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GENERAL ORDERS—

2014 WAIRC 00471

2014 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00471
CORAM	:	CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S J KENNER COMMISSIONER S M MAYMAN
HEARD	:	WEDNESDAY, 28 MAY 2014, FRIDAY, 6 JUNE 2014
DELIVERED	:	WEDNESDAY, 11 JUNE 2014
FILE NO.	:	APPL 1 OF 2014
BETWEEN	:	COMMISSION'S OWN MOTION Applicant AND (NOT APPLICABLE) Respondent

CatchWords	:	State Wage order - Commission's own motion - Minimum wage for employees under Minimum Conditions of Employment Act 1993 - Award rates of wage - Award minimum wage - State wage principles
Legislation	:	Industrial Relations Act 1979 s 26, s 41, s 50A, Minimum Conditions of Employment Act 1993 s 12, Fair Work Act 2009 (Cth) s 284
Result	:	2014 State Wage Order issued

Representation:

Ms M Williams and with her Ms C Purcell on behalf of the Hon Minister for Commerce

Mr P Moss and with him Ms D Mead-Adams on behalf of the Chamber of Commerce and Industry of WA (Inc)

Mr S Dane and with him Dr T Dymond on behalf of UnionsWA

Case(s) referred to in reasons:

Fair Work Commission Annual Wage Review 2013-14 [2014] FWCFB 3500

State Wage Order Decision [2013] WAIRC 00347; (2013) 93 WAIG 467

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

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

Reasons for Decision

INTRODUCTION

- 1 This is the unanimous decision of the Commission in Court Session. Section 50A of the *Industrial Relations Act 1979* (the Act) requires the Commission before 1 July in each year, of its own motion, to make a General Order –
 - setting the minimum weekly rate of pay applicable under s 12 of the *Minimum Conditions of Employment Act 1993* to employees who have reached 21 years of age and who are not apprentices;
 - setting the minimum weekly rates of pay applicable to apprentices;
 - adjusting rates of wages paid under awards;
 - varying each award affected by the General Order to ensure that the award is consistent with the order;
 - making other consequential changes to specified awards if appropriate, and
 - setting out a statement of principles to be applied and followed in relation to the exercise of jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.
- 2 The Commission gave public notice of the hearing in local newspapers on 19, 23 and 28 April 2014, and on the Commission's website and in the WA Industrial Gazette on 23 April 2014 ((2014) 94 WAIG 401) inviting submissions from interested persons. We set out below an outline of the submissions received.

The Hon Minister for Commerce

- 3 The Minister submits that the WA Government is committed to promoting flexible, fair and productive employment practices that serve the interests of employees, employers and the State as a whole. WA has experienced strong economic growth underpinned by high levels of business investment in recent years. However, as outlined by the Department of Treasury, business investment levels and employment growth have moderated significantly as a number of large resource projects move into the less labour-intensive operational phase. Leading indicators of labour demand suggest employment growth in the State will remain subdued in the near-term. It is therefore imperative that any adjustment to the State minimum and award rates of pay does not damage the viability of business enterprises or the willingness of employers to create new jobs. The Minister supports taking a balanced approach which accords appropriate significance to the impact of minimum wage and award rate adjustments on both employers and employees and any adjustment should be weighed against the capacity of employers, particularly in small business, to pay for wage increases.
- 4 The Minister notes that employers will soon bear the cost of another increase to compulsory employer superannuation contributions following the increase implemented in July 2013 which will be a considerable impost on employers, particularly those in small business. This year's minimum wage increase should also be considered in the context of employer capacity to sustain a rise in minimum and award wages. Improving the performance and competitiveness of the State's economy and supporting employers to sustain and create employment is critical to meeting the social and economic aims of the criteria set out in s 50A(3) of the Act.
- 5 In the Minister's view, current economic circumstances warrant a cautious approach to the State Wage Order. While it is important that living standards for minimum and award wage earners are maintained, it is also crucial that the ability of employers to sustain and create jobs is not impeded by higher wage increases. For these reasons, the Minister argues that an increase to State minimum and award wages in line with estimated actual CPI for the current financial year is the most responsible and appropriate course of action at the current time. The most recent Treasury estimates of growth in the CPI for Perth, as published in the 2014-15 State Budget, would preserve the spending power of employees receiving minimum and award rates whilst ensuring that wage costs for employers remain sustainable. That Treasury estimate is 3 per cent, which would result in the current minimum wage of \$645.90 per week being increased by \$19.40 to \$665.30 per week, with corresponding increases to award rates of pay for other classifications of employees. The Minister notes that the available information suggests that a relatively small proportion of Western Australian employees are reliant upon minimum and award rates. As such, it is unlikely that an increase to minimum and award wages in line with CPI would have a detrimental effect on employment, inflation or the economy. The State Wage Order does influence outcomes across the spectrum of pay setting arrangements by providing a floor for negotiation of individual or collective agreements in the State jurisdiction.

Chamber of Commerce and Industry of Western Australia (Inc)

- 6 CCIWA states that WA is the only State to which two different minimum rates of pay still apply within the private sector. The current difference between the State and national minimum wages is \$23.70 per week which creates an uneven playing field for business. State based employers, who are often small businesses with a limited ability to absorb increased costs, have to pay higher award rates of pay compared to their often larger national system competitor.
- 7 Whilst growth within the WA economy has been strong in recent years, this is no longer the current economic climate, with the WA economy slowing in line with the national economy, particularly in comparison with recent years. Growth in the cost of living as measured by the CPI for Perth is largely in line with the national average. Consequently, CCIWA submits that the Commission should look to equalise the State minimum wage with the national minimum wage over a number of years. CCIWA proposes that this occur by taking into account the 2014 national minimum wage increase and then decreasing the percentage increase awarded by 1 per cent which, over a period of three to five years, will close the gap between the State and national minimum wages, subject to the discretion of the Commission.

- 8 CCIWA advocates for an increase to the State minimum wage which is lower than the rate of inflation on the basis that the current economic climate provides a strong argument for such an adjustment and also it is important to ensure that minimum wages do not act as a barrier for the unemployed. CCIWA also points to the high level of unemployment currently seen across both WA and Australia and states that the high cost of employing people contributes to levels of employment.
- 9 CCIWA believes that it is appropriate for there to be a restrained approach to adjusting State minimum wage and relevant award rates of pay to take into account the decline in the State economy. This is particularly important for the small businesses that make up the majority of the State system who have not necessarily benefited from the resource boom.
- 10 In arriving at its position CCIWA carefully weighed the different statutory considerations and particularly the state of the WA economy and relevant national and international economic factors, particular industry sectors and businesses most affected by minimum wage decisions, the tax transfer system and superannuation impacts, and changes in the cost of living.
- 11 CCIWA also submits that any increases granted beyond that awarded through the national minimum wage review will have a very limited impact on the overall living standards of WA employees. Hence higher wages growth in the State system will have a negative impact upon the largely small businesses in the State system without a corresponding benefit to the overall standard of living of WA employees.
- 12 CCIWA states that the capacity of employers to increase wages is affected by the superannuation guarantee contribution rate increases. Superannuation is a direct cost to employers which affects an employer's ability to increase an employee's base rate of pay.
- 13 It is CCIWA's opinion that the majority of employees who are covered by the State system would be covered by an award, and that employees in the retail and hospitality sector are largely award reliant. The introduction of seven day trading and the opportunity to trade until 9 pm on weekdays means that penalty rates now form part of many employers' standard operating hours. However, the market in which small business currently operates has also changed with online competitors not having the same restrictions and being able to maintain a lower cost base. Therefore an increase to the base rate of pay of the award is compounded by the effect of penalty rates. Penalty rates have a large impact on the profitability of small business over weekend and public holiday periods.
- 14 CCIWA states that although growth in the WA economy remains strong, not everyone has benefitted from the resources boom, including employers, with a number of industries facing significant challenges. The current economic environment remains a challenge for WA businesses. The ability for a small employer to meet the cost of doing business is a key determinant in its survival. CCIWA submits that there is a lower rate of business survival in WA compared to Australia as a whole and increasing costs on business will further increase the pressure on business in WA in an already volatile period for business. Business is less confident about its future growth.
- 15 CCIWA points to the cost burden on business from the WA State Budget, with increases in electricity prices, water expenses, land tax and land fill levy directly impacting on employers.
- 16 CCIWA states that Australia currently has the highest minimum rate of pay compared to any other OECD member country. This has implications for the competitiveness of Australian industry within a global economy. CCIWA urges consideration to be given to a combination of both minimum wages and the tax transfer system in determining whether the current minimum wage provides an effective safety net.
- 17 CCIWA tendered the affidavit of Kendall Scott, Manager of the Employee Relations Advice Centre. Ms Scott attached call figures from the CCIWA Employee Relations Advice Centre reflecting calls recorded specifically in relation to redundancy from the period May 2012 to April 2013 and May 2013 to April 2014. Her evidence showed that between May 2012 and April 2013 CCIWA received 1,621 calls with respect to redundancies, equating to 5.51 per cent of total calls; between May 2013 and April 2014 there were 2,226 calls, equating to 6.93 per cent of total calls. This is showing a worrying increase in the number of employers who are considering the need to make employees redundant. CCIWA attached copies of the March Quarter 2014 Outlook publication.

UnionsWA

- 18 UnionsWA contends that the Commission should make a substantial real wage increase for award reliant workers, saying that it is essential to address the ever widening gap between low paid workers and the rest of the workforce in WA. UnionsWA advocates for a wage increase of 5.5 per cent which will increase the minimum wage by \$35.52 per week. This increase will address the needs of the low paid, improve and maintain living standards, protect employees who are unable to bargain, and aims to address the gender pay gap.
- 19 UnionsWA states WA remains a highly unequal State in terms of income distribution between individuals, between households and between genders. In order to address these gaps, any increase to the State minimum wage should constitute a real increase.
- 20 UnionsWA contends that WA's minimum wage should reflect its overall strong economic performance; it should also play its part in redressing the growing inequalities in WA society and while it is by no means the only response to these growing inequalities, other responses will not be adequate without a sufficient minimum wage increase.
- 21 UnionsWA argues that for low paid workers some costs have more impact than others and thus the State minimum wage should be increased higher than the movement in the all groups CPI. Reference was made to the recent State and Commonwealth budgets increasing key essential items well above CPI levels. UnionsWA refers to the April 2014 'State of the States' economic performance report produced by CommSec which found that WA remains Australia's best performing economy, leading the way on retail trade and is second strongest on economic growth. UnionsWA says that economic performance, alongside continuing strong population growth, supports its contention that business can afford such an increase.
- 22 UnionsWA points to the WA, and national, minimum wages deteriorating as a percentage of average weekly ordinary time earnings with WA doing worse than Australia as a whole despite having a higher minimum wage in absolute terms. The most

recent release of the household income and income distribution survey for 2011-12 shows that WA remains more unequal than Australia as a whole. WA's boom times have not 'trickled down' to the lowest income households. Minimum wage rates complement, rather than compete with, the tax transfer system. The work of Professor Peter Whiteford of the Social Policy Research Centre argues that the combination of Australia's relatively high minimum wages and targeted family benefits also reduces child poverty among working families by more than any other country.

- 23 UnionsWA asks for a percentage increase rather than a flat increase as part of its general concern to maintain the real value of award rates.
- 24 Referring to the difference between the WA and national minimum wages, UnionsWA observes there is no evidence that the difference has been detrimental to WA's economy. To set the WA minimum wage on par with the national minimum wage would mean that s 50A(3)(b), which requires the Commission to take into consideration the state of WA's economy and the likely effect of its decision on the economy, and in particular on the level of employment, inflation and productivity in WA, would have little work to do and would be inconsistent with the functions given to the Commission.
- 25 UnionsWA says that WA's unemployment rate of 4.9 per cent in April 2014 is the lowest of all states and this indicates that the WA economy has not suffered from having a State minimum wage that is higher than the national minimum wage. There is also no evidence that WA's productivity has suffered from having a higher minimum wage.
- 26 UnionsWA provides data to support the contention that vulnerable groups of employees, being female, aged between 15 to 24 years and working part time, are over represented within the private sector of the State industrial relations system. Having a majority female workforce in these sections of the State industrial relations system is particularly significant given that WA's gender earnings gap of 23.6 per cent continues to be far higher than the national gap of 17.1 per cent.
- 27 UnionsWA submits that WA's labour productivity growth has been driven significantly by the rental hiring and real estate services industry, one of the industries most likely to include unincorporated business. UnionsWA provided a table showing that for these industries, labour productivity growth over the past five years has been to varying degrees positive in comparison with their national counterparts, and this is important as it substantially covers a period of time in which the WA State minimum wage has been higher than the national minimum wage. There is no evidence that the State minimum wage has been a burden for these industries.
- 28 UnionsWA noted that the number of businesses operating in the industries most likely to be impacted by the State minimum wage increased 3.4 per cent between 2007-8 to June 2012 with retail trade the only industry with business numbers that went backwards during this period; however, figures for retail turnover since 2008 appear to show that that industry continued to expand in WA during this time. UnionsWA concludes that neither the WA economy, nor those industries most likely to be impacted by the State minimum wage, have been adversely impacted by having a State minimum wage higher than the national minimum wage; indeed, they demonstrate the WA economy's ability to sustain a higher State minimum wage. UnionsWA contends, however, that whilst the State economy is performing well there are serious concerns about how many Western Australians are actually sharing in the benefits of that performance. It refers to the most recent WA State Budget as adding to cost of living pressures. It joins with the WACOSS submission pointing out that dramatic increases in the cost of gas, electricity and water in recent years has meant that low income households who spend a greater portion of their income on utility bills are feeling the pressure of the rising cost of utilities more than other Western Australians.
- 29 UnionsWA urges the Commission to again conclude that growth in the State minimum wage is not keeping pace with the growth in wages generally in WA whether measured according to the WPI or to AWOTE. WA is the most unequal State in the country in terms of income distribution. The Commission should not award a lower increase to the minimum wage than it otherwise would by taking into account the impact of the superannuation guarantee rate increase. UnionsWA attached a copy of the ACTU submission to the Annual Wage Review 2013-2014, Fair Work Commission Research Report 7/2013 entitled Minimum wages and their role in the process and incentives to bargain and the ACTU Budget Briefing May 2014.

Australian Hotels Association (Western Australia)

- 30 AHAWA submits that the Commission should consider the wage increase to be awarded should take into account the superannuation guarantee increase of 0.25 per cent on 1 July 2013 as an added cost to small business that will put further strain on the cost-to-wage ratio. It submits that the hospitality sector has been significantly impacted by the introduction of the carbon tax and that the profitability of hospitality businesses has been impacted up to 11.8 per cent due to the carbon tax alone. Utility expenses have also increased at a rate higher than expected because of the carbon tax and other general increases.
- 31 Trading conditions for hospitality businesses, which are generally small businesses and family owned and are more likely to be located in regional areas, are affected due to a downturn in the economy, a reduction in tourism and the impact of the high Australian dollar, all of which have not assisted small business in regional and rural WA.
- 32 AHAWA submits that the national and State minimum wage should be on an equivalent level and therefore the State minimum wage should remain stagnant, or alternatively transition this difference over the next two years until the federal minimum wage attains the same level as the State minimum wage.
- 33 AHAWA submits that if there is to be a wage increase, it should be a 1 per cent, or \$6.46 per week, wage increase.
- 34 AHAWA notes that historically, hospitality is an award based industry and employees within it are more likely to be employed under the award system than in most other industries nationwide. Therefore, any adjustment to the minimum wage has a significantly greater impact on the hospitality and tourism sectors than other industries where there is less exposure to the award system.
- 35 AHAWA submits that the hospitality industry has experienced difficult conditions over recent periods, mainly because it operates on a 24 hour/7 day basis. It is highly labour intensive and as such is impacted by wage increases which affect not only the base rate but penalty rates as well. AHAWA members have wages costs some 65 per cent higher than the average Australian business because of these higher labour costs.

- 36 AHAWA also points to the increasing cost in operating a small business in hospitality as a result of the State Budget increases, including electricity, land tax, and water rates.
- 37 Businesses in regional areas will be continually exposed to significant increases in operational costs and worsening labour shortages in the foreseeable future. Regional businesses are generally small and primarily sole traders or small partnerships. These businesses often have few staff with the responsibility falling on proprietors to work longer hours.

Western Australian Council of Social Services Inc

- 38 WACOSS relies on s 50A(3)(a) of the Act to submit that an increase of \$35 to the State minimum wage is consistent with the need to maintain a fair system of wages and conditions in the current WA context. It refers to the range of issues facing minimum wage workers in WA which were addressed by it in its 2013 State Wage Case submission, and carefully assesses the changing economic and workplace environment for these workers. Its current submission aims to provide the Commission with the best available data upon which to base its deliberations in the best interests not only of minimum wage workers and their families but also of the wider WA community. WACOSS considers minimum wages to be a vital means of protecting low income workers from poverty, the benefits of which are felt by minimum wage workers, their families, their children and society at large. It is important for the wages earned by full time minimum wage employees to be sufficient to ensure they have the capacity to meet their basic living costs while living with dignity and respect.
- 39 The primary focus of WACOSS's claim is the increasing cost of living pressures in WA. Ultimately, WACOSS's conclusion is that the living standards of the lowest paid members of our community have not improved in any significant way in the last 12 months and the current minimum wage does not currently reflect a fair wage in the context of living standards generally prevailing in the community.
- 40 WACOSS developed its submissions in relation particularly to income inequality in WA, noting that lower levels of income inequality deliver stronger economic growth. Lower levels of inequality also deliver better social outcomes. WACOSS remains concerned about the rate at which the gap between the State minimum wage rate and median pay levels continues to grow in WA: between November 2003 and November 2013, AWOTE increased by 79 per cent (from \$905.50 to \$1,620) but the State minimum wage only increased 44 per cent.
- 41 WACOSS submits that WA remains in a relatively strong economic position, however WACOSS's analysis shows that the cost of essential services and items including housing, utilities and food has increased at a much faster rate than non-essential or discretionary and luxury items such as cars, computers and overseas holidays. The increase in the cost of essential items is hardest felt by low income households who spend a much higher proportion of their household income on essentials. It is the low income individuals and households in WA who are really struggling with the increases to the essential costs of living and are, or are at risk of, slipping into poverty. These are the people for whom increases to the rate of the State minimum wage really count.
- 42 WACOSS submits the lack of affordable housing and the ongoing increases in the cost of housing are the most pressing issues facing low income households in WA. High rental costs continue to place great pressure on low and medium income households and it is imperative that the State minimum wage be increased at a rate which reflects the rising cost of living in WA over recent years. WACOSS acknowledges that the urgent need to address the lack of affordable housing is outside the remit of the Commission, however, the high cost of housing must remain a key consideration for the Commission when regard is had to the need to provide fair wage standards in the context of living standards generally in the community. WACOSS also refers to utilities, food and transportation cost of living pressures which caused particular stress for households in WA.
- 43 WACOSS also submits that the level of the State minimum wage is significant to the WA community sector because community sector service providers play an important role in supporting vulnerable members of the WA community, including many who struggle to survive on low incomes due to the rising cost of living. For a long time the community sector in WA has been under resourced and community sector employees have been significantly underpaid. Minimum wage increases are significant for many workers within the female-employee dominated community sector. WACOSS also points to the equal remuneration orders by which the Commission amended the *WA Social and Community Services Award* and the *Crisis Assistance and Supported Housing Award* submitting that in the event of a weak minimum wage increase, community sector workers will effectively be losing some of the pay equity remedy they have just been awarded.
- 44 WACOSS also notes that WA consistently records the largest gender pay gap of any State in Australia, a gap much larger than the national average. WACOSS submits that it is broadly accepted that in Australia women are more likely than men to be reliant on the minimum wage. Significant contributors to this are the disproportionate responsibility women have for unpaid work, including the care of elderly people, children and adults with disabilities, and grandchildren, and their lower pay relative to men. WACOSS says that the most recent figures from November 2013 show that the male ordinary time earnings are 30.9 per cent higher than those of females in WA, compared with a 20.6 per cent difference nationally. Therefore, the Commission's decision relating to the setting of the State minimum wage is of particular significance to female workers in WA.
- 45 Further, WACOSS argues that by increasing the minimum wage the resilience and self-sufficiency of low paid workers would be improved to the benefit of the national welfare system and the community more broadly. WACOSS believes that given the decreasing relevance of junior wages in WA, the full rate of the increase to the minimum wage must be applied to both junior and adult wage rates, and not a proportion of the minimum wage increase. WACOSS attached the Cost of Living Report 2013.

Mr Archie W Marshall

- 46 In a written submission, Mr Marshall submitted that the minimum basic wage for persons over 18 years of age should be abolished. Mr Marshall believes that it is a disadvantage to many marginal people who become unemployable as a result. All people should be paid what they are worth and that is to a large extent up to them. The best employees will get the best jobs and vice versa to the advantage of both employers and employees. Mr Marshall states that high wages fixed by regulation

prevent many new business ventures starting at all and thus denying the employment of marginal people, earning taxable income and providing service to the customers of those businesses. He believes that a minimum wage for persons over 18 creates a sense of entitlement and does nothing to help create a work ethic in young people. Young people who cannot find work due to the high wages required will tend to do little to improve their chances of getting a job and will likely turn to crime and other antisocial activities due to boredom and a sense of hopelessness. Mr Marshall set out some of his personal history and submits that while he has no academic qualifications, his extensive experience entitles him to an opinion which is to abandon the regulated wage system and release the potential of all people to better themselves.

The Statutory Criteria

47 The Act obliges the Commission to set a minimum wage. Section 50A(1)(a) states:

- (1) The Commission shall before 1 July in each year, of its own motion make a General Order (the *State Wage order*) —
 - (a) setting —
 - (i) the minimum weekly rate of pay applicable under section 12 of the Minimum Conditions of Employment Act to employees who have reached 21 years of age and who are not apprentices;
 - (ii) the minimum weekly rate or rates of pay applicable under section 14 of the MCE Act to apprentices.

48 The Act in s 50A(3) obliges the Commission in making a State Wage order to take into consideration:

- (a) the need to —
 - (i) ensure that Western Australians have a system of fair wages and conditions of employment;
 - (ii) meet the needs of the low paid;
 - (iii) provide fair wage standards in the context of living standards generally prevailing in the community;
 - (iv) contribute to improved living standards for employees;
 - (v) protect employees who may be unable to reach an industrial agreement;
 - (vi) encourage ongoing skills development; and
 - (vii) provide equal remuneration for men and women for work of equal or comparable value;
- (b) the state of the economy of Western Australia and the likely effect of its decision on that economy and, in particular, on the level of employment, inflation and productivity in Western Australia;
- (c) to the extent that it is relevant, the state of the national economy;
- (d) to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances and other remuneration;
- (e) for the purposes of subsection (1)(b) and (c), the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment;
- (f) relevant decisions of other industrial courts and tribunals; and
- (g) any other matters the Commission considers relevant.

49 The operation of the *Fair Work Act 2009* (Cth) (the FW Act) means that the order which will issue from this decision will apply only to employers in the private sector, and local governments in WA, which are not trading or financial corporations and the public sector.

Mr Marshall's Submission

50 The Commission is obliged to apply the law as it stands and, relevantly, the law is that the Commission must set a minimum wage each year for persons over 18 years of age. Whether or not the minimum basic wage for persons over 18 years of age should be abolished is a matter for the WA Parliament. Even if the WA minimum wage was abolished, there would still be a national minimum wage applying in WA to employees employed by employers covered by the national industrial relations system. Mr Marshall's submission therefore cannot be considered by the Commission.

Coverage of the State Wage Order

51 Each of the persons appearing made some submissions on the accuracy of the data available which allows the estimate to be made of the numbers of employers and employees covered by the WA industrial relations system. The differences between the submissions are matters of detail and no person submitted that it was necessary for the Commission to decide those differences for the purpose of this matter.

52 In our 2013 decision ([2013] WAIRC 00347; (2013) 93 WAIG 467) we referred to the conclusion of the late Professor David Plowman, from the Graduate School of Management at the University of Western Australia¹ in 2006 that about 2.2 per cent of

¹ It is with sadness that we note Professor Plowman died in December 2013. At the request of the Commission in 2006 when s 50A of the Act was passed Professor Plowman prepared a report on the effects of past statutory minimum wage adjustments on the number of persons employed, the number of unemployed persons seeking work, job vacancies, average weekly ordinary earnings, the level of inflation, the profit share, and the level of investment in Western Australia. We note here that his report has been recognised by the Commission, and persons appearing, in successive State Wage Cases as providing a definitive and accurate analysis.

the WA workforce would be directly affected by the State minimum wage adjustment and possibly 4 per cent of the WA workforce could be affected in differing degrees by the adjustments to other wages to maintain established relativities. There has not been a change in the available data which suggests his conclusion needs to be revisited here. We see no reason not to continue to regard his conclusion as valid for the purpose of our considerations.

CONSIDERATION

- 53 We have set out above a summary of the respective submissions. UnionsWA points to the WA and national minimum wages as a proportion of AWOTE to show that WA is doing worse than Australia as a whole despite having a higher minimum wage in absolute terms. It develops a submission based upon measures of inequality from ABS data and argues strongly that an increase to the WA minimum wage arrests the relative decline of the minimum wage compared to wages generally and to assist other measures which go to inequality. The submissions particularly from WACOSS, and also UnionsWA, go to relative measures of the increase in the cost of essential services and items including housing, utilities and food compared with non-essential or discretionary and luxury items and that low income households spend a much higher proportion of their household income on essentials.
- 54 While low income households do not necessarily equate with employees who receive the WA minimum wage, the submissions present another context in which to set the minimum wage. They provide relevant information to the Commission which is helpful when endeavouring to measure the needs of the low paid, subject to an understanding of what the data measures.
- 55 The need to ensure that Western Australians have a system of fair wages and conditions of employment, and to provide fair wage standards in the context of living standards generally prevailing in the community, raise the concept of fairness. Fairness is a relative concept. The WA minimum wage has been set by properly taking into account all of the considerations in s 50A(3)(a) of the Act. The level of the WA minimum wage may be assessed by comparing it with a range of economic indicators.
- 56 The WA minimum wage has steadily increased in real terms since the 2006 amendment to the Act which required the Commission to set a minimum wage for WA taking into account a number of considerations. The increase to the WA minimum wage over time has been greater than the increase in the Perth CPI although not as great as the increase in wages generally as measured by the WPI, and significantly less than wages as measured by the AWOTE index (Minister's written submission p 16 Figure 3).
- 57 However, our past decisions have made clear our view that the proper application of s 50A(3)(a) of the Act means that we do not, and cannot, set the WA minimum wage by reference to one particular measure. All of the measures, as they are encompassed within the considerations we are obliged to take into account, are relevant to our decision. These considerations, as reflected particularly in the respective submissions of UnionsWA and WACOSS on the one hand, and CCIWA and AHAWA on the other, necessarily require balancing by us.
- 58 In that context, UnionsWA and WACOSS emphasise the decline in the WA minimum wage relative to wage movements in WA as measured by the WPI and the AWOTE. We have endeavoured to point out that the need in s 50A(3)(a) of the Act for the Commission to ensure that Western Australians have a system of fair wages and conditions of employment, and to provide fair wage standards in the context of living standards generally prevailing in the community means this is a relevant, but not a determinative, consideration. Necessarily, the considerations in s 50A(3)(a) will not all point to the one result - there is likely to be tension between the economic, social and other considerations which the Commission is obliged to take into account. It is not resolved by adopting a rule such as increases to the WA minimum wage must be equal to wage movements in WA as measured by the WPI or the AWOTE. The Act requires the Commission to take into account each of the relevant statutory considerations.
- 59 A submission common to the positions of CCIWA and AHAWA, that we should order a lesser increase than might otherwise be warranted so that the WA minimum wage aligns over time with the national minimum wage, attracts a similar comment. In essence, the submission repeats their respective submissions in 2013. We repeat our conclusion in the 2013 State Wage Order decision that not to increase the WA minimum wage in order to allow it to align with the national minimum wage if the considerations in s 50A(3) of the Act otherwise warrant an increase would be inconsistent with the requirements imposed on the Commission by s 50A(3).
- 60 Between 1980, when the Act was proclaimed, and 2006 the Commission was required to consider the then National Wage Decision whenever it was made and give effect to it unless there were good reasons not to do so (s 51). That nexus with the national wage decision was broken in 2006 with the demise of national wage decisions. The Act was amended in 2006 in s 50A to require the Commission to set a minimum wage for WA each year to operate from 1 July. At the time of that amendment, there was no national wage decision as such and s 50A does not contemplate what is now the Annual Wage Review of the Fair Work Commission (FWC). For this reason s 50A(3) does not refer to the level of the national minimum wage as a matter to be taken into consideration when setting the WA minimum wage.
- 61 We are obliged by s 50A(3) of the Act to set a minimum wage for WA by having regard primarily to the conditions of the WA economy and labour market. If the Parliament wanted the WA minimum wage to be set by reference to the level of the national minimum wage this should be reflected in the Act. The requirements imposed on the Commission by the Act to take into account the need to meet the needs of the low paid, and to contribute to improved living standards for employees, are requirements which make it difficult, in our view, for a submission that the WA minimum wage be allowed to stagnate, or reduce, because it is higher than the level of the national minimum wage, to be able to be validly considered. No person appearing sought to persuade us that our view of the proper application of s 50A(3)(a) is incorrect.
- 62 Section 50A(3)(f) requires the Commission to take into consideration relevant decisions of other courts and tribunals and we have used this as a means for us to take the Annual Wage Review of the Fair Work Commission into consideration, as we do so later in these reasons.

- 63 The requirement on the Commission in ss 26(1)(a) and (c) of the Act to decide matters according to equity, good conscience and substantial merit, having regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole, makes the national minimum wage relevant. There will be those who assess it as too low, as in UnionsWA's submission, and those who assess it as too high; however for these proceedings, we recognise that it applies in WA and nationally.
- 64 In particular, it applies to businesses in WA, and their employees, in industry sectors, and in small businesses, which are trading corporations. The corporate structure of a business provides no basis for minimum wage setting purposes to validly differentiate between such national system employers and their employees in WA, and those businesses and their employees who are in the WA industrial relations system. If fairness is a relative concept then in fairness we must take into account and give due weight to the minimum wage that the majority of minimum wage employees receive in WA, and indeed throughout the country including by employees of sole traders, partnerships and unincorporated businesses in States other than WA. It should be noted, that those employees in WA who are reliant on the national minimum wage bear the same cost of living increases as those employees who are reliant on the WA minimum wage.
- 65 The regular setting of the WA minimum wage according to the proper application of s 50A(3)(a) of the Act has resulted in the WA minimum wage being higher than the national minimum wage because of differences between the relevant Commonwealth legislation and the Act, particularly since 2006. This requires us to consider the state of the economy of WA which has at times been quite different from the state of the national economy.
- 66 In the absence of any legislative requirement in the Act to take the level of the national minimum wage into consideration in setting the WA minimum wage, it is likely that there will be a gap between the two. Moreover, the requirement in s 50(3)(a)(ii) of the Act for us to take into account the need to contribute to improved living standards for employees, and the performance of the WA economy to that of the performance of the national economy, suggests it is likely that the WA minimum wage will remain higher than the national minimum wage over time.
- 67 However if the size of the gap between the two can be demonstrated as actually causing employers who are in the WA industrial relations system a practical, and not just a theoretical, detriment with the potential to affect any of the considerations in s 50A(3), s 50A(3)(g) together with s 26(1)(a) of the Act, it may permit this to be taken into account by the Commission in setting the WA minimum wage each year.
- 68 We do not have the evidence before us on this occasion to show that this point has been reached.
- 69 To return to the submissions which are before us, it must follow that when considering, as we are obliged to, the capacity of employers as a whole to bear costs of increased wages we accept that employers in the WA system who pay the minimum wage are paying a higher minimum wage than employers in WA in the national system, and nationally, who pay the minimum wage. The weight to be attached to the difference between the two minimum wages in WA is not clear. The full difference is apparent for employers who pay the minimum wage although it is not clearly established by the submissions before us what the significance of it is for employers in the WA system who pay above the minimum wage.
- 70 We recognise the need for wage increases resulting from the State Wage Orders not to act as a disincentive for employers and employees to pursue productivity improvements at the enterprise level. CCIWA submits that the opportunity for enterprise bargaining in small business is limited under the WA industrial relations system, and the impact of the State Wage Order on this is not able to be determined. Further, increasing minimum rates of pay to actual rates will reduce the opportunity for employers to pay over-award payments to individual employees to reflect individual levels of performance.
- 71 We recognise that the registration of an industrial agreement under s 41 of the Act requires a union to be party to the agreement to be registered and that union presence in small business is relatively insignificant. However we noted in the 2013 State Wage Order decision the evidence of Professor Barrett that there may be different responses of small business employers to an increase in the minimum wage including some opportunity for informal arrangements to be discussed. We note that we have not been provided with any evidence which would lead to the conclusion that the increases to the WA minimum wage since s 50A commenced in 2006 have discouraged productivity improvements at the workplace level. There will be employees who are unable to bargain for increased wages and we consider that the adjustment arising from this decision will protect those employees.

Encouraging Ongoing Skills Development

- 72 Section 50A(3)(a)(vi) requires the Commission to take into consideration the need to encourage ongoing skills development. We here set out table 10 in the Minister's submission:

**Apprenticeships commenced in Western Australia
January 2006 – December 2013**

Year	Under 21 years	21 years and over	Total	Proportion of 21 years and over
2006	6,949	1,968	8,917	22.1%
2007	7,026	2,377	9,403	25.3%
2008	6,581	2,198	8,779	25.0%
2009	5,294	1,817	7,111	25.6%
2010	7,647	2,708	10,355	26.2%
2011	6,907	2,925	9,832	29.7%
2012	6,456	3,220	9,676	33.3%

2013	5,923	2,780	8,703	31.9%
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- 73 We note that there has been a decline in the number of apprenticeships commenced in WA since 2010. In submissions, the Minister stated the categories of building and construction, automotive and metals, and manufacturing and services trades have all experienced a decrease in the number of apprentices in training since March 2008, although the metals and automotive trades has had a modest recovery since 2010, and there was a relatively strong take-up of electrical apprentices was due to the demand for electrical tradespeople during the construction phase of major projects in the resources sector.
- 74 There has been a decline in the number of traineeships commenced in WA in 2013 compared to previous years.
- 75 There is no submission that it is previous State minimum wage increases for apprentices and trainees resulting from State Wage Orders which have discouraged their uptake in WA. We note also that there has been no adjustment in WA awards to the standard relativity in State awards between the trade rate and the rates prescribed for first and second year apprentices.
- 76 We note the evidence (Minister submission p 31 Figure 4) showing that the average unemployment rate for 15-24 year olds looking for full time work has increased. The Commission should be mindful of the potential for minimum wage increases to affect employment opportunities for young people. WACOSS draws attention to the concept of junior rates and sees them as an anachronism, saying that a wage should be set according to competence rather than age. We see that as an issue going beyond the effect of a minimum wage adjustment and we do not accede to the WACOSS submission that junior wages receive the full amount of any increase to be awarded. We will continue to apply any increase proportionately to junior employees.

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

- 77 We consider that an increase to the minimum wage has the potential to assist in providing equal remuneration for men and women for work of equal or comparable value. The distinction between this consideration and the gender pay gap has been recognised in previous State wage proceedings. We have recognised that in the private sector in Australia, women are much more likely than men to be dependent on the award rate and therefore annual increases to the minimum wage. The gender pay gap in WA has been estimated at 23.6 per cent, higher than the national average of 17.1 per cent. CCIWA submits that the gender pay gap has fallen by 2.8 per cent in the past 12 months.
- 78 We stated in the 2011 State Wage Order decision at 39 and 40 that the reasons for the gender pay gap in WA are complex and that the scope in State Wage Order proceedings for us to address those reasons is limited. We repeat that conclusion here. We nevertheless accept the evidence that a significant proportion of minimum wage employees is female, and correspondingly increases to the minimum wage will be of benefit to female employees.
- 79 Section 50A(3)(a) as a whole means that the requirement on us in s 50A(3)(a)(vii) of the Act, the need to ensure equal remuneration for men and women for work of equal or comparable value, also needs to be balanced with the other considerations in s 50A(3). In principle, an increase to the minimum wage will assist, at least to some extent, in reducing the gender pay gap for those female employees within the State jurisdiction.

The State of the Economy of Western Australia

- 80 We are obliged to take into consideration the state of the economy of WA. We express our thanks to the WA Department of Treasury for providing its analysis of WA's economy, and in the context of the national and international economies. The evidence given by Mr David Christmas, Director of the Economic Revenue and Forecasting Division is seen by the Commission as of significant importance given the requirement in s 50A to have consideration to the state of the WA economy and, to the extent that it is relevant, the state of the national economy. This assists us in our consideration of the corresponding analyses of the WA and national economies in the submissions before us.
- 81 In summary, growth of the State's domestic economy is expected to moderate from very strong growth rates in recent years, including 5 per cent in 2012/13, to fairly flat growth in State Final Demand in the next two years, and a gradual increase to 2.2 per cent by the end of the budget period. Gross State Product (GSP) is also expected to moderate but not to the same extent and then to strengthen in the next two years.
- 82 Employment growth is forecast to ease in 2013/14 and remain subdued over the following years, reflecting the transition from a labour-intensive investment phase of growth to a less labour-intensive production phase of growth. Wages growth as measured by WA Wage Price Index is forecast to remain below average, reflecting greater capacity in the labour market. The rate of inflation is expected to pick up in 2013 and 2014 but remain broadly within the Reserve Bank target of 2 to 3 per cent. Dwelling investment is one of the strong growth areas of the economy with dwelling investment increasing by 10.6 per cent in the calendar year of 2013, and forecasted to grow by 14 per cent in the financial year 2013/14. Household consumption is the single largest component of GSP and is projected to grow by 3 per cent in 2013/14, increasing to 3.75 per cent per annum by the end of the budget period. The available information suggests that business investment peaked in 2012/13 and is likely to taper off in coming years, although the level of investment is expected to remain high.
- 83 We reproduce the table of major economic aggregates for WA referred to by Mr Christmas.

WESTERN AUSTRALIAN FORECASTS						
Major Economic Aggregates, Annual Growth ^(a) (%)						
	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
	Actual	Estimated Actual	Budget Estimate	Forward Estimate	Forward Estimate	Forward Estimate
State Final Demand (SFD)	5.0	0.25	0.0	0.75	1.5	2.0
Gross State Product	5.1	3.75	2.75	3.0	4.25	5.0

(GSP)							
Employment	3.5	1.5	1.5	1.75	1.75	2.0	
Unemployment rate (b)	4.4	5.0	5.5	5.25	5.0	4.75	
Wage price index (WPI)	4.0	3.25	3.25	3.5	3.5	3.75	
Consumer price index (CPI)	2.3	3.0	2.75	2.5	2.5	2.5	

(a) Annual average growth unless otherwise stated

(b) Average rate over the year

Source: 2014-15 Budget, Budget Paper No.3

- 84 With respect to labour productivity in WA, the evidence before us from both Mr Christmas and also from the UnionsWA submission is that productivity is not easy to measure at the State level. We acknowledge UnionsWA's submission that in the year to 2013 WA's labour productivity increased by 2.9 per cent. However, we think prudence should be exercised in attempting to reach any conclusions on the material before us.
- 85 The Commission has been responsive in the past to the State's economic performance as providing a context to movements in the cost of living and wage rates generally in WA in the context of the considerations in s 50A(3)(a) of the Act. Overall, the evidence before us, particularly from the Department of Treasury, but also the information from CCIWA and UnionsWA, is that according to current economic indicators the WA economy has softened but continues to grow, however not as rapidly as it has grown in the past two years. Both inflation as measured by the CPI for Perth, and wages growth as measured by WPI, have slowed.

The State of the National Economy

- 86 Mr Christmas's evidence was that the Commonwealth Treasury projects the Australian economy will grow by 2.75 per cent in 2013/14 and 2.5 per cent in 2014/15. These rates are below the average growth of 2.9 per cent over the past decade and the Commonwealth Treasury is also expecting growth to dip and then strengthen as the economy transitions from resource-investment led growth to broader sources of growth over the coming years. The Commonwealth also expects softer employment growth in that transition period and is forecasting the unemployment rate to peak at 6.25 per cent in 2014 and 2015/16. Consumer prices are projected to grow by 3.25 per cent this year before softening to around 2.5 per cent in the following years.

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

- 87 The Minister's submission showed that profits for WA businesses as a whole decreased by \$8.66 billion in the year to June 2013, a decline in overall profitability of 6.5 per cent. A number of industries in WA experienced an overall improvement in profitability over that period however an overall decline was recorded in half of all industry sectors. Nevertheless all sectors as measured by the Gross Operating Surplus plus Gross Mixed Income measure produced by the ABS, remain profitable. We accept that this data reveals little about the profitability or otherwise of individual businesses.
- 88 We take into account that the superannuation contribution rate will increase a further 0.25 per cent in July 2014 which represents a direct cost to employers and which affects their capacity to increase wages. There is some evidence, particularly from CCIWA, to suggest that small business finds the economic environment challenging.
- 89 The evidence from the CCIWA Employee Relations Advice Centre indicates a rising trend in enquiries regarding redundancies although we consider the trend is not necessarily directly related to increases in the WA minimum or award wages.
- 90 We take into consideration the AHAWA submission that the highly labour intensive hospitality industry has experienced difficult conditions over recent periods, mainly because it operates on a 24 hour/7 day basis and to the increasing cost of operating a small business in hospitality as a result of the State Budget increases, including electricity, land tax, landfill levy and water rates. There are additional costs too for businesses in regional areas.
- 91 Both CCIWA and AHAWA included in their respective submissions that the effect of any increase to the minimum wage is compounded by the effect of penalty rates. We recognise the effect of penalty rates, and other award provisions, on overall costs to employers but do not consider them to be an issue directly relevant to the setting of the minimum wage.
- 92 When considering the setting of the WA minimum wage, the Commission will take into account the evidence and submissions about those industry sectors identified by CCIWA and AHAWA which are not experiencing strong conditions and which are likely to have employers and employees in the WA industrial relations jurisdiction who are award-reliant. The Minister's submission suggests that employment trends in WA's award-reliant industries differ widely. Of the two biggest employing award reliant industries, there appears to be a growing availability of work in the accommodation and food services sector, while employment in the retail trade sector, which employs nearly 10 per cent of WA's workforce, has declined by 1.4 per cent on average over the last year.

The Fair Work Commission Annual Wage Review 2013-2014

- 93 Section 50A(3)(f) requires the Commission to take into consideration relevant decisions of other courts and tribunals. No person sought to persuade us that we were incorrect in our conclusion in the 2012 and 2103 State Wage Order decision that the Annual Wage Review of the FWC is a relevant and significant consideration.
- 94 In the 2013 State Wage Order decision at 69 we said:

We noted in our 2012 decision ([2012] WAIRC 00346 at [90]; (2012) 92 WAIG 557 at 566) that although s 284(1) of the FW Act does not require consideration of the state of the WA economy and the WA award framework which we are obliged by s 50A(3)(b) and (e) of the Act to take into consideration, we consider it significant that there is a substantial overlap between the considerations of FWC's Minimum Wage Panel and the considerations we are obliged by s 50A(3) to take into account. Further, the timing of the Annual Wage Review and the date of operation of the minimum wage to be set by FWC is contemporaneous with the obligations on this Commission under s 50A of the Act.

- 95 We consider the FWC Annual Wage Review 2013-14, which increased the national minimum wage by 3.0 per cent from \$622.20 to \$640.90 per week from 1 July 2014, an increase of \$18.70 per week, to be a relevant and significant consideration.

CONCLUSIONS

- 96 The obligation imposed on the Commission requires a balancing of many differing considerations. The respective submissions before us each urge us to give preference, or greater weight, to their position to the exclusion of those who disagree with them.
- 97 The evidence is that the WA economy has grown above average for the last two years, however growth has moderated. Even though the WA economy is slowing, WA growth rates are at or above national rates. Growth is expected to be similar to, or stronger than, growth through much of the 1990s. Unemployment in WA has increased although it is still less than for Australia as a whole. While consumer spending increased in 2013, spending on hotels, cafes and restaurants, and recreation and culture, both dropped slightly.
- 98 We recognise, and have recognised previously, that increasing the WA minimum wage assists in meeting the needs of the low paid, contributes to improved living standards for employees, provides a wage increase to those employees who may be unable to reach an industrial agreement and assists in a limited way to lessen the gender pay gap in WA. The increase of 5.5 per cent to the WA minimum wage urged upon us by UnionsWA and WACOSS is supported by well-argued submissions.
- 99 However, that is not all we are obliged to consider. We also recognise, as we stated in the 2013 State Wage Order decision at 77, that the assessment of whether the minimum wage, and award wages generally, ensure WA has a system of fair wages and conditions of employment, and the need to provide fair wage standards in the context of living standards generally prevailing in the community, includes taking account of the national minimum wage operating in WA and the extent to which the WA minimum wage is higher.
- 100 The information and submissions from CCIWA, and in relation to the hospitality sector AHAWA, assist us to take into consideration the capacity of employers as a whole to bear the cost of increased wages, salaries, allowances and other remuneration. While we set a minimum wage to apply in WA, in practice it is a minimum wage applicable to certain sectors of the economy only and many employers directly affected are small businesses.
- 101 The extra cost to employers from 1 July 2014 from the increase to compulsory employee contributions to superannuation is an employment cost which we take into account and which moderates the increase we would otherwise award, as was the case in the FWC Annual Wage Review 2013-14 when it awarded a 3 per cent, or \$18.40 per week, increase to the national minimum wage. This, together with the overall softening of the WA economy, in terms of projected economic growth, combined with lower wages outcomes as measured by the WPI, increasing unemployment, and the additional cost imposed on business of the increase in the superannuation contribution rate from 1 July this year, cause us to adopt a cautious approach to any adjustment to the State minimum wage on this occasion. We consider the comment of the Minister of the importance of improving the performance and competitiveness of the WA economy to be timely. We need to be confident about the effect of the increase to be awarded upon the WA economy and, in particular, on the level of employment, inflation and productivity in WA.
- 102 An increase to the WA minimum wage should not have negative consequences for either employees or employers. We refer again to the conclusions of Professor Plowman in relation to the operation of the WA minimum wage in the period 1990 to 2005 which suggests that there has been little minimum wage effect on the economy as a whole, and weak effects on those sectors with higher levels of low paid employees. We consider the Minister's view that an increase to the WA minimum and award wages in line with estimated actual CPI for the current financial year of 3 per cent, which would result in the current minimum wage of \$645.90 per week being increased by \$19.40 to \$665.30 per week has much to commend it. It is a view not inconsistent with the conclusion of the Fair Work Commission when it adjusted the national minimum wage by 3 per cent.
- 103 A 3 per cent increase to the WA minimum wage is slightly less than the actual movement of the Perth CPI to the March quarter 2014. We again favour a flat-dollar increase rather than a percentage increase because:-
- (a) We consider a flat increase targets those employees who are on the minimum wage or slightly above it; and
 - (b) A flat increase has the potential to result in a lower overall cost to an employer compared to a percentage adjustment because the increase is not compounded when applied to award rates of pay.
- 104 We have decided the proper application of all of the considerations in s 50A(3)(a) of the Act warrants an increase of \$20.00 per week to the WA minimum wage.
- 105 Even with weaker conditions in the State's economy and labour market the aggregate impact of the proposed increase is likely to be small. The number of employees directly affected is estimated at 2.2 per cent of the WA workforce and is thus relatively small. It is within the range of adjustments to the WA minimum wage which we have awarded in previous years and we are confident it will not have a negative effect on the WA economy and on the level of employment, inflation and productivity in WA. Even taking into account the extra cost to employers from 1 July 2014 from the increase to compulsory employee contributions to superannuation, we consider it to be within the capacity to pay of employers as a whole.
- 106 There was no direct evidence of issues having arisen from any compression of award relativities from past flat-dollar increases. We observe that it is open to any party to seek to vary an award to address issues which arise from any compression of relativities.

107 We have referred earlier to our concern that s 50A(3) of the Act means it is likely that the WA minimum wage will remain higher than the national minimum wage over time. This decision inevitably results in the gap between the WA minimum wage and the national minimum wage increasing by \$1.30 to \$25.00 per week. For the reasons we have given earlier in this decision, we anticipate this being comprehensively addressed by those appearing in the 2015 State Wage Case.

108 The WA minimum wage to operate from the first pay period on or after 1 July 2014 will be \$665.90 per week for adult employees.

109 We are obliged by s 50A(4) to ensure, to the extent possible, that there is consistency and equity in relation to the variation of awards. No person appearing submitted that we should not correspondingly adjust rates of wages paid under awards. Given that position, and the role of awards in providing fair wage standards, we will adjust award wages by \$20.00 per week from the first pay period on or after 1 July 2014. The increase will apply only to employees who are paid the award wage; any wage paid over the award wage is able to be used to offset the increase.

The Minimum Weekly Rate of Pay Applicable to Apprentices and Trainees

110 No person appearing submitted that we should vary the manner in which the increase to the WA minimum wage is usually applied to apprentices or trainees. We propose to apply the increase in this State Wage Order to adult apprentices, other apprentices and to trainees in accordance with the usual practice of the Commission.

Industry/Skill Levels

111 As in previous State Wage Order proceedings, the Minister has provided the Commission with an updated industry/skill level classifications table based on advice from the Department of Education and Training. This updated table will be included in Attachment A to the 2014 State Wage order to issue.

THE STATE WAGE PRINCIPLES

112 Section 50A(1)(d) of the Act obliges the Commission to set out a statement of principles to be applied and followed in relation to the exercise of jurisdiction to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment. No person suggested that any change is required to be made to the Statement of Principles set out in the 2013 State Wage Order. We set out the Statement of Principles July 2014 to issue. They are unchanged from the Statement of Principles July 2013 apart from the necessary and consequential amendments to Principle 9.

MINUTE OF PROPOSED GENERAL ORDER

113 A minute of proposed General Order now issues. The Commission should be advised by 2.00 pm on Friday, 13 June 2014 whether or not a speaking to the minutes is requested. If a speaking to the minutes is necessary, it will be dealt with on the papers and written submissions should be received by 10.00 am on Monday, 16 June 2014.

2014 WAIRC 00485

2014 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM

CHIEF COMMISSIONER A R BEECH
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER S J KENNER
COMMISSIONER S M MAYMAN

DATE

MONDAY, 16 JUNE 2014

FILE NO/S

APPL 1 OF 2014

CITATION NO.

2014 WAIRC 00485

Result

2014 State Wage Order issued

Representation

Ms Ms M Williams and with her Ms C Purcell on behalf of the Hon Minister for Commerce

Mr P Moss and with him Ms D Mead-Adams on behalf of the Chamber of Commerce and Industry of WA (Inc)

Mr S Dane and with him Dr T Dymond on behalf of UnionsWA

General Order

THE COMMISSION IN COURT SESSION in accordance with section 50A(1) of the *Industrial Relations Act 1979* hereby makes the following General Order to be known as the 2014 State Wage order and thereby orders as follows:

1. THAT the 2014 State Wage order takes effect on 1 July 2014.
2. THAT the General Order which issued in matter No. APPL 1 of 2013 ((2013) 93 WAIG 476) is rescinded with effect on and from the commencement of the first pay period on or after 1 July 2014.
3. THAT the Minimum Weekly Rate of Pay applicable under section 12 of the *Minimum Conditions of Employment Act 1993* to an employee who has reached 21 years of age and who is not an apprentice shall be \$665.90 per week on and from the commencement of the first pay period on or after 1 July 2014.

Apprentices

4. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking an apprenticeship ("apprentice") shall be:
 - (a) In relation to that class of apprentice to whom an award or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of apprentice under the award where the award applies or the relevant award where an employer-employee agreement is in force.
 - (b) In relation to that class of apprentice to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay shall be the rate of pay determined by reference to apprentices' rates of pay in the *Metal Trades (General) Award* which operate on and from the commencement of the first pay period on or after 1 July 2014:

	1 July 2014
<i>Four Year Term</i>	
First year	\$320.40
Second year	\$419.60
Third year	\$572.20
Fourth year	\$671.40
<i>Three and a Half Year Term</i>	
First six months	\$320.40
Next year	\$419.60
Next year	\$572.20
Final year	\$671.40
<i>Three Year Term</i>	
First year	\$419.60
Second year	\$572.20
Third year	\$671.40

5. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice who has reached 21 years of age shall be \$572.20 per week on and from the commencement of the first pay period on or after 1 July 2014.

Trainees

6. THAT the Minimum Weekly Rate of Pay applicable under section 14 of the *Minimum Conditions of Employment Act 1993* to an apprentice whose training contract specifies they are undertaking a traineeship ("trainee") shall be:
 - (a) In relation to that class of trainee to whom an award applies or a relevant award applies where an employer-employee agreement is in force, the minimum weekly rate of pay shall be the rate of pay that applies to that class of trainee under the award where an award applies or the relevant award where an employer-employee agreement is in force.
 - (b) In relation to that class of trainee to whom an award does not apply and to whom there is no relevant award to apply if an employer-employee agreement is in force or is subsequently entered into, the minimum weekly rate of pay at the relevant Industry/Skill level as determined by reference to Attachment A hereunder, shall be the rate of pay based on the *Metal Trades (General) Award* contained in Table 1 as follows:

Table 1

The following rates of pay apply on and from the commencement of the first pay period on or after 1 July 2014:

Industry/Skill Level A			
School Leaver	Year 10 \$	Year 11 \$	Year 12 \$
	229.00	273.00	337.00
Plus 1 year out of school	273.00	337.00	389.00

Plus 2 years	337.00	389.00	455.00
Plus 3 years	389.00	455.00	521.00
Plus 4 years	455.00	521.00	
Plus 5 years or more	521.00		
Industry/Skill Level B			
School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	229.00	273.00	328.00
Plus 1 year out of school	273.00	328.00	374.00
Plus 2 years	328.00	374.00	440.00
Plus 3 years	374.00	440.00	503.00
Plus 4 years	440.00	503.00	
Plus 5 years or more	503.00		
Industry/Skill Level C			
School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	229.00	273.00	324.00
Plus 1 year out of school	273.00	324.00	364.00
Plus 2 years	324.00	364.00	408.00
Plus 3 years	364.00	408.00	458.00
Plus 4 years	408.00	458.00	
Plus 5 years or more	458.00		

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

Australian Qualification Framework (AQF)

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

Part-time and School-Based Trainees

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

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

Wage levels	Current year of schooling	
	Year 11	Year 12
A	\$7.18	\$8.87
B	\$7.18	\$8.63
C	\$7.18	\$8.53

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

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

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

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

On and from the commencement of the first pay period on or after 1 July 2014:

Industry/Skill Level A	\$521.00 per week
Industry/Skill Level B	\$503.00 per week
Industry/Skill Level C	\$458.00 per week

7. THAT

- (a) The rates of pay applicable to trainees under the following awards be adjusted in accordance with the formula outlined in sub-clause (b).
- (i) AWU National Training Wage (Agriculture) Award 1994;
 - (ii) Food Industry (Food Manufacturing or Processing) Award;
 - (iii) Furniture Trades Industry Award;
 - (iv) Licensed Establishments (Retail and Wholesale) Award 1979;
 - (v) Metal Trades (General) Award;
 - (vi) Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980;
 - (vii) Printing Award;
 - (viii) Sheet Metal Workers' Award No. 10 of 1973;
 - (ix) The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977;
 - (x) Soft Furnishings Award; and
 - (xi) Vehicle Builders' Award 1971.
- (b) Trainee rates be adjusted as follows:
- (i) Industry/Skill Level A, B and C top rates are increased by 80% of the arbitrated safety net adjustment. Each result is then rounded to the nearest dollar.
 - (ii) All other Industry/Skill Level A, B and C rates are increased by a percentage of the unrounded result of the first step. Each result is then rounded to the nearest dollar.
 - (iii) However, if an existing rate in Industry/Skill Level B or C is the same as an existing rate in Industry/Skill Level A or B, the former is adjusted in line with the latter rate in order to maintain consistency.

Award Rates of Pay

8. THAT weekly rates of pay for adults in each award of the Commission, other than those set out in Schedule 1, be increased by \$20.00 per week on and from the commencement of the first pay period on or after 1 July 2014 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.
9. THAT any increase to wages resulting from this State Wage order on and from the commencement of the first pay period on or after 1 July 2014, unless provided for elsewhere, shall be calculated on the basis that:
- (a) Where the award prescribes an adult fortnightly rate of pay, the fortnightly rate of pay is increased by \$40.00 per fortnight.
 - (b) Where the award prescribes an adult annual rate of pay, the annual rate of pay is increased by \$1043.00 per annum.
 - (c) Where the award prescribes an adult hourly rate of pay, the hourly rate of pay is increased by the amount of \$20.00 per week divided by the number of ordinary hours of work prescribed by the relevant award for a full-time employee. Where applicable, casual loadings are to be calculated based on the hourly rate.
10. THAT where an award rate other than an adult rate is determined by reference to a percentage of the adult rate or some other formula, those award rates shall be varied on the basis of that percentage or formula to take into account the application of this State Wage order increase of \$20.00 per week to the adult award wage on and from the commencement of the first pay period on or after 1 July 2014.
11. THAT increases under previous State Wage Case decisions prior to 1 July 2014, except those resulting from enterprise agreements, are not to be used to offset this State Wage order increase of \$20.00 per week.
12. THAT on and from 1 July 2014 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:
- (a) Deleting the words "\$645.90 per week payable on and from the first pay period on or after 1 July 2013" and inserting in lieu the words "\$665.90 per week payable on and from the commencement of the first pay period on or after 1 July 2014".
 - (b) Deleting the words "\$557.20 per week on and from the commencement of the first pay period on or after 1 July 2013" in the Adult Apprentices section and inserting in lieu the words "\$572.20 per week on and from the commencement of the first pay period on or after 1 July 2014".

- (c) Deleting the date “1 July 2013” wherever it appears and inserting in lieu the date “1 July 2014”.
- (d) Deleting the words “2013 State Wage order decision” wherever they appear and inserting in lieu the words “2014 State Wage order decision”.

Statement of Principles

13. THAT the Statement of Principles – July 2013 under the General Order in matter No. Appl 1 of 2013 be replaced by the Statement of Principles – July 2014 in Schedule 2.

Publication

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

(Sgd.) A R BEECH,
Commission In Court Session.

[L.S.]

ATTACHMENT A

INDUSTRY / SKILL LEVEL A (as at April 2014)

TITLE	CERTIFICATE LEVEL
<i>Aeroskills Industry (MEA)</i>	
Aeroskills (Aircraft Mechanical)	II
Aeroskills Engineer - Avionics	Diploma
Aeroskills Engineer – Mechanical	Diploma
<i>Aviation (AVI)</i>	
Aviation Flight Operations	II & III
Aviation Ground Operations & Service	II & III
<i>Beauty (SIB)</i>	
Beauty Services	III
Beauty Therapy	IV
<i>Business Services (BSB)</i>	
Business Administration	III & IV
Business	II & III & IV
Customer Contact	III & IV
Frontline Management	IV
Legal Administration	III
Legal Assistant	IV
Recordkeeping	III & IV
Marketing	IV
Manager	Diploma
Human Resources	IV
Medical Administration	III
Occupational Health and Safety Officer	IV
Union Recruitment and Organising	IV
<i>Chemical, Hydrocarbons and Refining (PMA)</i>	
Process Plant Advanced Technician	Diploma
Process Plant Operations	II & III
Process Plant Operations (Maintenance Engineering)	II
Process Plant Technology	IV
<i>Civil Construction (RII)</i>	
Bituminous Surfacing	II & III
Civil and Structural Engineering Draftsperson	Diploma
Civil Construction	II & III
Civil Construction Manager	Diploma
Civil Construction Senior Designer	Advanced Diploma
Civil Construction Senior Manager	Advanced Diploma
Civil Construction Supervisor	IV
Civil Construction Designer	IV & Diploma
Civil Foundations	III
Plant Operations	III
Pipelaying	III
Public Works Engineering Technical Officer **	Diploma
Road Marking	III
Road Construction and Maintenance	III
Bridge Construction & Maintenance	III
Trenchless Technology	III
Tunnel Construction	III
<i>Community Services (CHC)</i>	
Career Development Officer	III & IV

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

TITLE	CERTIFICATE LEVEL
Powerline Vegetation Control	II
<i>Electrotechnology (UEE)</i>	
Antennae Equipment	II
Appliance Servicing - Refrigerants	II
Business Equipment Servicing	II
Fire Alarms Servicing	II
Hazardous Areas	IV
Refrigeration and Air Conditioning Systems	IV
Remote Area Essential Service	II
Electrotechnology Systems Electrician	IV
Computer Assembly & Repair	II
Computer Systems	IV
Computer Systems Engineer	Diploma & Adv Diploma
Data and Voice Communications	II
Data and Voice Technician	III
Electrical Engineer	Diploma & Adv Diploma
Electronic Assembly	II
Electronics	II
Electronics and Communications	IV
Electronics & Communications Engineering	Diploma & Adv Diploma
Industrial Electronics and Control	IV
Renewable Energy	II
Security Assembly and Setup	II
Video and Audio Systems	IV
Winding and Assembly	II
<i>Floristry (SFL)</i>	
Floristry	III & IV
<i>Food Processing (FDF)</i>	
Food Processing	III
Food Processing (Wine)	III
Food Processing (Sales)	III
Pharmaceutical Manufacturing	III
Production Line Supervisor	IV
<i>Gas Industry (UEG)</i>	
Gas Industry Advanced Technician	Advanced Diploma
Gas Industry Operations	IV
Gas Industry Technician	Diploma
<i>Information and Communication Technology (ICA)</i>	
Information Technology	II & III
Information Technology (Networking)	IV
Information Technology (Websites)	IV
Information Technology (Multimedia)	IV
Information Technology (Support)	IV
Information Technology (Systems Analysis & Design)	IV
<i>Laboratory Operations (MSL)</i>	
Sampling and Measurement	II
Laboratory Skills	III
Laboratory Techniques	IV
Laboratory Technology	Diploma
Senior Laboratory Technician	Advanced Diploma
<i>Local Government (other than operational works) (LGA)</i>	
Local Government	II & III
Local Government Administration	IV
Local Government Planning	IV
Ranger	IV
Trainee Community Ranger	III
<i>Manufacturing (MSA)</i>	
Aluminium Window and Frames	II
Aluminium Windows and Frames Manufacturing	II
Competitive Systems and Practices - Manager	Diploma
Glass Processor	II
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Manufacturing Technician - Metallurgy	Diploma

TITLE	CERTIFICATE LEVEL
Manufacturing Technologist - Metallurgy	Adv Diploma
Process Support	II & III
Process Manufacturing	III
Manufacturing Equipment Operation	III
Manufacturing Team Leader	IV
Surface Preparation and Coatings Application	III
<i>Metal and Engineering (MEM)</i>	
Engineering Assistant	Advanced Diploma
Engineering Production	II
Engineering Technician	III
Draftsperson	Diploma
Engineering (Advanced Trade)	Diploma
Engineering – Higher Engineering Trade	IV
Metallurgical Technician	Diploma & Adv Diploma
Production Systems (Foundry)	III
Production Systems (General Engineering)	III
Production Systems (Surface Finishing)	III
<i>Metalliferous Mining (RII)</i>	
Underground Metalliferous Mining	II & III & IV
Underground Metalliferous Mining Manager	Diploma
<i>Library, Information and Cultural Services (CUL)</i>	
Library and Information Services	II & III & IV
Museum Practice	II & III
<i>Plastics, Rubber and Cablemaking (PMB)</i>	
Plastics	III
Polymer Technology	IV
Plastics – Film	III
Plastics – Blow Moulding	III
Plastics – Extrusion	III
Plastics – Fabrication	III
Plastics – Injection Moulding	III
Plastics – Thermoforming	III
Plastics – Rotational Moulding	III
Plastics – Polystyrene	III
Rubber	III
Process Manufacturing (Rubber - Injection Moulding)	III
Rubber - Belt Splicing	III
Rubber – Rubber Lining	III
Process Manufactured Mineral Products	III & IV
<i>Public Safety (PUA)</i>	
Firefighting Operations	III
Policing	Diploma
<i>Public Sector (PSP)</i>	
Government	II & III & IV
Government – Financial Services	Diploma
Government – Fraud Controller	IV
Government – Human Resources	Diploma
Government – Investigator	IV, Diploma
<i>Property Services (CPP)</i>	
Property Management	IV
Spatial Services Technician	Diploma
Surveyor	Diploma
<i>Retail (including Wholesale and Community Pharmacy) (SIR)</i>	
Business to Business Sales Officer	III
Retail	III
Retail Management	IV
Community Pharmacy	III & IV
<i>Integrated Telecommunications (ICT)</i>	
Telecommunications	II & III
Telecommunications Cabling	II
Telecommunications (Access Network)	II
Telecommunications (Cabling & Customer Premises Equipment)	III
Telecommunications Engineering	IV
<i>Textile Clothing and Footwear (LMT)</i>	

TITLE	CERTIFICATE LEVEL
Textile Fabrication	III
Textile Production	III
Laundry Operations	III
Clothing Production	III & IV
Dry Cleaning Operations	III
Early Stage Wool Processing	III
Leather Production	III
Footwear Repair	III
Tourism, Hospitality and Events (SIT: CUE)	
Assistant Manager (Resorts)	IV
Events Technical	III
Hospitality (Accommodation Services)	III
Hospitality (Food and Beverage)	III
Hospitality – (Asian Cookery)	II
Hospitality – (Catering Operations)	II & III
Hospitality – (Commercial Cookery)	II
Hospitality – (Patisserie)	II
Hospitality – (Operations)	II & III
Hospitality Gaming	III
Hospitality - Supervision	IV
International Retail Travel Sales	III
Tourism	III
Tourism (Attractions and Theme Parks)	II
Tourism (Guiding)	II & III & IV
Tourism (Sales/Office Operations)	II
Tourism (Visitor Information Services)	III
Travel and Tourism Officer	IV
Venues & Events (Customer Service)	III
Costume for Performance	IV
Live Production Theatre & Events	II
Entertainment (Front of House)	II
Live Production Theatre & Events (Technical Operations) Lighting	III & IV
Live Production Theatre & Events (Technical Operations) Vision Systems	III & IV
Live Production Theatre & Events (Technical Operations) Audio	III & IV
Manager (Resorts)	Diploma
Transport and Distribution (TLI)	
Driving operations - heavy recovery driver	IV
Driving operations - tanker driver	IV
Freight Forwarding Operator	III
Integrated Rating	III
Logistics Operations	III
Transport and Distribution (Marine Engine Driving)	III
Transport and Distribution (Maritime Operations)	III
Mobile Cranes	III
Operations Supervisor - Freight Forwarding	IV
Rail Infrastructure	III
Rail Operations	III & IV
Road Transport	III & IV
Stevedoring	III
Warehousing & Storage	III & IV
Water Industry(NWP)	
Water Operations	III & IV

* Cadetship

** Accredited Course Qualification - not part of National Training Package

INDUSTRY / SKILL LEVEL B (as at April 2014)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Animal Care & Management (ACM)	
Veterinary Nursing	IV
Animal Control and Regulation	IV
Animal Studies	II
Animal Technology	III
Captive Animals	III

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Companion Animal Services	III & IV
Asset Maintenance (CPP)	
Asset Maintenance (Cleaning Operations)	II & III
Asset Maintenance (Waste Management)	II & III
Asset Maintenance (Fire Protection Equipment)	II & III
Pest Management Technician	III
Australian Meat Industry (MTM)	
Meat Processing (Abattoirs)	II
Meat Processing (Boning)	III
Meat Processing (Food Services)	II & III
Meat Processing (General)	III
Meat Processing (Rendering)	III
Meat Processing (Smallgoods)	II & III
Meat Processing (Slaughtering)	III
Meat Processing (Leadership)	IV
Meat Processing (Quality Assurance)	IV
Meat Inspector	III
Meat Inspector / Quality Assurance Officer	IV
Production Manager (Meat Processing)	Diploma
Automotive Industry Manufacturing (MSA)	
Recreational Vehicle Production Assistant	II
Recreational Vehicle Production Team Leader	III
Automotive Industry/Retail Service and Repair (AUR)	
Automotive (Administration)	II & III
Automotive Administration (Rental Vehicles)	III
Automotive Electrical Technology	II
Automotive Management	IV & V
Automotive (Mechanical)	II
Automotive (Sales)	II & III
Automotive (Vehicle Body)	II
Automotive Aftermarket Warehousing Distribution Operations	II & III
Bicycles	II
Marine	II
Outdoor Power Equipment	II
Vehicle Servicing	II
Automotive Retail Service and Repair (Tyre Fitting)	III
Mechanical Driveline	II
Mechanical Engine Overhaul	II
Mechanical Hydraulics	II
Mechanical Machine Assembly	II
Mechanical Transmissions	II
Beauty (SIB)	
Make-Up Services	II
Nail Technology	II
Retail Cosmetic Services	II
Caravan Industry (SIT)	
Caravan Park Operations	II & III
Civil Construction (RII)	
Civil Construction for entry level Indigenous Workers	I
Community Recreation Industry (SIS)	
Community Recreation	II & III
Extractive Industries(RII)	
Extractive Industries Senior Manager	Advanced Diploma
Field/Exploration Operations	II
Minerals Processing	Diploma
Resource Processing	II & III & IV
Surface Extraction Operations	II & III & IV
Surface Operations Manager	Diploma
Floristry (SFL)	
Floristry	II
Food Processing Industry (FDF)	
Food Processing	II
Food Processing (Sales)	II
Food Processing (Wine)	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Forest and Forest Products Industry (FPI)	
Forest Growing and Management	II & III
Harvesting & Haulage	II & III
Sawmilling and Processing	II & III
Timber Manufactured Products	II & III
Timber Merchandising	II & III
Timber Fabrication Detailer	IV
Timber Fabrication Production Manager	Diploma
Timber Fabrication Detailing Manager	Diploma
Timber Fabrication Estimator or Jig Setter	III
Timber Fabrication Production Hand	II
Timber Fabrication Production Specialist Or Leading Hand	IV
Wood Panel Products	II & III
Production Technician (Timber)	IV
Forester (Operations)	IV
Furnishing ()	
Furnishing (Flooring)	II
Furnishing (Polishing)	II
Furnishing (Upholstery)	II
Furniture Making	II
Glass and Glazing	II
Interior Design – Retail Services	III
Picture Framing	III
Soft Furnishing	II & III
Designer (Kitchens, Bathrooms and Interior Spaces) *	IV
Gas Industry (UEG)	
Gas Industry Advanced Technician	Adv Diploma
Gas Industry Technician	Diploma
Gas Industry Operations	II & III & IV
Health (HLT)	
Aboriginal Environmental Health	II & III
Admissions Clerk	III
Assistant Aboriginal and/or Torres Strait Islander Health Care Worker	II
Aboriginal and/or Torres Strait Islander Health Care Worker	III
Senior Aboriginal and/or Torres Strait Islander Health Care Worker	IV
Allied Health Assistance	III & IV
Client/Patient Support Services	III
Coding Clerk	IV
Dental Assisting	III & IV
Health Practice Manager	Diploma
Health Service Assistant	III
Health Support Services	II & III
Optical Dispensing	IV
Sterilization Services	III
Pathology Collection	III
Local Government (Operational Works) (LGA)	
Local Government (Operational Works)	Diploma
Metal and Engineering (MEM)	
Engineering – Production	II
Aluminium Windows and Frames Manufacturing	II
Outdoor Recreation (SIS)	
Outdoor Recreation	III & IV
Community Recreation	II & III
Sport and Recreation	II & III & IV
Plastics, Rubber and Cablemaking (PMB: PMC)	
Process Manufacturing (Cablemaking)	II
Plastics	II
Plastics – Film	II
Plastics – Blow Moulding	II
Plastics – Composites	II
Plastics – Extrusion	II
Plastics – Fabrication	II
Plastics – Injection Moulding	II
Plastics – Thermoforming	II

TRAINEESHIP TITLE	CERTIFICATE LEVEL
Plastics – Rotational Moulding	II
Plastics – Polystyrene	II
Rubber	II
Rubber – Rubber Lining	II
Process Manufacturing (Rubber – Injection Moulding)	II
Rubber - Belt Splicing	II
Process Manufactured Mineral Products	II
Process Plant Operations - REMOVED FROM B – SHOULD BE LEVEL A	II
Printing and Graphic Arts (ICP)	
Desktop Publishing	II
Graphic Arts Services	II
Print Production Support	II
Printing and Graphic Arts (Instant Print)	II
Printing and Graphic Arts (Multimedia)	III
Screen Printing	II
Property Services (CPP)	
Property Management	IV
Property Services (operations)	III
Technical Security	II & III
Security Operations	III
Spatial Services Technician	Diploma
Strata / Facilities Manager	IV
Surveying	IV & Diploma
Retail (SIR) (including wholesale and Community Pharmacy)	
Retail	II
Community Pharmacy	II
Salon Assistant	II
Warehouse	II
Screen and Media (CUF)	
Broadcasting (Radio)	II & III & IV
Broadcasting (Remote Area Operations)	III
Broadcasting (Television)	III & IV
Screen	II & III & IV
Multimedia	II & III & IV
Sport, Fitness and Recreation (SIS)	
Fitness	III & IV
Sport (Career Orientated Participation)	II & III
Community Activity Programs	III
Textile, Clothing and Footwear (LMT)	
Dry Cleaning Operations	II
Footwear Repair	II
Laundry Operations	II
Textile Production (Complex or Multiple Processes)	II
Transport and Logistics (TLI)	
Furniture Removalist	II
Transport and Distribution (Aviation Flight Operations)	II
Aviation Ground Operations and Service	II
Transport and Distribution (Marine Engine Driving)	II
Transport and Distribution (Maritime Operations)	II
Transport & Distribution (Maritime Operations – Coxswain)	II
Rail Infrastructure	II
Rail Operations	II
Road Transport	II
Stevedoring	II
Logistics Operations	II
Warehousing & Storage	II
Visual Arts, Craft and Design (CUV)	
Arts Administrator	III
Water Industry(NWP)	
Water Operations	II

* Cadetship

** Accredited Course Qualification - not part of National Training Package

INDUSTRY / SKILL LEVEL C (as at April 2014)

TRAINEESHIP TITLE	CERTIFICATE LEVEL
<i>Amenity Horticulture (AHC)</i>	
Horticulture	II & III & IV
Horticulture (Arboriculture)	II & III & IV
Horticulture (Floriculture)	II & III & IV
Horticulture (Landscape)	II & IV
Horticulture (Retail Nursery)	II & IV
Horticulture (Wholesale Nursery)	II & IV
Horticulture (Parks and Gardens)	II & IV
Horticulture (Turf)	II & IV
<i>Conservation and Land Management (AHC)</i>	
Conservation and Land Management	II & III & IV
<i>Funeral Services (SIF)</i>	
Funeral Services (Embalmer)	IV
Funeral Services	IV
Gravedigging, Grounds and Maintenance	III
Cemetery and Crematorium Operations	III
<i>Music (CUS)</i>	
Music	III & IV
Music Industry (Foundation)	II
Music Industry (Technical Production)	III & IV
Music Industry (Business)	III
<i>Racing Industry (RGR)</i>	
Racing - Stablehand	II
Racing - Advanced Stablehand	III
Racing - Trackrider	III
Racing - Jockey	IV
Racing (Harness Driver)	IV
<i>Rural Production (AHC)</i>	
Agriculture	II & III & IV
Agriculture (Beef Cattle Production)	III & IV
Agriculture (Dairy)	III
Agriculture (Goat Production)	III
Agriculture (Grain Production)	III
Agriculture (Horse Breeding)	III
Horticulture (Production)	II & III & IV
Agriculture (Pig Production)	III
Agriculture (Sheep and Wool)	III
Agriculture (Rural Merchandising)	III
Advanced Wool Handler	III
Irrigation	II & III & IV
Rural Operations	II & III
Shearing	II & III & IV
Wool Handling	II
Wool Clip Preparation	III
Wool Classing	IV
<i>Seafood Industry (SFI)</i>	
Seafood Processing	II & III
Seafood Sales and Distribution	II & III
Seafood (Aquaculture)	II & III & IV
Seafood (Fishing Operations)	II & III
Seafood (Fisheries Compliance)	III

*** Cadetship****** Accredited Course Qualification - not part of National Training Package**

Schedule 1

LIST OF AWARDS NOT SUBJECT TO THIS GENERAL ORDER**Awards that do not contain wages and are therefore excluded:**

Alcoa Long Service Leave Conditions Award, 1980

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

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

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

Health Care Industry (Private) Superannuation Award 1987
 Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award
 Miscellaneous Government Conditions and Allowances Award No A 4 of 1992
 Miscellaneous Workers' (Security Industry) Superannuation Award, 1987
 Ngala Superannuation Award, 1989
 Printing Industry Superannuation Award 1991
 Public Service Allowances (Fisheries and Wildlife Officers) Award 1990
 Supported Employees Industry Award
 The Swan Brewery Company Limited (Superannuation) Award 1987
 West Australian Petroleum Pty Ltd Long Service Leave Conditions Award 1991
 Woodside Offshore Petroleum Pty. Ltd. Long Service Leave Conditions Award, 1984
 Worsley Alumina Pty. Ltd. Long Service Leave Conditions Award, 1984

Awards that have certain parts quarantined:

Clerks (Racing Industry - Betting) Award 1978 – **Schedule C**
 The Iron Ore Production & Processing (Locomotive Drivers) Award 2006 – **Clause 2.1**
 Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006 – **Clause 6**
 Shearing Contractors' Award of Western Australia 2003 – **Clause 4.2**

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

Clothing Trades Award 1973 – **Clause 18**
 Department for Community Development (Family Resource Workers, Welfare Assistants and Parent Helpers) Award 1990 – **Schedule F**
 Education Department Ministerial Officers Salaries Allowances and Conditions Award 1983 No. 5 of 1983 – **Schedule I**
 Egg Processing Award 1978 – **Appendix 4**
 Electorate Officers Award 1986 – **Schedule G**
 Family Day Care Co-Ordinators' and Assistants' Award, 1985 - **Schedule C**
 Government Officers (Social Trainers) Award 1988 – **Schedule K**
 Government Officers (Insurance Commission of Western Australia) Award, 1987 – **Schedule D**
 Government Officers Salaries, Allowances and Conditions Award 1989 - **Schedule P**
 Juvenile Custodial Officers' Award – **Schedule G**
 Public Service Award 1992 – **Schedule M**

Schedule 2

STATEMENT OF PRINCIPLES – July 2014

1. Application of the Statement of Principles

- 1.1 This Statement of Principles is to be applied and followed when the Commission is making or varying an award or making an order in relation to the exercise of the jurisdiction under the Act to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment.
- 1.2 In these Principles, wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of employment will be referred to as “wages”.
- 1.3 In making a decision in respect of any application brought under these Principles the primary consideration in all cases will be the merits of the application in accordance with equity, good conscience and the substantial merits of the case pursuant to section 26(1)(a) of the Act.
- 1.4 These Principles do not have application to Enterprise Orders made under section 42I of the Act or to applications made under section 40A of the Act to incorporate industrial agreement provisions into an award by consent.

2. (deleted)

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

- 3.1 In the following circumstances wages in an award, may on application, be varied or another award made without the application being regarded as a claim for wages above or below the minimum award conditions:
 - 3.1.1 To include previous State Wage Case increases in accordance with Principle 4.
 - 3.1.2 To incorporate test case standards in accordance with Principle 5.

- 3.1.3 To adjust allowances and service increments in accordance with Principle 6.
- 3.1.4 To adjust wages pursuant to work value changes in accordance with Principle 7.
- 3.1.5 To adjust wages for total minimum adjustments in accordance with Principle 8.
- 3.1.6 To vary an award to include the minimum wage in accordance with Principle 9.

4. Previous State Wage Case Increases

- 4.1 Wage increases available under previous State Wage Case Decisions such as structural efficiency adjustments, and previous arbitrated safety net adjustments will, on application, still be accessible.
- 4.2 Minimum rates adjustments may also be progressed under this Principle.

5. Test Case Standards

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

6. Adjustment of Allowances and Service Increments

- 6.1 Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.
- 6.2 Adjustment of existing allowances which relate to work or conditions which have not changed and of service increments will be determined in each case in accordance with State Wage Case Decisions.
- 6.3 Allowances which relate to work or conditions which have not changed and service increments may be adjusted as a result of the State Wage order in Principle 8.
- 6.4 In circumstances where the Commission has determined that it is appropriate to adjust existing allowances relating to work or conditions which have not changed and service increments for a monetary safety net increase, the method of adjustment shall be that such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.
- 6.5 Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7.
- 6.6 New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.
- 6.7 Where changes in the work have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant Principles of this Statement of Principles. The relevant Principles in this context may be Principle 7 and Principle 11.
- 6.8 New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of Principle 7 of this Statement of Principles.

7. Work Value Changes

- 7.1 Applications may be made for a wage increase under this Principle based on changes in work value.
- 7.2 Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
- 7.3 In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award classifications structure but also against external classifications to which that structure is related. There must be no likelihood of wage "leapfrogging" arising out of changes in relative position.
- 7.4 These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this provision.
- 7.5 In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed.
- 7.6 Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- 7.7 The time from which work value changes in an award should be measured is any date that on the evidence before the Commission is relevant and appropriate in the circumstances.

- 7.8 Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this provision.
- 7.9 Where the tests specified in 7.2 and 7.3 are met, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work and the nature and extent of the change in work.
- 7.10 The expression “the conditions under which the work is performed” relates to the environment in which the work is done.
- 7.11 The Commission should guard against contrived classifications and over-classification of jobs.
- 7.12 Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other provision of these Principles, shall not be taken into account in any claim under this provision.

8. Total Minimum Rate Adjustments

- 8.1 Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and State Wage order adjustments to be combined so that the award specifies only the total minimum rate for each classification.
- 8.2 By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates or weekly rates. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.
- 8.3 The State Wage order arising from this decision is \$20.00 per week.

9. Minimum Adult Award Wage

- 9.1 A minimum adult award wage clause will be required to be inserted in all new awards.
- 9.2 The minimum adult wage clause will be as follows –

MINIMUM ADULT AWARD WAGE

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

The minimum adult award wage for full-time employees aged 21 or more is \$665.90 per week payable on and from the commencement of the first pay period on or after 1 July 2014.

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

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

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

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

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

Subject to this clause the minimum adult award wage shall –

Apply to all work in ordinary hours.

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

Minimum Adult Award Wage

The rates of pay in this award include the minimum weekly wage for employees aged 21 or more payable under the 2014 State Wage order decision. Any increase arising from the insertion of the minimum wage will be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to enterprise agreements, consent awards or award variations to give effect to enterprise agreements and over award arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Adult Apprentices

Notwithstanding the provisions of this clause, an apprentice, 21 years of age or more, shall not be paid less than \$572.20 per week on and from the commencement of the first pay period on or after 1 July 2014.

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

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

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

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

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

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

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

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

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

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

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

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

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

12. **Economic Incapacity**

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

13. **Duration**

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



2014 WAIRC 00518

RESCIND GENERAL ORDER NO. 7/2013 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

COMMISSION'S OWN MOTION

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**CHIEF COMMISSIONER A R BEECH
ACTING SENIOR COMMISSIONER P E SCOTT
COMMISSIONER S M MAYMAN**DATE**

THURSDAY, 19 JUNE 2014

FILE NO/S

APPL 11 OF 2014

CITATION NO.

2014 WAIRC 00518

Result

General Order issued

General Order

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

- (1) THAT each award, industrial agreement or order cited in Schedule A of this General Order be varied by substituting for the location allowances provisions contained in each such award, industrial agreement or order the location allowance provisions in Schedule B of this General Order.
- (2) THAT each such variation shall have effect from the beginning of the first pay period to commence on or after the first day of July 2014.
- (3) THAT this General Order replace the General Order in Matter No 7 of 2013 which thereby shall be rescinded.

[L.S.]

(Sgd.) A R BEECH,
Commission In Court Session.

LOCATION ALLOWANCESSCHEDULE A

<u>Title of Award or Order</u>	<u>Clause No.</u>
Aerated Water and Cordial Manufacturing Industry Award 1975	31
Aged and Disabled Persons Hostels Award, 1987	28
Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979	20
Animal Welfare Industry Award	14
Artworkers Award	20
The Australian Workers Union Road Maintenance, Marking and Traffic Management Award 2002	5.14
Bakers' (Country) Award No. 18 of 1977	20
Breadcarters (Country) Award 1976	27
Building Trades Award 1968	24
Building Trades (Construction) Award 1987	Appendix A
Child Care (Out of School Care - Playleaders) Award	10
Children's Services (Private) Award 2006	12
Cleaners and Caretakers Award, 1969	3.6
Cleaners and Caretakers (Car and Caravan Parks) Award 1975	22
Clerks' (Accountants' Employees) Award 1984	23
Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972	27
Clerks' (Control Room Operators) Award 1984	25
Clerks' (Credit and Finance Establishments) Award	31
Clerks' (Customs and/or Shipping and/or Forwarding Agents) Award	30
Clerks' (Hotels, Motels and Clubs) Award 1979	22
Clerks' (Taxi Services) Award of 1970	28
Clerks (Timber) Award	31
Clerks (Unions and Labor Movement) Award 2004	37
Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947	28
Clothing Trades Award 1973	22
Contract Cleaners Award, 1986	24
Contract Cleaners' (Ministry of Education) Award 1990	21
Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011	17.6
Dental Technicians' and Attendant/Receptionists' Award, 1982	27
The Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979	32
Dry Cleaning and Laundry Award 1979	22
Earth Moving and Construction Award	25
Electrical Contracting Industry Award R 22 of 1978	22
Electrical Trades (Security Alarms Industry) Award 1980	19
Electronics Industry Award No. A 22 of 1985	24
Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973	25
Engine Drivers' (General) Award	20
Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	23
Foremen (Building Trades) Award 1991	15

<u>Title of Award or Order—continued</u>	<u>Clause No.</u>
Funeral Directors' Assistants' Award No. 18 of 1962	33
Furniture Trades Industry Award	46
Gate, Fence and Frames Manufacturing Award	21
Golf Link and Bowling Green Employees' Award, 1993	28
Hairdressers Award 1989	31
The Horticultural (Nursery) Industry Award, No. 30 of 1980	6
Industrial Spraypainting and Sandblasting Award 1991	19
Independent Schools Administrative and Technical Officers Award 1993	22
Independent Schools (Boarding House) Supervisory Staff Award	22
Independent Schools Psychologists and Social Workers Award	21
Independent Schools' Teachers' Award 1976	18
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Lift Industry (Electrical and Metal Trades) Award, 1973	20
Local Government Officers' (Western Australia) Interim Award 2011	17.2
Materials Testing Employees' Award, 1984	12
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Interim Award 2011	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Social and Community Services (Western Australia) Interim Award 2011	18.10

<u>Title of Award or Order—continued</u>	<u>Clause No.</u>
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003- The	8.4

<u>Title of Industrial Agreements</u>	<u>Clause No.</u>
Altone Continental and SDA Agreement 2002	32
Beverley Four Square Supermarket and SDA Agreement 2002	32
Bindoon General Store and SDA Agreement 2002	32
Bridgetown Mini Mart and SDA Agreement 2002	32
Broadwater Mini Mart and SDA Agreement 2002	32
Cadoux Traders and SDA Agreement 2002	32
Caversham Store and SDA Agreement 2002	32
Cherries Fine Food Super Mart and SDA Agreement 2002	32
Chicken Treat Dunsborough SDA Agreement 2001	34
Chicken Treat Katanning SDA Agreement 2001	34
Chicken Treat Narrogin SDA Agreement 2001	34
Chicken Treat Padbury SDA Agreement 2001	34
Chicken Treat Rockingham SDA Agreement 2001	34
Chidlow Growers Mart and SDA Agreement 2002	32
Cranberries and SDA Agreement 2002	32
Crisp's Corner Store & Newsagency and SDA Agreement 2002	32
Essentials Supermarket of South Perth and SDA Agreement 2002	32
Foodland Amelia Heights and SDA Agreement 2002	32
Foodland Bayswater (Beechboro Road) and SDA Agreement 2002	32
Foodland Bayswater (Whatley Crescent) and SDA Agreement 2002	32
Foodland Bindoon and SDA Agreement 2002	32
Foodland Boddington and SDA Agreement 2002	32
Foodland Dowerin and SDA Agreement 2002	32
Foodland Lesmurdie and SDA Agreement 2002	32
Foodland Manning and SDA Agreement 2002	32
Foodland Merredin and SDA Agreement 2002	32
Foodland Mukinbudin and SDA Agreement 2002	32
Foodland Ravensthorp and SDA Agreement 2002	32
Foodland Tarcoola and SDA Agreement 2002	32
Foodland Toodyay and SDA Agreement 2002	32
Foodland Wagin and SDA Agreement 2002	32
Foodys Express and SDA Agreement 2002	32

<u>Title of Industrial Agreements—continued</u>	<u>Clause No.</u>
Fresh Food Corner Supermarket and SDA Agreement 2002	32
Glen Forrest Supermarket and SDA Agreement 2002	32
Hall's Creek Caravan Park and SDA Agreement 2002	32
Hannan's Foodmart and SDA Agreement 2002	32
John's Food and Liquor Store and SDA Agreement 2002	32
Kam Food & News Centre and SDA Agreement 2002	32
Kendenup Stores and SDA Agreement 2002	32
Kimberley Super Value and SDA Agreement 2002	32
Kirkwood Food Store & Delicatessen and SDA Agreement 2002	32
K-Mart Western Australia Distribution Centres Enterprise Agreement No. AG 16 of 1995	40
K-Mart Western Australia Distribution Centres Enterprise Agreement No. AG 100 of 1996	40
Laverton Stores and SDA Agreement 2002	32
Leighton Contractors Maintenance Personnel Agreement 2000, No AG 116 of 2000	Schedule 1, Cl 6
Leighton Contractors Mining and Processing Personnel Enterprise Agreement 1997	Schedule 1, Cl 9
Lionel St Markets and SDA Agreement 2002	32
Little Bucks Supermarket and SDA Agreement 2002	32
Mariella's Continental Deli and SDA Agreement 2002	32
McDonald Wholesalers and SDA Agreement 2002	32
Midland Junction Fresh Markets and SDA Agreement 2002	32
MJ and VD Quinlan and SDA Agreement 2002	32
Muir's Fresh Food Supermarkets and SDA Agreement 2002	32
Murdoch Drive Continental Super Deli and SDA Agreement 2002	32
Noakes Store Denmark and SDA Agreement 2002	32
P.R. & B.M. Harrington and SDA Agreement 2002	32
Pemberton General Store and SDA Agreement 2002	32
Perenjori Supermarket and SDA Agreement 2002	32
Pioneer Store and SDA Agreement 2002	32
Port Hedland Truck Stop and SDA Agreement 2002	32
R & E General and SDA Agreement 2002	32
Retail Food Establishments Employees Agreement 1992	34
Retail Food Services Employees' Agreement 1991	39
River Rooster Broome Agreement No. AG 271 of 1996	34
River Rooster Bunbury Agreement No. AG 264 of 1996	34
River Rooster Busselton/Dunsborough Agreement No. AG 285 of 1996	34
River Rooster Carnarvon Agreement No. AG 270 of 1996	34
River Rooster Merriwa Agreement No. AG 268 of 1996	34
River Rooster Narrogin Agreement No. AG 265 of 1996	34
South Metropolitan Youth Link (Inc.) Agreement 1997	20
South Perth Food Mart and SDA Agreement 2002	32
Supa Valu Capel and SDA Agreement 2002	32
Supa Valu Dongara and SDA Agreement 2002	32

Title of Industrial Agreements—continued**Clause No.**

Supa Valu Hamilton Hill and SDA Agreement 2002	32
Supa Valu High Wycombe and SDA Agreement 2002	32
Supa Valu Huntingdale and SDA Agreement 2002	32
Supa Valu Innaloo and SDA Agreement 2002	32
Supa Valu Kelmscott and SDA Agreement 2002	32
Supa Valu Ocean Reef and SDA Agreement 2002	32
Supa Valu Stirling and SDA Agreement 2002	32
Supa Valu Willetton and SDA Agreement 2002	32
Three Springs General Store and SDA Agreement 2002	32
Top Valu Supermarket and SDA Agreement 2002	32
Trade Winds Supermarket and SDA Agreement 2002	32
Wundowie One Stop and SDA Agreement 2002	32
Wyndham Supermarket and SDA Agreement 2002	32
York Mini Mart and SDA Agreement 2002	32

SCHEDULE B

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

TOWN	PER WEEK
Agnew	\$20.60
Argyle	\$54.90
Balladonia	\$21.10
Barrow Island	\$35.70
Boulder	\$8.70
Broome	\$33.10
Bullfinch	\$9.70
Carnarvon	\$17.00
Cockatoo Island	\$36.30
Coolgardie	\$8.70
Cue	\$21.10
Dampier	\$28.80
Denham	\$17.00
Derby	\$34.40
Esperance	\$6.00
Eucla	\$23.10
Exmouth	\$30.10
Fitzroy Crossing	\$41.70
Goldsworthy	\$17.80
Halls Creek	\$48.10
Kalbarri	\$7.30
Kalgoorlie	\$8.70
Kambalda	\$8.70
Karratha	\$34.50
Koolan Island	\$36.30
Koolyanobbing	\$9.70
Kununurra	\$54.90
Laverton	\$21.00
Learmonth	\$30.10
Leinster	\$20.60
Leonora	\$21.00
Madura	\$22.10
Marble Bar	\$53.10
Meekatharra	\$18.20
Mount Magnet	\$22.80
Mundrabilla	\$22.60
Newman	\$19.80
Norseman	\$18.10
Nullagine	\$53.00
Onslow	\$35.70
Pannawonica	\$26.80
Paraburdoo	\$26.70
Port Hedland	\$28.60
Ravensthorpe	\$10.90

TOWN	PER WEEK
Roebourne	\$39.70
Sandstone	\$20.60
Shark Bay	\$17.00
Shay Gap	\$17.80
Southern Cross	\$9.70
Telfer	\$48.90
Teutonic Bore	\$20.60
Tom Price	\$26.70
Whim Creek	\$34.20
Wickham	\$33.00
Wiluna	\$20.80
Wittenoom	\$46.90
Wyndham	\$51.50

- (2) Except as provided in subclause (3) of this clause, an employee who has:
- (a) a dependent shall be paid double the allowance prescribed in subclause (1) of this clause;
 - (b) a partial dependent shall be paid the allowance prescribed in subclause (1) of this clause plus the difference between that rate and the amount such partial dependent is receiving by way of a district or location allowance.
- (3) Where an employee:
- (a) is provided with board and lodging by his/her employer, free of charge; or
 - (b) is provided with an allowance in lieu of board and lodging by virtue of the award or an order or agreement made pursuant to the Act;
- such employee shall be paid $66\frac{2}{3}$ per cent of the allowances prescribed in subclause (1) of this clause.
- The provisions of paragraph (b) of this subclause shall have effect on and from the 24th day of July, 1990.
- (4) Subject to subclause (2) of this clause, junior employees, casual employees, part time employees, apprentices receiving less than adult rate and employees employed for less than a full week shall receive that proportion of the location allowance as equates with the proportion that their wage for ordinary hours that week is to the adult rate for the work performed.
- (5) Where an employee is on annual leave or receives payment in lieu of annual leave he/she shall be paid for the period of such leave the location allowance to which he/she would ordinarily be entitled.
- (6) Where an employee is on long service leave or other approved leave with pay (other than annual leave) he/she shall only be paid location allowance for the period of such leave he/she remains in the location in which he/she is employed.

- (7) For the purposes of this clause:
- (a) “Dependant” shall mean -
- (i) a spouse or defacto partner; or
- (ii) a child where there is no spouse or defacto partner;
- who does not receive a location allowance or who, if in receipt of a salary or wage package, receives no consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (b) “Partial Dependant” shall mean a “dependent” as prescribed in paragraph (a) of this subclause who receives a location allowance which is less than the location allowance prescribed in subclause (1) of this clause or who, if in receipt of a salary or wage package, receives less than a full consideration for which the location allowance is payable pursuant to the provisions of this clause.
- (8) Where an employee is employed in a town or location not specified in this clause the allowance payable for the purpose of subclause (1) of this clause shall be such amount as may be agreed between Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia and the Trades and Labor Council of Western Australia or, failing such agreement, as may be determined by the Commission.
- (9) Subject to the making of a General Order pursuant to s.50 of the Act, that part of each location allowance representing prices shall be varied from the beginning of the first pay period commencing on or after the 1st day in July of each year in accordance with the annual percentage change in the Consumer Price Index (excluding housing), for Perth measured to the end of the immediately preceding March quarter, the calculation to be taken to the nearest ten cents.

FULL BENCH—Appeals against decision of Commission—

2014 WAIRC 00408

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 : 2014 WAIRC 00408
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 CHIEF COMMISSIONER A R BEECH
 ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : WEDNESDAY, 12 MARCH 2014
DELIVERED : THURSDAY, 15 MAY 2014
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) - Appeal filed out of time - Leave granted to institute an appeal - Application to adduce fresh evidence refused - Whether action of employer conferred a right to stand down an employee without pay considered - Found employee stood down for disciplinary reasons in circumstances where no right to deduct pay - No error in discretion to accept evidence of employee's evidence in respect of the terms of contract demonstrated - Error found in finding that payment for 40 hours a week was retrospective - Turns on own facts - Appeal allowed in part

Legislation : *Industrial Relations Act 1979* (WA) s 27(1)(n), s 29(1)(b)(ii), s 49, s 49(4)(a)
Industrial Relations Commission Regulations 2005 (WA) reg 33(1)
Fair Work Act 2009 (Cth) s 524, s 524(1)(c)
Workplace Relations Act 1996 (Cth) (repealed) s 691A, s 691B

Result : Appeal allowed

Representation:
Appellant : Mr P King, as agent
Respondent : Mr A M Dzieciol (of counsel)

Case(s) referred to in reasons:

Coal & Allied Mining Services Pty Ltd v MacPherson [2010] FCAFC 83; (2010) 270 ALR 414
 Codelfa Constructions Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337
 Cousins v YMCA of Perth [2001] WASCA 374; (2001) 82 WAIG 5
 Gallo v Dawson [1990] HCA 30; (1990) 64 ALJR 458
 Malik v Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 683
 O'Meara v John Paul College [2014] WAIRC 00036; (2014) 94 WAIG 50

Case(s) also cited:

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v TransAdelaide [2009] FWA 351, 25 September 2009

Esther Investments Pty Ltd v Markalinga Pty Ltd (1989) 2 WAR 196

House v The King (1936) 55 CLR 499

Re Minister for Immigration & Multicultural and Indigenous Affairs; Ex parte Lam [2003] HCA 6; (2003) 214 CLR 1

Kioa v West [1985] HCA 81; (1985) 159 CLR 550

MacPherson v Coal & Allied Mining Service Pty Ltd (No 2) [2009] FMCA 881; (2009) 189 IR 50

Muir v Refugee Review Tribunal [2002] HCA 30; (2002) 190 ALR 601

Norbis v Norbis (1986) 161 CLR 513

Salemi v Minister for Immigration and Ethnic Affairs (No 2) (1977) 14 ALR 1

The Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Services Board v Denise Drake-Brockman [2012] WAIRC 00150; (2012) 92 WAIG 203

Reasons for Decision

SMITH AP AND BEECH CC:

Introduction

- 1 Carmike Nominees Pty Ltd trading as West Coast Vacuum Trucks (Carmike) seeks to institute an appeal under s 49 of the *Industrial Relations Act 1979* (WA) (the Act) against a decision given by the Commission, constituted by a single Commissioner, given on 20 May 2013 in B 162 of 2012.
- 2 The time prescribed for instituting an appeal against a decision of a single member of the Commission is within 21 days of the date of a decision. Carmike filed a notice of appeal on 13 June 2013 which was three days outside the time prescribed under s 49 of the Act for instituting an appeal to the Full Bench.
- 3 Application B 162 of 2012 was an industrial matter referred to the Commission by David Pratt under s 29(1)(b)(ii) of the Act. Mr Pratt claimed that he had been denied unpaid wages of \$5,663, one week and one day's wages for the period ending on 18 June 2012 in the sum of \$1,344 and two weeks' pay in lieu of notice \$2,240. After hearing the matter Commissioner Kenner upheld part of the claim and ordered Carmike to pay Mr Pratt the sum of \$5,663 for unpaid wages for 202.25 hours of work and \$1,344 for unpaid wages from 12 June to 18 June 2012 inclusive.
- 4 The appeal was listed for hearing before the Full Bench on 12 March 2014. At the hearing of the appeal an application was made on behalf of Carmike for leave to extend time in which to file the notice of appeal to the Full Bench and to extend the time in which to file and serve the appeal books. The applications for extension of time were opposed by the respondent. After hearing submissions by the parties in respect of the applications for extension of time the Full Bench informed the parties that it would reserve its decision as to whether leave would be granted and that it wished to hear the arguments in respect of the merits of the appeal.

Facts found by the Commission at first instance

- 5 Carmike is engaged in the business of waste removal, trenchless excavations and potholing. Mr Pratt was employed by Carmike as an operator of a vacuum truck from 9 January 2012 until his employment was terminated on 18 June 2012.
- 6 Mr Pratt was engaged under a contract of employment which was partly written and partly oral. To the extent that the contract of employment was oral, it comprised conversations between Mr Pratt and Mr Michael John Bray.
- 7 Mr Pratt's claim for unpaid wages of \$5,663 arose out of a claim for wages for 40 paid hours each week. Carmike at the hearing at first instance and in this appeal contends that there was an agreement between the parties that:
 - (a) If Mr Pratt worked less than 20 hours in a week he would be paid for 20 hours; and
 - (b) If Mr Pratt worked more than 20 hours in a week, he would be paid for 40 hours.
- 8 Although part of the contract of employment was in writing, there was nothing in the written contract of employment in respect to this issue. It was common ground that this matter then fell to be resolved on the basis of what was said to have been orally agreed between Mr Pratt and Mr Bray.
- 9 In respect of a claim for wages for one week and one day ending on 18 June 2012 and two weeks' pay in lieu of notice, Carmike contended that Mr Pratt breached his contract of employment, by refusing to perform duties he was required to perform on 12 June 2012. As a result, it said it lawfully dismissed Mr Pratt for misconduct, in which case no further monies were owing.
- 10 The parties agreed that Mr Pratt's employment was covered by the *Waste Management Award 2010* (Cth) (the award). It was accepted, however, by the parties that each of the claims related to the recovery of amounts in excess of the award entitlements.
- 11 The learned Commissioner made the following findings:
 - (a) There was a conflict on the evidence as to the agreed hours of work. Mr Pratt testified that at the time of the initial discussions before he commenced employment, there was no mention of hours of work. He said, however, that at all times he expected to be a full-time employee and to be paid for 40 hours per week. He raised this matter after the commencement of his employment. When he raised the issue with Mr Bray, Mr Bray informed him that he would pay him at least 20 hours per week and if he worked more than 20 hours per week, he would be

paid for 40 hours. In response, Mr Pratt informed Mr Bray that he was not able to survive on 20 hours per week. Accordingly, Mr Bray agreed to discuss the issue with his partner and Mr Pratt subsequently received a telephone call from Mr Bray and was informed that as they did not want to lose his services, they had agreed to pay him for a 40 hour week.

- (b) Mr Bray's evidence was at odds with that of Mr Pratt. Mr Bray testified that as the Carmike's business was new, it depended on jobs coming in as to the hours Mr Pratt would work. At the time the parties entered into the agreement on 6 January 2012, Mr Bray said that he mentioned this to Mr Pratt. He proposed to pay Mr Pratt 20 hours per week if he worked up to that number of hours, and 40 hours if he worked in excess of 20 hours per week. Mr Bray contended, therefore, that Mr Pratt was employed on a part-time basis. In the early stages of his employment, particularly during January 2012, Mr Pratt was doing a lot of inductions, obtaining licences for the business and running around in the truck. Mr Bray was therefore prepared to pay Mr Pratt for these hours of work.
- (c) There is a substantial discrepancy between the documentary evidence in the form of payslips set out in exhibit A3, and Mr Pratt's timesheets set out in exhibit R1. The payslips cover the period 9 January 2012 up to and including 17 June 2012. Contrary to the evidence of Mr Bray, for some 11 of the total of 22 pay periods, Mr Pratt was paid for 40 hours per week but on only three of those occasions did Mr Pratt work more than 20 hours per week. Thus, the employer's own time and wages and payroll records were not consistent with the case advanced by Carmike. Coupled with the fact that Mr Pratt said in his evidence that he raised the issue of his wages and hours with Mr Bray, the evidence as a whole supports the proposition advanced by Mr Pratt.

- 12 Accordingly, it was an oral term of the contract that Mr Pratt be paid by Carmike for 40 hours per week, irrespective of the actual hours worked.
- 13 For these reasons, the learned Commissioner was satisfied that Mr Pratt had established his claim in relation to the hours of work on the balance of probabilities and that he had been denied a contractual benefit, some 202.25 hours at \$28 per hour in the total sum of \$5,663.
- 14 The learned Commissioner then went on to consider Mr Pratt's claim for two weeks' pay in lieu of notice and the claim for wages from the period of 12 June 2012 to 18 June 2012. These claims arose out of an interpretation of events that occurred on or about 12 June 2012. On that day Mr Pratt was asked by Mr Bray to perform a potholing job in Bayswater. Potholing is an extension of trenchless excavation work. The issue was whether such work was a duty Mr Pratt was required to perform.
- 15 It is common ground that on 12 June 2012, Mr Pratt had finished a job about mid-morning that day when he received a telephone call from Mr Bray who told him the next job for the day was a potholing job in Bayswater. This was work that Mr Pratt had not previously performed. Mr Pratt refused to perform the work and claimed that this sort of work was 'not in his contract'. Mr Bray was not impressed by Mr Pratt's refusal to work. Mr Pratt told Mr Bray words to the effect 'we can either terminate this contract, rip it up and redraw it up, alright, to a new contract with the potholing and all that in the contract'.
- 16 Mr Bray's testimony was that Carmike's business was formed for the purpose of carrying out potholing work. He intended to meet Mr Pratt onsite at Bayswater on the day in question, to do the work with him. Mr Bray said the work involved nothing really different to other liquid waste work. When Mr Pratt said to him that if he was not happy with him not performing this sort of work, they may as well 'go our own separate ways', Mr Bray told Mr Pratt that if that was the way he wanted it he would have to reorganise the work and Mr Pratt should take the truck home. Later in the day, Mr Pratt was requested to drop the truck off at Carmike's premises, which he did.
- 17 When Mr Bray gave evidence, he said he gave Mr Pratt a week to consider his position. On or about 18 June 2012, Mr Bray telephoned Mr Pratt. He said that he did so because he had had no contact from Mr Pratt and was unsure of his intentions. Also, he wanted to confirm that they were 'parting ways'.
- 18 Mr Pratt's evidence was that he put it again to Mr Bray whether he wanted to 'rip up the contract and start it again'. Mr Bray's response was there was 'no point in going on' and he took this as the termination of his employment.
- 19 After considering this evidence, the learned Commissioner found that the request by Mr Bray to Mr Pratt to perform the Bayswater job on 12 June 2012 was both lawful and reasonable. In coming to this view, the learned Commissioner had regard to the express terms of the contract of employment and found that the duties expressed in the contract included work involving trenchless excavation and potholing. In these circumstances, he found that at common law, the wilful disobedience of a lawful and reasonable instruction may constitute grounds for summary dismissal. He also found that the conduct of Mr Pratt in refusing to perform the work in question, and in suggesting to Mr Bray that the contract be 'ripped up and redrawn', was, on any reasonable view, a repudiation of the essential conditions of the contract. For these reasons, the learned Commissioner found that there was no obligation on Carmike to give Mr Pratt two weeks' notice under cl 8 – Termination of the contract, when the contract was terminated.
- 20 As to the status of the period between 12 June 2012 and 18 June 2012, the learned Commissioner rejected an argument put on behalf of Carmike that Mr Pratt had abandoned his employment and found that Mr Pratt was waiting confirmation of the outcome of the somewhat uncertain response of Mr Bray on 12 June 2012. He also found that Mr Bray did not exercise the contractual right of dismissal at that time. The learned Commissioner then found that Mr Pratt was dismissed as a consequence of the telephone call between Mr Pratt and Mr Bray on 18 June 2012.
- 21 The learned Commissioner then observed that there is no right at common law, nor under the award, to stand down an employee without pay and as the contract of employment remained on foot until 18 June 2012, Mr Pratt was entitled to be paid to 18 June 2012. For these reasons, the learned Commissioner ordered that Carmike pay Mr Pratt the sum of \$1,344 for unpaid wages from 12 June 2012 to 18 June 2012.

Application to adduce fresh evidence

- 22 During the hearing of the appeal, Carmike's representative, Mr King, sought to tender into evidence a copy of an advertisement that was said to have been placed by Carmike in The West Australian newspaper advertising the job that Mr Pratt applied for. The application was opposed. After hearing from the parties, the Full Bench informed the parties that the application was refused. The reasons why the Full Bench refused the application are as follows:
- (a) Section 49(4)(a) of the Act provides that an appeal to the Full Bench shall be heard and determined on the evidence and matters raised in the proceedings before the Commission;
 - (b) The Full Bench does have a discretion to receive additional evidence within strict confines which is that fresh evidence can only be admitted if:

The evidence, insofar as it was relevant, and some of it was not, could only be admissible if it were not 'available to the appellant at the time of the trial' and could not by reasonable diligence have been made available. Further, it is only admissible if the evidence sought to be admitted is credible, although it does not have to be beyond controversy. Further, it can only be admitted if it is almost certain that, if the evidence had been available and adduced, an opposite result would have been reached: *Underdown v Dowford Investments Pty Ltd* [2005] WAIRC 1243; (2005) 85 WAIG 1437 [8] (Sharkey P and Kenner C); applied in *Merredin Customer Service Pty Ltd v Green* [2007] WAIRC 01150; (2007) 87 WAIG 2789 [10]; *Liquor, Hospitality and Miscellaneous Union, West Australian Branch v The Minister for Health* [2011] WAIRC 00192; (2011) 91 WAIG 291 [60].
 - (c) As the advertisement is contained in records that could have been searched by Carmike prior to the hearing at first instance, we were not satisfied that the advertisement could not by reasonable diligence have been made available at the time of the hearing.

Grounds of appeal

- 23 At the hearing of the appeal, Carmike sought leave to amend the grounds of appeal. As the application was not opposed, leave to amend was granted. The amended grounds of appeal are:
- a. Ground 1: Commissioner Kenner erred in denying the Appellant natural justice/procedural fairness. Commissioner Kenner denied the Appellants [sic] request for the closing submissions to be written not oral.
 - b. Ground 2: Commissioner Kenner erred in law in that he failed to take into account the statutory provision of section 524 *Fair Work Act 2009* whereby a [sic] employee can in certain circumstances be stood down without pay.
 - c. Ground 3: Commissioner Kenner erred in fact in finding that in relation to 11 of a total of 22 pay periods during the course of Mr Pratt's employment, Mr Pratt was paid for 40 hours per week but on only 3 occasions, did Mr Pratt work more than 20 hours. In his assessment of the time sheets and pay slips Commissioner Kenner failed to take into account the relevant provisions of the Waste Management Award 2010.
 - d. Ground 4: Commissioner Kenner erred in fact in his decision that the applicant was employed as a full time employee for 40 hours per week and that it was the oral term of the agreement that Mr Pratt be paid by Carmike for 40 hours per week irrespective of the actual hours worked.
 - e. Ground 5: Commissioner Kenner erred in fact in making the oral agreement retrospective for the whole of the employment period 9 January 2012 to 18 June 2012.

The applications for extension of time – submissions

- 24 Carmike submits that the Full Bench must act fairly and in good conscience in exercising its discretion to grant an extension of time. It also contends that the discretion to accept an appeal outside of the 21 day time period and the filing of the appeal books outside the 14 day time period required under the *Industrial Relations Commission Regulations 2005* (WA) (the Regulations) ought to be exercised, unless it would be unfair to do so: *Malik v Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683; *Gallo v Dawson* [1990] HCA 30; (1990) 64 ALJR 458.
- 25 As to the reasons for the delay in filing the Notice of Appeal, Mr King informed the Full Bench on behalf of Carmike that:
- (a) When the decision was handed down, he had been unable to contact the directors of Carmike, Mr Bray and Ms Domek, to obtain instructions as to whether an appeal should be instituted. Mr Bray and Ms Domek were overseas on their honeymoon;
 - (b) When he was able to finally contact Mr Bray, the time for filing a notice of appeal had almost expired. He then gave Mr Bray a brief summary of the decision and sought instructions as to whether the appellant wished to file an appeal;
 - (c) Mr Bray provided instructions to him to file an appeal just when the time period for filing an appeal had expired. At that time, he was becoming unwell and was unable to attend to his duties;
 - (d) Both directors of the company were overseas for the entire 21 day period after the decision was delivered by the Commission;
 - (e) Carmike will be prejudiced if an extension of time is not granted as it would have to pay money to Mr Pratt which it says is not owed;
 - (f) There is no prejudice to Mr Pratt if an extension of time is granted;
 - (g) The merits of the substantive application may be taken into account when determining whether to grant an extension of time and that requires hearing the points raised in Carmike's submissions.

- 26 On behalf of Mr Pratt a submission was made that the Full Bench must consider the length of the delay, the reason for the delay and consider whether there is any prejudice to either party and the prospects of the success of the appeal. Whilst Mr Pratt concedes that the delay is not lengthy, he says that Carmike's case is not strong. As to the reasons for the delay, it is pointed out that the first explanation that has been given is the explanation given from the bar table at the hearing of this appeal. There is no affidavit or any other material setting out the circumstances as to when the directors of Carmike went overseas and when they returned. This, Mr Pratt says, is not satisfactory. In particular, if a party seeks the indulgence of a tribunal to exercise its discretion to extend the time prescribed for doing a particular matter, it should provide an affidavit providing an explanation for that delay setting out the circumstances surrounding the delay and from that information the tribunal can assess whether the excuse for the delay is reasonable in the circumstances.

Should leave be granted to extend time to the appellant to institute an appeal?

- 27 The Commission is empowered under s 27(1)(n) of the Act to grant an extension of time to bring an appeal. However, the granting of an extension of time is not automatic and in each case turns on its own facts. The discretion is conferred for the sole purpose of enabling the Commission to do justice between the parties and it is always necessary to consider the prospects of success of the applicant: *Cousins v YMCA of Perth* [2001] WASCA 374; (2001) 82 WAIG 5 [46] (Kennedy J, with whom Scott and Parker JJ agreed), recently applied in *O'Meara v John Paul College* [2014] WAIRC 00036; (2014) 94 WAIG 50 [20].
- 28 The discretion can only be exercised in favour of an applicant on proof that strict compliance of the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard for the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: *Gallo v Dawson* (459) (McHugh J).
- 29 It is conceded in this matter by Mr Pratt that the length of the delay is very short. Whilst the reasons for delay have not been put to the Full Bench in the usual way, but by way of assertions made from the bar table, we are of the opinion that there is an adequate explanation for the delay. We are also of the opinion that, with the exception of ground 5 of the amended grounds of appeal, the grounds of appeal have no merit whatsoever. We are, however, satisfied that there is a strong case to be made out in respect of ground 5 when the evidence given by Mr Pratt is carefully considered. For these reasons, we would grant leave to appeal.

Ground 1 of the appeal

- 30 In ground 1 of the appeal Carmike complains that it was denied procedural fairness as the learned Commissioner denied a request by its agent to put its closing submissions in writing.
- 31 At page 68 of the transcript of the hearing at first instance, after Mr King informed Commissioner Kenner that the case of Carmike was concluded, Commissioner Kenner asked Mr King to commence Carmike's closing address the following exchange occurred:

KING, MR: I was about to make application for written submissions, Commissioner.

KENNER C: Why?

KING, MR: I've got a number of cases I've got to raise.

KENNER C: No. I want to hear from the parties now, Mr King. It's not a complicated case. You can address the - address the evidence and - and the - and the exhibits.

- 32 At the hearing of the appeal a submission was made by Mr King that:
- (a) he had a 'lot of cases' to make submissions about and they wanted to make written submissions because there was a lot to get through;
 - (b) The learned Commissioner wanted him to hurry through the submissions and that he had made up his mind.
- 33 However, when the transcript of the hearing is examined, it is clearly apparent that the learned Commissioner Kenner did not say to, or indicate to Mr King in any way that Carmike was restricted in the submissions it wished to make.
- 34 As Mr Pratt points out in his written submissions in this appeal, Carmike was provided with the same opportunity to present its case as all other parties who appear before the Commission and that the hearing at first instance proceeded in the manner prescribed by reg 33(1) of the Regulations which provides:

Subject to subregulation (2), the procedure before the Commission, except before the President, on an appeal to be heard by the Full Bench or the Commission in Court Session, is as follows —

- (a) the applicant may make a brief statement outlining the applicant's case and describing the evidence the applicant will bring;
- (b) the applicant may then call the applicant's witnesses;
- (c) unless the Commission otherwise permits, the examination in chief may be conducted by not more than one person on behalf of the applicant, and the cross-examination may be conducted by not more than one person on behalf of each respondent;
- (d) the applicant will be allowed to re-examine but the re-examination must be confined to matters arising out of the cross-examination;
- (e) the case for the applicant must then close;
- (f) the respondent may then state the respondent's case and call the respondent's witnesses and paragraphs (c) and (d) apply with such modifications as are necessary;

- (g) if the respondent has produced evidence in support of any counter-proposal the applicant may call witnesses in respect of the counter-proposal;
 - (h) the respondent may then make closing submissions as to the evidence and the law;
 - (i) the applicant may then make closing submissions as to the evidence and the law;
 - (j) the respondent then has a right of reply limited to any questions of law raised that could not reasonably have been anticipated.
- 35 When the transcript of the hearing is examined, it is clear that Carmike had the opportunity to cross-examine Mr Pratt, state its case, call evidence in-chief and in re-examination and to make closing submissions as to the evidence and the law.
- 36 In addition, Carmike was represented. The evidence adduced by the parties did not depart from the matters pleaded in the application and the notice of answer and counter-proposal. Nor is there any claim made on behalf of Carmike that a matter of fact or law was raised in the hearing that took it by surprise which could have raised an expectation that it be afforded an opportunity of considering that matter and providing written submissions in respect of that issue following the conclusion of the hearing.
- 37 For these reasons, we are of the opinion that ground 1 of the appeal has no substance.

Ground 2 of the appeal

- 38 Carmike contends that the learned Commissioner erred in finding that there is no right at common law or under the award to stand down an employee without pay, as s 524 of the *Fair Work Act 2009* (Cth) confers such a right in certain circumstances.
- 39 Section 524 of the *Fair Work Act* provides:
- (1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:
 - (a) industrial action (other than industrial action organised or engaged in by the employer);
 - (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;
 - (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.
 - (2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:
 - (a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and
 - (b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.
- Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.
- Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).
- (3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

- 40 A submission is made on behalf of Carmike that it was entitled to rely upon s 524(1)(c) of the *Fair Work Act* when Mr Bray stood down Mr Pratt on 12 June 2012 because the effect of the acts and omissions of Mr Pratt on that day any work had to cease for which Carmike could not reasonably be held responsible. It is notable that this was not a submission put to the Commission at first instance.
- 41 Although it is not argued on behalf of Mr Pratt that it is not open to raise this new issue as a ground in this appeal, it is pointed out on behalf of Mr Pratt that there was no evidence put before the Commission on which it could have made a finding about the matters relevant to the application of s 524 of the *Fair Work Act*. This submission in our opinion has merit. Mr Bray gave evidence-in-chief that Mr Pratt told him he was not prepared to do the potholing work, and Mr Pratt was happy for us to go our own separate ways (ts 49). Mr Bray was then asked in examination-in-chief whether he gave Mr Pratt any time period to reconsider the matter and he said 'Yeah, approximately a week.' He then said he told Mr Pratt he would have to get back to him as he would have to reorganise this job (ts 50).
- 42 It was plain from the evidence of Mr Bray that the reason why he stood Mr Pratt down was because of disciplinary reasons, as Mr Pratt had refused a reasonable request to carry out potholing work. There was no evidence that Mr Pratt was stood down because of a stoppage of work during which Mr Pratt could not be usefully employed.
- 43 Similar circumstances arose in *Coal & Allied Mining Services Pty Ltd v MacPherson* [2010] FCAFC 83; (2010) 270 ALR 414. In that matter, Mr MacPherson advised management that he did not want to work a rostered shift for personal reasons. He was 'stood down' indefinitely and without pay until he was prepared to work in accordance with his contract of employment. Mr MacPherson initiated proceedings in the Federal Magistrates Court, claiming that Coal & Allied Mining Services Pty Ltd had breached s 691B of the *Workplace Relations Act 1996* (Cth) (repealed). When the matter was heard, s 691A and s 691B contained substantially the same rights and obligations as s 524 of the *Fair Work Act*. The majority of the Full Court of the Federal Court found that Mr MacPherson was not 'stood down' as there was work for him to do which he chose not to do, rather he was 'put off pay', in circumstances where Coal & Allied was refusing to pay him for any period of time he was not prepared to work in accordance with his contract of employment. In particular, two members of the Full

Court, Marshall and Cowdroy JJ, found this was not a 'stand down' within the meaning of s 691A and s 691B of the *Workplace Relations Act*, an essential element of which is that the employer cannot gainfully employ the employee: [44].

- 44 Justices Marshall, Cowdroy and Buchanan also found that Mr MacPherson was not entitled to be paid for the shift he did not work as terms of the certified agreement that applied to Mr MacPherson's employment provided for an entitlement to pay dependent on service, or at least a willingness to work: [46] - [54], [113] - [116]. However, in this matter whether the terms of the contract of employment only entitled Mr Pratt for payment for hours worked or availability for work, is not a matter raised on behalf of Carmike in any ground of appeal.

Grounds 3 and 4

- 45 Grounds 3 and 4 rely upon argument put forward on behalf of Carmike that the learned Commissioner did not have proper regard to the provisions of the award, nor how the award affected how the weekly hours of work would have been calculated in each pay period. This was also an argument not raised as an issue in the submissions put to the Learned Commissioner at first instance.

- 46 In support of this argument, Carmike contends:

- (a) The learned Commissioner erred in fact in finding that in 11 out of 22 pay periods Mr Pratt was paid for 40 hours a week, but in only three periods did he work more than 20 hours a week.
- (b) The timesheets do not record all of the hours Mr Pratt was paid for.
- (c) If the learned Commissioner had proper regard to cl 13.1 - cl 13.2, cl 27.1 - cl 27.2, cl 28.1(a) - cl 28.1(e), cl 28.3(a) - cl 28.3(b), cl 28.5(a) - cl 28.5(c), cl 30.1 - cl 30.3 and cl 31.1 - 31.4 of the award he would have found that time worked by Mr Pratt outside the normal spread of hours and on Saturdays and Sundays were 'scaled up' by Mr Bray to take account of the provisions of the award that require payment of additional hours of work as overtime and penalty rates.
- (d) Clause 13.1 of the award provides a part-time employee is an employee who works less than 38 ordinary hours a week. Clause 27.2 of the award provides the ordinary hours of work must not exceed eight hours on Monday to Friday between 4.00 am and 5.00 pm. Clause 30.1 of the award provides that work done outside ordinary hours must be paid for at 150% of the relevant minimum wage calculated hourly for the first two hours and 200% after the first two hours. For work carried out of a Saturday cl 31.1 of the award requires an employee to be paid for at least four hours at overtime rates and pursuant to cl 31.4 of the award all time worked on Sunday must be paid for at 200% of the relevant minimum wage for a minimum of four hours.
- (e) Carmike says that when regard is had to the evidence of Mr Bray that he paid Mr Pratt 'by the award', when the timesheets for the weeks which Mr Pratt recorded hours worked of less than 20 hours and was paid for 40 hours are examined, it is apparent Mr Pratt's hours of work were scaled up in accordance with the provisions of the award so that Mr Bray paid Mr Pratt for 40 hours a week instead of 20 hours. Thus Carmike says that if the learned Commissioner had had regard to this evidence he should have accepted Mr Bray's evidence that if Mr Pratt worked in a week less than 20 hours he would be paid for 20 hours but if he worked more than 20 hours he would be paid for 40 hours a week.

- 47 Whilst it is clear that the learned Commissioner erred in finding that Mr Pratt worked more than 20 hours a week on three occasions, as the timesheets reveal that Mr Pratt recorded that he worked more than 20 hours a week on four occasions, this error is not material. The timesheets and payslips record that on 11 occasions Mr Pratt was paid for 40 hours a week. On four of those occasions, Mr Pratt recorded on his timesheet hours more than 20 hours a week. On seven of those occasions he recorded the following:

- (a) 16/1/2012 – 22/1/2012: 11.25 hours (no hours of work outside ordinary hours or on Saturday or Sunday);
- (b) 6/2/2012 – 12/2/2012: 8.25 hours (no hours of work outside ordinary hours or on Saturday or Sunday);
- (c) 13/2/2012 – 19/2/2012: 17.25 hours (no hours of work outside ordinary hours or on Saturday or Sunday);
- (d) 20/2/2012 – 26/2/2012: 12.50 hours plus 2 hours worked on Saturday;
- (e) 19/3/2012 – 25/3/2012: 8 hours including 4 hours worked on Thursday outside ordinary hours;
- (f) 21/5/2012 – 27/5/2012: 14.25 ordinary hours plus 1.50 hours worked on Saturday and 2.25 hours worked on Sunday;
- (g) 28/5/2012 – 3/6/2012: 19.75 hours including 4.75 hours worked on Wednesday outside of ordinary hours.

- 48 Consequently, it is clear that in three of seven weeks that Mr Pratt was paid for 40 hours he recorded less than 20 hours of work. Mr Pratt worked no time outside the ordinary hours of work prescribed in cl 27.2 of the award in these three weeks. In any event, in the week ending 25 March 2012, even if the overtime provisions in cl 30.1 of the award are applied to scale up four hours of overtime worked outside of ordinary hours to seven hours, the total number of notional hours worked that week would be 11 hours. However, Mr Pratt was paid for 40 hours' work in that week.

- 49 In any event, the provisions of the award only require the calculation of rates of pay at the award rate, not the contract rate of pay for the work. It is common ground that it was agreed that Mr Pratt was to be paid a rate of pay calculated at \$28 an hour whereas the award rate of pay was at the material time either \$18.78 or \$19.10 an hour (Appeal hearing ts 42).

- 50 Whilst it is also common ground that in the first few weeks of work Mr Pratt carried out additional duties, this fact is also not material as for the first seven weeks of work Mr Pratt was paid for 40 hours a week on five occasions. On one occasion in that period which was the first week of work, his timesheet records he worked 29.75 hours and his payslip records he was paid for

29.75 hours. In the week ending 5 February 2012 his timesheet records he worked 11.50 hours and his payslip records he was paid for 20 hours of work.

- 51 Leaving these issues aside, the fundamental flaw in this argument is that there was no evidence that Mr Bray calculated the hours of work of Mr Pratt in the manner contended by Carmike in this appeal. The effect of Mr Bray's evidence was, if Mr Pratt worked for 20 hours a week, I paid him for 40 hours. Thus when he worked for 20 hours in a week for each two hours of work, he was paid four hours. In particular, the transcript of the hearing records that:

KING, MR: Could the witness please be shown exhibit A1, Waste Management Award 2010.

KENNER C: Why do you want to show Mr Bray that?

KING, MR: I would like him to refer him to a clause in there, Commissioner.

KENNER C: All right.

KING, MR: Thank you.

Well, first of all, Mr Bray, you said that you were fair in paying. Why did you want to pay Mr Pratt that amount, 40 if he worked more than 20?---As I said before, just as a - a goodwill gesture and to retain the services of Mr Pratt.

Yes. And can I ask when - if Mr Pratt worked two hours a day?---He'd be paid a minimum of four.

Did you pay him a minimum of four?---Yes.

Could you please turn to page 11 of this and find clause 13?---Yes.

There's - I think your copy's been underlined there?---13.1?

He's got - sorry. Can you please read that?---13.1?

Yes?---

'A part-time employee is an employee who works less than 38 ordinary hours per week'.

So he worked 38 hours or less, did he?---Yes (ts 53).

- 52 For these reasons, the appellant's arguments in respect of grounds 3 and 4 have absolutely no merit. They do not support a cogent argument that when proper regard is had to the timesheets and the payslips that the learned Commissioner erred in exercise of his discretion to accept the evidence given by Mr Pratt that it was an oral term of his contract of employment that he be paid for 40 hours of work each week.

Ground 5

- 53 In ground 5, the appellant contends that even if Mr Pratt's evidence is accepted, his evidence was that the agreement made by the parties to pay him for 40 hours a week was not made, nor did it come into effect, until after the first pay period ending 15 January 2012.

- 54 Having considered the evidence given by Mr Pratt, we are of the opinion that the learned Commissioner erred in fact in finding that the oral agreement applied for the whole of the employment period from 9 January 2012 until 18 June 2012.

- 55 Ground 5 is that the learned Commissioner erred in making the oral agreement retrospective for the whole of the employment period. The Commission had concluded at [11]:

... the evidence as a whole supports the proposition advanced by Mr Pratt. I am satisfied that it was an oral term of the contract that Mr Pratt be paid by Carmike for 40 hours per week, irrespective of the actual hours worked. I accept on the evidence that this issue was raised at an early stage by Mr Pratt with Mr Bray, and Mr Bray subsequently agreed, in order to keep Mr Pratt's services, to pay him 40 hours per week.

- 56 Mr Pratt gave evidence that he was under the 'impression' when he accepted the offer of employment that he would be engaged as a full time employee paid to work 40 hours per week (ts 21), and he approached Mr Bray early in his employment about discrepancies in his pay and told Mr Bray he needed more than 20 hours' pay a week, he needed a full week's wages (ts 17 - 18).

- 57 However, the material evidence of Mr Pratt, relevantly, at ts 19 was as follows:

So where did you get the opinion that you were working 40 hours, fulltime? --- Well, when I spoke to Michael on the phone, right, like I said, he said he didn't want to lose me. I got dragged out of the shower at 8.30 or quarter to 9 at night. And he'd spoken to Carlie, his business partner, saying, 'We don't want to lose you. I'm going to start paying you 40 hours a week.'

KENNER C: When was this, Mr Pratt? About when was this after you started? --- Probably late January, early February. I was living in Sawyers Valley then - on Great Eastern Highway, Sawyers Valley then. I was - got dragged out of the shower cos my partner, who is sitting over there - she grabbed the mobile, and I'd come out dripping wet of course, so I had to dry myself abruptly and answer the phone to - to - to Michael, Mr Bray.

This evidence was not contradicted by Mr Bray in his evidence. In our view, the Commission was in the circumstances entitled to accept it. The evidence is that the conversation occurred in late January, early February. Mr Pratt did say earlier, ts 12, that he had spoken to Mr Bray 'from the very beginning - the very beginning of that, in January ...' about needing fulltime work, however the evidence that he had not been paid 40 hours from the commencement of his employment does lead to the conclusion that it is more likely to have been late January, early February.

- 58 It is clear that expectations of a party are not receivable in a determination of the terms of a contract: *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352 (Mason J). Thus the only relevant evidence of Mr Pratt was when the oral agreement in question was formed.

- 59 When regard is had to the evidence of Mr Pratt, it is clear that an agreement to pay Mr Pratt 40 hours a week irrespective of the hours worked each week was after Mr Pratt commenced work. It is also clear from Mr Pratt's evidence that the words 'I am going to start paying you' cannot, in the absence of any other evidence, be construed as an agreement to pay Mr Pratt additional pay for work completed on weeks prior to the agreement. These words make it clear the payment of 40 hours a week was going to commence from the time of that conversation and there is no evidence that it was to be made retrospective.
- 60 For these reasons, we are of the opinion that ground 5 of the appeal has been made out. It follows, therefore, that order (a) of the decision should be varied to exclude 10.25 hours at the rate of \$28 an hour for the hours claimed in the week ending 15 January 2012.

Proposed Order

61 We are of the opinion that an order should be made by the Full Bench as follows:

- (a) The time for instituting the appeal be extended to 13 June 2013;
- (b) The time for filing appeal books be extended to 10 December 2013;
- (c) The application made on behalf of Carmike to adduce fresh evidence is dismissed;
- (d) The appeal be upheld and order (a) of the decision in B 162 of 2012 [2013] WAIRC 00293 be varied to delete:
 - (i) \$5,663 and substitute \$5,376;
 - (ii) 202.25 and substitute 192.

SCOTT ASC

62 I have read a draft of the reasons for decision of her Honour, the Acting President and the Chief Commissioner. I agree with those reasons and have nothing to add.

2014 WAIRC 00433

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

TUESDAY, 27 MAY 2014

FILE NO/S

FBA 5 OF 2013

CITATION NO.

2014 WAIRC 00433

Result

Appeal allowed

Appearances

Appellant

Mr P King, as agent

Respondent

Mr A M Dzieciol (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 12 March 2014, and having heard Mr P King, as agent, on behalf of the appellant, and Mr A M Dzieciol (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 15 May 2014, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

1. The time for instituting the appeal be extended to 13 June 2013.
2. The time for filing appeal books be extended to 10 December 2013.
3. The application made on behalf of Carmike Nominees Pty Ltd t/as West Coast Vacuum Trucks to adduce fresh evidence is dismissed.
4. The appeal be upheld and the decision be varied:
 - (a) by varying order (a) of the decision in B 162 of 2012 [2013] WAIRC 00293 to delete:
 - (i) \$5,663 and substitute \$5,376;
 - (ii) 202.25 and substitute 192.

- (b) by adding an order that the total sum of \$6,720 gross be paid in three equal instalments as follows:
- (i) the sum of \$2,240 gross less any applicable tax, on or before 31 May 2014;
 - (ii) the sum of \$2,240 gross less any applicable tax, on or before 30 June 2014; and
 - (iii) the sum of \$2,240 gross less any applicable tax, on or before 31 July 2014.

By the Full Bench
(Sgd.) J H SMITH,
Acting President.

[L.S.]

FULL BENCH—Unions—Application for Alteration of Rules—

2014 WAIRC 00438

APPLICATION FOR DECLARATION PURSUANT TO S 71(2) AND APPLICATION PURSUANT TO S.62 - ALTERATION
OF REGISTERED RULES: ADDITION OF PART VIII - OFFICE BEARERS TO BE PERSONS HOLDING OFFICE IN PTA
BRANCH

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2014 WAIRC 00438
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER
HEARD	:	TUESDAY, 25 MARCH 2014, MONDAY, 12 MAY 2014
DELIVERED	:	WEDNESDAY, 28 MAY 2014
FILE NO.	:	FBM 6 OF 2013, FBM 7 OF 2013
BETWEEN	:	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant

CatchWords	:	Industrial Law (WA) - Application pursuant to s 71 for declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices that exist within the State organisation - Application to alter rules of an organisation to enable the holders of an office in the counterpart Federal body to hold an office in a State organisation
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 55(4), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 56(1), s 62(2), s 62(4), s 71, s 71(2), s 71(3), s 71(4), s 71(5), s 71(5)(a) <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) s 159(1), s 182(2)
Result	:	Orders and declaration made
Representation:		
Applicant	:	Mr P G Laskaris (of counsel)

Case(s) referred to in reasons:

Jones v Civil Service Association Inc [2003] WASCA 321; (2003) 84 WAIG 4

Re Western Australian Prison Officers' Union of Workers [2014] WAIRC 00006; (2014) 94 WAIG 62

Reasons for Decision

FULL BENCH:

Introduction

1 The Full Bench had before it two applications made under the *Industrial Relations Act 1979* (WA) (the Act). In FBM 6 of 2013, the applicant (the State organisation) sought the following declarations:

1. Pursuant to sec. 71(2) of the *Industrial Relations Act 1979* ('IR Act') the rules of the Applicant and the Australian Rail, Tram and Bus Industry Union, West Australian PTA Branch ('PTA Branch') of the Australian Rail, Tram and Bus Industry Union ('RTBU'), being a counterpart Federal Body as defined in sec. 71(1) IR Act relating to qualification of person for membership are in the Full Bench's opinion deemed to be the same;
2. Pursuant to sec. 71(4) of the IR Act that the rules of the Applicant and the PTA Branch of the RTBU, being a counterpart Federal Body as defined in sec. 71(1) IR Act, prescribing the offices which exist in the PTA Branch of the RTBU are deemed to be the same as the rules of the Applicant prescribing the offices which exist in the

Applicant there being for every office in the Applicant a corresponding office in the PTA Branch of the RTBU; and

3. Conditional upon a certificate being issued by the Registrar to the Applicant pursuant to sec. 71(5) of the IR Act then pursuant to sec. 71(7) of the IR Act the terms of the deed between the Applicant and the RTBU made for the purposes of sec. 71(6) of the IR Act relating to the management and control of the funds and property of the Applicant are not detrimental to the interests of the persons who are eligible to be members of the Applicant and of the PTA Branch of the RTBU and will not prevent or hinder the Applicant from satisfying any debt or obligation howsoever arising and is approved.
- 2 In FBM 7 of 2013, the State organisation made an application pursuant to s 62(2) and s 71(5)(a) of the Act to insert a new Part VIII of the rules of the State organisation to provide for officers holding office in its counterpart Federal body to hold a corresponding office in the State organisation.
- 3 After hearing counsel for the State organisation on 12 May 2014, the Full Bench was of the opinion that the applications should be granted and it made the following orders:
 - (a) In FBM 6 of 2013 the following order and declaration was made:
 - (1) (a) The Australian Rail, Tram and Bus Industry Union, West Australian PTA Branch is the counterpart Federal body (the counterpart Federal body) of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the State Organisation).
 - (b) The rules of the State Organisation and its counterpart Federal body relating to the qualification of persons for membership are deemed to be the same.
 - (c) The rules of the counterpart Federal body prescribing the offices that exist in the counterpart Federal body are deemed to be the same as the offices that exist in the State Organisation.
 - (2) The application is hereby and is otherwise dismissed.
 - (b) In FBM 7 of 2013 the following order was made:
The Registrar is hereby authorised to register the alteration to the rules of the applicant by inserting new Part VIII after r 47.2.22:

PART VIII - OFFICE BEARERS TO BE PERSONS HOLDING OFFICE IN PTA BRANCH

48. PTA Branch of RTBU

- 48.1 Each Office of the Union from such time as the Executive may determine shall be held by the person who in accordance with the rules of the PTA Branch of the RTBU holds the corresponding office in that body.
- 48.2 Any determination by the Executive in accordance with rule 48.1 shall be notified to the Registrar and from the date specified in the notification all Offices in the Union will be filled in accordance with rule 48.1.

- 4 These reasons set out the reasons why the Full Bench made the orders and declarations.

FBM 6 of 2013

- 5 The State organisation is a registered organisation that represents employees employed by the Public Transport Authority of Western Australia. The State organisation became registered as an organisation under the Act on 12 March 1999 when the Australian Railways Union of Workers, (WA Branch) and The West Australian Locomotive Engine Drivers', Firemen's and Cleaners' Union of Workers amalgamated: (1999) 79 WAIG 975. At the time of registration the State organisation operated under the incorrect assumption that an effective s 71 certificate under the Act, relating to a Branch of its Federal organisation, the Australian Rail, Tram and Bus Industry Union (RTBU), was in place. As a consequence of this assumption, from 1999 to early 2012 the State organisation failed to keep a proper and current list of its members and had failed to hold elections for office bearers. After the irregularity was revealed, steps were taken to regularise the state of affairs of the State organisation and these are recorded in reasons for decision given by the Full Bench in FBM 3 of 2012: [2012] WAIRC 00431; (2012) 92 WAIG 747.
- 6 After the decision of the Commission was given in FBM 3 of 2012, and after the Registrar registered new rules which substituted the old rules of the State organisation in its entirety, elections for office bearers of the State organisation were held in September 2012.
- 7 On 23 November 2012, the Fair Work Commission, pursuant to an application by the RTBU under s 159(1) of the *Fair Work (Registered Organisations) Act 2009* (Cth) for the alteration of its rules, the delegate of the General Manager of the Fair Work Commission certified the alteration of rules of the RTBU which resulted in the creation of the Australian Rail, Tram and Bus Industry Union, West Australian PTA Branch (PTA Branch). On 7 April 2014, further alterations to the rules of the RTBU were made to correct some errors and omissions.
- 8 There are currently no elected office bearers of the PTA Branch of the RTBU. It is proposed, however, that subject to an application by the RTBU to the Fair Work Commission pursuant to the provisions of s 182(2) of the *Fair Work (Registered Organisations) Act*, an exemption be obtained for the election of office bearers of the PTA Branch until the next general election for offices in the RTBU scheduled for November 2014. If, however, such application is not granted by the Fair Work Commission, then the election of office bearers of the PTA Branch will be conducted immediately upon the granting of the orders and declarations sought from the Full Bench in this application.

- 9 The State organisation seeks a declaration pursuant to s 71(2) of the Act to facilitate the orderly and efficient administration and co-ordination of the State organisation and its counterpart Federal body who is the PTA Branch by only having one set of elections to fill the corresponding offices of each organisation. A certificate issued pursuant to s 71(5) of the Act will also enable it to make an agreement with the RTBU relating to the management and control of funds. Section 71 of the Act provides:
- (1) In this section —

Branch means the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);

counterpart Federal body, in relation to a State organisation, means a Branch the rules of which —

 - (a) relating to the qualifications of persons for membership; and
 - (b) prescribing the offices which shall exist within the Branch,

are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and

State organisation means an organisation that is registered under Division 4 of Part II.
 - (2) The rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.
 - (3) The Full Bench may form the opinion that the rules referred to in subsection (2) are substantially the same notwithstanding that a person who is —
 - (a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or
 - (b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.
 - (4) The rules of a counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.
 - (5) Where, after the coming into operation of this section —
 - (a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body; and
 - (b) the committee of management of the State organisation decides and, in the prescribed manner notifies the Registrar accordingly, that from a date specified in the notification all offices in the State organisation will be filled in accordance with the rule referred to in paragraph (a),

the Registrar shall issue the State organisation with a certificate which declares —

 - (c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation; and
 - (d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation,

and the certificate has effect according to its tenor.
 - (6) A State organisation to which a certificate issued under this section applies may, notwithstanding any provision in its rules to the contrary, make an agreement with the organisation of which the State organisation's counterpart Federal body is the Branch, relating to the management and control of the funds or property, or both, of the State organisation.
 - (7) Where a memorandum of an agreement referred to in subsection (6) is —
 - (a) sealed with the respective seals of the State organisation and the other organisation concerned; and
 - (b) signed on behalf of the State organisation and the other organisation by the persons authorised under their respective rules to execute such an instrument; and
 - (c) lodged with the Registrar,

the Full Bench may, if it is satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising, approve the agreement.
 - (8) Where the Full Bench approves an agreement under subsection (7) the Registrar shall —
 - (a) register the memorandum as an alteration to the rules of the State organisation; and
 - (b) amend, where necessary, the certificate issued to the State organisation under subsection (5) by declaring that the State organisation is, from the date of registration of the memorandum, exempted from compliance with such provisions of this Act and to such an extent as the Full Bench may, having regard to the terms of the memorandum, direct; and

- (c) notify the State organisation in writing of the matters referred to in paragraphs (a) and (b).
- (9) After the issue to a State organisation of a certificate or an amended certificate under this section —
 - (a) the rule referred to in subsection (5)(a) and a memorandum registered under subsection (8)(a) shall not be altered unless the alteration is approved by the Full Bench; and
 - (b) an alteration to any rule of the State organisation other than the rule referred to in paragraph (a) may be registered by the Registrar if he is satisfied that the rule as so altered is the same as a rule of the State organisation's counterpart Federal body; and
 - (c) every member of the State organisation's counterpart Federal body who is eligible to be a member of the State organisation shall, for all the purposes of this Act and of any award, industrial agreement or order, be deemed to be a member of the State organisation.
- (10) Before granting approval to an alteration of the rule or memorandum referred to in subsection (9)(a), the Full Bench may require compliance by the State organisation with such conditions as the Full Bench considers appropriate.

(a) Are the rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership the same or can they be deemed to be the same?

- 10 Pursuant to r 3.1 of the rules of the State organisation, any person employed in the Public Transport Authority of Western Australia who is an employee within the meaning of the Act may be admitted as a member of the State organisation.
- 11 Under r 191 of the rules of the RTBU, the PTA Branch is to comprise all members of the union who are in the employ of the Public Transport Authority of Western Australia, or who are employed in, or in connection with the activities of the Public Transport Authority, including those persons employed in, or in connection with security, urban rail, customer relations, administrative technical and supervisory, TransWA, Delron and Goldfields buses and miscellaneous infrastructure.
- 12 Under s 71(2) of the Act, the Full Bench can make a declaration that the rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership can be deemed to be the same if it forms the opinion the rules of each body are substantially the same. Section 71(3) of the Act, provides the Full Bench may form the opinion that the rules referred to in s 71(2) are substantially the same notwithstanding that a person who is eligible to be a member of the counterpart Federal body is ineligible to be a member of the State organisation.
- 13 After reviewing the rules of the State organisation and the counterpart Federal body the Full Bench was of the opinion it is clear that all members of the State organisation are also eligible to be members of the PTA Branch and it is immaterial that there are additional categories of members of the PTA Branch who are ineligible to be a member of the State organisation because of the operation of s 71(2) of the Act.
- 14 For these reasons, the Full Bench formed the opinion that the eligibility rules of the State organisation and the counterpart Federal body are substantially the same within the meaning of s 71(2) and s 71(3) of the Act.

(b) Are the offices that exist in the counterpart Federal body the same as the offices of the State organisation?

- 15 When determining whether the offices that exist in the PTA Branch (the counterpart Federal body) are the same as the offices of the State organisation, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: *Jones v Civil Service Association Inc* [2003] WASCA 321; (2003) 84 WAIG 4 [35] (Pullin J).
- 16 Pursuant to s 71(4) of the Act, the rules of a counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.
- 17 In *Re Western Australian Prison Officers' Union of Workers* [2014] WAIRC 00006; (2014) 94 WAIG 62 the Full Bench considered how the task of assessing whether the functions and powers of each office in an organisation registered under the Act and its counterpart Federal body should be assessed. In its reasons for decision, the Full Bench observed:

It is apparent from the scheme of the provisions of s 71 when read with the definition of 'office' in s 7(1) of the Act together with the provisions in the Act that deal with the subject matter of elections of office holders of an organisation (s 56, s 56A, s 57) and the provisions of s 71A which authorises a State organisation to adopt the rules of its counterpart Federal body, that it is intended that once a declaration is made by a Full Bench and a certificate is issued by the Registrar of the Commission under s 71(5) of the Act, a State organisation and its counterpart Federal body can effectively operate as one organisation. If they wish to do so they can jointly manage the property and funds of both organisations by entering into a memorandum of agreement with the counterpart Federal body under s 71(6) and s 71(7) of the Act relating to the management and control of the funds or property, or both, of the State organisation. It is also clear that by authorising persons holding office in a counterpart Federal body to hold office in a State organisation is that effectively the two organisations can be operated for many purposes as if the organisations were as one.

Where there is no difference between the functions and powers of the offices of both organisations, clearly the offices can be deemed to be the same. However, if the powers and functions of the offices of the State organisation and its counterpart Federal body are not sufficiently similar, a decision or decisions of the management committees of the organisations could in some circumstances be challenged as invalid. If, for example, a State management committee and its counterpart Federal body committee of management sit at the same time with the same officers holding office in each committee and make decisions that collectively affect the members and/or property or funds of both organisations, the question is likely to arise if the issue is to be dealt with differently or by different persons holding offices under the rules,

which rules do they have to comply with in making decisions that affect members of both organisations, if it is not possible to comply with the rules of both organisations.

Whilst Pullin J in *Jones* at [35] found that when determining whether the offices that exist in a counterpart Federal body are the same as the offices in the State organisation it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules, his Honour did not analyse how this task is to be conducted. Nor did his Honour formulate any principles upon which similarity of powers and functions of offices should be assessed. Section 71(4) of the Act deems offices of the State organisation to be the same as offices in the counterpart Federal body if there is a corresponding office for each State office in the counterpart Federal body. For an office to 'correspond', its functions and powers must be similar. To determine whether there is similarity, the functions and powers must have a degree of similarity that is sufficient to enable a finding to be made that offices can be deemed to be the same and thus correspond within the meaning of s 71(4) of the Act.

In *Re CFMEU* after comparing each office of the State organisation and its counterpart Federal body, the Full Bench was unable to be satisfied that there was sufficient similarity in the functions and powers of the some offices to be sufficiently similar, or the same or substantially the same [37]. In respect of other offices the Full Bench found there was sufficient similarity in the function and powers of offices to form the requisite opinion [44], [45], [46], [47] and [48].

In assessing similarity, it is also necessary to assess whether a conflict arises between the functions and powers of the duties of each office of the State organisation and each office that is not a 'corresponding' office in the counterpart Federal body but corresponds to another office. This issue arose in *Re CFMEU*. One of the reasons why the Full Bench in that matter found that the offices of the President of the State organisation and the Divisional Branch President could not be deemed to be the same is that the Divisional Branch President had some of the powers and functions of a treasurer which were in part similar to the powers of the Treasurer of the State organisation [38]. In these circumstances, a clear conflict arose as the functions and powers of one office could be performed by the holder of another office.

Where an office of a State organisation is said to correspond with an office of its counterpart Federal body, no conflict will usually arise if each office has the same or substantially similar functions and power. Nor will any conflict usually arise if any of the offices of the counterpart Federal body have additional functions and powers that are not comparable to the powers and functions of any office in the State organisation. In such a case, no conflict arises if those other functions and powers are simply 'additional'. For example, some differing additional obligations arise out of the fact that the Act and the *Fair Work (Registered Organisations) Act* impose different regulatory obligations on the organisations [21] - [26].

- 18 In analysing the offices of each organisation, it is first necessary to identify the committee of management of each organisation. In this matter, pursuant to r 6 of the rules of the State organisation, the Executive of the union is the committee of management of the union. Rule 6.1 entrusts the Executive with the responsibility of the affairs of the union. The offices of the Executive, pursuant to r 6.2 of the rules of the State organisation, consist of the President, the Vice-President, the Secretary, the Assistant Secretary and one representative from each Branch.
- 19 Pursuant to r 192 of the rules of the RTBU, the PTA Branch is governed by the Branch Executive which is autonomous subject to the rules and the supervision of the National Executive and National Council. The effect of this rule is that the Branch Executive is the management committee of the Branch and the National Executive and the National Council are its governing bodies.
- 20 Pursuant to r 194 and r 198 of the rules of the RTBU, the PTA Branch Executive consists of the Branch Secretary, the Branch President, the Branch Vice-President and one representative from each Sub-Branch within the Branch. The PTA Branch is organised into Sub-Branchees of security, urban rail, customer relations, TransWA, Delron and Goldfields buses and other such Sub-Branchees as the Branch Executive may determine: r 193.
- 21 The powers and functions of the office of President of the State organisation are as follows:
 - (a) The President together jointly with the Secretary may determine when the Executive should meet (r 6.3).
 - (b) A decision to hold a supplementary Executive meeting is to be made by the President and the Secretary jointly (r 6.7.1).
 - (c) In addition to any other duties specified in the rules, the President is required to:
 - 15.1.1 Preside at all meetings of the Executive and all general meetings of members;
 - 15.1.2 Preserve order and decorum at such meetings and shall confirm the minutes thereof; and
 - 15.1.3 Ensure that the Rules and the policies of the Union are adhered to.
 - (d) The President is also empowered to interpret the rules of the State organisation but such interpretation is subject to review by the Executive (r 15.2).
 - (e) At all meetings of the union, at which he or she presides, the President shall have a deliberative vote only (r 15.3).
 - (f) All cheques are to be signed by the Secretary together with the President unless the Executive has authorised other members of the Executive or designated employees of the union to sign in place of the Secretary or President should either the Secretary or President not be readily available (r 25.1).
 - (g) The President is empowered to deal with any charges made against the Secretary (r 33.6).
 - (h) The seal of the union is required to be affixed to any document by the President and the Secretary or other such member or members of the Executive as may be determined by the Executive (r 41.1). Other documents not required to be under seal shall be executed on behalf of the union by the Secretary or in the Secretary's absence by the President (r 41.2).

- 22 The powers and functions of each of the offices of the PTA Branch are set out in Part VI of the rules of the RTBU. When the powers and functions of the Branch President are examined it is apparent that the powers and functions of the Branch President, whilst not identical to the President of the State organisation, are sufficiently similar.
- 23 Pursuant to r 195 of the rules of the RTBU, the Branch President and the Branch Secretary jointly can determine when meetings of the Branch Executive are to be held. They can also determine jointly when to hold an urgent Branch Executive meeting. All disbursements from the Branch fund are to be by cheque signed by the Branch Secretary together with the Branch President or the Branch Vice-President: r 23(3). Also the seal of the Branch is to be affixed by the Branch President and the Branch Secretary: r 81(2). Branch documents not required to be under seal are to be executed by the Branch Secretary or in his or her absence by the Branch President: r 81(4). The remaining duties of the Branch President are set out in r 52 of the rules of the RTBU which provides as follows:
- (a) The Branch President is to preside at all meetings of the Branch Council and the Branch Executive. He or she is to preserve order and decorum at such meetings and confirm the minutes thereof and ensure the rules of the union and the PTA Branch are adhered to.
 - (b) The Branch President is empowered to give an interpretation of Part XVI of the rules of the RTBU (which establishes the PTA Branch). His or her decision shall be final and conclusive unless overruled by the Branch Council or the National Council.
 - (c) The Branch President has a deliberative but not a casting vote and is to be an ex officio member of all Branch governing bodies and committees.
- 24 In respect of the powers, functions and duties of the Vice-President of the State organisation, pursuant to r 16, the duties of the Vice-President are to assist the President in the conduct of the President's formal duties and in the absence of the President to deputise for the President. Thus, the powers, functions and duties of the Branch Vice-President are in effect the same pursuant to r 53 of the rules of the counterpart Federal body.
- 25 The Secretary of the State organisation has quite extensive powers and functions. Pursuant to r 17.1 the Secretary is the principal officer of the union. Apart from the joint duties to be performed with the President, the Secretary is required to perform numerous functions. These include forwarding notices of meeting of the Executive to each Executive member: r 6.4. All persons eligible for membership of the union are to make their application to the Secretary: r 9.1. Pursuant to r 9.5 of the rules of the State organisation the Secretary determines whether a person who applies for membership is either ineligible or of general bad character. If that is the case the Secretary is to refer the application for consideration to the Executive: r 9.5. All dues are to be paid to the Secretary: r 10.1 and all notices of resignation are to be addressed and delivered to the Secretary: r 13.
- 26 The main functions and duties of the Secretary are provided for in r 17. Rule 17 provides as follows:
- 17.1 The Secretary shall be the principal officer of the Union.
 - 17.2 Between meetings of the Executive, the Secretary shall, subject to the Rules and the policies and decisions of the Executive, have primary responsibility for the conduct and management of the affairs of the Union and do all things necessary to be done by or on behalf of the Union.
 - 17.3 Without limiting the generality of the foregoing the Secretary shall:
 - 17.3.1 Discharge all duties assigned to the Secretary by the Rules, and the Executive;
 - 17.3.2 Summon and attend all meetings of the Executive;
 - 17.3.3 Where the Secretary considers it necessary, consult with the President on any urgent matters which require a decision between meetings of the Executive;
 - 17.3.4 Arrange for all Union correspondence to receive attention;
 - 17.3.5 Issue press statements and provide media comment in relation to the Union and its affairs;
 - 17.3.6 Be responsible for the safe custody of the Union seal, documents, securities and accumulated funds
 - 17.3.7 Prepare, keep and/or file or cause to be prepared, kept and/or filed, all union documents and records required under the provisions of the IRA or any other relevant legislation;
 - 17.3.8 Receive all monies belonging to the Union and deposit the same in the Union's bank account as soon as practicable;
 - 17.3.9 Disburse all Union funds in accordance with the Rules;
 - 17.3.10 Ensure that union financial records are maintained and that annual accounts are prepared and audited;
 - 17.3.11 Monitor the accounts and other affairs of any Branch and for this purpose to have custody of and access to Branch documents and financial records;
 - 17.3.12 Prepare or cause to be prepared, all necessary documents for the Executive including the minutes of Executive meetings;
 - 17.3.13 Prepare or cause to be prepared, regular financial statements for the Executive;
 - 17.3.14 Co-ordinate the activities of a Branch;
 - 17.3.15 Control and supervise the Union office and its staff including the engagement and termination of such staff;

- 17.3.16 Maintain the Register of Members;
- 17.3.17 Maintain Register of Office Bearers;
- 17.3.18 Be responsible to the Executive for the proper performance of the Secretary's duties.
- 27 The Secretary is also empowered to investigate disciplinary action against members pursuant to r 19.2 of the State organisation. Unless the Secretary decides the matter is without substance, the charge is to be referred to the Executive for determination. Under r 20.1 the register of members is to be kept by the Secretary. The Secretary is also responsible for purging the names and details of persons who have resigned or whose membership has ceased: r 21. Pursuant to r 22 the Secretary has the power to authorise action in the name of the union in a court of competent jurisdiction to recover any subscriptions, fees or levies due from any member and shall take such action when instructed to do so by the Executive. All entrance fees, subscriptions, levies and other fees shall be paid to and collected by the Secretary: r 24.2. All loans, grants or donations under \$1,000 can only be made by the Secretary: r 26.2. Pursuant to r 29 the Secretary is to ensure adequate books and accounts are kept and the provisions of the Act are complied with in relation to maintenance, lodgement and distribution of financial records. The Secretary is also required to forward notices of general meetings to the members with an agenda: r 44.3.
- 28 The duties of the Branch Secretary of the PTA Branch are sufficiently similar to the duties of the Secretary of the State organisation. Under r 54 of the Federal rules the Branch Secretary is the principal officer and treasurer of the Branch. Between meetings of the Branch Council and the Branch Executive, he or she is required (subject to the rules of the Federal union and to the policies and decisions of the National Council, the National Executive, the Branch Council and the PTA Branch Executive), to have responsibility for the conduct and management of the affairs of the PTA Branch and to do all things necessary to be done by or on behalf of the PTA Branch. Without limiting the generality of those obligations, he or she is required to carry out the following duties under r 54. These are as follows:
- (i) discharge all duties assigned to him/her by these Rules, the Branch Council or the Branch Executive;
 - (ii) summon and attend all meetings of the Branch Council and the Branch Executive;
 - (iii) attend all meetings of the National Council and the National Executive;
 - (iv) consult with the Branch President and the Assistant Branch Secretary (where such Office exists) and relevant Branch Divisional Secretaries on any urgent matters which require a decision between meetings of the Branch Executive;
 - (v) attend to all Branch correspondence;
 - (vi) authorise and release press statements and provide media comment on behalf of the Branch;
 - (vii) be responsible for the safe custody of the Branch Seal (if any), and Branch documents, securities and accumulated funds;
 - (viii) prepare, keep and/or file or cause to be prepared, kept and/or filed, all Branch documents and records required under the provisions of the Industrial Relations Act 1988 and the Regulations or any other relevant legislation;
 - (ix) receive all monies belonging to the Branch Fund and deposit same in a Bank on behalf of the Branch as soon as practicable;
 - (x) disburse all Branch funds in accordance with the Rules;
 - (xi) ensure that Branch financial records are maintained and that annual accounts are prepared and audited;
 - (xii) monitor the accounts and other affairs of the Branch Divisions, Sub-Divisions and Sub-Branches and for this purpose to have access, whenever requested, to relevant documents and financial records;
 - (xiii) prepare or cause to be prepared, all necessary documents for the Branch Council and the Branch Executive including the minutes of meetings;
 - (xiv) prepare or cause to be prepared, regular financial statements for the Branch Council and the Branch Executive;
 - (xv) prepare or cause to be prepared a statement showing Branch membership by category and financial status as at December 31 of each year and a statement of Branch income and expenditure and a balance sheet as at December 31 of each year and forward such statements to the National Secretary no later than March 31 of each year.
 - (xvi) maintain Registers of Members of the Branch and Branch Office Bearers.
 - (xvii) co-ordinate the activities of Branch Divisions;
 - (xviii) control and supervise the Branch Office and its staff including the appointment and termination of such staff;
 - (xix) initiate legal, industrial or other proceedings on behalf of the Branch before any Court, Commission, Board or Tribunal;
 - (xx) be an ex-officio member of all Branch Governing Bodies and Committees;
 - (xxi) be responsible to the Branch Council and the Branch Executive to the proper performance of his/her duties;
- 29 Persons eligible for membership of the PTA Branch are to make an application to the Branch Secretary: r 10(1). If the Branch Secretary considers the applicant for membership to be ineligible, or is of general bad character, he or she is to refer the application to the Branch Executive: r 10(5). The Branch Secretary is to inform applicants of financial obligations arising from membership and the manner in which a member may resign from the union: r 10(6). All monies due as membership contributions (which include subscription rates, entrance fees and national levies) are to be paid to the Branch Secretary:

r 11(1). The Branch Secretary is to keep the register of members, purge the register of the names and details of members who have resigned and transfer members between branches of the union: r17, r 18 and r 20. The Branch Secretary is also empowered to recover any monies due from a member: r 19. The Branch Secretary is empowered to submit disputes or matters to the Fair Work Commission or other body: r 83(4). The Branch Secretary is also responsible for investigating charges against a member and, unless he or she determines that the matter is without substance, he or she is required to refer the charge to the Branch Executive for determination: r 16.

- 30 There are no powers or functions prescribed for the Branch representatives of the Executive of the State organisation or the Sub-Branch representatives of the Executive of the PTA Branch. However, this is not material as members of each executive they would be required (along with other members of each executive), to carry out the powers and functions of each executive.
- 31 Section 71(4) of the Act does not require that the offices that exist in the Branch are required to have a corresponding office in the State organisation. In this matter it was apparent to the members of the Full Bench that for each office of the State organisation there is a corresponding office in the PTA Branch.

FBM 7 of 2013

- 32 Section 62(2) of the Act prohibits the Registrar from registering any alterations to rules of an organisation that is a matter referred to in s 71(5) of the Act unless so authorised by the Full Bench. Pursuant to s 62(4) of the Act, the requirements of s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application. Section 55(4) of the Act provides that the Full Bench shall refuse an application by the organisation unless it is satisfied that:

- (a) the application has been authorised in accordance with the rules of the organisation; and
- (b) reasonable steps have been taken to adequately inform the members —
 - (i) of the intention of the organisation to apply for registration; and
 - (ii) of the proposed rules of the organisation; and
 - (iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,
 and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection; and
- (c) in relation to the members of the organisation —
 - (i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or
 - (ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;
 and
- (d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and
- (e) rules of the organisation relating to elections for office —
 - (i) provide that the election shall be by secret ballot; and
 - (ii) conform with the requirements of section 56(1),
 and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.

- 33 The first matter about which the Full Bench must be satisfied is that the proposed rule alteration must be authorised by the organisation in accordance with its rules. The authority of the State organisation to alter its rules is found in r 45 of the rules of the State organisation. The power to alter the rules resides with the Executive of the union. Rule 45 provides as follows:

- 45.1 Subject to rule 45.3 of the Rules, the Executive shall have power to rescind, alter or amend these Rules in accordance with the procedure set out in rule 45.2 of the Rules.
- 45.2 Any rescission, alteration or amendment to these Rules shall be of no effect unless it complies with the following provisions:
- 45.2.1 The Secretary shall forward all members of the Executive written notice of the proposed rescission, alteration or amendment of the Rules which sets out the proposal in full;
 - 45.2.2 Such notice shall specify the time and place of the Executive meeting which is to consider the proposal for the rescission, alteration or amendment of the Rules, which meeting shall be not less than one month after the date of the notice;
 - 45.2.3 The resolution meets the requirements of these Rules for carriage of a resolution at a meeting of the Executive.
- 45.3 Any rescission, alteration or amendment to any provisions of these Rules shall be of no effect unless such rescission, alteration or amendment of the Rules is resolved to by the Executive.
- 45.4 Notwithstanding the foregoing in rule 45 of the Rules, the Executive shall also comply with any requirements as to the alteration of the Rules required by section 62 IRA that include but are not necessarily limited to:

- 45.4.1 Notification to all members of the proposal for the alteration of the Rules and the reasons therefore along with a copy of the proposed alterations to the Rules;
- 45.4.2 Notification to all members that any member may object to the proposed alteration of the Rules by forwarding a written objection, within 21 days of notification, to the Registrar.
- 45.5 No alteration of the Rules shall be effective until the Registrar has given to the Union a certificate that the alteration to the Rules has been registered.
- 34 The facts supporting the State organisation's submission that it complied with the rules and the statutory requirements of the Act are supported by the following evidence:
- (a) On 23 August 2013, the Secretary of the State organisation, Paul Robinson, sent by email a notice of meeting of the Executive to all members of the Executive. The notice set out the date, time and place of the meeting and the proposed alterations to the rules.
 - (b) On 24 September 2013, the Executive of the State organisation met. The minutes of the meeting of the Executive record that each member of the Executive had received a notice of meeting of the Executive dated 23 August 2013 with three attachments which set out the alterations and additions to the rules of the union and the reasons therefor. One of the alterations which was sought was the addition of a new Part VIII to provide for office bearers to be persons holding office in the PTA Branch.
 - (c) It is clear from these minutes that each member of the Executive had received the agenda no less than seven days prior to the date of the meeting as required by r 6.4 of the rules of the State organisation. The minutes record that six members of the Executive were present and the following relevant resolutions were unanimously resolved:
 - (i) Subject to the compliance by the Executive of the union with r 45.4 of the rules and to the receipt of a certificate from the Registrar to the registration of the alterations of the rules of the union, to adopt the alterations and additions to the rules of the union set out in attachment B.
 - (ii) Notice be given to all members of the union of the proposal for the alterations and additions to the rules of the union by sending out to each member of the union copies of three attachments. (The first was a current copy of the rules (attachment A). The second was a copy of the rules showing the alterations (attachment B). The third attachment set out the reasons for the alterations and the reasons for seeking a s 71 certificate and the relevant history of the matter (attachment C)).
 - (iii) In the event that 5% or more of the members of the union object to the proposed alterations and additions by forwarding written objection to the Registrar the Secretary of the union was authorised to request the Registrar to arrange for the conduct of a ballot of the members of the union to determine if the majority of the members of the union who vote in the ballot authorise or approve the proposed alterations and additions to the rules of the union.
 - (iv) The Secretary of the union was authorised to disseminate all necessary information to the members of the union, in the name of the Executive, relating to the proposal for the alterations and additions to the rules of the union by sending each of the members of the union the documents referred to in paragraph (ii).
 - (v) The Secretary of the union was directed to take steps to send via Australia Post to all members of the union at their residential address the documents in paragraph (ii). Also to publish that information on the union's RTBU website and, to send via email to all members of the union who have provided the union with an email address the documents and to post the documents on a notice board at each of the depots of the Public Transport Authority of Western Australia where members of the union work.
 - (d) Pursuant to r 6.5 it is clear that a quorum for a meeting of the Executive was present as r 6.5 of the rules of the State organisation provides that a quorum for a meeting of the Executive shall be a majority of the members of the Executive entitled to attend the meeting.
- 35 In a statutory declaration made by Mr Robinson on 27 September 2013, he set out the steps he took to comply with the resolutions made by the Executive on 24 September 2013. These were as follows:
- (a) On 25 September 2013, he sent by mail to 595 members of the union copies of Attachments A, B and C together with a memorandum that advised each member that any of them could object to the proposed alterations and additions to the rules of the State organisation by forwarding a written objection to the Registrar within 21 days of the date of the memorandum.
 - (b) There were two people on the membership list that were not sent by post copies of those documents. One was himself and the other was a Mr Tan for whom the State organisation does not have a residential address.
 - (c) On 25 September 2013, he caused a webpage to be created and put up on the website of the State organisation headed 'WA Rail Tram and Bus Union', together with links to attachments A, B and C.
 - (d) Over the period 25 September 2013 to 27 September 2013, he put in a prominent place in a number of places and crib rooms of the Public Transport Authority being the place of employment of the members of the State organisation attachments A, B and C.
 - (e) On 25 September 2013, Mr Kivraj Singh, the industrial officer of the State organisation, sent an email attaching attachments A, B and C to each member of the State organisation who had provided the State organisation with a non-Public Transport Authority email address.
- 36 When regard is had to this evidence it was clear to the members of the Full Bench that r 45 of the rules of the State organisation had been complied with. In particular:

- (a) The Secretary had forwarded all members of the Executive written notice which set out the proposed alteration or amendment of the rules.
 - (b) The notice to the Executive specified the time and place of the Executive meeting which was to consider the proposal and the meeting was not less than one month after the date of the notice.
 - (c) The resolution to alter the rules met the requirements of r 6.5 for carriage of a resolution at a meeting of the Executive.
 - (d) Notification was given to all members of the proposal and the reasons therefor, along with a copy of the proposed alterations to the rules.
 - (e) Notification was also given to all members that any member could object to the proposed alteration of the rules by forwarding written objection, within 21 days of notification, to the Registrar.
- 37 The members of the Full Bench were also satisfied that members of the State organisation had been afforded a reasonable opportunity to make an objection to the making of the alteration to the rules and we noted that no member of the State organisation had objected to the making of this application or to the variation of the rules.
- 38 For these reasons, the Full Bench was satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act had been complied with. Section 55(4)(e) and s 56(1) of the Act provide for procedural rules that are to be provided for the rules of all organisations in respect of elections by secret ballot. The State organisation's current rules provide for the procedures as required by these provisions of the Act and the alterations sought in this application do not relate to those matters.

2014 WAIRC 00399

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

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

APPLICANT**CORAM**

FULL BENCH

THE HONOURABLE J H SMITH, ACTING PRESIDENT
 CHIEF COMMISSIONER A R BEECH
 COMMISSIONER S J KENNER

DATE

MONDAY, 12 MAY 2014

FILE NO/S

FBM 6 OF 2013

CITATION NO.

2014 WAIRC 00399

Result

Declaration and order issued

Appearances**Applicant**

Mr P G Laskaris (of counsel)

Declaration and Order

This matter having come on for hearing before the Full Bench on 12 May 2014, and having heard Mr P G Laskaris (of counsel) on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby declares and orders that —

- (1)
 - (a) The Australian Rail, Tram and Bus Industry Union, West Australian PTA Branch is the counterpart Federal body (the counterpart Federal body) of The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the State Organisation).
 - (b) The rules of the State Organisation and its counterpart Federal body relating to the qualification of persons for membership are deemed to be the same.
 - (c) The rules of the counterpart Federal body prescribing the offices that exist in the counterpart Federal body are deemed to be the same as the offices that exist in the State Organisation.
- (2) The application is hereby and is otherwise dismissed.

By the Full Bench
 (Sgd.) J H SMITH,
 Acting President.

[L.S.]

2014 WAIRC 00401

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES WEST AUSTRALIAN BRANCH	APPLICANT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER S J KENNER	
DATE	MONDAY, 12 MAY 2014	
FILE NO/S	FBM 7 OF 2013	
CITATION NO.	2014 WAIRC 00401	
Result	Order made	
Appearances		
Applicant	Mr P G Laskaris (of counsel)	

Order

This matter having come on for hearing before the Full Bench on 12 May 2014, and having heard Mr P G Laskaris (of counsel) on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The Registrar is hereby authorised to register the alteration to the rules of the applicant by inserting new Part VIII after r 47.2.22:

PART VIII - OFFICE BEARERS TO BE PERSONS HOLDING OFFICE IN PTA BRANCH**48. PTA Branch of RTBU**

- 48.1 Each Office of the Union from such time as the Executive may determine shall be held by the person who in accordance with the rules of the PTA Branch of the RTBU holds the corresponding office in that body.
- 48.2 Any determination by the Executive in accordance with rule 48.1 shall be notified to the Registrar and from the date specified in the notification all Offices in the Union will be filled in accordance with rule 48.1.

By the Full Bench
(Sgd.) J H SMITH,
Acting President.

[L.S.]

2014 WAIRC 00439

APPLICATION PURSUANT TO S.62 - APPLICATION TO VARY CURRENT RULE 5 BY REPLACING IT WITH A NEW
RULE 5 - COUNTERPART FEDERAL BODY AND APPLICATION FOR DECLARATION PURSUANT TO S.71

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2014 WAIRC 00439
CORAM : THE HONOURABLE J H SMITH, ACTING PRESIDENT
 CHIEF COMMISSIONER A R BEECH
 COMMISSIONER J L HARRISON
HEARD : TUESDAY, 20 MAY 2014
DELIVERED : WEDNESDAY, 28 MAY 2014
FILE NO. : FBM 3 OF 2014, FBM 4 OF 2014
BETWEEN : THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA,
 WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS
 Applicant

CatchWords : Industrial Law (WA) - Application pursuant to s 71 for declaration relating to qualifications of persons for membership of a State Branch of a Federal organisation and offices that exist within the State organisation - Application to alter rules of an organisation to enable the holders of an office in the counterpart Federal body to hold an office in a State organisation
Legislation : *Industrial Relations Act 1979* (WA) s 55(4), s 55(4)(b), s 55(4)(c), s 55(4)(d), s 55(4)(e), s 56(1), s 62(2), s 62(4), s 71, s 71(2), s 71(3), s 71(4), s 71(5), s 71(5)(a), s 71(6)
Result : Order and declaration made
Representation:
Applicant : Ms N Ireland

Case(s) referred to in reasons:

Jones v Civil Service Association Inc [2003] WASCA 321; (2003) 84 WAIG 4
 Re Western Australian Prison Officers' Union of Workers [2014] WAIRC 00006; (2014) 94 WAIG 62

Reasons for Decision

FULL BENCH:

Introduction

- 1 The Full Bench had before it two applications made under the *Industrial Relations Act 1979* (WA) (the Act). In FBM 4 of 2014, the applicant (the State organisation) sought the following declarations:
 1. A declaration pursuant to section 71 of the Industrial Relations Act that the Communications, Electrical, Energy, Postal, Plumbing and Allied Services Union of Australia Plumbing Division WA Branch is the counterpart federal body of the Plumbers and Gasfitters Union of Australia West Australian Branch Industrial Union of Workers.
 2. A declaration pursuant to section 71(2) of the Act that the rules of the counterpart body relating to the qualification of persons for membership are the same as or deemed to be the same as the qualifications of persons for membership of the registered state organisation.
 3. A declaration pursuant to section 71(4) of the Act that the officers within the counterpart federal body are the same as or are deemed to be the same as the officers within the state organisation.
- 2 In FBM 3 of 2014, the State organisation made an application pursuant to s 62(2) and s 71(5)(a) of the Act to amend r 5 of the rules of the State organisation to delete the current rule (5 – Adoption of Rules of the Federal Organisation – Reserved) and replace that rule with a new title and a rule that provided for each office in the State organisation to be held by a person who holds a corresponding office in its counterpart Federal body.
- 3 After hearing from the State organisation on 20 May 2014, the Full Bench was of the opinion that the applications should be granted and made the following orders and declarations:
 - (a) In FBM 4 of 2013, the following declaration was made:
 1. The Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Western Australian Branch is the counterpart Federal body (the counterpart Federal body) of The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers (the State organisation).

2. The rules of the State Organisation and its counterpart Federal body relating to the qualification of persons for membership are deemed to be the same.
3. The rules of the counterpart Federal body prescribing the offices that exist in the counterpart Federal body are deemed to be the same as the offices that exist in the State Organisation.

(b) In FBM 3 of 2014, the following order was made:

The Registrar is hereby authorised to register the alteration to the rules of the applicant by deleting r 5, **5 – ADOPTION OF RULES OF THE FEDERAL ORGANISATION – RESERVED** and inserting:

5 - COUNTERPART FEDERAL BODY

Each Office within the Union will be held by the person who in accordance with the rules of the Communications, Electrical, Energy, Postal, Plumbing and Allied Services Union of Australia Plumbing Division WA Branch holds the corresponding office in that body.

4 These reasons set out the reasons why the Full Bench made the order and declaration.

FBM 4 of 2014

- 5 The State organisation is a registered organisation who represents employees employed as plumbers.
- 6 On 7 October 1996, the Registrar of the Commission had granted a s 71 certificate that exempted the State organisation from election for its offices from 25 September 1996. The certificate also provided that as from that date the persons holding office in the Western Australian Branch of the Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia shall for all purposes be the offices of the State organisation. However, after the certificate was issued the State organisation did not alter its rules to give effect to the certificate to provide for offices within the State organisation to be held by persons who hold corresponding offices in its counterpart Federal body, the Communications, Electrical, Electronic, Energy, Postal, Plumbing and Allied Services Union of Australia Plumbing Division WA Branch.
- 7 In 2012 it came to the attention of the State organisation that it was unable to rely upon the validity of the s 71 certificate granted in 1996. On 21 May 2012, a member of the State organisation, Brendan Reeve, made application to the President for the appointment of an interim executive because there had not been any valid elections for offices of the State organisation since 1996.
- 8 On 8 June 2012, the Acting President made the following order by consent ([2012] WAIRC 00343; (2012) 92 WAIG 604):
 1. An Interim Committee of Management is established, constituted as follows:
 1. President
Robert Manhood
 2. Vice-President
Matthew Coulter
 3. Secretary
Leslie McLaughlan
 4. Trustees
Gerry McDonald
Jamie Hughes-Owen
 5. Committee persons
James Balfour
Jay Dellavanzo
Mark Donaldson
Mark Henner
 2. Rule 23 - Elections to Office shall be waived for a period of 12 months from the date of this order.
 3. Whilst paragraph 1 and paragraph 2 of this order remain in force, r 18 and r 19(1) are varied, insofar as the offices of Trustees and Secretary are required to be elected pursuant to r 23.
 4. Until further order, the Interim Committee of Management shall have the authority to exercise all of the powers, duties and functions of the Committee of Management and each of the holders of office as set out in paragraph 1 of this order shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.
 5. There be liberty to the parties to apply to vary the terms of this order.
- 9 On 30 April 2013, Mr McLaughlan, the Secretary of the State organisation, wrote to the Associate to the Acting President advising that they sought an extension of the period that the interim committee was to remain in place for a further period of three months to enable it to put arrangements in place within its Federal organisation. Its Federal body, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU) has three

divisions, communications, electrical and plumbing. The Plumbing Division in Western Australia was incorporated into the Electrical Division in 2006. After much debate it was decided that the plumbing members in Western Australia would now return to the Plumbing Division. Mr McLaughlan also advised that they were now embarking upon a process of changing the rules of both the Electrical and Plumbing Divisions of the CEPU in order to reflect a change in the eligibility rules of the CEPU and once that change had been approved by the CEPU and had been approved by the Fair Work Commission, it was anticipated that elections would be held for the new Western Australian Branch of the Plumbing Division of the CEPU. After that correspondence was received on behalf of the State organisation, the applicant in PRES 1 of 2012 advised the Commission that he consented to a variation of order 2 of the order made on 8 June 2012 to provide that r 23 should be waived until the close of business on 7 September 2013. An order was then made on 2 May 2013 in those terms ([2013] WAIRC 00256; (2013) 93 WAIG 408).

- 10 On 27 August 2013, a representative for the applicant in PRES 1 of 2012 advised the Associate to the Acting President that a further extension of the period that the interim committee was to remain in place was required as there had been delay in rule changes being approved by the Fair Work Commission because of a backlog in work. The State organisation advised that it agreed to a further order being made and on 29 August 2013 an order was made by the Acting President to waive r 23 until close of business on 7 March 2014 ([2013] WAIRC 00777; (2013) 93 WAIG 1379).
- 11 On 6 February 2014, a representative of the applicant in PRES 1 of 2012 by an email to the Associate to the Acting President requested that a further extension of the interim committee be allowed. Although the changes to the rules of the CEPU had been approved by the Fair Work Commission on 3 February 2014 which meant that the Plumbing Division of Western Australia had now been re-established and removed from the coverage of the Electrical Division, it was now in the process of elections for the Plumbing Division. After the representative of the State organisation advised the Commission that it consented to the extension, the Acting President made an order on 6 March 2014 waiving r 23 until close of business on 7 June 2014 ([2014] WAIRC 00167; (2014) 94 WAIG 203).
- 12 After that the counterpart Federal body was in place, the State organisation sought a declaration pursuant to s 71(2) of the Act to facilitate the orderly and efficient administration and coordination of the State organisation and its counterpart Federal body (who is the Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Western Australian Branch), by only having one set of elections to fill the corresponding offices of each organisation. A certificate issued pursuant to s 71(5) of the Act will also enable it if it wishes to make an agreement with the CEPU relating to the management and control of funds: s 71(6). Section 71 of the Act provides:

(1) In this section —

Branch means the Western Australian Branch of an organisation of employees registered under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);

counterpart Federal body, in relation to a State organisation, means a Branch the rules of which —

- (a) relating to the qualifications of persons for membership; and
- (b) prescribing the offices which shall exist within the Branch,

are, or, in accordance with this section, are deemed to be, the same as the rules of the State organisation relating to the corresponding subject matter; and

State organisation means an organisation that is registered under Division 4 of Part II.

- (2) The rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership are deemed to be the same if, in the opinion of the Full Bench, they are substantially the same.
- (3) The Full Bench may form the opinion that the rules referred to in subsection (2) are substantially the same notwithstanding that a person who is —
 - (a) eligible to be a member of the State organisation is, by reason of his being a member of a particular class of persons, ineligible to be a member of that State organisation's counterpart Federal body; or
 - (b) eligible to be a member of the counterpart Federal body is, for the reason referred to in paragraph (a), ineligible to be a member of the State organisation.
- (4) The rules of a counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.
- (5) Where, after the coming into operation of this section —
 - (a) the rules of a State organisation are altered pursuant to section 62 to provide that each office in the State organisation may, from such time as the committee of management of the State organisation may determine, be held by the person who, in accordance with the rules of the State organisation's counterpart Federal body, holds the corresponding office in that body; and
 - (b) the committee of management of the State organisation decides and, in the prescribed manner notifies the Registrar accordingly, that from a date specified in the notification all offices in the State organisation will be filled in accordance with the rule referred to in paragraph (a),
 the Registrar shall issue the State organisation with a certificate which declares —
 - (c) that the provisions of this Act relating to elections for office within a State organisation do not, from the date referred to in paragraph (b), apply in relation to offices in that State organisation; and

- (d) that, from that date, the persons holding office in the State organisation in accordance with the rule referred to in paragraph (a) shall, for all purposes, be the officers of the State organisation, and the certificate has effect according to its tenor.
- (6) A State organisation to which a certificate issued under this section applies may, notwithstanding any provision in its rules to the contrary, make an agreement with the organisation of which the State organisation's counterpart Federal body is the Branch, relating to the management and control of the funds or property, or both, of the State organisation.
- (7) Where a memorandum of an agreement referred to in subsection (6) is —
- (a) sealed with the respective seals of the State organisation and the other organisation concerned; and
 - (b) signed on behalf of the State organisation and the other organisation by the persons authorised under their respective rules to execute such an instrument; and
 - (c) lodged with the Registrar,
- the Full Bench may, if it is satisfied that the terms of the agreement are not detrimental to the interests of persons who are eligible to be members of the State organisation and of its counterpart Federal body and will not prevent or hinder the State organisation from satisfying any debt or obligation howsoever arising, approve the agreement.
- (8) Where the Full Bench approves an agreement under subsection (7) the Registrar shall —
- (a) register the memorandum as an alteration to the rules of the State organisation; and
 - (b) amend, where necessary, the certificate issued to the State organisation under subsection (5) by declaring that the State organisation is, from the date of registration of the memorandum, exempted from compliance with such provisions of this Act and to such an extent as the Full Bench may, having regard to the terms of the memorandum, direct; and
 - (c) notify the State organisation in writing of the matters referred to in paragraphs (a) and (b).
- (9) After the issue to a State organisation of a certificate or an amended certificate under this section —
- (a) the rule referred to in subsection (5)(a) and a memorandum registered under subsection (8)(a) shall not be altered unless the alteration is approved by the Full Bench; and
 - (b) an alteration to any rule of the State organisation other than the rule referred to in paragraph (a) may be registered by the Registrar if he is satisfied that the rule as so altered is the same as a rule of the State organisation's counterpart Federal body; and
 - (c) every member of the State organisation's counterpart Federal body who is eligible to be a member of the State organisation shall, for all the purposes of this Act and of any award, industrial agreement or order, be deemed to be a member of the State organisation.
- (10) Before granting approval to an alteration of the rule or memorandum referred to in subsection (9)(a), the Full Bench may require compliance by the State organisation with such conditions as the Full Bench considers appropriate.
- (a) **Are the rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership the same or can they be deemed to be the same?**
- 13 The State organisation says its eligibility rules and the rules of its counterpart Federal body are substantially the same. They have 669 members and the counterpart Federal body also has 669 members. The eligibility rule of the State organisation is set out in r 4.1 which provides as follows:
- The Union shall consist of an unlimited number of persons who have been admitted as members in accordance with the Rules of the Union, and who are bona fide workers employed or usually employed as plumbers on house, ship, sanitary, chemical or general plumbing work on water (hot or cold), steam, gas air, vacuum, heating or ventilation, appliances, fittings, services or installations and who executes any gas fitting, pipe fitting, domestic engineering work or drainage work in connection therewith; together with such other person whether employed in the industry or not, as have been appointed officers of the Union or its branches, and admitted as members thereof.
- 14 The eligibility rule of the counterpart Federal body is provided for in r 2.4 of the rules of the CEPU which provides as follows: Without limiting or in any way being limited by sub rules 2.1 to 2.3 inclusive and sub rules 2.5 to 2.21 inclusive, the Union shall also consist of an unlimited number of persons who have been admitted as members in accordance with the Rules of the Union and:
- 2.4.1 who are bona fide workers employed or usually employed in executing any plumbing, gasfitting, pipe-fitting, or domestic engineering work, whether prefabricated or not, or who execute any work in or in connection with:
 - 2.4.1.1 Sheet lead, galvanised iron, or other classes of sheet metal, or any other materials which supercede [sic] the materials fixed by plumbers;
 - 2.4.1.2 lead, wrought, cast or sheet iron, copper, brass or other classes of pipe work;
 - 2.4.1.3 Water (hot or cold), steam, gas, air, vacuum, heating or ventilating appliances, fittings, services or installations;
 - 2.4.1.4 house, ship, sanitary, chemical or general plumbing and drainage; or

- 15 Persons defined in r 2.4 of the rules of the CEPU are covered by the registered rules of the Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the Plumbing Division): r 3 of the rules of the Plumbing Division. The rules of the Plumbing Division were altered on 3 February 2014 in matter R 2013/408. The amendments registered on that date effected the transfer of persons eligible to be members pursuant to r 2.4 of the rules of the CEPU to the Western Australian Branch of the Plumbing Division.
- 16 Under s 71(2) of the Act, the Full Bench can make a declaration that the rules of the State organisation and its counterpart Federal body relating to the qualifications of persons for membership can be deemed to be the same if it forms the opinion that the rules of each body are substantially the same. Further, s 71(3) of the Act provides the Full Bench may form the opinion that the rules referred to in s 71(2) are substantially the same notwithstanding a person who is eligible to be a member of the counterpart Federal body is ineligible to be a member of the State organisation.
- 17 After reviewing the rules of the State organisation, r 2.4 of the rules of the CEPU and the rules of the Plumbing Division, the Full Bench was of the opinion that it is clear that all members of the State organisation are also eligible to be members of the counterpart Federal body. It is apparent that whilst under r 4 of the rules of the State organisation that all persons who are eligible to be members are described as persons employed as plumbers and r 2.4 of the rules of the CEPU, whilst they do not describe those persons as plumbers, it is clear from a description of the work carried out by the persons eligible to be members of the Plumbing Division that they carry out plumbing work. For these reasons, the Full Bench formed the opinion that the eligibility rules of the State organisation and the counterpart Federal body are substantially the same within the meaning of s 71(2) and s 71(3) of the Act.
- (b) Are the offices that exist in the counterpart Federal body the same as the offices of the State organisation?**
- 18 When determining whether the offices that exist in the Branch (the counterpart Federal body) are the same as the offices of the State organisation, it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules: *Jones v Civil Service Association Inc* [2003] WASCA 321; (2003) 84 WAIG 4 [35] (Pullin J).
- 19 Pursuant to s 71(4) of the Act, the rules of the counterpart Federal body prescribing the offices which shall exist in the Branch are deemed to be the same as the rules of the State organisation prescribing the offices which shall exist in the State organisation if, for every office in the State organisation there is a corresponding office in the Branch.
- 20 In *Re Western Australian Prison Officers' Union of Workers* [2014] WAIRC 00006; (2014) 94 WAIG 62 the Full Bench considered how the task of assessing whether the functions and powers of each office in an organisation registered under the Act and its counterpart Federal body should be assessed. In its reasons for decision, the Full Bench observed:

It is apparent from the scheme of the provisions of s 71 when read with the definition of 'office' in s 7(1) of the Act together with the provisions in the Act that deal with the subject matter of elections of office holders of an organisation (s 56, s 56A, s 57) and the provisions of s 71A which authorises a State organisation to adopt the rules of its counterpart Federal body, that it is intended that once a declaration is made by a Full Bench and a certificate is issued by the Registrar of the Commission under s 71(5) of the Act, a State organisation and its counterpart Federal body can effectively operate as one organisation. If they wish to do so they can jointly manage the property and funds of both organisations by entering into a memorandum of agreement with the counterpart Federal body under s 71(6) and s 71(7) of the Act relating to the management and control of the funds or property, or both, of the State organisation. It is also clear that by authorising persons holding office in a counterpart Federal body to hold office in a State organisation is that effectively the two organisations can be operated for many purposes as if the organisations were as one.

Where there is no difference between the functions and powers of the offices of both organisations, clearly the offices can be deemed to be the same. However, if the powers and functions of the offices of the State organisation and its counterpart Federal body are not sufficiently similar, a decision or decisions of the management committees of the organisations could in some circumstances be challenged as invalid. If, for example, a State management committee and its counterpart Federal body committee of management sit at the same time with the same officers holding office in each committee and make decisions that collectively affect the members and/or property or funds of both organisations, the question is likely to arise if the issue is to be dealt with differently or by different persons holding offices under the rules, which rules do they have to comply with in making decisions that affect members of both organisations, if it is not possible to comply with the rules of both organisations.

Whilst Pullin J in *Jones* at [35] found that when determining whether the offices that exist in a counterpart Federal body are the same as the offices in the State organisation it is necessary for the Full Bench to consider the functions and powers of each office based on a consideration of the similarity or otherwise of the content of the rules, his Honour did not analyse how this task is to be conducted. Nor did his Honour formulate any principles upon which similarity of powers and functions of offices should be assessed. Section 71(4) of the Act deems offices of the State organisation to be the same as offices in the counterpart Federal body if there is a corresponding office for each State office in the counterpart Federal body. For an office to 'correspond', its functions and powers must be similar. To determine whether there is similarity, the functions and powers must have a degree of similarity that is sufficient to enable a finding to be made that offices can be deemed to be the same and thus correspond within the meaning of s 71(4) of the Act.

In *Re CFMEU* after comparing each office of the State organisation and its counterpart Federal body, the Full Bench was unable to be satisfied that there was sufficient similarity in the functions and powers of the some offices to be sufficiently similar, or the same or substantially the same [37]. In respect of other offices the Full Bench found there was sufficient similarity in the function and powers of offices to form the requisite opinion [44], [45], [46], [47] and [48].

In assessing similarity, it is also necessary to assess whether a conflict arises between the functions and powers of the duties of each office of the State organisation and each office that is not a 'corresponding' office in the counterpart Federal body but corresponds to another office. This issue arose in *Re CFMEU*. One of the reasons why the Full Bench in that

matter found that the offices of the President of the State organisation and the Divisional Branch President could not be deemed to be the same is that the Divisional Branch President had some of the powers and functions of a treasurer which were in part similar to the powers of the Treasurer of the State organisation [38]. In these circumstances, a clear conflict arose as the functions and powers of one office could be performed by the holder of another office.

Where an office of a State organisation is said to correspond with an office of its counterpart Federal body, no conflict will usually arise if each office has the same or substantially similar functions and power. Nor will any conflict usually arise if any of the offices of the counterpart Federal body have additional functions and powers that are not comparable to the powers and functions of any office in the State organisation. In such a case, no conflict arises if those other functions and powers are simply 'additional'. For example, some differing additional obligations arise out of the fact that the Act and the *Fair Work (Registered Organisations) Act* impose different regulatory obligations on the organisations [21] - [26].

- 21 Pursuant to r 9 of the rules of the State organisation, subject to the review and control of a special or general meeting, the business of the State organisation is conducted by a committee of management consisting of the President, Vice-President, Secretary, Assistant Secretary (if any), two trustees, organisers (if any) and not more than nine other committee persons, the number of whom shall be determined by the annual meeting or special meeting of the members. Pursuant to r 48.2 of the rules of the Plumbing Division, a committee of management is established for each State Branch including the counterpart Federal body in the same terms as the committee of management of the State organisation. The committee of management of the Branch is also subject to the review and control of a special or general meeting of the Branch and the committee of management consists of a Branch President, Branch Vice-President, Branch Secretary, Branch Assistant Secretary (if any), two Branch trustees, Branch organisers (if any) and not more than nine other committee persons, the number of whom shall be determined by the Branch at an annual meeting or a special general meeting of the members: r 48.2.3 of the rules of the Plumbing Division.
- 22 The powers and functions of the President of the State organisation and the Branch President of the counterpart Federal body are sufficiently similar. The President and the Branch President are, so far as possible, required to:
 - (a) preside at all meetings of the Union, and superintend the discussion of all business tabled for consideration;
 - (b) sign all minutes of meetings when confirmed, vouchers and other documents to which their signature is requisite;
 - (c) be ex-officio President of all committees: r 16(1) of the rules of the State organisation and r 53 of the rules of the Plumbing Division.
- 23 The President is also, so far as possible, required to exercise a deliberate vote only: r 16(1) of the rules of the State organisation. However, the Branch President can exercise a deliberate vote only and this power is not subject to the qualification which applies to the President of the State organisation which he or she is required to do that so far as possible: r 53.2 of the rules of the Plumbing Division. The President can direct a member to leave a meeting if the member behaves in an insulting or offensive manner: r 16(2)(c) and r 35(7) of the rules of the State organisation. The Branch President does not have a similar power.
- 24 The President and Branch President also have the power to direct an audit of the books and accounts of the union: r 20 of the rules of the State organisation and r 60.2.1 of the rules of the Plumbing Division. The President and the Secretary are empowered in certain circumstances to convene a special meeting of members: r 35(5) of the rules of the State organisation. The Branch President and the Branch Secretary also appear to have that power: r 61.2.2 of the rules of the Plumbing Division. The Branch President, however, can execute industrial agreements: r 45.4 of the rules of the Plumbing Division. The President of the State organisation does not have such a power. Such agreements are to be executed under seal by the Secretary of the State organisation: r 40 and r 41 of the rules of the State organisation. The Branch Secretary also is empowered to affix the Branch seal to any instrument: r 46 of the rules of the Plumbing Division.
- 25 Pursuant to r 70 of the rules of the Plumbing Division, the Branch President, the Branch Secretary, or the Branch Assistant Secretary may execute documents required to be executed by law.
- 26 The powers and functions of the Vice-President of the State organisation and the Branch Vice-President of the counterpart Federal body are the same. Both are required to take the chair in the absence of the President in the case of the State organisation and the Branch President in the case of the counterpart Federal body and may exercise all the powers of the President and Branch President respectively. They both also are empowered to assist, the President in the case of the State organisation and the Branch President in the case of the counterpart Federal body, to maintain order at the meetings: r 17 of the rules of the State organisation and r 54 of the rules of the Plumbing Division.
- 27 When the rules creating the powers and functions of the Secretary of the State organisation and the Branch Secretary of the counterpart Federal body are considered, it is clear that those powers and functions are sufficiently similar.
- 28 The Secretary of the State organisation has a wide variety of powers and functions. Under r 6 of the rules of the State organisation, the Secretary is required to inform persons making application to become a member of the union of financial obligations arising from membership and the manner in which they may resign from the union. Under r 13, the Secretary is to receive all levies which are paid by the members of the union. The other duties of the Secretary are set out in r 19(2) of the rules of the State organisation as follows:

The Secretary shall:

 - (a) attend all meetings, take note of all necessary proceedings, sign all cheques, money orders or documents to which the Secretary's signature is requisite, and countersign all cash accounts on behalf of the Union.
 - (b) cause to be received all enrolment fees, contributions, levies, fines and dues payable by members to the Union.
 - (c) cause to be kept and produced as may be required, all books, documents and accounts to the auditors, together with a balance sheet showing correctly the financial and numerical position of the Union.

- (d) cause to be attended to and filed all correspondence or copies thereof and make out and forward all returns that are from time to time required, pursuant to the Industrial Relations Act, 1979.
 - (e) read at each ordinary meeting of the Union or Committee of Management an account of the receipts and expenditure for the Union from meeting to meeting.
 - (f) be an ex-officio member and Secretary of all committees.
 - (g) cause to be kept a register of all members in the State.
 - (h) be liable to a fine of eleven dollars (\$11.00) if he/she fails to forward any returns required within the time specified in these Rules.
 - (i) cause to be kept a current account of the receipts and expenditure of the Union.
- 29 Pursuant to r 30, the Secretary is to receive payment of all enrolment fees, contributions, levies and fines. Pursuant to r 32(2) of the rules of the State organisation, the Secretary, together with at least one trustee, is to sign all cheques. Under r 33, it is a function of the Secretary to sue for or recover all claims for fees, contributions, levies, fines or liabilities due or payable to the union by any member. Pursuant to r 39, the Secretary is to represent the union before the Commission, the Western Australian Industrial Appeal Court or any other tribunal appointed pursuant to the provisions of the Act. The Secretary is also required to furnish a duly audited statement of receipts and expenditure and balance sheet of the union to the Registrar: r 43 of the rules of the State organisation.
- 30 The powers and functions of the Branch Secretary of the counterpart Federal body are partially set out in r 55 of the rules of the Plumbing Division. Rule 55 provides as follows:
- 55.1 The Branch Secretary shall be elected by the members, as provided for in Rule 49 'Branch Elections', and shall receive such salary as the Divisional Council may from time to time determine.
 - 55.2 The Branch Secretary shall:
 - 55.2.1 attend all meetings, take note of all necessary proceedings, sign all cheques, money orders or documents to which his/her signature is requisite, and countersign all cash accounts on behalf of the Branch;
 - 55.2.2 receive all enrolment fees, contributions, levies, fines and dues payable by members to the Branch;
 - 55.2.3 produce as may be required all books, documents and accounts to the Auditors, together with a balance sheet showing correctly the financial and numerical position of the Branch;
 - 55.2.4 attend to and file all correspondence or copies thereof and make out and forward all returns that may from time to time be required by the Divisional Council or otherwise may be necessary;
 - 55.2.5 read at each Ordinary Meeting of the Branch or Committee of Management an account of the receipts and expenditure for the Branch from meeting to meeting;
 - 55.2.6 be an ex-officio member and Secretary of all Committees;
 - 55.2.7 keep a register of all members resident in the State or Territory;
 - 55.2.8 forward to the General Secretary the names of all new members admitted;
 - 55.2.9 forward to the General Secretary an up-to-date list of names and addresses of all members and/or an up-to-date list of names and addresses of sections of members whenever requested by the General Secretary;
 - 55.2.10 forward to the General Secretary within eight (8) weeks of the close of each financial period the amount prescribed in Sub-rule 41.6 together with three (3) duly audited and signed statements for such financial period showing:
 - 55.2.10.1 a total of receipts and disbursements under their respective headings,
 - 55.2.10.2 the total credit or debit balance of each fund, and
 - 55.2.10.3 the total membership of each Branch;
 - 55.2.11 forward to the General Secretary all moneys payable to the Divisional Council, together with a full statement showing the details of all moneys forwarded.
- 31 Pursuant to r 6.1, the Branch Secretary, like the Secretary of the State organisation, is required to inform persons who wish to be members of the counterpart Federal body of the financial obligations arising from membership and the circumstances and the manner in which a member may resign. All applications for membership are also to be lodged with the Secretary of the Branch: r 6.5. Pursuant to r 11.3, the Branch Secretary is responsible for the remitting of levies to the General Secretary. Under r 15, the Branch Secretary is responsible for all claims for fees, contributions, levies, fines or liabilities due or payable to the union by any member and to sue and recover those dues. The Branch Secretary is also responsible for the transfer of members from one Branch to another: r 17. Pursuant to r 39, all enrolment fees, contributions, levies and fines payable by members are to be paid to the Branch Secretary. Under r 41, all disbursements are to be duly authorised by the Branch Secretary. The Branch Secretary is also responsible for sending the duly audited statements to the Head Office: r 41.7. The Branch Secretary is also required to present an audited balance sheet to the committee of management at the end of each financial year: r 60.2.3 of the rules of the Plumbing Division. Pursuant to r 66.2, the Branch Secretary is required to forthwith call a meeting of the committee of management whenever a dispute arises between any employer and a member or members: r 66.1 and r 66.2 of the rules of the Plumbing Division. The Branch President and Branch Secretary are responsible for convening of Branch meetings: r 61.2 and r 61.3.

- 32 The Branch Secretary, subject to r 41.11, also exercises the powers of the Branch Trustees: r 72.7. Rule 41.11 is not relevant. This rule provides for interim arrangements for the management of funds until an agreement is reached by the Branch council and the divisional executive that the Western Australian Branch has the resources and capacity to independently administer the fund. The Secretary does not have a power to exercise the powers of the Trustees. However, we are of the opinion that this does not raise a conflict as the Secretary has in effect the same functions and powers as the Trustees.
- 33 Under r 10 of the rules of the State organisation, the offices of Assistant Secretary or Organiser are created by a determination at an annual meeting or a special meeting of members. The functions of those offices are to generally assist in conducting the business of the union under the direction of the Secretary and to carry out the duties of the Secretary during his or her temporary absence. The functions and duties of the Branch Assistant Secretary or Organiser are the same under r 56.2 of the rules of the Plumbing Division. However, under r 56.1, the creation of the offices is in the hands of the Branch committee of management who is empowered with a discretion to create those offices. Whilst the process of creation of the positions of Branch Assistant Secretary or Organiser are different to the creation of the office of Assistant Secretary or Organiser in each of the rules governing the two organisations, the powers and functions of those offices are the same.
- 34 The powers and functions of the offices of Trustees and Branch Trustees are also the same: r 18 of the rules of the State organisation and r 57 of the rules of the Plumbing Division. In each case they are respectively responsible for the safekeeping of funds and property and the custody, control and management of each union. They are also required to sign all cheques: r 18 of the rules of the State organisation and r 57 and r 41.8 of the rules of the Plumbing Division.
- 35 There are no powers, duties or functions prescribed for committee members of the State organisation or the committee members of the counterpart Federal body. However, this is not material as the holders of those offices would be required (along with other members of each of the committees of management) to carry out the powers and functions of each committee of management. Thus, it was found that the powers and functions of these offices are sufficiently similar.
- 36 When this application was heard by the Full Bench it was apparent to the Full Bench that for each office of the State organisation there is a corresponding office in the counterpart Federal body. In particular, it was clear that for each of the offices prescribed under the rules of the State organisation not only is there a directly corresponding office, the duties and functions of the corresponding offices are either the same or sufficiently similar.

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- 37 Section 62(2) of the Act prohibits the Registrar from registering any alterations to rules of an organisation that is a matter referred to in s 71(5) of the Act unless authorised to do so by the Full Bench. Pursuant to s 62(4) of the Act, the requirements of s 55(4) of the Act must be complied with before the Full Bench can approve a rule alteration application. Section 55(4) of the Act provides that the Full Bench shall refuse an application by the organisation unless it is satisfied that:
- (a) the application has been authorised in accordance with the rules of the organisation; and
 - (b) reasonable steps have been taken to adequately inform the members —
 - (i) of the intention of the organisation to apply for registration; and
 - (ii) of the proposed rules of the organisation; and
 - (iii) that the members or any of them may object to the making of the application or to those rules or any of them by forwarding a written objection to the Registrar,
 and having regard to the structure of the organisation and any other relevant circumstance, the members have been afforded a reasonable opportunity to make such an objection; and
 - (c) in relation to the members of the organisation —
 - (i) less than 5% have objected to the making of the application or to those rules or any of them, as the case may be; or
 - (ii) a majority of the members who voted in a ballot conducted in a manner approved by the Registrar has authorised or approved the making of the application and the proposed rules;
 and
 - (d) in relation to the alteration of the rules of the organisation, those rules provide for reasonable notice of any proposed alteration and reasons therefor to be given to the members of the organisation and for reasonable opportunity for the members to object to any such proposal; and
 - (e) rules of the organisation relating to elections for office —
 - (i) provide that the election shall be by secret ballot; and
 - (ii) conform with the requirements of section 56(1),
 and are such as will ensure, as far as practicable, that no irregularity can occur in connection with the election.
- 38 The first matter about which the Full Bench must be satisfied is that the proposed rule alteration must be authorised by the State organisation in accordance with its rules. The authority of the State organisation to alter its rules is found in r 45 of the rules of the State organisation. Rule 45 provides as follows:
- Subject to the operation of any Adopting provision in these Rules in accordance with Section 71A of the Industrial Relations Act 1979:
1. The union shall have the right to make rules for its own use and guidance. Rules may be amended, added to, varied, repealed by notice of any proposed alteration to the rules being laid before the Committee of Management

or before a special meeting of the union called for the purpose, which may amend, add to, vary or repeal the rules or any part of them in accordance with the proposal in the said notice or any reasonable amendment of same.

2. No amendment, addition to, variation, repeal, or substitution of these rules shall be made unless a notice of the proposed alteration, and the reasons therefore, is distributed to all members.
 3. In the notice referred to in sub-rule (2) members are to be informed that they or any of them may object to the proposed alteration by forwarding a written objection to the Registrar to reach him / her no later than twenty one (21) days after the date of receipt of the notice referred to in (2) above.
- 39 The facts supporting the State organisation's submission that it complied with its rules and the statutory requirements of the Act are set out in the statutory declaration made by Mr McLaughlan on 14 April 2014. In his statutory declaration Mr McLaughlan stated as follows:
- (a) On 27 February 2014, he caused a notice to be sent to all committee of management members by email notifying them of a committee of management meeting to be held on 5 March 2014 to consider the proposed rule change. In the email he stated that the meeting would consider the proposal to alter the rules of the union so that elections of the Federal CEPU Plumbing Division are the same as the elections for the State organisation.
 - (b) The proposed changes to the rules of the State organisation were tabled at a meeting of the interim committee of management on 7 March 2014 [sic]. The minutes of the committee of management meeting of 5 March 2014 are annexed to the statutory declaration of Mr McLaughlan as attachment B. Those minutes record that seven members of the interim executive were present. These were the President, the Secretary, the Vice-President, two trustees and two committee members. A motion was put to the meeting which was carried unanimously that the committee of management approve and endorse the proposed change to the union rules to add r 5. (The text of the rule carried was as set out in the order which is made by the Full Bench). Motions were also carried unanimously that:
 1. The Committee of management authorises and empowers the Secretary to write to the members of the Union notifying them of the proposed rule change.
 2. The Committee of management authorises and empowers the Secretary to make application to the WAIRC for the approval of the proposed rule change.
 3. The Committee of management authorises and empowers the Secretary to make application to the WAIRC for a s71 certificate in accordance with the proposed rule change.
 - (c) In a letter dated 10 March 2014, Mr McLaughlan sent a letter to all members of the State organisation. The letter set out the proposed change to add r 5 – Counterpart Federal Body. The letter also explained the reasons why the rule variation was sought and advised each of the members that they could object to the making of the application for the alterations or to the proposed alterations by forwarding written objection to the Registrar of the Commission no later than 21 days after the date of the letter. Also attached to the letter was a copy of the proposed rules showing the proposed change to the rules.
 - (d) At the expiry of 21 days no objection was received from any member of the union to the proposed alteration.
- 40 It was clear to the members of the Full Bench from the matters set out in the statutory declaration made by Mr McLaughlan that r 45 of the rules of the State organisation had been complied with. It was also clear that r 9(4) of the rules had also been complied with as notice had been given to each member of the committee not less than 24 hours before the time fixed for the meeting. Further, that r 9(2) had been complied with as there was a majority of the members of the committee present which formed a quorum.
- 41 The members of the Full Bench were also satisfied that members of the State organisation had been afforded a reasonable opportunity to make an objection to the making of the alteration to the rules and we noted that no member of the State organisation had objected to the making of this application or to the variation to the rules.
- 42 For these reasons, the Full Bench was satisfied that s 55(4)(b), s 55(4)(c) and s 55(4)(d) of the Act had been complied with. Section 55(4)(e) and s 56(1) of the Act provide for procedural rules that are to be provided for in the rules of all organisations in respect of elections by secret ballot. The State organisation's current rules provide for the procedures as required by these provisions of the Act and the alterations sought in this application do not relate to those matters.
- 43 At the hearing of this matter members of the Full Bench informed the representative of the State organisation, Ms Ireland, that the proposed rule contained a typographical error in that the name of the counterpart Federal body was incorrect. The Full Bench also informed Ms Ireland that the proposed rule should subsequently be amended to provide that the committee of management of the State organisation is to determine who is the person who is to hold office as contemplated by s 71(5) of the Act. Upon the undertaking of Ms Ireland that a further amendment would be subsequently sought to be made by the union, the Full Bench made the order authorising the Registrar to alter r 5.
-

2014 WAIRC 00420

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS	APPLICANT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 21 MAY 2014	
FILE NO.	FBM 3 OF 2014	
CITATION NO.	2014 WAIRC 00420	
Result	Order made	
Appearances		
Applicant	Ms N Ireland	

Order

This matter having come on for hearing before the Full Bench on 20 May 2014, and having heard Ms N Ireland on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The Registrar is hereby authorised to register the alteration to the rules of the applicant by deleting r 5, **5 – ADOPTION OF RULES OF THE FEDERAL ORGANISATION – RESERVED** and inserting:

5 - COUNTERPART FEDERAL BODY

Each Office within the Union will be held by the person who in accordance with the rules of the Communications, Electrical, Energy, Postal, Plumbing and Allied Services Union of Australia Plumbing Division WA Branch holds the corresponding office in that body.

[L.S.]

By the Full Bench
(Sgd.) J H SMITH,
Acting President.

2014 WAIRC 00422

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS	APPLICANT
CORAM	FULL BENCH THE HONOURABLE J H SMITH, ACTING PRESIDENT CHIEF COMMISSIONER A R BEECH COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 21 MAY 2014	
FILE NO.	FBM 4 OF 2014	
CITATION NO.	2014 WAIRC 00422	
Result	Declaration made	
Appearances		
Applicant	Ms N Ireland	

Declaration

This matter having come on for hearing before the Full Bench on 20 May 2014, and having heard Ms N Ireland on behalf of the applicant, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby declares that —

1. The Plumbing Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, Western Australian Branch is the counterpart Federal body (the counterpart Federal body) of The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers (the State organisation).
2. The rules of the State Organisation and its counterpart Federal body relating to the qualification of persons for membership are deemed to be the same.
3. The rules of the counterpart Federal body prescribing the offices that exist in the counterpart Federal body are deemed to be the same as the offices that exist in the State Organisation.

By the Full Bench
(Sgd.) J H SMITH,
Acting President.

[L.S.]

AWARDS/AGREEMENTS—Application for—

2014 WAIRC 00443

HELENA COLLEGE (INC) COLLECTIVE AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF
EMPLOYEES; HELENA COLLEGE AND UNITED VOICE WA

APPLICANTS

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

FRIDAY, 30 MAY 2014

FILE NO/S

AG 6 OF 2014

CITATION NO.

2014 WAIRC 00443

Result

Agreement registered

Representation

Ms M Cook, The Independent Education Union of Western Australia, Union of Employees (by correspondence)

Ms K Adams, Helena College (by correspondence)

Mr B Palmer, United Voice WA (by correspondence)

Order

WHEREAS the Commission has before it an application pursuant to s 41 of the *Industrial Relations Act 1979* (the Act) to register an agreement as an industrial agreement;

AND WHEREAS I am satisfied that the agreement meets the requirements of the Act and that it should be registered;

AND WHEREAS the parties have consented to the Commission registering the agreement without the need to attend a hearing for the purpose;

NOW I, the undersigned, pursuant to the powers conferred on me under s 41 of the Act hereby order —

THAT the agreement made between the parties filed in the Commission on 16 May 2014 entitled *Helena College (Inc) Collective Agreement 2014* attached hereto be registered as an industrial agreement in replacement of *Helena College (Inc) Collective Agreement 2010* which by operation of s 41(8) is hereby cancelled.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

2014 WAIRC 00442

THE QUINTILIAN SCHOOL ENTERPRISE BARGAINING AGREEMENT 2014

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	THE INDEPENDENT EDUCATION UNION OF WESTERN AUSTRALIA, UNION OF EMPLOYEES; THE QUINTILIAN SCHOOL AND UNITED VOICE WA	APPLICANTS
CORAM	CHIEF COMMISSIONER A R BEECH	
DATE	FRIDAY, 30 MAY 2014	
FILE NO/S	AG 5 OF 2014	
CITATION NO.	2014 WAIRC 00442	
<hr/>		
Result	Agreement registered	
Representation	Ms S Howe, The Independent Education Union of Western Australia, Union of Employees (by correspondence) Mr D Cameron, The Quintilian School (by correspondence) Mr B Palmer, United Voice WA (by correspondence)	

Order

WHEREAS the Commission has before it an application pursuant to s 41 of the *Industrial Relations Act 1979* (the Act) to register an agreement as an industrial agreement;

AND WHEREAS I am satisfied that the agreement meets the requirements of the Act and that it should be registered;

AND WHEREAS the parties have consented to the Commission registering the agreement without the need to attend a hearing for the purpose;

NOW I, the undersigned, pursuant to the powers conferred on me under s 41 of the Act hereby order –

THAT the agreement made between the parties filed in the Commission on 16 May 2014 entitled *The Quintilian School Enterprise Bargaining Agreement 2014* attached hereto be registered as an industrial agreement in replacement of *The Quintilian School Enterprise Bargaining Agreement 2012* which by operation of s 41(8) is hereby cancelled.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.**UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—**

2014 WAIRC 00445

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	MICHAEL JOHN BELTRAN	APPLICANT
	-v-	
	GRAHAM HARRIS, SHIRE PRESIDENT. SHIRE OF WILUNA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 30 MAY 2014	
FILE NO/S	U 67 OF 2013	
CITATION NO.	2014 WAIRC 00445	
<hr/>		
Result	Discontinued	
Representation		
Applicant	In person	
Respondent	Mr D McLeod (of counsel)	

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 10 June 2013 the Commission convened a conference to deal with scheduling issues with respect to this application.

The applicant filed a Notice of Withdrawal or Discontinuance on 18 June 2013 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00410

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JONATHAN CHELLIAH	APPLICANT
	-v-	RESPONDENT
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	
CORAM	COMMISSIONER S M MAYMAN	
DATE	THURSDAY, 15 MAY 2014	
FILE NO/S	U 174 OF 2013	
CITATION NO.	2014 WAIRC 00410	

Result	Application discontinued
Representation	
Applicant	Mr D Stojanoski (of counsel)
Respondent	Mr R Bathurst (of counsel)

Order

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

AND WHEREAS on 27 February 2014 a conference between the parties was convened;

AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;

AND WHEREAS on 1 May 2014 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.

2014 WAIRC 00458

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	JOHN D'ORAZIO	
	-v-	
	NEC IT SOLUTIONS AUSTRALIA PTY LTD	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 6 JUNE 2014	
FILE NO/S	B 125 OF 2013	
CITATION NO.	2014 WAIRC 00458	

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms E Hartley of counsel

Order

HAVING heard the applicant on his own behalf and Ms E Hartley 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.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00407

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	SHABNAM HANCOCK	
	-v-	
	GOVERNING COUNCIL OF WEST COAST INSTITUTE OF TRAINING MS MICHELLE HOAD, MANAGING DIRECTOR	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	THURSDAY, 15 MAY 2014	
FILE NO/S	U 212 OF 2013	
CITATION NO.	2014 WAIRC 00407	

Result	Application discontinued
Representation	
Applicant	Ms M McCormack (of counsel)
Respondent	Mr R Bathurst (of counsel)

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 5 February 2014 a conference between the parties was convened;
AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;
AND WHEREAS on 29 April 2014 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.

2014 WAIRC 00482

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER HANLAN

APPLICANT

-v-

INNOVATIVE CORROSION MANAGEMENT PTY LTD

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 13 JUNE 2014

FILE NO/S

B 29 OF 2014

CITATION NO.

2014 WAIRC 00482

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 email on the 22nd day of April 2014 and formal correspondence dated the 23rd day of April 2014 addressed to the applicant at the address contained in the Form 3 – Notice of application the Commission informed the applicant that a conference would be convened on the 11th day of June 2014; and

WHEREAS on the 10th day of June 2014 the Commission attempted to contact the applicant by mobile telephone to confirm his intention to attend the conference scheduled for the following day; and

WHEREAS the voicemail message confirmed the telephone number was that of the applicant and a message was left asking him to telephone the Commission; and

WHEREAS by 10.30 am on the 11th day of June 2014 the applicant had not contacted the Commission; and

WHEREAS at 10.30 am on the 11th day of June 2014 when the conference was scheduled to commence there was no appearance by the applicant at the conference and the Commission attempted to contact him by mobile and landline telephone; and

WHEREAS there was no answer on the mobile telephone and the landline telephone indicated that the number had been disconnected; and

WHEREAS the applicant has not contacted the Commission to indicate his intention to proceed with the application or to explain his failure to respond to telephone messages or to attend the conference;

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.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00449

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	JOHN ANTHONY JEREDIS	
	-v-	
	ACTION MOTOR'S	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 4 JUNE 2014	
FILE NO/S	B 66 OF 2014	
CITATION NO.	2014 WAIRC 00449	

Result	Application dismissed for want of prosecution
Representation	
Applicant	No appearance
Respondent	No appearance required

Order

THERE having been no appearance on behalf of the applicant and there being no requirement 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.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00417

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	ADAM LEASK	
	-v-	
	CITY OF WANNEROO	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	TUESDAY, 20 MAY 2014	
FILE NO/S	B 135 OF 2013	
CITATION NO.	2014 WAIRC 00417	

Result	Discontinued
Representation	
Applicant	Mr K Trainer (as agent)
Respondent	Mr J Lord (as agent)

Order

This is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

The Commission set down a conference on 16 October 2013 for the purpose of conciliating between the parties.

On 16 October 2013, before the conference commenced, the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the conference was vacated.

The respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00429

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BAIRBRE LEWIS

APPLICANT

-v-

RURAL COMMUNITY LEGAL SERVICE INC. T/AS WHEATBELT COMMUNITY LEGAL
CENTRE

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE FRIDAY, 23 MAY 2014
FILE NO/S U 239 OF 2012, B 248 OF 2012
CITATION NO. 2014 WAIRC 00429

Result Discontinued
Representation
Applicant In person
Respondent Ms C Sharpe (of counsel)

Order

These are applications pursuant to s 29(1)(b)(i) and (ii) of the *Industrial Relations Act 1979*.

On 14 February 2013 the Commission convened a conference for the purpose of conciliating between the parties and at the conclusion of that conference the applicant was given time to consider an offer made by the respondent to settle the matters.

The Commission contacted the applicant on a number of occasions about the status of the matters and on 1 July 2013 and 18 December 2013 the Commission convened further conciliation conferences. At the conclusion of the conference held on 18 December 2013 the parties reached an agreement with respect to the applications.

The applicant filed Notices of Withdrawal or Discontinuance forms on 21 February 2014 in respect of the applications and the respondent consents to the matters being discontinued.

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

THAT these applications be, and are hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00431

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION WILLIAM PETER MADIGAN	APPLICANT
	-v- CITY OF ALBANY	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	MONDAY, 26 MAY 2014	
FILE NO/S	U 206 OF 2012	
CITATION NO.	2014 WAIRC 00431	

Result	Discontinued	
Representation		
Applicant	Mr B Hocking (of counsel)	
Respondent	Ms A McKay (of counsel)	

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

The matter was set down for hearing and determination on 20 and 21 May 2014.

The applicant advised the Commission on 7 May 2014 that the parties had reached an in principle settlement of the matter.

On 12 May 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application and the respondent consents to the matter being discontinued.

The hearing was vacated on 12 May 2014.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00424

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PANOS MARLASSIS	APPLICANT
	-v- YAANDINA FAMILY CENTRE	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 22 MAY 2014	
FILE NO/S	U 115 OF 2013	
CITATION NO.	2014 WAIRC 00424	

Result	Discontinued	
Representation		
Applicant	In person	
Respondent	Ms E Stevenson SC	

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 12 September 2013 the Commission convened a conference for the purpose of conciliating between the parties and at the conference the parties reached an agreement in respect of the application.

The applicant filed a Notice of Withdrawal or Discontinuance on 26 September 2013 and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00423

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GEOFF ALLAN MCCANN

PARTIES

APPLICANT

-v-

SERENITY LODGE INCORPORATED

RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE THURSDAY, 22 MAY 2014
FILE NO/S B 109 OF 2013
CITATION NO. 2014 WAIRC 00423

Result Discontinued
Representation
Applicant Mr I Curlewis (of counsel)
Respondent Mr B Jackson (of counsel)

Order

This is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

On 2 September 2013 the Commission convened a conference for the purpose of conciliating between the parties and following the conference the parties were given further time for discussions.

On 3 October 2013 the applicant filed a Notice of Withdrawal or Discontinuance and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00446

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	ANNETTE MCLOUGHLIN	
	-v-	
	THE ROMAN CATHOLIC ARCHBISHOP OF PERTH TRADING AS IDENTITY WA	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 4 JUNE 2014	
FILE NO/S	U 137 OF 2013	
CITATION NO.	2014 WAIRC 00446	
Result	Discontinued	
Representation		
Applicant	Mr M Richards (of counsel)	
Respondent	Mr D McKenna (of counsel)	

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 10 October 2013 the Commission convened a scheduling conference with respect to the application being lodged out of time.

Following the conference the parties were contacted by the Commission with respect to listing the matter for hearing and on 15 November 2013 the applicant's representative advised the Commission that the parties had reached an in principle settlement with respect to the application.

On 20 February 2014 the applicant filed a Notice of Withdrawal or Discontinuance form in respect of the application and the respondent consents to the matter being discontinued.

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

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2014 WAIRC 00419

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	PHILIP ALAN MIDDLETON	
	-v-	
	OUTCARE	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	WEDNESDAY, 21 MAY 2014	
FILE NO/S	U 86 OF 2013	
CITATION NO.	2014 WAIRC 00419	
Result	Withdrawn by leave	

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 1 July 2013 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00415

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WUI LING ONG

APPLICANT

-v-

JOHANN YAP

RESPONDENT

CORAM COMMISSIONER J L HARRISON

DATE MONDAY, 19 MAY 2014

FILE NO/S U 6 OF 2014

CITATION NO. 2014 WAIRC 00415

Result Discontinued

Representation

Applicant Mr S Edwards (as agent)

Respondent Dr J Yap

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

On 5 February 2014 the applicant's representative advised the Commission that the parties had reached an agreement.

On 24 February 2014 the applicant filed a Notice of Withdrawal or Discontinuance in respect of the application.

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

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00447

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DELWYN PAIRAMA

APPLICANT

-v-

KLEENHEAT GAS

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE TUESDAY, 3 JUNE 2014

FILE NO/S U 5 OF 2014

CITATION NO. 2014 WAIRC 00447

Result	Application discontinued
Representation	
Applicant	Mrs D Pairama in person
Respondent	Mr W Milward (as agent) by correspondence

Order

WHEREAS on 6 January 2014 Ms Pairama referred a claim of unfair dismissal to the Commission naming Kleenheat Gas as her former employer;

AND WHEREAS on 6 February 2014 a Notice of Answer was filed by Wesfarmers Kleenheat Gas Pty Ltd as Ms Pairama's former employer and stating that the Commission does not have the jurisdiction to hear the claim of unfair dismissal on the basis that Wesfarmers Kleenheat Gas Pty Ltd is a trading corporation and therefore a national system employer;

AND WHEREAS on 13 February 2014 the Commission wrote to Ms Pairama asking whether she agreed or disagreed that the correct identity of her former employer was Wesfarmers Kleenheat Gas Pty Ltd and drawing to her attention the issue of jurisdiction raised;

AND WHEREAS the claim was listed For Mention for 24 March 2014 but there was no appearance by Ms Pairama, although she made contact with the Commission later that day;

AND WHEREAS the claim was re-listed For Mention for 1 April 2014 and Ms Pairama:

1. Confirmed that the correct identity of her former employer was Wesfarmers Kleenheat Gas Pty Ltd; and
2. Requested 3 weeks for her to seek the appropriate advice regarding the issue of jurisdiction.

AND WHEREAS on 1 April 2014 Ms Pairama undertook to advise the Commission of her intentions with respect to her application within a further 21 days;

AND WHEREAS the Commission wrote to Ms Pairama on 24 April 2014 asking that she advise the Commission of her intentions with respect to her application as soon as possible;

AND WHEREAS the Commission wrote to Ms Pairama on 5 May 2014 advising her that the Commission would issue an order on 12 May 2014 discontinuing her application if there was no response from her;

AND WHEREAS on 12 May 2014 Ms Pairama requested an extension of time to 16 May 2014 by which to reply, which was granted, however nothing further was heard from Ms Pairama and she was advised by letter dated 23 May 2014 that an order would issue on 30 May 2014 discontinuing her application unless she provided a valid reason to the Commission before that date;

AND WHEREAS by close of business on 30 May 2014 there has been no further contact from Ms Pairama;

AND WHEREAS the Commission is of the view that Wesfarmers Kleenheat Gas Pty Ltd is likely to be a national system employer and the Commission does not have the jurisdiction to deal with the claim and Ms Pairama has not taken the opportunities provided to her to suggest otherwise,

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

THAT this application be, and is hereby, discontinued.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

2014 WAIRC 00406

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SALLY-ANNE PRICE

APPLICANT

-v-

SHACKS AND KERR MOTORS TRADING AS SHACKS HOLDEN FREMANTLE

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE THURSDAY, 15 MAY 2014

FILE NO/S U 181 OF 2013

CITATION NO. 2014 WAIRC 00406

Result Application discontinued
Representation
Applicant Ms S Price
Respondent Mr R Gifford (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 19 January 2014 a conference between the parties was convened;
AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;
AND WHEREAS on 30 April 2014 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.

2012 WAIRC 01001

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
OVIDIU PUSCAS

APPLICANT

-v-

CAIMES PTY LTD (ACN 102 573 928)

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE MONDAY, 12 NOVEMBER 2012
FILE NO. B 212 OF 2012
CITATION NO. 2012 WAIRC 01001

Result Direction issued
Representation
Applicant Mr N Marouchak of counsel
Respondent Mr A Chamberlain of counsel

Direction

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr A Chamberlain of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act, 1979* hereby directs –

- (1) THAT evidence in chief in this matter be adduced by way of signed witness statements which will stand as the evidence in chief of the maker. Evidence in chief other than that contained in the witness statements may only be adduced by leave of the Commission.
- (2) THAT the respondent file and serve upon the applicant any signed witness statements upon which they intend to rely no later than 21 days prior to the date of hearing.
- (3) THAT the applicant file and serve upon the respondent any signed witness statements upon which they intend to rely no later than 14 days after receiving the witness statements filed by the respondent.
- (4) THAT the parties file and serve an outline of submissions no later than 3 days prior to the date of hearing.
- (5) THAT the matter be listed for hearing for 1 day on a date to be fixed.
- (6) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2013 WAIRC 00074

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION OVIDIU PUSCAS	APPLICANT
	-v-	
	CAIMES PTY LTD (ACN 102 573 928)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	FRIDAY, 8 FEBRUARY 2013	
FILE NO.	B 212 OF 2012	
CITATION NO.	2013 WAIRC 00074	

Result	Directions issued
Representation	
Applicant	Mr N Marouchak of counsel
Respondent	Mr Z Bozkurt

Direction

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr Z Bozkurt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent is to produce for inspection by the applicant the following documents or classes of documents within 21 days of the date of this direction:
 - (a) All of the respondent's proposals in relation to the clients listed at par (f);
 - (b) All the respondent's web site design and development proposals to the clients listed in par (f);
 - (c) All the respondent's tax invoices issued to the clients listed in par (f);
 - (d) All email communications between the applicant and the clients listed in par (f), using the caimes.com.au, caimes.com and the caimesweb.com email address extensions with the clients listed in par (f);
 - (e) All documents the applicant created or was involved in creating regarding the clients listed in par (f); and
 - (f) The clients that the applicant seeks documents to be produced in respect of are as follows:
 - Dandy Badges and Magnets;
 - Vitulus Lowline Studs;
 - The Communication Queen;
 - Zambezi Plumbing;
 - Caradvice A;
 - Carbuddy B;
 - Crankyads A;
 - Cupstart;
 - Macro Business;
 - Macro Associates;
 - Macro Investor;
 - Aanthill Online;
 - Hotmix Group (Don't Lose Data);
 - Westech Doors and Windows;
 - Mondo Talk;
 - TGMI Pty Ltd;
 - Mile Designs.
- (2) THAT the applicant file and serve upon the respondent any signed witness statements upon which he intends to rely no later than 14 days after receiving the documents referred to in par (1) above.

- (3) THAT the applicant file and serve upon the respondent an affidavit within seven days of the date of this direction, setting out the basis of his belief that emails referred to in the respondent's witness statement may be fraudulent. This includes the basis for his request for the appointment of an expert to determine the validity of such email communications.
- (4) THAT the parties file and serve an outline of submissions no later than three days prior to the date of hearing.
- (5) THAT the matter be listed for hearing for one day on a date to be fixed.
- (6) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 00114

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

OVIDIU PUSCAS

APPLICANT

-v-

CAIMES PTY LTD (ACN 102 573 928)

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

FRIDAY, 1 MARCH 2013

FILE NO.

B 212 OF 2012

CITATION NO.

2013 WAIRC 00114

Result

Direction issued

Representation

Applicant

Mr N Marouchak of counsel

Respondent

Mr Z Bozkurt

Direction

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr Bozkurt 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 provide to the respondent no later than 15 March 2013, any documents of the kind identified in par 7 of the respondent's interlocutory application dated 20 February 2012 that being "a list of all MX and or DNS records and or email system that the Applicant performed services for outside the work activities for CAIMES and or CAIMES WEB, and any associated invoices for such services" over the period 1 June 2010 to 31 July 2012.
- (2) THAT the applicant file and serve any witness statements of expert witness he proposes to give evidence no later than seven days prior to the date of hearing.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 00169

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION OVIDIU PUSCAS	APPLICANT
	-v-	
	CAIMES PTY LTD (ACN 102 573 928)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 27 MARCH 2013	
FILE NO/S	B 212 OF 2012	
CITATION NO.	2013 WAIRC 00169	
Result	Order issued	
Representation		
Applicant	Mr N Marouchak of counsel	
Respondent	Mr Z Bozkurt	

Order

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr Z Bozkurt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

- (1) THAT David McLeod of Business Computing Australia (“Mr McLeod”) be appointed as an expert to give evidence as to whether, in his opinion, the following emails annexed to the respondent’s statutory declaration dated 30 January 2013 are genuine:
 - (a) Appendix N: from Mr Bozkurt to the applicant and Marius Leonard dated Saturday, 26 June 2010 11:09 AM;
 - (b) Appendix P: from Mr Bozkurt to the applicant dated Tuesday, 10 August 2010 8:57 PM;
 - (c) Appendix W: from Mr Bozkurt to the applicant dated Saturday, 29 January 2011 9:45 AM;
 - (d) Appendix X: from Mr Bozkurt to the applicant dated Monday, 31 October 2011 5:04 PM; and
 - (e) Appendix X: from Mr Bozkurt to the applicant dated Monday, 31 October 2011 10:02 PM.
- (2) THAT between 9am and 5pm on business days, on 24 hours’ written notice from the applicant, the respondent provides Mr McLeod access to the respondent’s premises.
- (3) THAT the respondent provides Mr McLeod reasonable assistance to carry out his task including but not limited to:
 - (a) Allowing Mr McLeod to bring his own hardware including a laptop;
 - (b) Providing Mr McLeod access to the respondent’s email accounts on Mr McLeod’s laptop, and allowing Mr McLeod to download all relevant emails, provided Mr McLeod logs out when the inspection is complete.
- (4) THAT the applicant has leave to file an expert report prepared by Mr McLeod.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2013 WAIRC 00206

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2013 WAIRC 00206
CORAM : COMMISSIONER S J KENNER
HEARD : TUESDAY, 2 APRIL 2013, THURSDAY, 14 MARCH 2013, THURSDAY, 28
 FEBRUARY 2013, WEDNESDAY, 6 FEBRUARY 2013
DELIVERED : TUESDAY, 2 APRIL 2013
FILE NO. : B 212 OF 2012
BETWEEN : OVIDIU PUSCAS
 Applicant
 AND
 CAIMES PTY LTD (ACN 102 573 928)
 Respondent

Catchwords : Industrial law (WA) - Alleged denied contractual entitlements - Application for adjournment
 - Principles applied - Adjournment granted
Legislation : Industrial Relations Act 1979 ss27(1), 29(1)(b)(ii)
Result : Adjournment granted
Representation:
Applicant : Mr N Marouchak of counsel
Respondent : Mr Z Bozkurt

*Reasons for Decision**Ex Tempore*

- 1 The respondent has made an application to adjourn the proceedings. This is the second time in which a proposed adjournment has been brought, the matter last having been adjourned on 6 February 2013 not opposed, because the state of preparedness of the proceedings was such that the matter could not be properly heard.
- 2 As I have already indicated, there was a large bundle of material filed this morning, in the Registry, which I only first sighted in my Chambers at about 9.45 this morning. The Commission has obviously had no opportunity to consider those documents, some of which may be very important in terms of the conduct of the applicant's case. I also understand those documents were electronically served on the respondent late yesterday afternoon at the time they were transmitted to the Registry. Mr Bozkurt informed the Commission that he has had no proper opportunity to consider the content of the documents and to adequately prepare for the proceedings today.
- 3 I should note, however, that the applicant has complied with the Commission's direction for service of the documents in accordance with the orders made by the Commission on 18 March 2013. The reason for the late filing is the respondent's delay and obfuscation in the production of documents to the applicant, for reasons which have already been dealt with in earlier for mention and directions proceedings. So, therefore, the respondent does not come to this application without any fault. To his credit Mr Bozkurt accepts that is the case.
- 4 As I have mentioned, the Commission has not had any opportunity of considering the vast body of material which has been filed early this morning. Also is the issue of the expert evidence, which was foreshadowed to be called, which was the subject of an order of the Commission on 27 March. According to counsel for the applicant, because of the present circumstances, that evidence may now not proceed thus that issue may not be able to be determined in accordance with its merits.
- 5 I also note, despite the request of the Commission, that the video-link this morning established with Queensland is not satisfactory. I have concerns about the capacity of counsel for the applicant and the applicant himself, to adequately follow the train of the evidence, given the nature of the link that we have.
- 6 Whether an adjournment is granted or not is a discretionary issue for the Commission to consider. In that respect, I have to weigh the interests of both parties as to whether there will be prejudice to one or the other on the grant or refusal, as the case may be, of an application to adjourn. I refer to the well-known and often cited decision of the Supreme Court of Western Australia in *Myers v Myers* [1969] WAR 19. In this matter, the circumstances are finely balanced because of the lateness of the documents being filed and the reason for that. What, I intend to do, with great reluctance, is to grant the application to adjourn. However, there will be consequences of that application succeeding.
- 7 I intend to make orders in relation to costs under section 27(1) of the Act, in connection with costs thrown away by way of witness expenses and incidental expenses incurred by the applicant. The applicant is directed to file a schedule of costs in that respect within seven days of today. The Commission will make an order that the application be adjourned to a date to be fixed.
- 8 Secondly, I make a further order that the respondent will appear by video-link at the relisted date for the hearing of the matter, from a venue approved by the Commission. Approval will not be granted for Mr Bozkurt to appear from his premises, as has

been the case today. Mr Bozkurt will need to appear from a court or tribunal in Queensland, or other appropriate venue, in order that the hearing can be properly conducted.

- 9 Thirdly, there will be an order that the applicant file and serve a bill of costs, as I have mentioned, within seven days of today.

2013 WAIRC 00207

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	OVIDIU PUSCAS	APPLICANT
	-v-	
	CAIMES PTY LTD (ACN 102 573 928)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	TUESDAY, 9 APRIL 2013	
FILE NO/S	B 212 OF 2012	
CITATION NO.	2013 WAIRC 00207	

Result	Order issued
Representation	
Applicant	Mr N Marouchak of counsel
Respondent	Mr Z Bozkurt

Order

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr Z Bozkurt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders that –

- (1) The hearing be adjourned to a date to be fixed.
- (2) The respondent be granted leave to appear by video link subject to the venue being approved by the Commission.
- (3) The applicant file and serve upon the respondent a schedule of costs within seven days of the date of this order.
- (4) The applicant file and serve upon the respondent any expert report within 14 days of the date of this order.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 00794

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	OVIDIU PUSCAS	APPLICANT
	-v-	
	CAIMES PTY LTD (ACN 102 573 928)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 5 SEPTEMBER 2013	
FILE NO.	B 212 OF 2012	
CITATION NO.	2013 WAIRC 00794	

Result	Direction issued
Representation	
Applicant	Mr N Marouchak of counsel
Respondent	Mr Z Bozkurt

Direction

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr Z Bozkurt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

- (1) THAT the respondent be provided with a copy of the transcript of the hearing listed on 5 September 2013.
- (2) THAT the respondent file and serve any written closing submissions by 19 September 2013.
- (3) THAT the applicant file and serve any written closing submissions in reply by 26 September 2013.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2013 WAIRC 01063

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2013 WAIRC 01063
CORAM : COMMISSIONER S J KENNER
HEARD : WEDNESDAY, 6 FEBRUARY 2013, THURSDAY, 28 FEBRUARY 2013,
 THURSDAY, 14 MARCH 2013, FRIDAY, 14 JUNE 2013, MONDAY, 19 AUGUST
 2013, THURSDAY, 5 SEPTEMBER 2013
DELIVERED : FRIDAY, 13 DECEMBER 2013
FILE NO. : B 212 OF 2012
BETWEEN : OVIDIU PUSCAS
 Applicant
 AND
 CAIMES PTY LTD (ACN 102 573 928)
 Respondent

Catchwords : Industrial law (WA) – Contractual benefits claim – Claim for unpaid wages – Threshold issues to be determined – Whether there was an employment relationship, partnership or joint venture – Principles applied – Credibility of witnesses in issue – Caimes Web aspect of the business was not separate to the respondent business – Employment indicia applied to the facts – Right to exercise control – Totality of the relationship considered – Employment had a sufficient connection to Western Australia – Claim within jurisdiction

Legislation : *Industrial Relations Act 1979* (WA) s 29(1)(b)(ii)
Partnership Act 1891 (Qld) s 5(1)
Partnership Act 1895 (WA) s 7(1)

Result : Declaration issued

Representation:
 Applicant : Mr N Marouchak of counsel
 Respondent : Mr Z Bozkurt

Case(s) referred to in reasons:

Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385
Baldwin v Commissioner of Taxation [2005] AATA 44
Duke Group Limited (in liquidation) v Pilmer (1999) 73 SASR 64
Gibson Motor Sport Merchandise Pty Ltd v Forbes [2005] FCA 749
Hollis v Vabu Pty Limited (2001) 207 CLR 21
In re Ruddock (1879) 5 VLR (IP & M) 51
John Alexander's Clubs Pty Limited v White City Tennis Club Limited (2010) 24 CLR 1
Morden Rigg and Co and RB Eskrigge and Co v Monks [1923] 8 TC 450
Parker v Tranfield (2001) 81 WAIG 2505
Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers (2004) 85 WAIG 5
Pooley v Driver (1876) 5 Ch D 458
R & R Fazzolari Pty Limited v Parramatta City Council (2009) 237 CLR 603

Scott v Commissioner of Taxation [2002] AATA 778

Stevens v Brodribb Sawmilling Company Proprietary Limited (1986) 160 CLR 16

The Commissioners of Inland Revenue v Williamson (1928) 14 TC 335

United Dominions Corporation Limited v Brian Proprietary Limited (1985) 157 CLR 1

Walker v Hirsch (1884) 27 Ch D 460

Yellow Cabs of Australia Limited v Colgan (1930) 29 AR 137

Reasons for Decision

- 1 Caimes Pty Ltd is engaged in the business of professional consulting services and website design in the information technology industry. Its business is principally based in Queensland. Mr Puscas, up until about June 2010, performed services for Caimes as a contractor, in web design and consultancy work. From June 2010, Mr Puscas contended that he commenced employment with Caimes. The arrangement was for Mr Puscas to work about 20 to 25 hours per week initially. From about October 2011, Mr Puscas maintained that he worked 40 hours a week for Caimes. Whilst Mr Puscas initially worked in Queensland for Caimes, he relocated to Perth in November 2010. Mr Puscas maintained that it was agreed that he would be paid \$30 per hour net.
- 2 Mr Puscas ceased working for Caimes in July 2012. He alleges he was underpaid by Caimes in the sum of \$39,146.40. Mr Puscas now brings these proceedings seeking to recover this amount as a contractual benefit which he says he has been denied.
- 3 Caimes opposes Mr Puscas' claim. It maintained that Mr Puscas was never employed by Caimes. Caimes alleged that one of its directors, Mr Bozkurt, along with Mr Puscas and another person, Mr Leonard, agreed to carry on an offshoot of Caimes' business, Caimes Web, as partners. This business was to be dedicated to web design work. According to Caimes, under this arrangement, Mr Bozkurt held a 70% share, with Mr Puscas and Mr Leonard each holding a 15% share. According to Caimes, the partnership envisaged a profit share in the business, proportionate to the respective shareholdings of the partners. It was a feature of this arrangement, according to Caimes, that both Mr Puscas and Mr Leonard were not required to purchase their respective shares in the business straight away, because they could not then afford to. They had the option to purchase equity in the business after 30 June 2013. Until that time, Mr Bozkurt contributed all of the working capital for Caimes Web.
- 4 As Caimes contended that Mr Puscas was never employed by it, it is necessary for the Commission to resolve this issue at the threshold, before considering the merits of Mr Puscas' claim. These reasons deal with that threshold issue. In doing so, it will be necessary to consider relevant legal principles in relation to employment and partnerships, and also those relevant to a joint venture, which was also asserted by Caimes. A further question to be considered is whether, given the location of Caimes in Queensland, Mr Puscas' alleged employment had a sufficient connection with Western Australia to ground jurisdiction under the Act. It will only be necessary to determine this issue, in the event that the Commission finds Mr Puscas to have been an employee at the material times.

Relevant legal principles

Partnership

- 5 A partnership, under relevant partnership legislation, is described as the relationship which exists between persons carrying on a business in common with a view to profit: Partnership Act 1895 (WA) s 7(1); Partnership Act 1891 (Qld) s 5(1). In addition to state legislation, partnerships are also governed by any relevant deed or agreement and the common law. In general terms, there are three elements that partnerships have in common. The first is a combination of persons carrying on a business. The second is doing so "in common". The third element is the conduct of the business with a view to profit: *Baldwin v Commissioner of Taxation* [2005] AATA 44.
- 6 Whether or not a partnership exists will depend on the facts of the particular case. The onus is on the person asserting the existence of a partnership, to establish it on the balance of probabilities: *Morden Rigg and Co and RB Eskrigge and Co v Monks* [1923] 8 TC 450. It is the substance of the relationship that matters, not how the parties may describe their relationship: *Baldwin; In re Ruddock* (1879) 5 VLR (IP & M) 51; *Pooley v Driver* (1876) 5 Ch D 458. The parties cannot change the nature of their relationship, by putting a different label on it: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385.
- 7 In *Duke Group Limited (in liquidation) v Pilmer* (1999) 73 SASR 64, the Full Court of the South Australian Supreme Court considered the various indicia constituting a partnership. The Court (Doyle CJ, Duggan and Bleby JJ) considered, at 275, the following features would be included:
 - (a) partaking in management;
 - (b) having a share in the profits and assets;
 - (c) making decisions about the composition of the partnership;
 - (d) an indemnity from partnership assets;
 - (e) interest on capital contributions in certain circumstances; and
 - (f) partners will retire at will and assign a partnership share.
- 8 Furthermore, the Full Court considered that obligations of partners would also extend to:
 - (a) bearing losses equally;
 - (b) the existence of fiduciary obligations owed from one partner to another;
 - (c) the rendering of accounts;

- (d) only using partnership property for partnership purposes; and
 - (e) keeping the books of account at the place of the partnership.
- 9 As to a general statement of principle, in *The Commissioners of Inland Revenue v Williamson* (1928) 14 TC 335 the respondent and his sons worked on a farm jointly without any formal document to record their working relationship. The respondent supplied the working capital, conducted all buying and selling and controlled the bank account, which was in his name. In considering whether, on the facts, a partnership existed, The Lord President Clyde said at 340:
- you do not constitute or create or prove a partnership by saying that there is one. The only proof that a partnership exists is proof of the relations of agency and of community of losses and profits and of the sharing in one form or another of the capital of the concern; the only proof of a partnership consists in proof of these things. No doubt the proof may be supplied by what in fact the persons alleging themselves to be partners have done during the currency of the alleged partnership. For instance, if they had treated the capital as if it were partnership capital or consistently with its being partnership capital, perhaps I should say, and if they had treated the profits or losses as partners would treat them, and in fact, if there are facts and circumstances to show that their relations were those consistent with partnership, no doubt the thing can be proved; but I do not see for myself how it could be reasonable to accept such evidence as the three persons gave before the Commissioners as evidence of anything more than this, that they were bona fide under the impression... that in carrying on the business of the farm they were, to use a cant expression, all in the same boat and with equal ultimate interests in it.
- 10 An agreement to share profit and loss is a strong indicator of a partnership. The strongest being the sharing of losses. In *Walker v Hirsch* (1884) 27 Ch D 460, the plaintiff commenced an action to wind up a partnership, after a dispute arose in relation to the operation of the firm in question, and the defendant excluded the plaintiff from the office. The plaintiff received a fixed salary and a one eighth share of profits and losses. The plaintiff also advanced the sum of £1500 to the business. There was no reference to the plaintiff on the firm's documents and he was not introduced to banks and other institutions as a partner. The Court concluded that the plaintiff was not a partner. Baggallay LJ (at 464-478) held that an agreement to share profits and losses was prima facie evidence of a partnership. The documents in this particular case did not evidence a partnership. There was no provision for the assets and goodwill of the business. It was held that the plaintiff was an employee who took an active part in the management of the business.
- 11 Disputes often arise, as in the present case, as to whether a person is a partner or an employee. As a partnership is not a separate legal entity, a person cannot be both a partner and an employee: *Scott v Commissioner of Taxation* [2002] AATA 778. I turn now to consider the relevant tests for employment.

Employment

- 12 The tests as to whether a person is an employee, as opposed to being in another relationship, such as that of principal and independent contractor, is now well settled. The contemporary approach is to regard the issue of control as still important, but also to consider a range of other indicia in the relationship. This is described as the "multi-factor" test: *Stevens v Brodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16; *Hollis v Vabu Pty Limited* (2001) 207 CLR 21; *Personnel Contracting Pty Ltd t/as Tricord Personnel v The Construction Forestry Mining and Energy Union of Workers* (2004) 85 WAIG 5. In terms of control, the emphasis has shifted from the actual exercise of control, to the right to do so, "so far as there is scope for it": *Stevens* per Mason J at 29.
- 13 In addition to control, and the right to exercise it, a number of other factors are also relevant to consider and they include:
- (a) the mode of remuneration;
 - (b) the provision and maintenance of equipment;
 - (c) an obligation to perform work;
 - (d) the hours of work;
 - (e) the provision of holidays;
 - (f) the deduction of income tax; and
 - (g) the capacity for the delegation of work by the "putative" employee.
- 14 Further, the relevant principles in relation to employment were set out in *Tricord Personnel*. In this case, the Industrial Appeal Court dealt with the issue of whether a person was an independent contractor or an employee. In considering the applicable tests, in particular that relating to control, Simmonds J observed at pars 95-100 as follows:

The test for a contract of service

- 95 The common law test for distinguishing a relationship of employer/employee, on the one hand, and principal/independent contract or, on the other, has recently been reviewed in some detail in the judgment of Hasluck J of this Court in *Birighitti* (*supra*), at [57] to [67]. The other members of the Court (Anderson J, who dissented on the jurisdictional issue in the case, and Scott J) did not find it necessary to enter into the question in as much detail because of the case's particular facts.
- 96 In this case, where it seems to me the matter is rather more evenly balanced than in *Birighitti*, I consider it is necessary to review the matter again, particularly as it was contended in this case that there had been a shift in the law not entered into in *Birighitti*. I review the matter again without meaning to depart from the view of Hasluck J there in any way, but to emphasise matters of first principle particularly relevant to this case.

- 97 The most recent High Court authority in point, for the purposes of vicarious liability for the negligence of a bicycle courier, is *Hollis v Vabu Pty Ltd (supra)*. There was a clear majority on the issue of the application of the test, that of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, with McHugh J dissenting, and Callinan J not expressing a concluded view on the matter. As to the test itself, however, I see no clear difference between all of the members of the Court who expressed a concluded view.
- 98 The test set out in *Vabu* by the majority is expressed in terms of the difference between a person (an employee) whose work serves another, and is done in that other's business, on the one hand, and a person whose work is likewise for the benefit of another's business, but is done in the course of the carrying on of a trade or business of the person doing the work, on the other. The majority referred (*Vabu*, at 39) for this purpose to *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41, at 48, per Dixon J, and to *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, at 217 per Windeyer J, where language of this sort is used. The *Vabu* majority also referred to *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, at 366 per McHugh J, where the distinction is expressed in terms of the independent contractor as a person who does the work not as "the representative of the employer".
- 99 For the application of the test, and particularly for the relevance of the matter of "control" of the work done, the *Vabu* majority refer to the dicta in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, at 29 per Mason J. There, his Honour acknowledges the historical significance of the "control test" and the difficulties in using it in the historical ways in modern working conditions, where he says
- "The common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters': *Zuijs v Wirth Brothers* [(1955) 93 CLR 461, at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."
- 100 What his Honour meant by the reference to the factors, including but not limited to control, subsumed by the "totality of the relationship" is indicated by an earlier passage in his judgment in *Stevens (supra)*, which is not referred to in *Vabu*, but which is a passage quoted in *Odco* as setting out the law on this point (*supra*) at 754):
- "The approach of this court has been to regard it [control] merely as one of a number of indicia which must be considered in the determination of the question: *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539 at 552; *Zuijs'* case [*supra*]; *FCT v Barrett* (1973) 129 CLR at 401; 2 ALR 65; *Marshall [supra]* at 218. Other relevant factors include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."
- 15 As there as some suggestion by Caines, that both Mr Puscas, Mr Leonard and itself as an alternative to partnership, were involved in a form of joint venture in relation to the Caines Web operation, I will briefly refer to the relevant principles concerning joint ventures now.

Joint venture

- 16 There is no precise legal definition of a joint venture under Australian law and the area of law is still developing: *R & R Fazzolari Pty Limited v Parramatta City Council* (2009) 237 CLR 603. There is also no general legislation which defines a joint venture. Generally, a joint venture creates a common enterprise for parties to assist each other with a common goal. Joint ventures are usually governed by the common law and contract law. Joint ventures are often used for particular businesses or projects with a limited life span, for example minerals exploration, mining or the development of land.
- 17 Broadly, a joint venture is an association of persons, both natural and corporate, formed for the purpose of undertaking a specific venture typically requiring a wide range of technical, managerial and financial resources. A variety of legal forms may be used for the conduct of such a venture, including a corporation, trust, partnership or an unincorporated association which is not a partnership. (See generally Thomson Reuters, *The Laws of Australia* (at 1 August 2010) 4 Business Organisations, '8 Non-corporate Organisations' [4.8.1890]-[4.8.1900]).
- 18 In *United Dominions Corporation Limited v Brian Proprietary Limited* (1985) 157 CLR 1, Mason, Brennan and Deane JJ observed at 10 that:
- The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill.
- 19 In the case of an unincorporated joint venture, each joint venturer will own a share in the assets of the project in proportion to its participating interest in the joint venture. In Crommelin M, 'The Mineral and Petroleum Joint Venture in Australia' (1986) 4(2) *Journal of Energy and Natural Resources Law* 65, the learned author says at 65:
- The mineral and petroleum joint venture is an association of persons (natural or corporate) to engage in a common undertaking to generate a product to be shared among the participants. Management of the undertaking is divided: specified activities are to be performed by a designated person (the operator or manager) as agent for the participants; the

power to determine certain matters is vested in a committee (the operating or management committee) upon which participants are represented and entitled to vote in accordance with their interests in the venture; and other matters are decided at the outset by the participants as terms of the association. The relationship among the participants is both contractual and proprietary: the terms of the association are fixed by agreement, and property employed in the undertaking is held by the participants as tenants in common.

- 20 As with the existence of a partnership, whether a joint venture exists is a question of fact. As was said by Crennan J in *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 479 at par 81 “It is always a question of fact whether any particular undertaking constitutes a joint undertaking for mutual commercial gain.” It is important to consider the agreement between the parties. The High Court in *John Alexander’s Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1 at 44, commented that the expression “joint venture” is vague, but it is correct to say that:

The rights and obligations of the parties remain to be determined by examination of the detail of what they have agreed and done.

- 21 In *Gibson* Crennan J set out a number of recognisable and common characteristics of joint ventures and said (at par 80), that it could be concluded that a joint venture exists where the participants:

- (a) Hold proprietary interests in the assets of the joint undertaking, often, but not necessarily, as tenants in common;
- (b) Exercise joint control of the undertaking;
- (c) Contribute to the joint undertaking, although not necessarily equally;
- (d) Enjoy rights and assume obligations calculated by reference to ownership of shares and / or contributions made;
- (e) Share “a community of interest” in the performance of the undertaking’s purpose; and
- (f) Associate for mutual commercial gain which can include mutual profits.

- 22 In the present context, the distinction between a joint venture and an employment relationship is relevant. As with a partnership, bodies such as an unincorporated joint venture, have no separate legal entity capable of entering into a contract. (See generally Thomson Reuters, *The Laws of Australia* (at 1 April 2011) 26 Labour Law, ‘1 Individual Employment’ [26.1.560]).

- 23 The distinction between the two relationships of employment and a joint venture is illustrated in *Yellow Cabs of Australia Limited v Colgan* (1930) 29 AR 137. In this case, before the Full Bench of the Industrial Commission of New South Wales, the issue was whether the appellant was required to pay wages to a taxi driver under the relevant award. The Commission had to determine whether the driver was an employee. The driver leased the taxi and made a percentage contribution to the company based upon his fare income. The relevant agreement imposed restrictions on the driver, such as operating the meter and bringing the cab in at times for servicing. Over a period of 16 weeks, the driver concerned worked an average of 70-75 hours per week. The appellant argued that the agreement created co-adventurers in a joint enterprise, as both were equally interested in making a profit from the use of the taxi.

- 24 In its judgement, the Full Bench, by a majority, held that the driver in question was not an employee. It was held that the arrangement was not a contract of employment, but rather a joint venture. The Commission did not accept that there was anything in the nature of orders given by the superintendents that were required to be obeyed by the drivers. The drivers had the sole control of the cabs’ running and management. The superintendents ensured that the drivers carried out the work on the cab according to the relevant regulations and the terms of the lease. The Full Bench observed at 169 as follows:

Such a system does not appear to establish that the drivers were subject to the commands of the company as to the manner in which they shall do their work, but were independent in that, though they embarked upon the carrying out of a joint enterprise, each driver was substantially in the position of an independent contractor ‘who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand’ ... this system was necessary to further the interests of both parties to the joint adventure ...

- 25 Finally, some comment as to the differences between partnerships and joint ventures may be apposite. Such a distinction is not always easy to discern: *United Dominions* at 15 per Dawson J. As to the relevant element of a partnership, that being the carrying on of a business, there appears to be no material distinction. As to the second element, that being carrying on the business in common, a joint venture may carry on a business severally rather than in common. As to the third element, in a typical joint venture, the participants take separate shares of product or output and accordingly do not share in joint profits (see generally Thomson Reuters, *The Laws of Australia* (at 1 August 2010) 4 Business Organisations, ‘8 Non-corporate Organisations’ [4.8.1950]). In *United Dominions*, Dawson J at 15, observed that the important distinction between a partnership and a joint venture is between an association of persons who engaged in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants.

Connection with the jurisdiction

- 26 For a claim of the present kind to be within the Commission’s jurisdiction, it must have a sufficient connection with Western Australia. In *Parker v Tranfield* (2001) 81 WAIG 2505 McKechnie J put the test of a relevant connection in these terms:

Legal principles

- 12 It is not disputed that the Western Australian Parliament may make laws for the peace, order and good government of Western Australia and that pursuant to this power its laws may have extra-territorial effect.

- 13 In *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 the High Court held that the Commonwealth Conciliation and Arbitration Commission had jurisdiction to make a binding award in respect of a log of claims served on a shipping company whose ships, registered in London, traded between South Australia and Japan. Dixon CJ was of the view that there was sufficient connection with Australia because the disputants were, for the most part, connected by residence, or the likes, with Australia and the demands were made with respect to employment for which masters, officers, and engineers were engaged in Australia.
- 14 Taylor J at 289 took the view that it was necessary for there to be a substantial connection with Australia.
- 15 Windeyer J, although in dissent on the overall decision, on this point expressed the position as follows at 311 –
 "Prima facie Commonwealth statutes ought not to be so construed as authorising any subordinate law-making body to deal with matters which have no real and substantial connexion with Australia or to make any rules except such as can be directly or indirectly enforced by the authority of Australian courts."
- 16 Later decisions of the High Court appear to have moved from the requirement of a "real and substantial connexion" to a less substantial connection.
- 17 In *Pearce v Florenca* (1975-76) 135 CLR 507 the High Court considered the validity of the Western Australian *Fisheries Act*.
- 18 After discussing the rule requiring a relevant connection between the personal circumstances on which the legislation operates and the State, Gibbs J said:
 "For that reason it is obviously in the public interest that the test should be liberally applied, and that legislation should be held valid if there is any real connexion - even a remote or general connexion - between the subject matter of the legislation and the State. And it has been established by a series of well-known decisions, which are collected in *Cobb & Co Ltd v Kropp* [1967] 1 AC 141, at pp 154-156, that within their limits the legislatures of the States have powers 'as plenary and as ample' as those of the Imperial Legislature itself. It would seem anomalous and unfitting that the enactments of such a legislature should be held invalid on narrow or technical grounds."
- This test was followed by the High Court in the *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 by the Court at 14.
- 19 The cases are not precisely analogous in that the appellant does not dispute that the *Industrial Relations Act 1979* might have extra-territorial effect in a proper case. Instead it is contended that the particular facts have no sufficient connection with the State. However, I consider the principles expressed in *Pearce v Florenca* and confirmed in *Union Steamship v King* are generally applicable to resolve factual questions about the extra-territorial effect of the *Industrial Relations Act* in particular circumstances.
- 20 As a result it may be that the nexus between the factual circumstances and Western Australia may not be so substantial as the Commission considered necessary to ground jurisdiction. A real, even though a remote, or general connection with Western Australia is sufficient.

Evidence

- 27 Having outlined the applicable legal principles, I now turn to consider the relevant evidence.
- 28 Mr Puscas testified that prior to June 2010 he worked as a contractor for Caimes. At about this time, Mr Puscas said he had some discussions with Mr Bozkurt as to future arrangements. Mr Puscas acknowledged that there was a discussion between himself, Mr Leonard and Mr Bozkurt regarding the establishment of a separate business to do web development business. Mr Puscas testified that they were told by Mr Bozkurt that this would involve establishment costs of between \$10,000 and \$30,000 and each of them would have to contribute. It was Mr Puscas' evidence that he was then only 20 years old, did not have financial capacity, and did not want the responsibility of being a director of a company. He told Mr Bozkurt he only wished to work as an employee for Caimes. This was particularly so he would have a regular income to establish an income history for the purposes of obtaining a loan to buy a house.
- 29 According to Mr Puscas, the upshot of these discussions was that he commenced working as a part time employee for Caimes working approximately 20 hours per week and was paid \$30 per hour net. All payments to him were made by Caimes for the hours that he worked. The work to be performed by Mr Puscas would be in the division of the Caimes business called Caimes Web, which was providing website design and development services to clients under this divisional name. Whilst Mr Bozkurt maintained that an email from him to Mr Puscas and Mr Leonard of 26 June 2010 (see Appendix N to Mr Bozkurt's witness statement) set out what he proposed to be a partnership or joint venture between them regarding the Caimes Web business, Mr Puscas denied he ever had seen or received such an email. Mr Puscas strongly denied that there was any such agreement reached between himself, Mr Leonard and Mr Bozkurt. Mr Puscas said that at the time he was discussing his future with Mr Bozkurt, he trusted him as a friend to do the right thing.
- 30 According to Mr Puscas, Caimes Web, as a division of Caimes, was established because clients of Caimes were becoming confused as to the range of services offered by the Caimes business. In this respect, Mr Puscas referred to a number of matters. First, was an email from Mr Bozkurt to him, of 13 August 2010, (see Appendix Q to Mr Bozkurt's witness statement) to the effect that it was important to develop a separate Caimes Web website, to separate out the web development aspect of Caimes' business so it could be separately identified by clients. Further to this separate division concept, Mr Puscas also referred to a proposed "rebranding" of Caimes, to be undertaken by a consultant, and set out in an email of May 2012 (annexure B to Mr Puscas' witness statement). In this proposal, which was authorised and compiled by Mr Bozkurt as the chief executive

officer of Caimes, a number of matters are referred to. Firstly and significantly according to Mr Puscas, is that the proposed rebranding had the intention of reducing the divisions operating within Caimes from five, including web services, to two divisions, they being business consulting and web services. Mr Puscas said the web services division was Caimes Web. In this document, prepared by Mr Bozkurt, both Mr Puscas and Mr Leonard were referred to by him as "payroll staff" and not as contractors.

- 31 In the consultants initial rebranding proposal, set out in a document attached to an email from the consultant to Mr Bozkurt of 22 January 2012, it is stated that "Caimes recently started a web based division of the business called CAIMES Web, and based on the success of CAIMES Consulting, has started to enjoy a measure of success."
- 32 When in about November 2010, Mr Puscas moved from Queensland to Perth he remained employed by Caimes and commenced working in Perth and attempted to obtain further clients for Caimes in the Perth marketplace. Mr Puscas said he opened a post office box in the name of Caimes. As a part of developing the Caimes business in Perth, Mr Puscas testified that he engaged in various "networking activities" one of which was attending functions conducted by a business networking group called "BNI". In this respect, Mr Puscas said he was given specific instructions by Mr Bozkurt as to how to present himself as a part of Caimes.
- 33 Mr Puscas referred to an email to him of 15 March 2011, from Mr Bozkurt, which set out how he should answer questions on behalf of Caimes at a function known as a "BNI Dance Card" at which each attendee has a brief one on one meeting with others, presenting their business. In the email, Mr Bozkurt directed Mr Puscas to represent that he was acting on behalf of Caimes and not Caimes Web. The instructions from Mr Bozkurt to Mr Puscas referred to the functions of Caimes as combining project management with web development as a point of difference to other companies. Mr Puscas said that he attended the BNI functions and answered questions put to him by other attendees, based on Mr Bozkurt's instructions to him.
- 34 According to Mr Puscas, there were many aspects of the Caimes Web aspect of the Caimes business that made it very clear that there was not a separate business entity, but rather was a part of Caimes' overall operations. Mr Puscas highlighted this when referring to an email of 3 July 2012 from Mr Bozkurt to a client, copied to Mr Puscas, in relation to intellectual property rights. In the email, which was in response to a client query about the matter, Mr Bozkurt makes it clear that Caimes, as the developer of the website, owns the intellectual property associated with it. There is no reference to Caimes Web owning anything.
- 35 Furthermore, on Mr Puscas' evidence, there are a number of other factors consistent with Caimes Web never, at any time, being a separate business to Caimes and that it was at all times, a division of Caimes. These factors included that Caimes Web never had a separate registered business name; it did not have a separate bank account; there was never any formal agreement entered into between himself, Mr Leonard and Mr Bozkurt, identifying any business structure for Caimes Web; the CaimesWeb.com domain name, was owned by Caimes as its intellectual property; at all times Mr Puscas was paid by Caimes for all work done by him; he had no equity in the business nor any control over its finances; and nor did Mr Puscas make any substantial business decisions.
- 36 Importantly, Mr Puscas testified that when he undertook work for a client and entered into a contract with them for the performance of services, all contracts were entered into on behalf of Caimes and not Caimes Web. In this regard, Mr Puscas referred to a bundle of business proposals which are signed by both the client and Mr Puscas. In each case, Mr Puscas signed the agreement to perform services on behalf of Caimes and not Caimes Web. Furthermore, Mr Puscas also referred to how work undertaken for clients was invoiced. Annexed to his witness statement, was a bundle of client invoices. On each occasion where Mr Puscas did work on behalf of a client, the client was invoiced by Caimes and was required to make payment to Caimes at its business bank account. There is no reference anywhere on the invoices to Caimes Web.
- 37 In terms of his own payments, Mr Puscas testified that all payments to him for the work he performed were made by Caimes and deposited directly into his bank account. An extract of Mr Puscas' internet banking account confirms that this was so. The payments were described as "Base Contract Fee". I will return to this issue later.
- 38 As noted above, Mr Puscas relocated to Perth. After opening a post office box on behalf of Caimes, on Mr Bozkurt's instruction, Mr Puscas was also provided with a credit card by Caimes, to pay for expenses associated with developing local business. The credit card was in the name of Caimes and had Mr Puscas' name on it. In conducting business on behalf of Caimes in Perth, Mr Puscas said that he was required to locate new clients and secure business in accordance with proposals as authorised by Mr Bozkurt. Once a client was secured, Mr Puscas would be responsible for the design work on the website and he would liaise with Mr Leonard in relation to its development. When he attended the BNI referred to above, Mr Puscas said he did so at all times on behalf of Caimes, and the costs associated with his membership of BNI were met by Caimes.
- 39 Importantly also, according to Mr Puscas, is the fact that in business proposals put to clients set out in the bundle of proposals annexed to Mr Puscas' witness statement, from September 2010 to March 2011, proposals were under the "Caimes Project Managers" logo and business name owned by Caimes. The Caimes Web logo did not appear on business proposals until about April 2011, with Mr Bozkurt's approval, well after the alleged commencement of the partnership / joint venture. The Caimes Web business was said by Mr Bozkurt to have commenced in August 2010.
- 40 In terms of the day to day work he performed, Mr Puscas testified that at all times Mr Bozkurt had overall supervision and control of his activities. This day to day control manifested itself in a number of ways. Mr Puscas referred to what is described as the "ticketing system" adopted by Caimes in the operation of its business. This system is used for both client work and internal administration procedures that were required to be completed by Caimes staff. Mr Puscas referred to an email to him and others from Mr Bozkurt of 11 July 2012, in which Mr Bozkurt requested staff to reduce the number of tickets in the support system. The next day on 12 July 2012, Mr Bozkurt sent an email to Mr Puscas and others, directing Mr Puscas to inform clients that Mr Thomson, a business strategist for Caimes, was managing client accounts. The final paragraph of Mr Bozkurt's email to Mr Puscas and others reads:

- I expect that all the clients to be contacted at least once a month from today on, and please put in the comments within Caimes Connect.
- 41 Numerous other examples were referred to in Mr Puscas' testimony of occasions where Mr Bozkurt exercised control and provided instruction to both him and other staff of Caimes. As referred to in Mr Puscas' witness statement these included:
- (a) A copy of an email of 19 January 2012 from Mr Bozkurt to Mr Puscas and others, referring to a dispute between Caimes and a client. In this lengthy email, Mr Bozkurt provided various directions and instructions as to how to deal with the client; who to be contacted, and made the decision of his own volition for Caimes to cease payments to the other company;
 - (b) An email from Mr Bozkurt to Mr Puscas and others of 20 January 2012 instructing staff to change their passwords used for internal systems;
 - (c) An email of 23 January 2012 from Caimes' office manager requesting Mr Puscas to change his email account settings so that Mr Bozkurt could access all of his emails and monitor them;
 - (d) An email of 15 April 2012 to Mr Puscas and Mr Leonard providing instructions to attend to a number of matters prior to the arrival of new staff;
 - (e) An email of 28 May 2012 from Mr Bozkurt to various persons including Mr Puscas, regarding a new roster for staff that he would be introducing and a requirement that staff adhere to it along with the relevant policies;
 - (f) On 19 June 2012 Mr Bozkurt directed Mr Puscas to contact a client of Caimes to advise of Caimes' fee structure;
 - (g) On the same day Mr Bozkurt instructed Mr Puscas to execute a list of tasks required to be performed including a further direction in relation to the use of "tickets";
 - (h) Mr Bozkurt forwarded to Mr Puscas a copy of an email dated 22 June 2012 to the consultant preparing the rebranding proposal, advising unilaterally, that he was not satisfied with the branding proposal and major changes needed to be made to it;
 - (i) On 27 June 2012 an email was sent by Mr Bozkurt to Caimes staff, including Mr Puscas, raising again the issue of the "ticket" system. In it, Mr Bozkurt said:

I have been through a number of tickets and I am surprised as to how many of them our weeks and months old. ...

I would like each staff to review their tickets and ensure they are all handled this week.

I do not expect more than 6 tickets to span the weekend.

Please note JUST emailing clients is not GOOD client services, please make the call to the client and chase things and close the tickets off.
 - (j) On 2 July 2012 Mr Thomson the business strategist for Caimes sent an email to Mr Puscas stating that Mr Bozkurt had requested staff to make changes to their IT systems;
 - (k) In relation to the rebranding proposal, in an email of 9 July 2012 to Mr Puscas, Mr Leonard and others, Mr Bozkurt advised of his decision not to proceed further with the project as the consultant was unable to complete the required tasks.
- 42 Additionally, Mr Puscas testified that in various email communications, including external communications, set out in the bundle of emails annexed to Mr Puscas' witness statement, Mr Bozkurt refers to both Mr Puscas and others as "staff". Furthermore, reference is made to other persons within Caimes as employed on "salary packages".
- 43 Mr Puscas also gave evidence in relation to a number of communications between himself and Mr Bozkurt regarding his remuneration. Mr Puscas said that in early 2011, Mr Bozkurt agreed with him that he would increase his hours of work for Caimes from 20 to 25 hours per week. At that time, Mr Puscas' weekly pay would increase from \$600 to \$750 per week. Later, in 2011, in October, Mr Puscas said that he and Mr Bozkurt agreed that Mr Puscas would increase his hours to work on a full time basis at 40 hours per week, leading to a fortnightly gross income of \$2,400 plus superannuation. Mr Puscas said he agreed with Mr Bozkurt for the increase in hours and payments over the telephone.
- 44 Subsequently, Mr Puscas said he confirmed his understanding of this arrangement in an email to Mr Bozkurt dated 12 September 2011. Further, on 29 October 2011, Mr Puscas sent an email to Mr Bozkurt requesting that he provide a group certificate for the 2010-11 financial year and that there be written confirmation of the revised terms of his employment. Mr Puscas said he also brought to Mr Bozkurt's attention the fact that payments being made by Caimes to him were less than the fortnightly amount agreed. There were other email communications from Mr Puscas in early 2012, referring to his assertion that he had been employed for at least 2 years by Caimes and had been underpaid his wages and made a claim for them. Mr Puscas also reiterated his request for a group certificate which he needed for income tax purposes. In particular, Mr Puscas referred to an email from Mr Bozkurt to him dated 6 July 2012. In it, Mr Bozkurt referred to Mr Puscas' "wage" being based upon his budgeted sales performance and billable hours, which had fallen short of expectations. Mr Puscas noted that there is no reference in Mr Bozkurt's email of 6 July to any alleged joint venture or partnership as previously asserted.
- 45 Furthermore, in email communications in mid-July 2012, Mr Puscas again raised the necessity for group certificates and payment summaries for the 2010-11 and the 2011-12 financial years to be provided for him, in order for him to finalise his income tax returns. Mr Puscas testified that he completed and filed a tax file declaration confirming that he was an employee of Caimes over the material times.

- 46 Mr Bozkurt, a director of Caimes, had a very different view to that contained in Mr Puscas' testimony. Mr Bozkurt referred to first meeting Mr Puscas in about September 2007, at a time when Mr Puscas was providing web based consultancy services to another company. They both remained in contact and in about June 2009, Mr Bozkurt testified that Mr Puscas approached him regarding Mr Puscas contracting his services to Caimes. Various discussions and email exchanges took place which culminated, on Mr Bozkurt's evidence, in confirmation of an arrangement by email dated 18 November 2009, which confirmed Mr Puscas providing contractor services to Caimes on an as required basis.
- 47 From about February 2010, according to Mr Bozkurt, to obtain more leverage, Mr Puscas began using the Caimes business name and was issued with a Caimes.com email address, to provide greater credibility in obtaining work. In about May and June 2010, Mr Bozkurt testified that some discussions took place between himself, Mr Puscas and Mr Leonard as to their future arrangements. According to Mr Bozkurt, both Mr Puscas and Mr Leonard were seeking greater certainty in their incomes and that they would have difficulty in securing finance for home purchases etc, if they remained associated with Caimes as contractors. Mr Bozkurt acknowledged that both Mr Puscas and Mr Leonard raised the issue of them becoming employees of Caimes for this purpose.
- 48 In addition to becoming employees, Mr Bozkurt also said that Mr Puscas and Mr Leonard wished to incorporate some form of reward payments as the web development aspect of Caimes business became more successful. According to Mr Bozkurt, Mr Puscas and Mr Leonard also suggested that the web development work should be part of a separate identity to ensure that it could be expanded and developed independently of the other activities of Caimes. The upshot of these discussions, according to Mr Bozkurt, was the concept of creating a new entity to develop this aspect of the business, in relation to which the three of them would have equity, in the form of a joint venture / partnership arrangement. The intention was that each of them would be able to draw a regular payment in advance of work being achieved, with a subsequent reconciliation once income had been generated from work performed on behalf of clients, taking into account relevant expenses. Mr Bozkurt testified that the agreed joint venture / partnership was set out in an email from him to Mr Puscas and Mr Leonard dated 26 June 2010, a copy of which was Appendix N to Mr Bozkurt's witness statement. This email became a central issue in these proceedings. This is the email communication from Mr Bozkurt that Mr Puscas testified he never received and had never seen.
- 49 According to Mr Bozkurt, the essence of the agreement reached, reflected in Appendix N, was that effective 1 July 2010, but with a commencement of mid-August 2010, a new venture would be established between Mr Bozkurt, Mr Puscas and Mr Leonard, to be known as "Caimes Web", to be operated as Mr Bozkurt described it, a joint venture / partnership arrangement. Whilst the email of 26 June 2010 is very lengthy, it is important to set out the material parts of it as that formed a central plank in Caimes' case in these proceedings. Formal parts omitted, the relevant terms of the alleged arrangement were as follows:

.....

- We accept that the following will apply:
 - Zaff, Some sales, business administration and initially will fund the venture
 - Ovi, Sales and artwork and account management
 - Marius Development and research
- We also accept that for this venture to work we will need more skills, and this can be backfilled by contractors as and when we need, and that we budget \$35.00 ex GST per hour all inclusive
- As this is a new venture that the three of us are embarking on, we agree that we did not want the venture to be part of CAIMES as I (zaff) did not want affect the business reputation of Caimes if this does not work and if this does work we are clearly identify the activities for profit share and to be able to separate the venture away from CAIMES
- After many hours of discussion we agreed that we want to leverage from the existing Caimes name, website and email system, so after deliberation CAIMES WEB was accepted
- We sat down and came up with a base working capital top set up the new venture and rounded off the figures to \$100K, this figure is based on the estimated capital needed to set the venture up and have sufficient funds to cover living expenses for the first few months
- As we need the funds to start, the best way is to gain capital from the three of us, so the idea is that both of you Ovi and Marius buy into CAIMES WEB, and therefore have equal shared each based on the follow percentages
 - Zaff 70 shares
 - Ovi 15 shares
 - Marius 15 shares
- Based on the above Ovi, and Marius puts in AUD\$1,000 per share, ie \$15K each and I put in \$70K. However neither Ovi or Marius wanted to risk their money and put in. Which then meant that following will apply within the agreement.
 - Zaff will fund the venture from consulting revenue received by CAIMES and as a result will retain all Intellectual property and clients and all other items created during the venture
 - All funds allocated to this venture will need to be put in as a loan and repaid back over the course of operation
 - Zaff will remain in the consulting field 4 days a week and allocated approx. 20-25 hours a week for general administration and guidance on an as needed basis

- To be equal between all three of us, Marius and Ovi would allocate the same ie between 20 - 25 hours a week towards this venture (this suited Marius as he was still working with Pizza Hut, and Ovi had other work and study commitments). End result, we all put in similar time and effort into the venture to ensure success
- As funding the venture was under a loan and to minimise the funds needing to be paid back, all three of us agreed that we would supply our own PC and relevant software, internet connection, mobile phone, car travel costs etc
- As both Marius and Ovi needed funds to cover living expenses, they would receive a fortnightly payment in advance and that the funds provided to each of them will be recorded so that we had a clear idea of the funds needed to be paid back to CAIMES
- The base agreement and business strategy around future budgeting was agreed to be the following percentages:
 - 50% to cover total human resources income, ie to be allocated to cover contracted staff and the advance payments made to Ovi and Marius
 - 5% to cover any additional work we require to do to keep clients happy
 - 5% to cover the regular ad hoc bonuses
 - 10% to cover CAIMES WEB profit margin and funds the future growth
 - 20% to cover general administration
 - 10% to cover client activities and general marketing

Note All the funds provided to CAIMES WEB will be recorded and will be paid back from the income generated by CAIMES WEB

- CAIMES WEB domain will be registered and the website will be created. Resulting in clearly separating the activities from CAIMES
 - Obviously as the team cannot be held inhibited in its growth all the items developed and relevant IP and the clients will remaining with CAIMES / ZAFF (until we formally register CAIMES WEB). The concept is that CAIMES/ZAFF retains the IP etc. until such time otherwise stated and the person, staff, contractor, volunteer and or other may be granted the right to use the items developed (as long as it is not in direct competition) and should this venture not work or Ovi and or Marius decided to leave or if for some reason or there is a need to ask a person to leave the IP and all relevant items must remain within CAIMES/ZAFF, Ovi as Marius has no desire to deal with the other contractors and or clients, it is up to you and I to ensure that this culture and agreement is clearly understood and followed
 - To compensate Ovi and Marius, for the additional time put in both Ovi and Marius would receive profit share based on the original share percentages, however this was clearly explained not a share of CAIMES WEB or CAIMES just a profit share of CAIMES WEB generated income
 - Based on this idea above, both Ovi and Marius agree that you have no involvement in CAIMES as a shareholder, profit share, employee and or contractor. And the focus is CAIMES WEB
 - Both Marius and Ovi agreed that the work for them and others are based on deliverables for allocated budgeted time, and that neither one of them and or any contractor will be paid purely for time worked, as we will have an agreed budget for activities and to ensure fair financial matters both all involved people will need to work within the budgeted parameters. Any time worked over and above will not be made to Ovi, Marius or any other yet to be names contractor. Ie every post needs to be commercially viable
 - We will base the actual billable work (client billable work) to be \$35.00 per hour ex GST all inclusive of super, holiday pay, sick leave, insurances, work cover etc ... (as you would expect that each contractor would be managing their own financial affairs)
 - We agree that the same hourly rate will apply to Zaff, Ovi, and Marius, And that any advance payment made to either Ovi and Marius would be reviewed (checks and balances) based on their billable timesheet records for a given projects
 - Therefore any funds remaining from the 50% income generated by CAIMES WEB after paying all funds back to CAIMES and covering contractors (including Marius and Ovi) would be shared based on the original profit sharing.
 - It was agreed that time spent on building the client base is not directly proportional to income, so the main thing to clearly manage is billable hours (billed to clients projects), for every billable hour means more income generation for CAIMES WEB and therefore more funding to each of the three of us....
- 50 According to Mr Bozkurt, as neither Mr Puscas nor Mr Leonard had any available funds, Caimes funded the new venture on as he put it, a "loan basis". Mr Bozkurt said that as a result of the discussions he had with Mr Puscas and Mr Leonard, and the terms of Appendix N, it was clear to all that there was no employment relationship between Caimes, Mr Puscas and Mr Leonard. A little later, on 10 August 2010, Mr Bozkurt sent an email to Mr Puscas and Mr Leonard, in relation to future payments headed "Wage Payments". In the email, Mr Bozkurt set out a schedule of fortnightly payments from 9 July 2010 through to and including 24 December 2010 and referred to the payments as "wage payments fortnightly".
- 51 Additionally in the same email, Mr Bozkurt also referred to superannuation payments being resolved when he had the relevant superannuation account details. Later on the same day Mr Bozkurt sent another very lengthy email to Mr Puscas and Mr Leonard referring to the "error" of the earlier email. The later email of 10 August 2010 is headed "Ovi – understanding,

URGENT". Mr Bozkurt in his evidence described this as "The updated email had a lot of thought put into it to finally clarify all past misconceptions and or misunderstanding, and all of as times refer to the team as team members, staff members, contractors, partners etc. and at times some of these terms have been incorrectly interchanged." The email is, again, lengthy, but relevantly provides as follows:

.....
 Marius did bring to my attention that the original email which was sent late June this year (the original email attached) which clearly listed all the base rules, agreement, understanding and conditions of the three way joint ventureship/partnership is actually the agreed direction.

I went though some hand written notes and the original document (with some notes for my reference) and must agree Marius is 100% right. The idea of being employees of CAIMES WEB was discussed many times however both you and Marius finally suggested and agreed that being an employee of CAIMES WEB meant that you had no ownership and therefore had no part in the direction or profit share and had no potential to purchase the 15% shares of CAIMES WEB that has been set aside at a fixed price off \$1,000 per share. We all fall into the trap of using the terms of wage and salary and employee loosely, we need to be very clear in the concept that CAIMES has never had employees and never intend to. It is a project management company that obtains services from contractors, vendors etc.

As both of you want to have ownership and the ability to take part in decisions and drive the CAIMES WEB business, being an employee of CAIMES WEB will not allow for this and therefore this option is not a suitable option for both of you. (as a personal note this makes the arrangement much easier and caters with the philosophy that partnership/joint venture creates a sense of belonging and will keep all of us more accountable to each other and not sit on our laurels as most employees do in organisations.)

The final lump sum payment, paid to you and Marius has been scheduled, it may take a few days to get to you via EFT. This payment will clear all past owings for all past contract work relating to CAIMES or me personally which includes all compensation super leave payments as you were both contractors up until last week. This now means that both you and Marius now have no legal, financial or other tie to CAIMES at all from this week forth .. this is a big milestone in the new business venture, so welcome aboard, YEAH to both of you. Lets put our thoughts together and make his work for all.

.....
 52 Mr Bozkurt's email further goes on to say:

Given both you and Marius have not invested any of your cash into CAIMES WEB, and as per my role I will reserve the right to retain the control of the finance, corporate administration etc, were Marius will look after Dev and you look after the client artwork and sales. And it needs to be noted at all times we may need to assist each other to ensure that work is delivered on time and within budget. And although we are committed for between 1-2 years before both of you need to purchase the share allocation, as I am funding the venture via CAIMES, both you and Marius accept that I also need to have the right to wind up CAIMES WEB without any penalties and issues or if it is no longer a financial sound model. (obviously we then need to take into account who owes who funds)

53 And finally, at the end of the email, Mr Bozkurt concludes in the penultimate paragraph by saying:

In short, all of the above is trying to clarify one things only, both you and Marius are in a joint venture/partnership agreement with me to form CAIMES WEB to build a web based business, and when the time is right (estimated 2-3 years away, ie after you finish your degree and have some street cred) Ovi you will end up being the director of the incorporated entity and manage the entire business. the let's look at finalising all the items to make this a success for all three of us.

54 In his evidence, Mr Bozkurt also referred to various communications from Mr Puscas to himself and others during the latter part of 2010, including various emails, which referred in Mr Bozkurt's view, to Mr Puscas helping establish Caimes Web as a separate operation. In relation to Mr Puscas' claims in early 2011 for arrears of wages, Mr Bozkurt testified that he responded promptly to these communications. According to Mr Bozkurt, his responses referred to Mr Puscas' relationship as being a partner / joint venturer and in any event, earnings of the participants were linked to the level of revenue generated. In Mr Puscas' case, Mr Bozkurt asserted that the level of revenue generated fell far short of an amount warranting payments of the sums demanded by Mr Puscas. Indeed, Mr Bozkurt asserted that Mr Puscas had cost him approximately \$100,000 in lost revenue.

55 Overall, Mr Bozkurt's assertion was that the understanding was clear in his view. From about August 2010 he, Mr Puscas and Mr Leonard were operating in a new business venture and the relationship between Caimes and Mr Puscas was not one of employment. In the final analysis, Mr Bozkurt said that towards the end of the relationship, the business venture was not as successful as foreshadowed, and Mr Puscas was attempting to extract funds from a business which was unable to afford it.

56 Evidence was also given by Mr Leonard. He testified that up until June 2010 he was with Mr Puscas, contracting his services in the web development area to Caimes. Mr Leonard referred to discussions between himself, Mr Puscas and Mr Bozkurt, over the course of April to June 2010, regarding the development of a new business for Caimes Web. Mr Leonard referred to Mr Bozkurt's email of 26 June 2010 (see Appendix N to Mr Bozkurt's witness statement) as the "base understanding and agreement of the partnership, profit share of CAIMES Web."

57 In relation to payment arrangements, Mr Leonard referred to all services he provided to Caimes as a contractor, being paid out in full to him up to August 2010. From that point on, Mr Leonard referred to further payments as "drawings/advanced payments" to cover living expenses to be later adjusted based upon income and profit share from the venture. Given that the initial stage of the Caimes Web business was slow, Mr Leonard referred to the funding being provided by Mr Bozkurt through Caimes. Mr Leonard asserted that he never regarded himself as an employee of Caimes. He did accept however, that prior to this arrangement, both he and Mr Puscas had discussed with Mr Bozkurt the benefits of becoming an employee and that of a

partnership. According to Mr Leonard, as both he and Mr Puscas wanted to obtain the benefits of developing the web services business, it was better that they “stay on as equity partners in CAIMES Web.”

- 58 Whilst some evidence was given by Mr Schmidt, who also did work for Caimes Web, from June 2012, his evidence did not directly relate to the formation of the contractual relationship between Mr Puscas and Caimes in June 2010 and I do not propose to deal with it any further.

Consideration

- 59 As noted above in the discussion of legal principles, it is the substance of the relationship and not the form that is important in determining whether a relationship of employment, or some other relationship, is found.

- 60 Given the conflict on the evidence between Mr Puscas and Mr Bozkurt as to the central issues in dispute in this case, credit of the witnesses is an issue to be resolved. This issue loomed large in the proceedings on 19 August 2013, in the course of the cross-examination of Mr Leonard. In the course of that testimony, counsel for Mr Puscas was asking questions of Mr Leonard as to his view of the working arrangement with Mr Bozkurt. Mr Bozkurt and Mr Leonard were appearing by video link from Queensland. Mr Bozkurt was sitting close by Mr Leonard whilst he was giving his evidence. At 245T the following exchange took place. The first question is from Mr Marouchak to Mr Leonard:

Okay. So I - I - I'm just focusing on your understanding of the agreement. You're on a regular retainer so it's basically - the way you understood it to work is like a real estate gent gets a basic retainer, a basic wage, and then a potential for profits above that wage in the future if it's successful?

BOZKURT, MR: It's not a wage.

MAROUCHAK, MR: Mr Bozkurt just whispered - - -

LEONARD, MR: It's not a wage

MAROUCHAK, MR: Mr Bozkurt just whispered to the witness, Commissioner. Mr Bozkurt just whispered something.

BOZKURT, MR: Well, I'm sorry.

MAROUCHAK, MR: Mr Bozkurt, I - - -

KENNER C: It's all right, Mr Bozkurt. I - you didn't make any audible noise, did you, then?

BOZKURT, MR: If I did, it was inadvertent because I was talking to myself and writing down notes.

- 61 Counsel for Mr Puscas further pressed Mr Leonard on the issue of whether he heard Mr Bozkurt say something as Mr Leonard was giving his evidence. At 246-247T the following was said:

Mr Leonard, did Zaff just whisper in your ear a comment? Did he say something just then? Did you hear - - -?---He didn't whisper - ear.

But he - Zaff said something, right? Before I interrupted this Commission, I - I said Zaff said something. Did he say something and audible and did you hear it?---No.

Mr - Mr Leonard, you heard Zaff say, "It's not a wage", moments ago. You heard that from him, right?---No. Commissioner, can I object to this?

KENNER C: Well, did - did you make - did you - what - did you make - what sound did you make, Mr Bozkurt? What did you say? You whispered something?

BOZKURT, MR: I actually - I actually wrote down, "Fixed income", and, "Paid invoices", so the only invoice I would have made, from my recollection, is something to do with that, and I can show you the document of which I was writing down at the time so I may have inadvertently said something as I was writing it down, but nowhere does it say what was claimed.

- 62 A review of the transcript, as set out above, clearly shows Mr Bozkurt making an audible comment “it's not a wage” as Mr Leonard was being cross-examined about payments received from Mr Bozkurt under the arrangement. After receiving a copy of the transcript, the Commission reviewed the FTR audio recording of the proceedings on 19 August 2013. The words of Mr Bozkurt, reflected in the transcript excerpts above, were clear and audible.
- 63 I am therefore satisfied that the comment alleged to have been made by Mr Bozkurt whilst Mr Leonard was giving his evidence, was in fact made. I am also satisfied, based upon the excerpts of the evidence outlined above, that when confronted with this, Mr Leonard denied it. I am also satisfied that when it was raised with him, albeit whilst he was not on oath, Mr Bozkurt was less than frank with the Commission in his response.
- 64 As also noted by counsel for Mr Puscas, at times Mr Bozkurt, when giving his evidence, was most reluctant to make concessions and was evasive. A number of examples were referred to in the cross-examination of Mr Bozkurt as to client income of Caimes Web (at 123T) and the fact that Caimes owned 70% of Caimes Web under the alleged partnership / joint venture arrangement (131-136T). On the other hand, I generally found Mr Puscas' evidence, in cross-examination, to be direct and not evasive.
- 65 Having regard to these matters, which are most regrettable, I approach the testimony of Mr Bozkurt and Mr Leonard with some considerable caution. In the event of a conflict on the evidence between Mr Puscas and witnesses for Caimes, I prefer that of Mr Puscas.
- 66 Dealing first with the status of Caimes Web. It was asserted by Mr Bozkurt, as a part of Caimes' case that Caimes Web was a separate business to Caimes and that in accordance with the alleged partnership / joint venture, Caimes owned 70% of the business and Messrs Puscas and Leonard had a 15% “shareholding” each. However, it is also the case on the evidence, that

neither Mr Puscas nor Mr Leonard contributed any funds to the purchase of their “shares” in Caimes Web. On the evidence, Caimes owned all of the intellectual property of Caimes Web and the Caimes Web website. Caimes Web did not have separate incorporation. It did not have an Australian Business Number. It did not have a separate bank account and nor was there any evidence before the Commission of separate accounts kept by Caimes Web, reflecting its alleged independent operations.

- 67 On the evidence also, all contracts entered into by Mr Puscas in relation to the web development work, were between the client and Caimes and not Caimes Web. The documentary evidence before the Commission, in the form of bundles of business proposals, clearly shows that Mr Puscas executed contracts for work with clients on behalf of Caimes. Additionally, all invoices to clients were issued by Caimes and not Caimes Web. All payments made to Mr Puscas for work that he did was paid by Caimes. Further, the marketing work done by Mr Puscas in Perth, for example at the BNI functions, was done on behalf of Caimes. In particular as to this issue, it is to be noted that these functions, and Mr Bozkurt’s directions as to how Mr Puscas should approach them, were well after the alleged partnership agreement entered into in August 2010. The BNI functions took place from March 2011.
- 68 Furthermore, representations by Mr Bozkurt himself, in the document he prepared for the “8 Strategic” rebranding exercise, described the web services aspect of Caimes’ business as a “division” of Caimes, amongst other divisions. On all of the evidence, the Caimes Web development business was solely owned and operated by Caimes as a separately identified division of the Caimes business. It was identified as separate to Caimes’ other business operations, to overcome confusion amongst clients.
- 69 Neither Mr Puscas nor Mr Leonard, on the evidence, made any financial contribution to Caimes Web in accordance with the alleged partnership / joint venture arrangement. Neither did they share in other costs or losses, on the evidence. As I have mentioned, no books of account were kept that involved either Mr Puscas or Mr Leonard, on the evidence before the Commission. I am not therefore satisfied to any extent, that Caimes Web was a separate and independent business to that of Caimes. It was, in my view, another aspect of the Caimes business, fully funded and operated by it. It created a separate identity to clients of the web development business, so they could see a clear differentiation between the various strands of the overall Caimes business operation.
- 70 The relationship between Mr Puscas and Caimes was characterised by a range of indicia. Mr Puscas, from June 2010, continued to be paid an agreed hourly rate of pay of \$30 per hour for work performed. Initially, Mr Puscas worked on a part time basis for about 25 hours per week, which eventually increased to 40 hours per week from about October 2011. Mr Puscas’ work for Caimes was regular and continuous. He was paid from September 2011, at the rate of \$1,500 per week on a regular and systematic basis. The \$1,500 per week had all the appearance of a wage or salary, paid on a regular basis, for the performance of work at the agreed hourly rate. The fact that it was described, in Mr Puscas’ bank statements, as a “base contract fee” is not to any extent decisive.
- 71 I am also satisfied on the evidence, that Mr Bozkurt, in reality, exercised considerable supervision and control over Mr Puscas in the operations of the Caimes Web aspect of Caimes’ business. Whilst Mr Puscas plainly had considerable autonomy in the marketing and promotion of the web development aspect of the business, autonomy of itself, does not negative employment. A strong indicator of employment is not just actual day to day control and supervision, but the right to exercise it. I am well satisfied on the evidence that Mr Bozkurt had such a right.
- 72 There were numerous examples on Mr Puscas’ evidence, where Mr Bozkurt exercised actual day to day control and supervision of the Caimes Web aspect of Caimes business. Mr Bozkurt is an experienced businessman. All key financial and management decisions as to the web development operations were made by him. Directions as to administrative matters to Mr Puscas and others were issued by Mr Bozkurt. In my view, it was plainly the case on the evidence, that Mr Bozkurt expected those directions to be followed. Mr Puscas made requests to Mr Bozkurt for time off and to take leave. It is also relevant to observe, that Mr Leonard himself regarded Mr Bozkurt as “the boss”.
- 73 On the evidence, Mr Puscas raised with Mr Bozkurt, in various emails over the period October 2011 to July 2012, the issue of his underpayment of wages. Mr Puscas also made repeated requests of Mr Bozkurt for a group certificate, so that Mr Puscas could complete and file his tax returns. Whilst not of itself of great weight, Mr Puscas was also required to complete a “Caimes Pty Ltd Staff / Payroll Information” form, containing various entries including “Super Details” and “Employment Information (Employment Status, Salary P/A, Holidays / Sick Leave, Public Holidays, Long Service Leave, Super)”.
- 74 I am not persuaded on all of the evidence, that Appendix N to Mr Bozkurt’s witness statement reflected the agreement between Mr Puscas and Mr Bozkurt. It was common ground that Mr Bozkurt, Mr Puscas and Mr Leonard, discussed the arrangements for their ongoing involvement in the business. Mr Puscas clearly wished to be an employee, for reasons that he set out in his evidence. Whilst Appendix N may have been what Mr Bozkurt proposed at the time to Mr Puscas, I am satisfied that Mr Puscas did not agree to it. In any event, its terms were never met. Neither Mr Puscas nor Mr Leonard took equity in the new venture. They never became partners or joint venturers in the new business. Caimes Web emerged as a part of the overall Caimes business operation.
- 75 Of some significance, and quite telling in my view, was the email from Mr Bozkurt to Messers Puscas and Leonard of 10 August 2010 sent at 12:15PM, noted above. It clearly refers to both Mr Puscas and Mr Leonard receiving fortnightly wage payments, and also refers to their superannuation and tax file numbers. It is passing strange that this would appear nearly two months after the alleged partnership / joint venture agreement, if that was so certain as Mr Bozkurt asserted.
- 76 In the absence of a written agreement reflecting the relationship between Mr Puscas and Caimes, it is the totality of the relationship, and oral statements and the conduct of the parties, that is to be considered by the Commission. From all of the evidence, and the conduct of the parties, I am not persuaded that there was any partnership or joint venture arrangement between Mr Puscas and Mr Bozkurt. The indicia point to Mr Puscas being an employee of Caimes. The Commission finds accordingly.

- 77 Having concluded that at the material times Mr Puscas was an employee of Caimes, the final issue for present purposes, is to determine whether Mr Puscas' employment by Caimes had a sufficient connection with Western Australia, in order for the Commission to deal with Mr Puscas' contractual benefits claim.
- 78 I refer to the relevant principles set out above. Mr Puscas accepts that the relationship with Caimes was initially formed in Queensland. Mr Puscas moved to Perth in November 2010. I accept that he did so primarily for personal reasons to be with his fiancé. However, Mr Puscas continued to work for Caimes. A post office box was set up in Perth so Caimes could have a business address. Mr Puscas attended marketing functions with BNI and obtained work for Caimes in Perth. The contracts for work by Caimes for clients were entered into in Western Australia. The work was performed by Mr Puscas in Western Australia for those clients, and for which Mr Puscas was paid by Caimes. Finally, the employment relationship between Mr Puscas and Caimes came to an end in Perth.
- 79 On the authority of *Tranfield* I am well satisfied that Mr Puscas' work for Caimes in Western Australia over the material time, constituted a sufficient connection with the Commission's jurisdiction under the Act in this State.

Conclusion

- 80 Accordingly, the Commission will issue declarations that Mr Puscas was an employee of Caimes and that Mr Puscas' claim for denied contractual benefits falls within the Commission's jurisdiction.

2013 WAIRC 01070

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	OVIDIU PUSCAS	APPLICANT
	-v-	
	CAIMES PTY LTD (ACN 102 573 928)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	WEDNESDAY, 18 DECEMBER 2013	
FILE NO.	B 212 OF 2012	
CITATION NO.	2013 WAIRC 01070	

Result	Declaration issued
Representation	
Applicant	Mr N Marouchak of counsel
Respondent	Mr Z Bozkurt

Declaration

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and Mr Z Bozkurt on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby declares –

THAT the applicant was an employee of the respondent and his claim for denied contractual benefits falls within the Commission's jurisdiction.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.

2014 WAIRC 00164

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	OVIDIU PUSCAS	APPLICANT
	-v-	
	CAIMES PTY LTD (ACN 102 573 928)	RESPONDENT
CORAM	COMMISSIONER S J KENNER	
DATE	THURSDAY, 6 MARCH 2014	
FILE NO/S	B 212 OF 2012	
CITATION NO.	2014 WAIRC 00164	

Result	Order issued
Representation	
Applicant	No appearance
Respondent	No appearance

Order

WHEREAS this matter has been listed for hearing on 7 March 2014 for the purposes of determining whether the applicant has been denied certain contractual benefits. On 18 December 2013, the Commission declared that the applicant was an employee of the respondent at the material times and his claim was within the Commission's jurisdiction;

AND WHEREAS by order of the Commission of 9 April 2013 the respondent was granted leave to appear by video link from Queensland subject to the venue being approved by the Commission;

AND WHEREAS on 20 February 2014 my Associate requested the respondent to provide video conference request details in accordance with the Commission's usual procedure by close of business 27 February 2014. A reminder email was sent by my Associate to the respondent on 25 February 2014 confirming that the video conference request details must be provided by the close of business 27 February 2014;

AND WHEREAS the respondent has failed to provide the video conference request details as required. By further email of 4 March 2014, my Associate again requested the relevant information and informed the respondent that the Commission may revoke the respondent's approval to appear by video link should it fail to supply it by close of business 5 March 2014. A letter of 4 March 2014 from my Associate to the respondent also referred to the same. No response of any kind has been received from the respondent;

AND WHEREAS despite repeated requests, the respondent has failed to provide the required information in the video conference request form which is necessary in order for staff of the Department of the Registrar to establish a video link as required for the hearing at 10.30am on 7 March 2014;

AND WHEREAS the Commission notes that this is not the first occasion where the respondent has failed to respond in a timely fashion to a request for video conferencing details. This occurred in June and August 2013 prior to a hearing by video link;

AND WHEREAS the ability for a party to appear by video link before the Commission is not available as of right. Such an appearance may only be made after an application is made and granted by the Commission under reg 44 of the Industrial Relations Commission Regulations 2005. It is implicit in such an order being made, that a party provide relevant information in a timely way in order that video conferencing facilities can be set up to enable the Commission to hear and determine a matter listed for hearing. The respondent has failed to discharge its obligations in this regard;

NOW THEREFORE the Commission pursuant to the powers vested in it by the Industrial Relations Act, 1979, hereby orders –

THAT order 2 of the Commission's order of 9 April 2013 granting leave to the respondent to appear by video link at a venue approved by the Commission be and is hereby revoked.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00405

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00405
CORAM	:	COMMISSIONER S J KENNER
HEARD	:	WEDNESDAY, 6 FEBRUARY 2013, THURSDAY, 28 FEBRUARY 2013, THURSDAY, 14 MARCH 2013, FRIDAY, 14 JUNE 2013, MONDAY, 19 AUGUST 2013, THURSDAY, 5 SEPTEMBER 2013, FRIDAY, 7 MARCH 2014
DELIVERED	:	WEDNESDAY, 14 MAY 2014
FILE NO.	:	B 212 OF 2012
BETWEEN	:	OVIDIU PUSCAS Applicant AND CAIMES PTY LTD (ACN 102 573 928) Respondent

Catchwords	:	Industrial law (WA) – Contractual benefits claim – Documentary and oral evidence considered – Principles applied – Finding that the applicant worked the hours claimed and was not paid accordingly – Order issued
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Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 27(1)(d)
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Result : Application upheld

Representation:

Counsel:

Applicant : Mr N Marouchak

Respondent : No appearance

Solicitors:

Applicant : MKI Legal

Case(s) referred to in reasons:

Hotcopper Australia Ltd v Saab (2001) 81 WAIG 2704

Reasons for Decision

- 1 In reasons for decision of 13 December 2013, the Commission found that Mr Puscas was an employee of Caimes and that Mr Puscas' claim was within the Commission's jurisdiction: *Puscas v Caimes Pty Ltd (ACN 102 573 928)* [2013] WAIRC 01063. In that decision, the Commission referred to an agreement in about June 2010, by which Mr Puscas and Caimes agreed for Mr Puscas to work initially on a part time basis for about 20 hours per week, at the rate of \$30 per hour net for all work performed. From about October 2011, it was further agreed between Mr Puscas and Caimes, that Mr Puscas would increase his weekly hours of work to 40 per week, and be paid \$1,500 per week.

Revocation of leave to appear

- 2 The matter was relisted by the Commission to hear Mr Puscas' claim for contractual benefits in the form of salary payments not paid to him by Caimes, in the sum of \$39,146.40 net. For the purposes of the earlier proceedings, Caimes had previously been granted leave to appear by video link from Queensland. That leave was continued. As was the practice in the earlier proceedings, Caimes was required to provide to the Commission, in good time, prior to the hearing, details of the video link to be established. Despite repeated requests from my Associate, and also despite the Commission foreshadowing revocation of the leave to appear by video link, Caimes failed to do so.
- 3 Accordingly, the leave granted to Caimes to appear by video link was revoked by order of the Commission of 6 March 2014: [2014] WAIRC 00164. At the commencement of the hearing, Caimes failed to appear. Being satisfied that Caimes had been duly notified of the hearing, and no reason having been advanced by it as to why the matter should not proceed, under s 27(1)(d) of the Industrial Relations Act 1979, the Commission proceeded to hear Mr Puscas' claim in the absence of Caimes.

The contractual claim

- 4 As already averted to above, Mr Puscas testified that he was owed unpaid salary in the sum referred to. This represents \$12,251.40 net for the 2010/11 financial year and \$26,895 net for the 2011/12 financial year. Mr Puscas testified that he submitted a tax file declaration to Caimes. He also said that he had received contact from the Australian Taxation Office, as he wanted to finalise his tax arrangements. Mr Puscas informed the ATO that he could not do so, as he had not received PAYG summaries from Caimes, which he had previously requested.
- 5 Mr Puscas outlined again, his arrangements with Mr Bozkurt, on behalf of Caimes. He testified that he initially commenced working for Caimes in June 2010, at the rate of \$30 per hour net, for about 20 hours' work per week. Any hours worked by Mr Puscas in excess of 20 per week, were to be paid at the same rate of pay. Mr Puscas kept records of his hours of work, and payments received. Tendered as exhibit A3 was a bundle of documents. Tabs A to G in the bundle, refer to various time recording systems used by Caimes, to record client related work done by staff. Mr Puscas said that as these various systems were changed or alternatively, in the process of being built or modified, Mr Puscas used his "Google Apps Calendar" to record time and work performed for Caimes. A copy of these records, for the period over Mr Puscas' employment, was tab J in exhibit A3.
- 6 Mr Puscas also kept records of time worked, salary paid and salary due, in the form of schedules set out at H(a) and H(b) in exhibit A3. Schedule H(a) refers to work performed in the 2011/12 financial year. The table refers to the week number, the weekly period, the hours worked, net salary payable, net salary actually paid, and any shortfall. Mr Puscas testified that he would tally his hours of work for each week, and enter the figures into the table. He would then enter the salary he expected to receive for that work. The actual amount, paid into his bank account by Caimes, was then entered. Schedule H(b), shows 20 hours per week initially for the first few months. After this, the hours vary from about 25 to about 40 hours per week.
- 7 By the end of 2010, Mr Puscas testified that he reached agreement with Mr Bozkurt, that from about January 2011, Mr Puscas would work at least 25 hours per week. Mr Puscas was also studying at this time. Later, in further discussions with Mr Bozkurt in about September 2011, Mr Puscas said that he and Mr Bozkurt agreed to increase Mr Puscas' hours worked to 40 hours per week, at the same hourly rate of pay. This would lead to a net payment from Caimes to Mr Puscas of \$1,200 per week. Mr Puscas testified that it was agreed with Mr Bozkurt that this arrangement would take effect from October 2011. Despite this agreement however, and Mr Puscas working the hours required, he said that Caimes kept paying him at the former rate for 25 hours per week, at \$30 per hour net, being \$750 per week.
- 8 The direct debits to Mr Puscas' bank account from Caimes, consistent with the contents of schedules H(a) and H(b) in exhibit A3, were set out at annexure OVP1 to Mr Puscas' supplementary affidavit. Annexure OVP1 is a copy of Mr Puscas' bank statements which cover the period June 2010 to July 2012. The last payment recorded, is for the sum of \$1,500, on 18 July 2012. I note however, that the bank statement for the period 19 June to 18 September 2011 was not included in

annexure OVP1. On the documentary and oral evidence as a whole however, including the record of payments received maintained by Mr Puscas, the pattern of payments from Caimes to Mr Puscas is clear enough, on balance.

- 9 Mr Puscas testified that he raised the issue of monies owed to him by Caimes, with Mr Bozkurt. Mr Puscas sent emails to Mr Bozkurt in early 2012, raising the issue of salary owed. In early July 2012, Mr Puscas said he raised the issue again with Mr Bozkurt by email. A copy of these emails was at tab H in exhibit A3. Mr Puscas testified that he spoke with Mr Bozkurt about getting his PAYG summaries, as he needed to submit his tax returns. According to Mr Puscas, when he raised these matters with him, Mr Bozkurt became “blunt”. It became apparent to Mr Puscas, that there was going to be a problem with his claims. Mr Puscas placed the matter in the hands of his solicitor, who wrote to Caimes. On receiving Mr Puscas’ solicitor’s letter, Mr Bozkurt telephoned Mr Puscas. Mr Puscas was informed that he was no longer working for Caimes and Mr Puscas said he was locked out of the Caimes information technology systems.
- 10 In addition to the record of work contained in exhibit A3, also annexed to Mr Puscas’ supplementary affidavit at annexure OVP2, are various handwritten notes containing records of work performed by Mr Puscas for Caimes, over some of the relevant periods. Mr Puscas testified that he would then transfer the information on these notes to excel spreadsheets, as contained in the schedules H(a) and H(b) to exhibit A3. Mr Puscas said that given the way that he was required to work at this time, he generally did not keep the notes that he made, once the hours of work and the relevant time periods were recorded in the spreadsheet.
- 11 Additionally, marked as exhibit A4, also accompanying Mr Puscas’ supplementary affidavit, was a DVD of very many emails sent and received by Mr Puscas, in connection with work performed by Mr Puscas for Caimes, over the relevant period. The email account used was one that Mr Puscas said he was instructed to use by Mr Bozkurt, for all Caimes related work.

Consideration

- 12 I have carefully considered the oral and documentary evidence in this matter. It is for Mr Puscas to establish that the benefit he has claimed was a benefit under his contract of employment and that it has been denied to him: *Hotcopper Australia Ltd v Saab* (2001) 81 WAIG 2704. I refer to my earlier finding that Mr Puscas was an employee over the relevant period of time. I am further satisfied that Mr Puscas worked for the hours that he said he did in the period June 2010 to September 2011, on the basis of an hourly rate of pay of \$30 net, initially for 20 hours per week, increasing to 25 hours per week in or about January 2011. Further, from about October 2011, the agreed hours of work, consistent with the clear pattern of increasing hours of work to that time, were increased to 40 hours per week at the same hourly rate of pay, in accordance with the agreement reached between Mr Puscas and Mr Bozkurt.
- 13 From the documentary evidence before the Commission, in particular schedules H(a) and H(b) to exhibit A3 and Mr Puscas’ bank records at annexure OVP1 to Mr Puscas’ supplementary affidavit, despite the omission referred to above, in conjunction with his oral evidence, I am satisfied that Mr Puscas worked the hours as agreed with Mr Bozkurt, set out in the claim. I am also satisfied that despite agreement with Mr Bozkurt to increase Mr Puscas’ hours of work, the payments received by him from Caimes were not in accordance with that agreement. Accordingly, Mr Puscas has been denied the contractual benefits he is claiming. An order should be made in his favour.
- 14 In terms of the quantum, given the agreement between Mr Puscas and Caimes was for Mr Puscas to receive a rate of pay of \$30 hour net, the basis of the order to be made will be in net terms. It will be in the total sum claimed. Clearly, given the Commission’s earlier finding that at all material times Mr Puscas was an employee of Caimes, then there was and is an obligation on Caimes to remit the appropriate tax deductions to the ATO under the relevant income tax legislation. Also, as a consequence of the Commission’s earlier finding that Mr Puscas was an employee of Caimes, Caimes is required to issue to Mr Puscas PAYG statements for the 2010/11 and 2011/12 financial years, in order that Mr Puscas can lodge his taxation returns with the ATO.
- 15 An order now issues.

2014 WAIRC 00418

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

OVIDIU PUSCAS

APPLICANT

-v-

CAIMES PTY LTD (ACN 102 573 928)

RESPONDENT

CORAM

COMMISSIONER S J KENNER

DATE

TUESDAY, 20 MAY 2014

FILE NO/S

B 212 OF 2012

CITATION NO.

2014 WAIRC 00418

Result

Application Upheld

Representation

Applicant

Mr N Marouchak of counsel

Respondent

No appearance

Order

HAVING heard Mr N Marouchak of counsel on behalf of the applicant and there being no appearance on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the respondent pay to the applicant the sum of \$39,146.40 net as a denied contractual benefit within 21 days.

[L.S.]

(Sgd.) S J KENNER,
Commissioner.**2014 WAIRC 00466**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION ELIZABETH SQUANCE	APPLICANT
	-v-	
	LORD AND COMPANY	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	TUESDAY, 10 JUNE 2014	
FILE NO/S	U 82 OF 2014	
CITATION NO.	2014 WAIRC 00466	

Result	Order issued
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Order

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

WHEREAS on the 4th day of June 2014 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS on the 6th day of June 2014 the parties advised that they had reached agreement in respect of the application and that the terms of any agreement reached in settlement of the claim be reflected in an Order of the Commission;

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

1. THAT the termination of the applicant's employment will be characterised as a resignation.
2. THAT the parties will not disparage one another.
3. THAT the respondent will refer any enquiries from prospective employers to Ms S McDiarmid.
4. THAT the respondent pay to the applicant the equivalent of 8 weeks' salary on the basis that 4 weeks will be paid on Friday, 13 June 2014 and the balance four weeks from that date.
5. THAT the agreement is in full and final settlement of all matters associated with the employment including any allegation of sexual harassment.
6. THAT the application be, and is otherwise dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.**2014 WAIRC 00440**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MR LUKE JOHN STEVENSON	APPLICANT
	-v-	
	MR MATTHEW BYASS	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN	
DATE	WEDNESDAY, 28 MAY 2014	
FILE NO/S	U 188 OF 2013	
CITATION NO.	2014 WAIRC 00440	

Result Application discontinued

Representation

Applicant Mr LJ Stevenson

Respondent Mr M Byass

Order

WHEREAS this is an application pursuant to section 29(1)(b)(i) of the *Industrial Relations Act 1979* (WA);
AND WHEREAS on 30 January 2014 and 19 March 2014 conferences between the parties were convened;
AND WHEREAS at the conclusion of the conference an agreement was reached between the parties;
AND WHEREAS on 28 May 2014 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.]

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Darryl Warren	Consolidated Site Services (WA) Pty Ltd ABN: 97 164 603 525	B 58/2014	Commissioner S J Kenner	Discontinued
Emma Jayne Corley	Peard and Associates Pty Ltd t/as Peard Real Estate Hillarys	B 42/2013	Chief Commissioner A R Beech	Discontinued

CONFERENCES—Matters referred—

2014 WAIRC 00409

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION OF WORKERS WESTERN AUSTRALIAN BRANCH

APPLICANT

-v-

COMBINED METAL INDUSTRIES

RESPONDENT

CORAM COMMISSIONER S M MAYMAN

DATE THURSDAY, 15 MAY 2014

FILE NO/S CR 5 OF 2014

CITATION NO. 2014 WAIRC 00409

Result Application discontinued

Representation

Applicant Ms P Lim

Respondent Mr G McCorry (as agent)

Order

WHEREAS this is an application pursuant to s 44 of the *Industrial Relations Act 1979*;
AND WHEREAS this matter was listed for hearing on 3 and 4 June 2014;

AND WHEREAS the hearing was vacated as the applicant advised the Commission it did not intend to proceed with the matter;
 AND WHEREAS on 7 May 2014 the applicant filed a Notice of Discontinuance in respect of this application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) S M MAYMAN,
 Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
Australian Medical Association (WA) Incorporated	The Minister for Health	Scott A/SC	PSAC 32/2012	3/12/2012 1/02/2013 7/06/2013	Dispute re higher duties allowance	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 236/2013	23/12/2013 19/03/2014	Dispute re transfer of employee	Discontinued
United Voice WA	The Director General Disability Services Commission	Harrison C	C 230/2013	24/10/2013	Dispute re outside employment	Discontinued
United Voice WA	The Catholic Education Office, Western Australia	Mayman C	C 14/2014	N/A	Dispute re initiation of bargaining agreements	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2014 WAIRC 00457

APPEAL AGAINST DECISION OF EMPLOYER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STEVEN LOCKWOOD

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE THURSDAY, 5 JUNE 2014

FILE NO. APPL 52 OF 2013

CITATION NO. 2014 WAIRC 00457

Result Directions Issued

Representation

Applicant Mr S Kemp (of counsel)

Respondent Mr D Matthews (of counsel) and with him, Ms C Bradstater

Direction

WHEREAS this matter is listed for hearing Monday, 11 to Friday, 15 August 2014;

AND WHEREAS the parties have conferred and agreed upon the following in relation to the hearing of the matter and request that it issue as a Direction;

AND WHEREAS the Commission is of the view that a Direction in those terms is appropriate for the orderly hearing of the matter,

NOW THEREFORE I, Chief Commissioner, acting pursuant to the powers in s 27(1)(o) of the *Industrial Relations Act 1979* hereby make the following Direction:

1. The Respondent shall lead its evidence first.
2. The evidence of the child witnesses shall be heard before the evidence of the adult witnesses.
3. The child witnesses shall provide their evidence by way of CCTV in the presence of a support person from a location outside of the Western Australian Industrial Relations Commission.
4. The parties agree that, as the matter is to proceed by way of a hearing de novo, matters relating to procedure are not in issue in the proceedings.
5. Direction 4 will not preclude either party from referring to the Respondent's investigation report filed in the proceedings in submissions or cross-examination.
6. By Monday, 14 July 2014 the Respondent will serve upon the Applicant:
 - (a) a list of the witnesses it intends to call at the hearing; and
 - (b) a tender bundle of documents that it intends to rely upon at the hearing.
7. By Monday, 28 July 2014 the Applicant will serve upon the Respondent:
 - (a) a list of the witnesses it intends to call at the hearing; and
 - (b) a tender bundle of documents that it intends to rely upon at the hearing.
8. Liberty is reserved to either party to apply on short notice to the other to vary or amend this Direction.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

2014 WAIRC 00435

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DARRYL KELLY SMITH

APPLICANT

-v-

ELECTRICAL DISTRIBUTORS OF WA PTY LTD

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

TUESDAY, 27 MAY 2014

FILE NO.

B 33 OF 2014

CITATION NO.

2014 WAIRC 00435

Result Direction issued

Representation

Applicant Mr S Edwards as agent

Respondent Mr J Moore

Direction

HAVING heard Mr S Edwards as agent on behalf of the applicant and Mr J Moore on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the respondent discover to the applicant all documents in existence in relation to the bonus payment in issue which go to the formula for the calculation and the financial documents upon which that calculation would be based for the year ended 30 June 2013 within 14 days;
2. THAT the respondent file and serve an amended Notice of Answer and Counterproposal particularising its response within 14 days of this direction;
3. THAT this matter be listed for hearing for one day at a time to be arranged;
4. THAT there be liberty to apply.

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

[L.S.]

2014 WAIRC 00464

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
TRACY MCAULIFFE **APPLICANT**

-v-
GOLDFINGER FACILITY MANAGEMENT PTY LTD **RESPONDENT**

CORAM CHIEF COMMISSIONER A R BEECH
DATE TUESDAY, 10 JUNE 2014
FILE NO. B 122 OF 2014
CITATION NO. 2014 WAIRC 00464

Result Direction issued
Representation
Applicant Ms T McAuliffe (by written correspondence)

Direction

WHEREAS a claim was filed in the Commission pursuant to s 29(1) (b)(ii) of the *Industrial Relations Act 1979* on 3 June 2014;
AND WHEREAS on 3 June 2014 the applicant filed an application for an order that the time for the respondent to file an answering statement be shortened on the grounds that from 5 June 2014 she will be travelling outside of Western Australia and then returning to Ireland on 1 July 2014;

AND WHEREAS I consider it appropriate to reduce the time by which the respondent is to file a statement in answer to the claim made;

NOW THEREFORE I the undersigned, pursuant to r 99D(4) of the *Industrial Relations Commission Regulations 2005*, hereby direct -

THAT the respondent is to file an answering statement within seven (7) days of the date of service of the claim upon the respondent.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 00460

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GERARD LEAHY **APPLICANT**

-v-
MEEDAC INCORPORATED **RESPONDENT**

CORAM COMMISSIONER S M MAYMAN
DATE FRIDAY, 6 JUNE 2014
FILE NO. B 176 OF 2013
CITATION NO. 2014 WAIRC 00460

Result Order issued
Representation
Applicant Mrs Mitchell (of counsel)
Respondent Mr P King

Order

THE COMMISSION has heard from the applicant and the respondent and in order to expedite the hearing the parties have agreed to a number of directions. Accordingly, the Commission in accordance with the powers conferred on it under the *Industrial Relations Act 1979* hereby directs -

1. The hearing be set down for 29 and 30 July 2014;
2. Discovery of documents is to be informal and is to be concluded by close of business on Friday, 4 July 2014;
3. The parties are to draw up statement of agreed facts prior to the hearing;
4. The applicant is to file and serve on the respondent witness statements by close of business on 15 July 2014;
5. The respondent is to file and serve on the applicant witness statements by close of business on 22 July 2014; and
6. There be liberty to apply at short notice.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

2014 WAIRC 00031

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
MICHELLE DANIELA ALEXIUS-BROWN

PARTIES

APPLICANT

-v-

DEPARTMENT OF REGIONAL DEVELOPMENT

RESPONDENT

CORAM COMMISSIONER S J KENNER
DATE THURSDAY, 23 JANUARY 2014
FILE NO/S B 208 OF 2013
CITATION NO. 2014 WAIRC 00031

Result Order issued
Representation
Applicant In person
Respondent Mr P Humphries

Order

WHEREAS on 19 December 2013 the applicant filed an application under s 29(1)(b)(ii) of the Industrial Relations Act 1979 alleging the respondent had denied her contractual benefits in the sum of \$55,800;

AND WHEREAS by notice of application filed on 22 January 2014 the respondent seeks an order under reg 36 of the Industrial Relations Commission Regulations 2005 to extend the time within which to file a notice of answer on the grounds that due to the Christmas/New Year holiday period and an administrative oversight, the documents were not distributed internally within the respondent in a timely fashion. Accordingly, the respondent has not had an adequate opportunity to formulate its notice of answer;

AND WHEREAS the Commission, having considered the application and the grounds on which the application is made, considers that an order should be made extending the time within which the respondent may file its notice of answer to 29 January 2014;

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

THAT the time within which the respondent is to file its notice of answer in the herein application is extended to 29 January 2014.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2014 WAIRC 00444

DISPUTE RE TERMINATION OF EMPLOYMENT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

APPLICANT

-v-

THE GOVERNING COUNCIL OF KIMBERLEY TRAINING INSTITUTE

RESPONDENT**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT**DATE** FRIDAY, 30 MAY 2014**FILE NO/S** C 11 OF 2014**CITATION NO.** 2014 WAIRC 00444**Result** Consent order issued**Representation****Applicant** Mr M Amati**Respondent** Mr D Anderson of counsel and with him Ms G Husk*Order*WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979* (WA); andWHEREAS on the 16th day of April 2014, the 1st day of May 2014, the 9th day of May 2014, the 19th day of May 2014 and the 30th day of May 2014 the Commission convened conferences for the purpose of conciliating between the parties; andWHEREAS at the conference on the 30th day of May 2014 the applicant sought that the matter be referred for hearing and determination; and

WHEREAS the applicant sought an interim Order, pending the hearing and determination of the matter, that the respondent cease its disciplinary process regarding Mr Petticrew, the subject of the application; and

WHEREAS the respondent consented to such an Order;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 44 of the *Industrial Relations Act 1979*, and by consent, hereby orders:

1. THAT notwithstanding the respondent's letter of 15 May 2014, the respondent cease its disciplinary process regarding the alleged breach of discipline arising from an incident on 24 February 2014, against Mr James Alex Petticrew, pending the hearing and determination of this matter.
2. THAT there be liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00411

DISPUTE RE USE OF FIXED TERMS CONTRACTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED VOICE WA

APPLICANT

-v-

THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 (WA) AS THE HOSPITALS FORMERLY COMPRISED IN THE METROPOLITAN HEALTH SERVICE BOARD

RESPONDENT**CORAM** COMMISSIONER J L HARRISON**DATE** THURSDAY, 15 MAY 2014**FILE NO/S** C 13 OF 2014**CITATION NO.** 2014 WAIRC 00411

Result Interim order issued

Representation

Applicant Ms A Hamlin

Respondent Ms J Symons

Order

On 17 April 2014 the applicant lodged a s 44 application concerning a dispute with the respondent about whether a fixed term contract under clause 16.2 of the *WA Health – LHMU – Enrolled Nurses, Assistants in Nursing, Aboriginal and Ethnic Health Workers Industrial Agreement 2011* (the Agreement) applied to one of its members, Mr Rod Tucker.

The applicant is seeking that the following interim order issue pending the hearing and determination of Mr Tucker's correct classification:

THAT Mr Rod Tucker be reinstated to his position as an Assistant in Nursing at the respondent's Royal Perth Hospital, Wellington Street Campus until the resolution of the dispute.

The respondent opposes this interim order.

Submissions

Applicant

This dispute concerns whether Mr Tucker was employed under a fixed term contract in an Assistant in Nursing (AIN) position and his entitlement to remain in this position or his former Patient Carer Assistant (PCA) position to which he was transferred on 21 April 2014. The applicant relies on clause 66.2(i) of the dispute settlement procedure of the Agreement which requires that the status quo be maintained, that is Mr Tucker remain in his AIN position, pending the resolution of the dispute about Mr Tucker.

An interim order that Mr Tucker be reinstated as an AIN until the determination of this matter is appropriate. The balance of convenience is in favour of Mr Tucker and it is just to issue the interim order being sought. There are substantive matters to be tried in relation to Mr Tucker's employment status and position and there is a strong prima facie case for relief and the damage done to Mr Tucker if the interim order is not made outweighs any damage to the respondent.

Respondent

The Commission cannot enforce the Agreement or remedy a breach of it and if there has been a breach of the Agreement the applicant must pursue this claim in the Industrial Magistrates Court. The respondent sees no reason why conciliation and arbitration cannot be undertaken whilst Mr Tucker remains in his PCA role and Mr Tucker will not be financially disadvantaged or suffer practical disadvantage if he remains in his PCA position.

The respondent submits that the industrial relationship between the parties in respect to the matter in question would not deteriorate if the interim order does not issue and the applicant has failed to demonstrate that there is a substantial matter to be tried.

Consideration

I find that this application relates to an industrial matter as it concerns Mr Tucker's employment classification. I am of the view that the Commission has jurisdiction to issue the interim order being sought by the respondent as s 44(6) of the *Industrial Relations Act 1979* (the Act) enables the Commission to issue orders which will assist in the arbitration of a dispute concerning an industrial matter. I also find that the issue in dispute, that is, the correct classification of Mr Tucker, does not relate to the enforcement of the Agreement.

When taking into account equity and fairness, s 26 considerations and after considering the parties' submissions with respect to this matter I have decided that an interim order should issue in the terms sought by the applicant. In making this decision I have not reached a concluded view on the merits relevant to this dispute.

Whilst Mr Tucker will not suffer a financial disadvantage if he continues working as a PCA and the respondent will have to fill the PCA position not undertaken by Mr Tucker, Mr Tucker will be denied the opportunity to utilise recently gained higher level AIN skills if the interim order does not issue. By continuing to work as an AIN pending the arbitration of this dispute, Mr Tucker will be able to undertake Enrolled Nurse studies without undertaking PCA relief duties and it is also the case that AIN duties continue to be required to be undertaken at Wellington Street campus.

In reaching my decision, I take into account that the applicant initiated a dispute with the respondent about Mr Tucker's employment status whilst Mr Tucker was working as an AIN which could be regarded as the status quo at the time this dispute was raised with the respondent. This application was lodged expeditiously as it was lodged prior to Mr Tucker being required to return to his former role as a PCA and issuing the interim order in the terms sought is not irreversible. I also find that the issue in dispute is serious as the Commission must determine whether Mr Tucker is entitled to an ongoing position as an AIN in the circumstances where the respondent may not have employed him as an AIN on a fixed term contract.

NOW THEREFORE having heard Ms A Hamlin on behalf of the applicant and Ms J Symons on behalf of the respondent, the Commission having regard for the interests of the parties directly involved and pursuant to the powers vested in it by the Act, hereby orders -

1. THAT Mr Rod Tucker be reinstated to a position as an Assistant in Nursing at the respondent's Royal Perth Hospital, Wellington Street Campus pending the hearing and determination of this application.

2. THAT liberty to apply is granted to the parties to vary or rescind this order.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2014 WAIRC 00461

DISPUTE RE OUTSTANDING PAYMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NINO MERENDA TRADING AS THUNDER

APPLICANT

-v-

CONSOLIDATED SITE SERVICES PTY LTD

RESPONDENT

CORAM CHIEF COMMISSIONER A R BEECH

DATE FRIDAY, 6 JUNE 2014

FILE NO. RFT 12 OF 2014

CITATION NO. 2014 WAIRC 00461

Result Direction issued

Representation

Applicant Mr A Dzieciol (of counsel)

Direction

WHEREAS a notice of referral of a dispute was filed in the Commission pursuant to s 40(a) and/or (b) of the *Owner Drivers (Contracts and Disputes) Act 2007* on 6 June 2014 concerning monies said by the applicant to be owed to him by the respondent;

AND WHEREAS on 6 June 2014 the applicant filed an application for an order that the time for the respondent to file an answering statement be shortened to seven (7) days on the grounds that:

- There is no dispute that the monies are owed;
- The respondent has on several occasions promised to pay the monies to the applicant but has failed to do so; and
- The applicant is a small business and the non-payment is causing hardship to him.

AND WHEREAS by telephone on 6 June 2014 Mr A Dzieciol, of counsel on behalf of the applicant, gave his assurance to the Commission that the respondent has admitted that the money claimed is owed;

AND WHEREAS I therefore consider it appropriate to reduce the time by which the respondent is to file a statement in answer to the claim made;

NOW THEREFORE I the undersigned, pursuant to r 99D(4) of the *Industrial Relations Commission Regulations 2005*, hereby direct -

THAT the respondent is to file an answering statement within seven (7) days of the date of service of the notice of referral upon the respondent.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 00462

DISPUTE RE OUTSTANDING PAYMENTS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GC AND GE LIDDICOAT

APPLICANT

-v-

CONSOLIDATED SITE SERVICES PTY LTD

RESPONDENT**CORAM** CHIEF COMMISSIONER A R BEECH**DATE** FRIDAY, 6 JUNE 2014**FILE NO.** RFT 13 OF 2014**CITATION NO.** 2014 WAIRC 00462**Result** Direction issued**Representation****Applicant** Mr A Dzieciol (of counsel)*Direction*

WHEREAS a notice of referral of a dispute was filed in the Commission pursuant to s 40(a) and/or (b) of the *Owner Drivers (Contracts and Disputes) Act 2007* on 6 June 2014 concerning monies said by the applicant to be owed to him by the respondent;

AND WHEREAS on 6 June 2014 the applicant filed an application for an order that the time for the respondent to file an answering statement be shortened to seven (7) days on the grounds that:

- There is no dispute that the monies are owed;
- The respondent has on several occasions promised to pay the monies to the applicant but has failed to do so; and
- The applicant is a small business and the non-payment is causing hardship to him.

AND WHEREAS by telephone on 6 June 2014 Mr A Dzieciol, of counsel on behalf of the applicant, gave his assurance to the Commission that the respondent has admitted that the money claimed is owed;

AND WHEREAS I therefore consider it appropriate to reduce the time by which the respondent is to file a statement in answer to the claim made;

NOW THEREFORE I the undersigned, pursuant to r 99D(4) of the *Industrial Relations Commission Regulations 2005*, hereby direct -

THAT the respondent is to file an answering statement within seven (7) days of the date of service of the notice of referral upon the respondent.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2014 WAIRC 00441

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRIAN KEITH WALL

APPLICANT

-v-

SHIRE OF DANDARAGAN

RESPONDENT**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT**DATE** FRIDAY, 30 MAY 2014**FILE NO.** U 27 OF 2014**CITATION NO.** 2014 WAIRC 00441**Result** Direction issued

Direction

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

WHEREAS the application was set down for a Directions hearing on the 11th day April 2014; and

WHEREAS the parties agreed to Directions for the preparation for the hearing 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*, and by consent, hereby directs:

1. THAT the applicant and respondent file and serve witness statements and copies of any documents upon which they rely by 5.00 pm Monday the 30th day of June 2014.
2. THAT the applicant and respondent file and serve Outlines of Submissions and a List of Authorities upon which they rely by 5.00 pm Monday the 14th day of July 2014.
3. THAT the applicant and respondent jointly file a written summary of the factual matters that are not in dispute by 5.00 pm Monday the 21st day of July 2014.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2014 WAIRC 00480

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2014 WAIRC 00480
CORAM	:	ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	WRITTEN SUBMISSIONS THURSDAY, 15 MAY 2014, FRIDAY, 23 MAY 2014, WEDNESDAY, 28 MAY 2014
DELIVERED	:	FRIDAY, 13 JUNE 2014
FILE NO.	:	U 203 OF 2013
BETWEEN	:	JOSH MCDUGALL
		Applicant
		AND
		CHAMFORD INTERIORS
		MEGAN & BEN DAVEY
		THE TRUSTEE FOR THE TERPSTRA DAVEY DISCRETIONARY TRUST
		ABN 77 409 692 927
		Respondent

CatchWords	:	Unfair dismissal – Jurisdiction – Application for claim to be received out of time – Whether application for claim to be received out of time and substantive application to be heard separately
Legislation	:	<i>Industrial Relations Act 1979</i> s 29(2), s 29(3), s 22B
Result	:	Decision issued
Representation:		
Applicant	:	Mr K Trainer as agent
Respondent	:	Mr P Brunner of counsel

Reasons for Decision

- 1 The applicant has lodged with the Registrar a claim of unfair dismissal which is made outside the time for the filing of such claims (s 29(2) *Industrial Relations Act 1979* (the Act)). The applicant seeks that the claim be received out of time (s 29(3)) and the respondent opposes that application.
- 2 The parties are in dispute as to whether the Commission should hear the application for the claim to be received out of time and the substantive claim of unfair dismissal at the same time.
- 3 I note the written submissions of the parties. The law requires that the Commission determine any question of jurisdiction raised before it before exercising power to resolve the dispute (*R v Bolton* [1835 – 1842] All ER 71; *Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)* (1987) 67 WAIG 466 at 330). In my view, this does not mean that, for the sake of dealing with matters before it in an expeditious manner as required by s 22B

of the Act, the Commission is precluded from hearing the jurisdictional matter at the same time as the substantive matter. This is particularly so, where the jurisdictional facts are intricately intertwined with those relevant to the substantive matter. However, the Commission would properly determine that it has jurisdiction prior to any determination of the substantive matter.

- 4 I note from the Form 2 – Notice of application and attachments that the reasons for dismissal include issues of alleged unsatisfactory performance, refusal of a reasonable request and causing intentional damage. There is also a question of the timing of the notice of termination being given to the applicant. It is likely that evidence regarding such matters may be detailed and lengthy.
- 5 A decision as to whether the claim should be received out of time requires consideration of a number of criteria which do not relate to the reasons for or circumstances of dismissal. However, one of those criteria may be the merits of the substantive application in the sense that there is a sufficiently arguable case (*Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683). In those circumstances, those merits are only assessed in a ‘fairly rough and ready way’ (*Jackamarra v Krakouer* (1998) 195 CLR 519 at 9 per Brennan CJ and McHugh J).
- 6 Given the particular circumstances of this case, I conclude that it is appropriate to hear the application to extend time separately and prior to any hearing of the substantive application. This is because, as noted earlier, the Notice of application and attachments indicates that the consideration of the dismissal will involve detailed and lengthy evidence of a range of matters which, if they are to be addressed in consideration of the application to receive the claim out of time, would be dealt with for the purposes of demonstrating that there is a sufficiently arguable case, and on a fairly rough and ready basis.
- 7 Accordingly, the Commission will contact the parties for the purpose of scheduling the hearing of the application for an extension of time. Given that any consideration of the merits of the substantive application are to be dealt with in the ‘fairly rough and ready way’, and that this should not be a ‘full rehearsal’ of the unfair dismissal, I propose to list the jurisdictional issue for no more than one day.
- 8 The parties are to confer with a view to agreeing directions for the hearing, and advising the Commission of the outcome of those discussions within 14 days.

2014 WAIRC 00481

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JOSH MCDUGALL

APPLICANT

-v-

CHAMFORD INTERIORS

MEGAN & BEN DAVEY

THE TRUSTEE FOR THE TERPSTRA DAVEY DISCRETIONARY TRUST

ABN 77 409 692 927

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

FRIDAY, 13 JUNE 2014

FILE NO.

U 203 OF 2013

CITATION NO.

2014 WAIRC 00481

Result

Direction issued

Direction

HAVING heard Mr K Trainer as agent on behalf of the applicant and Mr P Brunner of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby directs:

THAT the application that the Commission accept the referral of the unfair dismissal claim out of time be heard separately from the substantive application.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

PUBLIC SERVICE APPEAL BOARD—

2014 WAIRC 00454

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 MAY 2013

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPELLANT
	BERKE BISCUIT NIGUSSIE	
	-v-	
	DEPARTMENT OF EDUCATION, CHURCHLANDS HIGH SCHOOL	RESPONDENT
CORAM	PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN MS ELIZABETH MCADAM - BOARD MEMBER MR G RICHARDS - BOARD MEMBER	
DATE	THURSDAY, 5 JUNE 2014	
FILE NO	PSAB 15 OF 2013	
CITATION NO.	2014 WAIRC 00454	

Result	Name of appellant and respondent amended
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Order

WHEREAS this is an appeal pursuant to Section 80I of the *Industrial Relations Act 1979*; and

WHEREAS on the 12th day of September 2013 the respondent indicated in its Form 5 – Notice of answer and counter-proposal that the name of the respondent is rightfully “Director General, Department of Education”; and

WHEREAS on the 5th day of June 2014 the Public Service Appeal Board convened a hearing for the purpose of jurisdiction; and

WHEREAS at the hearing the appellant agreed that her name be amended to “Biscuit Nigussie Berke”;

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. The name of the appellant in the appeal be amended to “Biscuit Nigussie Berke”.
2. The name of the respondent in the appeal be amended to “Director General, Department of Education”.

(Sgd.) P E SCOTT,

Acting Senior Commissioner,

On behalf of the Public Service Appeal Board.

[L.S.]

2014 WAIRC 00478

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 MAY 2013

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2014 WAIRC 00478
CORAM	: PUBLIC SERVICE APPEAL BOARD ACTING SENIOR COMMISSIONER P E SCOTT- CHAIRMAN MS E McADAM - BOARD MEMBER MR G RICHARDS - BOARD MEMBER
HEARD	: MONDAY, 11 NOVEMBER 2013, THURSDAY, 5 JUNE 2014
DELIVERED	: FRIDAY, 13 JUNE 2014
FILE NO.	: PSAB 15 OF 2013
BETWEEN	: BISCUIT NIGUSSIE BERKE Appellant AND DIRECTOR GENERAL, DEPARTMENT OF EDUCATION Respondent

CatchWords	:	Public Service Appeal Board — Termination of employment — Jurisdiction of the Public Service Appeal Board — Whether the appellant was a public service officer or government officer
Legislation:	:	<i>Industrial Relations Act 1979</i> s 7(1), s 80C, s 80C(1), s 80I, s 80I(1), s 80J <i>Public Sector Management Act 1994</i> s 3, s 78 <i>School Education Act 1999</i> s 235(1)(d)
Result	:	Appeal dismissed for lack of jurisdiction
Representation:		
Appellant	:	Mr A Asemahign as agent
Respondent	:	Ms S Bhar

Reasons for Decision

- 1 These are the unanimous reasons for decision of the Public Service Appeal Board (the Board).
- 2 The appellant claims that she was unfairly dismissed by her employer, the Department of Education. She appeals against what is said to have been a decision to dismiss.
- 3 The appellant was employed by the Director General, Department of Education, as a cleaner. As such, the appellant's employment conditions are those set out in the *Cleaners and Caretakers (Government) Award 1975* and the *Government Services (Miscellaneous) General Agreement 10 of 2013*. The respondent says that the appellant has no standing to bring the appeal and that the Public Service Appeal Board (the Board) is without jurisdiction to hear and determine the appeal on the basis that the appellant was not a public service officer or a government officer as defined.
- 4 Section 80J(b) of the *Industrial Relations Act 1979* (IR Act) sets out who may institute an appeal under s 80I. It may be instituted by the public service officer or government officer concerned or by an organisation on his behalf. Therefore, to have standing to bring this appeal, the appellant must be either a public service officer or a government officer.
- 5 The Board's jurisdiction is set out in s 80I – Board's jurisdiction of the IR Act. Subsection (1) is that which is relevant and it provides:
 - (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).
- 6 As the appeal is said to be against a decision to dismiss, and is not a decision which arises under s 78 of the *Public Sector Management Act 1994* (PSM Act), the Board can deal with an appeal against a decision to dismiss by s 80I(1)(c) or (e) of the IR Act. In either case, it is necessary for the appellant to be a government officer.
- 7 Government officer is defined in s 80C(1) of the IR Act:

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 Amendment and Repeal (Industrial Relations) Act (No. 2) 1984*,
- but does not include —
- (d) any teacher; or
- (e) any railway officer as defined in section 80M; or
- (f) any member of the academic staff of a post-secondary education institution;
- 8 In dealing with each of the categories of government officer, a public service officer is defined in s 7(1) of the IR Act as ‘a public service officer within the meaning of the [PSM Act]’.
- 9 The PSM Act defines a public service officer as:
- means an executive officer, permanent officer or term officer employed in the Public Service under Part 3.
- (s 3)
- 10 There is no evidence that the appellant was appointed as a public service officer. The appellant’s letter of employment (exhibit R1) says that the employment is as a fixed term employee in accordance with s 235(1)(d) of the *School Education Act 1999* (SE Act). Section 235(1)(d) is that category of persons employed in the Department as ‘wages staff’.
- 11 Therefore, s 80C(1)(a) of the IR Act is not met.
- 12 There is no suggestion that the appellant was a member of the Governor’s Establishment and therefore, the provisions of s 80C(1)(aa) are not met. Nor was she a member of a department of the staff of Parliament or an electorate officer. Therefore, s 80C(1)(ab) is not met.
- 13 The only category which might apply to the appellant is that of a ‘person employed on the salaried staff of a public authority’ (s 80C(1)(b)). The respondent admits that the appellant was an employee and that the respondent is a public authority. The remaining question is whether she was employed on the ‘salaried staff’.
- 14 We note the decision of the Industrial Appeal Court in *The Totalisator Agency Board v Edith Fisher* (1997) 77 WAIG 1889, where Kennedy J examined the meaning of the term ‘salary’, being ‘Fixed payment made periodically to a person as compensation for regular work; now usually restricted to payments made for non-manual or non-mechanical work (as opposed to wages)’.
- 15 The Public Service Appeal Board in *Gerad McGinty v Department of Corrective Services* [2012] WAIRC 00054 noted at [11] that the employees covered by s 80C of the IR Act, being government officers, ‘are generally those in the administrative, technical and professional ranks of the public sector’.
- 16 Given that the appellant was employed as a cleaner, her duties were of a manual nature. Her employment was, pursuant to s 235(1)(d) of the SE Act, as part of the Department’s ‘wages staff’, it was not executive, administrative, technical or professional in nature.
- 17 In those circumstances, the appellant does not meet the requirements for being a government officer. Therefore, pursuant to s 80J of the IR Act, she has no capacity to institute the appeal, and the Board is unable to hear and determine any appeal pursuant to s 80I of the IR Act.
- 18 Accordingly, the appeal must be dismissed.

2014 WAIRC 00479

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 28 MAY 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BISCUIT NIGUSSIE BERKE

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM**

PUBLIC SERVICE APPEAL BOARD
 ACTING SENIOR COMMISSIONER P E SCOTT - CHAIRMAN
 MS E McADAM - BOARD MEMBER
 MR G RICHARDS - BOARD MEMBER

DATE

FRIDAY, 13 JUNE 2014

FILE NO

PSAB 15 OF 2013

CITATION NO.

2014 WAIRC 00479

Result Appeal dismissed for lack of jurisdiction

Order

HAVING heard Mr A Asemahign as agent on behalf of the appellant and Ms S Bhar on behalf of the respondent, 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 for lack of jurisdiction.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

2014 WAIRC 00427

APPEAL RE MISCONDUCT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SERGIO COOPER

PARTIES

APPELLANT

-v-

ROYAL PERTH HOSPITAL - HUMAN RESOURCE SERVICES

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD
COMMISSIONER J L HARRISON - CHAIRPERSON
MS P MARCANO - BOARD MEMBER
MR S GREGORY - BOARD MEMBER

DATE

FRIDAY, 23 MAY 2014

FILE NO

PSAB 21 OF 2012

CITATION NO.

2014 WAIRC 00427

Result Discontinued

Representation

Appellant Ms K Heal (as agent)

Respondent Mr P Heslewood

Order

This is an appeal to the Public Service Appeal Board (the Board) lodged in the Commission pursuant to s 80I of the *Industrial Relations Act 1979*.

On 21 February 2013 the Board convened a scheduling conference.

On 11 September 2013 the appellant filed a Notice of Withdrawal or Discontinuance in respect of this appeal.

NOW THEREFORE, the Public Service Appeal Board, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner,
On behalf of the Public Service Appeal Board.

[L.S.]

RECLASSIFICATION APPEALS—**2014 WAIRC 00459**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION YASIR ARFAT	APPLICANT
	-v-	
	WA COUNTRY HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 6 JUNE 2014	
FILE NO	PSA 98 OF 2013	
CITATION NO.	2014 WAIRC 00459	
Result	Application dismissed	

Order

WHEREAS this is a reclassification appeal made pursuant to the *Industrial Relations Act 1979*; and

WHEREAS on the 22nd day of November 2013 the Public Service Arbitrator convened a conference for the purpose of conciliating between the parties; and

WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and

WHEREAS by email on the 16th day of May 2014 the applicant advised he wished to withdraw his application;

NOW THEREFORE, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.