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GENERAL ORDERS—

2015 WAIRC 00435

2015 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00435
CORAM	**:**	CHIEF COMMISSIONER A R BEECH ACTING SENIOR COMMISSIONER P E SCOTT COMMISSIONER S J KENNER COMMISSIONER J L HARRISON COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 2 JUNE 2015; WEDNESDAY, 3 JUNE 2015
DELIVERED	**:**	THURSDAY, 11 JUNE 2015
FILE NO.	**:**	APPL 1 OF 2015
BETWEEN	**:**	ON THE COMMISSION'S OWN MOTION

CatchWords	**:**	State Wage order - Commission's own motion - Minimum wage for employees under Minimum Conditions of Employment Act 1993 - Award rates of wage - Award minimum wage - State wage principles
Legislation	**:**	Industrial Relations Act 1979 s 50A, s 50A(3), s 50A(3)(a)(i)-(v) & (vii), s 50A(3)(a) & (d)-(f), Minimum Conditions of Employment Act 1993 s 12, Fair Work Act 2009 (Cth) s 3, s 3(a), s 284(1)
Result	**:**	*2015 State Wage Order issued*

Representation:

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

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

Mr K Singh and Dr T Dymond on behalf of UnionsWA

Case(s) referred to in reasons:

Fair Work Commission Annual Wage Review 2014-15 [2015] FWCFB 3500

Fair Work Commission Annual Wage Review 2011-12 [2012] FWA 5166

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

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

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 18 – 19 April 2015, 22 April 2015 and 4 – 10 May 2015, and on the Commission's website and in the WA Industrial Gazette on 22 April 2015 ((2015) 95 WAIG 458) inviting submissions from interested persons. We set out below an outline of the submissions received.

SUBMISSIONS

The Hon. Minister for Commerce

3 The Minister notes that the Commission is required to consider a range of social and economic factors including the needs and living standards of the low paid, the capacity of employers as a whole to bear the costs of increased wages and the state of the economy of WA. Economic growth in WA has begun to moderate from very strong rates experienced in recent years. There has been a notable softening in domestic economic conditions as business investment tapers from a peak in 2012-13. This is flowing through to more moderate labour market conditions. Unemployment is gradually increasing, and in June 2014 wages began to decline in real terms for the first time since 2006. Leading indicators are consistent with expectations that employment growth will remain modest in the near term. It is the Minister's submission that the current economic circumstances warrant a greater degree of wage restraint.

4 Nonetheless, the Minister recognises the importance of providing a fair system of wages which meets the needs of the low paid. The Minister submits it is appropriate to adjust the WA minimum wage in line with the Department of Treasury's most recently published figure for estimated actual growth in the Perth Consumer Price Index (CPI) in 2014-15 and that adult award rates of pay be adjusted by the same flat dollar amount. The Treasury forecast is 2 per cent which would result in the current minimum wage of $665.90 per week being increased by $13.30 to $679.20 per week. State adult award wages would then be increased by a flat dollar amount of $13.30 per week.

5 The Minister refers to Treasury's overview of the economy and notes that in recent years the WA economy has grown at a very strong pace, supported by unprecedented levels of investment which have lifted the productive capacity of the economy and laid the foundation for the export phase of growth. However, conditions in the WA domestic economy have softened and are expected to remain subdued over the next two years.

6 The Minister referred to operating conditions for WA businesses, observing that there is little specific data available to assess the health of those businesses likely to be affected by the State Wage Order, however the total industry income from the sales of goods and services in WA has declined for three consecutive quarters to December 2014, the first consecutive quarterly declines since mid-2009. The Gross Operating Surplus (GOS) plus Gross Mixed Income (GMI) measure also suggests that some sectors are facing a more challenging trading environment. Declines in the total industry income from the sales of goods and services were recorded in several industries known to employ significant numbers of award-reliant employees such as Retail trade, Accommodation and food services, Administrative and support services, and Other services.

7 There is a heightened risk that excessive increases to minimum and award wages could impede the ability of employers to maintain and create job opportunities. The exact relationship between changes in the minimum wage and employment levels is unknown, nevertheless, it is reasonable to suppose that there is a point at which rising wages would have an impact on employment, and the prevailing economic conditions also affect the capacity of employers to meet higher wage costs. The Minister submits that an adjustment to the WA minimum wage in line with CPI and an equivalent flat dollar adjustment to State award wages would provide a fair increase to employees while reducing the risks for employers that might result from a real wage rise at the current time.

Chamber of Commerce and Industry WA

8 CCIWA submits that WA employers and employees are facing a significantly more challenging economic environment compared to this time last year. This is characterised by:

(a) A substantial decline in WA's economic performance which has seen WA trailing most of the other states and territories in terms of the growth of State Final Demand (SFD).

(b) A significant drop in business confidence with employers reducing capital expenditure and employment levels. Wage costs continue to be the key priority issue for employers in an environment of cost reduction.

(c) A significant increase in unemployment levels, with a spike in redundancies. The opportunity for future employment is also diminishing due to a fall in the job vacancy rates.

(d) Diminished job opportunities which has negatively affected consumer confidence, resulting in a shift towards paying off debt in preference to spending and by changes in spending patterns, is having a direct impact on the retail and hospitality industry.

(e) A substantial decline in wage increases, with employees showing a clear preference for job security over increases to wages.

(f) Extremely low levels of inflation which have meant that the cost of living for WA employees has not significantly changed compared to this time last year. There have been falls in a number of key expenditure items including fuel, accommodation and grocery items.

9 CCIWA therefore believes that the Commission should focus on the needs of those who are looking for work and those whose jobs could be lost or hours of work reduced as a result of increases to the award rates of pay and the WA minimum wage.

10 In the context of the generally high impact that wages costs have upon small businesses, particularly in the retail, hospitality and other service-based industries, private sector employers in the WA industrial relations system are likely to be small businesses and these account for 97 per cent of all businesses in WA. Whilst small unincorporated businesses reflect a very small proportion of the total WA economy, under the right conditions many of these businesses have the potential to grow and prosper, thus delivering greater benefits to the economy as a whole. This potential is stymied where they are faced with greater cost barriers compared to larger competitors.

11 The WA minimum wage is currently $25.00 per week higher than the national minimum wage, in part derived from the stronger economic performance of WA compared to the other States and territories. The basis for maintaining this difference no longer exists within the context of the current economic climate. CCIWA's consideration of the different statutory considerations particularly with regard to 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, leads CCIWA to submit that there should be no increase to either the WA minimum wage or the award rates of pay.

12 CCIWA submits that the WA minimum wage will continue to provide an effective safety net for the low paid given the significant reduction in the level of inflation along with falls in the cost of accommodation and fuel. CCIWA points out that since 2006 the WA minimum wage has increased by 32 per cent compared to an increase in inflation of 27.8 per cent between March 2006 and March 2015. No increase would still see low paid employees better off with the minimum wage for WA remaining higher than the national minimum wage which, in WA, provides the safety net for the majority of WA employers. No increase will help relieve pressure on those employers whose businesses are also affected by the economic slowdown.

13 CCIWA presented detailed submissions on the state of the economy, the capacity of employers to increase wages, and the system of fair wages and conditions. It tendered information on business expectations which showed a significant decline in expectations for the next quarter and next year. It showed the key issue for employers is wages costs.

UnionsWA

14 UnionsWA contends that the Commission should make a substantial real wage increase for award-reliant workers. This is essential to address the ever widening gap between low paid workers and the rest of the workforce in WA. UnionsWA advocates for a $30.00 per week increase to the WA minimum wage, the same amount for award rates from Levels C14 to C10, and a 3.9 per cent increase for higher rates to C5. UnionsWA's preferred position would see the weekly minimum wage of $665.90 increase to $695.90 per week.

15 UnionsWA presented data to support its contention that vulnerable groups of employees are overrepresented within the private sector of the State industrial relations system. These employees are less likely to negotiate their own agreements and more likely to be award reliant, and therefore the outcome of the State Wage Case is a major opportunity for them to share in the benefits of WA's leading position within the Australian economy.

16 UnionsWA emphasised that it seeks a percentage increase rather than a flat dollar increase, presenting data showing that there has been a small, but noticeable, compression of wage rates between 2010 and 2014 using a comparison between the pay scales of the *Metal Trades (General) Award*.

17 It submits that WA remains a highly unequal State in terms of income distribution between individuals, between households and between genders, and an increase to the WA minimum wage should constitute a real increase in order to address these gaps. UnionsWA says that Australia's safety net used to be distinctively robust such that in 1992 Australia's minimum wage was 55.7 per cent of the average full time wage; by 2003 it had fallen to around 50 per cent of the average wage. For low paid workers, some costs have more impact than others, for example the differential impact of housing costs on the low paid compared to other income groups. It referred to a recently published report on rental affordability by Anglicare.

18 UnionsWA addressed the statutory criteria in s 50A of the Act. It also presented data on the state of the WA and the Australian economies. It submits that low wages growth is a drag on the economy overall and cannot be justified simply by claims that 'at least inflation is low'. The benefits of low inflation for consumers can only be fully realised if purchasing power is maintained. Given that workers on lower incomes have more propensity to spend their additional earnings, a strong increase to the WA minimum wage would be an important signal to the wider economy that consumer spending can be maintained. UnionsWA submitted that there is evidence to suggest that while WA is no longer the leading economy of the nation, it is still the strongest State in terms of Gross State Product. The strength of retail spending is seen as particularly important.

19 UnionsWA called Mr Shane Dirou, the Executive Officer of the WA No Interest Loans Network Inc and the WA Low Interest Loans Network Inc to provide direct evidence of the minimum wage as a complement to the Australian tax transfer system, reasonable wages as a facilitator of personal responsibility, the value of fair wages for making financial literacy meaningful, and the value of fair wages for relieving financial pressure on other household members. Mr Dirou gave evidence that No Interest Loans Network provides no interest loans to people on low income. The majority of these persons are holders of a

health-care card, however the organisation also provides significant loan facilities to low wage earners. They assist over 1,000 individuals and families each year. In recent times, the organisation has been struggling to keep up with demand for loans by people on low incomes.

20 Mr Dirou gave evidence that the minimum wage should complement the welfare system because many young people on the minimum wage do not rely on welfare, rather they provide for themselves instead of heading to the Centrelink office. A real increase to the minimum wage makes independence for young adults closer to reality. People on the minimum wage do not earn enough to be treated as having the required earning capacity to simply borrow funds from a bank or credit society.

21 In Mr Dirou's evidence, WA is building a generation of 'moochers' who have no choice other than to rely on their parents' generosity, largely due to the minimum wage not keeping up with the cost of living in WA. WA is ranked the second highest in terms of cost of living which impacts upon a majority of our lowest paid workers greater than others in the community. Many of the workers on the minimum wage are not full time workers but rather part-time or casual employees, which impacts on their ability to earn a higher wage to provide a decent standard of living and move out of home. In Mr Dirou's opinion, raising the minimum wage by $30.00 per week, instead of just CPI, will enable financially capable individuals to be less reliant on welfare and services, and to place money into the economy which will kickstart it.

WA Council of Social Service

22 WACOSS points out it is the leading peak organisation for the community services sector in WA. It notes that many organisations in the community services sector are still incorporated entities without significant or substantial trading or financial activities and are therefore subject to the State industrial relations system. It has an interest in ensuring that the wages of all low paid employees, including those employed in the community sector, keep pace with the cost of living and community standards. It considers the minimum wage to be a vital means of protecting low income workers from poverty, as well as contributing to the delivery of economic benefits to the wider WA community.

23 WACOSS submits that an increase of $30.00 per week in the WA minimum wage rate and minimum award rates is consistent with a need to maintain a fair system of wages and conditions in the current WA context and is a very reasonable increase which takes into account current economic conditions.

24 The primary basis for WACOSS's claim is the cost of living pressures facing low income households in WA. Over the period of the recent mining boom in WA, the WA population experienced extraordinary increases in many non-discretionary living costs, most notably housing. While many in the WA population also benefited from significant salary increases over the same period, these benefits were not spread equally across the population and many low income households fell further behind as a result and are still trying to catch up.

25 With the end of the mining boom and the subsequent tightening of economic and fiscal conditions in WA, growth in some, but not all, major household costs has started to slow, however many of these costs have not fallen relative to the amount they grew over the time of the mining boom in particular. As such, the many low wage workers who achieved little relative benefit during the boom period have fallen further and further behind.

26 WACOSS contends that it has been many years since the minimum wage decision has delivered a demonstrable improvement to living standards for low wage employees. In reality, the minimum wage decisions have consistently fallen short of what WACOSS has considered, and submitted, as necessary for low wage employees to actually keep up with cost of living increases. As a result, the standards of living of those on the lowest wages have fallen further behind community expectations and standards.

27 WACOSS's analysis shows that low income earners are already struggling to stretch their full time minimum wage salaries to cover the cost of living in WA. Every extra dollar a low wage worker earns is more than likely to end up boosting demand for goods and services, and WACOSS suggests that a $30.00 per week increase in the WA minimum wage will increase the spending power of those with the largest marginal propensity to consume, that is, those on lower incomes. The resulting increased spending will help drive growth in retail spending, improve consumer confidence and help drive the economy. WACOSS encourages the Commission to pay particular attention to the opportunity this State Wage Case provides to deliver 'improved standards of living for employees' by awarding an increase of $30.00 per week.

28 WACOSS submitted a detailed submission regarding who an increase in the WA minimum wage assists, the cost of living in WA and income inequality and attached its 2014 Cost of Living Report.

Meri Forrest

29 The Commission received an email submission from Meri Forrest, saying that the minimum wage of $665.00 is vastly inadequate and that if politicians had to pay rent and feed themselves and a child on the paltry amount for a month, they would be more likely to give adequate increases.

SUBMISSIONS IN REPLY

The Hon. Minister for Commerce

30 The Minister submits that although UnionsWA accurately states the WA economy is projected to grow by almost $40 billion over the forecast period, it should be read in the context of the State Budget forecasts for Gross State Product (GSP) growth in percentage terms. Specifically, GSP is expected to grow at the slowest rate of growth since 1990-91, well below the long-run trend growth of 4.6 per cent per annum over the five years to 2018-19. The State Budget papers also highlight a marked contraction in the State's domestic economy as measured by the SFD which fell by 2.2 per cent in 2013-14 and is forecast to contract further by 2.5 per cent in 2014-15 and 1.25 per cent in 2015-16. This reflects a substantial decline in business investment and subdued growth in household consumption which are flowing through to a softer local labour market.

31 In relation to CCIWA's contention that the cost of living for WA employees has not significantly changed compared to this time last year, the projection in annual average terms for the Perth CPI is that it will be 2 per cent higher in 2014-15.

Chamber of Commerce and Industry of Western Australia

32 CCIWA agrees with the Minister's acknowledgement that 'it is important that minimum and award wage increases do not threaten the capacity of employers to sustain and create employment'. In CCIWA's view, given the precarious nature of the labour market, even an increase in line with inflation will have a negative impact on employment.

33 CCIWA believes Treasury's forecast of 2 per cent inflation is an over-estimation; CCIWA believes that the CPI for the 2014-15 period will reach 1.5 per cent.

34 CCIWA considers that the increases sought by UnionsWA and WACOSS are exceedingly high and do not reflect the current circumstances facing the low paid or the economy. They would result in reduced working hours and lost jobs for low paid employees as well as establishing a barrier to employment for young workers and the long term unemployed. Given the substantial decline in the WA and national economies since this time last year, CCIWA submits that the claim of UnionsWA and WACOSS is irresponsible and would have a significant detrimental effect on those employers and employees to whom the Order would apply. It points out that UnionsWA has not considered the high level of unemployment in its submissions, nor established any basis for the formulation of its position.

35 CCIWA presented submissions on who is likely to be impacted by the State Wage Case. It also submits that in the current economic environment, there is a strong need to focus on the cost impact of any increase to award rates of pay and that, if any increase is granted, it should be a flat dollar increase because it provides a proportionately higher benefit to the low paid compared to a percentage increase which provides a greater monetary benefit to those employees on higher award classifications and also applies greater pressure on employers who need to focus on the need to reduce costs.

36 CCIWA also addressed wage inequality, the objective of the need to protect employees who may be unable to reach an industrial agreement, and cost of living for the low paid. It addressed encouraging ongoing skill development, equal remuneration and the capacity of employers to bear costs of increased wages and replied in detail to the WACOSS submission.

UnionsWA

37 UnionsWA, in response to the Minister's submission, states that increases to the minimum wage based on CPI measures alone will not satisfy s 50A(3)(a)(ii) – (iv) of the Act. It endorses WACOSS's position that the increase in the cost of essential items is hardest felt by low income households. Granting no increase would continue the decline in the proportion of the WA minimum wage compared to average weekly earnings, not the Wage Price Index (WPI). It submits that the CCIWA's submission of a zero increase to the minimum wage is contrary to every part of s 50A(3) of the Act.

38 Further, the WA State Budget for 2014-15 increased household fees and charges by around 6.6 per cent which is still higher than the minimum wage increase being asked for by the Minister. The increase sought by UnionsWA and WACOSS would best meet the needs of the low paid when meeting cost increases to essential services. Federal Budget changes will be a 'live issue' for 2015-16 and should remain a consideration for the Commission when determining to meet the needs of the low paid and contribute to improved living standards.

39 UnionsWA notes that there has been a small, but noticeable, compression of wage rates over the period between 2010 and 2014 and that the compression has been more pronounced at the higher rates than the lower rates. It submits its claim seeks to address both the desire to target increases of most benefit to those employees who are actually on the minimum wage and the compression of relativities within awards. It considers its claim is therefore superior to the Minister's claim. UnionsWA says that the Minister's submission, that a greater degree of wage restraint is necessary to support employers in the current economic conditions, is not supported by the WA Treasury attachment which spoke about the decline in purchasing power. This decline will not be arrested by a CPI-only increase. It is important that an increase to the level of the minimum wage makes a contribution to increasing consumption.

THE STATUTORY CRITERIA

40 The Act in s 50A(3) obliges the Commission to take into consideration:

(a) the need to —

(i) ensure that Western Australians have a system of fair wages and conditions of employment; and

(ii) meet the needs of the low paid; and

(iii) provide fair wage standards in the context of living standards generally prevailing in the community; and

(iv) contribute to improved living standards for employees; and

(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;

and

(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; and

(c) to the extent that it is relevant, the state of the national economy; and

(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; and

(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; and

(f) relevant decisions of other industrial courts and tribunals; and

(g) any other matters the Commission considers relevant.

41 The submissions before us also addressed each of these considerations.

Ensuring that Western Australians have a system of fair wages and conditions of employment, providing fair wage standards in the context of living standards generally prevailing in the community, and meeting the needs of the low paid

42 The Minister submits it is difficult to determine which employees constitute the low paid group and what level of minimum wage would meet the variety of personal, family and household circumstances amongst low paid employees. Maintenance of the real value of the WA minimum wage is an important element in providing fair wages in the context of community standards. A flat dollar adjustment to minimum and award wages would ensure that the greatest benefit of this year's State Wage Order is directed to the lowest paid.

43 CCIWA says that the CPI provides the most reliable measure of increases to the cost of living and over the past 12 months there has been a substantial decline in the level of inflation, currently sitting at 1.4 per cent for Perth in the year to March 2015. This also reflects a substantial decrease in the costs of a number of key components of the index. There has been a decline of petrol prices and a shift in housing affordability with a fall in the medium rental prices. The increase in vacancies means that the stock of affordable rental properties will increase as those who can afford to upgrade rental properties or purchase their own home do so. CCIWA cautioned against 'unpacking' the various components of CPI.

44 CCIWA submits that strong competition between two major retailers has resulted in a reduction in prices in both major outlets. Australia has the highest minimum rate of pay compared to any other OECD member country. On-costs such as penalty rates and allowances further improve the living standard of WA employees. Consideration needs to be given to a combination of both minimum wages and the tax transfer system in providing an effective safety net.

45 CCIWA asks the Commission to consider the impact that a high minimum wage has on the ability for people to move from social security benefits to paid employment because a high minimum wage can act as a barrier to entry to the workforce. Increases to the minimum award wage through the State Wage Case are unlikely to be a key factor in the decision of most individuals to seek employment. There is a high level of unemployment currently seen across both WA and Australia, and the high cost of employing people contributes to levels of employment. The cost of labour makes up such a large proportion of costs, and large cost savings are made by reducing the size of the labour force. Major companies are consistently downsizing their operations. Job cuts in the mining and resources sector have an impact on local businesses and jobs. Keeping the minimum wage at a level which allows employers to maintain staffing levels or provide employment opportunities to the unemployed is therefore vital.

46 CCIWA submits that for small businesses in the State system, the minimum rate of pay is higher than those applicable to their larger competitors in the national system, which has a direct impact on their ability to compete and operate profitably. Small businesses are vulnerable, and a key reason for small business failure is an inability to cope with costs and an increase in debt.

47 In relation to the tax transfer system, CCIWA refers to a report which examined the interaction between the national minimum wage and the tax transfer system which found that although between January 1986 and January 2012 there was a minimum $7.67 per week real growth in the minimum wage, the disposable income of a single person working for the minimum wage would have increased in real terms by $53.00 per week due to an almost halving of the income tax paid by that person.

48 UnionsWA notes that for low paid employees some costs have more impact than others, a key example being the differential impact of housing costs. There is a need to maintain a minimum wage with a high purchasing power. A substantial increase, well above CPI inflation, is required.

49 WACOSS says the minimum wage process of annual review and adjustment is imperative to protecting the lowest paid workers within our community. Research undertaken by the Fair Work Australia, which is reasonably comparable for the purposes of the WA minimum wage, indicated that between 10 per cent and 11 per cent of all adult employees earned between 100 per cent and 120 per cent of the federal minimum wage. Of the employees below, on or slightly above the minimum wage:

- 51 per cent were women compared with 47 per cent of the total workforce;
- 58 per cent were partnered, and approximately half of these had dependent children;
- 5 per cent were sole parents with dependent children;
- 14 per cent worked less than 30 hours per week;
- 11 per cent worked in the healthcare and social assistance industries;
- The industries which had the most employees were Accommodation and Food services, Healthcare and social assistance, and Retail trades.

50 Occupations with the most employees earning below, at, or just above the minimum wage were labourers, community and personal service workers, sales workers, technicians and trade workers. Community members who are affected by the ability of wage increases to contribute to a 'fairer' system of wages and conditions include:

- workers in the WA community sector;
- women;
- young people; and
- people in insecure work arrangements.

51 WACOSS examined these in detail. With respect to the cost of living, WACOSS sees the plight of low income individuals and households - in particular, those who have struggled to achieve and maintain an acceptable standard of living by WA standards whilst working full time. Low wages today hinder the ability of households to develop financial resilience which in turn increases the likelihood that households will be less financially secure later in life, and will place increased pressure on the

welfare system and the wider economy into the future. The increase in the cost of essential items is hardest felt by low income households.

52 WACOSS referred to its Cost of Living Report, submitting that the unaffordability of housing in WA and the ongoing unaffordability of rental property housing must be included in the Commission's considerations. The proposed $109.00 per year increase in compulsory third party premiums equates to an additional weekly cost of approximately $2.00 per week, and this alone is 7 per cent of the WACOSS total claim of $30.00 per week. This highlights the importance of delivering WACOSS's full $30.00 per week claim if the Commission is to seek to improve employees' standards of living.

53 CCIWA says that it is important to note that the greater part of WACOSS's submission considers the impact of various matters on those on 'low incomes', which is a broad definition and includes those who are also reliant on sources of income other than paid employment. CCIWA does not consider that increases to the minimum wage have been effective in addressing the gender pay gap issue. The more effective means of addressing affordable childcare is the tax transfer system. It is also unclear how a $30 increase to the WA minimum wage will improve the resilience and self-sufficiency of low paid workers. Rather, it may well increase the precarious nature of their employment because in the situation of a downturn in business, it is easier to adjust labour costs by reducing the hours of work of, or terminating, casual employees than it is to reduce the hours or terminate permanent employees. One of the areas in which there has been a noticeable reduction is rental and housing affordability. There has been a decline in the cost of electricity in July 2014. The cost of utilities is reflected in CPI and is therefore considered by the Commission in its previous State Wage Order decisions.

Protecting employees who may be unable to reach an industrial agreement

54 The Minister submits that protecting vulnerable employees is clearly an important aspect of the Commission's wage setting function however the minimum wage for low paid employees should allow scope for negotiation of agreements which lead to productivity improvements. A CPI based adjustment should protect the needs of the low paid while not reducing the impetus for employees and employers to pursue bargaining.

55 UnionsWA submits that increases to the minimum wage are more likely to encourage bargaining in lower wage sectors, and at any rate do not constitute the principal 'incentive' to embark upon bargaining in individual workplaces. The Commission should put no weight on claims that a substantial minimum wage increase will act to discourage bargaining.

Encouraging ongoing skills development

56 The Minister submits that since apprentice numbers peaked in 2010, apprenticeship commencements have decreased by 16.1 per cent overall. The total number of apprentices in training across the State has fallen slightly over the last year. There has been an 8.9 per cent decrease in the number of traineeship commencements in 2014. Since the recent peak in traineeship commencements in 2012, commencements have reduced overall by 20.8 per cent. The total number of employees currently in training in WA decreased slightly as at 31 December 2014. The Minister urges the Commission to consider the potential impact of any minimum wage increase on the willingness of employers to engage staff in training arrangements.

57 In relation to encouraging ongoing skills development, CCIWA points out that apprentice wages are still a significant part of the cost of employing an apprentice and this cost increases as a proportion of total costs as the apprenticeship progresses. Apprentices are frequently supervised by award-based employees whose wages will either be directly or indirectly impacted upon by the State Wage Case Order decision, thus increasing the cost of supervision. There is a need for caution in increasing the costs of engaging an apprentice.

58 UnionsWA submits that unless regular and generous increases in apprentices wages flow from minimum wage increases, apprenticeships will become increasingly unattractive. UnionsWA argues that a substantial wage increase that seeks to address the disparity between minimum rates and average weekly earnings will play its part in making apprenticeships more attractive thereby encouraging greater skills development. This has been recognised in the national system and should be recognised in the State system. It provided data about course fees.

59 WACOSS submits that the full rate of the increase to the minimum wage must be applied to both junior and adult wages. To provide only a proportion of the minimum wage increase would be unfair as it would mean that the Commission would be failing to meet the needs of the youngest and lowest paid full time workers.

Providing equal remuneration for men and women for work of equal or comparable value

60 The Minister submits that the gender pay gap in Western Australia increased from 23.6 per cent in November 2013 to 25.6 per cent in November 2014 compared to 17.1 per cent to 18.8 per cent nationally over the same period. In both cases, the widening of the gap reflects male average earnings having increased at a faster rate than earnings for females.

61 UnionsWA urges us to have regard to gender pay inequity more broadly noting that in WA the gender pay gap can be seen to exceed the national gender pay gap on every available measure. It recognises that while the minimum wage plays only a modest role in reducing the gender pay gap, very little else will work to reduce it without regular, substantial real increases to the minimum wage.

The state of the economy of Western Australia

62 We again express our thanks to the WA Department of Treasury for providing its analysis of WA's economy and for making available Mr David Christmas, Director of the Economic and Revenue Forecasting Division, to give evidence in these proceedings. The evidence is of assistance to the Commission in our consideration of the corresponding analyses of the WA and national economies in the submissions before us.

63 The WA economy as measured by GSP grew at an average of 5.9 per cent per annum over the three years to 2013-14, but it is expected to moderate to 3.25 per cent in 2014-15 and to ease further to 2 per cent by 2015-16. Strong contributions from the external sector are expected to be moderated by a weak domestic economy as measured by SFD which contracted by

2.2 per cent in 2013-14. Domestic activity is forecast to decline further in 2014-15 and 2015-16, and remain unchanged in 2016-17. This will be the first time on record that SFD will have contracted over two or more consecutive financial years.

64 The primary reason for the weakness is a tapering of investment from unprecedented levels reflecting the gradual completion of construction on major resource projects and recent sharp falls in commodity prices, particularly iron ore and oil, which has reduced the probability of major new resource investment projects emerging. The substantial decline in key commodity prices has also reduced revenue for mineral and energy producers leading to cost cutting and impacting on the growth in household incomes.

65 Annual growth in household spending has eased to its weakest pace since 2009 and is expected to remain below the long run average over the near term, constrained by lower wage and steadier population growth. Growth in dwelling investment is expected to ease. The sustained weakness in the domestic economy is expected to result in GSP growth remaining below trend out to 2018-19.

66 There is a rising unemployment rate, subdued growth in full time hiring and a slowing of wage growth to its weakest pace on record. Employment growth is expected to grow at a more moderate pace than in recent years while the unemployment rate is expected to peak at 6.25 per cent in 2015-16. Furthermore, wages growth will likely remain subdued consistent with business' efforts to rein in costs.

67 WA's population growth has eased. Inflation in Perth has been weak over the first part of 2014-15, mainly constrained by falling automotive fuel prices and the removal of the carbon tax from 1 July 2015. Inflation is expected to grow by 2 per cent in 2014-15 before returning to the middle of the Reserve Bank of Australia's target band by 2016-17.

68 We reproduce the table of major economic aggregates for WA referred to by Mr Christmas.

Table 1.1: Major Economic Aggregates, Annual Growth (%)[(a)]

	2013-14 Actual	**2014-15** Estimated Actual	**2015-16** Budget Estimate	**2016-17** Forward Estimate	**2017-18** Forward Estimate	**2018-19** Forward Estimate
State Final Demand (SFD)	-2.2	-2.5	-1.25	0.0	1.0	2.0
Gross State Product (GSP)	5.5	3.25	2.0	3.5	2.75	2.75
Employment	1.1	2.5	1.75	1.75	2.0	2.0
Unemployment rate[(b)]	4.8	5.5	6.25	6.0	5.75	5.25
Consumer Price Index (CPI)	3.0	2.0	2.25	2.5	2.5	2.5
Wage Price Index (WPI)	2.8	2.25	2.75	3.0	3.25	3.5
Population	2.6	1.9	2.0	2.1	2.2	2.2

(a) Annual average growth unless otherwise stated.

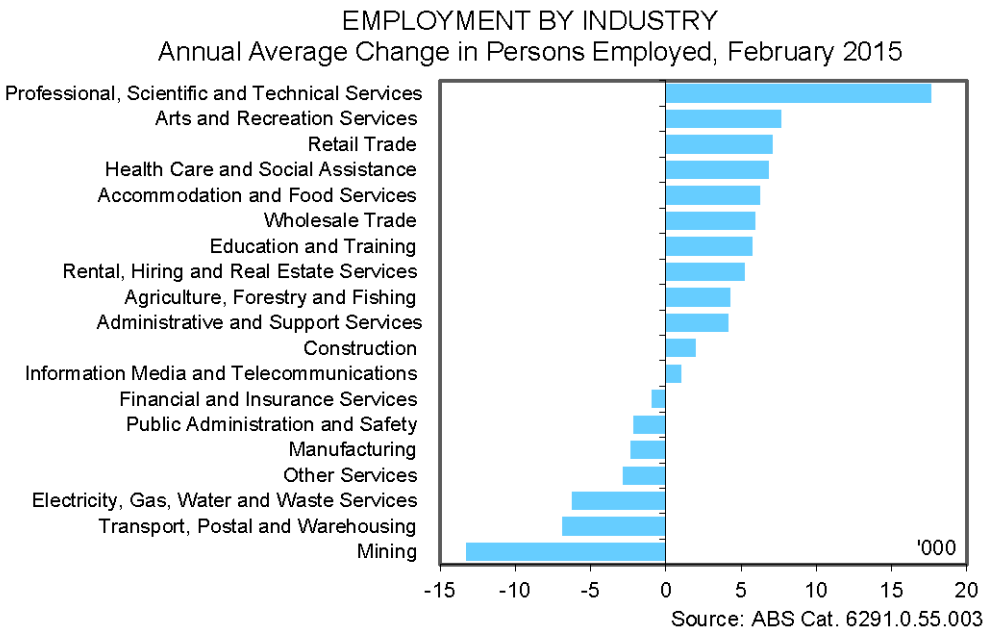
(b) Average rate over the year.

Source: 2015-16 Budget, Budget Paper No 3

(Submission of the Hon. Minister for Commerce Attachment A, p 2)

69 WA Treasury believes economic growth is expected to slow to a below-trend pace over the coming years, with strong contributions from exports moderated by a further tapering of business investment from unprecedented levels. Growth is forecast to slow to 2 per cent in 2015-16 before lifting modestly over the following years. Activity in WA's domestic economy has moderated. The recent fall in SFD compares to a 1.2 per cent growth in the national domestic economy over 2014. In the case of business investment, the decline was less severe at the national level. Household consumption has shown the weakest annual growth since 2009, growing by a very modest 1.6 per cent in 2014. Retail trade and sales of motor vehicles have been subdued.

70 Conditions in WA's labour market have remained relatively subdued over the past year with employment growing below trend and the unemployment rate drifting higher. Despite this, the State's labour market continues to outperform the national equivalent. Employment grew by 2.2 per cent in annual average terms to April 2015, which is below the historical average of 2.7 per cent per annum. We set out the information on the annual average change in persons employed by industry sector as provided in the Hon. Minister's submissions.



71 Annual growth was mainly underpinned by part time employment which grew by a robust 4.4 per cent in the year to April. Conversely, full time hiring was weaker at 1.4 per cent indicating that underlying labour market conditions remain soft. A number of service sector industries such as Professional services, Arts and recreation, and Retail trade showed an annual employment growth. Trends in job vacancy measures for WA have declined over recent months and remain at low levels.

72 WA's unemployment rate has increased, averaging 5.6 per cent over the four months to April 2015. This is an increase from 5.2 per cent in 2014. The State's unemployment rate remains the lowest of all States and below the national rate. WA's unemployment rate is forecast to grow to 5.5 per cent in 2014-15 and 6.25 per cent in 2015-16.

73 Annual growth in the State's WPI moderated from 3.1 per cent in March 2014 to just 2.2 per cent in March 2015, the slowest growth on record since 1998-99. Inflation at 2.3 per cent in the year to March meant that wages as measured by the WPI fell by 0.1 per cent in real terms, the first fall in real wages since 2006. There was a significant moderation in private sector wages which grew by just 2.1 per cent in March 2015, the weakest on record.

74 The slowdown in annual wages growth has been more pronounced in WA than nationally. Historically, growth in WA's WPI has exceeded the national equivalent during periods of stronger economic conditions in the State relative to national growth. Wage growth in WA is expected to be more closely aligned with growth at the national level over the coming years. The State's WPI is expected to grow by 2.25 per cent in 2014-15, well below the long run average of 3.9 per cent per annum.

75 Inflation as measured by growth in the CPI in Perth has eased in annual average terms to 2.3 per cent in the March quarter 2015, down from 3 per cent over 2013-14 and slightly higher than growth at the national level. The CPI is expected to remain subdued at 2 per cent in 2014-15 and 2.25 per cent in 2015-16.

National economic outlook

76 Growth in the Australian economy continued at below trend pace over the past year as business investment waned further. Gross Domestic Product (GDP) grew by 2.7 per cent over 2014, which is lower than the long run average growth of 3.2 per cent, but up from 2.1 per cent growth in 2013. Labour market conditions at the national level remain subdued by historical standards, employment increasing by 1.2 per cent to April 2015 while the unemployment rate remained above 6 per cent.

Capacity of employers to pay

77 The Minister submits that while there is little specific data available to assess the health of those businesses likely to be affected by the State Wage Order, there is evidence to suggest that WA businesses have been affected by the softening domestic economy. The GOS plus GMI measure produced by the Australian Bureau of Statistics also suggests some sectors are facing a more challenging trading environment. While that measure recorded an improvement in a number of industries in 2013-14, it recorded a decline in several industries known to employ significant numbers of award-reliant employees such as Retail trade Accommodation and food services, Administrative and support services, and Other services.

78 In the Minister's view, in these circumstances there is a heightened risk that excessive increases to minimum and award wages could impede the ability of employers to maintain and create job opportunities. The exact relationship between changes in the minimum wage and employment levels is unknown, nonetheless it is reasonable to suppose that there is a point at which rising wages would have an impact on employment and that prevailing economic conditions also affect the capacity of employers to meet higher wage costs.

79 CCIWA says the Minister's concern is reflected in the decline in the employment intentions of businesses which continue to be in negative territory, meaning businesses are continuing to shrink the size of their workforce. CCIWA is of the view that an increase to the WA minimum wage will result in a reduction in the number of people employed or hours of work offered to staff.

80 UnionsWA submits that the Commonwealth government has recently provided a major stimulus to boost businesses more likely to be in the State system. It freezes increases to the superannuation guarantee contribution and insofar as they are considered an employment cost, this should be considered as a contribution to employers' capacities to pay.

81 CCIWA responds that it is difficult to understand how a $30.00 per week increase in award rates of pay can be absorbed into the government's proposed small business tax relief package. The package is capped at $1,000 per annum which does not cover the $1,500 per annum wage increase which would result from UnionsWA's $30.00 claim. Further, the intention of that package is to encourage small businesses to invest, take on new staff and grow. Increasing the wages of existing staff will substantially reduce the ability for small businesses to use the tax savings to help generate jobs or increase working hours.

The Fair Work Commission Annual Wage Review 2014-15

82 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 State Wage Order decision that the Fair Work Commission Annual Wage Review is a relevant and significant consideration for the purposes of s 50A(3)(f) of the Act.

83 We maintain that view and consider the Fair Work Commission (FWC) Annual Wage Review 2014-15 [2015] FWCFB 3500, which increased the national minimum wage by 2.5 per cent from $640.90 per week to $656.90 per week from 1 July 2015, an increase of $16.00 per week, to be a relevant and significant consideration.

CONSIDERATION

84 Previous State Wage Order 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 preferring one or more considerations in it to the exclusion of the other considerations. The considerations under s 50A of the Act are not easily reconciled. They require balancing. All of the measures, as they are encompassed within the considerations we are obliged to take into account, are relevant to our decision.

85 The respective submissions of CCIWA and UnionsWA, together with the submission by WACOSS, emphasise those considerations which support the views they hold. However, the weight to be given to one consideration may well be balanced by the weight to be given to the other considerations.

86 Our obligation to meet the needs of the low paid (s 50A(3)(a)(ii)) and to contribute to improved living standards for employees (s 50A(3)(a)(iv)) are strong indicators that the submission that there be no increase to the WA minimum wage should not be accepted. The need to protect employees who may be unable to reach an industrial agreement (s 50A(3)(a)(v)), given the evidence of the growth in wages generally in the community, also suggests that awarding no increase would not meet that consideration.

87 We recognise that unemployment in WA is rising and understand the submission that no increase to the WA minimum wage may increase employment opportunities. However, it is by no means clear that the rising unemployment is in the industry sectors most likely to be affected by the WA minimum wage. The evidence before us of the growth in employment in the Retail trade, Health care and social assistance, Accommodation and food services and Wholesale trade suggest that some of the employment in those sectors which had been lost to the more highly paid mining sector may be returning.

88 Moreover, the link between minimum wage increases and the level of employment is complex. In the years since 2006, when this Commission was obliged by amendments to the Act to set a WA minimum wage in the absence of a national minimum wage, there is no evidence suggesting that the increases to the WA minimum wage since 2006 have materially affected the industry sectors most likely to be affected by it.

89 We recognise, and have previously recognised, 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. This gives recognition to the WACOSS submission that the minimum wage process of annual review and adjustment is imperative to protecting the lowest paid workers within our community. We consider the evidence of Mr Dirou, and the submissions of WACOSS to be helpful to our considerations even though they do not address directly the circumstances of employees in WA who are on, or just above, the WA minimum wage.

90 The concept of fairness inherent in the need to ensure that Western Australians have a system of fair wages and conditions of employment (s 50A(3)(a)(i)) and provide fair wage standards in the context of living standards generally prevailing in the community (s 50A(3)(a)(iii)) brings into consideration that wages generally in the community, and the national minimum wage, have increased.

91 We have recognised that an increase to the WA minimum wage contributes to providing equal remuneration for men and women for work of equal or comparable value (s 50A(3)(a)(vii)) and have noted the distinction between this consideration and the gender pay gap. 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 dependent on annual increases to the minimum wage.

92 We therefore do not accept the submission that we should award no increase to the WA minimum wage.

93 The submissions of UnionsWA and WACOSS, and perhaps the brief submission of Meri Forrest, together seek a significant increase to the minimum wage. We recognise the validity of their submissions however they cannot be determinative of the decision we are obliged to make under s 50A(3) of the Act to the exclusion of all other considerations.

94 We also are obliged to consider the capacity of employers as a whole to bear the costs of increased wages, salaries and other remuneration (s 50A(3)(d)), and recognise that any increase we award will be an additional employment cost to employers. A significant increase will be a significant cost and this must be a relevant consideration given the evidence that wage costs continue to be the key priority issue for employers in an environment of cost reduction.

95 The employment effects of the decision we make will depend upon many factors. There is no evidence before us that our previous minimum wage decisions have had a direct impact on levels of employment, inflation or productivity. We consider this may be explained by the 2006 Plowman report which concluded, amongst other things, that there has been little minimum wage effect on the economy as a whole, and weak effect on those sectors with higher levels of low paid employees. Minimum wage increases have had only minor effects on employment.

96 However it is significant that Professor Plowman suggests that aggregate demand in the WA economy moderates, to a considerable extent, any minimum wage effects. Except for 2009, since 2006, the WA economy as a whole has been in a relatively strong position, including compared to the national economy, and this is likely to have moderated the effects of past increases to the WA minimum wage.

97 On this occasion the economic circumstances of WA are significantly different from previous years. For the first time on record the State's domestic economy as measured by SFD has contracted over two or more consecutive financial years, and the forecast is that domestic activity is expected to decline further in 2014-15 and 2015-16 and remain unchanged in 2016-17. The State's economy as a whole including exports as measured by GSP is certainly more positive although it is forecast to grow at the slowest rate of growth since 1990-91, well below long-run trend growth of 4.6 per cent per annum over the five years to 2018-19.

98 On previous occasions, we have pointed to the strength of the WA economy, and its strength relative to the national economy, to justify awarding an increase to the minimum wage which may exceed the increase given to the national minimum wage. Now WA's GSP growth is more in line with growth in the national economy and growth in the national economy is likely to exceed growth in the WA economy.

99 We have taken into account the considerations in s 50A(3)(a) of the Act, and are aware of the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment (s 50A(3)(e)). We take into account the estimated impact on the representative household from the WA Budget papers, noting as CCIWA points out, that some of the cost increases, for example to utilities, are costs which employers as well as employees have to bear.

100 We consider there is much to be said for the submission of the Minister that in the current economic circumstances there should be a greater degree of wage restraint.

101 We give considerable weight too to the increase to the national minimum wage from the FWC Annual Wage Review 2014-15. The timing of the Annual Wage Review and the date of operation of the minimum wage set by the FWC is contemporaneous with the obligations on us under s 50A of the Act. The national minimum wage applies to the vast majority of minimum wage employees in WA and is set after a comprehensive examination of information, including information directly relevant to the economy of WA, and that it is reached according to comparable legislative considerations.

102 In both its written submissions and its submissions following the FWC Annual Wage Review 2014-15, UnionsWA contended that the differences in language between s 284(1) of the Fair Work Act 2009 (Cth) (the FW Act) and s 50A(3) of the Act, especially in relation to consideration of living standards of people on the minimum wage and the award system, are of some significance. In both the 2012 and 2013 WA State Wage decisions, we referred to the "substantial overlap" between the requirements of s 284(1) of the FW Act and s 50A(3) of the Act, in terms of considerations to be taken into account: (([2012] WAIRC 00344; (2012) 92 WAIG 557); ([2013] WAIRC 00347; (2013) 93 WAIG 467)). We remain of that view. While it is correct to say there is some difference in emphasis in the respective statutory provisions, it also needs to be borne in mind that s 284(1) of the FW Act is to be read with the objects of the FW Act in s 3: *Annual Wage Review 2011-12* [2012] FWA 5000. Amongst other things, the objects of the FW Act in s 3 include "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions…through…minimum wage orders" (s 3(a)).

103 Given that we are required to balance a range of considerations under s 50A(3) other than those in par (a) we do not consider that from the terms of the legislation alone we are required to award a higher increase or maintain a higher minimum wage in WA. Each WA State Wage Case will require consideration by the Commission of the circumstances prevailing at the time.

104 The difference between the level of the WA and national minimum wages is not an irrelevant consideration. It is an issue which has been regularly raised in previous State Wage Cases as well as this one. To award a significant increase to the WA minimum wage which, in the case of the UnionsWA and WACOSS claim, would result in the WA minimum wage being $39.00 per week higher that the national minimum wage, will disproportionately increase the wage costs of employers in the WA system compared to their counterparts in WA in the national system both in WA and elsewhere in Australia.

105 The balancing of all the considerations under s 50A(3) considerably reduces the opportunity for the WA minimum wage, which applies to such a small proportion of WA minimum wage earners, to be able to address many of the issues relied upon by UnionsWA and WACOSS. There have been real increases to the WA minimum wage since 2006 even if those increases have consistently fallen short of what Unions WA and WACOSS have considered, and submitted, as necessary for low wage employees to actually keep up with cost of living increases. We have observed in previous decisions that the WA minimum wage has only a limited capacity to address issues of housing affordability and the gender pay gap.

106 We place considerable weight upon the submissions we receive, including those which are consistently made each year, and the decision we make depends, as it should, very much on equity, good conscience, and the substantial merits of the case presented. It must be acknowledged that the ability to award significant real wage increases to the WA minimum wage is not unconstrained.

DECISION

107 After considering all of the evidence and the submissions before us on this occasion, we conclude that we should award a lesser increase than we awarded in our 2014 decision.

108 We have decided that the WA minimum wage should be increased by $14.00 per week to $679.90 per week. This is an increase of 2.1 per cent.

109 The operation of 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.

110 The WA minimum wage remains higher than the national minimum wage by $23.00 per week, although a consequence of our decision is that the gap between the two minimum wages is reduced.

111 We have generally preferred to increase award rates of pay by a flat-dollar amount because we consider a flat increase targets those employees who are on the minimum wage or slightly above it and it 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. We are aware that this will over time compress award relativities.

112 On this occasion, UnionsWA has demonstrated the level of compression at higher wages levels in the *Metal Trades (General) Award*. We are persuaded on this occasion to adjust award wage rates by 2.1 per cent. We take into account that a percentage increase to award rates will give a greater increase to higher award rates than the minimum wage, and the corresponding cost to employers. We observe that the increase is able to be absorbed into any over award payment such that it 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 rounding of calculations in awards is to be in accordance with the methodology in Appendix A to the Reasons for Decision in the 2013 State Wage Order ([2013] WAIRC 00347; (2013) 93 WAIG 467 at 476).

113 It is open to any party to seek to vary an award to address issues which arise from the compression of relativities. An application to do so does not undermine this, or previous State Wage Order decisions and can be dealt with by a single commissioner.

114 We are not persuaded on this occasion by the UnionsWA and WACOSS submissions that we should apply the full rate of the increase to junior wages. In particular, we are uncertain of the employment effects of doing so, and nothing put on this occasion has reassured us that it is appropriate to do so on this occasion. We have noted in the 2012 State Wage Order decision ([2012] WAIRC 00346; (2012) 92 WAIG 557) the absence of evidence from which we could reach a conclusion regarding the effect of doing so on the need to encourage ongoing skills development. If we are to be asked to apply the outcome of the national review of apprentice and trainee wages and conditions then a case will need to be presented. This can be presented in advance of the next State Wage Case so that its result may be incorporated into the decision to issue on that occasion.

INDUSTRY/SKILL LEVELS

115 The Minister circulated to the UnionsWA and CCIWA a newly revised list of industry/skill level classifications as provided by the Department of Training and Workforce Development. The newly revised list no longer includes traineeship names. Instead, it lists training packages, their National Qualification Codes and the relevant Australian Qualification Framework (AQF) certificate levels, grouped by level in alphabetical order based on the training package code.

116 The Minister advised that each traineeship undertaken in WA is allocated an industry/skill level based on the training package to which it belongs and the applicable AQF certificate level. The industry/skill level is then used, in combination with a trainee's age and years out of school, to determine the appropriate minimum wage for award-free trainees. In some cases, traineeships belonging to the same training package are classified at different industry/skill level, due to differing AQF certificate levels.

117 Each training package has a three letter identifier code, known as a National Qualification Code. When employers and trainees enter into a training contract to establish a traineeship, the first section of the contract spells out the title and level of the qualification and the National Qualification Code, and the first three letters of the alphanumeric code denote the relevant training package.

118 When seeking the appropriate minimum wage for an award-free trainee, the relevant industry/skill level for a traineeship can be identified by matching the first three letters of the National Qualification Code and the AQF Certificate Level of the qualification on the training contract with the Level A, B or C section of the Industry/Skill level list.

119 There is no objection to those revisions and we consider it is appropriate to incorporate the list in the order to issue. We express our thanks to the Minister for circulating the newly revised list well in advance of the hearing.

THE STATE WAGE PRINCIPLES

120 No person suggested that any change is required to be made to the State Wage Principles. Section 50A(1)(d) of the Act obliges the Commission to set out a statement of principles to be applied and followed in relation to the exercise of jurisdiction to set the wages, salaries, allowances or other remuneration of employees or the prices to be paid in respect of their employment. The Statement of Principles July 2015 to issue remains unchanged from the Statement of Principles July 2014 apart from the necessary and consequential amendments to Principle 9.

MINUTE OF PROPOSED GENERAL ORDER

121 A minute of proposed General Order now issues. The Commission should be advised by 2.00pm on 15 June 2015 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 10.00am on 16 June 2015.

2015 WAIRC 00444

2015 STATE WAGE ORDER PURSUANT TO SECTION 50A OF THE ACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 16 JUNE 2015
FILE NO.	APPL 1 OF 2015
CITATION NO.	2015 WAIRC 00444

Result 2015 State Wage Order issued

Representation

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

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

Mr K Singh and 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 2015 State Wage order and thereby orders as follows:

1. THAT the 2015 State Wage order takes effect on 1 July 2015.

2. THAT the General Order which issued in matter No. APPL 1 of 2014 ((2014) 94 WAIG 652) is rescinded with effect on and from the commencement of the first pay period on or after 1 July 2015.

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 $679.90 per week on and from the commencement of the first pay period on or after 1 July 2015.

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 2015:

	1 July 2015
Four Year Term	
First year	$327.10
Second year	$428.40
Third year	$584.20
Fourth year	$685.40
Three and a Half Year Term	
First six months	$327.10
Next year	$428.40
Next year	$584.20
Final year	$685.40
Three Year Term	
First year	$428.40
Second year	$584.20
Third year	$685.40

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 $584.20 per week on and from the commencement of the first pay period on or after 1 July 2015.

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 2015:

Industry/Skill Level A			
School Leaver	**Year 10** **$**	**Year 11** **$**	**Year 12** **$**
	234.00	279.00	344.00
Plus 1 year out of school	279.00	344.00	397.00
Plus 2 years	344.00	397.00	465.00
Plus 3 years	397.00	465.00	532.00
Plus 4 years	465.00	532.00	
Plus 5 years or more	532.00		
Industry/Skill Level B			
School Leaver	**Year 10** **$**	**Year 11** **$**	**Year 12** **$**
	234.00	279.00	335.00
Plus 1 year out of school	279.00	335.00	382.00
Plus 2 years	335.00	382.00	450.00
Plus 3 years	382.00	450.00	514.00
Plus 4 years	450.00	514.00	
Plus 5 years or more	514.00		
Industry/Skill Level C			
School Leaver	**Year 10** **$**	**Year 11** **$**	**Year 12** **$**
	234.00	279.00	331.00
Plus 1 year out of school	279.00	331.00	372.00
Plus 2 years	331.00	372.00	417.00
Plus 3 years	372.00	417.00	468.00
Plus 4 years	417.00	468.00	
Plus 5 years or more	468.00		

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

Australian Qualification Framework (AQF)

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

Part-time and School-Based Trainees

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

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

	Current year of schooling	
Wage levels	Year 11	Year 12
A	$7.34	$9.05
B	$7.34	$8.82
C	$7.34	$8.71

(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 2015:

Industry/Skill Level A	$532.00 per week
Industry/Skill Level B	$514.00 per week
Industry/Skill Level C	$468.00 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 2.1% on and from the commencement of the first pay period on or after 1 July 2015 and that this increase shall be subject to absorption in the same terms as previous State Wage decisions.

9. 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 2.1% to the adult award wage on and from the commencement of the first pay period on or after 1 July 2015.

10. THAT increases under previous State Wage Case decisions prior to 1 July 2015, except those resulting from enterprise agreements, are not to be used to offset this State Wage order increase of 2.1%.

11. THAT on and from 1 July 2015 all awards which contain a Minimum Adult Award Wage Clause or provision be varied by:

(a) Deleting the words "$665.90 per week payable on and from the first pay period on or after 1 July 2014" and inserting in lieu the words "$679.90 per week payable on and from the commencement of the first pay period on or after 1 July 2015".

(b) Deleting the words "$572.20 per week on and from the commencement of the first pay period on or after 1 July 2014" in the Adult Apprentices section and inserting in lieu the words "$584.20 per week on and from the commencement of the first pay period on or after 1 July 2015".

(c) Deleting the date "1 July 2014" wherever it appears and inserting in lieu the date "1 July 2015".

(d) Deleting the words "2014 State Wage order decision" wherever they appear and inserting in lieu the words "2015 State Wage order decision".

Statement of Principles

12. THAT the Statement of Principles – July 2014 under the General Order in matter No. Appl 1 of 2014 be replaced by the Statement of Principles – July 2015 in Schedule 2.

Publication

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

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

ATTACHMENT A

INDUSTRY / SKILL LIST

(as at February 2015)

SKILL LEVEL A		
CODE*	**TRAINING PACKAGE TITLE**	**AQF CERTIFICATE LEVEL**
AVI	Aviation	II, III
BSB	Business Services	II, III, IV, Diploma
CHC	Community Services	II, III, IV, Diploma
CPC	Construction, Plumbing and Services Integrated Framework	II, III, IV, Diploma
CSC	Correctional Services	II, III, IV
CUL	Library, Information and Cultural Services	II, III
FDF	Food Processing Industry	III, IV
FNS	Financial Services	II, III, IV
FPP	Pulp and Paper Manufacturing Industries	III
ICA	Information and Communications Technology	II, III, IV
ICT	Integrated Telecommunications	II, III
LGA	Local Government (other than Operational Works Certificate II)	II, III
LMT	Textiles, Clothing and Footwear	III, IV
MAR	Maritime	II, III
MEA	Aeroskills	II, Diploma
MEM	Metal and Engineering (Technical)	II, III, IV, Diploma, Advanced Diploma
MSA	Manufacturing	II, III, IV, Diploma, Advanced Diploma
MSL	Laboratory Operations	II, III, IV, Diploma, Advanced Diploma
MSS	Sustainability	III, IV, Diploma

SKILL LEVEL A		
CODE*	**TRAINING PACKAGE TITLE**	**AQF CERTIFICATE LEVEL**
NWP	Water Industry	III, IV
PMA	Chemical, Hydrocarbons and Refining	II, III, IV, Diploma
PMB	Plastics, Rubber and Cablemaking	III, IV
PMC	Manufactured Mineral Products	III, IV
PSP	Public Sector	II, III, IV, Diploma, Advanced Diploma
PUA	Public Safety	III, Diploma
RII	Resources and Infrastructure	II, III, IV, Diploma, Advanced Diploma
SFL	Floristry	III, IV
SIB	Beauty	III, IV
SIR	Retail Services (including wholesale and Community Pharmacy)	III, IV
SIT	Tourism, Travel and Hospitality	II, III, IV Diploma
TLI	Transport and Logistics	III, IV
UEE	Electrotechnology	II, III, IV, Diploma, Advanced Diploma
UEG	Gas Industry	IV, Diploma, Advanced Diploma
UEP	Electricity Supply Industry—Generation Sector	II, III, IV, Diploma
UET	Transmission, Distribution and Rail Sector	II, III, IV, Diploma, Advanced Diploma

INDUSTRY / SKILL LIST

(as at February 2015)

SKILL LEVEL B		
CODE*	**TRAINING PACKAGE**	**AQF CERTIFICATE LEVEL**
ACM	Animal Care and Management	II, III, IV
AUM	Automotive Industry Manufacturing	II, III
AUR	Automotive Industry Retail, Service and Repair	II, III, Diploma
CPP	Property Services	II, III, IV, Diploma
CUA	Live Performance and Entertainment	II, III
CUF	Screen and Media	II, III, IV
CUV	Visual Arts, Craft and Design	II, III
FDF	Food Processing Industry	II
FPI	Forest and Forest Products Industry	II, III, IV, Diploma
FPP	Pulp and Paper Manufacturing Industries	II
HLT	Health	II, III, IV, Diploma
ICP	Printing and Graphic Arts	II, III
LGA	Local Government (Operational Works)	II
LMT	Textiles, Clothing and Footwear	II
MEM	Metal and Engineering (Production)	II, III, IV, Diploma, Advanced Diploma
MSF	Furnishing	II, III, IV
MTM	Australian Meat Industry	II, III, IV, Diploma
NWP	Water Industry	II
PMB	Plastics, Rubber and Cablemaking	II
PMC	Manufactured Mineral Products	II
PUA	Public Safety	II
RII	Resources and Infrastructure	I
SFL	Floristry	II
SIB	Beauty	II
SIH	Hair	II

SKILL LEVEL B		
CODE*	**TRAINING PACKAGE**	**AQF CERTIFICATE LEVEL**
SIR	Retail Services	II
SIS	Sport, Fitness and Recreation Industry	II, III, IV
SUG	Sugar Milling	II, III
TLI	Transport and Logistics	II
UEG	Gas Industry	II

INDUSTRY / SKILL LIST

(as at February 2015)

SKILL LEVEL C		
CODE*	**TRAINING PACKAGE**	**AQF CERTIFICATE LEVEL**
AHC	Agriculture, Horticulture and Conservation and Land Management	II, III, IV
CUS	Music	II, III, IV
RGR	Racing Industry	II, III, IV
SFI	Seafood Industry	II, III, IV
SIF	Funeral Services	III, IV

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 2015

1. Application of the Statement of Principles

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

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

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

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

2. (deleted)

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

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

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

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

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

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

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

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

4. Previous State Wage Case Increases

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

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

5. Test Case Standards

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

6. Adjustment of Allowances and Service Increments

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

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

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

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

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

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

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

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

7. Work Value Changes

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

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

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

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

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

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

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

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

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

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

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

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

8. Total Minimum Rate Adjustments

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

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

8.3 The State Wage order arising from this decision is a 2.1% increase.

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 $679.90 per week payable on and from the commencement of the first pay period on or after 1 July 2015.

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 2015 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 $584.20 per week on and from the commencement of the first pay period on or after 1 July 2015.

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.

2015 WAIRC 00439

RESCIND GENERAL ORDER NO. 11/2014 AND ISSUE A NEW GENERAL ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	COMMISSION'S OWN MOTION
	APPLICANT
	-v-
	(NOT APPLICABLE)
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
	COMMISSIONER S J KENNER
	COMMISSIONER J L HARRISON
DATE	FRIDAY, 12 JUNE 2015
FILE NO/S	APPL 118 OF 2015
CITATION NO.	2015 WAIRC 00439

Result General Order issued

General Order

HAVING heard Ms L McBride and with her Ms C Purcell on behalf of the Honourable Minister for Commerce; Ms L Smith and with her Mr P Moss 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 2015.

(3) THAT this General Order replace the General Order in Matter No 11 of 2014 which thereby shall be rescinded.

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

LOCATION ALLOWANCES

SCHEDULE A

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

Title of Award or Order—*continued*	**Clause No.**
Independent Schools' Teachers' Award 1976	18
Landscape Gardening Industry Award	18
Licensed Establishments (Retail and Wholesale) Award 1979	31
Local Government Officers' (Western Australia) Interim Award 2011	17.2
Meat Industry (State) Award, 2003	21(1)
Metal Trades (General) Award	5.6
Motel, Hostel, Service Flats and Boarding House Workers' Award, 1976	42
Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980	17
Municipal Employees (Western Australia) Interim Award 2011	19.6
Nurses' (Day Care Centres) Award	22
Nurses (Dentists Surgeries) Award 1977	23
Nurses (Doctors Surgeries) Award 1977	22
Nurses' (Independent Schools) Award	20
Nurses' (Private Hospitals) Award	30
Pastrycooks' Award No. 24 of 1981	11
Pest Control Industry Award	14
Photographic Industry Award, 1980	29
Private Hospital Employees' Award, 1972	40
Quarry Workers' Award, 1969	19
Radio and Television Employees' Award	23
Restaurant, Tearoom and Catering Workers' Award	41
Retail Pharmacists' Award 2004	5.2
The Rock Lobster and Prawn Processing Award 1978	26
School Employees (Independent Day & Boarding Schools) Award, 1980	31
Security Officers' Award	20(3)
Sheet Metal Workers' Award No. 10 of 1973	26
The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977	39
Social and Community Services (Western Australia) Interim Award 2011	18.10
Teachers' Aides' (Independent Schools) Award 1988	17
Timber Yard Workers Award No. 11 of 1951	28
Transport Workers (General) Award No. 10 of 1961	5.13
Transport Workers (Mobile Food Vendors) Award 1987	18
Transport Workers' (North West Passenger Vehicles) Award, 1988	28
Transport Workers' (Passenger Vehicles) Award No. R 47 of 1978	24
Western Australian Surveying (Private Practice) Industry Award, 2003	8.4
Title of Industrial Agreements	**Clause No.**
Leighton Contractors Maintenance Personnel Agreement 2000, No Ag 116 of 2000	Sch 1, Cl 6
Leighton Contractors Mining and Processing Personnel Enterprise Agreement 1997	Sch 1, Cl 9
Retail Food Establishments Employees Agreement 1992	34
Retail Food Services Employees' Agreement 1991	39
South Metropolitan Youth Link (Inc.) Agreement 1997	20

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	$20.80
Argyle	$55.60
Balladonia	$21.40
Barrow Island	$36.20
Boulder	$8.80
Broome	$33.50
Bullfinch	$9.80
Carnarvon	$17.20
Cockatoo Island	$36.70
Coolgardie	$8.80
Cue	$21.40
Dampier	$29.10
Denham	$17.20
Derby	$34.80
Esperance	$6.10
Eucla	$23.40
Exmouth	$30.50
Fitzroy Crossing	$42.20
Halls Creek	$48.70
Kalbarri	$7.40
Kalgoorlie	$8.80
Kambalda	$8.80
Karratha	$34.90
Koolan Island	$36.70
Koolyanobbing	$9.80
Kununurra	$55.60
Laverton	$21.30
Learmonth	$30.50
Leinster	$20.80
Leonora	$21.30
Madura	$22.40
Marble Bar	$53.80
Meekatharra	$18.40
Mount Magnet	$23.10
Mundrabilla	$22.90
Newman	$20.00
Norseman	$18.30
Nullagine	$53.70
Onslow	$36.20
Pannawonica	$27.10
Paraburdoo	$27.00
Port Hedland	$29.00
Ravensthorpe	$11.00
Roebourne	$40.20
Sandstone	$20.80
Shark Bay	$17.20
Southern Cross	$9.80

TOWN	PER WEEK
Telfer	$49.50
Teutonic Bore	$20.80
Tom Price	$27.00
Whim Creek	$34.60
Wickham	$33.50
Wiluna	$21.10
Wyndham	$52.10

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

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

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

(3) Where an employee:

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

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

such employee shall be paid $66^{2}/_{3}$ per cent of the allowances prescribed in subclause (1) of this clause.

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

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

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

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

(7) For the purposes of this clause:

(a) "Dependant" shall mean -

(i) a spouse or defacto partner; or

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

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

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

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

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

PRESIDENT—Unions—Matters dealt with under Section 66—

2015 WAIRC 00392

APPLICATION PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PRESIDENT

CITATION	**:**	2015 WAIRC 00392
CORAM	**:**	THE HONOURABLE J H SMITH, ACTING PRESIDENT
HEARD	**:**	TUESDAY, 19 MAY 2015
DELIVERED	**:**	THURSDAY, 21 MAY 2015
FILE NO.	**:**	PRES 1 OF 2015
BETWEEN	**:**	GEORGE TILBURY
		Applicant
		AND
		WESTERN AUSTRALIAN POLICE UNION OF WORKERS
		Respondent

CatchWords	**:**	Industrial Law (WA) - Application pursuant to s 66 of the *Industrial Relations Act 1979* (WA) for an order for an interim board of directors - variation and waiver of union rules pending changes to the rules of the organisation and a new s 71 certificate
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 66, s 71
Result	**:**	Order made
Representation:		
Applicant	**:**	Mr P Hunt, as agent
Respondent	**:**	Mr P Hunt

Reasons for Decision

1 This application under s 66 of the *Industrial Relations Act 1979* (WA) (the Act) came before me by way of a directions hearing. The applicant, Mr Tilbury, is a member of the Western Australian Police Union of Workers (WAPU). He is the president of the counterpart Federal body of the WAPU, the Police Federation of Australia - Western Australia Police Branch (PFA Branch).

2 In 2006, the WAPU obtained a s 71 certificate enabling that the officers of the committee of management of the WAPU be held by persons who in accordance with the rules of the PFA Branch held the corresponding office in that body.

3 In March 2015, the WAPU received legal advice that because of differences in the rules of the WAPU and the PFA Branch, the s 71 certificate may be invalid after changes were made to the rules of the WAPU on 19 December 2013. After receipt of this advice, Mr Tilbury filed an application under s 66 of the Act on 15 May 2015 seeking a number of orders.

4 The WAPU consented to the application and to the orders sought. The orders sought by the parties were as follows:

1. An Interim Board of Directors is appointed until the expiry of the current Term, constituted as follows:
    1) President
    Mr George Tilbury
    2) Senior Vice President
    Mr Brandon Shortland
    3) Vice President
    Mr Harry Arnott
    4) Treasurer
    Mr Michael Kelly
    5) Metropolitan Region Director
    Mr Ward Adamson
    6) Metropolitan Region Director
    Mr Lindsay Garratt
    7) Central (Midwest/Gascoyne) Region Director

Mr Michael Gill

8) Metropolitan Region Director

Mr Mark Johnson

9) Metropolitan Region Director

Mr Graeme Macey

10) Metropolitan Region Director

Mr Kevin McDonald

11) Metropolitan Region Director

Mr Peter McGee

12) Metropolitan Region Director

Mr Peter Potthoff

13) Metropolitan Region Director

Mr Harry Russell

2. All decisions and actions taken by the Board of Directors, in conducting the business of the Respondent, in good faith since 19 December 2013 are validated.

3. To facilitate the expeditious resolution of the outstanding matters, the Applicant and Respondent jointly file and serve further and better particulars covering the grounds for seeking interim appointments to:

1) current and subsequent casual vacancies, and;

2) the Board of Directors due to take office from 24 November 2015.

within 7 days.

4. The matter be listed for a Hearing as soon as practicable thereafter.

5 Pursuant to r 6.1(b) of the rules of the WAPU the board of directors consists of 15 directors, of which 11 who hold office shall be from the Metropolitan Region and one each from the North (Kimberly/Pilbara) [sic] Region, Central (Midwest/Gascoyne) Region, East (Goldfields/Esperance) Region and South (Southwest/Wheatbelt/Great Southern) Region.

6 A general election for the PFA Branch is to be held in 2015 with the results declared no later than 15 October 2015. These officers will commence to hold office from 24 November 2015.

7 At this present time the WAPU only seeks an interim board of 13 directors be established. This is because the PFA Branch has casual vacancies for the position of executive member North (Kimberley/Pilbara) and executive member East (Goldfields/Esperance) Regions that are in the process of being filled by appointment pursuant to the rules of the PFA Branch. Consequently, the WAPU seeks that any casual vacancies that arise before the 2015 general election be filled on an interim basis (for the remainder of the current term), by persons appointed to the equivalent executive member vacancy of the PFA Branch.

8 To maintain control and governance, the WAPU seeks that an interim board of directors be appointed until such time as a new s 71 certificate can be granted. However, it also seeks an order that the interim board of directors be constituted by the persons declared elected as executive members of the PFA Branch in October 2015.

9 After hearing Mr Hunt on behalf of both parties, I formed the opinion that an interim order should be made to vary the rules of the WAPU to enable it to constitute an interim board of directors that is constituted by current directors of the board of the PFA Branch. On 19 May 2015, the following order was made:

1. An Interim Board of Directors is established, constituted as follows:

1. President

George Bradley Tilbury

2. Senior Vice President

Brandon Chad Shortland

3. Vice President

Harry Sean Arnott

4. Treasurer

Michael Craig Kelly

5. Metropolitan Region Director

Ward Darren Adamson

6. Metropolitan Region Director

Lindsay Bryan Garratt

7. Metropolitan Region Director

Mark Wayne Johnson

8. Metropolitan Region Director
   Graeme George Macey
9. Metropolitan Region Director
   Kevin Patrick McDonald
10. Metropolitan Region Director
    Peter McGee
11. Metropolitan Region Director
    Peter John Potthoff
12. Metropolitan Region Director
    Harry Anthony Russell
13. Central (Midwest/Gascoyne) Region Director
    Michael Robert Gill

2. The definitions of 'Board', 'Director', 'President', 'Senior Vice President', 'Vice President' and 'Treasurer' in r 3 of the rules of the Western Australian Police Union of Workers (the rules) shall be interpreted as the Board, offices and officers holding office in the Interim Board of Directors.
3. Save and except for r 6.1(a), r 6.1(b) and r 6.1(j), r 6.1 is waived.
4. Rule 6.2(a) and r 6.2(b) of the rules are waived.
5. Rule 6.3 of the rules is waived.
6. Rule 12 of the rules is waived.
7. The Interim Board of Directors shall have the authority to exercise all of the powers, duties and functions of the Board of Directors and each of the members of the Interim Board of Directors shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.
8. There be liberty to the parties to apply to vary the terms of this order.
9. Unless the operative effect of this order is varied, this order ceases to have effect on 20 May 2016.
10. The application be otherwise adjourned sine die.

10 Pursuant to paragraph 8 of the order, liberty to the parties to apply to vary the terms of the order was granted for the following purposes:

(a) if the WAPU wishes to pursue its application that an order be made that all decisions and actions taken by the board of directors, in conducting the business of the WAPU, in good faith since 19 December 2013 are validated, this is a matter that can be listed for hearing and determination and, if necessary, the order can be varied to deal with this issue;

(b) when appointments are made to the current casual vacancies for the positions of executive member North (Kimberley/Pilbara) Region and executive member East (Goldfields/Esperance) Region by the executive of the PFA Branch, an order can be sought to vary paragraph 1 of the order to change the constitution of the interim board of directors in accordance with the appointments made by the PFA Branch; and

(c) when the results of the forthcoming election of executive members of the PFA Branch are declared in October 2015, the constitution of the interim board of directors can be further varied by order.

11 The terms of the order make it clear that the interim board of directors is to have all of the powers, duties and functions of the board of directors as set out in the rules of the WAPU until the order ceases to have effect. The terms of the order also make it clear that no election of officers of the committee of management of the WAPU (its directors) are required to be held by the WAPU in accordance with its rules whilst the order remains in force.

12 The terms of the order are to take effect as an interim order. The interim order will cease to have effect on 20 May 2016 unless the operative effect of the order is varied. At this point in time, by 20 May 2016, the WAPU anticipates that variations would have been made to its rules to enable an application to be heard and determined by the Full Bench for a new s 71 certificate. Once a new s 71 certificate is issued, an order can be made to vary the order to cease its operative effect.

2015 WAIRC 00390

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE TILBURY
	APPLICANT
	-and-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	TUESDAY, 19 MAY 2015
FILE NO.	PRES 1 OF 2015
CITATION NO.	2015 WAIRC 00390

Result	Order issued
Appearances	
Applicant	Mr P Hunt, as agent
Respondent	Mr P Hunt

Order

This matter having come on for hearing before me on Tuesday, 19 May 2015, and having heard Mr P Hunt, as agent, on behalf of the applicant and Mr P Hunt on behalf of the respondent, the Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, by consent, hereby orders that until further order —

1. An Interim Board of Directors is established, constituted as follows:

    1. President

        George Bradley Tilbury

    2. Senior Vice President

        Brandon Chad Shortland

    3. Vice President

        Harry Sean Arnott

    4. Treasurer

        Michael Craig Kelly

    5. Metropolitan Region Director

        Ward Darren Adamson

    6. Metropolitan Region Director

        Lindsay Bryan Garratt

    7. Metropolitan Region Director

        Mark Wayne Johnson

    8. Metropolitan Region Director

Graeme George Macey

9. Metropolitan Region Director

Kevin Patrick McDonald

10. Metropolitan Region Director

Peter McGee

11. Metropolitan Region Director

Peter John Potthoff

12. Metropolitan Region Director

Harry Anthony Russell

13. Central (Midwest/Gascoyne) Region Director

Michael Robert Gill

2. The definitions of 'Board', 'Director', 'President', 'Senior Vice President', 'Vice President' and 'Treasurer' in r 3 of the rules of the Western Australian Police Union of Workers (the rules) shall be interpreted as the Board, offices and officers holding office in the Interim Board of Directors.

3. Save and except for r 6.1(a), r 6.1(b) and r 6.1(j), r 6.1 is waived.

4. Rule 6.2(a) and r 6.2(b) of the rules are waived.

5. Rule 6.3 of the rules is waived.

6. Rule 12 of the rules is waived.

7. The Interim Board of Directors shall have the authority to exercise all of the powers, duties and functions of the Board of Directors and each of the members of the Interim Board of Directors shall have the authority to exercise all of the powers, duties and functions of the office held by each of them.

8. There be liberty to the parties to apply to vary the terms of this order.

9. Unless the operative effect of this order is varied, this order ceases to have effect on 20 May 2016.

10. The application be otherwise adjourned sine die.

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

2015 WAIRC 00436

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GEORGE TILBURY
	APPLICANT
	-and-
	WESTERN AUSTRALIAN POLICE UNION OF WORKERS
	RESPONDENT
CORAM	THE HONOURABLE J H SMITH, ACTING PRESIDENT
DATE	THURSDAY, 11 JUNE 2015
FILE NO.	PRES 1 OF 2015
CITATION NO.	2015 WAIRC 00436

Result	Order made

Order

WHEREAS an order was made on 19 May 2015, wherein order 1 of the order established an Interim Board of Directors;

AND WHEREAS when the application was made for an order to establish an Interim Board of Directors the Commission was informed that the offices of East (Goldfields/Esperance) Region and North (Kimberley/Pilbara) Region of the Police Federation of Australia - Western Australia Police Branch (PFA Branch) were vacant and that when the positions were filled by the PFA Branch, the parties would seek to vary order 1 of the order to change the constitution of the Interim Board of Directors to accord with the appointments made by the PFA Branch;

AND WHEREAS the Commission has received a statutory declaration signed by the applicant in his capacity as president of the PFA Branch declaring that:

> David Harold Curtis was appointed to the office of Branch Executive Member from the East (Goldfields/Esperance) Region, effective 10 June 2015.
>
> Michael Joseph Henderson was appointed to the office of Branch Executive Member from the North (Kimberley/Pilbara) Region, effective 10 June 2015.

AND WHEREAS I am satisfied that order 1 of the order should be amended;

NOW THEREFORE as Acting President, pursuant to the powers conferred under the *Industrial Relations Act 1979*, by consent, I hereby order that order 1 of the order be varied by adding to the constitution of the Interim Board of Directors:

14. East (Goldfields/Esperance) Region Director

David Harold Curtis

15. North (Kimberley/Pilbara) Region Director

Michael Joseph Henderson

[L.S.]

(Sgd.) J H SMITH,
Acting President.

AWARDS/AGREEMENTS AND ORDERS—Application for variation of—No variation resulting—

2014 WAIRC 01031

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 19 SEPTEMBER 2014
FILE NO/S	APPL 24 OF 2014, APPL 66 OF 2012
CITATION NO.	2014 WAIRC 01031

Result	Applications joined
Representation	
Applicant	Mr K Singh
Respondent	Mr R Farrell

Order

HAVING heard Mr K Singh on behalf of the applicant and Mr R Farrell on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

(1) THAT Applications 24 of 2014 and 66 of 2012 be and are hereby joined and shall be heard and determined together.

(2) THAT the hearing be adjourned to a date to be fixed.

(Sgd.) S J KENNER,
Commissioner.

[L.S.]

2015 WAIRC 00377

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	FRIDAY, 15 MAY 2015
FILE NO/S	APPL 24 OF 2014, APPL 66 OF 2012
CITATION NO.	2015 WAIRC 00377

Result	Applications dismissed
Representation	
Applicant	Mr K Singh
Respondent	Mr R Farrell of counsel and with him Ms T Kerr

Order

HAVING heard Mr K Singh on behalf of the applicant and Mr R Farrell of counsel and with him Ms T Kerr on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the applications be and are hereby dismissed.

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

2015 WAIRC 00378

RAILWAY EMPLOYEES' AWARD NO. 18 OF 1969
PUBLIC TRANSPORT AUTHORITY RAIL CAR DRIVERS (TRANSPERTH TRAIN OPERATIONS) AWARD 2006

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00378
CORAM	**:**	COMMISSIONER S J KENNER
HEARD	**:**	TUESDAY, 27 JANUARY 2015, WRITTEN SUBMISSIONS TUESDAY, 3 FEBRUARY 2015, FRIDAY, 27 FEBRUARY 2015, FRIDAY, 6 MAY 2015
DELIVERED	**:**	FRIDAY, 15 MAY 2015
FILE NO.	**:**	APPL 24 OF 2014, APPL 66 OF 2012
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

Catchwords	**:**	Industrial law (WA) – Applications to vary awards – Variations sought to reflect the actual total percentage increases in adjustments to the State minimum wage – Compounding effect of flat dollar adjustments awarded in successive State Wage Cases – Wage relativity between award classifications and the State minimum wage – Principles applied – Compression of wage relativities – Objects of the Industrial Relations Act 1979 – Wage Fixing Principles – Public sector decision – Insufficient nexus between cumulative State minimum wage percentage increases and adjustment of award classification rates – Preservation of skill based career paths – Elevation of base rates of the awards for bargaining purposes – Applications dismissed – Order made
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 6(ad), 6(ae), 26, 26(1), 26(1)(c), 26(1)(d), 26(2A), 26(2A)(a), 26(2A)(b), 26(2A)(b)(iii), 26(2A)(c), 26(2A)(c)(ii), 26(2B), 26(2B)(c), 26(2E), 40, 42G, 50A, 50A(1)(b), 50A(1)(c), 50A(2), 50A(3), 50A(3)(a)(ii), 50A(3)(a)(v), 50A(4), 50A(7) *Labour Relations Legislation Amendment Act 2006* (WA) *Public Sector Management Act 1994* (WA) s 3(1), Sch 2 *Workforce Reform Act 2014* (WA)
Result	**:**	Applications dismissed
Representation:		
Applicant	**:**	Mr K Singh
Respondent	**:**	Mr R Farrell of counsel and with him Ms T Kerr

Case(s) referred to in reasons:

Public Transport Authority of WA v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch [2006] WAIRC 04051; (2006) 86 WAIG 807

State Wage Case (1981) 61 WAIG 1894

State Wage Case (1992) 72 WAIG 191

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

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

State Wage Case [2014] WAIRC 00471; (2014) 94 WAIG 641

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2006] WAIRC 03494; (2006) 86 WAIG 291

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2006] WAIRC 03895; (2006) 86 WAIG 457

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2011] WAIRC 00157; (2011) 91 WAIG 694

The Minister for Health in his Incorporated Capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board v Health Services Union of Western Australia (Union of Workers) [2015] WAIRC 00332

Trades and Labor Council of Western Australia v Minister for Consumer and Employment Protection, Chamber of Commerce and Industry of Western Australia [2006] WAIRC 04608; (2006) 86 WAIG 1633

Reasons for Decision

1 The present matter before the Commission involves applications brought under s 40 of the Industrial Relations Act 1979 to vary the Public Transport Authority Railway Employees' Award No 18 of 1969 and the Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006. The applications are made pursuant to Principle 10 of the Wage Fixing Principles.

2 The variations are sought to reflect the actual total percentage increases that were awarded to the State minimum wage since 2006, and the applications are made on the grounds that the flat dollar adjustments since 2006, have compressed relativities in the two awards. The Union seeks to restore wage relativity between classifications in the awards and restore wage relativity of both awards to the SMW. The Union contended that the effect of the compression of wage relativities in both awards has led to unfair wage structures and devalued employees' skills.

3 The Public Transport Authority opposes the Union's applications to vary the awards. The Authority points to s 50A(7) of the Act which provides that a State Wage order shall not be added to or varied, and contended that the Union is effectively seeking to vary the Commission's State Wage orders to apply a percentage outcome, in substitution of the flat dollar amount determined by the Commission.

4 The Authority contended that the Union's claim has failed to consider the wages paid to railcar drivers under the various industrial agreements and orders since 2006. It said the awards have already been modernised once and the present applications make no work value claims. From the Authority's point of view, the Union's applications seek to increase the wage rates so that the awards will become a competitive base from which to bargain. It said the outcome the Union is seeking would be contrary to s 26 and the objects of the Act.

5 As referred to below, it was common ground that in making a public sector decision, the Commission must take into consideration certain matters in accordance with ss 26 and 26(2A) of the Act. The Authority contended that the variation to the awards would have flow on effects across the State government and the private sector, and would have the effect of undermining the considerations the Commission had regard to in the State Wage Cases since 2006.

The parties' contentions

6 The Union submitted that wages in the awards have compressed over time due to flat dollar amounts being awarded in the State Wage Cases. The Union contended that the compounding effect of awarding a flat dollar amount since 2006, with the exception of 2012, has rendered the base rates of pay in the awards "obsolete", and has had the effect of making the awards effectively useless to railcar drivers.

7 The Union pointed out that in the *State Wage Case* [2012] WAIRC 00346; (2012) 92 WAIG 557 at par 112 the Commission in Court Session recognised the effect of compressing relativities between wage rates in awards, which was caused by awarding a flat dollar amount, and the Commission considered the importance of keeping awards modernised. The effect of compression of relativities in awards was also foreshadowed in other State Wage Cases such as the *State Wage Case* (2006) 86 WAIG 1633 at par 97 where the Commission stated that if the compression in relativities in particular awards are a cause for concern, the effects could be addressed by an individual award variation application pursuant to s 40 of the Act.

8 The parties made submissions and prepared statistical information to support their contentions which was tendered into evidence, which I turn to as follows.

Erosion of skill based career paths

9 Firstly, the Union submitted that the compression of relativities has led to an erosion of skill based career paths which has created a disincentive on employees to train and be trained, which has reduced the benefit of acquiring skills. The Union said that the flat dollar increases from 2006 to 2014 to the awards had led to the erosion of wage relativities among the classifications in each award.

10 For example, in respect of the RCD Award, the Union said the table below shows that the wage relativity between driver trainers and railcar drivers has eroded by 0.87%. Likewise, the wage relativity between driver coordinators and railcar drivers has eroded by 1.73%.

Table 1.2: The percentage change in wage relativities between classifications in the Rail Car Drivers' Award from 2006 to 2014

Percentage change in wage relativities from 2006 to 2014	
Trainee Railcar Driver	0%
Railcar Driver	0%
Driver Trainer	-0.87%
Driver Coordinator	-1.73%

11 In respect of the RE Award the below table prepared by the Union shows that the relativities between the base rates for levels 5, 6, 8, 9 and 10 have been eroded in relation to the level 4 base rate. The table shows that the relativities between the base rate for level 1, 2, 3, 3A and 7 increased as compared to the level 4 base rate. The Union pointed out that, except for level 7, the table shows that higher skilled workers, which are level 5 and higher, experienced a net loss of relativity to the level 4 base rate while lower skilled workers, which are level 1 to level 3A, experienced a net gain in relativity to the level 4 base rate.

Table 2.2: The percentage change in wage relativities between classifications in the Railway Employees' Award from 2006 to 2014

Percentage change in wage relativities from 2006 to 2014	
Level 1	2.97%
Level 2	2.03%
Level 3	1.20%
Level 3A	0.57%
Level 4	0%
Level 5	-0.94%
Level 6	-1.70%
Level 7	0.67%
Level 8	-4.57%
Level 9	-5.55%
Level 10	-6.50%

12 What this data means, according to the Union, is that the value of higher skilled workers' skills has been lost over time.

13 Tendered as exhibit A2 was a table prepared by the Union showing that the flat dollar amounts created a compressing effect within the relative classifications of the awards. For example, in respect of driver coordinators under the RCD Award, the table shows that in 2006, the role had a base rate of 111.91% of the drivers' rate, and in 2014 it was 110.18% of the drivers' rate, which was a difference of -1.73%, which has not maintained relativity.

14 In response to this evidence, the Authority submitted that there is no practical effect in the workplace because the relevant employees are covered by agreements which maintain relativities.

Erosion of award rates to the State minimum wage

15 Secondly, the Union submitted that flat dollar increases to the awards from 2006 to 2014 has led to the erosion of relativities between the classifications in each award and the SMW.

16 According to the Union, this erosion has meant that skilled workers' rates under the RCD Award and the RE Award have fallen closer to the SMW, which, in turn, devalues their skills and training. Exhibit A2 included tables showing the compressions of relative award classifications.

17 In respect of the RCD Award, the Union outlined that the loss of relativity between the base rates and the SMW was as follows:

a) Trainee railcar drivers' base rate got closer to the SMW by 8.27%;

b) Railcar drivers' base rate got closer to the SMW by 7.03%;

c) Driver trainers' base rate got closer to the SMW by 7.09%; and

d) Driver coordinators' base rate got closer to the SMW by 7.11%.

18 Similarly, in respect of the RE Award, the Union said the loss was as follows:

a) Level 1 base rate got closer to the SMW by 2.94%;

b) Level 2 base rate got closer to the SMW by 3.80%;

c) Level 3 base rate got closer to the SMW by 4.43%;

d) Level 3A base rate got closer to the SMW by 4.83%;

e) Level 4 base rate got closer to the SMW by 5.16%;

f) Level 5 base rate got closer to the SMW by 5.60%;

g) Level 6 base rate got closer to the SMW by 5.89%;

h) Level 7 base rate got closer to the SMW by 4.13%;

i) Level 8 base rate got closer to the SMW by 6.63%;

j) Level 9 base rate got closer to the SMW by 6.78%; and

k) Level 10 base rate got closer to the SMW by 6.89%.

19 Tendered as exhibit A1 was another table prepared by the Union showing the compounding effect of the flat dollar rate awarded by the State Wage orders to adjust the RCD Award. The table states that from 2006 to 2014 the SMW grew by 37.58%, and over the same period, the RCD Award grew by 20.95%. The table also included calculations of the rates under the RCD Award, if the rates grew by the same percentage as the SMW. The Union pointed out that, according to the table, over the period 2006 to 2014, the actual percentage increases to the RCD Award was less than the Perth Consumer Price Index and the percentage increase to the SMW.

20 The Authority said there is an insufficient justification for the nexus the Union says exists between the SMW percentage adjustments and the base rates of classifications other than the minimum wage in these awards.

Avenue, modernisation and utility

21 The Authority contended that instead of the current applications to vary the awards under s 40 and Principle 10, the more appropriate course would be for the Union to seek to be heard in the next s 50A, State Wage Case. Under s 50A(2), the Commission may adjust individual rates of wages in relation to specified awards, but since 2006 neither party has submitted that award rates should be varied by a percentage, rather than by flat rate increases.

22 The Authority submitted that the Commission, in setting the SMW is required to balance a number of competing considerations in ss 50A(3) and (4), which includes the need to meet the needs of the low paid and the capacity of employers to bear the costs of increased wages, salaries, allowances and other remuneration. The Authority pointed out that under s 26(2E), the factors in ss 26(1)(d) and 26(2A) do not apply when the Commission is exercising its jurisdiction under s 50A. The Authority said that while an application may be made to vary an award under s 40 and Principle 10, such an application is only appropriate if there is some special merit or circumstances of the employees covered by the awards. It said such circumstances do not exist here.

23 Section 50A(3)(a)(v) provides that the Commission must also take into consideration the need to protect employees who may be unable to reach an industrial agreement. The Authority asserted that the Commission's rationale for awarding a flat dollar increase in the State Wage orders was to favour low wage earners and to apply the largest proportional increase to those who are the target of the SMW; whereas a percentage increase flows through to higher levels and increases labour costs. It said it was the Commission's intention that flat increases achieve the best outcome for those employees who benefit most from the State Wage order.

24 Further, the Authority contended that the Commission made uniform flat dollar adjustments to all award rates, because it provided a larger increase to employees on lower award rates. If the Commission recognised a nexus between the percentage by which the SMW was increased and other award rates of pay then this would impact on the overall cost of the resulting award wage increases. This would constrain the Commission's capacity to meet the needs of the low paid.

25 The Authority characterised the Union's applications as seeking to undermine the series of State Wage Cases since 2006, by seeking a variation to the awards in an unconventional manner which, in effect, is seeking to re-litigate the outcomes of the s 50A process. The Authority said this was not a case where the employees covered by the awards cannot bargain and rely on the awards as a safety net. Rather, the wages and conditions of employees covered by the awards are already fixed by industrial agreements. It was the Authority's submission that the wages under the industrial agreements significantly exceed real wage maintenance and have maintained relativities. The Authority submitted that the importance of industrial agreements is reflected in the objects of the Act. Section 6(ad) promotes collective bargaining over individual agreements. Section 6(ae) places importance on ensuring all registered agreements provide for fair terms and conditions of employment.

26 The Authority said that consideration should be given to the fact that both awards have been modernised once, where the agreement rates were adopted by the awards. For example, the RE Award wage rates were set in the most recent 2014 State Wage Case, and since the modernisation of the RE Award in March 2006 the wage rates for employees up to level 7, have increased in real terms, which was identified in the award weekly wage rates tendered as exhibit R1.

27 Further, the Authority said the RCD Award wage rates set in the March 2006 modernisation process incorporated the agreement rates of pay, without adjustment for productivity elements underlying those agreement rates. This meant the subsequent adjustments made by the State Wage Cases, operated from a higher base than what would otherwise have applied. The Authority drew the Commission's attention to pars 371 to 373 of the decision of the Commission as presently constituted in *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority* [2011] WAIRC 00157; (2011) 91 WAIG 694, where I recognised that the real wages for railcar drivers had increased by a small margin since 2006 and it was not open to conclude that the award rates had not generally kept pace with inflation.

28 The Authority questioned the relevance of the compression effect to these applications. It submitted that the effect of flat safety net wage adjustments on the relativities within the awards is slight, and does not meet the threshold to require adjustments above the safety net. It said the Union has not pointed to a specific detriment suffered at the workplace level resulting from the change.

29 From the Authority's perspective, if the Commission considers that relativities should be restored, then that should be achieved by adjusting the other rates by reference to the current rate, as outlined in exhibit R1. That is, the rates should be restored to their relativity in the awards as at 2006. It should not be achieved by increasing every rate by the percentage of the increase to the SMW rate since 2006.

30 The Authority pointed out that while increases beyond the safety net adjustments provided annually through the State Wage Case could be available under the Wage Fixing Principles, they would usually require justification based on increases to work value, for example. The Authority said that, here, there is no such work value claim, and the current applications relate to awards that have already been modernised once.

Indirect effect

31 The Union's Secretary, Mr Robinson, gave evidence in the proceedings that the awards continue to have relevance in the workplace. For instance, if during negotiations for an agreement, railcar drivers seek to return to the award and the base rates have been compressed since 2006, then it would be unlikely or almost impossible for the drivers to return to the award, because the value of the current award would create a disincentive. As to the RE Award, according to the Secretary, the employees' return to the award is "basically ruled out because of the compression values", which has made the award redundant.

32 In early 2008 to late 2010 the rail car drivers returned to the RCD Award, because of the differences under the proposed agreement compared with the award. The Secretary said there was a difference of a few dollars, but the incentive to return was to obtain conditions that were not offered in the proposed agreement. The Secretary stated that the rail car drivers' return to the award in 2008 was "unusual" because usually agreements are superior to awards, but returning to an award would not be unheard of if bargaining started to fail. In that particular circumstance in 2008, the RCD Award rates had already been modernised relatively recently so as to incorporate the enterprise agreement rates.

33 The Secretary said that keeping the awards "relevant" means, when bargaining with an employer and the value of the award rates are less due to State Wage orders, this creates a disincentive to compare the award to the proposed agreement when negotiating for higher pay. According to the Secretary, hypothetically, if the next round of bargaining and negotiations continue over a lengthy period with no opportunity for retrospective payments, and the awards were not so far behind the proposed agreements, then the awards could become competitive.

34 The Secretary said if the awards were varied there would be better bargaining outcomes, as the awards would put pressure on the parties to come to an agreement quicker. The varied awards would be leverage if bargaining became protracted. From the Union's point of view, the awards create a safety net and the present applications do not place unnecessary pressure on the employer, rather, pressure would be placed on the Union to try and reach a deal.

35 The Secretary's evidence was that all employees that are covered by the awards are covered by agreements which are superior, and those employees would be in the same position even if the variations were made. Hence there is no cost to the Authority. The Secretary confirmed that any increases to the rates in the awards would have no monetary effect on the Authority, because most employees are covered by agreements anyway, which pay above the awards. The Secretary's evidence was that these applications are about maintaining relativity of the awards and keeping them relevant, so that they can be returned to for whatever reason.

36 Mr Debenham, until recently the Railcar Driver Sub-Branch Secretary, also gave evidence in the proceedings. He agreed that if the award rates were increased by the percentage claimed by the Union, then the award would become competitive. Mr Debenham's evidence was that a more competitive and relevant award, as a safety net, would allow the Union to be in a position to drive a bargain. If the gap between a proposed agreement and the award is too large, then there would be no opportunity to have a relevant award to fall back on if negotiations became protracted. Likewise, Mr Debenham said that if the awards' safety nets were relative then it would be less likely the Authority would push for tough work conditions from its employees.

37 In respect of the return to the RCD Award in 2008, the Authority submitted that was an unusual situation whereby the award became competitive with the agreement offered because the award had already been modernised. The relatively recent award modernisation discussed earlier in these reasons meant that the award rate had a significantly higher base rate to start with.

38 The Authority said that the awards already provide a reasonable base for bargaining, and these applications seek to increase the rates with no changes to conditions. Conversely, the wages and conditions bargained for in the relevant agreements reflect compensation for productivity and other efficiencies which is consistent with the objects of the Act and s 26, and such efficiencies are not reflected in the awards.

39 After the conclusion of the hearing the Commission invited further submissions from the parties in relation to the significance of the terms of Part 4 of the RE Award, which prescribes relativities, based on metal trades classifications. Also, submissions were invited in relation to the relativities established for railcar driver classifications in the Commission's enterprise order proceedings. The parties filed further written submissions. They were as follows.

40 As to the application of Part 4 of the RE Award, the Union submitted that it does not seek to rely on the relativities set out in the RE Award. Rather, it contends that it is seeking to restore the relativities as at 2006. In relation to the enterprise order relativities, the Union submitted that as it considered that the findings of the Commission in that matter were based on work value, then any application of similar principles should be the subject of a separate application.

41 For the Authority, it was submitted that the "notional" relativities set out in Part 4 are only indicative and not prescriptive. Further, reference was made to the actual agreed rates of pay inserted into the RE Award in March 2006, which were submitted to be different to the prescribed relativities, and which have been adjusted by SMW decisions since 2006. As to the larger issue of the restoration of relativities generally, the Authority retreated from submissions made in the hearing, as set out at par 29 above. The Authority contended in its further submissions that as the restoration of relativities to those specified in the RE Award as at 2006 may lead to a lowering of some classification rates, as set out in exhibit R1, then that course should only be adopted by the Commission if the Union unequivocally prefers that course, rather than the status quo ante.

42 As to the enterprise order proceedings for rail car drivers, the Authority submitted that the enterprise order proceedings were based on a work value assessment and it would be preferable for a further assessment of work value, if consideration is to be given to the terms of the former enterprise order relativities. Further, the Authority said that the 117% relativity for driver coordinators has been retained.

Public sector decision

43 The hearing on 27 January 2015 was adjourned on the basis that the Commission sought further submissions from the parties as to whether the matter involved a "public sector decision" in accordance with s 26(2A) of the Act. The Act was amended to insert s 26(2A) by the Workforce Reform Act 2014, which came into operation on 1 July 2014. Section 26(2A) requires the Commission to take into consideration certain matters when making a public sector decision. I set out s 26(2A) and parts of s 26(2B) as follows:

> **26. Commission to act according to equity and good conscience**
>
> . . .
>
> (2A) In making a public sector decision the Commission must take into consideration the following —
>
> (a) any Public Sector Wages Policy Statement that is applicable in relation to negotiations with the public sector entity;
>
> (b) the financial position and fiscal strategy of the State as set out in the following —
>
> (i) the most recent Government Financial Strategy Statement released under the *Government Financial Responsibility Act 2000* section 11(1) and made publicly available under section 9 of that Act;
>
> (ii) the Government Financial Projections Statement;
>
> (iii) any submissions made to the Commission on behalf of the public sector entity or the State government;
>
> (c) the financial position of the public sector entity as set out in the following —
>
> (i) the part of the most recent budget papers tabled in the Legislative Assembly that deals with the public sector entity under the title "Agency Information in Support of the Estimates" or, if the regulations prescribe another part of those budget papers, that other part;
>
> (ii) any submissions made to the Commission on behalf of the public sector entity or the State government.
>
> (2B) In subsection (2A) —
>
> …
>
> ***public sector decision*** means any of the following —
>
> …
>
> (c) if the matters set out in subsection (2A)(a), (b) and (c) are relevant to the decision, any other decision that will extend to and bind a public sector entity or its employing authority (as defined in the *Public Sector Management Act 1994* section 5);
>
> …

44 The Commission raised with the parties an issue as to whether the provision was enlivened because, by way of s 26(2B)(c), a "public sector decision" arises if the matters set out in subsection (2A)(a), (b) and (c) are relevant to the decision, and any other decision that will extend to and bind a public sector entity will be such a decision. The parties submitted that the considerations in s 26(2A) applied to the present proceedings.

45 The submissions were that given the applications are brought under s 40 the Commission must take the factors in s 26(1) and 26(2A) into consideration, as the applications involve a decision which would bind the Authority, as a public sector entity. The Authority is a public sector entity as defined in s 26(2B). This is because s 26(2B) provides that a "public sector entity" is a public sector body as defined by s 3(1) of the Public Sector Management Act 1994. A "public sector body" in s 3(1) of the PSM Act includes an agency, and an "agency" is also defined in s 3(1) to include an "SES organisation" which is body established or continued for a public purpose under a written law, and is specified in Schedule 2 to include the Authority. As such, the Authority, submitted that the Commission must take into consideration the matters outlined in s 26(2A).

46 The Commission sought to hear from the parties as to whether there was a potential financial impost on the Authority and the State.

47 As to the fiscal position of the State, the Authority submitted that from the Economic and Fiscal Outlook the overall budget position is poor, relative to previous periods. With the loss of the State's AAA credit rating, along with rapidly declining GST revenue, the ability for the State Government to restore is budget position is constrained. Thus, cost pressure control is important, in particular labour costs. As to the Authority's financial position it was submitted that from the 2014-2015 Budget Paper, it is apparent that the Authority's labour costs have increased and any further potential for labour cost increases should be avoided.

48 The Union did not dispute the content of the budget papers, and accepted the background facts as to the present state of the Western Australian economy. The Union submitted that the present applications will not further increase labour costs. Overall, the Union's submission was that the Commission should place little weight on the matters set out in s 26(2A) given there would be no actual extra labour costs involved if the present applications were granted. The Union submitted that the Commission ought to consider the actual economic impact of the applications to vary, rather than the potential impact on bargaining.

49 In respect of the indirect costs associated with bargaining, the Union said that it was difficult to tell whether the Awards, being a safety net, would be the platform for bargaining in practice, and no employees are currently covered by the awards. It was the Union's view that given the State's Wages Policy and given it is likely that wages will be adjusted from current agreement rates, it is unlikely that the award rates would have a role to play in setting wage rates. The Union's position was that future bargaining would not be impacted by the applications, unless the relevant employees hypothetically decided to return to the awards, which would provide lower wages in comparison to what they currently enjoy under the respective agreements.

50 The Union submitted that, in the context of bargaining, if the awards were varied, the effect would be to restore bargaining power to employees that had been lost over time simply because of the wage-setting structure. The Union said that there would be no costs involved if the applications were granted, because the Authority would not be suffering any detriment, because it never should have benefitted from the effects in the first place.

51 The Authority submitted that award rates provide the context for bargaining, and if those rates were increased so that the awards become a viable alternative to bargained outcomes then it will likely result in the Union achieving higher wages or fewer productivity increases from the bargaining process. This, the Authority said, would have an indirect impact on the Authority's budget. The Authority said the indirect effect would exist, even though the granting of the applications would not have an immediate direct cost impact on the Authority because the award rates would remain less than the agreement rates. As an example, exhibit R2 prepared by the Authority set out a table comparing the base rates under the awards and the relevant agreements.

52 The Authority said, if the Commission varies the awards and adjusts the rates to compensate the railcar drivers for receiving flat dollar increases, it will have potential flow on cost implications for employers, contrary to s 26(1)(d). The Union contended that the current applications are isolated to the RE and RCD Awards, and other applications brought by other Unions in respect of different awards will not necessarily be successfully varied under s 40.

53 I note that in respect of ss 26(2A)(b)(iii) and 26(2A)(c)(ii) no additional submissions were made on behalf of the Authority or the State government.

Consideration

Section 26(2A) consideration

54 For the purposes of the meaning of a "public sector decision" in s 26(2B) of the Act, I am prepared to accept, without finally deciding the matter on this occasion, that the matters referred to in s 26(2A)(a), (b) and (c) should be taken into consideration by the Commission. I do not however, without the benefit of further argument on the point, express any concluded view as to whether an indirect effect, such as that accepted by the parties in this case to potentially arise, is sufficient to enliven the requirements of s 26(2A) of the Act.

55 Assuming, however, for present purposes that s 26(2A) has application its terms were very recently considered by the Commission in Court Session in *The Minister for Health in his Incorporated Capacity under s.7 of the Hospitals and Health Services Act 1927 (WA) as the hospitals formerly comprised in the Metropolitan Health Service Board v Health Services Union of Western Australia (Union of Workers)* [2015] WAIRC 00332. In that case, involving the arbitration of disputed wage increases under s 42G of the Act, the Commission in Court Session considered the approach to the application of s 26(2A) and said at pars 118-123 as follows:

> 118 This is the first occasion on which the Commission has been required to consider s 26(2A).
>
> 119 The Minister says the question for determination by the Commission is whether there are any other factors present which are so overwhelming as to make the salary increases offered by the Minister unfair in such a way that the Commission, despite the matters referred to in s 26(2A) and (2B), feels compelled to award a higher increase. However, formulating the question in this way suggests that the matters referred to in s 26(2A) and (2B) are a standard against which other factors are to be judged and we do not agree that is an appropriate description of the Commission's task.
>
> 120 The HSU says the task of the Commission is to answer the question - what is the fair and reasonable wage rise in all of the circumstances, including the State government wages policy and the other economic evidence? This more closely describes the obligation on the Commission in s 26 of the Act than does the question posed by the Minister but it too, with respect, does not fully describe the Commission's task.

> 121 Notwithstanding the recent insertion of s 26(2A) and (2B) the Commission is still to act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms: s 26(1)(a) of the Act. It is to have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole: s 26(1)(c).
>
> 122 In doing so, it must take into consideration the matters in s 26(1)(d) and, in this case where the Commission is making a public sector decision, it also must take into consideration not just the public sector wages policy but also the financial position and fiscal strategy of the State and the financial position of the Department of Health: s 26(2A).
>
> 123 The legislation does not make s 26(2A) a standard against which the other considerations are to be assessed. Nor is s 26(2A) of greater weight than those matters in s 26(1)(d). Section 26(2C) specifies that '[t]he matters the Commission is required to take into consideration under subsection (2A) are in addition to any matter it is required to take into consideration under subsection (1)(d).' Each of the considerations in s 26(1)(d) and (2A) are to be given their own weight. Deciding what is the fair outcome of this arbitration under s 42G of the wage increases for the 2014 Agreement involves a balancing of the parties' respective positions in the context of those considerations.

56 I adopt and apply that approach to the application of s 26(2A) of the Act. As to the overall financial position of the State under s 26(2A)(b) the Commission in Court Session had before it material relevant to this issue and observed at pars 131-133 as follows:

> 131 This arbitration is occurring at a time when the State is experiencing the most challenging fiscal environment for many years and ongoing global economic uncertainty. While the state of the national economy is not a consideration relevant to this matter, the state of the economy of WA, and the capacity of the Department of Health to pay, are part of the considerations under s 26(1)(d) and (2A).
>
> 132 The rate of growth will be the slowest rate of growth since 1990-91 and State final demand is expected to fall by 1% in 2014 15. Revenue estimates in the Mid Year Review have been revised down since the 2014-15 Budget by $5 billion over the forward estimates period, due mainly to weaker commodity prices, particularly for iron ore and oil, as well as lower taxation revenue forecasts due to moderating economic conditions and weaker employment and wages growth. There is an estimated general government sector operating deficit in 2014-15 of $1.3 billion. Net debt for the total public sector is forecast to increase from $20.8 billion at 30 June 2014 to reach $30.9 billion by 30 June 2018.
>
> 133 We recognise that compliance with the government wages policy is crucial to achieving a return to budget surplus. The Department of Health is funded for a wage increase consistent with government wages policy and would be expected to absorb the cost of any additional wage increase. The Department's budget is already under pressure.

57 These observations in relation to the State's overall financial position are generally consistent with the thrust of the submissions of the Authority in these proceedings. I adopt and rely on the above observations of the Commission in Court Session for the purposes of determining this matter. Additionally, as to the specific financial position of the Authority, I take into account the submissions made in relation to its labour costs and the further requirement for an efficiency dividend.

Compression of wage relativities

58 The Union said the effect of compressing relativities was recognised in the *Trades and Labor Council of Western Australia v Minister for Consumer and Employment Protection, Chamber of Commerce and Industry of Western Australia* (2006) 86 WAIG 1633, where the Commission stated at par 95 that relativities between classifications in a particular award in question did compress as a result of flat dollar arbitrated safety net adjustments. However, the Commission found that in that instance, there was no evidence that compression of wage rates since 1991 eroded skill based career paths in awards or had any other detrimental effect at the industry or workplace level.

59 The Authority drew the Commission's attention to par 112 of the 2012 State Wage order which it said is intended to relate to employers and employees in award reliant industries, which does not apply to railcar drivers. Par 112 provides that:

> our past flat-dollar increases inevitably will have had the effect of compressing relativities between wage rates in awards. We also appreciate, as submitted by CCIWA, that many awards do require the attention of the parties to those awards if they are to be modernised, however, in the meantime, employers and employees in award-reliant industries in WA are still bound by them.

60 In the *State Wage Case* [2014] WAIRC 00471; (2014) 94 WAIG 641 and the *State Wage Case* [2011] WAIRC 00399; (2011) 91 WAIG 1008 the Commission stated that there was no direct evidence of issues arising from any compression of award relativities from past flat-dollar increases. However, the Commission in Court Session observed that it is open to any party to seek to vary an award to address issues which arise from any compression of relativities.

61 The Authority contended that the Union's argument advanced in respect to the RCD Award was dealt with by the Commission as presently constituted previously, in the 2011 enterprise order case, where the Commission rejected the Union's argument that the flat dollar amounts awarded in the State Wage Cases from 2006 to 2010 rendered the base rates of the RCD Award obsolete. In that decision the Commission rejected the claim that rates of pay for railcar drivers had not kept pace with inflation.

62 In successive State Wage Cases, the Commission in Court Session has recognised that awarding flat dollar increases to the SMW and in turn, extending that increase to award wages generally, will have the effect of compressing relativities in awards. In recent years, since 2006, and except for 2012, the Commission has awarded flat dollar increases to the SMW. It has done so on the basis the flat dollar increases will tend to favour the lowest paid, and hence, is consistent with the Commission meeting its statutory obligation to "meet the needs of the low paid" under s 50A(3)(a)(ii) of the Act.

63 In the 2006 State Wage Case, the Commission in Court Session considered the issue of percentage based or flat dollar adjustments. Whilst quite lengthy, the extract refers to the history of discussion of compression of relativities, particularly at the federal level, and the requirement for this Commission to have regard to the needs of the low paid in determining the SMW. At pars 85-97 the Commission observed:

> 85 The claim before us seeks a percentage increase in order to avoid any further compression of relativities which has occurred from a succession of past flat dollar safety net increases. The last occasion which the AIRC and this Commission awarded a percentage increase as opposed to a general flat amount increase was in 1991. Its reasons for doing so were as follows:
>
> "In the February 1989 Review decision (endorsed in the August 1989 National Wage Case decision), the Commission said that:
>
> "… minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards." In many awards, this facet of restructuring has not even commenced; in others, it is incomplete. The process has involved establishing specific relativities, defined in percentage terms, between classifications within awards and aligning classifications across awards. Without denying the possibility of redefining the vertical relativities in consequence of granting flat rate increases, we are reluctant to introduce this complication while the exercise is incomplete. More generally, we are concerned that considerations of cost, if accepted as a ground for flat rate increases, will very frequently cause a compression of relativities and that such a compression will create strong pressures for corrective increases. We acknowledge that flat rate increases have been granted in the past, but we have misgivings about the repetition of that approach particularly given the course set by the August 1989 National Wage Case Decision.
>
> Further reason for the approach adopted in relation to minimum rates and supplementary payments was the benefit to low wage and salary earners who suffered from inequities "due to the level of their award rates and their lack of substantial overaward payments". (52) That process is delivering substantial increases to low paid workers and is preferable to flat rate increases as a method of assisting them. "
>
> 86 From 1991 to 1996 there were six flat money adjustments to award rates generally. In 1997 the AIRC considered whether to award a further flat increase. On that occasion it was submitted by the Commonwealth Government and State Governments that joined them that internal award relativities were no longer an important part of the award system. The AIRC disagreed. In its August 1997 decision in Print P1977 it held:
>
> "Such relativities remain an important determinant of the fairness of the minimum wage structure within awards. How can award rates be fair if they do not properly reflect the relative skills, responsibilities, etc of jobs covered by the award? If an award system has to be fair, then it is no answer, as the Joint Governments suggest, to leave it to workplace agreements to establish appropriate relativities. The point is stronger when one considers that it is common for workplace agreements to build uniform percentage increases on to the established award rates. Furthermore, the provision of skill-based career structures in awards is a significant way in which employees are encouraged to improve their skills, contribute to higher productivity and advance to higher wages.
>
> We agree with the Joint Employers who submitted that the shift to competency-based classification structures in awards, which commenced with the *August 1989 National Wage Case* decision (the *August 1989 decision*) [7 August 1989; Print H9100], has generally operated successfully and has been regarded as important by the award parties. We also agree with their submission that the 18 month interim period provided by Schedule 5 of the WROLA Act will give parties the opportunity to consider the manner in which they wish to maintain viable award career structures having regard to the new Act. Further, the matter of relativities may be the subject of consideration by the Commission as a result of applications already filed by employers requesting the Commission, pursuant to s.106 of the new Act, to determine principles in respect of allowable award matters.
>
> Given our views on skill-based classification structures reflecting proper relativities, we would have preferred to grant a percentage increase throughout the award structures, thereby maintaining existing relativities. However, given the need to limit the addition to AWOTE - for the reasons elsewhere discussed - and weighing the competing needs of the low paid and the desirability of relativity preservation, we have chosen to give priority to the former.
>
> We add two further points in relation to relativities. First, because of our concern about the disturbance of relativities throughout the structure, we have awarded the $10 per week increase to all award classifications rather than adopt the arbitrary cut-off of AWOTE, as proposed by the Joint Governments. Second, what is said about the deterioration in the position of employees at the lower end of award structures, relative to movements in agreements, inflation and productivity, applies with even greater force at the higher end of award structures."

87 In 1998 the AIRC again considered the importance of internal relativities in its April 1998 decision. On that occasion it awarded three flat dollar amounts of $14.00, $12.00 and $10.00 a week. The low paid received the highest amounts. When delivering its decision the AIRC observed:

"As on earlier occasions, we are concerned about the effect of flat rate increases on award wage relativities. In 1989 the Commission introduced the Minimum Rates Adjustment principle in an attempt to correct inequities in the wages system because of the potential for those inequities to cause industrial disputation and instability. That Principle was concerned primarily with relativities across awards at the key classification level but also with vertical relativities. The resulting relativity levels were widely adopted in minimum rates awards. Flat increases tend to distort vertical relativities. The distortion is greater if the flat increase does not apply above a certain level. All of the parties advocating an increase in the safety net in these proceedings sought a flat increase. In addition a percentage increase, whilst preserving relativities, necessarily maintains the relative position of those at the lower end of the award hierarchy. Flat increases reduce the relativities in percentage terms. There will often be a tension between the maintenance of relativities and addressing the needs of employees at the lower award levels. The approach we have adopted on this occasion is deliberately designed to give a greater increase to award employees at the lower levels, whilst not neglecting the interests of those at the higher levels who also receive no payments other than those prescribed in the award. We have taken the question of relativities into account in formulating the adjustment on this occasion. The tapering of the adjustment at two points in the scale has an effect on relativities which is almost the same as the effect which would result if the $20.60 component of the ACTU claim was granted in full. We add that the maintenance of vertical relativities is a significant reason for our decision to reject the Joint Governments' proposal that any increase awarded only apply to employees classified at or below the C10 rate in the Metal Industry Award."

88 In 1999, the AIRC dealt with the submission that an adjustment should only apply to employees classified at or below the C10 rate in the Metal Industry Award. It also dealt with ACTU's claim which sought a percentage adjustment 5% of award rates above $527.80 per week. On that occasion it determined it should award a flat money increase rather than a percentage increase on the basis it would provide proportionately greater assistance to the low paid. The AIRC stated (Print R1999):

"In previous cases the Commission has drawn attention to the requirement that rates prescribed in awards be fair, to the importance of internal relativities between classification levels and to the need to provide increases for employees who, although employed at the higher levels, are dependent upon safety net increases for increases in pay. Each of these factors, on its own, favours an increase at all levels. Furthermore, we do not accept the Joint Governments' submission that the current legislative framework compels the conclusion that employees on higher award classification rates should generally not be eligible for award safety net increases. In all of the circumstances the approach we have adopted, both the amounts and the form of the increases, strikes the right balance between the competing equity and cost considerations which the parties have drawn to our attention in their submissions."

89 In May 2000, the AIRC considered the issue again. In its decision in Print S5000 the AIRC considered what it had said in its decisions in 1997, 1998 and in 1999 and observed at paragraphs [118] and [119]:

"[118] The last occasion on which the Commission awarded a percentage adjustment to award rates generally was in the April 1991 National Wage Case.31 Since that time there have been six adjustments to award rates generally which have been in flat money amounts. Relativities have been compressed further by the tapering of the amount of the increase at the higher levels in 1998 and 1999. As a consequence the rate of increase in award rates at the lower levels has continually exceeded the rate at the higher levels. Each of these decisions has given priority to the needs of the low paid and in relative terms the low paid have benefited significantly from this approach. We have decided to maintain the approach of granting a flat dollar increase on this occasion. We indicate now, however, that on the next occasion that award rates are reviewed we shall expect to be addressed on whether a return to percentage adjustment is appropriate to ensure that the award system provides fair wages for employees paid at the middle and upper award classification levels. A proper examination of that question will necessarily include an assessment of whether the reasons for percentage adjustments contained in the extract from the April 1997 decision which we have set out remain valid.

[119] In light of these considerations we turn to examine once again the Joint Coalition Governments' proposal that there should be no increase in award rates above the C10 level in the Metal Industry Award. The Joint Coalition Governments' support for a cap at that level rests primarily on their interpretation of the Act *"particularly the intended role of the award system as a genuine minimum safety net protecting the low paid and the Act's emphasis on the Commission's role in encouraging the spread of agreement making."* They also submit that the introduction of a cap will moderate the increases in aggregate wage costs and produce better distributional outcomes. In its April 1999 decision the Commission decided that the legislative framework does not compel the conclusion that employees on higher award classification rates should generally not be eligible for award safety net increases. Having reviewed the arguments on this occasion we see no reason for a different conclusion now. Furthermore, whilst it would be open to us to introduce a cap, we do not think it would be desirable to do so having regard to the internal relativity issues to which we have just drawn attention and our conclusion that growth in enterprise bargaining has not been materially inhibited by the application of safety net increases to all award rates. Whilst a cap would be likely to lead to a lower rate of growth in aggregate earnings the amount we intend to award is justifiable and, in the current economic environment, unlikely to lead to excessive growth in earnings overall. In relation to distributional outcomes, as we indicate elsewhere we are reluctant to place much reliance on the household income data presented to us."

90 All of the major parties made submissions on this issue in 2001. In its decision in May 2001 (Print PR002001) the AIRC dealt extensively with those submissions at paragraphs [130] to [139] and awarded three incremental flat dollar amounts.

91 This matter was last considered by the AIRC in May 2002. On that occasion the ACTU sought again a flat dollar increase and said that the Commission should not pay any regard to the fact that the implementation of its claim would compress relativities further. In particular the ACTU contended that the ongoing relevance of middle and upper case classification rates of pay needed a comprehensive response not a piecemeal solution and the ACTU signalled its intention to ensure that proper skilled based classification structures are not allowed to wither on the vine but are addressed in a responsible and economically sustainable way consistent with the requirements of the WRA. Further they said that the matter would not be agitated in the National Wage Case which can focus on delivering a decent increase for the lower paid. The Commission noted the ACTU submissions in their decision at [156] in PR002002 and reiterated what they said in their decisions in September 1994 [Print L5300] and October 1995 [Print M5600] that the Commission would not grant applications to restore pre-existing relativities on the basis that such relativities have been compressed by the granting of flat dollar arbitrated Safety Net Adjustments.

92 This is the first occasion this Commission has been called upon to consider awarding arbitrated Safety Net Adjustments without after having first considered a National Wage Decision whereby pursuant to section 51(2)(a) of the Act, the Commission unless it determines there are good reasons not to, must make a General Order to adjust by the amount of any change in the rate of wages under the national wage decision. Consequently until 2006 this Commission in a sense "inherited" the statutory framework of the WRA when it made a General Order to adjust wages under section 51. On this occasion the Commission is not so constrained. It must act according to its own statutory framework including the principal objects of the Act.

93 Unlike the AIRC under the now repealed section 88B(2) of the WRA this Commission when adjusting the safety net is not by statute expressly required to have regard to the specific requirements of fair minimum standards for employees in the context of living standards generally prevailing in the Australian community; economic factors, including levels of productivity and inflation and the desirability of attaining a high level of employment and the needs of the low paid. Whilst this Commission's statutory considerations could be said to encompass such matters, the matters this Commission is required to consider pursuant to section 26(1) are much broader in scope.

94 Whilst the Commission is not expressly required to pay regard to the needs of the low paid, we are of the opinion that such a consideration is implied as a matter the Commission can consider within the scope of the principal object in section 6(ca), in section 26(1)(a) and the opening words of section 26(1)(c) where such a consideration is raised on the evidence before it. In this matter the Commission has before it a substantial amount of cogent and uncontradicted evidence that supports the submission that the Commission should take into account the needs of the low paid and that they will be disadvantaged if they are not awarded a pay increase which will assist them to keep up with increases in the cost of living. We are of the opinion that in awarding an increase on this occasion that the increase we grant should assist the low paid to do so.

95 Although the evidence before us clearly shows that relativities between classifications in the *Metal Trades (General) Award 1966* have compressed as a result of flat dollar arbitrated Safety Net Adjustments, there is no evidence or submission before us that compression of wage rates since 1991 has eroded skill based career paths in awards or had any other detrimental effect at the industry or workplace level. If any party wishes in the future to address this issue it is open for them to do so in an application relating to a specific award under section 40 of the Act or for parties or those granted the right to be heard to raise it in any future proceedings for an adjustment of award safety net rates of pay. Whilst we note what the AIRC said in September 1994 and in October 1995 about not granting applications to restore pre-existing relativities on the basis that such relativities have been compressed by flat dollar increases we do not consider this Commission is necessarily bound to follow the decisions of the AIRC in respect of this issue.

96 We take into account also the evidence of Ms Cusworth in response to a question from Mr Cox: a flat rate increase ensures one is targeting the biggest proportional increase for those who are the key target of applying the minimum wage. A percentage increase will obviously flow through to higher levels and that potentially will affect more people. It will increase the labour costs arising from the decision by a little bit more than it otherwise would. A flat rate increase achieves the best outcome in terms of targeting those people who will benefit most from the decision. The more broadly based the increases are and the further up the pay scale they stretch, the more is the likelihood of seeing a slightly larger effect on employment and inflation.

97 The increase we propose will therefore be a flat dollar amount. We consider that where compression in relativities in particular awards have been a cause for concern, this can be addressed by an individual award variation application pursuant to s. 40 of the Act.

64 In the extract above, and in later State Wage Case decisions, the Commission has repeatedly said that in any case where it is contended that the compression of relativities in a particular award(s) has had a detrimental effect then an application can be made under s 40 of the Act to address it. Such is the case with the present applications. Accordingly, it is implicit in this observation, and in that this matter has been heard before me, after conferring with the Chief Commissioner in accordance with Principle 10.3 of the Commission's Wage Fixing Principles, set out below, that I do not accept the argument of the Authority that it would be preferable for these proceedings to be dealt with by the Commission in Court Session in a State Wage Case, under s 50A of the Act.

65 Principle 10 allows an application to be made for a variation in wages above or below the award minimum conditions.

10. <u>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</u>

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.

66 There is no barrier to this matter being dealt with by an application under s 40 of the Act, consistent with the Principles. I accept, based on the materials before the Commission in these proceedings, that in both awards there has been, since 2006, a degree of compression of relativities within the classifications prescribed by both awards. Taking the original relativities in 2006 as the benchmark, the compression is relatively small for rail car drivers under the RCD Award and is considerably greater for those in the REA levels 5 and above under the RE Award. For those in the REA level 3A and below, their relativity to the REA level 4 rate has somewhat improved over the same period. The question is whether this should be remedied and if so, how.

State minimum wage determination

67 For the following reasons, I am not persuaded that there is any merit in the view that there should be established a nexus between cumulative SMW movements, expressed in percentage terms, and the adjustment of all award classification rates in the awards the subject of these proceedings.

68 For the purposes of establishing the SMW as a result of the introduction of s 50A into the Act by the Labour Relations Legislation Amendment Act 2006, and its subsequent review and adjustment, the Commission in Court Session has been required by s 50A to have regard to a number of statutory criteria. Those criteria are set out in s 50A(3) which provides as follows:

50A. Rates of pay etc. for MCE Act and awards, annual State Wage order as to

…

(3) In making an order under this section, the Commission shall take into consideration —

(a) the need to —

(i) ensure that Western Australians have a system of fair wages and conditions of employment; and

(ii) meet the needs of the low paid; and

(iii) provide fair wage standards in the context of living standards generally prevailing in the community; and

(iv) contribute to improved living standards for employees; and

(v) protect employees who may be unable to reach an industrial agreement; and

(vi) encourage ongoing skills development; and

(vii) provide equal remuneration for men and women for work of equal or comparable value;

and

(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; and

(c) to the extent that it is relevant, the state of the national economy; and

(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; and

(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; and

(f) relevant decisions of other industrial courts and tribunals; and

(g) any other matters the Commission considers relevant.

69 An important factor, and one the Commission in Court Session has paid particular attention to in the past, is the needs of the low paid in s 50A(3)(a)(ii). Despite the adoption of flat dollar adjustments to the SMW in past years, there has never been any recognition by the Commission of a direct relationship between equalising percentage adjustments in the SMW and the adjustments of award rates of pay generally. The adjustment to award rates of pay, under s 50A(1)(b), consistent with a SMW General Order, is given effect by variations to awards under s 50A(1)(c). Any increase to the minimum award rate of pay, arising out of a SMW determination, is based on the determination of the Commission in Court Session to increase the SMW, be it on a flat dollar basis or a percentage adjustment respectively.

70 If the Union's claim to increase the base rates of pay in these awards by the cumulative percentage increase in the SMW were to be granted, it is not difficult to envisage a flow of such applications to the Commission, therefore having the potential to undermine the integrity of the SMW adjustment process, and the specific criteria set out in s 50A(3) of the Act, in particular, the criteria of meeting the needs of the low paid.

71 Additionally, as set out in exhibit R2, when a comparison is made between the percentage increases in the actual rates of pay for employees under the RE Award, compared to the cumulative increase in CPI from 2006 to 2014, up to the REA level 7 rate, which represents the bulk of employees covered by the award, the award wage rates have increased by more than CPI over this period. If an objective of setting a minimum wage is to at least preserve the real value of wages, as referred to by the Commission in Court Session in the 1981 State Wage Case then certainly for that group of employees just identified, this objective is met: *State Wage Case* (1981) 61 WAIG 1894. I accept overall however, that increases to the REA's levels 8 to 10 have achieved somewhat less than cumulative CPI over this time, but not substantially so.

72 For rail car drivers, from the materials before the Commission, a comparison between the total cumulative CPI increases of 25.93% from 2006 to 2014, to the actual percentage increases received over the same period, shows the classifications received between 4.93% and 6.83% less than the cumulative CPI figure. I note however, that some caution needs to be applied to the measurement of CPI, depending on whether the year-end or through the year rate is used for comparison purposes. I also make that observation in the knowledge that, as noted earlier, the base rate of wage for RCD Award employees, as at 2006, was substantially higher than it otherwise would have been, by reason of the incorporation of rates of pay previously applying under industrial agreements. Additionally, the rate was increased by the incorporation of the SERA allowance in the base rates.

73 It is also significant to note that as exhibit R2 shows, the employees under both awards enjoy rates of pay, under their respective industrial agreements, with one or two exceptions, that are significantly higher than the respective awards rate of pay, adjusted for both cumulative CPI increases and the increases sought in the Union's claim in these proceedings.

Relativities, skill based career paths and minimum rates adjustment

74 From the late 1980s the focus of the system of wage determination, at both State and federal levels, shifted to the enterprise level. Part of this development was the introduction of specific principles into wage fixing principles in the various jurisdictions, to accommodate this. In Western Australia, this included the adoption of the Enterprise Bargaining Principle and the Structural Efficiency Principle. The SE Principle in particular, placed a focus on reforming the award system to provide more flexibility and scope for efficiency in industries and enterprises to which awards applied. As a part of this process, the SE Principle contemplated the development of skill related career paths, the creation of appropriate relativities between different categories of employees within an award at the enterprise level, and the establishment of properly fixed minimum rates of pay (see for example *State Wage Case* (1992) 72 WAIG 191 at pp 199-201; 204-209).

75 Thus, the setting of properly established minimum rates and the creation of appropriate relativities between classifications in an award were important features of the system of wage fixation. As the system of wage fixing developed in the 1990s, with an even greater focus on enterprise level outcomes, awards became the safety net below which terms and conditions of employment could not be adjusted. Nonetheless, the SE Principle process for awards, to ensure they constituted a modern award safety net, remained important.

76 The RCD Award was made as a new award on 24 February 2006: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority* [2006] WAIRC 03895; (2006) 86 WAIG 457. The RE Award, was substantially modernised, through major variations, and was the subject of an order of the Commission on 17 March 2006: *Public Transport Authority of WA v The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch* [2006] WAIRC 04051; (2006) 86 WAIG 807. Both awards were made and varied respectively, by consent. As I have already noted, the RE Award incorporated appropriate relativities with the metal trades award classifications, as set out in Part 4 – Classification Structure and Rates of Pay. The REA level 4 was the benchmark classification, pegged at 100% of the metal trades tradesperson's rate.

77 Shortly prior to the modernisation of the RE Award, in March 2006, on 18 January 2006, the RE Award was varied to insert some new classifications and rates of pay, which were subsequently incorporated into Part 4: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority* [2006] WAIRC 03494; (2006) 86 WAIG 291. In those proceedings, again by consent, the parties informed the Commission that the amendments to the award were made to incorporate new classifications and to update others to reflect the modernisation of the RE Award's operation (see T5).

78 The RCD Award replaced the then Government Railways Locomotive Engineman's Award 1973. It was noted that the rates of pay in the new award, containing the classifications, which have been unchanged to date, incorporated the rates of pay that had been payable under industrial agreements previously applying (see TT12-13; 32). As there had been very substantial changes to the industry up to that time, many of the classifications in the former Locomotive Engineman's Award were obsolete and were removed. Given the higher rates of pay in the new RCD Award, incorporating rates from prior industrial agreements, including the former SERA allowance, the base rates of pay were considerably higher than those in the former Locomotive Engineman's Award. Thus the safety net for the employees covered by this award is already elevated.

79 Significantly, in 2010-2011, in the enterprise order proceedings, which was a large arbitration, a substantial body of evidence and submissions were put before the Commission in relation to terms and conditions of employment for rail car drivers. A key issue in that case was appropriate rates of pay. The Union proposed a departure from the current classification structure that was not accepted by the Commission. In my decision, in determining the respective claims and counterclaims of the parties, I determined what the rates of pay should be, and what the relativities should be within the classifications. At pars 405-411 of my reasons I said:

> Driver Coordinators
>
> 405 In relation to the Driver Coordinators, I accept the evidence of Ms Kent that based upon the Skills Council Report of June 2006, some work of Driver Coordinators was not adequately reflected in the JDF for the position. Whilst the skills assessment was not of itself a work value assessment, it is a necessary first step in

considering any change in work value. The Commission in these proceedings is entitled to, and does, take into account that evidence, in its assessment of the applicant and the Railcar Driver Group positions.

406 I accept, consistent with Mr Appleby's evidence, that the training workload as contended by Ms Kent may have been an over estimation. Relevant also, is the prospect of the new Training Officer position in the near future, although it is difficult to make an assessment of this factor at this point in time.

407 From all of the material before the Commission, I do not consider that a margin of 111% in the Award is an adequate reflection of the work of Driver Coordinators. I see no reason in principle, based upon the assessment of the work undertaken by Driver Coordinators that the relativity that was agreed between the parties in 2007, and as again offered by the respondent in 2009, without substantial changes to conditions of employment had that offer been accepted, should not be restored.

408 It must be regarded that the agreement reached in 2007, and the offer made in 2009, reflected at least an informed view by the respondent, as to the worth of the work of Driver Coordinators. This to a degree is supported by aspects of the Skills Council Report.

409 Additionally, the 117% margin as then applicable reflects the present margin for Driver Coordinators under the Transwa agreement. I also see no reason in principle why it should be materially different in the context of the Driver Coordinators and Railcar Drivers in the TTO operations, given the history to which I have referred. Thus the margin for the life of the enterprise order will be 117%.

Driver Trainers

410 I am not persuaded on the evidence and submissions to depart from the respondent's amended position, to restore the Driver Trainer relativity to 106% of the Driver's rate. Driver Trainers will receive the benefit of the increase to apply to base rates of wages by the application of this margin under the enterprise order.

411 Furthermore, unlike Driver Coordinators, there is no change in responsibilities of the position of Driver Trainer, or any lack of prior recognition of duties beyond those established for the role, that has been demonstrated on the evidence and the submissions.

80 Clauses 18.5-18.7 of the enterprise order made from those proceedings were in the following terms:

18.5 The following provisions apply to Trainees:

(a) The wage rate applicable to Trainees shall be 85% of the wage rate applicable to the classification of a Railcar Driver for which the employee is being trained.

(b) This rate will apply to a Trainee for the duration of the training period until the Trainee has passed the assessment in accordance with the Driver Training Program.

(c) Trainees shall be required to undertake training during all shift work hours across the whole roster cycle.

18.6 The wage rate for a Driver Trainer shall be 6% above the applicable base rate for a Railcar Driver.

18.7 The wage rate for a Driver Coordinator shall be 17% above the applicable base rate for a Railcar Driver.

81 As set out above, the principal contention of the Union was that the base rates in the awards should be increased by the cumulative percentage increase in adjustments to the SMW since 2006 and up to 2014 inclusive. Whilst it did not appear in the grounds of the applications, a substantial basis for the claim, as revealed in the evidence, was to elevate the award base rates as a floor to bargain for an industrial agreement. This was very clear on the evidence of the Secretary and Mr Debenham.

82 The elevation of award base rates to achieve bargaining leverage is not a proper basis to restore award relativities. The purpose of restoration of relativities, as set out above, is to preserve the integrity of skill based career paths, based on the skills and responsibilities of classifications in an award. To the extent this factor may be relevant to the higher level classifications under the RE Award, then any adjustment to relativities must be across the board, to preserve relativities and the integrity of the classification structure of the award. However, it is not open to the Union to "cherry pick", by only pursuing changes at the higher classification levels, whilst preserving the improvements in relativities at the lower classification levels. The Union cannot have it both ways. If there is to be a proper restoration of relativities then it needs to reflect the structure of the award classifications, relative to the benchmark rate, as at 2006.

Conclusion

83 I have carefully considered all of the evidence and the submissions made in these proceedings. I accept that compared to the original relativities established in the RE Award when it was modernised in 2006, in particular for the higher level classifications, which are the more skilled positions, there has been some erosion of relativities to the key classification REA level 4 rate. I therefore accept that on this basis, those in higher skilled positions may be seen to have had the value of their work, relative to the established skills related career paths, in award terms at least, diminished. Correspondingly, for those in the lower level award classifications, in REA level 3A and below, their relative position has improved somewhat.

84 The established relativities expressed in Part 4 of the RE Award, as at 2006, was the appropriate structure based on the metal trades classifications relativity. I consider if there is to be any restoration of relativities then they are the appropriate benchmark. There was no submission made in these proceedings, to the effect that the relevant award based relativities prescribed by Part 4, either as at 2006, or now, were no longer appropriate. No submissions were made that the skills related career path set out in Part 4 is no longer appropriate to the industry.

85 In the case of railcar drivers, the relativities as at 2006 have changed somewhat in the current rate structure, but only slightly. However, they were revisited by the Commission in the extensive arbitration in the enterprise order proceedings. The Commission, based on the evidence and the history of negotiations between the parties, determined that the appropriate relativities should be as set out at par 79 above. In my view, but for the supplementary submissions of the parties, they provide a cogent basis upon which any award based relativities should be restored.

86 Unlike industrial agreements, which are essentially instruments of the parties, given statutory effect under the Act, awards are instruments made by and of this Commission. The Commission may, independently of the parties, initiate proceedings of its own motion under the Act, to vary them. The parties' interests are of course, under s 26(1)(c) of the Act, to be taken into account. In the case of enterprise specific awards, like the awards the subject of these applications, perhaps more so than otherwise. Therefore, notwithstanding my preliminary conclusions in relation to the basis of any adjustment to relativities, given my rejection of the central contention underlying the Union's claims, and the parties' supplementary submissions, the most appropriate course on this occasion is to dismiss both applications. I would expect future claims, if any, to also encompass work value considerations.

CANCELLATION OF—Awards/Agreements/Respondents—

2015 WAIRC 00422

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00422
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	MONDAY, 25 MAY 2015
DELIVERED	**:**	FRIDAY, 5 JUNE 2015
FILE NO.	**:**	APPL 33, 79 & 108 OF 2010 AND APPL 89-91, 93-95, 100-103, 105 & 108 OF 2015
BETWEEN	**:**	ON THE COMMISSION'S OWN MOTION

CatchWords	**:**	Award - Effect of Fair Work Act 2009 on awards - Whether there is an employee to whom the awards apply - Awards cancelled
Legislation	**:**	Industrial Relations Act 1979 (WA) s 47(1)
Result	**:**	*14 Awards cancelled*
Representation:		Australian Workers' Union, West Australian Branch, Industrial Union of Workers in application 90 of 2015, by written submissions

Reasons for Decision

1 Section 47(1) of the *Industrial Relations Act 1979* (WA) ("the Act") provides as follows:

> (1) Subject to subsections (3), (4) and (5), where, in the opinion of the Commission, there is no employee to whom an award or industrial agreement applies, the Commission may on its own motion, by order, cancel that award or industrial agreement.

2 In the case of each of the following 14 awards I am of the opinion that there is no employee to whom the award applies.

3 The awards may be conveniently grouped into three categories.

1. Where an award is a common rule award by operation of s 37(1) of the Act however it is likely that there is now no employer in WA in the industry covered by the award:

Wool Scouring and Fellmongery Industry Award

2. Where an award is common rule and there are employers in WA in the industry or industries covered by it however it is unlikely there is an employer that is not a constitutional corporation:

AWU Gold (Mining and Processing) Award 1993

Building Trades (Goldmining Industry) Award

Cement Tile Manufacturing Award No 3 of 1966

Clerks' (Control Room Operators) Award 1984

Clerks' (Credit and Finance Establishments) Award

Clerks' (Taxi Services) Award of 1970

Lift Industry (Electrical and Metal Trades) Award 1973

Manufacturing Chemists Award, 1976 – The

Materials Testing Employees' Award, 1984

Mechanical and Electrical Contractors (North West Shelf Project Platform) Award 1986

Mooring Services (Cape Cuvier) Award 1982

Paint and Varnish Makers' Award No. 22 of 1957

3. Where an award is not common rule and the employer named as a party to the award -

(a) is no longer in existence; or

(b) is a constitutional corporation:

Heat Containment Industries (Refractory Specialties) Award No. 3 of 1981

4 I am satisfied that the requirements of s 47(1) and (3) have been complied with. In each case the parties to the awards were informed of my view and given an opportunity to object to its cancellation. There were no objections made to their cancellation.

5 I am still of the opinion that in each case there is no employee to whom the award applies and there is no good reason not to cancel it.

6 An order now issues cancelling each award.

7 In relation to the *Brick Manufacturing Award 1979*, the Australian Workers' Union, West Australian Branch, Industrial Union of Workers ("AWU") wrote on 22 April 2015 that it believed Narrogin Brick is a brick manufacturer covered by the award which may employ persons eligible to be covered by the AWU in the future, although it does not employ any at the moment. In my view, that is good reason not to cancel the award at this time. An order will issue discontinuing this application. This will not prevent the Commission reconsidering on a future occasion whether or not it should be cancelled under s 47(1) of the Act.

2015 WAIRC 00423

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 5 JUNE 2015
FILE NO/S	APPL 33, 79 & 108 OF 2010 AND APPL 89, 91, 93-95, 100-103, 105 & 108 OF 2015
CITATION NO.	2015 WAIRC 00423
Result	Awards cancelled
Representation	No appearances

Order

WHEREAS these are applications pursuant to s 47(1) of the *Industrial Relations Act 1979* (WA) ("the Act") on the Commission's own motion to cancel an award where in the opinion of the Commission there is no employee to whom the award applies;

AND HAVING given reasons for decision;

NOW THEREFORE I, pursuant to the powers conferred by s 27(1)(s) and s 47(1) of the Act, do hereby order:

1. THAT applications 33, 79 & 108 of 2010 and 89, 91, 93-95, 100-103, 105 & 108 of 2015 be consolidated.

2. THAT the following awards be cancelled:

AWU Gold (Mining and Processing) Award 1993

Building Trades (Goldmining Industry) Award

Cement Tile Manufacturing Award No 3 of 1966

Clerks' (Control Room Operators) Award 1984

Clerks' (Credit and Finance Establishments) Award

Clerks' (Taxi Services) Award of 1970

Heat Containment Industries (Refractory Specialties) Award No. 3 of 1981

Lift Industry (Electrical and Metal Trades) Award 1973

Manufacturing Chemists Award, 1976 – The

Materials Testing Employees' Award, 1984

Mechanical and Electrical Contractors (North West Shelf Project Platform) Award 1986

Mooring Services (Cape Cuvier) Award 1982

Paint and Varnish Makers' Award No. 22 of 1957

Wool Scouring and Fellmongery Industry Award

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

2015 WAIRC 00424

BRICK MANUFACTURING AWARD 1979

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 5 JUNE 2015
FILE NO/S	APPL 90 OF 2015
CITATION NO.	2015 WAIRC 00424

Result	Application discontinued
Representation	Australian Workers' Union, West Australian Branch, Industrial Union of Workers, by written submissions

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the *Brick Manufacturing Award 1979* applied, did give notice on the 8th day of April 2015 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act");

AND WHEREAS the Commission served on all named parties to the award a copy of that notice, a notice of hearing for the 25th day of May 2015 and a notice of objection to be filed if applicable by the 11th day of May 2015;

AND WHEREAS by letter dated the 22nd day of April 2015, the Australian Workers' Union, West Australian Branch, Industrial Union of Workers objected to the cancellation of the award as it may apply to future employees of the employer Narrogin Brick;

AND HAVING given reasons for decision why I consider the award should not be cancelled at this time;

NOW I, the undersigned, pursuant to the powers conferred on me by s 27(1)(a)(iv) of the Act, do hereby order –

THAT this application be discontinued.

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

2015 WAIRC 00412

NURSES' (ANF-RFDS WESTERN OPERATIONS) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00412
CORAM	**:**	CHIEF COMMISSIONER A R BEECH
HEARD	**:**	MONDAY, 25 MAY 2015
DELIVERED	**:**	FRIDAY, 29 MAY 2015
FILE NO.	**:**	APPL 104 OF 2015
BETWEEN	**:**	ON THE COMMISSION'S OWN MOTION

CatchWords	**:**	Award - Effect of Fair Work Act 2009 on awards - Whether there is an employee to whom the awards apply - Whether there is good reason not to cancel award - Award not cancelled
Legislation	**:**	Industrial Relations Act 1979 (WA) s 47(1)
Result	**:**	*Application discontinued*

Representation:

Mr M Clancy, as agent for The Australian Nursing Federation, Industrial Union of Workers Perth

Reasons for Decision

1 Section 47(1) of the *Industrial Relations Act 1979* (WA) provides as follows:

> (1) Subject to subsections (3), (4) and (5), where, in the opinion of the Commission, there is no employee to whom an award or industrial agreement applies, the Commission may on its own motion, by order, cancel that award or industrial agreement.

2 I formed the view that there is no employee to whom the award applies and advised the parties of my intention to cancel the award. The Australian Nursing Federation, Industrial Union of Workers Perth (ANF) objected to its cancellation. The ANF confirms that there is no employee to whom the award applies because the employees who would be covered by the award are covered by an agreement registered in the national system.

3 However, the award is still seen as relevant by the ANF because it contains employment conditions which are specific to the operations of the respondent which are a reference point in negotiations even though the result of the negotiations is registered in the national system.

4 Further, the ANF is cautious about the award being cancelled in case at some point in the future industrial coverage reverts to the WA system. The ANF does not anticipate this is going to happen but refers to the union's experience of the industrial coverage of some of the industries covered by it having changed from state coverage to national coverage prior to 2006 and then being required to revert to state coverage again after 2006.

5 While I do not regard either reason advanced by the ANF as particularly strong, I will not cancel the award. Neither party has sought its cancellation and one party opposes cancellation. If it retains at least some utility as a point of reference then that is a sufficient reason at this time not to cancel it. This will not prevent the Commission considering again at some time in the future whether the award should be cancelled.

6 This application on the Commission's own motion will be discontinued.

2015 WAIRC 00413

NURSES' (ANF-RFDS WESTERN OPERATIONS) AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ON THE COMMISSION'S OWN MOTION
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	FRIDAY, 29 MAY 2015
FILE NO/S	APPL 104 OF 2015
CITATION NO.	2015 WAIRC 00413

Result Application discontinued

Representation

Mr M Clancy, as agent for The Australian Nursing Federation, Industrial Union of Workers Perth

Order

HAVING HEARD Mr M Clancy, as agent for The Australian Nursing Federation, Industrial Union of Workers Perth;

AND HAVING issued reasons for decision;

NOW I, the undersigned, pursuant to the powers conferred on me by s 27(1)(a)(iv) of the Act, do hereby order –

THAT this application be discontinued.

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

NOTICES—Award/Agreement matters—

2015 WAIRC 00416

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 9 of 2015

APPLICATION FOR A NEW AGREEMENT TITLED

"SHIRE OF MURRAY ENTERPRISE BARGAINING AGREEMENT 2015"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union of Workers, Perth* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

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

5. Incidence and Parties Bound

…

(d) This Agreement shall apply in the state of Western Australia to approximately 30 employees.

(e) The parties to this Agreement shall be the Shire of Murray ("the Shire") and the Western Australian Municipal, Road Boards, Parks and Racecourse Employees Union of Workers Perth ("the Union") and those staff who are members of, or are eligible to be members of the Union and whose terms and conditions are under the:

- Municipal Employees (Western Australia) Interim Award 2011.
- Metal Trades (General) Award.
- Building Trades Award 1968.

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

(Sgd.) S BASTIAN,
Registrar.

[L.S.]
28 May 2015

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00411

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2015 WAIRC 00411
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY, 6 MAY 2015
DELIVERED	**:**	THURSDAY, 28 MAY 2015
FILE NO.	**:**	M 5 OF 2015
BETWEEN	**:**	JUNGHEE YOON
		CLAIMANT
		AND
		PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
		RESPONDENT

Catchwords	**:**	Whether the Claimant was an employee for the purposes of the *Long Service Leave Act 1958*; Whether the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011* governed the Claimant's long service leave entitlements; Whether the entitlement to long service leave under the Agreement is at least equivalent to the entitlement under the *Long Service Leave Act 1958*.
Legislation	**:**	*Long Service Leave Act 1958* *Industrial Relations Legislation Amendment and Repeal Act 1995* *Labour Relations Legislation Amendment Act 2006*
Instruments	**:**	Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011 Long Service Leave General Order [(1979) 59 WAIG 1]
Result	**:**	Claim proven
Representation:		
Claimant	**:**	Mr C. Fogliani (Counsel) instructed by W.G. McNally Jones Staff Lawyers
Respondent	**:**	Mr D. Matthews (Counsel) instructed by the State Solicitor for Western Australia

REASONS FOR DECISION

Undisputed Facts

1 Ms Junghee Yoon (Ms Yoon) was employed by the Public Transport Authority of Western Australia (PTA) from 28 May 2007 until 26 July 2014. It follows that she was employed by the PTA continuously for more than seven years but less than 10 years.

2 Ms Yoon's employment did not end because of misconduct or serious misconduct. At the time that she resigned from her employment she was employed in the classification of Level 4 (Passenger Ticketing Assistant) under the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011* (the Agreement). The Agreement has since been replaced. However, that is irrelevant for my purposes.

3 If it is proven that Ms Yoon was an employee for the purposes of the *Long Service Leave Act 1958* (LSL Act), then she has an entitlement pursuant to section 8(3) of that Act to pro-rata long service leave of 6.17 weeks, valued at $6,108.82.

Contentions

4 Ms Yoon contends that on 26 July 2014, pursuant to sections 8(1) and 8(3) of the LSL Act, she became entitled to a pro-rata long service leave payment of $6,108.82.

5 The PTA denies that Ms Yoon is entitled to pro-rata long service leave. It says that Ms Yoon was not an employee for the purposes of the LSL Act and is therefore not entitled to the pro-rata long service leave she claims.

6 The PTA contends that an employee's entitlement to long service leave under the Agreement is more beneficial than, or at least equivalent to, the entitlement to long service leave under the LSL Act. It therefore submits that the Agreement applies to the exclusion of the LSL Act by virtue of section 4(3) of that Act.

7 It is agreed that the Agreement provides for pro-rata long service leave, but only in the limited circumstances contained in Clause 6.6.5. of the Agreement.

Issue

8 The only issue that is in dispute between Ms Yoon and the PTA is whether Ms Yoon is an employee as defined in section 4 of the LSL Act.

Definition of Employee under the LSL Act

9 Section 4(1) of the LSL Act provides:

> "…
> ***employee*** *means, subject to subsection (3) —*
>
> *(a) any person employed by an employer to do work for hire or reward including an apprentice;*
>
> *(b) any person whose usual status is that of an employee;*
>
> *(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or*
>
> *(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee;*
>
> …"

10 It is not in dispute that Ms Yoon, while employed by the PTA, was a person whose usual status was that of an employee. It follows that she would have been an employee for the purposes of the LSL Act, so long as she was not ousted by section 4(3) of that Act.

11 Section 4(3) of the LSL Act provides:

> *"(3) Where a person is, by virtue of —*
>
> *(a) an award or industrial agreement;*
>
> *(b) an employer-employee agreement under Part VID of the Industrial Relations Act 1979 or other agreement between the person and his employer; or*
>
> *(c) an enactment of the State, the Commonwealth or of another State or Territory,*
>
> *entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of "employee" in subsection (1)."*

12 The narrower issue to be determined is whether Ms Yoon, by virtue of the Agreement, was entitled to, or eligible to become entitled to, a long service leave entitlement which is at least equivalent to the entitlement to long service leave under the LSL Act.

13 The Agreement contained "pro-rata" long service leave provisions derived from Clause 11 of the *Long Service Leave General Order* (1979) 59 WAIG 1 (LSL General Order) which was repealed on 4 July 2006. The conditions of Clause 11 of the LSL General Order were largely replicated in Clause 6.6.5. of the Agreement which provides:

> *"6.6.5. An employee will only be entitled to pro rata long service leave if his or her employment is terminated:*
>
> *a) by the Employer for other than disciplinary reasons; or*
>
> *b) due to the retirement of the employee on the grounds of ill health; or*
>
> *c) due to the death of the employee, in which case the payment would be made to the employee's estate; or*

d) due to employee's retirement at the age of 55 years or over, provided 12 months of continuous service has been completed prior to the day from which the retirement takes effect; or

e) for the purpose of entering an Invitro Fertilisation Programme, provided the employee has completed three years service and produces written confirmation from an appropriate medical authority of the dates of involvement in the programme; or

f) due to employees resignation for pregnancy, provided the employee has completed more than three years and produces certification of such pregnancy and the expected date of birth from a legally qualified medical practitioner."

14 Relevantly section 8(3) of the LSL Act provides:

> *"(3) Where an employee has completed at least 7 years of such continuous employment since the commencement thereof, but less than 10 years, and the employment is terminated —*
>
> *(a) by his death; or*
>
> *(b) for any reason other than serious misconduct,*
>
> *the amount of leave to which the employee is entitled shall be a proportionate amount on the basis of 8 $^{2}/_{3}$ weeks for 10 years of such continuous employment."*

15 The fact that Ms Yoon does not meet the criteria set out in Clause 6.6.5. of the Agreement is uncontroversial. Consequently, under the Agreement she has no long service leave entitlement but rather, has an entitlement of 6.17 weeks leave under the LSL Act if she is not ousted by section 4(3) of that Act.

Comparison of the LSL Provisions

16 The following table compares the long service leave provisions of the Agreement with those of the LSL Act:

	Agreement	**LSL Act**
7 to 10 years	Pro-rata if clause 6.6.5. conditions are met	Pro-rata at 8 $^{2}/_{3}$ weeks for 10 years of service
After 10 years	13 weeks	8 $^{2}/_{3}$ weeks
Every 5 years thereafter	-	4 $^{1}/_{3}$ weeks
Every 7 years thereafter	13 weeks	-

17 I observe that Clause 6.7.2. of the Agreement allows an employee at his or her initiative and request, in certain circumstances, to receive payment in lieu of their unutilised accrued long service leave. The LSL Act, however, does not provide for "cash in lieu" payments to employees.

18 Another difference is that section 10 of the LSL Act enables, by agreement and subject to certain conditions being met, an employee to take long service leave before his or her right thereto has accrued. There is no similar provision in the Agreement.

Ms Yoon's Submissions

19 Ms Yoon contends that for her, the entitlement to long service leave under the Agreement is not at least equivalent to the entitlement under the LSL Act for the following reasons:

1. under the LSL Act she is entitled to $6,108.82 after having completed seven years of continuous service, whereas under the Agreement she has no entitlement; and
2. the entitlement to long service leave after completing seven years of service is not constrained by the restrictions imposed by Clause 6.6.5. of the Agreement, and in particular, the requirement that termination be at the employer's initiative.

20 Ms Yoon submits that it was the intention of Parliament that pro-rata long service leave be available after completing seven years of continuous service. When the *Labour Relations Legislation Amendment Act 2006* (2006 Act) came into force on 4 July 2006, it modified the entitlement to long service leave under the LSL Act by reducing the time it took for an employee to become entitled to long service leave. The 2006 Act provided:

1. 8 $^{2}/_{3}$ weeks of long service leave in respect of 10 years continuous service; and 4 $^{1}/_{3}$ weeks for every five years thereafter; and
2. pro-rata long service leave for continuous employment with the same employer for between at least seven years but less than 10 years.

21 The Agreement avoids the 2006 Act reduction in the time an employee needed to work to become entitled to long service leave, and accordingly, is not at least equivalent to the entitlement contained in the LSL Act.

22 Further, before 16 January 1996, an employee would not be entitled to pro-rata long service leave under the LSL Act unless the employee's employment was, amongst other things, terminated on the employer's initiative.

23 On 16 January 1996, the *Industrial Relations Legislation Amendment and Repeal Act 1995* (1995 Act) came into force. Section 49 of the 1995 Act deleted and replaced the former section 8(3)(b) of the LSL Act, thereby making an employee under the LSL Act entitled to pro-rata long service leave even if his or her employment was terminated on his or her initiative. Ms Yoon submits that Clause 6.6.5. of the Agreement attempts to usurp the effect of section 49 of the 1995 Act. In this regard, the pro-rata long service leave entitlement under the Agreement is repugnant to, and not at least equivalent to, the entitlement created under the LSL Act.

PTA's Submissions

24 The PTA submits the following.

25 Ms Yoon is ousted as an employee for the purposes of the LSL Act by section 4(3) of that Act because the Agreement, which applied to her, made her entitled to or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under the LSL Act.

26 The Agreement and the LSL Act must be objectively compared to determine whether, on the whole, the Agreement is at least equivalent to the LSL Act. On the basis of such a comparison a person is either wholly within the Act or outside it.

27 There is no room for the mixing and matching of entitlements. The comparison cannot take into account a person's individual circumstances. The subjective effect of the conclusion on an individual circumstance is irrelevant. If the analysis is a subjective one, taking into account a person's circumstance, it would be completely unworkable. That is because employers would be required to assess the situation in respect of their employees on a regular basis to determine whether, at a given point, an employee would be better off. Given that a breach of the Act or an industrial instrument may result in enforcement proceedings, Parliament could not have intended that an employer would have placed on it this "unwieldy and onerous duty" of a regular evaluation of an employee's individual circumstances.

28 It is sufficient that an employer decides that, on the whole, the industrial instrument is at least equivalent to the LSL Act, and to apply that industrial instrument to its employees without further regard to the LSL Act.

29 The fixed point in time when the objective analysis is required is the time when an industrial instrument has application. Such is reinforced by the words "or eligible to become entitled to" in section 4(3) of the LSL Act.

30 The comparison does not require that any given person is actually entitled to a certain entitlement under the industrial instrument. It is the presence of the entitlement in the industrial instrument that is relevant. What is required is a comparison between two documents standing in isolation, not a comparison of the two documents as they apply at any given time in relation to any given person's individual circumstances.

31 The mixing and matching of entitlements under the Agreement and the LSL Act, in order to arrive at the best possible result for employees, is not intended or allowed.

32 An employee cannot be an employee for some purposes under the LSL Act, but not for others. There are two systems (either the Act or Agreement) and the employer is entitled to conclude that its employees are within one or the other for all purposes.

33 An employer cannot be obligated to arrive at a compendium of conditions drawing upon the LSL Act and an industrial instrument. This would be unworkable. In any event, the LSL Act has not enacted a series of "minimum conditions" that cannot be affected by an industrial instrument. If that was intended by the LSL Act, the Act would have expressly said so.

34 Section 4(3) of the LSL Act refers to an "entitlement" under an award or industrial agreement and an "entitlement" under the Act. The entitlement will have several conditions which form "the entitlement". A comparison of the whole entitlement comprising the respective conditions produced by the Agreement and the LSL Act is necessary. The test being equivalency.

35 It follows that the Court must make an objective and holistic comparison of the entitlement to long service leave under the Agreement and the LSL Act.

36 When that is done it will be seen that the entitlement under the Agreement is at least equivalent to that provided by the LSL Act because it provides for longer periods of leave and it enables employees to "cash in" their long service leave entitlement.

37 Although on a line by line analysis the LSL Act is more favourable to Ms Yoon than the Agreement, any entitlement she may have is part of an entitlement which also has a condition that only $8\ ^{2}/_{3}$ weeks of long service leave is granted after 10 years, instead of 13 weeks, as provided by the Agreement.

38 Section 8(3) of the LSL Act should be read in the context of the less beneficial entitlement contained in section 8(2)(a) of the LSL Act, which provides for only $8\ ^{2}/_{3}$ weeks of long service leave after 10 years.

39 On an objective analysis, the biggest benefit of any long service leave entitlement will be the length of leave when the first and subsequent milestones are met. The ability to cash out leave is also a significant benefit.

40 Section 8(3) of the LSL Act in context, is not enough to disturb the conclusions that the leave entitlement in the Agreement is at least equivalent to the leave entitlement under the LSL Act.

Determination

41 An objective analysis of whether "on the whole", the terms of the Agreement are at least equivalent to the LSL Act, is very difficult if not impossible to achieve.

42 The PTA submits that the biggest benefit of any long service leave entitlement will be the length of leave available upon reaching the first or subsequent milestones. However, that might not necessarily be the case.

43 The significance of the benefit provided by any particular provision will be dependent upon individual circumstances. For some it may be more important to reach the subsequent milestone in five years rather than seven years. Others may not want to cash out their long service leave entitlement and therefore such an entitlement is of no particular benefit. For others close to retirement age, reaching the pro-rata qualification will be of more importance than reaching the 10 year milestone which might be unachievable.

44 Each benefit must, in my view, be weighed against an employee's personal circumstances. It follows that any attempt made to weigh up, as whole, the entitlement under the Agreement in comparison to the entitlement under the LSL Act will be enormously difficult because no singular measure can be used. On what basis can the benefit provided be evaluated? The only practicable way equivalency can be determined is to weigh the competing applicable benefits relevant to the employee at the

time that the milestone giving rise to the benefit is reached. The requirement for equivalency in section 4(3) of the LSL Act is a beneficial provision which imports the setting of minimum standards for each particular benefit.

45 The only way in which a comparison can truly be made is if the condition is analysed and compared in the context of the individual's circumstances.

46 The PTA suggests that such will be unworkable and uncertain. However, I am not persuaded that will be so. The entitlement to long service leave is personal and is dependent upon individual circumstances.

47 A particular person's entitlement will only crystalise once the applicable milestone is met. On that event happening or in contemplation of that happening, an assessment has to be made as to whether the particular entitlement to long service leave, under the applicable industrial instrument, is at least equivalent to that provided by the LSL Act. It is only then that consideration must be given to whether a person is an employee for the purposes of the LSL Act or not.

48 Given that industrial instruments, particularly industrial agreements, may be finite it will be impossible for employers to determine whether a person is an employee for the purposes of the LSL Act until it is necessary to do so. That is, on or about the time that the milestone is met. That process is neither unwieldy nor onerous. Indeed, the employer can only assess each person's entitlement on a case-by-case basis. The entitlement is very much dependent upon personal milestones being reached. An analysis or comparison at any other time will be practically impossible.

49 It follows that if an employer has two employees, one may be an employee within the meaning of the LSL Act and the other may not, dependent upon their circumstances. In the context of the Agreement, if a person worked for more than seven years but less than 10 years, that person will be an employee within the meaning of the LSL Act, whereas, if the person worked more than 10 years they will not be an employee within the meaning of the LSL Act. The entitlement long service leave is very much dependent upon their personal circumstances.

50 It was submitted that the pro-rata provision in section 8(3) of the LSL Act should be read in the context of the less beneficial provisions as to the quantum of leave in section 8(2)(a) of the LSL Act. With respect, I do not agree. The entitlement under section 8(3) of the LSL Act is a discrete benefit contextually different from section 8(2)(a) of the LSL Act. There is no dependency between one provision and the other. Indeed, there is no reason to consider the provisions together.

51 There are two systems (LSL Act or industrial instrument) and the employer is required to conclude that its employee is within one or the other. That determination can only be made once the milestone for the entitlement is met. It requires a separate consideration each time a milestone enabling the entitlement is reached.

Conclusion

52 Ms Yoon was not entitled, under the Agreement, to any pro-rata long service leave entitlement. However, she was entitled to become eligible to pro-rata long service leave under the Agreement, provided that certain conditions were met. Those conditions under the Agreement were more onerous than the conditions provided for by the LSL Act. It follows therefore, that the long service leave entitlement under the Agreement was not, in her case, at least equivalent to the long service leave entitlement contained in the LSL Act.

53 I agree with Ms Yoon's submission that Clause 6.6.5. of the Agreement attempts to usurp the effect of section 49 of the 1995 Act. In this regard, the pro-rata long service leave entitlement under the Agreement is repugnant to, and not at least equivalent to, the entitlement created under the LSL Act.

54 I find therefore, that Ms Yoon was an employee for the purposes of the LSL Act. She is eligible to receive a pro-rata long service leave entitlement of 6.17 weeks, valued at $6,108.82.

G. CICCHINI
INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00381

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JIAJIA CHEN
	APPLICANT
	-v-
	ANTHONY BRYSON, DIRECTOR OF PROSTRUCT CONTRACTING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 15 MAY 2015
FILE NO/S	B 244 OF 2014
CITATION NO.	2015 WAIRC 00381

Result	Application discontinued
Representation	
Applicant	Ms L Wang (as agent)
Respondent	Mr C Gorasia and Mr H McCleary

Order

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

AND WHEREAS on 13 February 2015 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 12 May 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00382

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JIAFENG CHEN
	APPLICANT
	-v-
	ANTHONY BRYSON, DIRECTOR OF PROSTRUCT CONTRACTING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 15 MAY 2015
FILE NO/S	B 245 OF 2014
CITATION NO.	2015 WAIRC 00382

Result	Application discontinued
Representation	
Applicant	Ms L Wang (as agent)
Respondent	Mr C Gorasia and Mr H McCleary

Order

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

AND WHEREAS on 13 February 2015 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 12 May 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00409

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHAN CURR
	APPLICANT
	-v-
	COATES HIRE OPERATIONS PTY LTD
	RESPONDENT
CORAM	CHIEF COMMISSIONER A R BEECH
DATE	WEDNESDAY, 27 MAY 2015
FILE NO/S	B 214 OF 2014
CITATION NO.	2015 WAIRC 00409

Result	Order issued
Representation	
Applicant	Mr C Hershowitz of counsel
Respondent	Mr C Fogliani of counsel

Order

WHEREAS on 1 April 2015 the Commission declared and ordered ([2015] WAIRC 00281):

1. THAT Mr Curr has not been allowed by the respondent a benefit to which he is entitled under his contract of employment.
2. THAT it is a term of Mr Curr's employment agreement that he would receive a housing allowance of $1,600 per fortnight net of tax.
3. THAT the further hearing of the application be adjourned to a date to be fixed once the parties have completed their discussions.
4. THAT the hearing may be relisted at the request of either party.

AND WHEREAS on 26 May 2015 the parties filed a Minute of Consent Order;

AND WHERAS the Commission now issues this order in the terms of that Minute;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred under s 23(1) of the Act, and by consent, hereby order:

THAT the respondent pay to the applicant $23,413.60 within 21 days of the date of this order.

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

2015 WAIRC 00418

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00418
CORAM	**:**	COMMISSIONER J L HARRISON
HEARD	**:**	TUESDAY, 21 APRIL 2015
DELIVERED	**:**	TUESDAY, 2 JUNE 2015
FILE NO.	**:**	U 236 OF 2014
BETWEEN	**:**	ANDREW FORSTER Applicant AND P & C LONG Respondent

Catchwords	**:**	Termination of employment - Claim of harsh, oppressive or unfair dismissal - Summary termination - Principles applied - Applicant unfairly dismissed - Compensation ordered
Legislation	**:**	*Industrial Relations Act 1979* s 26(1)(a) and s 29(1)(b)(i)
Result	**:**	Upheld and order issued
Representation:		
Applicant	**:**	Mr T Jardine (of counsel)
Respondent	**:**	Mr A Dzieciol (of counsel)

Case(s) referred to in reasons:

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Byrne v Australian Airlines (1995) 61 IR 32

Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (1988) 68 WAIG 677

Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors (1995) 75 WAIG 813

Shire of Esperance v Mouritz (1991) 71 WAIG 891

Tranchita v Wavemaster International Pty Ltd (1999) 79 WAIG 1886

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

Reasons for Decision

1 Andrew Forster (the applicant) claims that he was unfairly dismissed by P & C Long (the respondent) on 14 November 2014. The respondent disputes the applicant's claim.

2 The applicant was summarily terminated in a text message sent to the applicant by the respondent's principal Mr Paul Long on the afternoon of 14 November 2014. This message is as follows:

> Hi Andy
>
> My Mom said:
>
> If you didn't turn up today or you left early, that I should let you go.
>
> "She has spoken"
> I'm really sorry to do this but you're fired.

(Exhibit A3)

3 The issue at the centre of the dispute between the parties is whether the applicant left work early on 14 November 2014 without completing his normal shift after he was told by Mr Long that he expected the applicant to work his usual shift that day. The applicant maintains that he worked his normal shift on 14 November 2014 and did not cease work early. The applicant claims he had worked the usual number of hours that week when he left work on 14 November 2014. The respondent claims that the applicant was required to be available to complete deliveries for up to 14 hours each shift and he did not do this on 14 November 2014.

Background

4 The applicant was employed by the respondent as a truck driver between 21 January 2013 and 14 November 2014 on a permanent full-time basis. He was paid $30 per hour for each hour worked. In the last three months of the applicant's employment he worked an average of 45 hours per week, Tuesday to Friday (see exhibit A1). The applicant's employment was covered by the *Transport Workers (General) Award No. 10 of 1961* (the Award) and he did not have a written contract of employment. The respondent provides trucks and drivers to Toll Holdings Limited (Toll) to transport goods to Woolworths stores from Woolworths distribution centre at Kewdale (the Kewdale site). Toll's fleet controller allocates jobs to drivers to transport these goods and when drivers return to the Kewdale site the fleet controller may allocate drivers another job if further work was required to be undertaken. In the last month of the applicant's employment with the respondent he completed three or four deliveries on each day he worked (exhibit A2). The applicant was not given any formal warnings and was not subject to any disciplinary proceedings during his employment with the respondent.

5 On 3 November 2014 the applicant told Mr Long that he would not be at work on Friday 14 November 2014 as he had to take his mother, who had been visiting from England, to the airport. The text messages exchanged between the applicant and Mr Long that day in relation to the applicant not working on Friday 14 November 2014 are as follows:

> While I think about it I won't be in to work on Friday 14th Nov.
>
> *Why's that?*
>
> Mom goes home that day.
>
> *I'll have a look at the roster, see if you can swap a day with whoever's off.*
>
> I'm happy with 3 days.
>
> *Can you do Sat 8th for David & have tue 11th off and Friday 14th.*
>
> My mrs does shopping on Saturday I'll ask her but Saturday isn't a good day.
>
> *Ok let me know.*
>
> Can't do any weekends, she has spoken.
> *Sorry Andy, I haven't got anybody to cover the 14th. Your (sic) going to have to do it.*

(Exhibit A3)

Evidence

Applicant

6 The applicant has been driving trucks for 31 years. The applicant usually worked between eight to 14 hours each day and he sometimes worked more than four days per week to assist the respondent.

7 When the applicant told Mr Long that he would not be working on 14 November 2014 Mr Long asked him to work another day instead of working that day but the alternatives he suggested were not convenient to the applicant. After completing one delivery on 14 November 2014, which took six and a half hours, the applicant returned to Toll's office. He copied his run sheet as normal, parked his truck and then left the Kewdale site because he had worked 44 hours that week. The applicant said that when Mr Long texted him telling him he was terminated on the afternoon of 14 November 2014 he thought it was a joke. He stated that the reference to him 'leaving early' was incorrect as he had worked 44 hours that week. It took the applicant seven weeks to find another job after he was terminated. The applicant is currently driving for SCT and is paid $30 per hour plus overtime, annual leave and sick leave.

8 Under cross-examination the applicant confirmed that Tolls' fleet controllers allocate work to drivers and drivers usually complete a maximum of three deliveries per day. When he finished his deliveries for the day he copied his run sheets, they were signed by the fleet controller and he then left the premises. When asked if he could decline taking a delivery he said this was never an issue. When he was sometimes asked to complete additional deliveries he did so. It was rare to complete one delivery in a day but the delivery he completed on 14 November 2014 was lengthy. The applicant gave evidence that if he had completed enough hours in a day he went home and Toll's afternoon fleet controller Mr Tim Dunnell was happy with this arrangement.

9 The applicant said that he could not recall being offered another job by Mr Dunnell on 14 November 2014 after completing his first delivery and he may have shaken Mr Dunnell's hand and said words to the effect 'it's been nice working with you' prior to leaving work but he could not recall doing so. The applicant maintained that as he did not work set hours each week there was no requirement on him to keep working until all deliveries were completed. He left work when he had completed enough hours each day and/or week and as he was not paid penalty rates, he believed working approximately 44 hours in a week was appropriate. The number of deliveries he completed each day was negotiated with Mr Dunnell. The applicant agreed that Toll directed the day-to-day work of the drivers and allocated deliveries to the applicant. The applicant stated that the respondent never raised the issue of him being required to work until all deliveries had been completed.

Respondent

10 The respondent provides trucks and drivers as part of its subcontract arrangement with Toll. Mr Long drives one of these trucks and he completes the same duties as the applicant. Mr Long said that the applicant did not work fixed hours but he could be expected to work up to 14 hours per day. When a driver returned to the Kewdale site after completing a delivery, if all deliveries for that day had been completed drivers were told that they could finish work for the day. Mr Long said that a driver cannot refuse to undertake a delivery except if this would result in the driver working over 14 hours for that day. Mr Long said that on some occasions the applicant worked on Saturdays and he sometimes worked more than four days per week.

11 Mr Long gave the applicant two alternatives instead of working on 14 November 2014. As no agreement was reached with the applicant Mr Long expected the applicant to work as normal that day. Alternatively, the applicant could have had time off on 14 November 2014 by organising a break with Toll.

12 After the applicant left work on 14 November 2014 Mr Dunnell rang Mr Long and told him that the applicant had left mid-shift when more deliveries were available for him to complete. Mr Long was concerned about the applicant's actions as his behaviour could have put the respondent's contract with Toll, which is the only contract the respondent has, in jeopardy.

13 Mr Long said that drivers were required to continue working until the deliveries for that day were finished and they could not pick and choose which deliveries they completed unless there was good reason. Mr Long believed that the alternatives he gave the applicant instead of working on 14 November 2014 were reasonable.

14 Mr Long was called to a meeting at Toll's office on Monday 17 November 2014 and he was asked about what had happened to the applicant. Mr Long told Toll's manager Mr Nathan Tuckey that the applicant had been terminated and Mr Tuckey responded by saying that this was the only outcome possible. Mr Long understood from what Mr Tuckey had said that if he did not terminate the applicant the respondent could have lost its contract with Toll.

15 Mr Long said that drivers would continue working until all jobs had been completed, drivers did not have set hours and some periods were busier than others. Mr Long said he had a good working relationship with the applicant. Mr Long was aware that the applicant was not keen to work on weekends but he did so on some occasions.

16 Mr Long said he could not replace the applicant after he left the Kewdale site on 14 November 2014 because he was attending a social engagement where he had been drinking. Mr Long could not recall if any of the respondent's other drivers were working that day however it would have been difficult to find another driver at 4.30 pm on a Friday. Mr Long said it was appropriate to summarily terminate the applicant by text message without having a discussion with him because the applicant walked out without completing his shift. Mr Long said that Toll was not happy with the applicant leaving work early and he claimed that the applicant's conduct affected the respondent's contract with Toll.

17 Mr Dunnell is currently employed by Toll as a truck driver. On 14 November 2014 he was employed as Toll's afternoon fleet controller at the Kewdale site. He assigned work to drivers including direct employees and subcontractors. After making a delivery a driver returned to the yard and Mr Dunnell allocated a driver more deliveries until all deliveries for the day had been completed. He stated that drivers usually completed three to four deliveries per day. Mr Dunnell said that a driver could decline to complete a delivery but it depended on the reason. If a driver was sick, fatigued or their truck had broken down he

may accept a driver declining to complete a delivery. He dealt with each situation on a case-by-case basis. If a driver said they had worked enough hours for that day or week Mr Dunnell would not accept that as a reason for declining to undertake a delivery. Mr Dunnell said he has never had a driver say they were leaving the Kewdale site because they had completed their hours for the week. Apart from this issue arising on 14 November 2014 this had never arisen before. Mr Dunnell understood that the applicant was available to work up to 14 hours each day.

18 On 14 November 2014 the applicant returned from his first delivery at around 4.30 pm and he handed his run sheet to Mr Dunnell, which is the normal practice when a driver finishes a shift. The applicant then shook his hand and said 'it's been nice working with you' or words to that effect and then left. Mr Dunnell had heard a rumour that the applicant had wanted to have the day off and this had not been agreed to by Mr Long. Mr Dunnell said that additional deliveries were required to be completed by the applicant that day after he finished his first delivery. Mr Dunnell gave evidence that he did not allocate any further deliveries to the applicant after he handed in his run sheet but he said that the applicant could be intimidating at times so he did not ask him to do more deliveries on 14 November 2014. He stated it would have been difficult to find another driver to complete the deliveries the applicant would have completed that day. After the applicant left he sent a text message to Mr Long asking him if he was aware that the applicant had left work. He also contacted Mr Tuckey to let him know what had happened because this could be a disciplinary issue which he could not handle. Mr Dunnell said drivers were aware that they were required to remain working as long as Toll required them to and Friday was the busiest day of the week and the demand for deliveries to be completed was increasing as it was close to Christmas.

19 Mr Dunnell said he was unaware of the contractual relationship between the respondent and the applicant and he did not monitor the hours worked by drivers. He stated that it was unusual for the applicant or any other driver to leave after completing only one or two deliveries. Mr Dunnell said there was no point asking the applicant to complete another delivery on 14 November 2014 after he completed his first delivery because he had heard rumours that the applicant did not want to work that day. Mr Dunnell said that 14 November 2014 was his last day working as a fleet controller and he conceded that the discussion he had with the applicant about working with each other could have been about Mr Dunnell leaving.

Submissions

Applicant

20 The applicant maintains that he completed the work required of him on 14 November 2014 and Mr Dunnell did not allocate any further deliveries for him to undertake that day. He had completed all of the hours he normally worked each week when he left work on 14 November 2014. There was therefore no reason for the applicant to be terminated. Terminating the applicant by text was inappropriate because he had no opportunity to respond to Mr Long's decision that he be terminated. There was no direct evidence that Toll's contract with the respondent was at risk because of the applicant's actions.

Respondent

21 The respondent argues that the applicant did not work set hours and he was required to complete all deliveries allocated to him by Toll each day, subject to not working more than 14 hours each day. The applicant did not have an agreement with Mr Long that he determined the number of hours he worked each day and the hours worked by a driver was determined by Toll once the driver signed in. It was also the case that the applicant completed an average of three deliveries per day throughout his employment with the respondent.

22 Mr Long gave the applicant options to work other days instead of working on 14 November 2014 but he refused to be flexible. After this exchange the applicant showed a wilful disregard of the lawful instruction given to him by Mr Long on 3 November 2014 to work as normal on 14 November 2014. It was therefore appropriate to summarily terminate the applicant when he breached this instruction. When the applicant left work early on 14 November 2014 this resulted in the relationship of trust between the applicant and Mr Long breaking down. On 14 November 2014 the applicant only worked six hours on his last day of work and he only completed one delivery when there were more deliveries to be allocated to him. The applicant was therefore not working in accordance with the normal custom and practice undertaken by the respondent's drivers. The respondent claims that communicating between Mr Long and the applicant by text messages was not unusual so it was appropriate to terminate the applicant by text message.

Consideration

Witness Credit

23 I find that both Mr Long and Mr Dunnell gave their evidence in a forthright manner and to the best of their recollection. Their evidence was consistent with each other, in particular the evidence they gave about the hours and deliveries drivers were required to complete each day. Mr Long undertook the same driving duties for Toll as the applicant so he was well placed to give evidence about the hours and deliveries undertaken by drivers working at the Kewdale site. Their evidence about drivers being required to complete a number of deliveries each day was also supported by the applicant's daily run sheets covering the four week period prior to his termination. These run sheets confirm that the applicant completed at least three deliveries each day except on his last day of employment (exhibit A2). In my view the applicant gave his evidence in a direct and clear manner. However the weight of evidence is against the applicant in relation to his claim that he had discretion to determine how many hours he worked each day/week and that he could cease work even if further deliveries were required to be undertaken. In the circumstances I prefer the evidence of Mr Dunnell and Mr Long about the hours to be worked and the number of deliveries required to be undertaken by drivers who worked at the Kewdale site.

Was the applicant unfairly dismissed?

24 The test for determining whether a dismissal is unfair is well settled. The question is whether an employer acted harshly, unfairly or oppressively in dismissing an employee (see ***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch*** (1985) 65 WAIG 385). The onus is on the applicant to establish that the dismissal was, in all the circumstances, unfair. Whether the right of the employer to terminate the

employment has been exercised so harshly or oppressively or unfairly against the applicant as to amount to an abuse of the right needs to be determined. A dismissal for a valid reason may still be unfair if, for example, it is effected in an unfair manner. However, terminating an employee in a manner which is procedurally irregular may not mean the dismissal is unfair (see ***Shire of Esperance v Mouritz*** (1991) 71 WAIG 891 and ***Byrne v Australian Airlines*** (1995) 61 IR 32). In ***Shire of Esperance v Mouritz***, Kennedy J observed that unfair procedures adopted by an employer when dismissing an employee are only one element that needs to be considered when determining whether a dismissal was harsh or unjust.

25 The applicant was summarily terminated for serious misconduct. The onus is on the applicant to demonstrate that the dismissal was unfair on the balance of probabilities. However, there is an evidential onus upon the employer to prove that summary dismissal is justified (see ***Newmont Australia Ltd v The Australian Workers' Union, West Australian Branch, Industrial Union of Workers*** (1988) 68 WAIG 677, 679). The question of whether a person is guilty of misconduct justifying summary dismissal is a question of fact and degree (***Robe River Iron Associates v Construction, Mining Energy, Timberyards, Sawmills and Woodworkers Union of Australia – Western Australian Branch & Ors*** (1995) 75 WAIG 813, 819). In most cases the employee should be given an opportunity to defend the allegations made against him or her.

26 In ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224, 229 the Full Bench of the South Australian Commission stated that the following factors were relevant when dealing with a dismissal based upon alleged misconduct. The employer will satisfy the evidentiary onus on it to demonstrate that before dismissing the employee it conducted a full and extensive investigation into all relevant matters surrounding the alleged misconduct as was reasonable in the circumstances and the employee must be given a reasonable opportunity and sufficient time to answer all allegations. If the employer then believes and has reasonable grounds for deciding that the employee was guilty of the misconduct alleged and after taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, the employer may decide whether such misconduct justifies dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

27 I find that the applicant left work early on 14 November 2014 and in doing so he breached the lawful instruction given to him by Mr Long to work as normal that day. Mr Long made it clear to the applicant on 3 November 2014 in one of the text messages he sent to him that he was required to undertake his normal duties on 14 November 2014 after the applicant and Mr Long could not agree on alternative arrangements for the applicant to have this day off (see paragraph 5). I have found that I prefer the evidence of Mr Long and Mr Dunnell to the applicant's evidence about the number of deliveries and hours drivers were expected to complete each day/week. Taking their evidence into account I find that the applicant did not work set hours each day/week. I also find that as a subcontract driver to Toll the applicant was expected to complete all deliveries Toll required him to undertake each day. The only restriction on this was that drivers were not expected to work more than 14 hours each day. I accept Mr Dunnell's evidence and I find that Toll had further deliveries which could have been allocated to the applicant after he completed his first and only delivery on 14 November 2014. As the applicant indicated to Mr Dunnell that he had finished work for the day after completing this delivery Mr Dunnell could not allocate him any further deliveries to complete. Mr Dunnell conceded that he did not ask the applicant to complete another delivery that day after he finished his first delivery however I accept Mr Dunnell's evidence that the applicant had indicated to him that he had ceased work when he handed Mr Dunnell his daily run sheet and I accept Mr Dunnell's evidence that he did not want to upset the applicant by insisting he complete another delivery as the applicant could be intimidating at times. Mr Dunnell had also heard a rumour that the applicant did not want to work at all that day.

28 I find that even though the applicant left work early on 14 November 2014 when he disobeyed the lawful instruction given to him by Mr Long to work as normal that day he did not commit misconduct sufficient to warrant his summary termination. I find that Mr Long did not have sufficient reason to terminate the applicant either on notice or summarily. I find that Mr Long did not take into account a number of relevant considerations when he decided to terminate the applicant. Mr Long should have considered the fact that when the applicant had completed his one delivery on 14 November 2014 he had completed close to the normal hours he had worked each week in the previous three months. Additionally, the applicant had not been subject to any disciplinary action during his employment with the respondent and he had been flexible in the hours and days he worked for the respondent on occasions. Whilst the applicant's conduct on 14 November 2014 was a concern to Toll, it is unclear whether the respondent's contract with Toll would have been terminated if the applicant was not summarily terminated.

29 I find that the respondent terminated the applicant in a procedurally unfair manner. The applicant was terminated by text message sent by Mr Long soon after the applicant left the Kewdale site on 14 November 2014. There was no dispute that he sent this text without talking to the applicant to ascertain the reason for the applicant leaving the Kewdale site after completing only one delivery or to discuss possible mitigating circumstances that the applicant could rely on such as the fact that he had worked similar hours that week to the hours he had previously worked.

30 When taking into account s 26(1)(a) of the Act considerations and equity, good conscience and substantial merit, I find that the respondent did not have a valid reason for summarily terminating the applicant and I find that he was not afforded a fair go all around. He was unfairly terminated (***Undercliffe Nursing Home v Federated Miscellaneous Workers Union of Australia, Hospital Service and Miscellaneous WA Branch***).

Compensation

31 The applicant is not seeking reinstatement and it is clear and I find that neither party has the necessary trust in each other to re-establish a viable and ongoing employment relationship. I am also satisfied on the evidence that the working relationship between the applicant and respondent has broken down such that an order for reinstatement or re-employment is impracticable.

32 I now turn to the question of compensation. I apply the principles set out in ***Bogunovich v Bayside Western Australia Pty Ltd*** (1998) 78 WAIG 3635 and ***Tranchita v Wavemaster International Pty Ltd*** (1999) 79 WAIG 1886. I am satisfied the applicant took reasonable steps to mitigate his loss as he obtained employment in a similar position seven weeks after his termination.

33 When assessing compensation due to the applicant I find that he would have had an ongoing expectation of employment with the respondent for a very limited period. I find this timeframe to be one week after 14 November 2014. In my view this would have been a sufficient timeframe for the applicant to be put on notice that his conduct in leaving early on 14 November 2014 would not be tolerated in future, especially when it could put at risk the respondent's contract with Toll. During this one week period after 14 November 2014 it would have been appropriate for the applicant and Mr Long to discuss the number of hours of work and deliveries the applicant was expected to complete each day/week and whether the hourly rate paid to the applicant was sufficient recompense for the overtime the applicant would work prior to the busy Christmas period when the applicant would be expected to work more hours than in the previous months. I find that during this period the applicant and the respondent would not be able to reach agreement about the number of hours the applicant would be required to work in this busy period. I do so on the basis that the applicant was annoyed at not being paid overtime rates for the hours he worked over 38 each week and the hours he would be expected to work close to Christmas was increasing. After this one week period whereby in my view no agreement would be reached between the applicant and Mr Long as to the hours the applicant was required to work each week I find that it would be appropriate for the respondent to terminate the applicant by giving him two weeks' notice of his termination as provided for in the Award.

34 The applicant is therefore due three weeks' wages as compensation for his unfair dismissal. The applicant's salary was $30 gross per hour and the applicant worked an average of 45 hours per week in his last three months of employment. I calculate that the applicant is due $4,050 gross as compensation for his unfair dismissal ($30 x 45 hours x 3 weeks = $4,050).

35 An order will now issue that the applicant be paid $4,050 gross as compensation for his unfair dismissal.

2015 WAIRC 00421

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDREW FORSTER
	APPLICANT
	-v-
	P & C LONG
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 5 JUNE 2015
FILE NO/S	U 236 OF 2014
CITATION NO.	2015 WAIRC 00421

Result	Upheld and order issued
Representation	
Applicant	Mr T Jardine (of counsel)
Respondent	Mr A Dzieciol (of counsel)

Order

HAVING HEARD Mr T Jardine of counsel on behalf of the applicant and Mr A Dzieciol of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby –

1. DECLARES THAT the dismissal of Andrew Forster by the respondent was unfair and that reinstatement or re-employment is impracticable.

2. ORDERS the respondent to pay Andrew Forster compensation in the sum of $4,050 gross within 14 days of the date of this order.

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

2015 WAIRC 00383

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	SHUQIANG JIN
	APPLICANT
	-v-
	ANTHONY BRYSON, DIRECTOR OF PROSTRUCT CONTRACTING
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	FRIDAY, 15 MAY 2015
FILE NO/S	B 246 OF 2014
CITATION NO.	2015 WAIRC 00383

Result	Application discontinued
Representation	
Applicant	Ms L Wang (as agent)
Respondent	Mr C Gorasia and Mr H McCleary

Order

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

AND WHEREAS on 13 February 2015 the Commission convened a conference for the purpose of conciliating between the parties;

AND WHEREAS at the conclusion of the conference no agreement was able to be reached between the parties;

AND WHEREAS on 12 May 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby discontinued.

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

2015 WAIRC 00403

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID MONKS
	APPLICANT
	-v-
	SAKO UNIT TRUST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 27 MAY 2015
FILE NO/S	B 52 OF 2015
CITATION NO.	2015 WAIRC 00403

Result	Application dismissed

Order

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

WHEREAS on the 24th day of April 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 21st day of May 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2015 WAIRC 00402

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	DAVID MONKS
	APPLICANT
	-v-
	SAKO UNIT TRUST
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 27 MAY 2015
FILE NO/S	U 52 OF 2015
CITATION NO.	2015 WAIRC 00402
Result	Application dismissed

Order

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

WHEREAS on the 24th day of April 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

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

WHEREAS on the 21st day of May 2015 the applicant filed a Notice of Discontinuance in respect of the application;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2015 WAIRC 00393

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ALEXIS NOAKES
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	THURSDAY, 21 MAY 2015
FILE NO/S	U 252 OF 2014
CITATION NO.	2015 WAIRC 00393
Result	Application dismissed
Representation	
Applicant	No appearance
Respondent	Mr D Anderson of counsel

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 March 2015 the Commission set the matter down for hearing from the 20th to the 23rd day of April 2015; and

WHEREAS on the 8th day of April 2015 the applicant's representative formally notified the Commission that it no longer represented the applicant; and

WHEREAS the Commission attempted to contact the applicant by telephone on several occasions without success; and

WHEREAS the Commission convened a Directions hearing on the 17th day of April 2015; and

WHEREAS at that Directions hearing there was no appearance for the applicant; and

WHEREAS at the directions hearing, the hearing dates for the 20th to the 23rd day of April 2015 were vacated; and

WHEREAS the Commission convened a Directions hearing on the 21st day of May 2015; and

WHEREAS at that Directions hearing there was no appearance for the applicant and the respondent requested that the application be 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 dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

CONFERENCES—Matters arising out of—

2015 WAIRC 00441

DISPUTE RE ALLEGED UNFAIR DISCIPLINARY PROCESS

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, 12 JUNE 2015
FILE NO/S	C 13 OF 2015
CITATION NO.	2015 WAIRC 00441

Result	Application for interim orders dismissed
Representation	
Applicant	Mr M Amati
Respondent	Mr D Anderson of counsel

Order

WHEREAS this is an application pursuant to Section 44 of the *Industrial Relations Act 1979* (the Act) relating to the dismissal by the respondent of the applicant's member Mr Alex Petticrew; and

WHEREAS on the 8th day of June 2015 the Commission convened a conference for the purposes of conciliating between the parties, however, no agreement was reached and the matter is to be referred for hearing and determination; and

WHEREAS during the conference, it was noted that the respondent had twice previously dismissed Mr Petticrew and that following proceedings before the Commission in matters CR 11 of 2014 and CR 34 of 2014 he had been reinstated due to procedural failings on the part of the respondent; and

WHEREAS at that conference the applicant applied to the Commission for interim orders pursuant to s 44(6)(ba)(i) of the Act, for the maintenance of Mr Petticrew's salary, his Government Regional Officers' Housing (GROH) accommodation and rental subsidy until the matter is heard and determined on the basis that Mr Petticrew will be without income unless and until the matter is determined, and he has been issued with a letter requiring him to vacate the GROH accommodation; and

WHEREAS the respondent opposed the issuing of interim orders in respect of maintenance of salary and rental subsidy but undertook to consider whether to maintain Mr Petticrew in GROH accommodation until the matter is heard and determined, and to advise the Commission of that decision by 1.00 pm on Tuesday the 9th day of June 2015; and

WHEREAS the Commission considered the requirements under s 44(6)(ba)(i) being to prevent the deterioration of industrial relations in respect of the matter in question until, in this case, arbitration has resolved the matter. The Commission noted that there was no indication as to how the issuing of the interim orders sought would prevent the deterioration of industrial relations, or that there was no evidence that the failure to issue the orders sought might result in the deterioration of industrial relations. Further the Commission considered that the balance of convenience lay with the respondent in that should the applicant be successful Mr Petticrew would be reinstated and be entitled to back pay for the period between dismissal and reinstatement whereas should the respondent be required to continue to pay Mr Petticrew and the applicant not be successful, there would be significant difficulties in recovery of the amounts paid;

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

THAT the application for interim orders be, and is hereby dismissed.

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2015 WAIRC 00362

DISPUTE RE HIGHER DUTIES ALLOWANCE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	WESTERN AUSTRALIAN PRISON OFFICERS' UNION OF WORKERS
	APPLICANT
	-v-
	THE MINISTER FOR CORRECTIVE SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 7 MAY 2015
FILE NO/S	C 24 OF 2014
CITATION NO.	2015 WAIRC 00362

Result	Order issued
Representation	
Applicant	Mr P Ledingham and with him Mr J Welch
Respondent	Ms I Rizmanoska and with her Mr N Cinquina

Order

HAVING heard Mr P Ledingham and with him Mr J Welch on behalf of the applicant and Ms I Rizmanoska and with her Mr N Cinquina on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued.

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

CONFERENCES—Matters referred—

2015 WAIRC 00386

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2015 WAIRC 00386
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	MONDAY, 1 DECEMBER 2014, MONDAY, 9 FEBRUARY 2015, FRIDAY, 13 MARCH 2015, MONDAY, 13 APRIL 2015
DELIVERED	**:**	MONDAY, 18 MAY 2015
FILE NO.	**:**	CR 32 OF 2014
BETWEEN	**:**	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH Applicant AND THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA Respondent

CatchWords	**:**	Industrial Law (WA) - Termination of employment - Allegation of harsh, oppressive and unfair dismissal - Application to seek reinstatement - Penalty of dismissal disproportionate to breaches - Procedural unfairness - Principles considered - Applicant not harshly, oppressively or unfairly dismissed - Application dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 27(1)(a), s 44
Result	**:**	Application dismissed
REPRESENTATION:		
Applicant	**:**	Mr C Fogliani (of counsel)
Respondent	**:**	Mr D Matthews (of counsel)

Case(s) referred to in reasons:

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2014] WAIRC 00824; (2014) 94 WAIG 1462

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2014] WAIRC 01367; (2014) 95 WAIG 1

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Briginshaw v Briginshaw (1938) 60 CLR 336

Garbett v Midland Brick Co [2003] WASCA 36

Kelly v Public Transport Authority [2009] WAIRC 00238; (2009) 89 WAIG 669

Mallard v The Queen (2003) 28 WAR 1

Pantovic v Public Transport Authority [2011] WAIRC 00876; (2011) 91 WAIG 2094

Pinker v Director General, Department of Education [2014] WAIRC 01312; (2014) 94 WAIG 1928

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

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

Reasons for Decision

1 The substantive application in this matter is one by The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant) on behalf of Ms Janet Vimpany that she was unfairly dismissed as a Passenger Ticketing Assistant (PTA) on 8 October 2014 following a conclusion reached by the Public Transport Authority of Western Australia (the respondent) that Ms Vimpany been repeatedly dishonest in her accounts of two incidents that occurred on 27 April 2013 at Perth station.

2 The dispute was referred and was first listed for hearing on 9 February 2015. On the day of the hearing the parties sought to amend the memorandum of matters as referred in light of the findings of the Full Bench decision in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 01367, (2014) 95 WAIG 1 (***ARTBIU v PTA (FB)***).

3 The amended memorandum as referred was specified in detail in the preliminary reasons for decision as issued on 11 March 2015 and I do not intend to re-state them here other than to say on the day of the hearing there was a procedural application by the respondent submitted pursuant to s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (the Act) requesting the Commission refrain from hearing part of the matter in the public interest. In particular, that the Commission ought hear

no further the question of whether Ms Vimpany (the applicant's member) gave false accounts of what occurred on 27 April 2013. It was put to the Commission that Kenner C in ***The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia*** [2014] WAIRC 00824, (2014) 94 WAIG 1462 (***ARTBIU v PTA)*** had already determined the facts relating to the incidents of 27 April 2013 and therefore Ms Vimpany must accept that her version of events and that of others as found by Kenner C are not able to be reconciled.

4 The Commission, having had regard for the submissions of the applicant in relation to the procedural application made by the respondent pursuant to s 27(1)(a) of the Act, accepted in part the respondent's application and issued reasons for decision and on 13 March 2015 issued an order that:

1. DECLARES that Application CR 32 of 2014 The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority is part dismissed on public interest grounds pursuant to s 27(1)(a) of the Act with the exception of those matters relating to:
   (a) whether there were reasonable grounds for the respondent to hold the belief that the applicant's member was guilty of the misconduct alleged, having regard for the principles reflected in the Full Bench decision ***The Minister for Health v Drake-Brockman*** (2012) 92 WAIG 203;
   (b) procedural fairness; and
   (c) penalty.
2. ORDERS THAT the application, other than those aspects listed in the Declaration, be and is hereby dismissed.
3. ORDERS THAT the application be re-listed at the applicant's and respondent's convenience to hear submissions on the matters referred to in the Declaration.

5 The matter was relisted on Monday, 13 April 2015 for hearing and determination of the remaining matters.

Applicant's Outline of Submissions

6 The applicant submitted the respondent, found that Ms Vimpany had engaged in misconduct and subsequently made a discretionary decision to dismiss Ms Vimpany. It is the applicant's case that Ms Vimpany has been unfairly dismissed by the respondent. The case of unfair dismissal is made out for two reasons:

(a) Mr Steedman was the decision maker who, on behalf of the respondent, ultimately made the decision to dismiss Ms Vimpany. Mr Steedman did not have reasonable grounds for believing on the information available at the time, that Ms Vimpany was guilty of the alleged misconduct; and

(b) the discretionary decision of Mr Steedman to dismiss Ms Vimpany was harsh, oppressive and unfair.

7 In relation to the alleged misconduct it is the respondent's allegation that Ms Vimpany:

> knowingly gave false accounts of a supervisor's actions on 27 April 2013, in the course of a disciplinary investigation and in support of claims in a grievance process and an OSH incident report that his behaviour was intimidating and bullying towards you.
>
> (extract of Ms Vimpany's termination letter exhibit A1, tab 1[2])

8 Mr Steedman, in the same letter concluded Ms Vimpany:

> … you were aware and deliberately gave a false account of the relevant events (page 3);
>
> … to deliberately make false allegations against another employee (page 3); and
>
> … acted dishonestly in the way alleged (page 4).

9 These were key findings of fact that it was suggested by the respondent were proved based on the review of documents by Mr Steedman. These findings are denied by the applicant.

10 Where an employer is relying upon the issue of misconduct the applicant submits there is a burden upon the respondent to demonstrate there is sufficient evidence to find that the alleged incident did occur, ***Garbett v Midland Brick Co*** [2003] WASCA 36. The applicant submits whether or not the misconduct occurred is not a discretionary decision but a finding of fact giving rise to the right to dismiss ***Minister for Health v Drake-Brockman*** [2011] WAIRC 00150; (2011) 92 WAIG 203.

11 The respondent is required to establish not that the employee was guilty of the misconduct but that following a proper inquiry there were reasonable grounds for a belief on the part of the employer that on the information available at the time that the employee, in this case Ms Vimpany was guilty of the alleged misconduct. In making the decision the respondent is required to take into account any mitigating circumstances that might be associated with the alleged misconduct or the employee's work record to determine whether the misconduct justified the dismissal, ***Minister for Health v Drake-Brockman***.

12 The applicant submitted that what constitutes 'sufficient evidence' to establish the facts said to demonstrate misconduct will vary from case to case depending on the gravity of the alleged misconduct having regard for the decision in ***Bi-Lo Pty Ltd v Hooper*** (1992) 53 IR 224. The allegation made by the respondent against Ms Vimpany was that she 'knowingly' gave false accounts of an incident to the respondent. As was recently found by the Full Bench in ***ARTBIU v PTA (FB)***:

> A finding that a person had formed a state of mind to give a false account, or, put another way, had subjectively determined to give a false account is a very serious matter which attracts a high standard of proof.

13 If the respondent discharges its burden in unfair dismissal matters of this nature the onus then shifts to the employee to demonstrate that the dismissal was indeed harsh, oppressive or unfair.

14 The applicant submits there were a number of documents reviewed by Mr Steedman to come to his finding. These documents are listed in exhibit A1, tab 1, the termination letter of 7 October 2014. It is asserted by the applicant that most of the documents reviewed by Mr Steedman were not relevant to the question of whether Ms Vimpany had formed a state of mind to give a false account or alternatively had subjectively determined to give a false account. It is suggested this is because Ms Blake, Ms Johnson, Mr Geson, Mr Pontarolo, Mr B Singh, Mr A Singh and Mr Hammon did not give any evidence about Ms Vimpany's subjective state of mind. The applicant suggests that the documents relevant to the assessment of Ms Vimpany's subjective state of mind include:

- Ms Vimpany's recollection, dated 29 August 2014 (exhibit A1, tab 3);
- an undated but signed two page statement;
- OSH incident report (exhibit A1, tab 8);
- Initial response, dated 17 May 2013 (exhibit A1, tab 9);
- Subsequent response, dated 11 June 2013 (exhibit A1, tab 11);
- statement in support of a worker's compensation claim, dated 2 July 2013 (exhibit A1, tab 12);
- Ms Vimpany's response, dated 27 September 2013 (exhibit A1, tab 14); and
- evidence in the Commission as is contained in transcript, dated 20 May 2014 (exhibit A1, tab 16).

15 It was claimed by Mr Steedman in Ms Vimpany's letter of termination (exhibit A1, tab 1) that there was no innocent explanation for the difference between Ms Vimpany's account and the accounts of Mr Hammon, Mr Pontarolo and Mr Geson. This is despite the respondent through their legal counsel having previously made the following oral submission to the Commission at a hearing on 21 May 2014:

> We acknowledge that differences in a witness's statements do not necessarily lead to a finding of dishonesty. We've heard different recollections. You know, often these differences can be explained by perception, recollection…
>
> (ts 151, CR 3/2014 Kenner C)

16 The allegation that the respondent made against Ms Vimpany was a serious one. The applicant suggests it was subjective in nature and that given the gravity of the allegation it is asserted by the applicant that the respondent did not have reasonable grounds to sustain that Ms Vimpany was guilty of the misconduct as alleged.

17 In determining whether a dismissal was unfair the question to be investigated is one as to whether the respondent has exercised their discretion to dismiss so harshly or oppressively against the employee as to amount to an abuse of that right having regard to the decision of the Industrial Appeal Court in ***Undercliffe Nursing Home v Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch*** (1985) 65 WAIG 385 at 387. The applicant asserts there was insufficient evidence before Mr Steedman for him to conclude that Ms Vimpany had made a statement that was 'knowingly false' or 'deliberately false'. A further assertion made in this case by Mr Steedman was a finding that the applicant's member was unable to meet the integrity test necessary to carry out her duties as a PTA which from time to time required Ms Vimpany to issue infringements and where necessary give evidence in court in support of her actions. The applicant submits that the evidence demonstrates that at the time of Ms Vimpany's dismissal the respondent did not have an integrity test and therefore it is impossible for Ms Vimpany to fail to meet the requirements of such a test. There was at the time of Ms Vimpany's dismissal no evidence that she was unable to issue infringements. At the same time there was no evidence that she would not be able to give evidence in court in support of her actions as a PTA. The respondent's findings with respect to the integrity test and their reliance on those findings are baseless and contribute to the decision to dismiss Ms Vimpany as being harsh, oppressive and unfair.

18 One of the terms of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014* (the Agreement) requires that:

> 2.8.22 The type of penalty applied must be proportionate to the conduct which gave rise to the breach of discipline or must be reasonably suitable in consideration of all of the circumstances of the case.

19 Ms Vimpany worked for the respondent for more than eight years and apart from the incident that occurred on 27 April 2013 relating to Mr Hammon and the associated internal processes her employment record was satisfactory.

20 The applicant submitted there were a range of alternative disciplinary options open to the respondent. Each of these options would have been less severe than the decision made by the respondent to dismiss. The alternative options included:

- No penalty being issued at all;
- A reprimand (which may include a final reprimand);
- A permanent or temporary transfer to an another location within the Employer's business or to another employment position within the Employer's business, including a position to which the Agreement does not apply;
- A permanent or temporary demotion or reduction to a lower increment or to a lower grade or position to which the Agreement applies; and/or
- A permanent or temporary demotion to another position to which the Agreement does not apply.

([31] applicant's outline of submissions)

21 In all of the circumstances the applicant submits the decision to dismiss Ms Vimpany was a disproportionate response to the misconduct as found by the respondent.

22 The applicant seeks an order requiring the respondent to reinstate Ms Vimpany into her former position, issuing an order requiring the respondent to recognise her continuity of service; and issuing an order requiring the PTA pay Ms Vimpany the remuneration lost or likely to be lost as a result of the dismissal.

23 In the event the Commission considers that reinstatement or reemployment would be impracticable then the applicant seeks an order that the respondent pay to Ms Vimpany an amount of compensation for loss or injury caused by the dismissal.

Respondent's Outline of Submissions

24 The respondent submitted that Ms Vimpany was employed by the respondent as a PTA. The respondent included a copy of the Job Description Form (JDF) reflecting that under the heading Responsibilities of the position it is made clear that the position carries with it enforcement powers. The sixth and seventh points listed under the heading are duties relating to enforcement concepts. Under the JDF of a PTA they are required to be 'subject to satisfactory integrity and criminal records checks'. It is clear that a PTA may be required from time to time to enforce matters with members of the public such as the payment of fares and enforcement of the law on other areas. Such persons have a higher than normal duty to be honest and trustworthy.

25 It has always been the case that Ms Vimpany has said that in that initial contact Mr Hammon was aggressive and that at the point at which the second contact occurred that Ms Vimpany attempted to raise with Mr Hammon the way that this had made her feel and Mr Hammon was again aggressive. Mr Hammon and others give a different account of the events.

26 The events however of 27 April 2013 have been conclusively determined by Kenner C after a contested hearing, ***ARTBIU v PTA***. Of particular relevance is Kenner C's decision whose findings appear at [36] to [65]:

> [44] As is often the case in matters such as this, Ms Vimpany's version of the events is diametrically opposed to that put by Mr Hammon.
>
> [53] The resolution of the factual contest as to the incident on 27 April 2013 turns on an assessment by the Commission of the credibility of the witnesses who gave evidence in this matter. I have carefully considered all of the oral testimony and the written evidence. I am satisfied that on 27 April 2013 at the Perth Train Station office both Ms Vimpany and Ms Blake entered the office at about 3:15-3:20pm and prepared to leave for the day. Unaware of the prior arrangement with the Station Coordinator on the morning shift, Mr Singh, Mr Hammon questioned Ms Vimpany and Ms Blake and informed them to continue working to their appointed finish time of 4:00pm.
>
> [56] I am therefore satisfied that Ms Vimpany entered the office at around 3:50pm with the purpose of confronting Mr Hammon as to the earlier exchange. I do not accept Ms Vimpany's evidence in chief, to the effect that she did not go looking for Mr Hammon and only went over to him, somewhat incidentally, after sighting him in the office.
>
> [57] In my view, both Ms Vimpany and Ms Blake were upset with Mr Hammon and I accept Mr Pontarolo's testimony, that when she entered the office, Ms Vimpany made a "beeline" for Mr Hammon, largely as described by the Authority's witnesses. I accept that Ms Vimpany did go up behind and to the side of Mr Hammon, and spoke to him in a strong and angry manner whilst pointing her finger at him.

27 Ms Vimpany argued that Mr Hammon had been the aggressor on 27 April 2013. Kenner C found:

> [61] … I am not satisfied that Mr Hammon conducted himself in an intimidating, threatening and aggressive manner as alleged. I am not persuaded that Mr Hammon entered Ms Vimpany's personal space and yelled and screamed at her in the company of the Authority's staff. I am not satisfied that Mr Hammon bullied, harassed or humiliated Ms Vimpany.
>
> [62] On the evidence however, I am satisfied that Ms Vimpany, when she did return to the office shortly prior to 4:00pm on 27 April, did shout at Mr Hammon and did engage with him in an inappropriate manner, pointing her finger at him and at his face whilst leaning over towards him. Such conduct was not appropriate conduct towards a supervisor.
>
> [64] … there was a large gulf in the versions of events between Ms Vimpany and Mr Hammon, and others involved. This is not a case of there being subtle differences in descriptions of events that may be more nuanced in their assessment. Whilst it is possible that Ms Vimpany has, with the passage of time as of now, reconstructed events in her own mind to convince herself that events transpired as she said they did, regrettably, it is also open to conclude, and I do conclude, that both Ms Vimpany and Ms Blake were less than frank in their characterisation of the events which occurred on 27 April 2013, when they were first reported to the Authority, and in the subsequent investigation, earlier in 2013.
>
> [65] Four employees of the Authority, one of whom as I have already mentioned, no longer has any association with it, gave clear and consistent evidence as to the incident on 27 April, quite at odds with that given by Ms Vimpany. Their versions of the events, has been largely consistent, since their first reports in April and May 2013. It is open therefore to conclude, that Ms Vimpany in particular, has demonstrated a lack of candour in relation to these events.

28 The only question remaining for the respondent is whether the accounts given by Ms Vimpany relating to what actually happened on 27 April 2013 were knowingly false or more succinctly, whether it was reasonable for the respondent to conclude they were knowingly false.

29 The respondent submits that the gulf between the truth and Ms Vimpany's accounts must be acknowledged and with respect the possibility that Ms Vimpany was innocently mistaken for whatever reason as to detail must be rejected.

30 The respondent concluded that Ms Vimpany had knowledge that the account she gave was false and it is submitted that in that the following are relevant issues.

- Given the language submitted in the accounts by Ms Vimpany the respondent was able to conclude that Ms Vimpany considered she was telling the truth.
- The accounts were given soon after the event in each case within three months and on each occasion between 14 May 2013 and mid July 2013. From the respondent's point of view the accounts amounted to a course of conduct.
- With respect to the OSH incident report (exhibit A1, tab 8) and also Ms Vimpany's grievance (exhibit A4) Ms Vimpany used internal processes to raise more details associated with the incidents surrounding 27 April 2013. The respondent contends that these were formal and serious processes that were used by the applicant's member.
- The Subsequent response (exhibit A1, tab 11) was prepared by Ms Vimpany following the receipt of 'independent advice'.
- The respondent submits that the language of all the documents relating to the events of 27 April 2013 is clear and assertive.

31 On the face of the documents there is no doubt in the mind of the reader that Ms Vimpany is asserting that she has a clear recollection of the events together with a definite version of what occurred. There is nothing in the documents to suggest that Ms Vimpany's recollection is restricted in any way.

32 The respondent refers to the applicant's reliance on ***Briginshaw v Briginshaw*** (1938) 60 CLR 336. The Full Bench makes reference to the same decision in ***ARTBIU v PTA (FB)*** [50]. The reference by the Full Bench was made in the context of whether Kenner C should have found in the matter before him at first instance that a false account had been given. The Full Bench held that Kenner C had not gone so far as to make such a finding.

33 The matter before the Commission as presently constituted in the view of the respondent is, importantly different to the context in which the issue was considered by the Full Bench. What needs to be considered is whether it was *reasonable for the respondent to conclude that Ms Vimpany had been dishonest.*

34 Ms Vimpany in her role as a PTA had responsibilities and powers to observe the tickets of clients of the Authority. In circumstances where a client is not carrying a valid ticket then she can ask for their name and address and may issue them with an infringement. Ms Vimpany, where a client is uncooperative has the means to call for assistance from personnel in a security capacity with wide coercive powers including the power of arrest. The respondent must have total confidence in the employee concerned. There is enough, in the view of the respondent, if the employer on reasonable grounds has 'lost confidence' in the employee. Relevant decisions in this regard relating to ***Police and PTA Transit Officers*** in the view of the respondent are ***Pantovic v PTA*** [2011] WAIRC 00876 and ***Kelly v PTA*** [2009] WAIRC 00238. The respondent is of the view that the test outlined in each of these decisions is a test that is significantly lower than the test in ***Briginshaw v Briginshaw***.

35 In circumstances where an employee is required to exercise enforcement powers it would be contrary to accepted wisdom to apply a 'high standard of proof' of dishonesty on the part of the employee before the employer can be said to have reasonably lost confidence in the employee.

36 Turning to the question of penalty the respondent submits that if the Commission finds the respondent was reasonably entitled to believe that Ms Vimpany had knowingly given false accounts to the respondent then, the respondent submits that dismissal was clearly within the range of appropriate options open in relation to the matter. Further there is no basis in the view of the respondent, upon which the Commission can or should interfere.

37 Apart from the obvious submission that dishonesty on the part of an employee with enforcement powers in their employment warrants dismissal the following issues are put up as relevant factors in relation to the consideration by the Commission:

(a) It was a continuing course of conduct over a period of months, not a one off incident;

(b) Ms Vimpany actually volunteered two of the false accounts, the HSE Report and the Grievance Document, and accordingly they were calculated and not made in a situation where Ms Vimpany was under pressure of the moment;

(c) The Health and Safety Incident reporting and Grievance Dispute Resolution processes are important, rely on the sincere and will-intentioned participation of employees, and should not be abused or undermined by the make of false reports;

(d) The disciplinary investigation into the incident was designed to get at the truth and employees need to be honest to assist in that process and a failure to do is serious (see *Pantovic* and *Pinker v Director General, Department of Education* **[**2014] WAIRC 01312; and

(e) Ms Vimpany's accounts went beyond a dishonest denial, or even the maintenance of silence, and constituted a positive and self-serving attack upon a fellow employee, Mr Hammon, which could have had serious consequences for his career.

[67] respondent's outline of submissions)

Applicant's Evidence

38 Prior to Mr Rahim giving evidence counsel for the respondent objected to Mr Rahim's evidence being submitted. Counsel for the respondent put that Kenner C has decided what occurred on 27 April 2013 furthermore there are reasons behind the rules of evidence relating to reliability and dependability of evidence. So far as the courts of Australia are concerned is that there is not case where a lie detector test has been accepted as evidence. The Full Court of the Supreme Court of Committal Appeal of Western Australia in the matter of ***Mallard v The Queen*** (2003) 28 WAR 1:

> A party offering novel scientific evidence as expert evidence has the burden of demonstrating that the evidence has been accepted as reliable among impartial evidence. Polygraphic examination had not been accepted to any appreciable extent

as scientifically valid and reliable by members of the psychological and physiological community as to constitute part of a body of knowledge or experience, which was sufficiently recognised to be accepted as a reliable body of knowledge or experience. Nor have polygraphic examinations been shown to have a sufficient scientific basis to render results arrived at by the application of polygraphic technique part of a field of knowledge, which was a proper subject of expert evidence.

39 The respondent relied on the court's findings in that case which remains the leading authority in this State that polygraphic evidence is simply not evidence. Whether someone is telling the truth is ultimately a decision for this tribunal to determine, it is ultimately a decision for the Commissioner. Counsel submitted that even if it were relevant it is not relevant in these proceedings because the false accounts of matters going back related to an incident in April 2013 and subsequent accounts given as part of the investigation into the events of 27 April 2013 which the respondent submits were knowingly false.

40 Counsel for the respondent submitted there were no rules of evidence relied upon necessarily in the Commission and at some stage during these proceedings Mr Steedman would be giving evidence that it was his belief that Ms Vimpany was not telling the truth. Such a point a view was an opinion.

41 In response the Commission noted carefully the argument put by counsel for the respondent indicating the Commission would allow the witness to proceed and accord the relevant weight to his evidence applying the principles reflected in ***Mallard v The Queen*** having regard for the fact that Commissioner Kenner has already determined what occurred on 27 April 2013.

42 Mr Charles Rahim of Cognitive Resolutions gave evidence for the applicant. Mr Rahim advised that he is employed as a polygraph examiner and this involves undertaking standardised programmes and processes in which a polygraph test is conducted which includes undertaking an interview running on three occasions a polygraph test. Throughout the tests the examiner measures blood pressure, respiration as well as skin response. Mr Rahim gave evidence that there are a series of relevant questions asked including the relevant question itself. In this case Ms Vimpany was asked whether she was telling the truth in relation to the statement. Mr Rahim gave evidence that there are also diagnostic questions drawn up to measure the normality of the nerves of the person associated with blood pressure changes and changes in the respiratory and skin responses. In relating to Mr Rahim's background he referred to his certification as a polygraph examiner from a school accredited by the American Polygraph Association given there are no associations of polygraph examiners in Australia the American standards are used. Throughout the world there are 22 schools used to accredit polygraph examiners and Mr Rahim gave evidence that he studied at one of these approved schools some 10 years ago.

43 The tests were carried out on Ms Vimpany back in December 2014. At the time Mr Rahim gave evidence he was here in Perth. The pertinent question asked of Ms Vimpany indicated by way of the polygraph instrument that she was in fact telling the truth.

44 In cross examination counsel for the respondent asked what was the relevant question asked of Ms Vimpany. Mr Rahim responded there are also several other diagnostic questions such as were you born in Australia or do you live in Perth. There are seven questions in all asked around the relevant question.

45 Ms Jennifer Anne Blake gave evidence for the applicant. Ms Blake gave evidence that she is a Customer Service Assistant (CSA) with the respondent having worked there for some nine years. Ms Blake is based on the Joondalup line and she has worked with the respondent for most of the period since she commenced with the exception of about a year. The witness gave evidence that for some period she was classified as a PTA and in that capacity she was required to issue infringement notices though was not required to go to court and give evidence in support of a prosecution. In cross examination Ms Blake did indicate that it may be possible that someone else on her line may have gone to court as a result of issuing infringements.

46 Mr Malcolm William Heatherly gave evidence as a character witness for the applicant having been employed for some eight years with the respondent. His substantive position is as a PTA but is currently acting as a CSA. Mr Heatherly gave evidence that he is currently based on the Joondalup line and works with Ms Vimpany, depending on the roster as often as three times a week sometimes twice a month. The witness has worked for the last eight years with Ms Vimpany.

47 Mr Heatherly gave evidence that Ms Vimpany was recommended for special training which was granted to her because of Ms Vimpany's achievements and knowledge. Mr Heatherly gave evidence that he has been required as a PTA and CSA to issue infringement notices but has never been required to attend court to support such infringements.

48 Mr Robert Charles Hall gave evidence for the applicant. Mr Hall has been employed by the respondent for just over eight years as a PTA. Mr Hall gave evidence that he knows Ms Vimpany very well having worked in the same job and worked together on many stations. Mr Hall gave a character reference for Ms Vimpany based on his experience:

> She's honest, hard-working, very sociable, very good with customers and she's a pleasure to work with.

(ts 36)

49 Mr Hall indicated that Ms Vimpany writes infringements out as other PTA's, handles lost property even where there is a monetary value involved and that Ms Vimpany is trustworthy. Mr Hall has had to issue infringements before but has not had to attend court.

50 In cross examination Mr Hall confirmed that the respondent gave Ms Vimpany credit by asking her to volunteer for a course because of her satisfactory performance.

51 Mr David Roger Scott gave evidence for the applicant. Mr Scott is an employee of the respondent having been employed by the respondent for the last 32 years. For the last 10 years Mr Scott gave evidence he has been employed as a CPA based at Warwick train station on the Joondalup line. Mr Scott gave evidence that Ms Vimpany's professionalism and integrity is beyond reproach. Further evidence was given that as a CPA he is required to issue infringements for parking violations but is not required to go to court to give evidence about infringements.

52 Mr Aleksander Sekulovski gave evidence for the applicant. Mr Sekulovski is an employee of the respondent, employed as a PTA for last seven to eight years and is currently employed on the Joondalup line. In that capacity the witness gave evidence he works shifts from time to time with Ms Vimpany. Mr Sekulovski described Ms Vimpany as an honest person and a good operator as helpful to passengers and co-workers. The witness gave evidence from time to time he issues infringements on behalf of the respondent but had not been required to attend court to in relation to the infringements or indeed for any other matter.

53 In cross examination Mr Sekulovski indicated he had not read Kenner C's decision.

54 Mr John Raymond Noble gave evidence on behalf of the applicant having been employed with the respondent for approximately 24 years. The witness described he knows Ms Vimpany as a PTA and in the course of interacting on the station during a shift both the witness and Ms Vimpany will interact with each other usually every two to three weeks on average depending on the rosters. The witness indicated he always finds Ms Vimpany to be trustworthy and honest and that from time to time he is required to issue infringements but has never attended court in relation to his duties.

55 In cross examination Mr Noble indicated he had not read Kenner C's decision.

56 Mr Mark Peter Counsel gave evidence on behalf of the applicant. Mr Counsel is an employee of the respondent having been employed by the respondent since 1981 and known Ms Vimpany through her work for the last eight years particularly since Ms Vimpany had become a PTA on the Joondalup line. The witness described he had not heard of any issues associated with her and only heard managers describe Ms Vimpany in a positive manner.

57 Ms Helen Angela Martin gave evidence for the applicant. The witness has been employed by the respondent for almost nine years and works with Ms Vimpany on the Joondalup line. The number of times the witness works with Ms Vimpany depends on the roster but the occasions are fairly regular. The witness indicated that Ms Vimpany presented herself in a good light and is always helpful to passengers, has a good rapport with staff and with management. There are incidents where staff are required to deal with members of the public on train stations and Ms Martin indicated that she was aware Ms Vimpany had received some commendations from the respondent. The witness indicated that Ms Vimpany from her point of view is an ethical and honest person.

58 As the affirmative action representative for females in the workplace the witness indicated she was on the customer service consultative committee as a peer support representative. In that capacity Ms Martin gave evidence that she spoke with Ms Vimpany when the workplace issues first arose. This was the day after the incidents on 27 April 2013. Ms Martin gave evidence that she considered Ms Vimpany was concerned about the workplace processes and that Ms Vimpany did not understand what was happening in the workplace. Many women can feel intimidated by the processes. Ms Martin gave evidence that this was a fairly low level dispute at this stage that could easily have been resolved by the respondent by simply bringing both parties together and resolving the matter through discussion. From the witnesses' point of view it seemed that Ms Vimpany considered that the process had become 'quite aggressive' (ts 48) and she did not understand how to handle it. Ms Martin gave the following evidence:

> And one of the matters I did raise was discipline in the workplace and I raised that because staff are very confused by the workplace processes because really they don't have anyone to turn to and they don't have any guidance or direction. And - and from the documentation that I've read through the public sector there - it does lead into describing discipline and a way in which you can get assistance through the workplace. So I had put this on the table because that was the direction really that had been indicated to me that I really should take.
>
> (ts 48)

59 Ms Martin went on to give evidence that in Transperth Train Operations there is not a woman in a position of power that a member of staff could speak to or raise an issue with. Ms Vimpany from my point of view lodged the grievance because she felt there was not anyone to talk to. Ms Martin gave evidence because the workplace was so very male dominated and the processes had become quite aggressive she really did not know who to turn to and that is when the grievance process was raised that hopefully by speaking to a female in the respondent's Peoples Organisational Development (POD) that perhaps some direction could be given to all of this. Ms Martin gave evidence that she contacted Ms Newby by way of email to indicate to her that as the union representative for affirmative action there were some issues in the workplace that Ms Vimpany would like to discuss. Ms Martin in response indicated that she was on extended leave and that Ms O'Callaghan was skilled and able to handle the grievance process and that Ms Newby would forward the information received onto her. Ms Martin indicated that in the email forwarded to Ms Newby she had attached statements from Ms Vimpany and Ms Blake. Ms Martin gave evidence that she was not aware if the outcome was helpful for Ms Vimpany however once the grievance was sent back it was no longer a grievance as the witness understood it, it was sent back to Transperth Perth Trains and from her point of view it was still left unresolved and still remained a problem.

60 At this point counsel for the respondent asked for clarification as to where the questioning was heading with respect to the grievance process asking whether it was to be in terms of procedural fairness submission by counsel for the applicant. In response counsel for the applicant indicated that the evidence was brought forward to indicate that the grievance was not lodged in malice rather to demonstrate that in this case Ms Vimpany had a legitimate grievance rather than lodging a grievance which may have the potential to have a negative effect on another employee (Mr Hammon).

61 Mr Barry Keith Watts gave evidence for the applicant. Mr Watts has been employed with the respondent and its predecessor for some 43 years and has worked with Ms Vimpany for approximately the last seven years. Mr Watts gave evidence he works on a different line namely the Armadale line however on special events over a number of years he has worked with Ms Vimpany, usually a couple of times a year. On those occasions the witness gave evidence he has found Ms Vimpany to be very professional and indeed pleasant in dealing with members of the public and assisting disabled persons.

62 Ms Janet Eileen Vimpany gave evidence as the applicant having been an employee for the respondent for some nine years. She gave evidence she was employed as a PTA based on the Joondalup line and in the period leading up to 27 April 2013 Ms Vimpany has a good repour with management and on her record there were no disciplinary issues to speak of. Ms Vimpany gave evidence that she had always had positive feedback from management during her reviews which occurred on an annual basis.

63 Ms Vimpany was directed to Notification (1) (exhibit A1, tab 7) a memorandum from Mr Gavin Heaysman the Acting Passenger Services Manager on the Joondalup line dated 8 May 2013 [sic]. Ms Vimpany gave evidence that the report came about as a result of Mr Heaysman arriving at Clarkson station and handing the letter to Ms Vimpany. The witness gave evidence that she became really stressed upon reading it and phoned Mr Heaysman who informed her that if you are leaving work you will need to fill out a form. On his advice she rang injury management as she needed someone to speak with. Ms Vimpany gave evidence that at that point she was really stressed and following her conversation with Mr Heaysman she went home and attended her own doctor. Her GP gave Ms Vimpany a certificate and associated medication and Ms Vimpany's partner went to see Mr Heaysman to get the associated paperwork (the OSH incident report). Injury management required the form to be emailed to the respondent. The form that was filled out and ultimately received by the respondent (A1, tab 8) and the details contained in that form were how she felt at the time, this form, in the witness' view reflected her views of what occurred on the day.

64 Ms Vimpany was taken to Ms Vimpany's grievance (exhibit A4) the document she was asked to write immediately following the incident on 27 April 2013. Ms Vimpany is not willing to change her opinion even though Kenner C has made findings in his decision. Her evidence was expressed as:

> --- No – no, that – that – that is the true – truth – the truth of what – the events of the day. That's what happened on that day.
>
> (ts 65)

65 Ms Vimpany then gave evidence that she spoke with Ms O'Callaghan from POD and subsequently had a meeting accompanied by Ms Martin. They advised the witness to write a report of what occurred on the day. The witness took their advice and did that. Accordingly, the Subsequent response was sent to the respondent (exhibit A1, tab 11).

66 Subsequently an interview that took place with Mr Steve McCullaugh, the witness and C Owen in attendance. The interview was typewritten and sent via email to the witness. The Tracked document was reflected at (exhibit A1, tab 13). There were a number of track changes in the document that were inserted by the witness as her own changes. These were changes that were made by Ms Vimpany and where the witness did not agree with comments made by participants in the interview. After the changes had been made Ms Vimpany gave evidence she returned the document to Mr McCullaugh having signed her name as the changes reflecting an accurate record of what had occurred. Ms Vimpany was then referred to exhibit A5 a memorandum to Mr Ian Luff from Mr Steve McCullaugh and she gave evidence that she was taken to the second last page and was asked whether she had seen the results of the investigation carried out prior to the day the respondent dismissed the witness, to which the witness answered in the affirmative.

67 The witness was taken to her JDF at page two at responsibilities of the position:

> To monitor and assist customers entering/leaving stations via fare gates. This duty includes checking validity of tickets, issuing of infringements, providing basis revenue protection and addressing fare evasion.

68 Ms Vimpany in response indicated she had carried out her job with honesty and integrity for the past eight years and there had not been any difference in the manner in which she had carried out her work. Ms Vimpany was able to issue infringements and give evidence in court and tell the truth. The witness had never been counselled or disciplined for anything relating to the issuance of infringements in the past nor about giving evidence in court.

69 Ms Vimpany then gave evidence that she had been awarded a Certificate of Appreciation by Mr Ian Luff and Mr Vince Cianci her managers in recent times for:

> … you went above and beyond the expectation of a Passenger Ticketing Assistant role by assisting to board a group of aged and some with disabilities at Warwick station travelling to Mandurah. The group insisted on travelling on a through service and arriving on platform one, despite the problem with the train control system at the time. Your prompt actions ensured that the group's needs were met and to the extent where a letter of commendation was received. - Congratulations on a job well done.
>
> (exhibit A6)

70 The witness explained that she received further commendations for her work performance at the Perth underground during the Sky Show in 2014 (exhibit A7).

71 In cross examination counsel for the respondent explained that there were principally four documents that the respondent relied on in these proceedings. The first of those related to the OSH incident report (exhibit A1, tab 8). The second document that the respondent relies on is Ms Vimpany's grievance (exhibit A4), namely the witness account of the events as they occurred on Saturday 27 April 2013. The third and relevant matter is the Subsequent response (exhibit A1, tab 11) namely Ms Vimpany's response to Ian Luff sent on Tuesday 11 June 2013. Finally, the Tracked document (exhibit A1, tab 13) the interview statement which includes the typewritten statement of Ms Vimpany, Mr McCullaugh, C Owen and the tracked changes made by Ms Vimpany and returned to reflect what she actually said on the day. These comprise the four accounts. Counsel for the respondent having gone to each of the four documents asked of the witness:

> Now, having gone to each of those do you maintain that each was truthful? --- Definitely. Yes.
>
> (ts 77)

72 The witness explained that she received further commendations for her performance at the Perth underground during the Sky show in 2014 (exhibit A7).

73 Counsel for the respondent having gone to each of the four documents asked of the witness:

> Now, having gone to each of those do you maintain each of was truthful? --- Definitely. Yes.
>
> ...
>
> So you weren't unwell in such a way as to affect your recollection of events, or anything like that at the time of giving any of those accounts?- - -No, not at all.
>
> And you wrote them seeking to be believed in relation to their contents by the reader? - - - Yes.
>
> Okay.
>
> So as far as you're concerned this is – in each of the four cases, "This is my recollection of events. I'm asserting it as the truth and I am asking and hoping that they're believed"? - - - Yes.
>
> And is it fair to say that in each of the four documents in relation to the events on 27 April 2013, Mr Hammon is represented by you as the aggressor in relation to the contact between yourself and him on that day? - - - Yes.
>
> And you are portrayed as the victim of that aggression? - - - Yes.
> And do you maintain that position today? - - - Yes.
>
> (ts 77, 78)

74 Counsel for the respondent took the witness to the OSH incident report (exhibit A1, tab 8) suggesting to Ms Vimpany that it was false to portray Mr Hammon as the aggressor which was denied by the witness.

75 In relation to the second document, that being the Ms Vimpany's grievance submitted to the respondent on 24 May 2013 (exhibit A4) counsel for the respondent suggested to Ms Vimpany that it was false to portray Mr Hammon as the aggressor and Ms Vimpany as the victim of Mr Hammon's aggression. The witness denied that what she had written was a false account and on each occasion where she was required to put a substantive response to the respondent including the Tracked document (exhibit A1, tab 13) where the witness had amended the document though the provision of tracked changes as a result of an interview. Ms Vimpany gave evidence that with the changes made it is a true reflection of what had occurred and she considered the tracked changes reflected an accurate record of what had been said in the interview. The witness rejected the respondent's assertion that the information as provided by the witness was false in that it portrayed Mr Hammon as the aggressor and herself as the victim of the aggression.

> And you don't offer up to the Commission any suggestion, do you that your versions given may have been affected in terms of their dependability or reliability by stress, overwhelmed feelings, intimidation by the employer, or anything else? - - - No. That's a true account. They're all true accounts of what happened on that day.
>
> (ts 79)

76 In re-examination Ms Vimpany indicated to counsel for the applicant that it was never her intention to give any false statements.

Respondent's Evidence

77 Mr Jeffery Charles Steedman, Business Manager, Transperth Train Operations gave evidence for the respondent. Mr Steedman indicated he had been employed by the respondent for some 42 years and has acted in the position of General Manager Transperth Train Operations and in that position dealt with allegations brought against Ms Vimpany.

78 Mr Steedman gave evidence that Ms Vimpany's letter of termination dated 7 October 2014 was signed by himself (exhibit A1, tab 1). Prior to drawing together the correspondence Mr Steedman gave evidence he had a file of relevant background information provided by Mr Farrell the Industrial Relations Manager for the respondent. Mr Steedman indicated that the letter of termination set out in some detail his findings in relation to the allegations against Ms Vimpany together with the reasons for those findings and the determination made by the respondent for the penalty decided ultimately to be imposed on Ms Vimpany.

79 In cross examination Mr Steedman was asked as to whether he had received any training in relation to how to undertake disciplinary investigations and how to make disciplinary findings. The witness indicated the primary issues he was required to consider when reviewing the evidence was to determine whether Ms Vimpany's claims themselves were knowingly false. Mr Steedman gave evidence that he initially reviewed all the primary documentary evidence that had been prepared in the identified bundle. That was undertaken as a first step and when the documents that had been provided were reviewed, a series of notes were made by the witness, some 12 pages in all (exhibit A9). The witness confirmed these were the only notes that he made in conducting the investigation process. The final sentence on page 12 of Mr Steedman's notes reflects:

> On balance Hammon version of events appear to represent what happened on the day given the support from Felix and Fab.
>
> (extract of last paragraph from exhibit A9)

80 Counsel for the applicant suggested to the witness there was nowhere specified in the notes where Mr Steedman dealt with the honesty issue related to Ms Vimpany. Whilst Mr Steedman agreed he had not written it specifically in the notes it was understood at the time when he was making the decision that was what he had to determine.

81 Mr Steedman gave evidence that on a telephone hook-up with Mr Farrell and Ms Annese on 2 or 3 October 2014 there was a discussion regarding a draft letter to Ms Vimpany. In that meeting Mr Farrell reported that he had prepared a draft decision letter based on the notes that the witness had prepared and on the discussion that had occurred the previous day. Mr Steedman gave evidence that he had reached conclusions regarding Ms Vimpany:

> That - um - I'd - um - reached the conclusions that - um - my - the - um - statements - I didn't believe the statements, er, of - um - Jan Vimpany. And that - um - I had - we'd discussed the various penalties as well at some point. I don't know if it was in that specific meeting, but I had had discussions with Richard about under the - um - agreement that CSAs and PTAs are employed with. What they're - what the different disciplinary processes were and - um - given the severity of the - the - um - this - um was dismissal.
> And - so by this point you had decided that you were going to dismiss Ms Vimpany, is that correct? - - - Correct.

(ts 113)

82 The witness was asked whether he wrote the contents of the draft letter. The answer was in the negative. The witness indicated that Mr Farrell gave him the draft letter to enable him to review it and make changes to the correspondence if necessary. The draft letter was identified as exhibit A12. Exhibit A13 indicates that Mr Mark Burgess confirms that Mr Steedman has a continuing delegation to deal with the disciplinary matter relating to Ms Vimpany. Accordingly, there was no need for Mr Italiano to be involved in the investigation or disciplinary process associated with Ms Vimpany even after his return to the position of General Manager. Mr Steedman advised he was however informed of what the witness was doing and the decisions the witness was making.

83 In answer to the question as why Mr Steedman thought Ms Vimpany was being deliberately dishonest Mr Steedman gave the following response:

> I read Ms Vimpany's account, I read Jen Blake's account, I read Felix and Fab and I noticed significant differences between all the versions. Hammon, Fab and Felix's were similar and were at odds with Jan Vimpany's.

(ts 123)

84 The witness was taken to exhibit A1, tab 20 to an interview of Ms Johnstone, Mr Luff and Mr McCullaugh dated 19 July 2013 and informed that Ms Vimpany had given evidence that she had not seen the document prior to the decision being made by the respondent to dismiss her. The witness was asked whether Ms Vimpany had seen this particular document and whether she ought to have had an opportunity to consider such a document prior to her dismissal the witness answered in the negative.

85 Mr Heatherly said in his evidence:

> The special training dealt with special needs children and that Jan went out and gave speeches to the special needs children and introduced them to the system.

(ts 131)

86 Mr Steedman was asked whether he took issue with the evidence of Mr Heatherly and in response he indicated he was not aware of such information. However Mr Steedman found in his review that in investigating Ms Vimpany the respondent considered they could not rely on her to be totally honest in circumstances such as court proceedings.

87 Counsel for the applicant asked the witness:

> In any - in any of the - well, in your opinion, has Ms Vimpany ever lied in court? - - - I don't know.
>
> But you have no reason to believe that she has? - - - I don't know if she's ever gone to court.

(ts 132)

88 Mr Steedman indicated that no one has raised the issue of Ms Vimpany's ability to issue infringements or her ability to give evidence in a court. The witness was asked whether he considered any of Ms Vimpany's performance reviews when was making the decision to dismiss. The answer to this question was in the negative. The witness did not consider performance reviews were relevant to the exercise. The witness's view was to review what happened in the incident on 27 April 2013 and the subsequent documents that were submitted. Nor did Mr Steedman review Ms Vimpany's personnel file before making the decision to dismiss her, nor did the witness consider any commendations or adverse findings that may have been contained in Ms Vimpany's personnel file.

89 Mr Steedman gave evidence he was not aware of any disciplinary action that had been taken with respect to Ms Vimpany prior to making the decision to formally dismiss.

Respondent's Concluding Submissions

90 Counsel for the respondent submitted the basis from which the applicant might succeed if the Commission found that Ms Vimpany had not given false accounts. The first option is no longer available as a result of the Commission's decision on the preliminary matter that was found [2015] WAIRC 00229; (2015) 95 WAIG 371. That is, it is no longer in dispute in these proceedings that Ms Vimpany did give false accounts to her employer about the events as they occurred on 27 April 2013.

91 The second matter is whether it was reasonable or not for Mr Steedman the business manager of the respondent to conclude, following an investigation, that Ms Vimpany has given deliberately false accounts to the respondent. Mr Steedman explained his conclusions and the reasons for them. In his correspondence of 7 October 2014 (exhibit A1, tab 1) the respondent submits the conclusions reached by the witness were open, fair and reasonable. Furthermore Ms Vimpany's version remains the complete opposite to other versions given by persons who had been present on the day including Mr Hammon, Mr Pontarolo and Mr Geson. Counsel for the respondent referred to the findings of Kenner C and in particular [44], [34], [64] and [65].

92 The principle question for the Commission to answer is whether it was reasonable for Mr Steedman on behalf of the respondent to consider that Ms Vimpany had deliberately given false accounts.

93 The respondent considers that Mr Steedman has explained his findings from the investigative process and ultimately the reasons he reached in making the particular findings. There remains an insistence that Ms Vimpany is telling the truth and all others are not. Counsel for the respondent submits it was reasonable for Mr Steedman to have come to the conclusion that he did. The respondent submits that in their view it is almost inevitable, that the Commission as presently constituted would find that Mr Steedman's conclusions were reasonable.

94 Moving to the third matter that is that the applicant may wholly succeed if the process leading to the findings of Mr Steedman were so flawed that as a matter of procedural fairness the Commission would not allow them to stand. In this matter the respondent submits such matters in terms of the process would be required for the purpose of interference to be an absolute mess for the Commission to interfere. In the respondent's view there was simply nothing wrong with the process. In terms of the decision-maker Mr Steedman carefully went through some 12 pages of notes in reviewing the documentation as part of the investigation process in the respondent's view. To undertake such a process was 'thorough' and although Mr Steedman

was assisted by Mr Farrell to do so was typical for decision makers and Mr Steedman was clearly independent and clear thinking as he proceeded through his consideration process.

95 The final matter was that in relation to penalty. The respondent submits that even if the applicant was not wholly successful in other matters it may partially succeed in relation to the issue of penalty. That may be because the Commission may find that dismissal may not be within the range of penalties which the employer could impose. The respondent referred to the decision of ***Minister for Health v Drake-Brockman*** [88]:

> There is no universal or exhaustive list of circumstances of which may constitute harsh, oppressive or unfair dismissal. However, where dishonesty is alleged, such conduct usually falls with the class of conduct which is destructive of mutual trust between an employer and employee that will inevitably result in dismissal.

96 In the same decision a High Court Case of ***Concut Pty Ltd v Worrell*** is then referred to in the decision of Kirby J from that case and is quoted:

> It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily.

97 Counsel for the respondent suggested there could only be interference with the decision made by Mr Steedman on behalf of the respondent if the Commission thought the penalty as determined; that of dismissal, was outside the range of appropriate penalties. Because Ms Vimpany was employed by the respondent with enforcement powers in her JDF she therefore warrants dismissal because:

(a) It was a continuing course of conduct over a period of months, not a one-off incident;

(b) Ms Vimpany actually volunteered two of the false accounts, the HSE Report and the Grievance Document and accordingly they were calculated and not made in a situation where Ms Vimpany was under the pressure of the moment;

(c) The Health and Safety Incident reporting and Grievance Dispute Resolution processes are important, rely on sincere and well-intentioned participation of employees, and should not be abused or undermined by the making of false reports;

(d) The disciplinary investigation into the incident was designed to get at the truth and employees need to be honest to assist in that process and a failure to do is serious (see Pantovic and Pinker v. Director General, Department of Education 2014 WAIRC 01312); and

(e) Ms Vimpany's accounts went beyond a dishonest denial, or even the maintenance of silence, and constituted a positive and a self-serving attack upon a fellow employee, Mr Hammon which could have had serious consequences for his career.

((a) – (e) respondent's opening submissions [67])

Applicant's Concluding Submissions

98 Counsel for the applicant submitted the Commission needs to consider whether it is open on the evidence to conclude whether Ms Vimpany has been deliberately dishonest with the respondent. Mr Steedman was required to review the documents contained in Ms Vimpany's letter of termination (exhibit A1, tab 1) and make a determination about whether the accounts given by Ms Vimpany were false. Counsel for the applicant submits it is unnecessary to make a determination about whether the matters dealt with by Kenner C need to be reconsidered. These are matters already determined. The issue that Mr Steedman was to deal with was whether Ms Vimpany had been deliberately dishonest.

99 The applicant submits that Ms Vimpany did not do that. The applicant submits what was before Mr Steedman and what was reasonable for him to conclude that Ms Vimpany has maintained the same story throughout the proceedings. It has not changed. She believes her version of events. There is no evidence to suggest that Ms Vimpany was in some way 'delusional'.

100 Counsel for the applicant submits that Mr Steedman was not shown the commendations that were given to Ms Vimpany nor did he look at her personnel file to consider what was going on in her employment. Mr Steedman agreed that he had not made an inquiry in relation to Ms Vimpany's performance to determine her status as an employee. Further he had no knowledge as to whether Ms Vimpany had issued infringements in the past nor did he know whether she had given any evidence in court yet he went so far as to make findings that there was an integrity issue associated with Ms Vimpany to the extent she could not issue or be trusted to issue infringements and she could not be trusted to give evidence in court. The applicant considers these findings were not open to Mr Steedman and they were not reasonably open to be made.

101 The test as to whether a decision-maker had reasonable grounds for finding that misconduct actually occurred lies in our view with the sufficient evidence test. That is, the evidence needs to be sufficient to establish for the respondent to conclude that Ms Vimpany was dishonest not just on the day concerned but that she was deliberately trying to be dishonest. In relation to the procedural fairness issue there are two documents the applicant submits that Ms Vimpany was not shown. The first is the statement of Rebecca Johnson (exhibit A1, tab 20). The applicant considers Ms Vimpany should have been given an opportunity to review that document before Mr Steedman made his decision because it is one of the documents that was considered by the respondent before the decision to dismiss was made.

102 Counsel for the applicant submits that the finding that was ultimately made by Mr Steedman and the evidence that was given in the Commission is flawed. Mr Steedman indicated that he has not been trained in disciplinary investigations or how to conduct them. The applicant does not consider that there has been any form of malicious intent by Mr Steedman as he was only in the position for four to five weeks.

103 Turning to the question of penalty Mr Steedman conceded the most severe penalty was dismissal. He neglected to consider Ms Vimpany's past performance which the applicant considered is a relevant factor given she has been employed by the

respondent for some seven to eight years and has a positive employment record. Evidence was given by Mr Steedman that he did not consider that to be particularly relevant and with respect to the submission by the respondent on ***Minister for Health v Drake-Brockman*** such a submission needs to be read in context and that is the ability to summarily dismiss.

104 The applicant submits that there are various degrees of dishonesty and in most of these matters where dishonesty is an issue it is in circumstances where an employer is attempting to protect their businesses from the potential element of shoplifter as an example. With Ms Vimpany is it a very different type of dishonesty that is being alleged. In this case it is that Ms Vimpany was a good operator and the employer was not vulnerable by allowing Ms Vimpany to remain in the workplace. The applicant submitted it was necessary to place this matter and the whole incident into context:

> It was - at the end of the day it was an argument between a manager and an employee that seems to have blown up to unusual proportions where it's already had one set of proceedings, it's had an appeal and now we're here with an unfair dismissal. So all of this arrives - derives from a little spat in the workplace that otherwise in normal circumstances wouldn't have gone anywhere, is something that just happens. People have arguments with their managers and subordinates in the workplace. That is quite common; and voices do get raised from time-to-time.
> So this whole dismissal and - it needs to be looked at in that context as well. This wasn't one where Ms Vimpany was alleged that she was stealing from the employer or committing a fraud or anything along those lines, it was - it arose out of a dispute over what happened in the workplace, a workplace spat and that's where this is distinguishable from what's been talked about in the context of summary dismissal in the Drake-Brockman sense and also dishonesty in the Bi-Lo sense that this is different to that.
>
> (ts 150)

105 The evidence presented in these proceedings was that Ms Vimpany was a good operator. There has been no evidence to the contrary. Commendations have been received in recent years for Ms Vimpany's employment. The applicant submits that the respondent would not be vulnerable if Ms Vimpany was to remain in the workplace. Mr Steedman conceded that the penalty for Ms Vimpany must be proportionate and that the circumstances of Ms Vimpany must be considered when determining the penalty. Counsel for the applicant submits that the decision taken by the respondent to dismiss was not a proportionate response in all of the circumstances particularly given Ms Vimpany's performance in the past, her record of employment and her length of service.

106 Counsel for the applicant submitted that they were seeking reinstatement or alternatively compensation. It is the submission of the applicant that a reprimand would have been adequate in this circumstance.

107 The applicant denied Mr Steedman's notes (exhibit A9) were 'thorough' (ts 152) and in response suggested there were 11 pages of the witness copying what had been contained in the documents for the first 11 pages of his notes then for a single page a conclusion on the first question as to whether Ms Vimpany's accounts had been false.

108 It was put that the Commission needed to make a finding on the evidence contained in exhibit A1 that Ms Vimpany had the intention at the time she put the documents in that is the OSH incident report (exhibit A1, tab 8) and Ms Vimpany's grievance (exhibit A4) to give a deliberately false account. In this context the applicant submitted the test to be supported by ***Briginshaw v Briginshaw*** [50]:

> A finding that a person had formed a state mind to give a false account, or, put another way, had subjectively determined to give a false account is a very serious matter which attracts a high standard of proof.

109 This particular test applies in the Commission and it is the applicant's submission that Kenner C did not make any findings regarding Ms Vimpany having been dishonest.

110 At the conclusion of proceedings counsel for the applicant considered that for the application to fail the Commission would have to find that Ms Vimpany deliberately gave false versions to the respondent.

Commission's Conclusions

Credibility of Witnesses

111 Having heard all of the evidence, the Commission is required to determine witness credibility. The applicant led evidence from Ms Vimpany herself and Mr Charles Rahim a polygraph examiner. The remaining witnesses for the applicant; Ms Jennifer Blake, Mr Malcolm Heatherly, Mr Robert Hall, Mr David Scott, Mr Aleksander Sekulovski, Mr John Noble, Mr Mark Counsel, Ms Helen Martin and Mr Barry Watts in the main appeared as character witnesses on behalf of the applicant. With respect to those persons who gave character references I accept their evidence was given in good faith and was largely unchallenged.

112 With respect to the evidence given by Mr Rahim the Commission has already adopted the view in this matter that Mr Rahim would be accorded the relevant weight applying the principles reflected in ***Mallard v The Queen***. Accordingly, the Commission accords little weight to his evidence. What is also relevant is that the polygraph test given to Ms Vimpany was given some considerable time after the incidents of 27 April 2013.

113 Ms Vimpany in her evidence was insistent and unwavering that her version of the events on 27 April 2013 remains a reality. From the actual day, that being 27 April 2013 through to the OSH incident report (exhibit A1, tab 8), Ms Vimpany's grievance (exhibit A4), the Subsequent response (exhibit A1, tab 11), the Tracked document (exhibit A1, tab 13) and Ms Vimpany's recollection (exhibit A1, tab 3) all the documents are consistent.

114 The Commission observed Ms Vimpany closely throughout the giving of her evidence however rejects that aspect of her evidence that relates to the events of 27 April 2013 and rather considers that with the passage of time that, sadly, for Ms Vimpany she has convinced herself that her version of what occurred on 27 April 2013 has become the reality.

Termination

115 Ms Vimpany's employment was terminated by way of correspondence (exhibit A1, tab1) by Mr Steedman, the business manager of the respondent. Ms Vimpany's dismissal was effective from 5.00 pm Wednesday 8 October 2014 and paid Ms Vimpany five weeks' pay in lieu of notice.

Decision of Kenner C

116 It is conceded by the applicant and the respondent that the findings of Kenner C in ***ARTBIU v PTA*** stand with respect to the events of 27 April 2013. Therefore in terms of Ms Vimpany's account of the events of 27 April 2013 the Commissioner considers it is relevant to consider the relevant findings of Kenner C:

> [44] As is often the case in matters such as this, Ms Vimpany's version of the events is diametrically opposed to that put by Mr Hammon…
>
> [53] The resolution of the factual contest as to the incident on 27 April 2013 turns on an assessment by the Commission of the credibility of the witnesses who gave evidence in this matter. I have carefully considered all of the oral testimony and the written evidence. I am satisfied that on 27 April 2013 at the Perth Train Station office both Ms Vimpany and Ms Blake entered the office at about 3:15-3:20pm and prepared to leave for the day. Unaware of the prior arrangement with the Station Coordinator on the morning shift, Mr Singh, Mr Hammon questioned Ms Vimpany and Ms Blake and informed them to continue working to their appointed finish time of 4:00pm.
>
> [56] … I do not accept Ms Vimpany's evidence in chief, to the effect that she did not go looking for Mr Hammon and only went over to him, somewhat incidentally, after sighting him in the office.
>
> [57] In my view, both Ms Vimpany and Ms Blake were upset with Mr Hammon and I accept Mr Pontarolo's testimony, that when she entered the office, Ms Vimpany made a "beeline" for Mr Hammon, largely as described by the Authority's witnesses. I accept that Ms Vimpany did go up behind and to the side of Mr Hammon, and spoke to him in a strong and angry manner whilst pointing her finger at him…
>
> [61] … I am not satisfied that Mr Hammon conducted himself in an intimidating, threatening and aggressive manner as alleged. I am not persuaded that Mr Hammon entered Ms Vimpany's personal space and yelled and screamed at her in the company of the Authority's staff. I am not satisfied that Mr Hammon bullied, harassed or humiliated Ms Vimpany.
>
> [62] On the evidence however, I am satisfied that Ms Vimpany, when she did return to the office shortly prior to 4:00pm on 27 April, did shout at Mr Hammon and did engage with him in an inappropriate manner, pointing her finger at him and at his face whilst leaning over towards him. Such conduct was not appropriate conduct towards a supervisor.
>
> [64] … there was a large gulf in the versions of events between Ms Vimpany and Mr Hammon, and others involved. This is not a case of there being subtle differences in descriptions of events that may be more nuanced in their assessment. Whilst it is possible that Ms Vimpany has, with the passage of time as of now, reconstructed events in her own mind to convince herself that events transpired as she said they did, regrettably, it is also open to conclude, and I do conclude, that both Ms Vimpany and Ms Blake were less than frank in their characterisation of the events which occurred on 27 April 2013, when they were first reported to the Authority, and in the subsequent investigation, earlier in 2013.
>
> [65] Four employees of the Authority, one of whom as I have already mentioned, no longer has any association with it, gave clear and consistent evidence as to the incident on 27 April, quite at odds with that given by Ms Vimpany. … It is open therefore to conclude, that Ms Vimpany in particular, has demonstrated a lack of candour in relation to these events.

Documentation

117 Documents play a crucial role in these proceedings and therefore it is considered important that each document be clearly identified both for the purposes of understanding which documents were reviewed by Mr Steedman in the investigation process. The documents that are of particular relevance are as follows:

(a) Notification (1)

Mr Gavin Heaysman, acting passenger services manager on the Joondalup line on 8 May 2013 [sic] notified Ms Vimpany pursuant to subclause 2.6.2 of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011*.

A response required Ms Vimpany describe her conduct in the workplace on 27 April 2013.

(exhibit A1, tab 7)

(b) Initial response

Ms Vimpany responded on 17 May 2013 with a two line memo.

(exhibit A1, tab 9)

(c) Subsequent response

Ms Vimpany's response to the allegation was sent, dated 11 June 2013 and forwarded same to Mr I Luff and Ms K Callaghan.

(exhibit A1, tab 11)

(d) OSH incident report

Dated 14 May 2013 forwarded by Ms Vimpany with respect to the events of 27 April 2013.

(exhibit A1, tab 8)

(e) Ms Vimpany's grievance

Forwarded from Ms Martin on behalf of Ms Vimpany to the respondent on 24 May 2013 in the form of a grievance relating to the events of 27 April 2013.

(exhibit A4)

(f) Tracked document

Typewritten notes of an interview between Ms Vimpany, Mr McCullaugh and C Owen of 15 July 2013. The tracked changes were amendments inserted by Ms Vimpany to appropriately reflect the truth as she considered it to be.

(exhibit A1, tab 13)

(g) Explanation required

A response sent by Mr I Luff, manager, customer service on 23 September 2013 to Ms Vimpany requiring her response to the respondent's view that she knowingly gave a false account of Mr Hammon's actions of 27 April 2013, and provided a similar false account in support of a grievance of 24 May 2013 and made a false allegation on 14 May 2013 in relation to an OSH incident report.

(exhibit A1, tab 2)

(h) Notification (2)

Correspondence from Mr Luff dated 11 August 2014 to Ms Vimpany providing her with a final opportunity to respond to the allegation and on any issue associated with penalty. Ms Vimpany was advised that her response should be in writing addressed to the general manager and submitted by 5.00 pm on Monday, 25 August 2014. Ms Vimpany was stood down on full pay until such time as the General Manager's decision had been made. Furthermore Ms Vimpany was also advised that 2.6.6 of the discipline provisions of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011* provides that:

> After considering any explanation provided by the employee, the Chief Executive Officer may either decide to take no further action or may arrange to carry out further investigations.

(exhibit A1, tab 37)

(i) Ms Vimpany's recollection

Correspondence sent by Ms Vimpany dated 29 August 2014 to Mr Italiano the general manager of Transperth train operations. The correspondence indicates Ms Vimpany did not at any stage give any false accounts of the events of 27 April 2013 and further she understands the seriousness of lodging grievances and OSH reports.

(exhibit A1, tab 3)

(j) Ms Vimpany's response

Correspondence from Ms Vimpany dated 27 September 2013 the purpose of which was to provide a response to allegations of inappropriate conduct made by the respondent. Ms Vimpany rejected the allegations as made and outlined in some detail her reasons, including the view that 'the fact is little weight should be placed on the investigation process as a whole, given management throughout the Authority were actively conspiring to gather evidence to discipline me.'

(exhibit A1, tab 14)

(k) Ms Vimpany's letter of termination

Dated 7 October 2014. The letter was written by Mr Steedman.

(exhibit A1, tab 1)

Principal Tasks

118 In the remaining matters before the Commission the principal tasks for determination are:

- having undertaken a review of relevant materials associated with the investigation into Ms Vimpany were there reasonable grounds for Mr Steedman to consider Ms Vimpany was guilty of the misconduct as alleged. In other words, had Ms Vimpany continued to deliberately give false versions of the incident on 27 April 2013 to the respondent;
- in the process of investigating the misconduct as alleged by the respondent was the conduct by the respondent procedurally fair; and
- was the penalty of dismissal as determined by the respondent a proportionate or disproportionate response?

Procedural Fairness

119 In considering the question of procedural fairness the applicant questioned the ability of Mr Steedman to conduct the investigation, suggesting his lack of training and limited time acting in the position of general manager Transperth train operations had meant the review of the information was undermined. Furthermore, counsel for the applicant raised two documents that had not been seen by Ms Vimpany prior to her dismissal, one of which was (exhibit A1, tab 20) suggesting the investigation may have been procedurally unfair as a result of the omission. The second document was not named by the applicant. Referring to (exhibit A1, tab 20) the document is the transcript of an interview:

Did you overhear any part of the conversation between Dave Hammon and Jan Vimpany.

> When I walked into the office to finish up I could hear raised voices but all I remember hearing was Dave say "just go" and one of them said something like "write me up" or words to that effect. I think that they were both standing up at the time.
>
> I cannot be sure but that is what I think happened, I only came into the office at the end of the conversation and can vaguely remember it.
>
> This account is a true and correct account to the best of my knowledge.
>
> (Signed)
> R. Johnston
>
> (p 113)

120 The Commission has had regard for the exhibit identified by the applicant and the fact that this was not seen by Ms Vimpany prior to her dismissal. In the overall context of the documentation considered by the respondent (exhibit A9) the Commission considers that the exclusion of exhibit A1, tab 20 has not compromised the relevancy of procedural fairness as to what was reasonable in the circumstances. The respondent is not required to investigate alleged misconduct '*at large*'. The failure of the respondent to provide exhibit A1, tab 20 to Ms Vimpany prior to her dismissal has not in the view of the Commission compromised the fairness of the procedure.

121 In ***Minister for Health v Drake-Brockman*** the Full Bench considered the type of investigation an employer should conduct in matters such as this [107-110]:

> The principles enunciated in ***Bi-Lo*** and in ***Sangwin*** establish that a 'full and extensive investigation' by an employer is to be conducted. Such an investigation is one that entails an investigation of relevant matters surrounding the alleged misconduct that is reasonable in the circumstances. An employer is not required to investigate alleged misconduct 'at large'. What should drive an investigation that meets this duty is the gathering of any information that is available that is centrally relevant to whether the employee in question has engaged in conduct that can be characterised as misconduct.
>
> When conducting an investigation, employers are not required to have the skills of police investigators or lawyers, but instead should only be expected to operate in a practical way in a commercial and industrial environment: ***Schaale v Hoescht Australia Ltd*** (1993) 47 IR 249, 252; ***Heard v Monash Medical Centre*** (1996) 39 AILR ¶3-203 and ***Amin v Burswood Resort Casino*** (1998) 78 WAIG 2441, 2442.
>
> Whilst an employer must ensure that an employee is given detailed particulars of the allegations, an opportunity to be heard in respect of the allegations and an opportunity to bring forward any witnesses he or she may wish to answer, an employer is not bound to investigate every avenue that may be suggested to him or her. An employer is only required to act fairly and reasonably in the circumstances and gather relevant information that is critical to the issue whether the alleged conduct occurred.
>
> Except if a departure results in actual unfairness, a decision-maker is not bound by any principle of procedural fairness to adhere to a statement of intention as to the procedure to be followed in an investigation. In ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*** [2003] HCA 6; (2003) 214 CLR 1, a departmental officer who was considering whether to recommend that Lam's visa be cancelled wrote a letter to Lam requesting contact details for the carer of Lam's children and said he wished to contact the carer to assess the impact that cancellation would have on the children. Lam provided the details but no contact by the department was made with the carer. The High Court held:
>
> (a) When a public authority represents that a particular procedure will be followed that may, but will not necessarily, affect the content of the requirements of procedural fairness;
>
> (b) To establish a breach of procedural fairness it must be demonstrated that the procedure adopted was unfair, not that an expectation engendered by a representation has been disappointed.

122 The Commission finds that in investigating the misconduct alleged by the respondent the procedure adopted by the respondent was fair and reasonable in the circumstances; Ms Vimpany was provided with:

- details of the contentions;
- an opportunity to respond to the employer, in particular Ms Vimpany was sent:
  - Notification (1) (exhibit A1, tab 7);
  - Explanation required (exhibit A1, tab 2) and
  - provided with the opportunity to amend the interview as per the Tracked document, (exhibit A1, tab 13).

Penalty

123 The issue of penalty was one of the remaining matters to be considered. One of the terms of the Agreement submitted by the applicant was drawn from the 2014 Agreement, an agreement that did not apply at the time of Ms Vimpany's dismissal. The relevant aspect relating to penalty is drawn from the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2011* and in particular clause:

> 2.6.9 After giving the employee a reasonable opportunity to be heard the Chief Executive Officer will determine the matter including penalty. The employee shall be given prior written notice of such intended action, stating the reason for the action being taken.

124 The applicant submitted there were a range of alternative disciplinary options open to the respondent. Each of these options would have been less severe than the decision made by the respondent to dismiss. The Commission has drawn the alternative options included:

> 2.6.10 The Chief Executive Officer may apply any of the following remedies:
>
> a) a reprimand;

b) a transfer within the Employer;

c) a reduction in grade; or

d) dismissal.

125 The decision to dismiss Ms Vimpany was, in the view of the applicant, a disproportionate response to the misconduct as found by the respondent. The applicant seeks an order requiring the respondent reinstate Ms Vimpany into her former position, requiring the respondent to recognise her continuity of service and requiring the respondent pay Ms Vimpany the remuneration lost or likely to be lost as a result of the dismissal or alternatively that the respondent pay to Ms Vimpany an amount of compensation for loss or injury caused by the dismissal.

126 The respondent considers that dismissal was within the scope of matters available on penalty having undertaken a full and proper investigation. Further, the respondent suggests the Commission had no basis on which it could interfere with the respondent's decision if the Commission considers the investigation was reasonably thorough in the circumstances.

127 The Commission is of the view that given the period of time over which false allegations were made by Ms Vimpany the penalty of dismissal is proportionate to the allegations as committed. In addition, failure to be honest in an investigation process is considered serious ***Pinker v Director General, Department of Education*** [2014] WAIRC 01312.

Summary

128 In conclusion, the Commission is not of the opinion that Ms Vimpany was harshly or unfairly dismissed. In making this decision the Commission has taken into account:

- aspects of Ms Vimpany's JDF as a PTA. In particular, the responsibilities of the position which require her to:

  > Monitor and assist Customers entering/leaving stations via fare gates. This duty includes checking validity of tickets, issuing of infringements, providing basic revenue protection and addressing fare evasion.
  >
  > (exhibit A1, tab 41)

- Much was made of the integrity test particularly by the applicant's counsel. It was submitted at the time of Ms Vimpany's dismissal no such test existed and therefore it is impossible for Ms Vimpany to fail to meet the needs of such a test. The Commission finds that Ms Vimpany in her position as a PTA is expected to undertake enforcement skills as part of the responsibilities of the position of a PTA.

- the continuing insistence by Ms Vimpany that she remains the victim and Mr Hammon the aggressor. Ms Vimpany continues to hold the view that Mr Hammon was the individual displaying antagonistic behaviours on 27 April 2013. This is in spite of the findings by Kenner C in ***ARTBUI v PTA*** and the view now held by the applicant regarding the Kenner C's findings:

  > The second thing was to make a determination about whether the accounts were false, which have been dealt with by Commissioner Kenner, it is not in dispute in these proceedings. We're not going there and we're not - we have no intention of going there; never did. I know my learned friend said it's no longer a string in our bow, but it never was a string in our bow because we - at no point have we argued that the Commission should be looking to overturn the findings made by Commissioner Kenner or anything along those lines.
  >
  > (ts 145)

- Ms Vimpany in response to questioning from the respondent's counsel continues to insist she remains the victim and Mr Hammon the aggressor (ts 77,78);
- persons classified as a PTA have a higher than normal duty to be honest and trustworthy; and
- that the respondent on reasonable grounds 'lost confidence' in the employee.

129 Having regard for:

- Ms Vimpany's grievance (exhibit A4) dated 24 May 2013 forwarded by Ms Martin on behalf of Ms Vimpany with respect to the events of 27 April 2013;
- OSH incident report (exhibit A1, tab 8) dated 14 May 2013 forwarded by Ms Vimpany with respect to the events of 27 April 2013;
- Subsequent response (exhibit A1, tab 11) Ms Vimpany's response to the allegation of the incidents on 27 April 2013, dated June 11 2013;
- Tracked document, notes of an interview between Ms Vimpany, Mr McCullaugh and C Owen of 15 July 2013 which inserted amendments by Ms Vimpany to appropriately reflect the truth as she considered it to be (exhibit A1, tab 13); and
- Ms Vimpany's recollection (exhibit A1, tab 3) dated 29 August 2014, as sent to Mr Italiano.

The Commission finds the views contained overall in the aforementioned documents relating to the two incidents on 27 April 2013 establish a course of conduct on the part of Ms Vimpany.

130 The language used by Ms Vimpany is clear. Ms Vimpany states her memory of what occurred is clear and the Commission finds overall there was nothing to impair Ms Vimpany's judgement on the separate occasions she was required to recount events or indeed chose to submit her own views as to what occurred on 27 April 2013. The Commission is not of the view there was anything amiss that may have affected the reliability of the versions that were given on each occasion. The Commission is therefore of the view that the respondent was reasonably entitled to ground the view that Ms Vimpany had given false accounts and had done so knowing them to be false.

131 The Commission considers that having undertaken a review of relevant materials associated with the investigation into Ms Vimpany, there were reasonable grounds for the respondent to consider Ms Vimpany was guilty of the misconduct as alleged. The review was thorough, detailed and just according to the circumstances. Mr Steedman was briefed by personnel within

the respondent's organisation on the task required and based on his evidence he carefully weighed up the statements from Mr Geson, Mr Pontarolo, Ms Vimpany and Mr Hammon. Furthermore, Mr Steedman understood clearly the task he was required to determine that being to conclude whether Ms Vimpany had given false accounts knowing them to be false. The Commission determines the fact that Mr Steedman did not write the answer to that question in his notes is irrelevant as he clearly understood the task he was required to complete when giving evidence.

132 It was said in ***Minister for Health v Drake-Brockman*** *[60]*:

> Considerations going to the interests of both employer and employee are part of the requirement at law, that in assessing whether a dismissal is unfair, the Commission is to have regard to the principle of a fair go all round, that is fairness to the interests of the employer and employee. Pursuant to s 26(1)(c) of the Act, the Commission is also required to have regard to the interests of persons immediately concerned whether directly affected or not and, where appropriate, the interests of the community as a whole.

133 The Commission has had regard for this matter in accordance with s 26(1)(c) of the Act and having found that the investigation conducted by Mr Steedman on behalf of the respondent was thorough the Commission notes that if there had been any error on Mr Steedman's part it was a failure to take into account those circumstances relating to Ms Vimpany's work history, her years of service and the record contained within her personnel file. However, that failure did not of itself result in Ms Vimpany being treated harshly, oppressively or unfairly by the respondent in its ultimate decision to terminate her employment.

134 In all of the circumstances the Commission is not satisfied that the respondent failed to provide Ms Vimpany with a fair go.

135 Accordingly the Commission will issue an order dismissing the application.

2015 WAIRC 00389

DISPUTE RE ALLEGED DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH
	APPLICANT
	-v-
	THE PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	MONDAY, 18 MAY 2015
FILE NO/S	CR 32 OF 2014
CITATION NO.	2015 WAIRC 00389

Result	Application dismissed
Representation	
Applicant	Mr C Fogliani (of counsel)
Respondent	Mr D Matthews (of counsel)

Order

HAVING HEARD Mr Cory Fogliani (of counsel) of behalf of the applicant and Mr Damian Matthews (of counsel) on behalf of the respondent, the Western Australian Industrial Relations Commission (the Commission) pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, (the Act) hereby orders –

THAT the application be, and is hereby dismissed.

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

2015 WAIRC 00420

DISPUTE RE CLASSIFICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	UNITED VOICE WA
	APPLICANT
	-v-
	THE DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	WEDNESDAY, 3 JUNE 2015
FILE NO/S	CR 51 OF 2012
CITATION NO.	2015 WAIRC 00420

Result	Adjourned sine die
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr D Matthews (of counsel)

Order

This matter having come on for mention hearing on 3 June 2015, and having heard Mr S Millman (of counsel) on behalf of the applicant and Mr D Matthews (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT application CR 51/2012 be adjourned sine die.

(Sgd.) S M MAYMAN,
Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties		Commissioner	Conference Number	Dates	Matter	Result
State School Teachers' Union of W.A. (Incorporated)	Director General, Department of Education	Scott A/SC	C 37/2014	3/02/2015	Dispute re Teachers (Public Sector Primary and Secondary Education) Award 1993	Concluded
The Civil Service Association of Western Australia Incorporated	Commissioner of Police, WA Police Service	Kenner C	PSAC 19/2014	20/08/2014 2/09/2014 19/11/2014	Dispute re implementation of re-organisation of operations	Discontinued
The State School Teachers' Union of Western Australia (Inc)	Ms Sharyn O'Neill, Director-General Department of Education	Scott A/SC	C 7/2015	N/A	Dispute re salary of union member	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—

2015 WAIRC 00437

INTERPRETATION OF CLAUSE15 (4)(B) OF THE DEPARTMENT OF HEALTH MEDICAL PRACTITIONERS (METROPOLITAN HEALTH SERVICES) AMA INDUSTRIAL AGREEMENT 2013

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	DEPARTMENT OF HEALTH
	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	FRIDAY, 12 JUNE 2015
FILE NO/S	APPL 110 OF 2015
CITATION NO.	2015 WAIRC 00437

Result	Name of respondent amended
Representation	
Applicant	Mr S Bibby
Respondent	Mr D Matthews of counsel

Order

WHEREAS this is an application for interpretation pursuant to Section 46 of the *Industrial Relations Act 1979*; and

WHEREAS on the 19th day of May 2015 the respondent filed a Form 5 – Notice of answer providing the correct title of the respondent as "Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 as the Metropolitan Health Service"; and

WHEREAS at a conference convened by the Commission on the 9th day of June 2015 the applicant agreed to the name of the respondent being amended;

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

THAT the name of the respondent in the application be amended to "Minister for Health in his incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 as the Metropolitan Health Service".

(Sgd.) P E SCOTT,
[L.S.] Acting Senior Commissioner.

2014 WAIRC 00983

DISPUTE RE IMPLEMENTATION OF RE-ORGANISATION OF OPERATIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED
	APPLICANT
	-v-
	COMMISSIONER OF POLICE, WA POLICE SERVICE
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	TUESDAY, 2 SEPTEMBER 2014
FILE NO.	PSAC 19 OF 2014
CITATION NO.	2014 WAIRC 00983

Result	Directions issued
Representation	
Applicant	Mr K Rukunga
Respondent	Mr T Clark

Directions

WHEREAS by an application filed on 19 August 2014 an urgent compulsory conference under s 44 of the Industrial Relations Act 1979 was listed in relation to a dispute regarding the implementation of the reorganisation of the WA Police Service;

AND WHEREAS the Arbitrator convened an urgent compulsory conference at 2.15pm on 20 August 2014. At the conference, the Arbitrator was informed by the Association that there were concerns about the content and timing of letters to eleven employees regarding the abolition of their substantive positions, procedures in relation to classifications, and the Association's attendance at consultation meetings, arising from the WA Police Service's "Frontline 2020" reform programme. As a result of the compulsory conference the parties were directed to confer;

AND WHEREAS as a consequence of the matters raised before the Arbitrator, and as directed, the parties conferred on 21 August 2014 and a range of issues were discussed concerning staffing implications of the Reform, affecting the Association's members;

AND WHEREAS on 28 and 29 August 2014 the WA Police Service raised concerns about matters relating to the Reform, including material provided to the Association in good faith, and matters that were raised at the conciliation conference on 20 August 2014, being disclosed to the media and requested that the Arbitrator convene an urgent compulsory conference on 29 August 2014;

AND WHEREAS despite the best efforts of the Associate to the Arbitrator, the relevant officers from the Association were unable to be contacted on 29 August 2014;

AND WHEREAS on 31 August 2014 "The Sunday Times" published an article titled "Key police jobs to go" which discussed the Reform, the abolition of positions, notification and consultation matters, and referred to internal briefing documentation;

AND WHEREAS the urgent compulsory conference was relisted on 2 September 2014 at 2.15pm. At the conference the WA Police Service raised serious concerns in relation to the publication of the "The Sunday Times" article and that information contained in it was not only general, but related to specific unnamed individuals in specific positions affected by the reforms and issues that had been canvassed in the compulsory conference on 20 August 2014. The WA Police Service also submitted that it had provided the Association with a considerable amount of material, including internal documents, in good faith, relation to the Reform as part of its consultation with the Association;

AND WHEREAS the WA Police Service further informed the Arbitrator that it was contacted by "The Sunday Times" for a response. The WA Police Service said that the newspaper confirmed that the Association had provided it with information about the Reform. The Association denied that it had been providing information to the media;

AND WHEREAS the WA Police Service also submitted that issues raised in the "The Sunday Times" had not been directly raised with it; that the newspaper article was creating uncertainty with employees; and that the WA Police Service's trust and confidence in the consultation process with the Association was being eroded;

AND WHEREAS the Arbitrator notes that by s 44(5) of the Act compulsory conferences are to be held in private unless the Arbitrator considers that the objects of the Act would be better served by holding the conference in public, which it does not consider would be the case in these proceedings;

AND WHEREAS the Arbitrator formed the view that the matters raised by the WA Police Service will have the effect of causing a deterioration in industrial relations between the parties, as exchanging or divulging attitudes or information and the full and frank disclosure of information is important in the context of the present dispute;

NOW THEREFORE the Arbitrator, having regard for the public interest and the interests of the parties directly involved, pursuant to the powers vested in him under s 44 of the Act and in particular s 44 (6)(b) hereby makes the following directions –

(1) THAT neither party, through their employees, servants or agents, disclose to media outlets, matters discussed in prior or future compulsory conferences arising out of or in connection with application PSAC 19 of 2014.

(2) THAT if any media outlet contacts either party to these proceedings that party inform the media outlet of this direction of the Arbitrator and inform the other party and the Associate to the Arbitrator that contact by a media outlet has been made.

(3) THAT the parties have liberty to apply on short notice.

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

2015 WAIRC 00432

DISPUTE RE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	AUSTRALIAN MEDICAL ASSOCIATION (WA) INCORPORATED
	APPLICANT
	-v-
	THE MINISTER FOR HEALTH
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	TUESDAY, 9 JUNE 2015
FILE NO.	PSACR 20 OF 2013
CITATION NO.	2015 WAIRC 00432

Result	Directions issued
Representation	
Applicant	Ms D Webb of counsel
Respondent	Mr D Matthews of counsel

Direction

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS the Public Service Arbitrator (the Arbitrator) convened a number of conferences for the purpose of conciliating between the parties and at a further conference convened on the 19th day of May 2015 the applicant requested that the application be referred for hearing and determination; and

WHEREAS at that conference the applicant provided a draft Minute of Consent Orders to be issued for the preparation of the hearing of the matter and the Arbitrator heard from the parties; and

WHEREAS the Arbitrator formed the opinion that the issuing of Directions will assist in the conduct of the hearing of the matter;

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

1. THAT the applicant file and serve any witness statements constituting the whole of the evidence in chief of the witnesses on which it intends to rely within 14 working days of the completion of discovery by both parties.

2. THAT the respondent file and serve any witness statements constituting the whole of the evidence in chief of the witnesses on which it intends to rely within 7 working days of the filing of the applicant's witness statements.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Dental Officers Industrial Agreement 2014 PSAAG 4/2015	(Not applicable)	The Minister for Health in his incorporated capacity under s.7 of the Hospital and Health Services Act 1927 (WA) as the Hospitals formerly comprised in the Metropolitan Health Service Board	The Civil Service Association of Western Australia Incorporated	Acting Senior Commissioner P E Scott	Agreement registered

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Workers' Union (Western Australian Public Sector) General Agreement 2015 AG 6/2015	18/05/2015	Director General, Department of Agriculture and Food Western Australia and Others	The Australian Workers' Union, West Australian Branch, Industrial Union of Workers	Commissioner J L Harrison	Agreement registered
Main Roads – CSA – Enterprise Agreement 2015 PSAAG 3/2015	9/06/2015	Commissioner of Main Roads, Main Roads Western Australia	Civil Service Association of Western Australia Incorporated	Commissioner S J Kenner	Agreement registered
Main Roads APEA Enterprise Bargaining Agreement 2015 PSAAG 2/2015	9/06/2015	The Association of Professional Engineers, Australia (Western Australian Branch), Commissioner of Main Roads, Main Roads Western Australia	(Not applicable)	Commissioner S J Kenner	Agreement registered
Main Roads AWU Enterprise Bargaining Agreement 2015 AG 8/2015	9/06/2015	The Australian Workers' Union West Australian Branch, Commissioner of Main Roads, Main Roads Western Australia	(Not applicable)	Commissioner S J Kenner	Agreement registered
Main Roads TWU Enterprise Agreement 2015 AG 7/2015	9/06/2015	The Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch, Commissioner of Main Roads, Main Roads Western Australia	(Not applicable)	Commissioner S J Kenner	Agreement registered

PUBLIC SERVICE APPEAL BOARD—

2015 WAIRC 00256

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 5 SEPTEMBER 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SIMONE PHASEY

APPELLANT

-v-

THE HONOURABLE BARRY HOUSE MLC, PRESIDENT OF THE LEGISLATIVE COUNCIL

RESPONDENT

CORAM PUBLIC SERVICE APPEAL BOARD
COMMISSIONER S J KENNER - CHAIRMAN
MR G BROWN - BOARD MEMBER
MS C SULLIVAN - BOARD MEMBER

DATE MONDAY, 30 MARCH 2015

FILE NO PSAB 12 OF 2014

CITATION NO. 2015 WAIRC 00256

Result Application discontinued

Representation

Appellant Mr C Fogliani

Respondent Mr R Andretich

Order

WHEREAS the applicant sought and was granted leave to discontinue the application, the Board, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby discontinued by leave.

(Sgd.) S J KENNER,
Commissioner.
[L.S.] On behalf of the Public Service Appeal Board.

RECLASSIFICATION APPEALS—

2015 WAIRC 00407

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES LINDA PALUMBO

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
ACTING SENIOR COMMISSIONER P E SCOTT

DATE WEDNESDAY, 27 MAY 2015

FILE NO PSA 3 OF 2007

CITATION NO. 2015 WAIRC 00407

Result Application dismissed

Order

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

WHEREAS on the 21st day of May 2015 the applicant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

2015 WAIRC 00419

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES SARAH SILVER

APPLICANT

-v-

DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE EMPLOYER

RESPONDENT

CORAM PUBLIC SERVICE ARBITRATOR
COMMISSIONER S M MAYMAN

DATE TUESDAY, 2 JUNE 2015

FILE NO PSA 101 OF 2013

CITATION NO. 2015 WAIRC 00419

Result Application dismissed

Order

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

WHEREAS on the 29 May 2015 the applicant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this application be, and is hereby dismissed.

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

2015 WAIRC 00406

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JENNIFER MAREE STOWELL
	APPLICANT
	-v-
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITAL AND HEALTH SERVICES ACT 1927 AS THE METROPOLITAN HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	ACTING SENIOR COMMISSIONER P E SCOTT
DATE	WEDNESDAY, 27 MAY 2015
FILE NO	PSA 2 OF 2007
CITATION NO.	2015 WAIRC 00406
Result	Application dismissed

Order

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

WHEREAS on the 21st day of May 2015 the applicant filed a Notice of Discontinuance in respect of the appeal;

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

THAT this application be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
[L.S.] Public Service Arbitrator.

OCCUPATIONAL SAFETY AND HEALTH ACT—Matters Dealt With—

2015 WAIRC 00397

REVIEW OF IMPROVEMENT NOTICES

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

CITATION	**:**	2015 WAIRC 00397
CORAM	**:**	COMMISSIONER S M MAYMAN
HEARD	**:**	TUESDAY, 20 JANUARY 2015, TUESDAY, 27 JANUARY 2015, WEDNESDAY, 11 MARCH 2015, MONDAY, 18 MAY 2015
DELIVERED	**:**	MONDAY, 25 MAY 2015
FILE NO.	**:**	OSHT 3 OF 2014
BETWEEN	**:**	REECE PTY LTD
		Applicant
		AND
		THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER Respondent

CatchWords	:	Occupational health and safety laws (WA) – Notice referred for further review by Occupational Safety and Health Tribunal s 51A - Nature of inquiry by WorkSafe Western Australia Commissioner - Interpretation of s 51A(5) – Relevant principles applied when carrying out an inquiry - Technical issues - Occupational Safety and Health Tribunal – WorkSafe Commissioner's s 51 notice revoked – Inspector's improvement notices cancelled.
Legislation	:	*Occupational Safety and Health Act 1984* (WA) s 48(1)(a), s 48(1)(b), s 51, s 51A(1), s 51A(5)(a),(b) and (c), s 51I
Result	:	Order issued revoking WorkSafe Commissioner's s 51 notices – Inspector's improvement notices cancelled

Representation:

Counsel:		
Applicant	:	Ms M Saraceni and Ms L Petersen (both of counsel)
Respondent	:	Ms A Crichton-Browne (of counsel)

Case(s) referred to in reasons:

Cummins v MacKenzie [1979] 2 NSWLR 803

Reece Pty Ltd v The Worksafe Western Australia Commissioner [2015] WAIRC 00057; (2015) 95 WAIG 306

Wayne Vigar v WorkSafe Western Australia Commissioner [2005] WAIRC 01869; (2005) 85 WAIG 2068

Reasons for Decision

Background

1 On 24 December 2014, Reece Pty Ltd (Reece) lodged a Form 7 – Notice of Referral to the Occupational Safety and Health Tribunal (the Tribunal) in the Registry of the Commission. The purpose of the referral was then described as:

> An application to review Improvement Notices 9000627 [sic], 90006228 and 90006235 pursuant to s.51A of the *Occupational Safety & Health Act 1984(Act)*.

2 Attached to the referral was a one page schedule of the grounds upon which the referral was then made. When the matter was first referred, there was a preliminary hearing before Beech CC. Reasons for decision were issued in ***Reece Pty Ltd v The Worksafe Western Australia Commissioner*** [2015] WAIRC 00057; (2015) 95 WAIG 306. A declaration and order was issued in the same matter ([2015] WAIRC 00133; (2015) 95 WAIG 313) on 4 February 2015. The Improvement Notices 90006227, 90006228 and 90006235 (the Notices) were provided together with the applicant's referral to the Tribunal:

Occupational Safety and Health Act 1984 (Section 48)

Improvement Notice

90006227

Issued to:
REECE PTY LTD
REECE PLUMBING
11 PACKARD ST JOONDALUP 6027

1. In relation to: inappropriate workplace culture and behaviour
at 11 PACKARD ST JOONDALUP 6027 on 24 Oct 2014
I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are:
See attached Improvement Notice
You are required to remedy the above by no later than 12 Dec 2014 at 1700 hours.
2. You are directed to take the following measures: see attached improvement notice
…

Received by Bob Johnson Position Regional Manager Date 27/10/2014

Signature of recipient [signature omitted] Time (24hr) 08:00

Workplace contact name Contact phone no. [number omitted]

Inspector MOTT, HELEN 484Signature [Signature omitted]

This notice, or a copy of it, must be displayed in a prominent place at or near the workplace affected by the notice.

(extract of Improvement Notice 90006227)

Occupational Safety and Health Act 1984 (Section 48)

Improvement Notice

90006228

Issued to:

REECE PTY LTD

REECE PLUMBING

11 PACKARD ST JOONDALUP 6027

1. In relation to: Supervisor Training

at 11 PACKARD ST JOONDALUP 6027 on 24 Oct 2014

I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are: My investigation revealed you are the employer at this work environment. During my investigation, discussions and review of documents I identified that during 2013 to October 2014 some employees at the work environment have reported being exposed to inappropriate workplace behaviour including swearing, being locked in toilets, having objects thrown at them, and having their personal affects hidden from them and this type of behaviour is known to have an effect on a persons[sic] psychological health. The workplace has an accepted culture of practical joking and inappropriate behaviour that does not adhere to the companies[sic] stated values and the inappropriate workplace behaviour has not been appropriately managed by supervisors. It is practicable to manage this behaviour.

You are required to remedy the above by no later than 30 Jan 2015 at 1700 hours.

2. You are directed to take the following measures:

…

Received by Bob Johnson Position Regional Manager Date 27/10/2014

Signature of recipient [signature omitted] Time (24hr) 08:08

Workplace contact name Contact phone no. [number omitted]

Inspector MOTT, HELEN 484Signature [Signature omitted]

This notice, or a copy of it, must be displayed in a prominent place at or near the workplace affected by the notice.

(extract of Improvement Notice 90006228)

Occupational Safety and Health Act 1984 (Section 48)

Improvement Notice

90006235

Issued to:

REECE PTY LTD

REECE PLUMBING

11 PACKARD ST JOONDALUP 6027

1. In relation to: employee information on respectful workplace behaviour

at 11 PACKARD ST JOONDALUP 6027 on 24 Oct 2014

I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are: My investigation revealed you are the employer at this work environment. During my investigation, discussions and review of documents I identified that during 2013 to October 2014 some employees at the work environment have reported being exposed to inappropriate workplace behaviour including swearing, being locked in toilets, having objects thrown at them, and having their personal affects hidden from them and this behaviour is known to effect a persons[sic] psychological health. The workplace has an accepted culture of practical joking and inappropriate behaviour that does not adhere to the companies[sic] stated values. It is practicable to provide employees with information, instruction and training on respectful workplace behaviour.

You are required to remedy the above by no later than 30 Jan 2015 at 1700 hours.

2. You are directed to take the following measures:

…

Received by Bob Johnson Position Regional Manager Date 27/10/2014

Signature of recipient [signature omitted] Time (24hr) 08:41

Workplace contact name Contact phone no. [number omitted]

Inspector MOTT, HELEN 484Signature [Signature omitted]

This notice, or a copy of it, must be displayed in a prominent place at or near the workplace affected by the notice.

(extract of Improvement Notice 90006235)

3 Following the initial issuance of the Notices on 24 October 2014, Reece sought a s 51 review under the *Occupational Safety and Health Act 1984* (the Act) by the WorkSafe Western Australia Commissioner, Mr Lex McCulloch. Following his review, the Commissioner wrote a letter as follows:

Ms Leveasque Peterson

Landers & Rogers Lawyers on behalf of

Reece Pty Ltd – Reece Plumbing

11 Packard Street

JOONDALUP WA 6027

Dear Ms Peterson

REVIEW OF IMPROVEMENT NOTICES 90006227, 90006228 & 90006235

In response to your request received on 21 November 2014, on behalf of Reece Pty Ltd, the above Improvement notices have been reviewed in accordance with section 51 of the *Occupational Safety and Health Act 1984* (the OSH Act). In doing so, I have considered your submission and the circumstances in which the notices were issued.

In reviewing the above notices, I am required to ascertain whether the inspector had reasonable grounds for forming the opinion that there was a breach of the legislation.

Therefore, in the case of the three notices, I have considered whether there were reasonable grounds for the opinion that there was a breach of section 19(1) of the OSH Act. This provision places an obligation on the employer to, as far as practicable, provide and maintain a working environment in which employees are not exposed to hazards and includes providing safe systems of work and procedures.

Section 48 of the OSH Act provides WorkSafe inspectors with the authority to issue improvement notices where the inspector is of the opinion that any person is contravening the OSH Act or the contravention is likely to continue. In forming her opinion about issuing the improvement notices, Senior Inspector/Scientific Officer Helen Mott interviewed employees and management at the workplace and did not rely on a sole complainant.

The Finding section of the investigation report, submitted by Landers & Rogers, on behalf of Reece Pty Ltd (the L&R investigation report), states '[the student]'s allegations of harassment and bullying cannot be substantiated'. The Recommendations also refer to the complaint being unsubstantiated. However, the improvement notices refer to observations by, and information provided to, Inspector Mott about conduct at the workplace during her investigation. The improvement notices do not relate to any complaint that may have been made about the workplace.

Improvement notice 90006227 – inappropriate workplace culture and behaviour

I am informed that during her inspection and subsequent interviews with employees and management, Senior Inspector/Scientific Officer Mott obtained evidence that indicates the Reece Pty Ltd workplace at Joondalup has a culture of accepting practical jokes and inappropriate behaviour. The L&R investigation report also provides details about this conduct which is not consistent with a safe system of work and introduces hazards, and the risks of psychological and/or physical injuries, to the workplace. The L&R investigation report also notes a comment that 'jokes and pranks … can go too far' and recommends some training takes place in relation to bullying and harassment.

In view of these circumstances, I consider that there were reasonable grounds for issuing the improvement notice. Therefore, I affirm the notice and agree to modify the compliance date to 5.00pm on 30 January 2015

Improvement notice 90006228 – supervisor training

Senior Inspector/Scientific Officer Mott's investigation revealed that management at the Joondalup store was aware of the inappropriate workplace behaviour. The manager's comments, in the L&R investigation report, identify awareness of the inappropriate conduct.

As a result of the investigation by Senior Investigator/Scientific Officer Mott and the L&R investigation report, conduct issues at the workplace have been clearly identified and require attention.

In view of these circumstances, I consider that there were reasonable grounds for issuing the improvement notice. Therefore, I affirm and agree to modify the date of compliance to 5.00pm on 27 February 2015.

Improvement notice 90006235 – employee information on respectful workplace behaviour

The evidence gathered by Senior Investigator/Scientific Officer Mott, at the Joondalup store during her interviews, identifies employees being involved in inappropriate workplace behaviour. It is appropriate in these circumstances for the employees to be provided with training that enable them to perform their work in such a matter that they are not exposed to hazards.

The improvement notice includes a requirement for bi-annual training. Rather than prescribing periods between training, the OSH Act imposes a requirement for training as is necessary to enable employees to perform their work in such a manner that they are not exposed to hazards. Bearing in mind the conduct identified, it would be reasonable to expect that subsequent training would occur.

In view of these circumstances, I have decided to affirm the notice, with the modification outlined below, and agree to modify the date of compliance to 5.00pm on 27 February 2015.

◦ Replace the directions of the notice (at section 2) with the following text:

You are directed to take the following measures: Provide training to all employees to enable them to identify respectful and appropriate workplace behaviour, to identify inappropriate behaviour, to be able to raise any concerns with workplace behaviour as soon as identified, to be able to address at the lowest level initially inappropriate behaviour, and to promote an acceptable workplace culture by modelling appropriate behaviours.

…

Yours sincerely

[Signed]

Lex McCulloch

WorkSafe Western Australia Commissioner

18 December 2014

4 Following the issuance of a declaration and order as earlier referred to, Reece submitted an amended Notice of reference with respect to each Notice. The amended notice of referral with respect to improvement notice 90006227 became:

A. 1. The Commissioner was not justified in holding that on the evidence available to him that there were reasonable grounds for Inspector Mott to have been justified in forming her opinion that on 24 October 2014, the Appellant was that day contravening section 19(1) of the Occupational Safety and Health Act 1984 (Act).

1.1 Specifically, the Inspector did not have reasonable grounds to form an opinion that:

(i) in each instance there was a current or present breach of the Act in that the Employer failed to take all reasonably practicable steps to not expose its employees to hazards for 365 days in 2013 and on each and every day from 1 January 2014 to October 2014;

(ii) there was a current or present contravention of the Act as at 24 October 2014 (the date of issue of the Notices) as required by section 48(2)(a)(i) of the Act;

(iii) alternatively, although reference is made to past occasions of alleged inappropriate workplace behaviour, there is no statement of belief based on reasonable, or any, grounds, that such behaviour will likely continue or be repeated in the future beyond the date of issue of the Notices (24 October 2014) as required by section 48(2)(a)(ii) of the Act; and

(iv) breach of the Employer's unspecified policies and procedures meant that the alleged workplace behaviour(s) was inappropriate;

(v) it is not a notorious fact that psychological injury is a known outcome of the alleged behaviour at work; and, consequently, it was in contravention of section 19(1) of the Act;

(vi) it may give rise to psychological injury because of the alleged behaviour;

(vii) it may give rise to harm to health because of the alleged behaviour;

(viii) any of, or any combination of, positive steps required to be taken by the Inspector would have to be effective or more effective than the current control mechanisms the employer has in place; and [sic]

(ix) the Employer's occupational health and safety management system and procedures (as opposed to any human resources policies) were inadequate to deal with the alleged behaviour and comply with its obligations under section 19(1) of the Act.

2. The Inspector inappropriately issued 3 separate Improvement Notices alleging the same 'inappropriate behaviour' conducted over the same period of time that was allegedly in breach of the same section of the Act by the same employer and same employees. This is otiose and constitutes more than 'doubling up' of the allegations.

3. The Inspector inappropriately issued 3 separate Improvement Notices relying on the same alleged inappropriate behaviour to then stipulate 3 separate ways to rectify similar, if not, the same alleged contravention of the Act. Even if the alleged behaviour constituted a breach of section 19(1) of the Act, which is denied, then the remedy(ies) identified by the Inspector to rectify same should have been postulated as a remedy(ies) for the conduct but limited to only 1 Improvement Notice.

4. The Appellant seeks an order that the Tribunal revoke the decision of the Commissioner of 18 December 2014 and cancel Improvement Notice No. 90006227.

5 The amended notice of referral with respect to improvement notice 90006228 became:

1 The Commissioner was not justified in holding that on the evidence available to him that there were reasonable grounds for Inspector Mott to have been justified in forming her opinion that on 24 October 2014, the Appellant was that day contravening section 19(1) of the Act.

1.1 The Appellant repeats the matters set out in A.1.1 above.

2. The Appellant repeats the matters set out in A2 above.

3. The Appellant repeats the matters set out in A3 above.

4. The Tribunal revoke the decision of the Commissioner of 18 December 2014 and Improvement Notice No.90006228 [sic] cease to have effect immediately [sic].

6 The amended notice of referral with respect to improvement notice 90006235 became:

1. The Commissioner was not justified in holding that on the evidence available to him that there were reasonable grounds for Inspector Mott to have been justified in forming her opinion that on 24 October 2014, the Appellant was that day contravening section 19(1) of the Occupational Safety and Health Act 1984 (Act).

1.1 The Appellant repeats the matters set out in A 1.1 above.

2. The Appellant repeats the matters set out in A 2 above.

3. The Appellant repeats the matters set out in A 3 above.

4. The Appellant seeks an order that the Tribunal revoke the decision of the Commissioner of 18 December 2014 and cancel Improvement Notice No. 90006235.

7 The file was reallocated by Beech CC to Mayman C.

Directions Hearing

8 The Tribunal listed a directions hearing on 11 March 2015. Prior to the hearing, the Tribunal received draft correspondence from the WorkSafe Western Australia Commissioner (the respondent) on 27 February 2015, an extract of which reads as follows:

> **OSHT 3 of 2014 – Reece Pty Ltd v The WorkSafe WA Commissioner**
>
> **Re review of Improvement Notices 90006227, 90006228 and 90006235**
>
> I refer to the above applications by Reece Pty Ltd for orders revoking the WorkSafe Commissioner's decisions and cancelling the notices.
>
> I am instructed that the WorkSafe Western Australia Commissioner does not oppose the applications. The parties ask that the Tribunal make the enclosed orders.
>
> …
>
> Andrea Crichton-Brown
>
> Director Legal Services WorkSafe Western Australia
>
> ENCLOSURE

9 The respondent enclosed a minute of proposed order signed by the respondent. The word 'draft' was stamped through the correspondence. As it was draft correspondence no action was taken. At the directions hearing on 11 March 2015, the respondent advised that the applicant consented to the order as drafted by the respondent.

10 The parties were asked to consider the interpretation of s 51A(5) of the Act. The particular provision as prescribed outlines the powers to affirm, affirm with modification as appropriate, or revoke the notices as issued by inspectors pursuant to s 48 or s 49 of the Act. It is the view of the Tribunal that such powers are limited by virtue of the preamble as written, which states:

> 51A(5) On a reference under subsection (1) the Tribunal shall inquire into the circumstances relating to the notice and may –
>
> (a) affirm the decision of the Commissioner; or
>
> (b) affirm the decision of the Commissioner with such modifications as seem appropriate; or
>
> (c) revoke the decision of the Commissioner and make such other decision with respect to the notice as seems fit,
>
> and the notice shall have effect or, as the case may be, cease to have effect accordingly.

11 The Tribunal is of the view that the statute is clear. Once a matter has been referred to the Tribunal for review pursuant to s 51A of the Act, provided the referral is within time and unless the applicant seeks to withdraw the application, an inquiry must proceed in order to access the provisions contained in s 51A(5)(a), (b) or (c) of the Act. Whether it be to endorse the decision of the Commissioner of WorkSafe or endorse the decision with variations as the Tribunal considers appropriate, or alternatively, invalidate the determination of the Commissioner and create such other determination or determinations as considered appropriate, there must be an inquiry into an improvement notice(s) or prohibition notice(s) as issued by an inspector of WorkSafe before the Tribunal can access such powers, even in circumstances where the parties consent to the orders issuing.

12 The applicant and the respondent were then given the option of adjourning the directions hearing, waiving the procedural requirements for listing a hearing and proceeding directly into a s 51A inquiry on that day. Neither Reece or the respondent chose such an option and the inquiry was listed on 18 May 2015.

The Inquiry

13 The respondent, in support of its position in the inquiry, tabled a series of witness statements:

Exhibit WorkSafe 1 – witness statement of Lex McCulloch;

Exhibit WorkSafe 2 – witness statement of Helen Mott;

Exhibit WorkSafe 3 – witness statement of Dawn Lucas;

Exhibit WorkSafe 4 – witness statement of Ian Munns;

Exhibit WorkSafe 5 – witness statement of John Innes;

Exhibit WorkSafe 6 – witness statement of Charles Mitchell; and

Exhibit WorkSafe 7 – witness statement of Justine McGillivray.

14 The aforementioned witness statements were lodged in the registry prior to the inquiry and in large part, with the exception of Commissioner McCulloch and the inspector exhibit WorkSafe 1 and exhibit WorkSafe 2, the evidence stands unchallenged as the applicant did not require the witnesses to attend.

15 Mr Lex McCulloch, Commissioner of WorkSafe, gave evidence and was cross examined on his witness statement (exhibit WorkSafe 1). In particular, he was referred to Improvement Notice 90006227 and asked whether he understood the contravention that was being relied upon was a breach pursuant to s 19(1) of the Act. In response, the witness indicated that is how he had read it at the time. Further questioning was asked:

> And did you also read and understand that the actual present contravention was occurring on the date shown on the face of the document being 24 October 2014?---Um, I realise there's a problem with the date, but at the time I actually looked more at the detail rather than the dates and I now appreciate I should have focussed on the dates.
>
> (ts 8)

16 The witness gave evidence that there was no interview of witnesses on that day and accepted that interviews took place before that date. Further, Mr McCulloch indicated that the improvement notice referred to; 90006227, reflects that it was actually issued on 27 October 2014. The witness indicated in relation to that particular date, there was no evidence of any breach of the Act occurring on that day. In terms of the review undertaken by Mr McCulloch pursuant to s 51 of the Act, he gave evidence that he would not have affirmed the improvement notice understanding what he now knows in relation to the technical difficulties associated with the Notices. Mr McCulloch gave evidence that he would not have affirmed the notice:

> And that would be on the basis that the inspector had no reasonable opinion at the time that there was a contravention of the Act?---On that date, yes.
> On the date of 24 October?---Yes, or the 27th.
>
> (ts 10)

17 Mr McCulloch was then asked a series of questions in relation to improvement notice 90006228 in which he indicated that the inspector at the time did not have a reasonable opinion that there was a breach of s 19 of the Act on 24 October 2014 nor 27 October 2014 was there any evidence of the inspector having an opinion that Reece was contravening s 19 of the Act. Mr McCulloch gave evidence that he would not have affirmed the Notices knowing what he now knows in relation to the dates that appear on the Notices.

18 Ms Helen Mott, inspector of WorkSafe was cross examined by counsel for Reece.

19 The inspector, in her statement, wrote:

> On each notice I wrote that the breach was occurring on the 24 October 2014, as that was the date I wrote the notices. On reflection, I didn't have evidence to indicate that the breach was occurring on that exact date. I had meant to indicate that it had happened in the past but was likely to continue or be repeated in the future.
>
> …
>
> I put the date the notices were issued as 27 October 2014, as that was the date I returned to the workplace to physically issue the notices. On reflection, the way I wrote the notices indicated that the breach had occurred, started and finished on 24 October 2014. I needed evidence that the hazard was still occurring on the date I issued the notices. In that case, on returning to the workplace on 27 October I should have gathered evidence to reflect the hazard was still occurring or the circumstances were such it was likely to occur again and altered the breach date on the notices to reflect this.
>
> (extract from exhibit WorkSafe 2 [56] and [59])

20 In cross examination, the inspector gave evidence she attended the workplace on 21 October 2014 with another inspector. The inspector gave evidence that at that site visit the evidence was gathered regarding the breach of the Act. The Notices had been typed on 24 October 2014 and were saved on the respondent's electronic system. On the day the witness was to serve the Notices on the respondent she printed them off electronically and gave evidence that what appears on the Notices is the relevant date of printing rather than the relevant date on which the Notices were either:

> written; or
>
> the breach was identified.

21 Accordingly, what appears on the Notices is the date of service of the Notices as 27 October 2014. As was indicated by the inspector, the relevant day on which she formed the opinion that Reece was contravening a provision of the Act was in fact not 24 October 2014, it was on the basis of the inspector's evidence 21 October 2014 when the inspector visited the site with another inspector.

22 The inspector gave evidence that when she printed the Notices prior to leaving the respondent's offices on the morning of 27 October 2014, she was unaware that the time of service had already been printed onto the Notices. The three Notices had various times printed onto them. All relate to times between 8.00 am and 9.00 am on the morning of 27 October 2014. The inspector gave evidence that these times were specifically related to printing times from WorkSafe's printers and were unrelated to times of service on Reece that afternoon.

23 The witness gave evidence that aside from the technical errors in the Notices, the basis of the opinion she had formed of the s 19 breach involved the student who was vulnerable at Reece's premises. The witness gave evidence she attended the worksite on 21 October 2014, together with another inspector and interviewed a number of persons. On her evidence there were unhealthy workplace practices occurring involving at least three to four employees and at least one supervisor. The practices included swearing, throwing of biscuits and harmful activities directed at a person. There were inappropriate attacks and incidents which isolated the student in particular, including personal items being thrown about and on occasions, hidden. Based on her investigations, the witness gave evidence individual employees were not able to inform her of the types of appropriate behaviour that was acceptable other than ruling out physical aggression. A number of the employees categorised this type of behaviour as 'good fun'. The inspector gave evidence that the basis of her opinion was reached having talked not just to the student but to the supervisor and other employees. The student was the trigger and the employees knew management had observed their behaviour and further, had not acted upon it. Certainly, the employees had not been in a situation where they had been informed to cease the behaviour.

Respondent's Concluding Submissions

24 Counsel for the respondent took the opportunity to repeat the submissions that had been set out in draft correspondence forwarded to Reece, that being that the Notices do not indicate that there were reasonable grounds for the opinion on 24 October 2014 that bullying was occurring and there was nothing in place at the workplace on that particular day either for the service of the Notices. Each of the Notices contained technical errors and although each Notice indicated there were reasonable grounds for the opinion on 24 October 2014, the inspector had not visited the site on that day. The respondent's submissions suggest that that is the beginning and the end of the respondent being able to proceed with the particular enforcement of each of the Notices.

25 There is a second error that is set out, that being that the date of the breach of each of the Notices, that being 24 October 2014. There is also an error due to the fact that the Notices were not served until 27 October 2014. The interpretation is therefore made that the breach commenced and stopped on 24 October 2014 but by the time the inspector served the Notices it was in fact 27 October 2014 and the day referred to in the Notices had passed by and therefore the opportunity for a reasonable opinion to be reached by the inspector in accordance with s 48(1)(a) of the Act had concluded.

Reece's Concluding Submissions

26 Counsel for Reece submitted this to be a review application pursuant to s 51A(1) of the Act. Furthermore, the hearing on 18 May 2015 was a rehearing and the remedy being sought by the applicant is that the Commissioner's decision ought to be revoked and the Notices cancelled.

27 The technical difficulties are such that in the view of Reece there is no option for the Tribunal other than to cancel the Notices as each was issued in reliance on s 48(1)(a) of the Act requiring there to be a present contravention. The evidence of the respondent's witnesses is consistent that as at 24 October 2014, the date on each of the Notices on which the inspector forms the opinion that she has a reasonable belief is in fact an impossibility given her evidence is she was not present at Reece's Joondalup premises on that particular day. She was in fact present on 21 October 2014. Reece submits each of the Notices was therefore issued incorrectly. Reece that the Notices are therefore defective and there is no choice but to cancel them.

Findings and Conclusions

Credibility

28 I have listened carefully to the evidence given by the two witnesses. I find that each witness gave their evidence honestly and in a considered manner. I have complete confidence in the veracity of the evidence given by both Mr McCulloch and the inspector. In my view, Mr McCulloch gave his evidence in a credible manner and the inspector, whilst recalling the details between 21 and 27 October 2014, had some difficulty with recall on the order of events however any inconsistencies were minor. Overall, I find that the inspector gave her evidence in a forthright and authoritative manner. Her evidence was consistent and detailed. The Tribunal therefore accepts the evidence given by the inspector and Mr McCulloch in its entirety.

Re-hearing

29 The Tribunal has had regard for an earlier decision, that of ***Wayne Vigar v WorkSafe Western Australia Commissioner*** [2005] WAIRC 01869; (2005) 85 WAIG 2068 [69]:

> … given that the matter is conferred by statute to be by way of a re-hearing the Tribunal draws on the decision of *Cummins v MacKenzie* [1979] 2 NSWLR 803 where Sheppard J concluded that the appeal to a Magistrate under consideration required a hearing de novo and made the observation (at 809):
>
> > '… The matter being by way of re-hearing, what the Commissioner has done in a particular case is irrelevant, except insofar as it is necessary to know that he has cancelled the licence, that being the justification for the court's exercise of jurisdiction. Furthermore, the appeal being by way of re-hearing, all matters occurring down to the time when the matter comes before the court are relevant to be taken into account.'
>
> I therefore find that when a matter is referred by an applicant pursuant to s 51A the issue for consideration is the notice at first instance. To ensure a fair and equitable process in the proceedings before the Tribunal the applicant is entitled to bring all matters and require all documentation or information to be placed before the Tribunal up until the time in which the matter is heard. This may, in some cases, involve a request for information relied upon the WorkSafe Commissioner in reviewing the notice pursuant to s 51.

30 Given this is a matter involving issues of a technical nature, it is important that those matters are placed in some perspective. The Tribunal therefore considers it to be important to enable the information to be placed in some context and also to enable the persons concerned, including the respondent and the inspectors involved with the investigation as indeed the student and persons (including the supervisor) associated with the matters at the applicant's premises to know of the background in which this matter is finally dealt with at the Tribunal. Rather than deal with just that final stage in which the Tribunal determines whether Notices ought to be cancelled and the decision of the Commissioner ought be revoked, in a re-hearing the Tribunal considers it is necessary to ensure fairness and equity in the proceedings.

Statute

31 The statute on which an inspector relies for forming a reasonable opinion with respect to an improvement notice is reflected in s 48 of the Act:

> **48. Improvement notices, issue and effect of**
>
> (1) Where an inspector is of the opinion that any person —
>
> (a) is contravening any provision of this Act; or
>
> (b) has contravened a provision of this Act in circumstances that make it likely that the contravention will continue or be repeated,

> the inspector may issue to the person an improvement notice requiring the person to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.

32 Given the significant emphasis within the Notices as outlined by the inspector:

> Improvement Notice **90006227**
>
> at 11 PACKARD ST JOONDALUP 6027 on **24 Oct 2014**
>
> I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 …;
>
> Improvement Notice **90006228**
>
> at 11 PACKARD ST JOONDALUP 6027 on **24 Oct 2014**
>
> I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are …; and
>
> Improvement Notice **90006235**
>
> at 11 PACKARD ST JOONDALUP 6027 on **24 Oct 2014**
>
> I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are …:
>
> (extract from each Notice)

Findings

33 It is the view of the Tribunal that the language used in each of the Notices relates to an alleged contravention as at the time each Notice was written (my emphasis), that being the evidence of the inspector. Therefore the Tribunal finds each of the Notices was issued pursuant to s 48(1)(a) of the Act, the day each of the Notices was written. The date was specified on each Notice to be 24 October 2014 on the evidence of the Inspector:

> On each notice I wrote that the breach was occurring on 24 October 2014, as that was the date I wrote the notices. On reflection, I didn't have evidence to indicate that the breach was occurring on that exact date. I had meant to indicate that it had happened in the past but was likely to continue or be repeated in the future.
>
> ([56] exhibit WorkSafe 2)

34 Further, the day the Notices were served, was 27 October 2014. Each Notice was received by Mr B Johnson, the regional manager at Reece premises at Joondalup. The timing of the receipt of the Notices, as indicated on each of the Notices, varies:

- Improvement Notice No. 90006227 indicates receipt of notice as at 08:00;
- Improvement Notice No. 90006228 indicates receipt of notice as at 08:08; and
- Improvement Notice No. 90006235 indicates receipt of notice as at 08:41.

35 The inspector gave evidence that the morning of 27 October 2014 she printed each of the Notices from the respondent's printers. The timing reflected on each Notice was automatic and did not reflect the time at which the Notices were served on Mr Johnson. The Tribunal so finds.

36 The inquiry, whilst relatively short, has been sufficient to fully inform the Tribunal on the evidence given and submissions made that there were technical shortcomings when the Notices alleging a breach of s 19(1) of the Act were served on Reece on 27 October 2014 in that the Tribunal finds:

- the inspector issued the notice against s 48(1)(a) of the Act by including in the wording on each of the Notices 'I have formed the opinion that you are contravening section 19(1) of the Occupational Safety and Health Act 1984 and the grounds for my opinion are', imply a current contravention of the Act;
- each of the Notices by virtue of the wording specify the breach as having occurred on 24 October 2014. By the inspector's own evidence, that was a date whereby the inspector did not visit Reece's premises and therefore could not issue a Notice on Reece alleging a contravention of s 19 of the Act;
- each of the Notices in terms of the time of service was received by Mr B Johnson at or about 2.00 pm on 27 October 2014 from the inspector. Each improvement notice should reflect the time of service. However, each Notice indicates a contrary view. Rather than the actual time of service times between 08:00, and 08:41 are reflected, being the times the Notices were printed from the WorkSafe printers that morning.

37 The Tribunal finds, following the inquiry, that there are a number of technical errors contained in:

- Improvement Notice 90006227;
- Improvement Notice 90006228; and
- Improvement Notice 90006235.

Further, the technical errors contained in each of the Notices removes the ability of the respondent to pursue s 19(1) breaches under the Act on 21 October 2014 against Reece for:

> … inappropriate workplace behaviour including swearing, being locked in toilets having objects thrown at them, and having their personal affects hidden from them and this behaviour is know(n) to effect a person's psychological health…
>
> (extract from Notice No 90006235)

Each of the Notices was served pursuant to s 48(1)(a) of the Act when from the evidence circumstances suggest it may have been more appropriate to consider service of an improvement notice pursuant to an ongoing contravention, namely s 48(1)(b) of the Act.

38 At the conclusion of the hearing Reece and the respondent were informed of the Tribunal's view. In the circumstances the Tribunal considers it appropriate to issue a minute pursuant to s 51A(5)(c) of the Act:

- revoking the Commissioner's s 51 notice of 18 December 2014 issued against Reece; and

- cancelling Notices 90006227, 90006228 and 90006235.

In respect of each Notice the action to take effect when the order issues.

39 The parties were also advised the Tribunal's reasons would issue at a later date.

2015 WAIRC 00401

REVIEW OF IMPROVEMENT NOTICES

THE OCCUPATIONAL SAFETY AND HEALTH TRIBUNAL

PARTIES	REECE PTY LTD
	APPLICANT
	-v-
	THE WORKSAFE WESTERN AUSTRALIA COMMISSIONER
	RESPONDENT
CORAM	COMMISSIONER S M MAYMAN
DATE	TUESDAY, 26 MAY 2015
FILE NO/S	OSHT 3 OF 2014
CITATION NO.	2015 WAIRC 00401

Result	Order issued
Representation	
Applicant	Ms M Saraceni and Ms L Peterson (both of counsel)
Respondent	Ms A Crichton-Browne (of counsel)

Order

WHEREAS the applicant sought, pursuant to s 51A of the *Occupational Safety and Health Act 1984* (the Act), to have the WorkSafe Western Australia Commissioner's (the Commissioner's) decisions of 18 December 2014 subject to further reviews by the Occupational Safety and Health Tribunal (the Tribunal);

AND WHEREAS the Tribunal on 18 May 2015 inquired into the circumstances of the issuance of each of the three improvement notices 90006227, 90006228 and 90006235;

AND WHEREAS the Tribunal has had regard for the consent orders sought by the applicant and the respondent in this matter;

HAVING HEARD Ms M Saraceni (of counsel) on behalf of the applicant and Ms A Crichton-Browne (of counsel) on behalf of the respondent and pursuant to the powers conferred under the Act and the *Industrial Relations Act 1979* the Tribunal hereby orders –

1. In accordance with s 51A(5)(c) of the Act the decisions of Lex McCulloch, Commissioner for WorkSafe dated 18 December 2014 to affirm Improvement Notices 90006227, 90006228 and 90006235 with modifications are hereby revoked;
2. In accordance with s 51A(5)(c) of the Act Improvement Notices 90006227, 90006228 and 90006235 issued against Reece Pty Ltd are hereby cancelled.
3. That the provisions of this order shall take effect on and from 26 May 2015.

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

VOCATIONAL EDUCATION AND TRAINING ACT 1996—Appeals dealt with—

2015 WAIRC 00394

APPEAL AGAINST THE REFUSAL TO TERMINATE A TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	MS FELICIA NANI, MS FRANCINE MORT + MR RICHARD MALSKI PARTNERS T/A HAIR FOR ALL
	APPLICANT
	-v-
	CHIEF EXECUTIVE OFFICER, DEPT TRAINING + WORKFORCE DEV.
	KAREN HO, EXECUTIVE DIRECTOR
	RESPONDENT
CORAM	COMMISSIONER J L HARRISON
DATE	FRIDAY, 22 MAY 2015
FILE NO/S	APA 2 OF 2015
CITATION NO.	2015 WAIRC 00394

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr D Anderson (of counsel)

Order

This is an appeal lodged pursuant to s 60G of the *Vocational Education and Training Act 1996*.

On 14 May 2015 the appellant filed a *Form 14 – Notice of withdrawal or discontinuance* in respect of the appeal.

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

THAT this appeal be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]