales incentive program. The incentive structure comprised two components, they being a commission of 2% on all invoiced sales paid quarterly, and an annual account achievement bonus ranging from $6,000 to a maximum $10,000, subject to the achievement of budgeted sales targets for the financial year. A document entitled "Sales Incentive Program 2012" specified that in the case of Ms Price, for the financial year January to December 2012, her budget sales target was $500,000.

3 Ms Price resigned from the company in April 2013. She is now in dispute with the company in relation to a claim for bonus payments under the sales incentive scheme. She brings these proceedings to recover the benefit she contends has been denied to her.

4 Ms Price claims that she should be entitled, in accordance with the scheme, to a $10,000 bonus for the 2012 year. As the applicant, Ms Price bears the onus to establish, on the balance of probabilities, that she has a contractual entitlement to a bonus and what that amount should be: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704. It was common ground that Ms Price was paid $4,000 on termination of her employment. Thus, Ms Price claims the balance of $6000. ABnote contended that the payment made to her was not a bonus payment in accordance with the scheme, as Ms Price did not have a sales budget which would entitle her to a bonus. In effect, ABnote contended that the payment of $4,000 made to Ms Price was in the nature of an ex gratia payment.

5 It was not controversial that the sales incentive program was a benefit under Ms Price's contract of employment. What ABnote contended however, was that after the change to her position set out in its letter to Ms Price of 15 November 2011, Ms Price no longer had a sales budget of at least $500,000 which would have qualified her for a bonus in 2012.

6 Ms Price testified that after the change to her position in late 2011, as a result of conversations she had with various managers, in particular Mr Pythas, a Commercial Sales Director based in Victoria, she understood that she had a sales budget of "about $500,000" for 2012. Proceeding on this assumption, based upon her performance during 2012, she was of the view that she was on target to reach her $500,000 budget and should therefore receive a performance bonus. Whilst Ms Price accepted that there were some changes to her position, in particular on the commencement of a new Business Development Manager in Perth in March 2012, nonetheless, her workload remained very high. This change also involved a reduction in her sales budget which was set at $1.2m for 2011.

7 From April 2012, on the basis of email correspondence between Ms Price and the ABnote accountant, it appeared that there was a downward revision of Ms Price's budget forecast at that point. For example, in an email to Ms Wong of ABnote from Ms Price, dated 17 April 2012, Ms Price submitted an updated forecast for the year, of $432,631. This figure is reflected in a spread sheet setting out budget forecasts for Ms Price in relation to each sales account. As a part of the change in positions, Ms Price accepted that a number of her accounts, and the budgets attached to them, were reallocated to other employees in the Perth office. In Ms Wong's email of 18 April 2012, reference is made to the re-allocation of accounts from Ms Price to two other employees, totalling some $155,503. This re-allocation of accounts was not disputed by Ms Price. Also, a document setting out all relevant employees' 2012 sales results for the year, showed Ms Price with an actual budget of $334,746 against an actual performance of $539,476. Her variance against that budget was $204,730 or 161% of her budget figure. It is to be noted that the end of year budget figure for Ms Price, approximately reflects an amount of $500,000, less the re-allocations referred to in the April emails between Ms Price and Ms Wong, the ABnote accountant.

8 ABnote contended that the 2012 results, setting out budget versus actual and the variance, is clear evidence that Ms Price's sales budget for 2012 was significantly less than $500,000, which therefore precluded her from formally participating in the sales incentive program for 2012. For the 2012 year, a minimum budget of $500,000 was required for any bonus payment. Despite this however, ABnote submitted that as Ms Price had performed well against her albeit lower budget, it decided to

make the minimum payment of $4,000 which would apply to an employee achieving 100% of a $500,000 budget. As noted, this was contended to be in effect, an ex gratia goodwill payment made on termination of Ms Price's employment.

9 There is no question that Ms Price was a loyal and committed employee and achieved significant sales performance in the course of the 2012 year. The issue is however, whether, as a matter of contract, Ms Price was entitled to the additional $6,000 which she now claims. For this claim to be successful, Ms Price needed to establish, on the balance of probabilities, that her budget fell within the minimum budget target range in order to receive a bonus payment based on actual performance, for the 2012 financial year.

10 On the evidence, the Commission is unable to conclude that Ms Price had an actual budget of a minimum of $500,000 to be entitled to the percentage based achievement bonus in accordance with the sales incentive program for 2012. Whilst Ms Price in her evidence, referred to various conversations she had with some of her managers, that her sales budget for 2012 would be "about $500,000", the documentary evidence set out in exhibit R1, produced by ABnote is to the contrary. It seems that at least initially, the budget may have been set at or around this level from the "Sales Incentive Plan 2012" document in evidence. However, it is also clear on the evidence, that by at least the middle of 2012, Ms Price's sales budget was reduced significantly below the minimum $500,000 threshold in order to qualify for a bonus for that year. This change appears to have largely been as a result of the reallocation of responsibility for accounts to other employees in the Perth office, to which I have referred above.

11 Ms Price was not able to establish by direct cogent evidence, that the 2012 overall sales results reflecting actual, budget and variance figures for all account management and business development management staff, including the applicant, was in some way inaccurate. That document, produced by ABnote, which Ms Price said she received in early 2013, is a summary of the calendar year 2012 performance, and shows an actual budget for Ms Price of $334,746 for 2012. This reflected the downward revision from Ms Price's April 2012 budget estimate for that year. Whilst Ms Price's performance against that budget was commendable, the Commission cannot be satisfied on the evidence, that the applicant has established that she had a contractual entitlement to a bonus payment based upon a minimum budget of $500,000, in accordance with the sales incentive program for 2012.

12 Accordingly, the application must be dismissed.

2013 WAIRC 00844

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	KIRI PRICE
	APPLICANT
	-v-
	ABNOTE AUSTRALASIA PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 8 OCTOBER 2013
FILE NO/S	B 82 OF 2013
CITATION NO.	2013 WAIRC 00844

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Ms H Christo

Order

HAVING heard Ms K Price on her own behalf and Ms H Christo on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2013 WAIRC 00783

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MR NATHAN JOHN RZEPECKI
	APPLICANT
	-v-
	INDEPTH INTERACTIVE PTY LTD
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 2 SEPTEMBER 2013
FILE NO/S	B 94 OF 2011
CITATION NO.	2013 WAIRC 00783

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 00949

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ZHENLUN, ANDREW SITU
	APPLICANT
	-v-
	SLICES OF FUSION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 5 NOVEMBER 2013
FILE NO/S	B 24 OF 2013
CITATION NO.	2013 WAIRC 00949

Result	Application discontinued
Representation	
Applicant	Mr N Dep and Mr A Zhenlun
Respondent	Mr P Chargeman

Order

HAVING heard Mr N Dep and Mr A Zhenlun on behalf of the applicant and Mr P Chargeman 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 00959

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA CHRISTINE STITZ
	APPLICANT
	-v-
	WESTERN AREAS LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 8 NOVEMBER 2013
FILE NO/S	B 156 OF 2013
CITATION NO.	2013 WAIRC 00959

Result	Application discontinued
Representation	
Applicant	Mr S Lawrence
Respondent	No appearance

Order

WHEREAS an application claiming an unpaid benefit under a contact of employment was lodged in the Commission on 26 September 2013;

AND WHEREAS the respondent named in the application denied it had ever employed the applicant and stated that it was a national system employer;

AND WHEREAS the claim was listed for hearing in order for the applicant to advise whether or not she wished to continue with the claim;

AND WHEREAS at the hearing the applicant stated she wished to withdraw the claim,

AND HAVING HEARD Mr S Lawrence on behalf of the applicant.

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

THAT the application be discontinued.

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

2013 WAIRC 00960

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SANDRA CHRISTINE STITZ
	APPLICANT
	-v-
	WESTERN AREAS LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 8 NOVEMBER 2013
FILE NO/S	U 156 OF 2013
CITATION NO.	2013 WAIRC 00960

Result	Application discontinued
Representation	
Applicant	Mr S Lawrence
Respondent	No appearance

Order

WHEREAS an application claiming unfair dismissal was lodged in the Commission on 26 September 2013;

AND WHEREAS the respondent named in the application denied it had ever employed the applicant and stated that it was a national system employer;

AND WHEREAS the claim was listed for hearing in order for the applicant to advise whether or not she wished to continue with the claim;

AND WHEREAS at the hearing the applicant stated she wished to withdraw the claim,

AND HAVING HEARD Mr S Lawrence on behalf of the applicant.

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

THAT the application be discontinued.

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

2013 WAIRC 00933

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00933
CORAM	**:**	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	**:**	THURSDAY, 3 OCTOBER 2013
DELIVERED	**:**	THURSDAY, 31 OCTOBER 2013
FILE NO.	**:**	B 129 OF 2013
BETWEEN	**:**	TRACEY ANN TOBIN
		Applicant
		AND
		THE GENERAL MANAGER,
		BRIAN GARDNER MOTORS PTY LTD (ACN 008 752 010) TRADING AS HONDA NORTH DL 0891
		Respondent

CatchWords	**:**	Denied contractual benefit claim – Entitlement under contracts of employment – Underpayment of monthly commission for period when on annual leave – Pro rata payments – Average earnings – Custom and practice
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	On her own behalf
Respondent	**:**	Mr G McCorry as agent

Reasons for Decision

1 The applicant is employed by the respondent as an Aftercare Sales Consultant. The respondent is a retailer of new motor vehicles. The applicant's role is to sell additional products to the customer following the sale of a vehicle, including window tinting, paint protection and warranties.

2 The applicant's first contract in that position commenced on 5 September 2011. She had two subsequent contracts for that position and an additional contract for another position, the latter not being relevant to this claim.

3 The applicant claims that on 14 August 2013 the respondent failed to pay her correctly for her monthly commission for the month of July 2013, in accordance with her contract, resulting in a significant underpayment. It is not my intention at this point to deal with the actual calculation of that underpayment claim but to deal firstly with whether, in principle, an underpayment arises.

4 The applicant took three weeks' annual leave from 1 to 21 July 2013, working eight days in that month. She was paid 34% of the monthly commissions for that month reflecting that she worked eight of the 23 working days in the month.

5 The applicant says that as she is the only person in the Aftercare Department, and, as I understand her case, that she is entitled to all of the commissions for the month for two reasons; firstly, she says her contract says that her commissions are calculated

at 15% of the Aftercare gross profit earned net of stamp duty, aftercare expenses and GST. Therefore, her commission is to be the whole of that calculation as the Aftercare gross profit is the figure for the whole of her work. However, it is suggested that there may have been commissions earned for the period that she was away by the sales of Aftercare products by others.

6 Secondly, the applicant relies on a sentence in the contract which says, 'there are no pro rata targets applicable for staff that commence or terminate part way through a month'. She says that by taking annual leave and recommencing part way through the month, the application of the contractual term means that she is to receive the commissions for the whole of the month not part of it.

7 The applicant also relies on custom and practice. She says that she was previously absent for shorter periods, including one occasion of five hours, one of four days and for two Saturdays and an Easter break, where no deductions were made from commissions on a pro rata basis.

8 The respondent says that the applicant is entitled to commissions earned by her. When she is on annual leave, she does not earn commissions. However, the contract provides for payment during annual leave of average earnings, which is calculated as retainer, commissions and month end bonuses. There have been no month end bonuses as part of her contract for this period, therefore it is simply an average of retainer and commissions.

9 The respondent says that custom and practice is not to be used in construing the terms of the contract. Further, the circumstances do not meet the tests for a term to be implied by custom and usage, of being notorious, certain, legal and reasonable.

10 Further, the respondent says that the applicant received a greater benefit by the use of the averaging of earnings than she would have done by the application of actual commissions.

11 In reply, the applicant appears to assert that when on annual leave she is entitled to average earnings plus commissions.

The Contracts

12 When construing contracts of this nature, it is appropriate to bear in mind that they are not usually drafted with the attention given to those drafted by lawyers. Further, as time goes on standard contracts are amended, also without due care to consequential changes to other clauses or to internal inconsistency. This appears to be the case in this matter as will be seen from what follows.

13 The applicant's initial contract as Aftercare Sales Consultant, dated 5 September 2011, provides the following relevant provisions:

> **Monthly Commission:** Aftercare bonus is to be paid at **12.0%** of Aftercare gross profit earned being net of stamp duty, aftercare expenses and GST. All vehicles must be delivered and paid for before any commission will be paid or due.
>
> **Monthly Bonus:** An additional monthly bonus of $750.00 will be paid *IF* Aftercare gross profit (being net of stamp duty, aftercare expenses and GST) achieved for the month is $35000.00 or over, with an average of $400.00 or more per vehicle delivered. (Original emphasis)
>
> Commissions are to be calculated after the end of the month is completed and paid only when the financials have been produced for Mr. Paul Gardner (Dealer Principal) and are subject to his authorization. It is generally paid by the 21st of the following month.
>
> Bear in mind that there are no pro rata targets applicable for staff that commence or terminate part way through a month.
>
> **Targets:** Targets as provided by Mr. Paul Gardner (Dealer Principal) and are subject to his review.
>
> …
>
> **Annual Leave:** Accrues at the rate of 20 days per year (standard four weeks) and *is paid at average earnings with no leave loading. … The average calculated will include retainer, commissions and month end bonuses.* The exceptions are workers compensation monies as these are paid by our workers compensation insurance company. (Original emphasis).

14 The next contract, dated 10 February 2012, in the comparable provisions, is in identical terms to the first except that the Aftercare bonus increased from 12% to 14% of the Aftercare gross profit earned.

15 The contract dated 1 September 2012, the current contract for the purposes of this claim, is in the same terms as the first two except that the Monthly Commission or Aftercare bonus has again increased, this time to 15% of Aftercare gross profit earned. However, Monthly Bonus has been removed and this appears to be accounted for on the basis that there has been an increase from 12% to 15% in the monthly commissions. The sentence dealing with there being no pro rata targets applicable for staff that commence or terminate part way through the month has been retained. The evidence is that there were no targets specified for the applicant, but of actual performance being recorded.

16 The applicant relies upon the sentence about there being no pro rata targets applicable to staff that commence or terminate part way through a month for the purpose of arguing that the monthly commission is not to be prorated. However, its reference is to targets. As I noted above, there is no evidence of there being targets set and, therefore, this paragraph is of no assistance in construing the terms of the contract in reference to any entitlement to commissions not being prorated for the month.

17 Further, it is not clear that reference to commencing or terminating part way through a month relates to going on and returning from leave. It is most likely reference to commencing and terminating employment. The applicant's employment did not commence or terminate part way through the relevant month. In any event, as noted above, it relates to the provision dealing with targets, which were removed from the most recent contract. This sentence most likely ought to have been removed at the same time because it relates to a provision which is not in the current contract.

18 I find that the contract provides that the applicant is entitled to a base rate each week in accordance with the contract and, in addition, to an Aftercare bonus of 15% of the Aftercare gross profit less earned certain expenses. However, when on annual

leave, payment is clearly identified as being 'at average earnings with no leave loading. … The average calculated will include retainer, commissions and month end bonuses'. There was no month end bonus. Therefore, the applicant's payments whilst on annual leave were to be an average of her retainer and commissions. The evidence is that this is what the applicant was paid for her period of annual leave. Otherwise, for the remainder of the month, she was paid commissions earned during the month.

19 Further, the monthly commission is a percentage of Aftercare gross profit earned. The term earned is significant, because it is not simply the Aftercare gross profit of the business, but that which was earned by the applicant's own endeavours. The contract cannot be read to suggest that she was entitled to commissions earned by others plus average earnings, but rather she was entitled to commissions earned by her when she has worked, other than when she was on annual leave, during which time she would be paid an average of her earnings.

20 As to the issue of custom and practice, for a term to be implied, the custom or usage must be proved to be 'notorious, certain, legal and reasonable': *Cheshire and Fifoot's Law of Contract* provides:

> **10.54 Terms implied by custom.** Occasionally terms are implied into contracts on the basis of custom usage. In *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* the High Court, in a joint opinion, endorsed the following propositions:
>
> 1. The existence of a custom is a question of fact.
> 2. Actual knowledge of the custom is not required.
> 3. The custom need not be universally accepted, but there must be evidence that it is so well known and acquiesced in that everyone making a contract in that situation can be reasonably presumed to have imported that term into the contract. It must be 'uniform, notorious, reasonable and certain'.
> 4. A term is not implied on the basis of custom if it is contrary to the actual terms of the contract.
>
> These propositions were derived from several prior decisions, and have been re-endorsed since.
>
> The burden of proving a custom is difficult to discharge, and in the majority of cases the decision has been against implication. 'The question is always whether the general notoriety of the custom makes it reasonable to assume that the parties contracted with reference to the custom.' That is, the obligation in question must be regarded as a term of all contracts to which the custom applies. (Seddon N and Ellinghaus M, *Cheshire and Fifoot's Law of Contract* (2008) 465) (Citations omitted). (See also Carter J, *Contract Law in Australia* (2007) [11–25]).

21 The applicant says that there have been no deductions for some small periods of leave taken by her. However, the evidence also indicates that the respondent has a practice of making adjustments to payments where employees move from one position to another part way through the month. There is no other evidence that a practice of not deducting was notorious or certain. My conclusion in that regard is that if the applicant had been paid commissions without deduction for those brief periods, then this was in error and may well have been an overpayment. Further, it would not be reasonable for the applicant to be paid for commissions which she did not earn when she was on annual leave, as well as receive an average of earnings.

22 In all the circumstances, I find that the applicant's contract of employment entitled her to payment of average earnings for the period that she was on leave in lieu of, but not additional to, commissions earned for Aftercare gross profit. For the remaining days of July 2013, she was entitled to her retainer and Aftercare monthly commission for sales made by her during the days when she was at work. In those circumstances, there is no underpayment of commissions and the application ought to be dismissed.

2013 WAIRC 00934

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	TRACEY ANN TOBIN
	APPLICANT
	-v-
	THE GENERAL MANAGER,
	BRIAN GARDNER MOTORS PTY LTD (ACN 008 752 010) TRADING AS HONDA NORTH DL 0891
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 31 OCTOBER 2013
FILE NO/S	B 129 OF 2013
CITATION NO.	2013 WAIRC 00934
Result	Application dismissed

Order

HAVING heard Ms T A Tobin on her own behalf and Mr G McCorry as agent 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 00948

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID WARD
	APPLICANT
	-v-
	RENTAL MANAGEMENT AUSTRALIA GROUP LIMITED
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 4 NOVEMBER 2013
FILE NO/S	B 58 OF 2013
CITATION NO.	2013 WAIRC 00948

Result	Application discontinued
Representation	
Applicant	Mr D Ward
Respondent	Mr S Bell

Order

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

AND WHEREAS on 21 June 2013 a conference between the parties was convened;

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

AND WHEREAS on 1 November 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* (WA), hereby orders:

THAT this application be, and is hereby discontinued.

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

2013 WAIRC 00936

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00936
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	TUESDAY, 29 OCTOBER 2013
DELIVERED	**:**	FRIDAY, 1 NOVEMBER 2013
FILE NO.	**:**	U 133 OF 2013
BETWEEN	**:**	JULIE WILKES
		Applicant
		AND
		METROPOLITAN HEALTH SERVICE - ROYAL PERTH HOSPITAL
		(FORMALLY EMHS NOW SMAHS)
		Respondent

CatchWords	:	Industrial law - Unfair Dismissal - Government officer - Jurisdiction - Exclusive Jurisdiction of Public Service Arbitrator
Legislation	:	*Industrial Relations Act 1979* (WA) ss 7, 23(1), 29(1)(b)(i), 29(2), 80C(1), 80E(1)
Result	:	*Claim of unfair dismissal dismissed for want of jurisdiction*
Representation:		
Applicant	:	Ms J Wilkes
Respondent	:	Mr M Aulfrey and with him, Ms J Symons

Case(s) referred to in reasons:

Director General, Department of Justice v Civil Service Association of WA (Inc) [2005] WASCA 244; (2005) 86 WAIG 231

Drake-Brockman v The Minister for Health [2011] WAIRC 00822; (2011) 91 WAIG 2234

Reasons for Decision

1 Ms Wilkes has referred a claim of unfair dismissal to the Commission under s 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA) (the Act). Her application raises two preliminary issues.

2 The first issue is whether the Commission has the jurisdiction to enquire into and deal with her claim. It is not disputed, and I find as a fact, that Ms Wilkes had been employed as a Clinical Pharmacist and Coordinator, Home Cancer Care Service. Ms Wilkes's former employer was the Minister for Health in his incorporated capacity under s 7 of the *Hospitals and Health Services Act 1927* (WA). The terms and conditions of her employment were governed by the *WA Health - Health Services Union – PACTS – Industrial Agreement 2011* or its predecessors. Ms Wilkes was classified as a salaried officer.

3 Section 80C(1) of the Act contains a definition of a "government officer" as follows:

> ***government officer*** means —
>
> (a) every public service officer; and
>
> (aa) each member of the Governor's Establishment within the meaning of the *Governor's Establishment Act 1992*; and
>
> (ab) each member of a department of the staff of Parliament referred to in, and each electorate officer within the meaning of, the *Parliamentary and Electorate Staff (Employment) Act 1992*; and
>
> (b) every other person employed on the salaried staff of a public authority; and
>
> (c) any person not referred to in paragraph (a) or (b) who would have been a government officer within the meaning of section 96 of this Act as enacted before the coming into operation of section 58 of the *Acts*

4 I find that Ms Wilkes was at the time of her employment a government officer as defined in (b) of that definition.

5 Ms Wilkes claims that she was unfairly dismissed. The dismissal of an employee is within paragraph (c) of the definition of an "industrial matter" in s 7 of the Act. Ms Wilkes's claim is therefore an industrial matter. Section 23(1) of the Act provides as follows:

> (1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

6 The point to be noted is that the jurisdiction of the Commission to enquire into and deal with any industrial matter is conditioned by the opening words: "Subject to this Act" and s 80E(1) of the Act provides as follows:

> (1) Subject to Division 3 of Part II and subsections (6) and (7), an Arbitrator has exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer, a group of government officers or government officers generally.

7 The reference to an Arbitrator is a reference to a Public Service Arbitrator. Therefore a Public Service Arbitrator has the exclusive jurisdiction to enquire into and deal with any industrial matter relating to a government officer. The WA Industrial Appeal Court considered the effect of those words "exclusive jurisdiction" in *Director General, Department of Justice v Civil Service Association of WA (Inc)* [2005] WASCA 244; (2005) 86 WAIG 231. Justices Wheeler and Le Miere held at [27]:

> 27 It seems likely, having regard to the considerations mentioned, that the expression "exclusive jurisdiction" in s 80E(1) was intended to do no more than exclude the general jurisdiction of the Commission, pursuant to s23, to inquire into and deal with industrial matters generally.

8 Therefore the Commission does not have the jurisdiction to enquire into and deal with Ms Wilkes's claim of unfair dismissal because:

> (a) the jurisdiction of the Commission in s 23(1) of the Act to enquire into and deal with Ms Wilkes's claim of unfair dismissal is conditioned by the opening words: "Subject to this Act";
>
> (b) the Act provides elsewhere in s 80E(1) for an industrial matter relating to a government officer to be dealt with exclusively by a Public Service Arbitrator; and
>
> (c) Ms Wilkes was a government officer;

(d) therefore, the jurisdiction of the Commission in s 23(1) is overridden by the exclusive jurisdiction of the Public Service Arbitrator.

9 During the hearing, reference was made to the Public Service Appeal Board (PSAB) which is established by s 80H of the Act. Ms Wilkes made the point that the jurisdiction of the PSAB in s 80I(1) of the Act is, generally, to hear an appeal by a public service officer against any decision of the employer. She contends that the PSAB would not have the jurisdiction to hear her claim because in her case she was "constructively dismissed" and no "decision" was made by her employer. The point made by Ms Wilkes may be valid; however, if the PSAB does not have the jurisdiction to deal with her claim, it does not follow for that reason that the Commission must have the jurisdiction to do so: the Commission does not have the jurisdiction to deal with her claim for the reasons set out above whether or not the PSAB has the jurisdiction to do so.

10 Ms Wilkes submitted that the Commission does have the power to enquire into and deal with her claim of unfair dismissal because it did so in the case of *Drake-Brockman v The Minister for Health* [2011] WAIRC 00822; (2011) 91 WAIG 2234. That matter was a claim of unfair dismissal against the Minister for Health made pursuant to the same section of the Act now relied on by Ms Wilkes, namely s 29(1)(b)(i) of the Act. However, as the decision in that matter makes clear, Ms Drake-Brockman had been employed as a Level 1 Mental Health Nurse. As such, she was not a government officer: the Commission has the jurisdiction to enquire into and deal with a claim of unfair dismissal made by an employee who is not a government officer. Ms Drake-Brockman's case does not assist Ms Wilkes's submission because Ms Wilkes was a government officer.

11 Accordingly, an order will issue that Ms Wilkes's claim of unfair dismissal be dismissed for want of jurisdiction.

12 That conclusion means that it is not necessary for the Commission to embark upon the second issue which arises from Ms Wilkes's claim, namely that she referred her claim of unfair dismissal some six weeks outside the time prescribed in s 29(2) of the Act of 28 days from the date her employment ended. Even if Ms Wilkes was likely to succeed in showing that it would be unfair not to accept her claim out of time (and I do not make that finding), the Commission does not have the jurisdiction to enquire into and deal with her claim.

13 The order now issues.

2013 WAIRC 00937

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JULIE WILKES
	APPLICANT
	-v-
	METROPOLITAN HEALTH SERVICE - ROYAL PERTH HOSPITAL
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 1 NOVEMBER 2013
FILE NO/S	U 133 OF 2013
CITATION NO.	2013 WAIRC 00937

Result	Claim of unfair dismissal dismissed for want of jurisdiction
Representation	
Applicant	Ms J Wilkes
Respondent	Mr M Aulfrey, and with him, Ms J Symons

Order

HAVING heard Ms J Wilkes on her own behalf and Mr M Aulfrey for the respondent;

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

THAT this claim of unfair dismissal be dismissed for want of jurisdiction.

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

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Bharat Bhushan	M Z H Mutty & B N Mutty 3F Cleaning	U 116/2013	Commissioner S J Kenner	Discontinued
Craig Maluish	Lesa Rae	U 127/2013	Chief Commissioner A R Beech	Discontinued
Darek Anderson	Belinda Scott Trading as Bel-Air Refuelling Services	U 84/2013	Commissioner S J Kenner	Discontinued
Jade Marie Rudnyckyj	Icky Finks	U 119/2013	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters arising out of—

2013 WAIRC 00942

DISPUTE RE IMPENDING INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES COMMISSIONER, DEPARTMENT OF CORRECTIVE SERVICES

APPLICANT

-v-

CIVIL SERVICE ASSOCIATION OF WA

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE FRIDAY, 1 NOVEMBER 2013
FILE NO/S C 213 OF 2013
CITATION NO. 2013 WAIRC 00942

Result Application discontinued
Representation
Applicant Ms R Hendon
Respondent Ms T Borwick

Order

HAVING heard Ms R Hendon on behalf of the applicant and Ms T Borwick 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.

2007 WAIRC 01110

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS

APPLICANT

-v-

THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)

RESPONDENT

THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)

APPLICANT

WAYNE COLLYER, MANAGING DIRECTOR, SWAN TAFE

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE WEDNESDAY, 19 SEPTEMBER 2007
FILE NO. C 23 OF 2007, C 24 OF 2007
CITATION NO. 2007 WAIRC 01110

Result Recommendations issued

Recommendations

WHEREAS on 19 September 2007 the applicants in application C 23 of 2007 applied to the Commission for an urgent conference pursuant to s44 of the Industrial Relations Act 1979 ("the Act") seeking the assistance of the Commission in relation to industrial action being taken by over 100 Lecturers at Swan TAFE in support of a lecturer who has refused to take a class given the number of students in the class; and

WHEREAS the respondent in application C 23 of 2007 made an application to the Commission with respect to a lecturer at Swan TAFE who was having his pay withheld because Swan TAFE alleged that he had failed to obey a lawful direction to teach a class of 17 students; and

WHEREAS on 19 September 2007 the Commission convened an urgent conference pursuant to s44 of the Act; and

WHEREAS after hearing from the parties the Commission formed the view that a number of recommendations were necessary to prevent the deterioration of industrial relations so that further conciliation and arbitration could take place in relation to the issues currently before the Commission;

NOW THEREFORE, the Commission having formed the view that in order for further conciliation and arbitration to occur to resolve the matters in dispute, pursuant to the powers conferred on it under the Industrial Relations Act 1979 and in particular s44(5a)(6)(ba)(i) and (ii), hereby directs the parties to consider the following recommendations:

1. THAT Swan TAFE workshop lecturers who are currently refusing to undertake their normal duties return to work as soon as practicable after 8.00am on 20 September 2007.
2. THAT Mr Laurin be allowed to resume his normal duties as soon as practicable on 20 September 2007 on full pay and that he be paid by his employer as though he has worked continuously for the week commencing 17 September 2007.
3. THAT the parties agree to the Commission undertaking site inspections of relevant workshops at Swan TAFE on the afternoon of 20 September 2007 and then hears further from the parties on that date to consider and finalise an interim process for determining appropriate workshop class sizes for apprentices and trainees.
4. THAT the parties accept that once this interim process is finalised it shall remain in place and be adhered to by the parties and no further industrial action will occur whilst the Commission hears further from the parties and finalises a process for determining appropriate workshop class sizes for apprentices and trainees at Swan TAFE.

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

2007 WAIRC 01114

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS

APPLICANT

-v-

THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)

RESPONDENT

THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)

APPLICANT

WAYNE COLLYER, MANAGING DIRECTOR, SWAN TAFE

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE FRIDAY, 21 SEPTEMBER 2007

FILE NO/S C 23 OF 2007, C 24 OF 2007

CITATION NO. 2007 WAIRC 01114

Result Order issued

Order

WHEREAS on 19 September 2007 the applicants in application C 23 of 2007 (“the applicants”) applied to the Commission for an urgent conference pursuant to s44 of the Industrial Relations Act 1979 ("the Act") seeking the assistance of the Commission in

relation to industrial action being taken by over 100 Lecturers at Swan TAFE in support of a lecturer who refused to take a class given the number of students in the class; and

WHEREAS the State School Teachers' Union of WA Incorporated ("the SSTU") made an application (C 24 of 2007) to the Commission with respect to a lecturer at Swan TAFE whose wages had been withheld because his employer alleged that he had failed to obey a lawful direction to teach a class of 17 students; and

WHEREAS on 19 September 2007 the Commission convened an urgent conference pursuant to s44 of the Act to hear from the parties about the issues in dispute and after hearing from the parties the Commission issued a number of recommendations to prevent the deterioration of industrial relations between the parties and to allow further conciliation and arbitration to take place; and

WHEREAS these recommendations were as follows:

1. THAT Swan TAFE workshop lecturers who are currently refusing to undertake their normal duties return to work as soon as practicable after 8.00am on 20 September 2007;

2. THAT Mr Laurin be allowed to resume his normal duties as soon as practicable on 20 September 2007 on full pay and that he be paid by his employer as though he has worked continuously for the week commencing 17 September 2007;

3. THAT the parties agree to the Commission undertaking site inspections of relevant workshops at Swan TAFE on the afternoon of 20 September 2007 and then hears further from the parties on that date to consider and finalise an interim process for determining appropriate workshop class sizes for apprentices and trainees;

4. THAT the parties accept that once this interim process is finalised it shall remain in place and be adhered to by the parties and no further industrial action will occur whilst the Commission hears further from the parties and finalises a process for determining appropriate workshop class sizes for apprentices and trainees at Swan TAFE; and

WHEREAS on 20 September 2007 the Commission was advised that the applicants accepted the recommendations that issued on 19 September 2007; and

WHEREAS on 20 September 2007 following a meeting of its members the SSTU advised the Commission that its members had accepted the recommendation issued by the Commission on 19 September 2007; and

WHEREAS on 20 September 2007 the Commission undertook site inspections at the Midland and Carlisle campuses of Swan TAFE; and

WHEREAS during these site inspections the Commission had discussions with Lecturers and Swan TAFE management representatives about class sizes and viewed machinery and other equipment used by students; and

WHEREAS on 20 September 2007 following the site inspections a conference was held in the Commission to hear submissions from the parties about an appropriate interim process for determining workshop class sizes for apprentices and trainees to be used by the parties when a dispute over class sizes arose until the Commission hears further from the parties and finalises a process for determining appropriate class sizes; and

WHEREAS at the conference the applicants provided a document setting out a two-tiered process to follow when a dispute over class sizes arose; and

WHEREAS the SSTU maintained that any interim process the Commission orders to resolve disputes over class sizes should limit the class size to 15 students given occupational health and safety considerations; and

WHEREAS the Commission is of the view that the matter before it is an industrial matter as it relates to issues pertaining to the employment relationship between the applicants and the SSTU's members and the rights of an organisation; and

WHEREAS the Commission is of the view that it has jurisdiction to issue orders pursuant to s44 of the Act which enables the Commission to issue orders with respect to an industrial matter; and

WHEREAS having heard from the parties and when taking into account equity and fairness and the substantial merits of this case and the objects of the Act including in particular s6(af) and s6(c) the Commission has formed the view that an order should issue detailing an interim process to finalise disputes over class sizes of apprentices and trainees working in workshops as set out in the schedule attached to this order; and

WHEREAS in reaching this conclusion the Commission has taken a range of issues into account including the following:

- that the appropriate size of each class will depend on a range of issue which will be peculiar to each class including the physical layout and resourcing of workshops, the nature of the work being undertaken by the students and the nature of the student cohort;

- that the resolution of appropriate class sizes should be, whenever possible, resolved by the Lecturers concerned and their respective managers;

WHEREAS on 21 September 2007 the Commission issued Reasons for Decision by way of recitals and a Minute of Proposed Order in relation to this matter; and

WHEREAS on 21 September 2007 the Commission conducted a Speaking to the Minutes of Proposed Order by way of written submissions; and

WHEREAS the applicants argued that as the recommendations issued by the Commission on 19 September 2007 only applied to Swan TAFE the interim process contained in the Commission's proposed order should only apply to Swan TAFE Lecturers; and

WHEREAS the SSTU agreed to the amendment being sought by the applicants; and

WHEREAS having considered the submissions of both parties the Commission is of the view that the order and the interim process should be amended to only apply to disputes about class sizes at Swan TAFE;

NOW THEREFORE having heard Mr P Wishart on behalf of the applicants and Mr M Amati on behalf of the SSTU, the Commission having regard for the interests of the parties directly involved, the public interest and to prevent the further deterioration of industrial relations, and pursuant to the powers vested in it by the Act, and in particular s44(6)(ba)(i) and (ii) and s44(6)(bb)(i), hereby orders:

1. THAT the applicants and the SSTU are to abide by the interim process in the schedule attached to this order until the matter is arbitrated by the Commission or the parties reach an agreement on a process.
2. THAT no industrial action is to take place with respect to the issues in dispute between the parties whilst this issue is being determined by the Commission.
3. THAT this order is to remain in force until revoked or varied by the Commission.
4. THAT both parties have liberty to apply to vary this order

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

SCHEDULE

PROCESS FOR DETERMINING DISPUTES ABOUT APPRENTICESHIP/TRAINEESHIP CLASS SIZES TAUGHT BY TRADES LECTURERS WHEN UNDERTAKING EMPLOYMENT BASED TRAINING WITHIN SWAN TAFE

1. The Program area liaises with relevant Lecturers about appropriate class numbers before scheduling classes and call-ups for apprentices/trainees.
2. The Portfolio Manager approves the class sizes, timetable and class call-ups taking into consideration:-
   a. Class Sustainability for College
   b. Occupational Safety and Health Principles
   c. Equity Principles
   d. Educational Principles
   e. Modes of Delivery Principles
3. Lecturers are then notified of timetables, class sizes and call-up numbers.
4. Process for dealing with a dispute about student numbers in a class due to occupational health and safety concerns:
   a. If a Lecturer has occupational health and safety concerns due to excessive student numbers in his or her class and if attempts between the Lecturer and his or her line manager to resolve the issue are unsuccessful then the Lecturer should notify the dispute to a safety and health representative (S&H Rep).
   b. The S&H Rep must investigate the dispute within three (3) days of this notification and endeavour to assist the Lecturer and line manager to arrive at a mutually agreed resolution.
   c. If the matter remains unresolved the dispute is to be referred to the appropriate safety and health (S&H) committee for consideration and possible resolution within seven (7) days of being notified of the dispute.
   d. After being considered by the S&H committee if the dispute remains unresolved the Chairperson of the S&H committee or a delegated S&H Rep shall notify the Department of Consumer and Employment Protection – WorkSafe WA for assistance in order to resolve the dispute.
   e. If the dispute remains unresolved after being referred to WorkSafe WA the dispute is to be notified to the Western Australian Industrial Relations Commission for determination.
   f. If the Lecturer believes that there is the possibility of imminent or serious injury occurring to anyone in the workshop or if the workshop is unsafe due to excessive student numbers whilst steps (a) to (d) above are being undertaken then students in excess of the number of students deemed appropriate by the Lecturer shall be removed from the class pending the resolution of the dispute. In the alternative an additional Lecturer may be rostered to assist the Lecturer with this class.
   g. The above periods for resolving a dispute may be extended by agreement between the parties.
5. Process for dealing with all other concerns arising out of the number of student in a class:
   a. If a Lecturer has concerns about the number of students in a class which is not based on occupational health and safety considerations the Lecturer is to detail concerns about this class in writing to the Portfolio Manager specifying the nature of the concerns and the remedy being sought within five working days of being notified about his or her class.
   b. Within five working days of being notified of the Lecturer's concerns and after considering the Lecturer's concerns and taking into account the considerations specified in point 2 above the Portfolio Manager is to notify the Lecturer of his or her decision in writing about this class specifying the basis on which the decision has been made.

c. If the Lecturer is aggrieved by the Portfolio Manager's decision then the dispute may be referred in writing by the Lecturer or Union representative to the Managing Director or his/her nominee and to the President of the Union and his/her nominee.

d. If the dispute is not resolved within ten (10) working days of being referred to the Managing Director or his/her nominee and to the President of the Union and his/her nominee, the dispute may be referred to the Western Australian Industrial Relations Commission or an agreed independent person for determination.

e. At all stages of this procedure the Lecturer may be accompanied by a Union representative.

f. The above periods for resolving a dispute may be extended by agreement between the parties.

g. Whilst the dispute remains unresolved the Lecturer will continue to undertake his or her duties as normal teaching the class numbers as timetabled.

2007 WAIRC 01162

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)
	RESPONDENT
	THE STATE SCHOOL TEACHERS' UNION OF W.A.(INCORPORATED)
	APPLICANT
	WAYNE COLLYER, MANAGING DIRECTOR, SWAN TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 12 OCTOBER 2007
FILE NO/S	C 23 OF 2007, C 24 OF 2007
CITATION NO.	2007 WAIRC 01162

Result	Order issued
Representation	
Applicant	Mr P Wishart
Respondent	Mr M Amati

Order

WHEREAS on 21 September 2007 the Commission issued an Order in relation to this matter; and

WHEREAS a schedule was attached to the Order containing an interim process for determining disputes about apprenticeship/traineeship class sizes taught by trades lecturers when undertaking employment based training within Swan TAFE; and

WHEREAS on 2 October 2007 Swan TAFE's representative wrote to the Commission seeking clarification about one of the provisions contained in the interim process; and

WHEREAS on 4 October 2007 the State School Teachers' Union of WA Incorporated ("the SSTU") provided a response in writing to the Commission on the issue Swan TAFE was seeking clarification about; and

WHEREAS on 12 October 2007 the Commission convened a conference for the purpose of hearing further from the parties about the issue raised by Swan TAFE; and

WHEREAS after hearing from the parties and having considered their submissions the Commission advised the parties that point 4(f) in the schedule attached to the order that issued on 21 September 2007 should be amended by deleting the reference to "steps (a) to (d)" and replacing it with the words "steps (a) to (e)" as this reflected the Commission's intention when the order containing the interim process issued; and

WHEREAS the parties have waived their rights to speak to the Minute of Proposed Order pursuant to s35(4) of the *Industrial Relations Act 1979*;

NOW THEREFORE having heard Mr P Wishart on behalf of the applicants and Mr M Amati on behalf of the SSTU, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT the schedule attached to the order which issued on 21 September 2007 be deleted and replaced with the schedule attached to this order.

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

SCHEDULE

PROCESS FOR DETERMINING DISPUTES ABOUT APPRENTICESHIP/TRAINEESHIP CLASS SIZES TAUGHT BY TRADES LECTURERS WHEN UNDERTAKING EMPLOYMENT BASED TRAINING WITHIN SWAN TAFE

1. The Program area liaises with relevant Lecturers about appropriate class numbers before scheduling classes and call-ups for apprentices/trainees.
2. The Portfolio Manager approves the class sizes, timetable and class call-ups taking into consideration:-
   a. Class Sustainability for College
   b. Occupational Safety and Health Principles
   c. Equity Principles
   d. Educational Principles
   e. Modes of Delivery Principles
3. Lecturers are then notified of timetables, class sizes and call-up numbers.
4. Process for dealing with a dispute about student numbers in a class due to occupational health and safety concerns:
   a. If a Lecturer has occupational health and safety concerns due to excessive student numbers in his or her class and if attempts between the Lecturer and his or her line manager to resolve the issue are unsuccessful then the Lecturer should notify the dispute to a safety and health representative (S&H Rep).
   b. The S&H Rep must investigate the dispute within three (3) days of this notification and endeavour to assist the Lecturer and line manager to arrive at a mutually agreed resolution.
   c. If the matter remains unresolved the dispute is to be referred to the appropriate safety and health (S&H) committee for consideration and possible resolution within seven (7) days of being notified of the dispute.
   d. After being considered by the S&H committee if the dispute remains unresolved the Chairperson of the S&H committee or a delegated S&H Rep shall notify the Department of Consumer and Employment Protection – WorkSafe WA for assistance in order to resolve the dispute.
   e. If the dispute remains unresolved after being referred to WorkSafe WA the dispute is to be notified to the Western Australian Industrial Relations Commission for determination.
   f. If the Lecturer believes that there is the possibility of imminent or serious injury occurring to anyone in the workshop or if the workshop is unsafe due to excessive student numbers whilst steps (a) to (e) above are being undertaken then students in excess of the number of students deemed appropriate by the Lecturer shall be removed from the class pending the resolution of the dispute. In the alternative an additional Lecturer may be rostered to assist the Lecturer with this class.
   g. The above periods for resolving a dispute may be extended by agreement between the parties.
5. Process for dealing with all other concerns arising out of the number of student in a class:
   a. If a Lecturer has concerns about the number of students in a class which is not based on occupational health and safety considerations the Lecturer is to detail concerns about this class in writing to the Portfolio Manager specifying the nature of the concerns and the remedy being sought within five working days of being notified about his or her class.
   b. Within five working days of being notified of the Lecturer's concerns and after considering the Lecturer's concerns and taking into account the considerations specified in point 2 above the Portfolio Manager is to notify the Lecturer of his or her decision in writing about this class specifying the basis on which the decision has been made.
   c. If the Lecturer is aggrieved by the Portfolio Manager's decision then the dispute may be referred in writing by the Lecturer or Union representative to the Managing Director or his/her nominee and to the President of the Union and his/her nominee.
   d. If the dispute is not resolved within ten (10) working days of being referred to the Managing Director or his/her nominee and to the President of the Union and his/her nominee, the dispute may be referred to the Western Australian Industrial Relations Commission or an agreed independent person for determination.
   e. At all stages of this procedure the Lecturer may be accompanied by a Union representative.
   f. The above periods for resolving a dispute may be extended by agreement between the parties.
   g. Whilst the dispute remains unresolved the Lecturer will continue to undertake his or her duties as normal teaching the class numbers as timetabled.

2008 WAIRC 01675

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 2 DECEMBER 2008
FILE NO/S	C 23 OF 2007
CITATION NO.	2008 WAIRC 01675

Result	Order issued
Representation	
Applicant	Mr P Wishart
Respondent	Mr M Amati

Order

WHEREAS on 19 September 2007 the applicants applied to the Commission for an urgent conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") seeking the assistance of the Commission in relation to industrial action being taken by over 100 Lecturers at Swan TAFE in support of a lecturer who refused to take a class given the number of students in the class; and

WHEREAS on 19 September 2007 the Commission convened an urgent conference about the issues in dispute and after hearing from the parties a number of recommendations were issued to prevent the deterioration of industrial relations between the parties and to allow further conciliation and arbitration to take place; and

FURTHER on 20 September 2007 the parties advised the Commission that they accepted the recommendations; and

WHEREAS on 20 September 2007 the Commission conducted site inspections and a conference was held that day to hear submissions from the parties about an appropriate interim process for determining workshop class sizes for apprentices and trainees to be used by the parties when a dispute over class sizes arose until the Commission heard further from the parties and finalised a process for determining appropriate class sizes; and

WHEREAS on 21 September 2007 the Commission issued an Order (as amended on 12 October 2007) and a schedule was attached to the Order containing an interim process for determining disputes about apprenticeship/traineeship class sizes taught by trades lecturers when undertaking employment based training within Swan TAFE; and

WHEREAS on 5 September 2008 the applicants' representative advised the Commission that a dispute over class sizes at the Midland Campus of Swan TAFE was to be referred to the Commission for determination under the interim process and the Commission convened a conference on 21 October 2008 to discuss the referral of this dispute; and

WHEREAS after obtaining details about the dispute from the parties on 11 November 2008 the Commission set out the issue in dispute for determination under clause 4(e) of the interim process contained in the schedule attached to the Commission's Order that issued on 21 September 2007, as amended on 12 October 2007; and

FURTHER the Commission advised the parties that the issue in dispute was to be set down for hearing on 19, 20 and 21 January 2009; and

WHEREAS on 13 November 2008 the respondent requested that the hearing dates of 19, 20 and 21 January 2009 be adjourned to a date after 30 January 2009 as some of the respondent's witnesses including the Lecturer involved in the dispute, would not be available on the dates set down due their being overseas; and

FURTHER the respondent stated that the evidence of these witnesses was necessary for the respondent's case and if they did not give evidence it would be detrimental to the respondent and cause a serious disadvantage to the respondent's case; and

WHEREAS on 1 December 2008 Swan TAFE's representative advised the Commission that it consented to the hearing of the dispute being adjourned to dates after 30 January 2009; and

WHEREAS in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* (1969) WAR 19) and when taking into account equity and fairness and given the consent of Swan TAFE to the adjournment the Commission is of the view that an adjournment should be granted; and

WHEREAS the Commission accepts that the respondent will suffer some prejudice if the hearing takes place on 19, 20 and 21 January 2009, due to the unavailability of witnesses;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s27(1), hereby orders:

THAT the hearing of application C 23 of 2007 scheduled for 19, 20 and 21 January 2009 be adjourned to 3, 4 and 5 February 2009.

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

2009 WAIRC 00018

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 20 JANUARY 2009
FILE NO/S	C 23 OF 2007
CITATION NO.	2009 WAIRC 00018

Result	Order issued
Representation	
Applicant	Mr P Wishart
Respondent	Mr M Amati

Order

WHEREAS on 19 September 2007 the applicants applied to the Commission for an urgent conference pursuant to s 44 of the *Industrial Relations Act 1979* ("the Act") seeking the assistance of the Commission in relation to industrial action being taken by over 100 Lecturers at Swan TAFE in support of a lecturer who refused to take a class given the number of students in the class; and

WHEREAS on 19 September 2007 the Commission convened an urgent conference about the issues in dispute and after hearing from the parties a number of recommendations were issued to prevent the deterioration of industrial relations between the parties and to allow further conciliation and arbitration to take place; and

FURTHER on 20 September 2007 the parties advised the Commission that they accepted the recommendations; and

WHEREAS on 20 September 2007 the Commission conducted site inspections and a conference was held that day to hear submissions from the parties about an appropriate interim process for determining workshop class sizes for apprentices and trainees to be used by the parties when a dispute over class sizes arose until the Commission heard further from the parties and finalised a process for determining appropriate class sizes; and

WHEREAS on 21 September 2007 the Commission issued an Order (as amended on 12 October 2007) and a schedule was attached to the Order containing an interim process for determining disputes about apprenticeship/traineeship class sizes taught by trades lecturers when undertaking employment based training within Swan TAFE; and

WHEREAS on 5 September 2008 the applicants' representative advised the Commission that a dispute over class sizes at the Midland Campus of Swan TAFE was to be referred to the Commission for determination under the interim process and the Commission convened a conference on 21 October 2008 to discuss the referral of this dispute; and

WHEREAS after obtaining details about the dispute from the parties on 11 November 2008 the Commission set out the issue in dispute for determination under clause 4(e) of the interim process contained in the schedule attached to the Commission's Order that issued on 21 September 2007, as amended on 12 October 2007; and

FURTHER the Commission advised the parties that the issue in dispute was to be set down for hearing on 19, 20 and 21 January 2009; and

WHEREAS on 13 November 2008 the respondent requested that the hearing dates of 19, 20 and 21 January 2009 be adjourned to a date after 30 January 2009 as some of the respondent's witnesses including the Lecturer involved in the dispute, would not be available on the dates set down due their being overseas; and

FURTHER the respondent stated that the evidence of these witnesses was necessary for the respondent's case and if they did not give evidence it would be detrimental to the respondent and cause a serious disadvantage to the respondent's case; and

WHEREAS on 1 December 2008 Swan TAFE's representative advised the Commission that it consented to the hearing of the dispute being adjourned to dates after 30 January 2009; and

WHEREAS on 2 December 2008 the Commission issued an order adjourning the hearing of the matter to 3, 4 and 5 February 2009; and

WHEREAS on 15 January 2009 Swan TAFE's representative requested that the hearing dates of 3, 4 and 5 February 2009 be adjourned for at least four weeks as Swan TAFE was having difficulty accessing witnesses over the Christmas/New Year holiday period and this was hindering Swan TAFE's preparation for the hearing; and

FURTHER Swan TAFE stated that there were significant issues to be determined that may have significant cost implications for it and Swan TAFE will suffer some disadvantage if the adjournment is not granted; and

WHEREAS on 16 January 2009 the respondent advised the Commission that it consented to the hearing of the dispute being adjourned for at least four weeks; and

WHEREAS in deciding whether the Commission should exercise its discretion to grant the adjournment and whether a refusal to adjourn would result in a serious injustice to one party (*Myers v Myers* [1969] WAR 19) and when taking into account equity and fairness and given the consent of the respondent to the adjournment the Commission is of the view that an adjournment should be granted; and

WHEREAS the Commission accepts that Swan TAFE will suffer some prejudice if the hearing takes place on to 3, 4 and 5 February 2009 due to the difficulty it is having in accessing witnesses over the Christmas/New Year holiday period which is hindering preparation for the hearing;

NOW THEREFORE the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, and in particular s27(1), hereby orders:

THAT the hearing of application C 23 of 2007 scheduled for 3, 4 and 5 February 2009 be adjourned to a date to be fixed.

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

2012 WAIRC 00866

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FILE NO	C 23 OF 2007
PARTIES	THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS
	APPLICANT
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
FILE NO	C 24 OF 2007
PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	WAYNE COLLYER, MANAGING DIRECTOR, SWAN TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	TUESDAY, 25 SEPTEMBER 2012
CITATION NO.	2012 WAIRC 00866

Result	Interim order suspended for a period
Representation	
	Mr P Wishart on behalf of Swan TAFE (now Polytechnic West)
	Mr M Amati on behalf of the State School Teachers' Union of W.A. (Incorporated)

Order

WHEREAS these are applications lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) relating to disputes between Swan TAFE (now Polytechnic West) and others (the applicant) and the State School Teachers' Union of W.A. (Incorporated) (the union) about proposed industrial action with respect to disputes over class sizes; and

WHEREAS on 19 and 20 September 2007 the Commission convened conciliation conferences; and

WHEREAS on 21 September 2007 the Commission issued an order containing an interim process to deal with disputes over class sizes at Polytechnic West which was subsequently amended on 12 October 2007 (the Order); and

WHEREAS on 5 September 2008 Polytechnic West referred a dispute to the Commission under the Order which was listed for hearing however the hearing did not proceed as Polytechnic West advised that it did not wish to proceed; and

WHEREAS since the Order issued the Commission conducted site inspections and a number of conferences were held in the Commission; and

FURTHER the parties have continued to have discussions about the issue of dealing with disputes over class sizes; and

WHEREAS on 2 July 2012 the Commission convened a status conference; and

WHEREAS at this conference the applicant requested that the Order be revoked and the union objected to this occurring; and

WHEREAS on 31 July 2012 and on 24 August 2012 the parties lodged submissions in support of their positions; and

WHEREAS the applicant submits the following:

1. the Order is unnecessary as appropriate dispute resolution procedures to resolve disputes about class sizes exist under the *Occupational Safety and Health Act 1984* (the OSH Act), Polytechnic West Occupational Safety and Health Procedures and the *Western Australian TAFE Lecturers' General Agreement 2011* (the Agreement);
2. under the OSH Act Polytechnic West has a duty to:
   (a) provide and maintain a working environment in which employees are not exposed to hazards (s 19);
   (b) ensure that the safety and health of a person who is not an employee is not adversely affected as a result of:
      (i) the work done by the employer or an employee of the employer; or
      (ii) any hazard that arises from the work done by the employer or an employee of the employer or the system of work operated by the employer (s 21);
3. section 8 of the *Public Sector Management Act 1994* and clause 82 of the Agreement reinforces Polytechnic West's obligation to comply with the OSH Act;
4. Polytechnic West is a party to a Memorandum of Understanding (MOU) with the union in relation to class sizes. Under the MOU Polytechnic West must consider the following when determining class sizes:
   (a) class sustainability;
   (b) OSH principles;
   (c) equity principles;
   (d) educational principles;
   (e) modes of delivery principles;
5. lecturers have access to the following dispute resolution procedures under the OSH Act and the Agreement to deal with any dispute about class sizes:
   (a) dispute resolution under the OSH Act:
      (i) sections 24, 25 and 26 of the OSH Act provide the steps for dispute resolution;
      (ii) section 26(1a) of the OSH Act provides that in determining whether an employee has reasonable grounds to believe that to continue to work would expose him or her or any other person to risk of imminent and serious injury or imminent and serious harm to health it is relevant to consider whether an inspector has attended the workplace;
      (iii) section 28(1) of the OSH Act provides that an employee who refuses to work in accordance with s 26(1) is entitled to the same pay and other benefits to which he or she would be entitled if they had continued to work and s 28(2) states that any dispute as to whether an employee is entitled to any pay or benefit may be referred to the Occupational Safety and Health Tribunal for determination;
   (b) Polytechnic West's Occupational Health and Safety Policy and Resolution of Safety and Health Issues Procedure complement the OSH Act;
   (c) dispute resolution procedure in the Agreement:

      clause 13 of the Agreement provides a procedure for resolving disputes that arise in the workplace and for class size disputes relating to safety. The Agreement's dispute resolution procedure operates in addition to the employer's duties under the OSH Act and in parallel with the dispute resolution procedure contained in the OSH Act;
6. there has been minimal disputation about class sizes at Polytechnic West since the original dispute in 2007;
7. since the dispute about class sizes in 2007 Polytechnic West has enhanced its OSH systems. In late 2010 two specialist OSH officers were appointed to coordinate OSH at Polytechnic West and all areas have elected OSH representatives. Local OSH committees meet approximately bi-monthly and local OSH representatives perform inspections prior to each local committee meeting. These committees report to the Standing Occupational Safety and Health committee approximately every eight weeks;
8. there has been an infrastructure upgrade at Polytechnic West's Midland workshop lessening the likelihood of disputes relating to class sizes arising;
9. the Order's dispute resolution procedure has only been used once which was in September 2008;
10. no increased protection is provided under the Order in relation to the potential personal liability of a lecturer for negligence under the OSH Act;

11. if the Commission finds it appropriate to introduce a further dispute resolution procedure the contents of the Order should be varied to more closely reflect the OSH Act; and

WHEREAS the union relies on the following:

1. the union contends that the Order be confirmed as a final order as it promotes a process of industrial cooperation beyond the dispute resolution procedures contained in the OSH Act and the Agreement;
2. the presence of the Order has resulted in industrial harmony and has prevented disputes from escalating;
3. as the Order sets out specific requirements for dealing with disputes about workshop class sizes it is effective and has efficacy;
4. without the Order lecturers could be exposed to potential fines under s 20A of the OSH Act as well as the risk of facing common law action for negligence;
5. the Order formalises a regime for dealing with class sizes during a dispute and directly prevents the employer from coercing a lecturer to take a class which the lecturer believes to be unsafe;
6. the Order does not prevent or hinder Polytechnic West from pursuing a dispute about a specific class size in accordance with the existing process;
7. the generalised nature of the dispute resolution procedures under ss 24, 25 and 26 of the OSH Act provide an incomplete or inadequate dispute resolution process to regulate urgent arrangements relating to class sizes;
8. sections 24 and 25 of the OSH Act do not deal directly with regulating imminent and urgent issues relating to class sizes and the manner in which it is to be dealt with;
9. section 26 of the OSH Act is silent on the issue of the immediate arrangements to be put in place relating to class sizes and the manner in which it ought to be organised in the interim period during which a dispute takes place;
10. the dispute resolution procedure in the Agreement and Polytechnic West's Occupational Health and Safety Policy and Resolution of Safety and Health Issues Procedure do not cure the inadequacy and limitations of the process contained in the OSH Act;
11. the Order enshrines and promotes constructive and orderly industrial cooperation relevant to the needs of Polytechnic West's workshops;
12. whilst some superficial changes have occurred at the Midland workshops lecturing staff are faced with issues relating to potential risks in the workshops on an ongoing basis;
13. the union claims that a specific provision in legislative or other instruments is to be preferred to a general one;
14. issuing the Order is consistent with the fair and equitable exercise of the Commission's jurisdiction pursuant to s 26 of the Act and the Objects of the Act (see s 6(af), (b) and (c)); and

WHEREAS having considered the respective positions of the parties and when taking into account equity, good conscience and the relevant objects of the Act the Commission has formed the view that the Order should be suspended for a period of 12 months; and

FURTHER at the end of this period a decision about the status of the Order is to be made after hearing further from the parties about any issues arising in this period with respect to any disputation over class sizes; and

WHEREAS in reaching this decision I have taken into account the following:

1. processes are in place under the OSH Act and the Agreement to deal with disputes over class sizes at Polytechnic West;
2. Polytechnic West is bound to consider a range of factors when determining class sizes (see MOU);
3. only one dispute has been dealt with under the Order and none have arisen since 2008;
4. Polytechnic West has upgraded workshop facilities and enhanced its OSH oversight and processes which may assist in preventing future disputes over class sizes; and

WHEREAS the Commission is of the view that if the Order is suspended for 12 months this will be a suitable period to ascertain if the dispute processes and other OSH improvements in place to deal with class sizes are adequate to prevent disputation over class sizes;

NOW having heard Mr P Wishart on behalf of the applicant and Mr M Amati on behalf of the union, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the order that issued on 21 September 2007, as amended on 12 October 2007, be and is hereby suspended until 30 September 2013.
2. THAT liberty to apply is granted to either party prior to 30 September 2013 to vary this order.

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

2013 WAIRC 00909

DISPUTE RE INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FILE NO/S	C 23 OF 2007
PARTIES	THE MANAGING DIRECTOR OF SWAN TAFE AND OTHERS
	APPLICANTS
	-v-
	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	RESPONDENT
FILE NO/S	C 24 OF 2007
PARTIES	THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
	APPLICANT
	-v-
	WAYNE COLLYER, MANAGING DIRECTOR, SWAN TAFE
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	THURSDAY, 24 OCTOBER 2013
CITATION NO.	2013 WAIRC 00909

Result	Order issued
Representation	
	Mr P Wishart on behalf of Swan TAFE (now Polytechnic West)
	Mr M Amati on behalf of the State School Teachers' Union of WA (Incorporated)

Order

These are applications lodged pursuant to s 44 of the *Industrial Relations Act 1979* (the Act) relating to disputes between Swan TAFE (now Polytechnic West) and others and the State School Teachers' Union of W.A. (Incorporated) (the Union) about proposed industrial action with respect to disputes over class sizes.

Background

On 21 September 2007 the Commission issued an order containing an interim process to deal with disputes over class sizes at Polytechnic West which was subsequently amended on 12 October 2007 (the Order).

On 25 September 2012 the Commission issued an order suspending the operation of the Order until 30 September 2013.

A conference was held on 18 October 2013 to hear from the parties about any issues that had arisen during the period the Order was suspended. Polytechnic West's representative stated that there had been no disputes over class sizes in this period and the Order was therefore unnecessary. The Union agreed that there had been no disputes in the intervening period however it was of the view that the interim process should remain in place as it is a specific process and valuable for resolving potential disputes.

After hearing from the parties the Commission stated that as the Order contained an interim process that had not been required by the parties these applications will be dismissed.

NOW THEREFORE having heard Mr P Wishart on behalf of Polytechnic West and Mr M Amati on behalf of the Union, the Commission pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the order that issued on 21 September 2007, as amended on 12 October 2007, be rescinded.
2. THAT applications C 23 of 2007 and C 24 of 2007 be and are otherwise hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2013 WAIRC 00116

DISPUTE RE IN-PRINCIPLE PAY AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 1 MARCH 2013
FILE NO.	C 194 OF 2013
CITATION NO.	2013 WAIRC 00116

Result	Recommendation issued
Representation	
Applicant	Mr N Cinquina and with him Mr J Peach
Respondent	Mr J Welch and with him Mr J Walker

Recommendation

WHEREAS on 1 March 2013 the Department of Corrective Services, on behalf of the Minister for Correctives Services, made application under s 44 of the Industrial Relations Act 1979 for an urgent compulsory conference concerning employees who are members, or eligible to be members, of the Western Australian Prison Officers' Union of Workers, having commenced industrial action;

AND WHEREAS on 1 March 2013 the Commission convened a compulsory conference between the parties;

AND WHEREAS the Department informed the Commission that the Union has commenced industrial action from approximately 7.00am this morning, that action involving a withdrawal of labour from prisons throughout the State;

AND WHEREAS the action is related to a break down in enterprise bargaining negotiations between the parties and the recent in-principle pay agreement reached between the State Government and the Australian Nursing Federation regarding public health sector nurses. The Union's stated intention is to receive a similar wages outcome for its members. The Union's further contention is that the Department, as a result of the in-principle agreement with nurses, is no longer bound by Government Wages Policy;

AND WHEREAS the Department of Corrective Services Prison Officers' Enterprise Agreement 2010 will expire on 10 June 2013. The Commission was informed that negotiations to replace the Agreement commenced on 11 December 2012. Twelve bargaining meetings have been held to date, with the Department and the Union meeting twice weekly. Negotiations are continuing, and further negotiations are scheduled for 5 March 2013;

AND WHEREAS on 31 January 2013 the Department made an offer to the Union of a CPI wage increase (3% per year over three years) with a rollover of current conditions. The Commission was informed that the Union has yet to formally respond to this offer. The Department advised the Commission that it is willing to negotiate with the Union in good faith to achieve a Wage Price Index (WPI) salary outcome which is consistent with Government Wages Policy;

AND WHEREAS the Department contended that the industrial action is pre-emptory, is contrary and detrimental to the good management, control and security of all State prisons and the welfare of prisoners and staff. The Department informed the Commission that the industrial action will lead to a further deterioration in industrial relations between the parties;

AND WHEREAS the Union further informed the Commission that it does not accept the Department's wages and conditions offer;

AND WHEREAS the Commission, after having conferred extensively with the parties, informed them that it would make recommendations in an endeavour to assist the parties in resolving the matters presently in dispute;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 44 the Industrial Relations Act, 1979 hereby–

(1) RECOMMENDS that the Union and employees of the Department who are members of the Union, whose conditions of employment are covered by the Prison Officers' Award and the Department of Corrective Services Prison Officers' Enterprise Agreement 2010, who are engaged in industrial action of any kind concerning matters the subject of these proceedings cease such industrial action and resume work in accordance with their contracts of service as soon as possible but by no later than start of shift Saturday 2 March 2013.

(2) RECOMMENDS that the parties resume bargaining for a replacement industrial agreement in good faith in accordance with the Act and in that respect that the Department re-consider its wages and conditions offer to the Union and provide any revised offer by 15 March 2013.

(3) RECOMMENDS that bargaining for a replacement industrial agreement be concluded by no later than 30 May 2013 and that any outstanding issues not resolved by that time be dealt with by arbitration under s 42G of the Act.

(4) ADVISES that the application will be the subject of conciliation under s 42E of the Act for the purposes of assisting the parties in bargaining to reach an industrial agreement and a report back conciliation conference will be held shortly on a date to be fixed.

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

2013 WAIRC 00139

DISPUTE RE IN-PRINCIPLE PAY AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 11 MARCH 2013
FILE NO.	C 194 OF 2013
CITATION NO.	2013 WAIRC 00139

Result	Recommendation issued
Representation	
Applicant	Ms M Binet of counsel and with her Ms H Harker and Mr R Heaperman
Respondent	Mr J Welch and with him Mr A Smith, Mr K Brown and Mr M Cromb

Recommendation

WHEREAS on 1 March 2013 the Commission made recommendations in relation to a dispute between the applicant and the respondent concerning enterprise bargaining negotiations for a replacement industrial agreement. The dispute had led to industrial action taking place on 1 March 2013;

AND WHEREAS the recommendations of the Commission included that the employees of the applicant, members of the Union, return to work and continue to work in accordance with their contracts of service - which they have done - and that the Department re-consider its wages and conditions offer and provide any revised offer by 15 March 2013;

AND WHEREAS at the request of the parties the Commission reconvened the compulsory conference for a report back today;

AND WHEREAS in accordance with the Commission's recommendation of 1 March 2013 the parties have been continuing their enterprise bargaining negotiations and will continue to do so in the coming week;

AND WHEREAS in view of the Western Australian State Election on Saturday 9 March 2013 and its outcome, in particular the time required for Ministerial appointments to be made in order to form a Cabinet, the Commission informed the parties it will revise its recommendations of 1 March 2013;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 44 the Industrial Relations Act, 1979 hereby further recommends –

(1) THAT the parties continue bargaining in good faith for a replacement industrial agreement in accordance with the terms of the Act and in that respect the parties report back to the Commission as to their progress by 15 March 2013.

(2) THAT the Department reconsider its wages and conditions offer to the Union and provide any revised offer by 22 March 2013.

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

2013 WAIRC 00234

DISPUTE RE IN-PRINCIPLE PAY AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 17 APRIL 2013
FILE NO/S	C 194 OF 2013
CITATION NO.	2013 WAIRC 00234

Result	Order issued
Representation	
Applicant	Ms M Binet of counsel and with her Ms H Harker and Mr R Heaperman
Respondent	Mr J Welch and with him Mr A Smith and Mr K Brown

Order

WHEREAS on 1 March 2013 the Commission made recommendations in relation to a dispute between the Department and the Union concerning enterprise bargaining negotiations for a replacement industrial agreement. The dispute had led to industrial action by members of the Union taking place on 1 March 2013. One of the recommendations made was in relation to a revised wages and conditions offer to be made by the Department to the Union;

AND WHEREAS as a consequence of the Commission's recommendation on 1 March 2013, the Union and employees of the Department members of the Union, ceased industrial action and returned to work in accordance with their contracts of service by 2 March 2013 and no further industrial action has occurred;

AND WHEREAS on 11 March the Commission made further recommendations, recognising the need to review the earlier recommendations as a result of the outcome of the Western Australian State Election on 9 March 2013;

AND WHEREAS the Commission reconvened the compulsory conference on 15 April 2013. The Commission was informed that the parties have been negotiating in accordance with the Act for a replacement industrial agreement. Some progress had been made on negotiations to date, however no revised offer had yet been made by the Department to the Union;

AND WHEREAS the Commission noted that despite earlier recommendations and understandings in relation to a further revised wages and conditions offer by the Department to the Union, it had not yet been formalised through the processes of Government. The Commission noted its concerns about further delay and the prospect of deterioration in industrial relations in respect of the matters in dispute. The Commission noted that it is required to have regard to not only the interests of the persons immediately concerned, but also the wider interests of the community;

AND WHEREAS the Commission, as a consequence of these matters and the recent history of the dispute, and having regard to s 42E of the Act, advised the parties that it would consider making an order for the purposes of ensuring and otherwise facilitating the negotiating parties bargaining in good faith. This is for the purpose of in particular, but not only, ensuring that the negotiations between the parties continue in a timely fashion;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 44 of the Industrial Relations Act, 1979 hereby orders –

> THAT the Department provide to the Union its revised wages and conditions offer for a replacement industrial agreement by no later than 4pm Friday 26 April 2013.

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

2013 WAIRC 00888

DISPUTE RE IN-PRINCIPLE PAY AGREEMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MINISTER FOR CORRECTIVE SERVICES
	APPLICANT
	-v-
	WESTERN AUSTRALIAN PRISON OFFICERS UNION OF WORKERS
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 21 OCTOBER 2013
FILE NO/S	C 194 OF 2013
CITATION NO.	2013 WAIRC 00888

Result	Application discontinued
Representation	
Applicant	Mr N Cinquina
Respondent	Mr J Welch

Order

HAVING heard Mr N Cinquina on behalf of the applicant and Mr J Welch 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—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 211/2013	5/08/2013	Dispute re alleged unfair dismissal	Discontinued
The Civil Service Association of Western Australia Incorporated	Commissioner for Corrections, Department of Corrective Services	Kenner C	PSAC 14/2012	27/06/2012 22/11/2012	Dispute re suspension of employee	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Education	Mayman C	PSAC 10/2013	24/04/2013 13/05/2013 27/05/2013	Dispute re payment deductions of Union member	Discontinued
The Civil Service Association of Western Australia Incorporated	The Commissioner of Police, Department of Police	Kenner C	PSAC 27/2013	29/08/2013	Dispute re implementation of the notification of change clause, clause 58	Discontinued
The Civil Service Association of Western Australia Incorporated	Director General, Department of Transport	Harrison C	PSAC 6/2013	8/03/2013	Dispute re operation clause 48 (DSP) Public Service and Government Officers General Agreement 2011 and the application of the personal leave or flexible working hours for rehabilitation reasons, and the employer's refusal to consider options	Discontinued

Parties		Commissioner	Conference Number	Dates	Matter	Result
The Civil Service Association of Western Australia Incorporated	Director General, Department for Child Protection	Harrison C	PSAC 11/2011	5/09/2011 18/11/2011 12/12/2011	Dispute re the conduct of an investigator retained to interview a Union Member	Concluded
The Minister for Health in his incorporated capacity under the Hospitals and Health Services Act 1927 as the Hospitals formerly comprised in the Metropolitan Health Service Board	Ms Carolyn Smith, Secretary United Voice WA	Harrison C	C 221/2013	4/09/2013	Dispute re unauthorised and unlawful industrial action	Discontinued
The Western Australian Police Union of Workers	Commissioner of Police	Kenner C	PSAC 24/2013	7/08/2013	Dispute re annual leave	Discontinued
United Voice WA	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	Harrison C	C 57/2012	1/11/2012	Dispute re alleged unfair dismissal of union member	Discontinued
Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Goldfields Land and Sea Council (GLSC)	Harrison C	C 206/2013	19/06/2013	Dispute re alleged misconduct of a Union Member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2013 WAIRC 00905

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ANDJELKO BUDIMLICH

APPLICANT

-v-

J-CORP PTY LTD

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE WEDNESDAY, 23 OCTOBER 2013

FILE NO/S B 63 OF 2013

CITATION NO. 2013 WAIRC 00905

Result Order amending claim

Representation

Applicant Mr P Mullally

Respondent Mr A Power, of counsel and with him, Ms J Howard, of counsel

Order

WHEREAS on 12 August 2013 the applicant sought leave to amend the claim in this application;

AND WHEREAS the respondent consents to the amendment sought,

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(l) of the *Industrial Relations Act 1979*, and by consent, hereby order:

THAT the claim in this matter be amended to include unpaid commissions on amounts wrongfully deducted from the sale price of the home and used to calculate the base commission.

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

2013 WAIRC 00910

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDJELKO BUDIMLICH
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 25 OCTOBER 2013
FILE NO/S	B 63 OF 2013
CITATION NO.	2013 WAIRC 00910

Result	Order issued for discovery and production of documents
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him Ms J Howard (of counsel)

Order

WHEREAS the applicant filed an application for discovery of documents on 16 July 2013;

AND HAVING HEARD Mr P Mullally for the applicant and Mr A Power (of counsel) and with him Ms J Howard (of counsel) for the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, hereby order:

1. THAT within 7 days of the date of this order, the respondent produce for inspection by the applicant and his representative, Patrick Edward Mullally, at the respondent's premises at 22 Mount Street, Perth for the period 26 April 2007 to 18 December 2012 electronic copies of:
   (a) each executed building contract for each client of the respondent procured by the applicant together with any addenda, schedule of particulars or variation sheets related thereto; and
   (b) commission reports in respect of commission earned by the applicant.
2. THAT the applicant and Patrick Edward Mullally at a time and on a date to be mutually agreed between the parties inspect the electronic copies of the discovered documents.
3. THAT the inspection be conducted in the presence of a representative of the respondent.
4. THAT Patrick Edward Mullally be permitted to make notes of the discovered documents during the inspection on the basis that those notes are:
   (a) used only for the purpose of this application;
   (b) not copied; and
   (c) provided to the solicitors for the respondent at the conclusion of the hearing of this application for destruction.
5. THAT the applicant and Patrick Edward Mullally will not directly or indirectly communicate any of the information obtained from the inspection of the discovered documents to any other person without further order of this Commission.

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

2013 WAIRC 00928

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDJELKO BUDIMLICH
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 29 OCTOBER 2013
FILE NO.	B 63 OF 2013
CITATION NO.	2013 WAIRC 00928

Result	Amended Directions issued
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him, Ms J Howard (of counsel)

Amended Directions

WHEREAS the Commission issued directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437);

AND WHEREAS the parties have conferred and reached agreement on matters relating to the programming of this application and have requested the replacement of the directions issued on 26 July 2013;

AND WHEREAS the Commission is of the opinion that the directions issued on 26 July 2013 ought be replaced by the following amended directions in the terms of the agreement reached between the parties;

AND HAVING HEARD Mr P Mullally on behalf of the applicant and Mr A Power (of counsel) and with him, Ms J Howard (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979*, and by consent, hereby direct:

1. By 7 November 2013 the applicant will file and serve full particulars of his claim.
2. By 28 November 2013 the respondent will file and serve a response to the applicant's full particulars.
3. The application be listed for a preliminary hearing on 9 December 2013 for 1 hour for oral submissions to determine the respondent's jurisdictional objection.
4. By 25 November 2013 the applicant will file an outline of submissions with respect to the jurisdictional objection.
5. By 2 December 2013 the respondent will file an outline of submissions with respect to the jurisdictional objection.
6. In the event that the Commission determines that it has jurisdiction to decide the substantive merits of the application, the applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 20 January 2014.
7. By 3 February 2014, the respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions.
8. The witness statements will stand as the evidence-in-chief of those witnesses.
9. By 3 February 2013 the parties will together file a statement of any agreed facts.
10. The application will be heard jointly with applications B 64 of 2013 and B 65 of 2013 and listed for three consecutive days during the week of 10 February 2014.

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

2013 WAIRC 00906

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HUGH SUTHERLAND ROGERS
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 23 OCTOBER 2013
FILE NO/S	B 64 OF 2013
CITATION NO.	2013 WAIRC 00906

Result	Order amending claim
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power, of counsel and with him, Ms J Howard, of counsel

Order

WHEREAS on 12 August 2013 the applicant sought leave to amend the claim in this application;

AND WHEREAS the respondent consents to the amendment sought,

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(l) of the *Industrial Relations Act 1979*, and by consent, hereby order:

THAT the claim in this matter be amended to include unpaid commissions on amounts wrongfully deducted from the sale price of the home and used to calculate the base commission.

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

2013 WAIRC 00911

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HUGH SUTHERLAND ROGERS
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 25 OCTOBER 2013
FILE NO/S	B 64 OF 2013
CITATION NO.	2013 WAIRC 00911

Result	Order issued for discovery and production of documents
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him Ms J Howard (of counsel)

Order

WHEREAS the applicant filed an application for discovery of documents on 16 July 2013;

AND HAVING HEARD Mr P Mullally for the applicant and Mr A Power (of counsel) and with him Ms J Howard (of counsel) for the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, hereby order:

1. THAT within 7 days of the date of this order, the respondent produce for inspection by the applicant and his representative, Patrick Edward Mullally, at the respondent's premises at 22 Mount Street, Perth for the period 26 April 2007 to 18 December 2012 electronic copies of:
   (a) each executed building contract for each client of the respondent procured by the applicant together with any addenda, schedule of particulars or variation sheets related thereto; and
   (b) commission reports in respect of commission earned by the applicant.
2. THAT the applicant and Patrick Edward Mullally at a time and on a date to be mutually agreed between the parties inspect the electronic copies of the discovered documents.
3. THAT the inspection be conducted in the presence of a representative of the respondent.
4. THAT Patrick Edward Mullally be permitted to make notes of the discovered documents during the inspection on the basis that those notes are:
   (a) used only for the purpose of this application;
   (b) not copied; and
   (c) provided to the solicitors for the respondent at the conclusion of the hearing of this application for destruction.
5. THAT the applicant and Patrick Edward Mullally will not directly or indirectly communicate any of the information obtained from the inspection of the discovered documents to any other person without further order of this Commission.

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

2013 WAIRC 00929

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HUGH SUTHERLAND ROGERS
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 29 OCTOBER 2013
FILE NO.	B 64 OF 2013
CITATION NO.	2013 WAIRC 00929

Result	Amended Directions issued
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him, Ms J Howard (of counsel)

Amended Directions

WHEREAS the Commission issued directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437);

AND WHEREAS the parties have conferred and reached agreement on matters relating to the programming of this application and have requested the replacement of the directions issued on 26 July 2013;

AND WHEREAS the Commission is of the opinion that the directions issued on 26 July 2013 ought be replaced by the following amended directions in the terms of the agreement reached between the parties;

AND HAVING HEARD Mr P Mullally on behalf of the applicant and Mr A Power (of counsel) and with him, Ms J Howard (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979*, and by consent, hereby direct:

1. By 7 November 2013 the applicant will file and serve full particulars of his claim.
2. By 28 November 2013 the respondent will file and serve a response to the applicant's full particulars.

3. The applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 20 January 2014.

4. By 3 February 2014, the respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions.

5. The witness statements will stand as the evidence-in-chief of those witnesses.

6. By 3 February 2013 the parties will together file a statement of any agreed facts.

7. The application will be heard jointly with applications B 63 of 2013 and B 65 of 2013 and listed for three consecutive days during the week of 10 February 2014.

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

2013 WAIRC 00907

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES EXPEDIT (STAN) CARVALHO

APPLICANT

-v-

J-CORP PTY LTD

RESPONDENT

CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 23 OCTOBER 2013
FILE NO/S	B 65 OF 2013
CITATION NO.	2013 WAIRC 00907

Result	Order amending claim
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power, of counsel and with him, Ms J Howard, of counsel

Order

WHEREAS on 12 August 2013 the applicant sought leave to amend the claim in this application;

AND WHEREAS the respondent consents to the amendment sought,

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1)(l) of the *Industrial Relations Act 1979*, and by consent, hereby order:

THAT the claim in this matter be amended to include unpaid commissions on amounts wrongfully deducted from the sale price of the home and used to calculate the base commission.

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

2013 WAIRC 00912

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES EXPEDIT (STAN) CARVALHO

APPLICANT

-v-

J-CORP PTY LTD

RESPONDENT

CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 25 OCTOBER 2013
FILE NO/S	B 65 OF 2013
CITATION NO.	2013 WAIRC 00912

Result	Order issued for discovery and production of documents
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him Ms J Howard (of counsel)

Order

WHEREAS the applicant filed an application for discovery of documents on 16 July 2013;

AND HAVING HEARD Mr P Mullally for the applicant and Mr A Power (of counsel) and with him Ms J Howard (of counsel) for the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent, hereby order:

1. THAT within 7 days of the date of this order, the respondent produce for inspection by the applicant and his representative, Patrick Edward Mullally, at the respondent's premises at 22 Mount Street, Perth for the period 26 April 2007 to 18 December 2012 electronic copies of:
   (a) each executed building contract for each client of the respondent procured by the applicant together with any addenda, schedule of particulars or variation sheets related thereto; and
   (b) commission reports in respect of commission earned by the applicant.
2. THAT the applicant and Patrick Edward Mullally at a time and on a date to be mutually agreed between the parties inspect the electronic copies of the discovered documents.
3. THAT the inspection be conducted in the presence of a representative of the respondent.
4. THAT Patrick Edward Mullally be permitted to make notes of the discovered documents during the inspection on the basis that those notes are:
   (a) used only for the purpose of this application;
   (b) not copied; and
   (c) provided to the solicitors for the respondent at the conclusion of the hearing of this application for destruction.
5. THAT the applicant and Patrick Edward Mullally will not directly or indirectly communicate any of the information obtained from the inspection of the discovered documents to any other person without further order of this Commission.

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

2013 WAIRC 00930

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	EXPEDIT (STAN) CARVALHO
	APPLICANT
	-v-
	J-CORP PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	TUESDAY, 29 OCTOBER 2013
FILE NO.	B 65 OF 2013
CITATION NO.	2013 WAIRC 00930

Result	Amended Directions issued
Representation	
Applicant	Mr P Mullally
Respondent	Mr A Power (of counsel) and with him, Ms J Howard (of counsel)

Amended Directions

WHEREAS the Commission issued directions for the orderly hearing of this application on 26 July 2013 ([2013] WAIRC 00437);

AND WHEREAS the parties have conferred and reached agreement on matters relating to the programming of this application and have requested the replacement of the directions issued on 26 July 2013;

AND WHEREAS the Commission is of the opinion that the directions issued on 26 July 2013 ought be replaced by the following amended directions in the terms of the agreement reached between the parties;

AND HAVING HEARD Mr P Mullally on behalf of the applicant and Mr A Power (of counsel) and with him, Ms J Howard (of counsel) on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under s 27(1) of the *Industrial Relations Act 1979*, and by consent, hereby direct:

1. By 7 November 2013 the applicant will file and serve full particulars of his claim.
2. By 28 November 2013 the respondent will file and serve a response to the applicant's full particulars.
3. The applicant will file and serve any witness statements and documents upon which he intends to rely and an outline of submissions by 20 January 2014.
4. By 3 February 2014, the respondent will file and serve any witness statements and documents upon which it intends to rely and an outline of submissions.
5. The witness statements will stand as the evidence-in-chief of those witnesses.
6. By 3 February 2013 the parties will together file a statement of any agreed facts.
7. The application will be heard jointly with applications B 63 of 2013 and B 64 of 2013 and listed for three consecutive days during the week of 10 February 2014.

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

2013 WAIRC 00935

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN D'ORAZIO
	APPLICANT
	-v-
	NEC IT SOLUTIONS AUSTRALIA PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	THURSDAY, 31 OCTOBER 2013
FILE NO/S	B 125 OF 2013
CITATION NO.	2013 WAIRC 00935

Result	Name of respondent amended
Representation	
Applicant	Mr J D'Orazio
Respondent	Ms L Barry, of counsel

Order

WHEREAS the respondent named in this matter does not correctly identify the applicant's former employer;

AND HAVING HEARD Mr J D'Orazio on his own behalf and Ms L Barry, of counsel, on behalf of the respondent;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, and by consent hereby order -

THAT the name of the respondent "NEC IT Solutions, formally known as CSG Technology Solutions" be deleted and "NEC IT Solutions Australia Pty Ltd" be inserted in lieu thereof.

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

2013 WAIRC 00873

DISPUTE RE ROSTERING

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD
	APPLICANT
	-v-
	MS CAROLYN SMITH, SECRETARY UNITED VOICE WA
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 18 OCTOBER 2013
FILE NO/S	C 224 OF 2013
CITATION NO.	2013 WAIRC 00873

Result	Interim order issued
Representation	
Applicant	Ms H Millar and Mr C Gleeson
Respondent	Ms S Hanrahan

Order

On 25 September 2013 the applicant lodged a s 44 application concerning a dispute with United Voice WA (the respondent) about a roster change which has resulted in some of its members refusing to work a day shift without being paid an afternoon shift allowance.

When the applicant amalgamated its warehouses at Royal Perth Hospital and Fremantle Hospital and established a single State Distribution Centre, 11 storepersons (the affected employees) were no longer required to work an afternoon shift to which a shift allowance applied. The affected employees are currently working day shift hours and the applicant agreed to pay the affected employees an afternoon shift allowance for four weeks on a without prejudice basis (approximately $350 per fortnight). When the interim payment of the shift allowance ceases the respondent's members at the State Distribution Centre have indicated they will revert to working an afternoon shift, even though this facility closes before this shift finishes.

The Commission convened a conciliation conference on 1 October 2013 however no agreement was reached.

On 15 October 2013 the respondent requested that the following interim order issue pending the hearing and determination of this application:

> THAT the applicant continue to pay the afternoon shift penalty (the interim payment) until the dispute has been finally resolved by the Commission.

The applicant opposes the Commission issuing this interim order.

The respondent submits that:

(1) the status quo, that is the payment of the afternoon shift allowance, should remain in place pending the determination of this matter as the affected employees rejected the roster change to a day shift (see Clause 13.11 and Clause 51 of the *WA Health – United Voice – Hospital Support Workers Industrial Agreement 2012* (the Agreement));

(2) employees will revert to working their afternoon shift hours if the interim payment of a shift allowance does not continue which will have an adverse impact on the applicant's operations; and

(3) the industrial relationship between the parties will deteriorate unless the interim order issues.

The applicant submits that:

(1) paying an afternoon shift allowance to some and not all employees working the new day shift roster is causing industrial disharmony;

(2) the affected employees have been on notice since June 2012 about the move to the new warehouse and the change to the hours of work expected of the affected employees;

(3) adherence to the status quo, that is employees working an afternoon shift and being paid an afternoon shift allowance, is not possible given the new warehouse arrangements; and

(4) it would not be possible to recover the shift allowance paid to the affected employees if the interim order issues.

Consideration

The Commission is of the view that this application relates to an industrial matter as it concerns the conditions of employment of storepersons.

The Commission is of the view that it has jurisdiction to issue the interim order being sought by the respondent. Section 44(6) of the *Industrial Relations Act 1979* (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 and s 44(6)(ba)(i) gives the commission the power to make such orders which will assist in the prevention of the deterioration of industrial relations pending the arbitration of the issue in dispute.

When taking into account equity and fairness, s 26 considerations and the parties submissions with respect to this matter the Commission has formed the view that an interim order should issue.

The Commission notes the issue in dispute is a serious one. The Commission must determine whether the affected employees are entitled to be paid afternoon shift penalty rates if they are to work a day shift, which must be balanced with an employer's right to manage and streamline its operations and pay an employee in accordance with the work they undertake.

The affected employees have been on notice since June 2012 of this roster change and these employees have been in receipt of an afternoon shift allowance for four weeks even though they have not worked an afternoon shift.

Without reaching a concluded view on the merits relevant to this dispute, the Commission is of the view that an order should issue continuing the payment of the shift allowance, but only for a limited time, pending the determination of this application. The payment of the shift allowance for a limited time is appropriate as the applicant may not be able to recover this payment if the Commission determines that the affected employees should not continue to receive an afternoon shift allowance whilst working a day shift. The affected employees will also have some certainty about the level of their income for a further fixed period.

NOW THEREFORE having heard Ms H Millar and Mr C Gleeson on behalf of the applicant and Ms S Hanrahan 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 the applicant pay the afternoon shift penalty rate to the affected employees for a period of four weeks in addition to the four week period already paid to these employees whilst they work their current day shift hours.
2. THAT at the end of this period the affected employees are to continue working in accordance with their new day shift roster until this matter is heard and determined.
3. THAT liberty to apply is granted to the parties to vary or rescind this order.

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

2013 WAIRC 00958

DISPUTE RE FUNDING RELIEF RE PERFORMANCE MANAGEMENT PROCESSES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE STATE SCHOOL TEACHERS' UNION OF WA (INCORPORATED)
	APPLICANT
	-v-
	THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 8 NOVEMBER 2013
FILE NO.	CR 33 OF 2011
CITATION NO.	2013 WAIRC 00958

Result Directions issued

Direction

WHEREAS this is a matter referred for hearing and determination pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 6th day of November 2013 the parties requested that the Commission issue agreed directions in respect of the matter; and

WHEREAS the Commission is of the opinion that the issuing of the directions will assist in the conduct of the hearing of the matter;

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

1. THAT the parties provide discovery of all documents in their possession, custody or power relevant to the matters in issue by the 28th day of November 2013.
2. THAT the parties file a Statement of Agreed Facts by the 19th day of December 2013.

3. THAT the applicant file and serve any witness statements upon which it intends to rely by the 14th day of March 2014.

4. THAT the respondent file and serve any witness statements upon which she intends to rely by the 24th day of April 2013.

5. THAT the applicant file and serve an Outline of Submissions by the 8th day of May 2014.

6. THAT the respondent file and serve an Outline of Submissions by the 22nd day of May 2014.

7. THAT the matter be set down for hearing for a duration of three days in the second half of May 2014.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2013 WAIRC 00717

DISPUTE RE ANNUAL LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	APPLICANT
	-v-
	COMMISSIONER OF POLICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER S J KENNER
DATE	MONDAY, 12 AUGUST 2013
FILE NO.	PSAC 24 OF 2013
CITATION NO.	2013 WAIRC 00717

Result	Recommendation issued
Representation	
Applicant	Mr P Kelly
Respondent	Mr T Clarke

Recommendation

WHEREAS the Union made an application under s 44 of the Industrial Relations Act 1979 for a compulsory conference in relation to a dispute between it and the Commissioner of Police concerning annual leave entitlements for a member;

AND WHEREAS at the conference the Arbitrator was informed by the Union that its member, Sergeant Colquhoun was on annual leave between 21 January and 3 February 2013. Prior to his return to duty, Sergeant Colquhoun was informed by his senior officer Senior Sergeant Bryan, to remain on leave and not return to duty, as an internal complaint about his conduct had been made and the matter was being investigated. Sergeant Colquhoun duly remained on leave. At this time, Sergeant Colquhoun was not informed that he was being either stood down or stood aside;

AND WHEREAS the Arbitrator was informed that in reliance on cl 29(11) of the Western Australia Police Industrial Agreement 2011, the Commissioner of Police deducted 160 hours of Sergeant Colquhoun's annual leave from his entitlements. This was for the additional period Sergeant Colquhoun was directed to remain off duty whilst the complaint was investigated by a Review Officer of the Internal Affairs Unit;

AND WHEREAS as a consequence of the complaint and investigation, it was determined that Sergeant Colquhoun had engaged in inappropriate and unprofessional conduct in breach of the Western Australia Police Code of Conduct. As a result, Sergeant Colquhoun was placed on a Management Action Plan which completed on 8 May 2013 and resulted in Sergeant Colquhoun being subject to a Management Initiated Transfer from his then position to another position;

AND WHEREAS the Union contended that the Commissioner of Police effectively stood down Sergeant Colquhoun in relation to a disciplinary matter. Having regard to the relevant provisions of the Police Force Regulations, the Union contended it was not appropriate to financially penalise Sergeant Colquhoun, by relying on clause 29(11) of the Agreement. This provision, according to the Union, has not been used in the past for standing down officers in relation to disciplinary matters and it is not appropriate to do so now. Accordingly, the Union considers that Sergeant Colquhoun should have his 160 hours of annual leave reinstated to his entitlements;

AND WHEREAS the Commissioner of Police informed the Arbitrator that it considers the terms of cl 29(11) of the Agreement override relevant provisions of the Police Force Regulations. It is considered that this provision is appropriate to use in relation to internal disciplinary investigations where the circumstances require an officer to be instructed to take annual leave;

AND WHEREAS the Arbitrator has considered the issues in dispute between the parties and in the interests of endeavouring to resolve the dispute through conciliation advised the parties that the Arbitrator intended to make a recommendation;

AND WHEREAS the Arbitrator notes, as a matter of general principle, annual leave is an entitlement available to employees for the purposes of rest and recreation. The Arbitrator further notes that given the nature of the police service, from time to time the Commissioner of Police may need to require an employee to take directed annual leave to ensure that the operational requirements of the police service are met. The Arbitrator also notes that as a general proposition, an employee will arrange the taking of annual leave, for the purposes of rest and recreation, in a planned fashion in accordance with the annual leave roster arrangements as prescribed by cl 29 of the Agreement and the relevant provisions of the Police Force Regulations 1979;

AND WHEREAS the Arbitrator refers to the common law principle that there is no general right to stand down an employee without pay, and also notes the terms of the Police Act 1892 and the Regulations in relation to the discipline of officers, in particular, s 33Y and reg 6A12 respectively;

AND WHEREAS in the circumstances applying to Sergeant Colquhoun, it is not in dispute that the request that he remain on leave, related to a complaint and subsequent investigation of a disciplinary nature, leading to disciplinary action being taken by the Commissioner of Police. It is also not in dispute that during the period that he was directed to remain off duty, Sergeant Colquhoun experienced considerable stress. In particular, it is common ground that Sergeant Colquhoun was not, at the time he was directed to remain on leave, made aware of the detail of the allegations against him;

AND WHEREAS the Arbitrator has considered all of the issues arising in this particular case and also matters of industrial principle. The Arbitrator has had regard to the purpose of annual leave, the terms of cl 29(11) of the Agreement, and the evident statutory intention that officers not be stood down without pay when subject to disciplinary proceedings. Accordingly, as a matter of industrial relations practice, the Arbitrator is of the view that cl 29(11) of the Agreement should not be relied upon by the Commissioner of Police to direct employees to take annual leave, in circumstances where the only reason for the direction is that the employee is the subject of potential disciplinary action;

NOW THEREFORE the Commission, pursuant to the powers conferred on it under s 44 the Industrial Relations Act, 1979 hereby recommends –

> THAT the Commissioner of Police restores 160 hours of annual leave to the annual leave entitlement of Sergeant Colquhoun.

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

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Quintilian School Enterprise Bargaining Agreement 2012 - The AG 11/2013	21/10/2013	The Independent Education Union of Western Australia, Union of Employees;The Quintilian School; AND united Voice WA	(Not applicable)	Chief Commissioner A R Beech	Agreement registered
Tranby College (Enterprise Bargaining) Agreement 2013 AG 12/2013	21/10/2013	The Independent Education Union of Western Australia, Union of Employees; Tranby College; United Voice Wa; and the australian nursing federation, industrial union of workers	(Not applicable)	Chief Commissioner A R Beech	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2013 WAIRC 00957

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 4 SEPTEMBER 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PETER BIBER
	APPELLANT
	-v-
	REECE WALDOCK, DIRECTOR GENERAL DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
	MR J BECKINGHAM - BOARD MEMBER
	MS B CONWAY - BOARD MEMBER
DATE	FRIDAY, 8 NOVEMBER 2013
FILE NO	PSAB 18 OF 2013
CITATION NO.	2013 WAIRC 00957

Result Appeal dismissed

Order

WHEREAS this is an appeal to the Public Service Appeal Board pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS this appeal was set down for a scheduling hearing on the 18th day of September 2013; and

WHEREAS at the hearing the parties agreed to engage in mediation with a view to resolving the matter; and

WHEREAS on the 21st day of October 2013 the appellant filed a Notice of Discontinuance in respect of the appeal;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this appeal be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00380

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 9 JUNE 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS J JOHNSTON
	APPELLANT
	-v-
	MR R WALDOCK, DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	- MR K TRENT - BOARD MEMBER
	- MR B IELATI - BOARD MEMBER
DATE	THURSDAY, 27 JUNE 2013
FILE NO	PSAB 7 OF 2011
CITATION NO.	2013 WAIRC 00380

Result	Directions issued
Representation	
Appellant	In person
Respondent	Mr RJ Andretich of counsel

Direction

HAVING heard the appellant in person and Mr R J Andretich of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the appellant file and serve an amended notice of appeal within 14 days.

(2) THAT the respondent file and serve a notice of answer within 14 days of service of the appellant's amended notice of appeal.

(3) THAT the parties exchange documents informally.

(4) THAT the appeal be listed for hearing to determine whether it should be dismissed or the Appeal Board should refrain from further hearing the appeal under s 27(1)(a) of the Act on a date to be fixed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00924

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 9 JUNE 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00924
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MR K TRENT - BOARD MEMBER MR W IELATI - BOARD MEMBER
HEARD	**:**	WEDNESDAY, 21 SEPTEMBER 2011, THURSDAY, 27 JUNE 2013, THURSDAY, 19 SEPTEMBER 2013
DELIVERED	**:**	TUESDAY, 29 OCTOBER 2013
FILE NO.	**:**	PSAB 7 OF 2011
BETWEEN	**:**	MS J JOHNSTON Appellant AND MR R WALDOCK, DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT Respondent

Catchwords	**:**	Industrial law (WA) – Termination of employment of a public servant – Appellant convicted of offences including stealing as a servant and fraud – Appellant provided with an opportunity to respond – Appeal against the appellant's conviction dismissed – Application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) that the Appeal Board should dismiss or refrain from hearing the matter – Conduct involved a high degree of dishonesty – Servant of the Crown – Obligation of fidelity and good faith – Further proceedings are not necessary or desirable in the public interest – Appeal dismissed
Legislation	**:**	*Criminal Code* (WA) ss 378(6), 409(1)(c); *Industrial Relations Act 1979* (WA) ss 27(1)(a), 80E(1); *Public Sector Management Act 1994* (WA) ss 35, 53, 64, 92(1)
Result	**:**	Appeal dismissed
Representation:		
Appellant	**:**	In person
Respondent	**:**	Mr R Andretich of counsel

Case(s) referred to in reasons:

Director-General of Education v Suttling (1987) 162 CLR 427

Holly v Director of Public Works (1988) 14 NSWLR 140

Jarratt v Commissioner of Police for New South Wales (2005) 224 CLR 44

Johnston v The State of Western Australia [2012] WASCA 148

Lucy v The Commonwealth (1923) 33 CLR 229

Mounsey v Findlay (1993) 32 NSWLR 1

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia (2013) 93 WAIG 1431

Reasons for Decision

1 This is the unanimous decision of the Appeal Board.

2 The appellant was a senior public servant employed by the Department of Transport in a level 8 position of Executive Director Sustainable and Active Transport Unit. By letter of 30 May 2011, the Department dismissed Ms Johnston from her employment effective 9 June 2011. The reason for Ms Johnston's dismissal was that she had been convicted on 12 May 2011, by trial on indictment in the District Court, of four counts of stealing in circumstances of aggravation, contrary to s 378(6) of the *Criminal Code*; a Commonwealth charge of obtaining property by deception; and six counts of obtaining a benefit by fraud, contrary to s 409(1)(c) of the *Criminal Code*. Her husband, Mr Chapman, was also convicted of largely the same and some other offences. The sum of money involved in the criminal offending engaged in by Ms Johnston and her husband was large, totalling some $1,705,328.40. These monies were stolen from the State of Western Australia over a course of some eight years.

3 On 24 June 2011, Wisbey DCJ in the District Court sentenced Ms Johnston and her husband. Ms Johnston was sentenced to a cumulative five year term of imprisonment, with a non-parole period of 32 months. Wisbey DCJ, in his sentencing remarks, concluded that although Ms Johnston's husband was the "mastermind" of the criminal conduct, Ms Johnston participated in the joint criminal enterprise by making her private companies available to effectively "launder" the money stolen from the State. Wisbey DCJ said that Ms Johnston was a willing participant and was a beneficiary of their joint criminal conduct. The overall criminality of Ms Johnston and her husband was described in Wisbey DCJ's sentencing remarks in the following terms:

> There can be no doubt that this criminality is of such seriousness and the necessity for general deterrence so important that imprisonment to be immediately served is the only appropriate disposition. The community would not only expect it but would demand it.
>
> This was carefully planned, implemented and sustained dishonesty of a high level over an extended period of time in respect of which there has been no demonstration of remorse.

4 The initial disciplinary proceedings leading to Ms Johnston's dismissal, were commenced in January 2009, following the laying the criminal charges against Ms Johnston coming to the attention of the Department. Ms Johnston was requested to respond to the alleged breach of discipline by 23 January 2009. Ms Johnston was placed on paid leave at this time. An investigator was appointed by the Department to investigate the allegations however the investigation was suspended because of the criminal proceedings.

5 The day following Ms Johnston's conviction, on 13 May 2011, the Department wrote to Ms Johnston indicating that it proposed to take action under s 92(1) of the Public Sector Management Act 1994, to dismiss her from her employment. Ms Johnston's response to this course of conduct was sought by 23 May 2011. Ms Johnston's then solicitors duly responded by letter dated 23 May 2011, and informed the Department that the proposed dismissal of Ms Johnston was premature, as she may successfully appeal against her conviction. Despite this, the Department proceeded to dismiss Ms Johnston by letter of 30 May 2011. On 17 June 2011, Ms Johnston's solicitors filed the present appeal to the Appeal Board under s 80E(1) of the Act. The sole ground of appeal as originally filed was:

> The Department of Transport terminated Ms Johnston's employment on 30 May 2011 effective 9 June 2011 as a result of a guilty verdict on all counts in District Court Proceedings 991 of 2010. Prior to that date, Ms Johnston was working from home for the Department of Transport. Although Ms Johnston has been found guilty of the crimes the subject of these proceedings, it is not yet known whether she will appeal against the verdict. The appeal period (which runs for 21 days) does not commence until after Ms Johnston's sentencing hearing which has been set down for 22 June 2011. A successful appeal may result in Ms Johnston's conviction being completely set aside, a finding which Ms Johnston has maintained throughout would be the appropriate finding. For these reasons, the Department of Transport's decision is at least premature and is representative of a denial of natural justice.

6 As a consequence of the matter being listed for mention before the Appeal Board on 27 June 2013, Ms Johnston was given leave to file any proposed amended grounds of appeal. Also, the Department foreshadowed an application under s 27(1)(a) of the Act, that the Appeal Board dismiss or refrain from further hearing the appeal. On 19 September 2013 the Appeal Board heard the Department's s 27(1)(a) application.

Contentions of the parties

7 For the Department, counsel contended that in summary, the offences committed by Ms Johnston had a direct relationship to her employment, by the State of Western Australia. This is by reason of her being convicted for stealing and obtaining benefits from the State by deception. Furthermore, the Department referred to the magnitude of the criminal conduct, involving the theft of monies from the State in the amount to which we have already referred above. It was submitted that the offending was

a result of a planned and sustained course of conduct, involving a high level of dishonesty, over a very considerable period of time. Such a magnitude of offending, according to the Department's submissions, led to a complete loss of trust and confidence of the Department, on behalf of the State, such that Ms Johnston's ongoing employment was untenable. In any event, the fact of Ms Johnston being sentenced to imprisonment for a minimum of 32 months, made any consideration of ongoing employment impractical.

8 Ms Johnston submitted on the other hand, that she had been employed as a public servant since 1984, and had an unblemished record over that time. Her dismissal was harsh, oppressive and unfair, because the investigation process undertaken by the Department was flawed and was not completed. Furthermore, the fact of the criminal offending being accepted, it did not directly relate to the performance of her duties as a senior public servant and the fact of the conviction alone, is insufficient to warrant the decision by the Department to terminate her employment. Ms Johnston also submitted that her dismissal was pre-emptive and she had not been afforded due process, and had not acted contrary to her obligation of trust and confidence to her employer.

Consideration

9 Whilst, as the Department correctly observed, the reference to unfair dismissal in the amended grounds of appeal is new, to the extent that it is necessary, for the purposes of dealing with the s 27(1)(a) application, we will grant leave to amend the grounds of appeal and consider the Department's application in light of the grounds of appeal now before the Appeal Board.

10 The power of the Commission, and the Appeal Board, to dismiss or refrain from hearing a matter under s 27(1)(a) of the Act, involves the exercise of a discretion. In relation to this issue, in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* (2013) 93 WAIG 1431 Kenner C said at pars 21-23 as follows:

> 21 Section 27(1)(a) of the Act provides as follows:
>
> **27. Powers of Commission**
>
> (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it —
>
> (a) at any stage of the proceedings dismiss the matter or any part thereof or refrain from further hearing or determining the matter or part if it is satisfied —
>
> (i) that the matter or part thereof is trivial; or
>
> (ii) that further proceedings are not necessary or desirable in the public interest; or
>
> (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
>
> (iv) that for any other reason the matter or part should be dismissed or the hearing thereof discontinued, as the case may be;
>
> 22 In another context, in *The Construction, Forestry, Mining and Energy Union of Workers v Skilled Rail Services Pty Ltd* (2006) 86 WAIG 1268, I considered the meaning of the "public interest" for the purposes of s 36A(1) of the Act. In referring to s 27(1)(a)(ii) of the Act, empowering the Commission to dismiss or refrain from further hearing a matter, I referred to *QEC* and at par 35 I observed as follows:
>
> 35 Given the construction I have placed on s 36A(1) of the Act, it is for the respondent to demonstrate that it would not be in the public interest for the Proposed Award to the made. The notion of the "public interest" is somewhat amorphous. Consideration of this issue is similar to the terms of s 27(1)(a)(ii) of the Act empowering the Commission to dismiss or refrain from further hearing a matter on the basis that further proceedings are not necessary or desirable in the public interest. Similar provisions exist in other industrial jurisdictions. In *Re Queensland Electricity Commission and Ors; Ex-parte Electrical Trade's Union of Australia* (1987) 21 IR 151 the High Court in proceedings for prerogative writs against a Full Bench of the then Australian Conciliation and Arbitration Commission, held that for the purposes of the then s 41(1)(d)(iii) of the Conciliation and Arbitration Act 1904 (Cth) that "Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree" (per Mason CJ and Wilson and Dawson JJ). In the same case, Deane J in dealing with the refrain from hearing power in the public interest observed at 162:
>
> *"The right to invoke the jurisdiction of the courts and other public tribunals of the land carries with it a prima facie right to insist upon the exercise of the jurisdiction invoked. That prima facie right to insist upon the exercise or jurisdiction is a concomitant of a basic element of the rule of law, namely, that every person and organisation, regardless of rank, condition or official standing, is "amenable to the jurisdiction" of the courts and other public tribunals (cf Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed (1959), p 193). In the rare instances where a particular court of tribunal is given a broad discretionary power to refuse to exercise its jurisdiction on public interest grounds, the necessary starting point of a consideration whether such a refusal would be warranted in the circumstances of a particular case in which its jurisdiction has been duly invoked by a party must ordinarily be the prima facie right of the party who has invoked the jurisdiction to insist upon its exercise (cf per Higgins J, Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association [No 1] (1920) 28 CLR 278 at 281). That position is a fortiori in a case where no other court or tribunal, Commonwealth or State, possesses jurisdiction fully to deal with the particular dispute. Were it otherwise, effective access to the courts and other public tribunals would be not a right which could be denied in an exceptional case on the grounds of extraordinary consideration of public policy but an uncertain privilege which could be withheld at any time on*

unconfined and largely unexaminable discretionary grounds (see, generally, Friedman, "Access to Justice: Social and Historical Context: in Cappelletti and Weisner (eds) Access to Justice, vol II, book 1 (1978) pp 5ff; Raz, The Authority of Law, (1979), at p 217)."

23 I adopt what I said in *Skilled Rail Services* for present purposes. The discretion open to the Commission to be exercised under s 27(1)(a) is a broad one. A gloss should not be put on the words of the section to import any particular level of satisfaction to be achieved by the Commission for the exercise of the power. However, given that a party is entitled to invoke the Commission's jurisdiction, and prima facie expect it to be exercised there is an onus on the Authority in this case, to persuade the Commission, that in the circumstances, that prima facie right should be overridden: *QEC* per Deane J at 163. Further, in the exercise of the discretion, the Commission is required, as in all matters before it, to have regard to its statutory obligations under s 26(1) of the Act: *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 4.

11 In this appeal, Ms Johnston was a senior public servant in a leadership position. She was responsible for the provision of high level advice to the responsible Minister, the Department's Director General, the Deputy Director General and others involved in the operations of the Department. Ms Johnston was convicted of fraudulently obtaining and theft as a co-accused with her husband, of a very large sum of money from the State. The period of offending was over a lengthy period of some eight years. As was noted in the sentencing remarks of Wisbey DCJ in the District Court, the offending of Ms Johnston and her husband, was planned, sustained and involved a high degree of dishonesty. It was of such a magnitude and seriousness, that it resulted in sentences of substantial terms of imprisonment for both of them.

12 As to the submission of Ms Johnston that the offending by her was not directly connected with her employment as a senior employee of the Department, and it did not arise out of it, that submission cannot be accepted. Whilst government departments and agencies are established under s 35 of the PSM Act for the purposes of the administration of public services to the people of the State, Ms Johnston was a servant of the Crown in the right of the State: *Holly v Director of Public Works* (1988) 14 NSWLR 140; *Mounsey v Findlay* (1993) 32 NSWLR 1. Appointments of employees under ss 53 and 64 of the PSM Act are made for and on behalf the State. The relationship between Ms Johnston and the Crown in right of the State was contractual, in the sense that a contract of employment existed between the parties: *Lucy v The Commonwealth* (1923) 33 CLR 229; *Director-General of Education v Suttling* (1987) 162 CLR 427; *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44. Unquestionably therefore, the obligation of fidelity and good faith was an implied term of Ms Johnston's contract of employment with the State (see generally Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) 215 - 220.

13 Ms Johnston and her husband, participated in a joint criminal enterprise against the State, and stole a large sum of money from the State. Given the circumstances of the offending, it was an obvious conclusion for the Department to reach that it had lost the required confidence and trust in Ms Johnston, as its employee. It is difficult to conceive what other steps the Department could have taken, other than dismissal, once the circumstances of the offending and the conviction became apparent. As to the suggestion of Ms Johnston that she has been denied natural justice, this submission also cannot succeed. Ms Johnston was, through her solicitors, given an opportunity to respond to the proposed course of action of dismissal, prior to it being put into effect. Whilst Ms Johnston did appeal against her conviction, the appeal was dismissed: *Johnston v The State of Western Australia* [2012] WASCA 148.

14 As to the further contention by Ms Johnston, that the fact of the investigation into her alleged breach of discipline was not completed led to a denial of procedural fairness that contention also must fail. The investigation was only suspended because of the criminal proceedings then instituted. On the conviction and sentencing of Ms Johnston, the investigation was, in the circumstances then prevailing, plainly overtaken by the criminal justice process.

15 Given the foregoing, the inevitable conclusion is that Ms Johnston's appeal against her dismissal has no prospects of success. It would not be appropriate in the public interest, to proceed to hear and determine the appeal in all of these circumstances. Accordingly, the appeal is dismissed.

2013 WAIRC 00925

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 9 JUNE 2011

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS J JOHNSTON
	APPELLANT
	-v-
	MR R WALDOCK, DIRECTOR GENERAL, DEPARTMENT OF TRANSPORT
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR K TRENT - BOARD MEMBER
	MR W IELATI - BOARD MEMBER
DATE	TUESDAY 29 OCTOBER 2013
FILE NO	PSAB 7 OF 2011
CITATION NO.	2013 WAIRC 00925

Result	Appeal dismissed
Representation	
Appellant	In person
Respondent	Mr R Andretich of counsel

Order

HAVING heard Ms Johnston on her own behalf and Mr R Andretich of counsel on behalf of the respondent the Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the appeal be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00561

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 21 DECEMBER 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIA ELIZABETH RE
	APPELLANT
	-v-
	THE INSPECTOR OF CUSTODIAL SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR A LYON - BOARD MEMBER
	MR G BROWN - BOARD MEMBER
DATE	MONDAY, 29 JULY 2013
FILE NO	PSAB 3 OF 2013
CITATION NO.	2013 WAIRC 00561

Result	Order issued
Representation	
Appellant	Mr DF Beere of counsel
Respondent	Mr D Matthews of counsel

Order

HAVING heard Mr DF Beere of counsel on behalf of the appellant and Mr D Matthews of counsel on behalf of the respondent the Appeal Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT the appeal be adjourned to a date to be fixed and the hearing dates of 6 and 7 August 2013 be vacated.

(2) THAT the appeal be relisted for hearing for 3 days.

(3) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00809

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 21 DECEMBER 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MARIA ELIZABETH RE
	APPELLANT
	-v-
	THE INSPECTOR OF CUSTODIAL SERVICES
	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD
	COMMISSIONER S J KENNER - CHAIRMAN
	MR A LYON - BOARD MEMBER
	MR G BROWN - BOARD MEMBER
DATE	TUESDAY, 17 SEPTEMBER 2013
FILE NO	PSAB 3 OF 2013
CITATION NO.	2013 WAIRC 00809

Result	Application dismissed.
Representation	
Appellant	Mr DF Beere of counsel
Respondent	Mr D Matthews of counsel

Order

HAVING heard Mr DF Beere of counsel on behalf of the appellant and Mr D Matthews of counsel on behalf of the respondent the Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.] On behalf of the Public Service Appeal Board.

2013 WAIRC 00830

APPEAL AGAINST THE DECISION TO TERMINATE THE EMPLOYMENT ON 21 DECEMBER 2012

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2013 WAIRC 00830
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD COMMISSIONER S J KENNER- CHAIRMAN MR G BROWN - BOARD MEMBER MR A LYON - BOARD MEMBER
HEARD	**:**	THURSDAY, 7 MARCH 2013, MONDAY, 16 SEPTEMBER 2013, TUESDAY, 17 SEPTEMBER 2013
DELIVERED	**:**	WEDNESDAY, 2 OCTOBER 2013
FILE NO.	**:**	PSAB 3 OF 2013
BETWEEN	**:**	MARIA ELIZABETH RE Appellant AND THE INSPECTOR OF CUSTODIAL SERVICES Respondent

Catchwords	:	Industrial law (WA) – Termination of employment – Appeal against the decision of the respondent to terminate employment – Misconduct – Appellant sought a remedy not open to the Public Service Appeal Board – Application made under s 27(1)(a) of the *Industrial Relations Act 1979* – Power of the Public Service Appeal Board to grant a remedy – Meaning of "adjust" in s 80I of the *Industrial Relations Act 1979* – Breach of duty of good faith and fidelity – Appeal had no reasonable prospect of success – Appeal dismissed
Legislation	:	*Health Act 1911* (WA) s 31; *Industrial Relations Act 1979* (WA) ss 26, 27(1)(a), 80E(1), 80I, 80I(e); *Inspector of Custodial Services Act 2003* (WA) s 47, Pt 4 Div 2, Pt 7; *Prisons Act 1981* (WA) s 40; *Public Sector Management Act 1994* (WA) ss 80A, 80A(c)
Result	:	Appeal dismissed
Representation:		
Counsel:		
Appellant	:	Mr D F Beere
Respondent	:	Mr D Matthews
Solicitors:		
Appellant	:	Lane Buck & Higgins
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Blyth Chemicals Limited v Bushnell (1933) 49 CLR 66

Concut Pty Ltd v Worrell (2000) 75 ALJR 312

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266

State Government Insurance Commission v Johnson (1997) 77 WAIG 2169

Reasons for Decision

1 This is the unanimous decision of the Appeal Board.

2 The appellant Ms Re was employed in the public service in Western Australia in various government departments since 1982. She spent the majority of her employment in the Department of Health, between 1994 and 2007. Towards the end of her period of employment in that organisation, Ms Re was responsible for environmental health matters and was appointed as an environmental health officer under s 31 of the Health Act 1911. As an environmental health officer, Ms Re was involved in undertaking environmental health duties in relation to prisons throughout the State.

3 Under s 40 of the Prisons Act 1981, up until 2007, inspections of prisons in relation to environmental health compliance were undertaken by the Department of Health. In 2006, as a consequence of some apparent overlap and confusion of responsibilities between the Department of Health and the respondent, the Inspector of Custodial Services, in relation to such inspections, responsibility for this work was transferred to the Inspector. To facilitate this transfer of responsibility, Ms Re was transferred in her employment from the Department of Health to the Inspector in October 2007. Thereafter, Ms Re carried out these responsibilities as an officer of the Inspector.

Office of the Inspector

4 The Inspector is established under the Inspector of Custodial Services Act 2003. The Inspector is constituted as an independent agency to carry out inspections of prisons, detention centres and other places where persons in custody are held. Apart from the Inspector, who is a statutory office holder appointed by the Governor, other staff necessary for the performance of the functions of the Inspector, are appointed under, and subject to, the Public Sector Management Act 1994. The Inspector was established, from Parliamentary materials as:

> "an autonomous organisation, outside the executive arm of government … The inspector will have the capacity to research world best practice with regard to custody services and will develop programs of announced and unannounced inspections and will also conduct thematic reviews on any aspect of custody deemed to be appropriate. This will provide Parliament with independent, informed advice about the treatment and conditions of prisoners and the extent to which the objectives of imprisonment are being achieved."
>
> (Hansard 15 September 1999 p 1183)

5 The powers of the Inspector to discharge his functions under the ICS Act are broad and are set out in Part 4 Division 2. The Inspector and his staff have unfettered access to all prisons, detention centres and other places where persons in custody are located. Given the nature of the work undertaken by the Inspector, and its obligation to report on its work directly to the Parliament, confidentiality in the day to day operations of the office is obviously important. This is dealt with in Part 7 of the ICS Act. Under s 47 of the ICS Act, it is an offence for a person to disclose information obtained by the Inspector or his staff in relation to a function to be performed under the legislation.

6 As the work of the Inspector involves the oversight of prisons run by the Department of Corrective Services, obviously, an appropriate and professional relationship between the two organisations must be maintained at all times.

Dismissal – the conduct and the appeal

7 It is against this background that the present appeal proceedings come before the Appeal Board. Ms Re was dismissed from her level 6 position with the Inspector on 21 December 2012. Ms Re was dismissed following the discovery of a large number of emails between herself and principally, Ms Rozlyn Marshall, an officer of the DCS. The emails, sent between August 2009 and January 2012, fall, in the main, into four broad categories, they being:

(a) Inappropriately revealing the internal deliberation process of the Office of the Inspector;

(b) Inappropriately criticising fellow staff of the Inspector and the Inspector himself;

(c) Revealing the contents of and sending copies of confidential documents to persons outside of the Office of the Inspector; and

(d) Inappropriately criticising the Office of the Inspector.

8 There were also four other allegations made against Ms Re, which are not necessary to deal with for the purposes of these proceedings. All of the allegations against Ms Re, including a copy of the relevant email communications, were sent to her for the purposes of giving her an opportunity to be heard.

9 The Inspector maintained that the conduct of Ms Re was a fundamental breach of the term of fidelity and good faith implied into her contract of employment with the Inspector. On the other hand, Ms Re maintained that the communications she had, principally with Ms Marshall, were as a result of a situation she found herself in at the Inspector. Ms Re says that the position and duties she formerly held at the Department of Health were subsequently downgraded by the Inspector, and this resulted in her dissatisfaction with her work arrangements.

10 It is important to observe at this juncture, that the conduct complained of by the Inspector is not contested. The Inspector filed a detailed notice of answer to the appeal and attached a copy of the communications complained of, which documents are quite voluminous. The existence of the documents and that they were sent by Ms Re is admitted. What was said by Ms Re however, is that taken in context, the conduct did not warrant dismissal. A lesser penalty, such as a reprimand or a fine, should have been imposed instead. Ms Re therefore seeks to overturn the penalty of dismissal.

The course of the proceedings

11 The appeal was listed for three days commencing on Monday 16 September 2013. The first day of the proceedings involved hearing evidence from Ms Marshall and also some evidence in chief from Ms Re. On the second day of the appeal, at the conclusion of her evidence in chief, Ms Re was asked some questions by her counsel in relation to what she was seeking by way of relief, if she was successful on her appeal. The following exchange took place between counsel and Ms Re:

> "Now, if the Board is persuaded to reinstate you, do you see it as - given your correspondence, do you see it as a feasible situation that you should recommence employment with OICS or somewhere else? --- I think a lot of the staff that actually were working in OICS were fantastic and I still see a lot of the staff socially, so personally - but with the new staffing and the culture, no, I don't ever want to go back there and work again, unfortunately, because it was a really good job and it was really a nice lot of people, as I said that I still see, but, no, I don't want to go to work in OICS again.
>
> So if you were reinstated, what - how do you seek to address that problem? --- Under the - which I've done in my position over the years, we have the unattached list in the public service. We used to be called "Supernumeraries" and in situations similar to this, we'd put people on the unattached list, the supernumerary list and that gives them - I think it's a two-year opportunity to find another job.
>
> So that's where you think - you think that would be the appropriate course of action if you were reinstated? --- Yes, yes.
>
> But you accept that going back to OICS is untenable because of the emails you've sent, particularly those criticising Professor Morgan? --- Yes. And I would be fearful considering how - with the procedural fairness - unfairness that went on, I felt I was targeted when I was there and now I'm not there and I feel more targeted, so - - -
>
> But that's not the question I asked you? --- No.
>
> In the context of your emails which commented on a number of staff members, but including Professor Morgan, would you accept that it would not be tenable for you to go back and work at OICS?--- Yes, I do - - -
>
> From his perspective? --- Yes. I totally agree. From both sides, yes, I agree."

12 This prompted an immediate response by counsel for the Inspector. The Inspector contended that it was clear from the testimony of Ms Re, that she was not genuinely seeking to overturn the decision of the Inspector to dismiss her, and to be reinstated. She was seeking in effect, a remedy, by an order of the Appeal Board, to be placed on the "unattached list" in the public service. In any event, the Inspector contended that Ms Re did not seek to go back into her employment with the Inspector, and accepted on her evidence, that to do so would be untenable in the circumstances. The Inspector's counsel then made an application that the appeal be dismissed under s 27(1)(a) of the Act on two bases:

(a) That the remedy sought by Ms Re was not one open to the Appeal Board under s 80E(1) of the Act and that Ms Re was not genuinely seeking to adjust the decision to dismiss her by being reinstated; and

(b) In any event, taking the evidence led on behalf of Ms Re at its highest, Ms Re's appeal was bound to fail.

13 The Inspector contended that the application under s 27(1)(a) should be granted. As to (a) above, the Inspector submitted that it was clear from Ms Re's testimony, that she did not genuinely wish to return to the employment of the Inspector. It was submitted that what Ms Re was in reality really seeking, was an order from the Appeal Board, as a first step only in her larger plan to exit the organisation of the Inspector. The submission was that the relief sought by Ms Re was not an order capable of being made by the Appeal Board and that Ms Re did not want to pursue the only remedy the Appeal Board can order in these

proceedings, that being an order of reinstatement. Thus, on this submission of the Inspector, the Appeal Board should not entertain this intention.

14 Further, even if, which was denied, the Appeal Board did have jurisdiction to grant the relief sought by Ms Re, to either "transfer" her to some other employer in the public sector, or grant some other remedy, the Inspector contended that there was no basis for such an order before the Appeal Board. No such third party was a party to these proceedings, and no evidence or other material was before the Appeal Board, to provide the basis for any such order being given effect.

15 For Ms Re, counsel submitted that the evidence of Ms Re was given in order to paint a picture that she recognised the problem in the working relationship between her and the Inspector. Furthermore, in relation to the powers of the Appeal Board, in reliance on s 80A of the PSM Act, counsel contended that it was open to the Appeal Board to reinstate Ms Re and to then, by directions or otherwise, leave the appropriate disciplinary response to the Inspector. In this case, Ms Re obviously had in mind a transfer under s 80A(c) of the PSM Act. As the proceedings before the Appeal Board are in the nature of a hearing de novo, it was open for the Appeal Board to make a decision that the Inspector should have made in the first place.

16 As to the second limb of the s 27(1)(a) application, counsel for Ms Re contended that there was no basis for the Inspector to dismiss Ms Re, given her twenty years of tenure as a public servant. The conduct of Ms Re, which was admittedly unprofessional, resulted from the changes to her position, on Ms Re's submission in that the environmental health concerns that Ms Re raised with the Inspector, were not adequately addressed.

Consideration

17 After adjourning for a short period to consider the s 27(1)(a) application, the Appeal Board announced its decision to uphold the application and to dismiss the appeal. These are our reasons for so concluding.

Statutory framework

18 This appeal comes before the Appeal Board under s 80I of the Act which is in the following terms:

> **80I. Board's jurisdiction**
>
> (1) Subject to section 52 of the *Public Sector Management Act 1994* and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer, who is the holder of an office included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*, under section 78 of the *Public Sector Management Act 1994* against a decision or finding referred to in subsection (1)(b) of that section;
>
> (c) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary not lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed;
>
> (d) an appeal by a government officer, other than a person referred to in paragraph (b), under section 78 of the *Public Sector Management Act 1994* against a decision or finding referred to in subsection (1)(b) of that section;
>
> (e) an appeal, other than an appeal under section 78(1) of the *Public Sector Management Act 1994*, by any government officer who occupies a position that carries a salary lower than the prescribed salary from a decision, determination or recommendation of the employer of that government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c), (d) and (e).
>
> (2) In subsection (1) ***prescribed salary*** means the lowest salary for the time being payable in respect of a position included in the Special Division of the Public Service for the purposes of section 6(1) of the *Salaries and Allowances Act 1975*.
>
> (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in section 94 of the *Public Sector Management Act 1994*.

19 In this case, the appeal is against the decision of the Inspector to dismiss her under s 80I(e). It is the "decision or determination" to dismiss, that is the subject of the appeal. No other decision or finding, is or indeed could be, challenged in the present circumstances.

20 The powers of the Appeal Board as to remedy are limited. On the determination of an appeal, other than in dismissing it, the Appeal Board has the power to "adjust" the decision to dismiss. The meaning of the power to "adjust" was considered by the Industrial Appeal Court in *State Government Insurance Commission v Johnson* (1997) 77 WAIG 2169. In this case, the appellant before the Appeal Board sought an order by way of a declaration that he had been unfairly dismissed and an order of compensation. The issue of the jurisdiction of the Appeal Board to make such an order was raised. This question of law was referred to the Full Bench of the Commission, which answered the question in the affirmative, that the Appeal Board did have jurisdiction to make such an order. On appeal to the Industrial Appeal Court, the appeal was allowed and the decision of the

Full Bench was set aside. The leading judgement of Anderson J considered the meaning of "adjust" in s 80I of the Act and his Honour said at 2170:

> "The word "adjust" has various applications in common parlance and in any given case it obtains its precise meaning or sense from the context in which it is used. In this legislation, the context is provided by each of the paragraphs (a) to (e) of s 80I(1) and in the case under consideration the context is provided by para (e). The only "matter" which is referred to in that paragraph is "a decision, determination or recommendation ... that the Government officer be dismissed". It is that, and only that, which may be "adjusted" in the exercise of this particular aspect of the Board's jurisdiction. The power to "adjust" a decision or determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is, by altering the period of notice. He made only a claim for monetary compensation on the ground that the decision of dismissal itself was unfair. Hence, the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus to adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss."

21 In the context of the present matter, the Appeal Board only has the jurisdiction to adjust the decision to dismiss Ms Re. There is no power to substitute for the decision to dismiss Ms Re, another and entirely different decision to, for example, transfer Ms Re to another government department. The remedy open in this case is one of reversing the decision to dismiss Ms Re and reinstating her to her former employment with the Inspector. Ms Re did not seek for example, an adjustment to the period of notice of her dismissal. Reinstatement is a course that plainly, on the testimony of Ms Re, she does not genuinely seek. Ms Re sought a remedy not open to the Appeal Board.

22 Counsel for Ms Re referred to the hearing before the Appeal Board as a hearing de novo. Whilst the proceedings are described as de novo, in the context of Appeal Board proceedings, the concept is used in the sense that the Appeal Board, in an appeal, is placed in the position of assessing the evidence and deciding for itself, whether the conduct complained of actually occurred. This is opposed to the approach of the Commission in an unfair dismissal case for example, where the Commission is required to objectively assess whether the employer's decision was reasonably open to it, without sitting in the managerial chair itself. This distinction, which is an important one, was referred to in *Raxworthy v The Authority for Intellectually Handicapped Persons* (1989) 69 WAIG 2266, where it was observed:

> "The nature of an appeal made under section 80I(1)(e) is somewhat different from the authority ordinarily given to the Commission to enquire into whether a dismissal is fair or not. The decided cases make it clear that in claims of unfair dismissal *per se* the Commission is not to act as an appellate court and substitute its own view as if it were the employer, but rather determine whether the employer's conduct was in all the circumstances reasonable. Hence in cases of misconduct the test is not whether to the satisfaction of the Commission the misconduct occurred, but whether the employer had a reasonable suspicion amounting to a belief that the misconduct had in fact occurred (see Mavromatidis *v.* TNT Pty Ltd (1987) 67 WAIG 1650). However, these proceedings are expressly an appeal, with the Appeal Board being given the power "to adjust" a decision to dismiss an employee. The onus is of course on the Appellant to show that the Board should interfere with and adjust the decision. However, as with promotion appeals the decision is to be reviewed *de novo* on the basis of the evidence before the Board, not merely on the basis of whether the decision maker made the right decision on the evidence available to it at the time (cf: Colpitts *v.* Australian Telecommunications Commission (1986) 20 IR 184). The process afforded by section 80I is such that the Commission, constituted by an Appeal Board, is given a greater license to substitute its own view. Although as Mr Burns so rightly said the dismissal was lawful, the matter does not end there. Where as here the dismissal was based on a particular act of misconduct, albeit that there are parts to it, the Board, as part of the appellate process, is required to enquire into that allegation, if as is the case, the Appellant denies the [C]ommission of such misconduct. If on appeal the act of misconduct is not shown to have occurred, then the very basis for the decision under appeal, in this case the decision to dismiss, is lost."

23 These proceedings are an appeal from a decision to dismiss. As in *Johnson*, the obvious and appropriate way of adjusting the decision in this case is to overturn it.

24 There is, however, another important issue in this case. That is a question of discretion. Ms Re at the conclusion of her testimony, made it plain that she does not wish to restore her working relationship with the Inspector. Whilst her counsel valiantly attempted to describe the basis for that testimony, the import of it was very clear. Any order of reinstatement, even if it were to be made, would only be, as counsel for the Inspector put it, part of a tactical approach to find a way to leave the Inspector's employment. To proceed to hear the rest of the appeal, and if Ms Re was to be successful, make an order of reinstatement, in the view of Ms Re's testimony, would be contrary to equity and good conscience under s 26 of the Act. The Appeal Board's jurisdiction would have been invoked, ultimately to achieve an ulterior purpose. We turn now to consider the second limb of the Inspector's application.

The merits

25 The second basis for the Inspector's application was that, taken at its highest, on the evidence led in Ms Re's case, her appeal had no real prospect of success. For reasons to follow, we agree with that submission. The conduct of Ms Re, without question, constituted a flagrant disregard for her obligations as an employee, and as a fiduciary, and was a clear breach of her duty of good faith and fidelity to her employer: *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; *Blyth Chemicals Limited v Bushnell* (1933) 49 CLR 66 .

26 As we have already mentioned, the fact of the emails, and the fact that they constituted misconduct, is not disputed. We have considered all of the emails sent by Ms Re to Ms Marshall and the responses from Ms Marshall. We have also considered the documents attached to and referred to in those communications. There is no question from their content, and we do not need to refer to them all, that allegation one as set out in the Inspector's first letter setting out the allegations, as to a serious breach of discipline, is made out. The documents, taken individually, and as a course of dealing over approximately two and a half years, speak for themselves. The fact that Ms Re was a senior and experienced officer, who also holds responsible positions in the community, makes the course of conduct she engaged in all the more startling. This is not a case of a junior and naïve employee, "letting off steam" with a person outside of their employer's organisation, on one or two occasions. That sort of conduct may be excusable and be appropriately dealt with by a reprimand and counselling, as to appropriate standards of professional behaviour.

27 Perhaps the "high water mark" of the misconduct engaged in by Ms Re, is revealed in a series of email exchanges with Ms Marshall on 6 and 7 October 2011. The trigger for the exchange appears to be the sending by the Inspector, of an extract of Hansard to all staff of the Inspector, in relation to a Bill to amend the ICS Act in the Parliament. One purpose of the email from the Inspector to his staff, was to draw attention to positive comments made by the then Minister for Corrective Services, as to the work of the Inspector. The Inspector's email to his staff, attaching the Hansard extract, was forwarded by Ms Re to Ms Marshall. The email string is as follows:

From: Neil Morgan

Sent: Thursday, 6 October 2011 3:32 PM

To: OICS

Subject: New Bill

FYI, I have pasted below a copy of the second reading speech from 28 September 2011. It includes some positive comments about the standard of work coming from the Office over the years (emphasis added!).

I have also attached (i) a copy of the government's response to the Ward inquest (from 2009) where Minister Porter outlines the aims of the government in giving us new powers; (ii) a copy of the Bill itself; and (iii) a copy of the Explanatory memorandum.

Regards

Neil

[Extract from second reading speech omitted]

From: Elizabeth Re [mailto:elizabeth.re@custodialinspector.wa.gov.au]

Sent: Thursday, 6 October 2011 3:34PM

To: Marshall, Rozlyn

Subject: FW: New Bill

Who side is terry on ?

From: Marshall, Rozlyn [mailto:Rozlyn.Marshall@correctiveservices.wa.gov.au]

Sent: Thursday, 6 October 2011 3:39 PM

To: Elizabeth Re

Subject: RE: New Bill

This speech was written by DotAG!

From: Elizabeth Re [mailto:elizebeth.re@custodialinspector.wa.gov.au]

Sent: Thursday, 6 October 2011 3:45 PM

To: Marshall, Rozlyn

Subject: RE: New Bill

We have to do something? thoughts

From: Marshall, Rozlyn [mailto:Rozlyn.Marshall@correctiveservices.wa.gov.au]

Sent: Thursday, 6 October 2011 3:47 PM

To: Elizabeth Re

Subject: RE: New Bill

there needs to be a well crafted parliamentary question written up that will make the press take notice. They are the ones who will ask the hard questions about wasting tax payer funds.

From: Elizabeth Re [mailto:elizebeth.re@custodialinspector.wa.gov.au]

Sent: Thursday, 6 October 2011 3:48 PM

To: Marshall, Rozlyn

Subject: RE: New Bill

If you can think of a good one that will make DCS look good and OICS not then let me know and I will see who I can give it to

---

From: Marshall, Rozlyn [mailto:Rozlyn.Marshall@correctiveservices.wa.gov.au]

Sent: Thursday, 6 October 2011 3:51 PM

To: Elizabeth Re

Subject: RE: New Bill

The issues paper written about the YAF was taken word for word from a briefing made by Heather Harker to OICS.

How come so many recommendations are now being supported as Departmental initiatives? Because they're nothing we didn't already know.

How come everyone involved in the Ward death was fined except OICS - who got more money - what is their role in protecting prisoners and providing a safe and just corrections system?? What did they do to prevent Ward's death?

Nothing!

From: Elizabeth Re [mailto:elizebeth.re@custodialinspector.wa.gov.au]

Sent: Thursday, 6 October 2011 5:12 PM

To: Marshall, Rozlyn

Cc: lizre(h)

Subject: RE: New Bill

Ok I will see if some one can ask the questions

From: Marshall, Rozlyn [mailto:Rozlyn.Marshall@correctiveservices.wa.gov.au]

Sent: Friday, 7 October 2011 8:09 AM

To: Elizabeth Re

Cc: lizre(h)

Subject: RE: New Bill

[] y 'report to Parliament' so why do they only ever send all their recommendations directly at us? Why aren't they recommending directly to Government that 'issues' or 'risks' need to be fixed? Because then Government might have to do something or really take them seriously.

From: Elizabeth Re

Sent: Friday, 7 October 2011 10:00 AM

To: 'Marshall, Rozlyn'

Cc: lizre(h)

Subject: RE: New Bill

Ok

I sent an email to Lisa Harvey last night from home and I will send one to southlands tonight

---

28 In many respects, this is a remarkable exchange. The exchange has nothing to do with the environmental health aspects of Ms Re's job with the Inspector. The exchange evidences both Ms Marshall and Ms Re conspiring to cause damage to and embarrass the Inspector, both in the Parliament and in the media. This is the organisation that was paying Ms Re's substantial salary. It is difficult to imagine a more serious breach of the implied obligation of fidelity and good faith that Ms Re owed to her employer. It also raises serious questions as to Ms Marshall's conduct as a public servant. Her disdain for the Office of the Inspector was quite plain from her testimony. This exchange must also be viewed in the context of the obvious necessity for there to be a professional and "arms' length" relationship between the two organisations.

29 This conduct alone, in our view, taken in isolation from all of the other acts of misconduct, would warrant in itself, the employer summarily dismissing Ms Re for serious misconduct.

30 Whilst there was evidence that Ms Re was under some stress over the period of her employment with the Inspector, we do not accept that as a justification for her conduct. There was also evidence before the Appeal Board, of other legal proceedings that Ms Re was engaged in over a similar period in connection with her position as a local government councillor. As a matter of public record, Ms Re, in a newspaper article, referred to the stress that these proceedings were causing her and her family.

31 Ms Re plainly had a range of options to deal with the situation that she found herself in. If she was unable to resolve her dissatisfaction with the nature of her duties within the Inspector, she could have sought a transfer under the PSM Act, to another organisation. Furthermore, she also could have sought employment outside the public sector. What she should not have done, was to attack her employer's organisation as she did. In our view, it is difficult to see what other response than dismissal the Inspector could have had under s 80A of the PSM Act, given the gravity of the misconduct.

32 For all of those reasons, we are fortified in our view that the appeal, on the strength of the evidence of Ms Re's case, had no reasonable prospect of success and also supported the dismissal of the appeal under s 27(1)(a) of the Act.

RECLASSIFICATION APPEALS—

2013 WAIRC 00963

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 11 NOVEMBER 2013
FILE NO	PSA 20 OF 2011
CITATION NO.	2013 WAIRC 00963
Result	Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of November 2013 the applicant advised by telephone that it no longer required the file to remain open;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2013 WAIRC 00964

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT FOR CHILD PROTECTION
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
DATE	MONDAY, 11 NOVEMBER 2013
FILE NO	PSA 21 OF 2011
CITATION NO.	2013 WAIRC 00964

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of November 2013 the applicant advised by telephone that it no longer required the file to remain open;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2013 WAIRC 00965

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL
DEPARTMENT FOR CHILD PROTECTION

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE MONDAY, 11 NOVEMBER 2013

FILE NO PSA 23 OF 2011

CITATION NO. 2013 WAIRC 00965

Result Application dismissed

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 8th day of November 2013 the applicant advised by telephone that it no longer required the file to remain open;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

EMPLOYMENT DISPUTE RESOLUTION MATTERS—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008 that concluded without an order issuing.

Application Number	Matter	Commissioner	Dates	Result
APPL 40/2013	Dispute re issues between employees	Harrison C	29/08/2013	Concluded
APPL 55/2013	Request for mediation re termination of employment	Harrison C	1/10/2013	Concluded

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2013 WAIRC 00932

DISPUTE RE DUTIES AND EMPLOYMENT

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	ROBERT KIETH FRASER
	APPLICANT
	-v-
	PATRICK PROJECTS AUSTRALIA MARINE COMPLEX, HENDERSON
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 30 OCTOBER 2013
FILE NO/S	OSHT 3 OF 2013
CITATION NO.	2013 WAIRC 00932

Result	Order issued
Representation	
Applicant	Ms L Morich and Mr RK Fraser
Respondent	Ms L Cordone (of counsel) and Ms M Storey

Order

WHEREAS this is an application pursuant to the *Occupational Safety and Health Act 1984*;

AND WHEREAS the matter was listed for hearing on 30 October 2013;

AND WHEREAS at the hearing it became clear that the respondent had been incorrectly named;

AND WHEREAS the Commission formed the view that is was appropriate to amend the respondent's name;

AND WHEREAS the parties agreed to amend the respondent's name;

NOW THEREFORE, I the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979*, hereby order –

THAT the name Patrick Projects Australia Marine Complex, Henderson be deleted and Patrick Projects Pty Ltd inserted in lieu thereof.

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

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2013 WAIRC 00922

APPEAL RE TERMINATION OF TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PAUL BATE
	APPLICANT
	-v-
	EXECUTIVE OFFICER, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	APA 1 OF 2013
CITATION NO.	2013 WAIRC 00922

Result	Appeal discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the applicant filed a notice of discontinuance, the Western Australian Industrial Relations 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 M MAYMAN,
[L.S.] Commissioner.

2013 WAIRC 00923

APPEAL RE TERMINATION OF TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOVAN NIKOLOV
	APPLICANT
	-v-
	EXECUTIVE OFFICER, DEPARTMENT OF TRAINING AND WORKFORCE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 28 OCTOBER 2013
FILE NO/S	APA 2 OF 2013
CITATION NO.	2013 WAIRC 00923
Result	Appeal discontinued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS the applicant filed a notice of discontinuance, the Western Australian Industrial Relations 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 M MAYMAN,
[L.S.] Commissioner.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Matters Dealt With—

2013 WAIRC 00841

REFERRAL OF DISPUTE RE RATE OF PAY

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	MARK WILLIAM TISCHLER
	APPLICANT
	-v-
	COCKBURN TRANSPORT
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 7 OCTOBER 2013
FILE NO/S	RFT 6 OF 2012
CITATION NO.	2013 WAIRC 00841

Result	Application discontinued
Representation	
Applicant	Mr H Boghossian of counsel
Respondent	Mr P Patterson of counsel

Order

HAVING heard Mr H Boghossian of counsel on behalf of the applicant and Mr P Patterson 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.

ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL—Notation of—

The following were matters before the Commission sitting as the Road Freight Transport Industry Tribunal pursuant to s 38 of the *Owner-Drivers (Contracts and Disputes) Act 2007* that settled prior to an order issuing.

Parties		Commissioner	Application Number	Dates	Matter	Result
David Whitehead	Star Track Express Pty Limited, T/as Star Track Express	Kenner C	RFT 8/2013	N/A	Referral of dispute	Discontinued