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FULL BENCH—Appeals against decision of Commission—

2016 WAIRC 00715

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NO. OSHT 2 OF 2016 GIVEN ON 31 MAY 2016

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	:	2016 WAIRC 00715
CORAM	:	THE HONOURABLE J H SMITH, ACTING PRESIDENT COMMISSIONER T EMMANUEL COMMISSIONER D J MATTHEWS
HEARD	:	TUESDAY, 2 AUGUST 2016
DELIVERED	:	THURSDAY, 18 AUGUST 2016
FILE NO.	:	FBA 7 OF 2016
BETWEEN	:	ANDRIES LUCAS HOFFMAN Appellant AND PALADIN ENERGY LTD Respondent

ON APPEAL FROM:		
Jurisdiction	:	**Occupational Safety and Health Tribunal**
Coram	:	**Commissioner S J Kenner**
Citation	:	**[2016] WAIRC 00335; (2016) 96 WAIG 596**
File No.	:	**OSHT 2 of 2016**

CatchWords	:	Industrial Law (WA) - Appeal against decision of Commission sitting as the Occupational Safety and Health Tribunal - Appellant carried out all work in Africa - Jurisdiction of Tribunal to hear and determine an application referred to it - Not satisfied *Mines Safety and Inspection Act 1994* (WA) has extra-territorial effect - Even if an employee working overseas is able to refer a claim the nature of claims made by the appellant not within the Tribunal's jurisdiction
Legislation	:	*Industrial Relations Act 1979* (WA) s 3, s 29AA, s 29AA(4), s 49 *Mines Safety and Inspection Act 1994* (WA) s 16, s 17, s 18, s 68A, s 68A(2)(a), s 68A(2)(c), s 68B, s 68C, s 68C(1), s 74(2), s 102, s 102(1), s 102(1)(b) *Occupational Safety and Health Act 1984* (WA) pt VIB, s 51G(1), s 51I, s 51I(1) *Constitution Act 1889* (WA) s 2 *Australia Act 1986* (Cth) s 2(1) *Interpretation Act 1984* (WA) s 7, s 8

Result	:	Appeal dismissed
Representation:		
Appellant	:	Mr A L Hoffman, by telephone
Respondent	:	Mr T J S French (of counsel) and with him Mr J X Cockerell (of counsel)
Solicitors:		
Respondent	:	Clyde & Co

Case(s) referred to in reasons:

Insight Vacations Pty Ltd v Young [2011] HCA 16; (2011) 243 CLR 149

Jumbunna Coal Mine NL v Victorian Coal Miners' Association [1908] HCA 95; (1908) 6 CLR 309

Kay's Leasing Co Pty Ltd v Fletcher (1964) 116 CLR 124

Parker v Tranfield [2001] WASCA 233; (2001) 81 WAIG 2505

Re Treneski and Comcare [2004] AATA 98

Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers) (1986) 67 WAIG 325

The Commissioners of Stamps (Queensland) v Wienholt (1915) 20 CLR 531

Case(s) also cited:

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

Reasons for Decision

SMITH AP:

The institution of the appeal

1 The appellant seeks to appeal a decision made by a single Commissioner of the Commission, sitting as the Occupational Safety and Health Tribunal (the Tribunal), to dismiss a dispute referred by an application made by the appellant on 31 May 2016: [2016] WAIRC 00335; (2016) 96 WAIG 596.

2 At first instance, the appellant sought to invoke the jurisdiction of the Tribunal pursuant to s 74(2) and s 68C of the *Mines Safety and Inspection Act 1994* (WA). Pursuant to s 102(1) of the *Mines Safety and Inspection Act*, a matter referred to the Tribunal under s 74(2) or a claim under s 68C may be heard and determined by the Tribunal and may be appealed against and enforced as if it were a matter in respect of which jurisdiction is conferred on the Tribunal by pt VIB of the *Occupational Safety and Health Act 1984* (WA).

3 Pursuant to s 51G(1) of the *Occupational Safety and Health Act*, the Tribunal has jurisdiction to hear and determine matters referred to it. Pursuant to s 51I(1) of the *Occupational Safety and Health Act*, s 49 of the *Industrial Relations Act 1979* (WA) (the IR Act) applies to and in relation to the exercise of the jurisdiction conferred upon the Tribunal. Accordingly, by a combination of s 102 of the *Mines Safety and Inspection Act*, s 51I of the *Occupational Safety and Health Act* and s 49 of the IR Act, this appeal may be made to the Full Bench.

Prior proceedings in the Commission

4 In 2015, the appellant lodged applications U 59 of 2015 and B 59 of 2015 claiming he was unfairly dismissed by Paladin Energy Ltd (the respondent to this appeal) and he was owed contractual benefits. In particular, in B 59 of 2015 he made a claim that he was owed remuneration, pursuant to his contract of employment, from the date his employment was terminated by the respondent on 27 February 2015 until the expiration of a fixed term contract of employment which was, but for the termination, to expire on 1 January 2016. After hearing the applications, both claims were dismissed by the Commission on 10 August 2015: [2015] WAIRC 00783; (2015) 95 WAIG 1439. The appellant instituted an appeal against the decision to dismiss application B 59 of 2015 (the claim for contractual benefits).

5 It was common ground that at the time of the termination of the appellant's employment his salary was $195,000 per annum. At the time of the termination of his employment the prescribed amount was $149,400: [2014] WAIRC 00615; (2014) 94 WAIG 775.

6 The Full Bench dismissed the appellant's appeal on grounds that the appellant's salary whilst employed by the respondent exceeded the amount prescribed in s 29AA(4) of the IR Act on 10 February 2016: [2016] WAIRC 00074; (2016) 96 WAIG 127.

7 The grounds upon which the Full Bench dismissed the appeal against the dismissal of the contractual benefits claim was because s 29AA of the IR Act prohibits the Commission from determining claims of contractual benefits where an employee's contract of employment provides for a salary which exceeds the prescribed amount, except where an industrial instrument applies to the employment of the employee: [2016] WAIRC 00073; (2016) 96 WAIG 121. After considering the facts in the matter before the Commission at first instance, the Full Bench found that because the appellant's contract of employment provided for salary in excess of the prescribed amount and because an industrial instrument did not apply to his employment, the preconditions in s 29AA(4) of the IR Act barred the Commission from enquiring into and dealing with the appellant's claim.

The matter referred to the Tribunal

8 Shortly after the Full Bench made an order dismissing the appellant's appeal against the decision to dismiss the contractual benefits claim, the appellant filed a notice of referral to the Tribunal.

9 The notice was filed on 23 February 2016 and states that the appellant 'has this day referred to the Tribunal: Referred FBA 10 of 2015 to the Occupational Safety and Health Tribunal' on the following grounds:

> Contractual Benefits relating to Occupational Health and Safety entitlements from my legal binding contract of employment. The referral is made under the Mines Safety and Inspection Act 1994 and the Occupational Safety and Health Act 1984.

Background

10 The appellant resides in South Africa. The respondent is engaged in mining and selling uranium. It has no active mining operations in Australia, although it has a number of tenements in Australia, including Western Australia. It has its administrative headquarters in Western Australia and is engaged in mining in a number of countries internationally.

11 When the respondent first employed the appellant it communicated with the appellant from Western Australia. The appellant signed all contracts of employment in Africa and all of the work he performed was exclusively performed in Malawi.

12 The respondent engaged the appellant initially as the maintenance manager of the respondent's Kayelekera Mine in Malawi. He was subsequently promoted to the position of engineering manager. At the time of the termination of the appellant's employment, the terms and conditions of employment were set out in a written contract of employment which was to expire on 1 January 2016. However, the contract was terminated by the respondent on 27 February 2015.

13 The appellant relies upon the following express terms of the contract of employment which were in place at the time of the termination of employment:

> **2. Term**
>
> This Employment Contract will commence on 2 January 2015 and is due to expire 1 January 2016.
>
> **3. Place of Work**
>
> You are engaged to perform work in our international operations. You will be engaged to work at the **Kayelekera Mine in Malawi**. The terms and conditions of your assignment at the **Kayelekera Mine** are set out in Annexure 1 and 2.
>
> You may be required to work at such other location of the Company's activities as the Company may determine from time to time on notification to you.
>
> **10. Policies**
>
> You must abide by the policies of the Company, any relevant Group Company policies and specifically those of the Kayelekera Mine site as issued from time to time. Variations or amendments may be required to these policies due to the ever changing nature of the business world. In the event that this happens, you will be advised.
>
> You must make yourself familiar with the Company's Corporate Governance policies prior to employment. These are accessible on the Company's website at www.paladinenergy.com.au. Access to the policies of the Company, the relevant Group Company policies and the relevant policies of the Kayelekera Mine site will be available to you upon commencement of your employment.
>
> **20. Governing Law**
>
> This Employment Contract is governed by the laws of Western Australia.

Reasons for decision of the Tribunal

14 The Tribunal dismissed the appellant's application for want of jurisdiction on grounds that:

(a) applying the rebuttable presumption that legislation is not to operate extra-territorially there is nothing in the *Mines Safety and Inspection Act* to suggest that it could apply to the appellant's former employment in Malawi;

(b) even if the *Mines Safety and Inspection Act* did extend to the appellant's former workplace it was not satisfied the appellant's claim falls within the jurisdiction of the Tribunal;

(c) the Tribunal does not have any general jurisdiction to deal with everything contained in the *Mines Safety and Inspection Act*. It may only deal with matters referred to it under s 51G(1) of the *Occupational Safety and Health Act* and s 102(1) of the *Mines Safety and Inspection Act*;

(d) no part of the appellant's claim falls within the matters that can be referred to the Tribunal pursuant to s 102(1) of the *Mines Safety and Inspection Act*.

Grounds of appeal

15 The grounds of appeal are as follows:

> 1. The Learned Commissioner has found correctly in its reason of decision that the Applicant was employed by the Respondent, Paladin Energy as Engineering Manager at its Kayelekera Mine in Malawi on a fix [sic] term contract. The Learned Commissioner erred in fact and law that the contract with its expressed terms specifically indicate in Clause 3 that '*you may be required to work at such other location of the Company's activities as the Company may determine from time to time on notification to you*', the contract of employment referred explicitly to that I may be employed in other operations including Australia. The Respondent have [sic] never from day one furnished any document to the commission pertaining Termination of employment. The Learned Commissioner referred to termination of employment without the facts.

2. The Learned Commissioner on its own motion brought the observation as if the Tribunal has any extra territorial effect. Thus, the Applicant say [sic] this was not in contention from either the Applicant nor the Respondent. The Learned Commissioner referred to a decision of the Industrial Appeal Court in *Ray Douglas Parker v Mark Anthony Transfield [sic] (2001) 81 WAIG 2505*, the Learned Commissioner then failed in fact and law to recognise that the Applicant in this case was employed on a Letter of Understanding and not a fixed term contract. The Letter of Understanding from the above Applicant [sic] did not at any time referred [sic] to Policies and Procedures. The Commissioner did state in Paragraph 8 that there is nothing in the MSI Act to suggest that it could apply, the Applicant herein say [sic] that the MSI Act also do [sic] not suggest that it **could not** apply.

   'The respondent admitted that if there were an argument over the terms in the contract that argument would be subject to West Australian law'. **Please see transcript of proceedings on page 11 U & B 59/2015**.

   The attention is drawn to the Tribunal to the Mine Safety and Inspection Act regulations 1994, as these regulations is [sic] of support to the Act.

   Regulations Section 104 in more specific: -

   S104 Regulations

   (1)(f) Providing for the safety and health standards and procedures to be complied with -

   (i) At any mine; or

   (ii) In the performance of any work in connection with a mine;

   (6) Regulations made under this Act may adopt either wholly or in part and either specifically or by reference, any standards, rules, codes or specifications of Standards Australia, and other Australian **and international bodies** of well - established high repute.

3. The Learned Commissioner referred to cases in reason *Andries Lucas Hoffman v Paladin Energy Ltd (2015) 95 WAIG 1436 and (2016) 96 WAIG 121*, and erred in fact and law that accordance with a decision in *Triantopoulos v Shell Company of Australia Ltd [2011] WAIRC 00004; (2011) 91 WAIG 67*. That the Commission has jurisdiction to deal with a claim of denied contractual benefits by an employee of a constitutional corporation.

4. The Learned Commissioner has erred in fact in respect that some information was not provided as requested from the Respondent namely, Safety and Health Minutes for the year 2014. This was not addressed by the Learned Commissioner at the time of the Show Cause Hearing as to failure by the Respondent to provide this information timeously.

5. The Learned Commissioner correctly indicated that the Tribunals [sic] Jurisdiction may only deal with matters referred to it under S51G(1) of the OSH Act and S102(1) of the MSI Act. Thus, the Applicant say [sic] from the Tribunals website this specific Jurisdiction is found on Schedule 1 of the OSH Act 1984 [sic] and Schedule 2 of MSI Act 1994 [sic]. Under MSI Act 1994 under S68C(1) the interpretation of the Commissioner to refer to that it only applies to employee representatives. Thus, the Applicant say [sic] S68C(1) refer to **a person may** and not exclusively to an Employee Representative. Further to the same Act on *S68C1 (i) the Act refer to 'a claim that the person's employer or a prospective employer has caused disadvantage to the person in contravention of section 68A; or (ii) in the case of a contractor referred to in Section 68B, a claim that the principal has contravened that section;'* Thus, the Applicant say [sic] that S68A and S68B should not be disregarded and the Commissioner erred in fact and law to recognise the limits of S68C(1). This will fall within the Jurisdiction of the Tribunal

6. The attention is drawn to the Commission to the **Interpretation Act 1984** in more specific to **Section 8**. '*A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense, is [sic] shall be applied to the circumstances as they arise, so that effect may be given to every part of the law according to its true spirit, intent, and meaning*'.

Consideration of the grounds of appeal

(a) Ground 1 and ground 2 - *Mines Safety and Inspection Act* - Does the Act have application to an employee employed in a mine in Africa operated by a company whose administrative headquarters are in Western Australia?

16 In Western Australia, s 2 of the *Constitution Act 1889* (WA) empowers the parliament of Western Australia to make laws for the peace, order and good government of Western Australia. Pursuant to s 2(1) of the *Australia Act 1986* (Cth) the legislative powers of each state include full power to make laws for the peace, order and good government of that state that have extra-territorial effect.

17 Whilst an Australian statute of a state can apply to activities that take place outside the geographical limits of a state, statutes are presumed to have no extra-territorial jurisdiction.

18 Even prior to the enactment of the *Australia Act*, states had the power to enact laws that have extra-territorial effect. However, it is a rule of statutory construction that laws of a state do not have such effect unless express words in the legislation in question provide for extra-territorial effect or by necessary implication the statute is required to be construed to apply beyond the boundaries of a state: ***The Commissioners of Stamps (Queensland) v Wienholt*** (1915) 20 CLR 531, 540 - 541.

19 In ***Jumbunna Coal Mine NL v Victorian Coal Miners' Association*** [1908] HCA 95; (1908) 6 CLR 309, 363, O'Connor J clearly explained:

> In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law.

20 This presumption has been given statutory effect by the enactment of s 7 of the *Interpretation Act 1984* (WA). Section 7 provides:

> Every written law shall be construed subject to the limits of the legislative power of the State and so as not to exceed that power to the intent that where any enactment thereof, but for this section, would be construed as being in excess of that power, it shall nevertheless be valid to the extent to which it is not in excess of that power.

21 Section 3 of the IR Act is an example of an express provision in a statute that extends the territorial application of the IR Act beyond its boundaries: see the discussion by the Industrial Appeal Court in ***Parker v Tranfield*** [2001] WASCA 233; (2001) 81 WAIG 2505. Section 3 of the IR Act provides:

> (1) Subject to subsections (5) and (6) where any industry is carried on —
>
> (a) partly within the State and partly within an area to which this subsection applies; or
>
> (b) wholly or partly in an area to which this subsection applies, and —
>
> (i) facilities for servicing or supporting that industry are maintained in the State by or on behalf of the employer concerned; or
>
> (ii) the employer concerned is connected with the State; or
>
> (iii) that industry is carried on from, or on, or by means of, an aircraft, ship, or vessel certificated, registered, or licensed under a law of the State or by a public authority, or which is required to be so certificated, registered, or licensed; or
>
> (iv) that industry is carried on from, or on, or by means of, a rig or other structure, installation, or equipment, the use or function of which is regulated by the State or by the State and the Commonwealth, or is required to be so regulated; or
>
> (v) that industry is authorised or regulated by the State or by the State and the Commonwealth; or
>
> (vi) that industry is carried on pursuant to a law of the State,
>
> then this Act applies to and in relation to that industry in so far as any employment relates to the area to which this subsection applies and in any such case this Act also applies to and in relation to any industrial matter or industrial action related thereto, and any jurisdiction, function, duty, or power exercisable, imposed, or conferred by or under this Act extends thereto.
>
> (2) An employer shall, for the purposes of subsection (1), be connected with the State if that employer —
>
> (a) is domiciled in the State; or
>
> (b) is resident in the State, normally or temporarily; or
>
> (c) being a body corporate, is —
>
> (i) registered, incorporated, or established under a law of the State; or
>
> (ii) taken to be registered in the State; or
>
> (iii) a related body corporate of such a body for the purposes of the *Corporations Act 2001* of the Commonwealth;
>
> or
>
> (d) in connection with the industry concerned, has an office or a place of business in the State; or
>
> (e) is the holder of a licence, lease, tenement, permit, or other authority, granted under a law of the State or by a public authority under or by virtue of which the industry is carried on.
>
> (3) The areas to which subsection (1) applies are —
>
> (a) that area situate west of 129° of east longitude reckoning from the meridian of Greenwich, that is part of the areas known as and comprised within —
>
> (i) the Australian fishing zone as defined by the Commonwealth *Fisheries Act 1952* [2]; or
>
> (ii) the continental shelf, within the meaning of the Convention on the Continental Shelf a copy of which in the English language is set out in Schedule 1 to the Commonwealth *Petroleum (Submerged Lands) Act 1967* [3];
>
> (b) any other area seaward of the State to which from time to time the laws of the State apply or, by a law of the Commonwealth, are applied.
>
> (4) For the purposes of any proceedings under this Act an averment in the application or process —
>
> (a) that an employer was, pursuant to subsection (2), at a specified time or during a specified period or at all material times connected with the State; or

(b) that any conduct, event, circumstance, or matter occurred, or that any place is situate, within an area referred to in subsection (3),

shall, in the absence of proof to the contrary, be deemed to be proved.

(5) Subsections (1), (2), and (3) shall not be construed as applying this Act to or in relation to any person, circumstance, thing, or place by reason only of the operation of paragraph (c) of the interpretation of the term ***industry*** set out in section 7(1) unless this Act would also apply by reason of the operation of subsection (1).

(6) Effect shall be given to subsections (1), (2), and (3) only where this Act or any provision of this Act would not otherwise apply as a law of the State, or be applied as a law of the Commonwealth, to or in relation to any person, circumstance, thing, or place. (endnotes omitted)

22 Section 3 of the IR Act, however, does not apply to extend the jurisdiction of the Tribunal as its jurisdiction and the jurisdiction of the Full Bench to hear this appeal pursuant to s 49 of the IR Act is solely conferred by s 102 of the *Mines Safety and Inspection Act* and s 51I of the *Occupational Safety and Health Act*.

23 Unlike the IR Act, the *Mines Safety and Inspection Act* and the *Occupational Safety and Health Act* do not specify whether the provisions of each Act extend beyond the geographical limits of Western Australia.

24 Whether the provisions of the *Mines Safety and Inspection Act* and/or the *Occupational Safety and Health Act* can be construed to apply to matters that arise outside the geographical limits of the state and, in particular in this matter to the African country of Malawi, depends upon a consideration of and thus the construction of the context and subject matter of the *Mines Safety and Inspection Act* and the *Occupational Safety and Health Act*: ***Kay's Leasing Corporation Pty Ltd v Fletcher*** (1964) 116 CLR 124, 142 (Kitto J).

25 Whether a law has application extra-territorially is not a matter the parties can determine by specifying the law of a state is to apply: ***Kay's Leasing Corporation Pty Ltd*** (143) (Kitto J); approved by the Full Court of the High Court in ***Insight Vacations Pty Ltd v Young*** [2011] HCA 16; (2011) 243 CLR 149 [31].

26 The fact that the terms of the contract contemplate that the appellant may be employed in another location which could on its terms contemplate work in a mine in Western Australia is not relevant. In any event, the facts are clear that the respondent does not operate any mines in Western Australia and, at all material times, whilst employed by the respondent, the appellant worked in Malawi.

27 Consequently, in this matter agreement by the parties to the contract of employment to specify the laws of Western Australia in cl 20 of the contract as the law that is to govern the terms of the contract cannot confer jurisdiction upon the Tribunal. The only basis jurisdiction can be found is if upon a proper construction of the *Mines Safety and Inspection Act* and the *Occupational Safety and Health Act* the Acts can be construed as intending to apply beyond the territorial limits of Western Australia.

28 When regard is had to the express provisions of the *Mines Safety and Inspection Act*, it is doubtful that such an intention can be inferred. The scheme of the Act is that activities in mines, including safety and the responsible management, are highly regulated through inspections carried out by district and special inspectors under the control of the state mining engineer: see s 16, s 17 and s 18 of the *Mines Safety and Inspection Act*. The inspectors are appointed and hold administrative positions in the Department of the Public Service of the State of Western Australia. That department is the Western Australian Department of Mines and Petroleum. It is difficult to contemplate that the state mining engineer and the inspectors employed in the department would or could have any ability to conduct inspections of a mine in a foreign country.

29 The same observations can be made about the scheme of the *Occupational Safety and Health Act*. Compliance with safe systems of work is regulated through the work of inspectors appointed under the Act under the supervision of the Worksafe Commissioner who inspect workplaces and who are employed in a state government department who assist the Commissioner for Occupational Safety and Health. It is also difficult to contemplate how the work of these inspectors could take place in a workplace that is located in a foreign country.

30 For these reasons, I am not satisfied that ground 1 and ground 2 of the grounds of appeal have any merit as I do not agree that it can be found that the Tribunal erred in finding that it is doubtful that it has jurisdiction in relation to occupational health and safety matters in the appellant's former workplace in Africa.

(b) Ground 3

31 Ground 3 of the grounds of appeal is also without merit. The Tribunal is not conferred with any jurisdiction to hear any matters that come within the jurisdiction of the Commission. The jurisdiction of the Tribunal in respect of matters that arise under the *Mines Safety and Inspection Act* is solely confined to a referral of the matters listed in s 102(1) of the *Mines Safety and Inspection Act*.

(c) Ground 4

32 This ground raises no arguable issue. Once a question of jurisdiction is raised, the issue going to jurisdiction must be determined before exercising a power to order discovery of documents to a party: ***Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)*** (1986) 67 WAIG 325, 330 (Rowland J).

33 The exception to this principle is that it may be appropriate in some circumstances to order a party to produce documents which are relevant to the determination of the issue of jurisdiction. For example, if the jurisdictional issue is whether the respondent to an application is an employer, prior to the determination of this issue, the circumstances may require an order for discovery of documents that are relevant to the determination of that issue only.

34 In this matter, the appellant sought discovery of safety and health minutes for the year 2014. However, it is difficult to contemplate how such documents could shed any light on the question whether the Tribunal has jurisdiction to deal with or determine the matter referred by the appellant.

(d) Ground 5

35 The appellant puts forward an argument in ground 5 of the appeal that the claim he seeks to refer to the Tribunal is authorised by s 102(1)(b) of the *Mines Safety and Inspection Act* as a claim made under s 68C of the *Mines Safety and Inspection Act*. Section 68C(1) provides:

> (1) A person may —
>
> (a) refer to the Tribunal —
>
> (i) a claim that the person's employer or a prospective employer has caused disadvantage to the person in contravention of section 68A; or
>
> (ii) in the case of a contractor referred to in section 68B, a claim that the principal has contravened that section;
>
> and
>
> (b) request the Tribunal to make one or more of the orders provided for by section 68D.

36 At the hearing of the appeal, the appellant contended that the respondent caused him disadvantage within the meaning of s 68A, or alternatively that it breached s 68B of the *Mines Safety and Inspection Act* and seeks payment of compensation for loss of employment or loss of earnings pursuant to s 68C of the *Mines Safety and Inspection Act*.

37 As the appellant was, at all material times, an employee of the respondent pursuant to the terms of a fixed term contract entered into by him on 22 December 2014, s 68B is not capable of application to the appellant as s 68B only applies to claims of discrimination made by an independent contractor.

38 Whilst s 68A does apply to employees, the circumstances prohibiting discrimination are very specific. Section 68A provides:

> (1) An employer or a prospective employer at a mine must not cause disadvantage to a person for the dominant or substantial reason that the person —
>
> (a) is or was a safety and health representative; or
>
> (b) is performing or has performed any function as a safety and health representative.
>
> (2) For the purposes of subsection (1) an employer causes disadvantage to a person if the employer —
>
> (a) dismisses the person from employment; or
>
> (b) demotes the person or fails to give the person a promotion that the person could reasonably have expected; or
>
> (c) detrimentally alters the person's employment position; or
>
> (d) detrimentally alters the person's pay or other terms and conditions of employment.
>
> (3) For the purposes of subsection (1) a prospective employer causes disadvantage to a person if the prospective employer refuses to employ the person.
>
> (4) An employer or prospective employer who contravenes subsection (1) commits an offence.

39 The appellant relies upon the circumstances of disadvantage in s 68A(2)(a) and s 68A(2)(c), in that he claims he was dismissed by the respondent. However, the circumstances claimed by him relating to the termination of his employment do not appear to be capable of drawing an inference that the termination occurred because he was a safety and health representative or was performing or has performed any function as a safety and health representative.

40 The appellant was, whilst employed by the respondent, the chairman of the safety, health and environment committee of the engineering department of the Kayelekera Mine (AB 61). He claims he was discriminated against, or put another way disadvantage was caused to him, by the respondent because he was denied an exit medical examination after he was given notice that his employment was terminated. The appellant points out that he had a contractual right to such a medical examination.

41 Clause 5 of annexure 2 - Terms and Conditions of Assignment to Kayelekera Mine, Malawi of the appellant's contract of employment provides that 'You will be required to have a further medical examination upon repatriation at the end of your assignment' (AB 58). This right was referred to in a letter dated 28 February 2015 that he says was the letter he received terminating his employment (AB 60). In the letter it is stated:

> [Y]ou will be required to undergo an exit medical as you transit through Johannesburg on your way to your home destination. All reservations pertaining to this medical will be arranged for you by the Kayelekera HR team and will be paid for by the Company.

42 The appellant informed the Full Bench that despite many enquiries of the Kayelekera HR team no medical examination was arranged.

43 It is plain, however, that these circumstances are not capable of constituting prohibited grounds of discrimination set out in s 68A of the *Mines Safety and Inspection Act*. Leaving aside the issue whether the position of chairman of a safety, health and environment committee could be characterised as a safety and health representative with the meaning of s 68A of the *Mines Safety and Inspection Act*, there is nothing in these circumstances upon which an argument could be put that the dominant or substantial reason why the respondent dismissed the appellant was because he was a safety and health representative or had performed functions as such.

44 The circumstances relied upon by the appellant appear to be not only after he was dismissed, but appear to have no connection with the fact that he had been appointed and carried out the functions of a safety and health representative.

45 For these reasons, I am of the opinion that ground 5 raises no arguable case.

(e) Ground 6

46 Section 8 of the *Interpretation Act* does not assist the appellant's argument. This provision simply requires that words in an Act of parliament are to be interpreted in accordance with their current meaning. Such a legislative presumption is necessary as with the passage of time the meaning and scope of words can change. For example, in ***Re Treneski and Comcare*** [2004] AATA 98 the words 'machine-made copy' was interpreted to extend to a printed copy of an electronic mail message: [36].

Conclusion

47 For these reasons, I am of the opinion an order should be made to dismiss the appeal.

EMMANUEL C:

48 I have read a draft of the Acting President's reasons for decision. I agree with those reasons and agree that an order should be made to dismiss the appeal.

MATTHEWS C:

49 I have read a draft of the reasons for decision of the Acting President. I agree with those reasons and agree that an order should be made to dismiss the appeal.

2016 WAIRC 00716

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	ANDRIES LUCAS HOFFMAN
	APPELLANT
	-and-
	PALADIN ENERGY LTD
	RESPONDENT
CORAM	FULL BENCH
	THE HONOURABLE J H SMITH, ACTING PRESIDENT
	COMMISSIONER T EMMANUEL
	COMMISSIONER D J MATTHEWS
DATE	THURSDAY, 18 AUGUST 2016
FILE NO.	FBA 7 OF 2016
CITATION	2016 WAIRC 00716

Result	Appeal dismissed
Appearances	
Appellant	Mr A L Hoffman
Respondent	Mr T J S French (of counsel) and with him Mr J X Cockerell (of counsel)

Order

This appeal having come on for hearing before the Full Bench on 2 August 2016, and having heard the appellant on his own behalf and Mr T J S French (of counsel) and with him Mr J X Cockerell (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 18 August 2016, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders that —

The appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) J H SMITH,
Acting President.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2016 WAIRC 00713

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00713
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	WEDNESDAY 13 JULY 2016, THURSDAY 14 JULY 2016
DELIVERED	**:**	THURSDAY 18 AUGUST 2016
FILE NO.	**:**	M 172 OF 2015
BETWEEN	**:**	NOEL HARDWICK
		CLAIMANT
		AND
		QANTAS GROUND SERVICES PTY LTD
		RESPONDENT
FILE NO.	**:**	M 173 OF 2015
BETWEEN	**:**	WILLIAM MCGLUE
		CLAIMANT
		AND
		QANTAS GROUND SERVICES PTY LTD
		RESPONDENT

Catchwords	**:**	Qantas Ground Services Pty Ltd Ground Handling Agreement 2013 – Alleged failure to pay cargo drivers a higher duties allowance – Whether a higher duty allowance is payable to a cargo driver who works without direct supervision – Whether the claimants performed cargo driving duties without direct supervision – Whether the claims are aimed at reclassification.
Legislation	**:**	*Fair Work Act 2009*
Instruments	**:**	Qantas Ground Services Pty Limited Ground Handling Agreement 2013 Qantas Ground Services Pty Limited Ground Handling Agreement 2009
Case(s) referred to in reasons	**:**	***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 ***Kucks v CSR Limited*** (1996) 66 IR 182 ***Transport Workers' Union of Australia v Linfox Australia Pty Ltd*** [2014] FCA 829 ***Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148 ***The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447 ***Veolia Transport Sydney Pty Ltd v Mifsud*** [2012] FCA 1472
Result	**:**	Claims dismissed
Representation:		
Claimants	:	Mr A. Dzieciol (Counsel) of the Transport Workers' Union of Australia, West Australian Branch appeared for the claimants
Respondent	:	Mr B. Rauf (Counsel) with Mr A. Reoch instructed by Ashurst Australia appeared for the respondent

REASONS FOR DECISION

Introduction

1 Mr Noel Hardwick and Mr William McGlue (the claimants) are cargo drivers employed by Qantas Ground Services Pty Ltd (the respondent). Their work involves the driving of a truck and/or cargo tug to transport cargo to and from aircraft at Perth Airport.

2 Their employment relationship with the respondent is governed by an enterprise agreement known as the Qantas Ground Services Pty Limited Ground Handling Agreement 2013 (2013 Agreement). They are classified as Ground Crew 2 (GC2) under that Agreement.

3 The claimants assert that they are entitled to receive a higher duty allowance at Ground Crew 3 (GC3) level for each day worked from 11 June 2014 until 23 June 2015. Although their claim is limited to that period they say that they have in fact been performing higher duties for each day that they have worked under 2013 Agreement. Mr Hardwick claims he is owed higher duties allowance amounting to $2,040.96 and Mr McGlue claims to be owed $1,886.11.

4 The respondent denies the claims on the following grounds:

1. The claimants are not entitled to the payment of a higher duties allowance because they did not perform the work of an employee at GC3 level; and
2. The claimants are impermissibly attempting to reclassify their roles of cargo drivers from GC2 to GC3 in circumstances in which the work they performed has not changed; and
3. The interpretation of the 2013 Agreement advanced by the claimants is contrary to statutory construction principles and cannot result in what the claimants seek; and
4. Further and in any event, even if the claimants are entitled to a higher duties allowance (which is denied) the amounts that they seek are not maintainable.

Jurisdiction

5 The claimants allege that, by failing to pay them a higher duty allowance, the respondent has contravened s 50 of the *Fair Work Act 2009* (FW Act).

6 The court has jurisdiction to deal with such a matter because it is an eligible state or territory court within the meaning of s 12 of the FW Act and because s 545(3) of the FW Act provides:

> *(3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:*
>
> *(a) the employer was required to pay the amount under this Act or a fair work instrument; and*
>
> *(b) the employer has contravened a civil remedy provision by failing to pay the amount.*

7 Section 50 of the FW Act provides that a person must not contravene a term of an enterprise agreement. That section is expressed to be a civil remedy provision.

The Facts

8 The facts are not controversial.

9 The parties have agreed the following facts:

1. *The Claimants are employed by Qantas Ground Services Pty Limited, and the Qantas Ground Services Pty Ltd Ground Handling Agreement 2013 (**2013 Agreement**) applies to the Claimants' employment. The 2013 Agreement took effect from 4 November 2013.*
2. *The 2013 Agreement replaced the Qantas Ground Services Pty Ltd Ground Handling Agreement 2009 (**2009 Agreement**).*
3. *The Claimants are classified under the 2013 Agreement as Ground Crew Level 2, and perform the role of a Cargo Driver. Cargo Drivers were also classified as Ground Crew Level 2 under the 2009 Agreement.*
4. *The role of a Cargo Driver involves operating equipment and vehicles including tow motors and freight trucks (which are 8 tonne rigid flattop trucks).*
5. *Cargo Drivers may also be required to operate a stationary FMC Lifter that is located at Bay 703 of the Perth Domestic standoff bay to transfer freight from a freight truck to profiles or vice versa.*
6. *The Claimants have not been trained to perform the following functions:*
   - *(a) Operation of in-hold systems and associated equipment on aircraft;*
   - *(b) Pushback of aircraft;*
   - *(c) Driving and operating high-lift catering vehicles;*
   - *(d) All Team Leader and related duties for employees classified in GC1; and*
   - *(e) Passenger handling.*

Cargo Driver duties during a shift

7. *At the start of each shift, Cargo Drivers will swipe their access cards to register their time and attendance using the iRoster program.*
8. *Cargo Drivers also log into the Qantas Staff Notification Order system (SNO).*
9. *Cargo Drivers print out a copy of the Port Arrivals Plan (**Arrivals/Departures Schedule**) to identify the order in which they will be required to perform their duties during a shift.*
10. *During their shift, the Cargo Drivers pick up freight from the Freight shed using a tow motor and take the freight to the required bay for the particular aircraft.*
11. *Cargo Drivers will also pick up freight from the aircraft bay and drop it off at the freight to the freight shed.*
12. *During their shift, the Cargo Drivers will identify an appropriate time to take their meal break. This will generally fall outside the morning and afternoon peak periods.*

13. *Cargo Drivers become aware of changes to the Arrivals/Departures Schedule by displays on the Flight Information Display Screens (**FIDS**) located at the Airport (including at aircraft bays, the freight shed, meal room and swipe on / off area).*

14. *At the end of a shift, the Cargo Driver does not conduct a handover with the incoming Cargo Driver. The incoming Cargo Driver identifies his or her tasks by reference to the updated Arrivals/Departures Schedule that they print out at the start of their shift.*

Claimants' Argument

10 Clause 14(d) of the 2013 Agreement provides that where an employee performs higher duties for any part of the shift or day, then the employee is entitled to be paid for that shift or day at the rate of pay for the higher level.

11 The classification regime set out in cl 13 of the 2013 Agreement provides:

13. Classifications and Duties

(a) Employees will be classified as either:

(i) Trainee

(ii) Ground Crew 1 (GC1)

(iii) Ground Crew 2 (GC2)

(iv) Ground Crew 3 (GC3)

(v) Ground Crew 3A (GC3A)

(vi) Ground Crew 3B (GC3B)

(vii) Ground Crew 4 (GC4)

(b) The Company has the right to determine the size, composition and duties and other work practices in place at any of its work sites.

(c) The roles and duties for each classification are provided at Attachment B. Both management and ground crew will work in a flexible and cooperative way to ensure that their responsibilities are met.

(d) The parties acknowledge that aircraft types and operating requirements will evolve over the life of the Agreement and that the duties relating to the functions identified at Attachment B will change from time to time in meeting those operating requirements.

(e) The Company will provide training to ensure that the appropriate industry standards are applied and maintained in the handling of aircraft and associated equipment and when dealing with guests and their property.

12 The roles and duties of GC2 and GC3 classification is set out in Attachment B to the 2013 Agreement as follows:

Ground Crew 2 ("GC2")

All of GC1 +

- *Perform "hands-on" activities in all ground crew areas that are directly and indirectly associated with aircraft handling;*
- *Operate equipment and vehicles including tow motors, small vans, tarmac buses, mobile steps, belts, disabled passenger lift, aerobridges, fork-lift and equipment requiring similar operational skills associated with ramp, cargo, freight, catering, aircraft servicing and general transport operations;*
- *Undertake basic serviceability and maintenance checks of vehicles and/or equipment, including refuelling, for vehicles operated at this level;*
- *Undertake store operations, loading and unloading of catering equipment and advanced preparation of foodstuffs;*
- *"Work down" as required.*

Ground Crew 3 ("GC3")

All of GC1 and GC2 +

- *Operate all in-hold systems and associated equipment on aircraft;*
- *Pushback;*
- *Undertake basic serviceability and maintenance checks of vehicles and/or equipment, including refuelling, for vehicles operated at this level;*
- *Driving and operating high-lift catering vehicles;*
- *Compile operational reports and documents using designated systems and equipment;*
- *Required to work without direct supervision;*
- *All Team Leader and related duties for employees classified in GC1;*
- *"Work down" as required; and*

- *Passenger handling. For an employee employed after the Date of Commencement of this Agreement GC3 Year 2 rate of pay will apply for passenger handling.*

13 The claimants assert that the work they do and did during the relevant period falls within the GC3 classification description because they are required to work without direct supervision. They say that they have performed higher duties for at least part of each shift they worked because of the following reasons:

1. In performing their duties as cargo drivers they, to a large extent, have worked autonomously and without direct supervision from a leading hand or from a supervisor; and
2. Working without supervision is a function of the GC3 classification.

14 The claimants contend that the issues for the court to determine are:

1. Whether, during the period which is the subject of the claims, the claimants worked without direct supervision for at least part of their shift; and
2. If they did work without direct supervision for at least part of their shift, whether they performed the duties of a GC3 employee.

15 They say that if both questions are resolved in the affirmative then it will follow that they are entitled to be paid the higher duties allowance pursuant to cl 14(d) of the 2013 Agreement.

16 The claimants contend that the central issue to be determined in these matters is what is meant by the term 'direct supervision' in the GC3 classification. They say that term ought to be interpreted as suggested by Flick J in ***Veolia Transport Sydney Pty Ltd v Mifsud*** [2012] FCA 1472 [16] - [17] and by Madgwick J in ***Kucks v CSR Limited*** (1996) 66 IR 182 [184]. In written submissions lodged on 27 April 2016 at [15] they suggest the following principles are distilled from those authorities:

(a) the construction task begins with considering the ordinary meaning of the words having regard to their context and purpose – ordinary or well-understood words should generally be accorded their ordinary or usual meaning;

(b) where the language is ambiguous or open to differing interpretations it is permissible to have regard to surrounding circumstances or context to assist in the interpretation of an agreement;

(c) regard should not be had to the subjective beliefs or understandings of the parties about their rights and liabilities; and

(d) the meaning of the provision is to be determined with regard to what a reasonable person would have understood it to mean, with this usually requiring consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

17 Further, at [16] – [21] of their written submissions, they went on to say:

16. The concept of "direct supervision" is well known and understood in the employment context. The word "direct" means "without intermediaries or intervention of other factors" (The Australian Oxford Dictionary, 4th Ed.). The word supervision is also well known and understood, and "supervise" means "to observe and direct the execution of a task, project or activity (The Australian Oxford Dictionary, 4th Ed.).

17. In this case the evidence of the claimants clearly shows that they do not work with a person who observes and directs the various tasks that the claimants undertake throughout their shift, the order in which they are to do things, and, when they are to take their meal break. Rather, the evidence shows that the claimants to a large degree work autonomously, and that during a shift the claimants only interact with persons in supervisory roles if there is a problem that they cannot deal with themselves.

18. The reasonable conclusion from the above, is that during each shift that the claimants worked in the relevant time period, there was at least a portion of that shift where the claimants worked without direct supervision, since they did not have a more senior person directing them in their work, to make sure that they were doing what they were supposed to be doing, and that they were doing the work correctly and safely.

GC3 Duties

19. Some of the duties and responsibilities associated with the GC3 classification in the Ground Handling Agreement are set out in paragraph 7 above. That description of the GC3 role includes a combination of specific jobs, such as the operation of in- hold systems and associated equipment and pushback of aircraft, and also more general requirements, such as working without direct supervision.

20. The evidence of the Claimants shows that an employee who is classified as a GC3 is not required to do, or have the capacity to do all of the tasks that are included in the description of the GC3 classification. For example, a person who does aircraft pushbacks, only pushes back aircraft and does not undertake any of the other duties listed in the GC3 clarification. For example, that person does not, and is not expected to operate in-hold systems and associated equipment.

21. One of the roles of a GC3 employee includes working without direct supervision. Accordingly, where a GC2 employee works without direct supervision for at least a part of their shift, then that employee is performing the duties of a GC3 employee, and, therefore, that GC2 employee is entitled to be paid a higher duties allowance for the whole of that shift, in accordance with cl.14(d) of the Ground Handling Agreement.

The Respondent's Answer

18 The respondent's answer to the claimants' argument is in part contained in [5] to [9] of its written submissions lodged on 23 May 2016 in which it said:

> *5. In this respect it is noted that the Claimants do not suggest that they performed any substantive GC3 duties (such as operating a High–Lift vehicle; the in- hold systems and associated equipment on an aircraft; or a pushback vehicle.)*
>
> *6. Rather, the Claimants assert that they should have been paid a Higher Duties Allowance for their work as Cargo Drivers, in reliance on a single indicator within the GC3 classification description, namely, of being "required to work without direct supervision."*
>
> *7. The Respondent submits that the Claimant's interpretation of the classification structure is misconceived, and that being "required to work without direct supervision" does not in and of itself mean that a role falls within the substantive GC3 level. Rather, it is a descriptive indicator of how Level 3 work is carried out, rather than what Level 3 work is.*
>
> *8. The Respondent further submits that the level of supervision referable to the Cargo Driver role is not determinative of whether or not the Cargo Driver role falls within the GC3 level. On a proper interpretation and application of the classification structure, the Cargo Driver's substantive role falls squarely within the GC2 classification.*
>
> *9. In any event, Mr Hardwick and Mr McGlue are subject to layers of supervision by persons and systems in relation to the performance of their work. Such supervision is direct in that there is oversight and direction in relation to the work performed by Mr Hardwick and Mr McGlue.*

Review of the Evidence

19 The evidence before me in respect to liability is that derived from the claimants and Mr Brett Robert Hardy (Mr Hardy), Head of the respondent. There is also other evidence before me with respect to quantum but for reasons which follow it will be unnecessary for me to consider the same.

20 The evidence received as to liability gives rise to the following findings.

The Work of Cargo Drivers

21 In the performance of their duties each claimant drives an eight tonne rigid flattop truck and/or cargo tug to and from aircraft. They also operate a pallet lifter to move cargo.

22 When the claimants start their shift they sign on by swiping their staff card on a scanner and log onto the Qantas Staff Notification Order system. They then print off details of the planned aircraft arrivals and departures which will occur during their shift and if working on the international side of the airport, they also print out an off load sheet. From that off load sheet they determine whether there is any perishable cargo on the aircraft. They then plan their work for the shift. They know that cargo has to be delivered to the aircraft one hour before the aircraft's departure time. Therefore, working from the print-outs, they work out the order in which they have to deliver and pick up cargo during their shift. They also work out when they will take their meal break. All those planning tasks are done without the input of a leading hand or supervisor.

23 There is no change over procedure between shifts so that if their shift starts just after a plane has arrived they go out to check the bay at which that aircraft is located to ascertain if there is cargo waiting to be transported to the cargo shed. If there is, they take that cargo to the cargo shed. If there is no cargo waiting they move onto their next task.

24 Whilst at the cargo shed they identify the freight that has to go out to the next plane. They check to ensure that the destination cards on the cargo are correct and the load is properly secured on the profiles awaiting to be towed. If necessary they ensure that the cargo is appropriately covered. They then take the freight to the bay allocated for the particular plane.

25 When working on the international side of the airport they drive a cargo truck to bay 703 where they use a lifter to transfer cargo from the truck to profiles. With respect to incoming cargo they take the cargo profiles to bay 703 where they transfer cargo from profiles to the truck using a lifter. They operate the lifter without supervision.

26 Cargo drivers usually leave outgoing cargo at the bay allocated to the plane. The ground crew will take the incoming freight off the plane and will leave that cargo in the allocated bay for the cargo driver to collect. They then load the outgoing cargo that had been left in the bay. However, on some occasions, cargo is taken directly to or from the plane. In such cases cargo drivers drive up to the lifter at the plane and place the cargo on the lifter for loading or alternatively take the cargo that has just come off the plane from the lifter onto the truck.

27 Cargo drivers regularly deal with perishable or special cargo which cannot be left on the tarmac. When that is the case, the cargo driver will contact the leading hand in charge of the particular plane to let him know whether the cargo on board should be offloaded directly onto truck, or alternatively profiles.

28 During their shift cargo drivers are involved in a continual process of delivering freight to aircraft and collecting cargo that has been offloaded. Their schedule of work which is determined at the commencement of their shift is subject to change. They need to regularly monitor the arrival and departure screens in order to keep up with changes and adjust their work schedule. Change usually occurs by reason of delay in the arrival or the departure of a flight. Sometimes there is a change in the bay to which an aircraft is sent. That necessitates the cargo driver contacting the Resource Allocation Officer (ROA) to find out where the plane has gone. Changes also occur for other reasons. From time to time one plane may be substituted for another on a particular service. In such cases cargo drivers are required to check for any changes to the registration number of the plane against the flight number.

29 Other than for the purpose of ascertaining the different location of an aircraft the ROA is rarely contacted. Contact will be made with him only in unusual or extraordinary circumstances.

30 For most of every shift cargo drivers work independently. They do not report to a leading hand or supervisor and they are not told what to do. They know the tasks that are required and do them. When things run smoothly they can go through the whole shift without talking to anyone about their work. As they finish a task they simply cross it off the list and move on to the next task.

The Dispute

31 Mr Hardy first became aware of an issue concerning the classification of cargo drivers on 24 June 2013 when he received an email from Mr McGlue complaining that the level of duties and responsibilities of cargo drivers was not reflected in their GC2 classification under the Qantas Ground Services Pty Limited Ground Handling Agreement 2009 (2009 Agreement) which then applied. Mr McGlue asked that cargo drivers be 'recognised' as level 3. Mr Hardy responded to his email and advised that the respondent regarded the GC2 classification to be the correct classification for Perth cargo drivers.

32 Subsequent negotiations with respect to the creation of the 2013 Agreement to replace the 2009 Agreement did not lead to a change in the classification of cargo drivers' position. The Transport Workers Union of Australia WA Branch (TWU) did not dispute or seek to change the position. The GC2 classification of cargo drivers was not revised. It was agreed that cargo drivers would continue to be employed at level two as had been the case under the 2009 Agreement. I accept Mr Hardy's evidence in that regard.

33 In about October 2013 Mr McGlue sent an email to Mr Hardy expressing his disappointment that cargo drivers had not been reclassified to a GC3 role as part of the 2013 Agreement negotiations. At that time Mr McGlue did not suggest he should be paid a higher duties allowance but instead maintained that the cargo driver role should be reclassified to a GC3 position.

34 From October 2013 the respondent was engaged in ongoing correspondence, discussions and site inspections with cargo drivers and the TWU concerning the classification of cargo drivers. Those things failed to resolve the classification issue.

35 On 12 March 2015 Mr Hardy received a letter from the TWU notifying the respondent of a dispute. In that letter the respondent was advised for the first time that the TWU on behalf of its members sought payment of a higher duties allowance for GC2 employees who had been performing GC3 duties. It also sought a review of machinery operations, associated tasks and responsibilities applying in the GC3 classification. The higher duties said to have been performed were working unsupervised, undertaking basic serviceability and maintenance checks of vehicles and/or equipment and/or compiling operational reports and documents using designated systems and equipment.

36 It suffices to say that prior to that date the claimants had not made a claim for the payment of a higher duties allowance. In order to receive payment of a higher duties allowance at Perth Airport an employee is required to complete a form for approval by their manager. The claimants' claim form for the payment of a higher duties allowance for the period 11 June 2014 to 23 June 2015 was not submitted until on or about 7 June 2016, which was after the commencement of these proceedings.

Determination

37 The claimants submit that the pivotal issues I need to determine is whether they worked without direct supervision for at least part of their shift and if so whether they performed the duties of a GC3 employee.

38 The respondent on the other hand, suggests that the court should assess the claims for what they are, being an impermissible attempt to reclassify the claimants positions. If that is found to be the case the claims are fundamentally flawed. In any event, there is no basis for the construction proposed by the claimants and further that the evidence does not support the claimants' contention that they work without supervision.

39 In my view these claims, properly characterised, constitute a reclassification claim. The role or function of each claimant has not changed since they first commenced in the role to the present. The claimants were classified as GC2 employees under the 2009 Agreement and such classification did not change in the 2013 Agreement.

40 Both claimants have been quite candid that they believe that they should have been paid at the GC3 level throughout. It is obvious that their claims relate to the desire and preference to receive a higher rate of pay for their role as cargo driver.

41 The claimants are prevented from advancing a reclassification dispute because of cl 5.1 and cl 30 of the 2013 Agreement which provide:

> ***5.1 Comprehensive Agreement***
>
> *This Agreement is a comprehensive agreement and replaces all other awards, orders of industrial commissions or industrial agreements that would otherwise apply to employees.*
>
> ***30. No Extra Claims***
>
> *The parties bound and employees covered by this Agreement will not pursue any claims relating to any matter or employment condition during the life of this Agreement.*

42 It is important to observe that no claim for a higher duties allowance was made week by week as the duties were performed. Rather, a period has been chosen. The period does not have any particularly identifying features. Indeed the claims could have related to any period of the claimants' employment under the 2013 Agreement. The claims are broad and non-specific. When properly analysed the claims are an attempt to reclassify. The allegation of underpayment has been used as a vehicle to achieve that which would otherwise have been impermissible.

43 Relevantly cl 14(d) of the 2013 Agreement states:

> ***Higher Duties***
>
> *An employee will complete all duties at or below the employee's classification level as required by the Company. Where an employee works higher duties for any part of the shift or day, the employee will be paid for that shift or day at the rate for the higher level.*

44 The performance of higher duties necessarily involves doing work which is different to the work which is usually done by that employee. It requires the doing of something which in most instances will be more demanding or complex than the characteristic of the employee's normal function or role. It is obvious however that during the material period the claimants did no more than to carry out the primary functions of GC2 employees.

45 Whereas, this court has jurisdiction to deal with an alleged underpayment claim (see s 545(3) of the FW Act) it certainly does not have jurisdiction to deal with reclassification.

46 Even if the claims could be characterised as genuine underpayment claims, the claims cannot succeed in any event because there is no basis for the construction the claimants contend.

47 The claimants contend that in performing their functional role as cargo drivers they, at all times, performed at a higher level and therefore ought to have received a higher duties allowance. They rely on a single descriptor in the GC3 classification of the 2013 Agreement.

48 In ***City of Wanneroo v Australian Municipal, Administrative, Clerical Services Union*** [2006] FCA 813. His Honour French J (as he then was) said:

> *53. The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument….*
>
> *57. It is of course necessary, in the construction of an award, to remember, as a contextual consideration, that it is an award under consideration. Its words must not be interpreted in a vacuum divorced from industrial realities – City of Wanneroo v Holmes (1989) 30 IR 362 at 378–379 and cases there cited. There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned – see eg George A Bond & Co Ltd (in liq) v McKenzie [1929] AR (NSW) 498 at 503–504 (Street J). It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in City of Wanneroo v Holmes (at 380):*
>
> > *Awards, whether made by consent or otherwise, should be make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties.*

49 In ***Kucks v CSR Limited*** (1996) 66 IR 182 Madgwick J set out the legal principles applicable to the interpretation of industrial instruments. He said at page 184:

> ***Legal Principles***
>
> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framers(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*
>
> *But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as arbitral body does, what might fairly be put into an award. So, for example, ordinary or well- understood words are in general to be accorded their ordinary or usual meaning.*

50 Each of the aforementioned decisions make it clear that it is important in seeking to understand the operation which is intended by the framers of the document, that regard is to be had to industrial realities and the consideration of the meaning not be divorced from that.

51 In ***Transport Workers' Union v Linfox Australia Pty Ltd*** [2014] FCA 829 his Honour Tracey J rejected a literal construction of the relevant clause provisions relating to the provision of crib time. He said:

> *95. This review supports the conclusion that, between the advent of the 1983 Award and, in particular, since the introduction into it in 1987 of the shift work provisions, and March 2012, the parties had, by their conduct, demonstrated that they held a common understanding that the provisions relating to crib time applied only to shift workers and that the large majority of workers who were treated as "day workers" were not "day shift" workers within the meaning of the award. In such circumstances the literal construction of Clause 26 must give way to the common understanding, over almost a quarter of a century, of the parties whose conduct it regulated.*

52 In ***Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148, his Honours Siopis, Buchanan and Flick JJ said:

> *45. In the search for an objective intention arising from the language used in an instrument of the present kind (i.e. 2008 EBA and 2011 EBA) it is relevant to bear in mind the context in which the instrument came into existence. In some cases that context might show that a particular construction or operation was unlikely to have been intended.*

53 In ***The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*** [2014] FWCFB 7447 Ross P, Gostencnik DP and Johns C after reviewing a number of authorities relating to the construction of enterprise agreements said:

> *From the foregoing, the following principles may be distilled:*
>
> *1. The AI Act does not apply to the construction of an enterprise agreement made under the Act.*
>
> *2. In construing an enterprise agreement it is first necessary to determine whether an agreement has a plain meaning or contains an ambiguity.*
>
> *3. Regard may be had to evidence of surrounding circumstances to assist in determining whether an ambiguity exists.*
>
> *4. If the agreement has a plain meaning, evidence of the surrounding circumstances will not be admitted to contradict the plain language of the agreement.*
>
> *5. If the language of the agreement is ambiguous or susceptible to more than one meaning then evidence of the surrounding circumstance will be admissible to aide the interpretation of the agreement.*
>
> *6. Admissible evidence of the surrounding circumstances is evidence of the objective framework of fact and will include:*
>
> *(a) evidence of prior negotiations to the extent that the negotiations tend to establish objective background facts known to all parties and the subject matter of the agreement;*
>
> *(b) notorious facts of which knowledge is to be presumed;*
>
> *(c) evidence of matters in common contemplation and constituting a common assumption.*
>
> *7. The resolution of a disputed construction of an agreement will turn on the language of the Agreement understood having regard to its context and purpose.*
>
> *8. Context might appear from:*
>
> *(a) the text of the agreement viewed as a whole;*
>
> *(b) the disputed provision's place and arrangement in the agreement;*
>
> *(c) the legislative context under which the agreement was made and in which it operates.*
>
> *9. Where the common intention of the parties is sought to be identified, regard is not to be had to the subjective intentions or expectations of the parties. A common intention is identified objectively, that is by reference to that which a reasonable person would understand by the language the parties have used to express their agreement.*
>
> *10. The task of interpreting an agreement does not involve rewriting the agreement to achieve what might be regarded as a fair or just outcome. The task is always one of interpreting the agreement produced by parties [41].*

54 The authorities referred to above support the respondent's construction which involves looking at the whole of the provisions of the 2013 Agreement, the broad functions of each classification level and the parties' understanding of how the classifications operate. In that regard I agree with the respondent' written submissions at [7].

55 Clause 13 of the 2013 Agreement provides:

> ***13. Classifications and Duties***
>
> *a. Employees will be classified as either:*
>
> *i. Trainee*
>
> *ii. Ground Crew 1 (GC1)*
>
> *iii. Ground Crew 2 (GC2)*
>
> *iv. Ground Crew 3 (GC3)*
>
> *v. Ground Crew 3A (GC3A)*
>
> *vi. Ground Crew 3B (GC3B)*
>
> *vii. Ground Crew 4 (GC4)*
>
> *b. The Company has the right to determine the size, composition and duties and other work practices in place at any of its work sites.*
>
> *c. The roles and duties for each classification are provided at Attachment B. Both management and ground crew will work in a flexible cooperative way to ensure that their responsibilities are met.*

d. The parties acknowledge that aircraft types and operating requirements will evolve over the life of the Agreement and that the duties relating to the functions identified at Attachment B will change from time to time in meeting those operational requirements.

e. The Company will provide training to ensure that the appropriate industry standards are applied and maintained in the handling of aircraft and associated equipment and when dealing with guests and their property.

56 The issue which remains is whether the claimants, in carrying out their functions, did the duties described in the GC3 classification. If it is established that they worked without direct supervision for at least part of their shifts during the material period, does it follow that they did the work ascribed to GC3 employees? The answer to that question can only be resolved by determining the requirements for GC3 classification.

57 I agree with the respondent's contentions at [8] of its written submissions.

58 The resolution of the disputed construction of the GC3 classification description in the 2013 Agreement will turn on the language used in that clause having regard to its context and purpose. Its context appears from the text of the clause and the classification structure in Attachment B to the 2013 Agreement viewed as a whole. When such is considered, it is self-evident that the classifications are hierarchical. The classifications are dependent upon the level of skill and responsibility required to do the job. In turn each classification must be read as a whole. The various descriptors within the classification cannot be isolated or divorced from each other. They must be read together in order to make the classification work within the established hierarchical structure.

59 It is clear that the classifications within the 2013 Agreement are based on functional roles. There are however ancillary descriptors within each classification. The role and ancillary descriptor must be read together. The isolation of the ancillary descriptor undermines the description of the classification.

60 I accept the respondent's submission that the descriptors in GC2 such as, 'required to work without direct supervision', 'undertake basic serviceability and maintenance checks on vehicles and or equipment including refuelling for vehicles operated at this level' and 'work down as required', makes no sense at all if treated in isolation. A literal construction of such a provision may potentially lead to a low classification employee saying 'I do that in relation to my vehicles on my level and therefore should receive a higher duties allowance', notwithstanding such a duty is ancillary to his or her primary function.

61 In the end it is the primary role descriptor which is of particular significance in determining the hierarchy of classifications. In the GC3 classification the primary function descriptors are those of the operation of in-hold systems on aircraft, the driving of pushback vehicles and the operation of highlift catering equipment. Other descriptions such as 'compile operational reports and documents using designated systems and equipment' are ancillary and cannot be read in isolation because that descriptor may apply to any number of employees at differing levels whether or not that particular descriptor is expressed in the classification description. The approach that the claimants suggest can lead to absurd results. For example, the requirement for an employee to provide a report in any context could lead to a claim for a higher duties allowance.

62 I accept Mr Hardy's evidence that GC3 employees have been trained to a higher level than GC2 employees and their classification levels are directly commensurate to their level of training and workplace abilities. To be classified in the GC3 role at Perth Airport, an employee must operate the in-hold systems of an aircraft, act as a pushback driver, or operate a highlift vehicle. That requires extra training and involves the operation of more complex vehicles and/or machinery than that applicable to the GC2 classification. The actual performance of such roles is an essential ingredient required to come within the GC3 classification.

63 In those circumstances even if it could be said that the claimants are required to work without direct supervision that alone cannot pull them up into a higher classification level. That is because they do not perform the tasks that GC3 employees perform in their primary roles.

64 In so far as the claimants rely on the operation of the lift at bay 703 which involves a similar task to that of GC3 employees at the aircraft, I observe that the level of responsibility attached to what they do is considerably less. GC3 employees need to ensure that lifts are operated in such a way that the aircraft is not damaged by its use, whereas the claimants, when operating the lifter at bay 703, are well away from aircraft and therefore cannot potentially damage the aircraft in their use of the lifter. Consequently, the level of skill and responsibility attached to what they do is considerably less.

65 For the sake of completeness I will move now to consider whether the claimants have established that during the material period they worked without direct supervision.

66 The respondent's employees even at the lowest classification level are not, when working, under constant direct supervision. The amount of direct supervision they require is dependent upon the task being performed. Some tasks do not require extensive supervision. Some GC1 and GC2 employees by the very nature of what they do perform tasks with minimal intervention. I accept Mr Hardy's evidence in that regard.

67 Cargo drivers' functions are consistent. That is, they perform the same day-to-day role week- by-week. Mr Hardy described their functions as being static. That description appears to be apt. The claimants do their work according to the chronology and departures indicated by their employer. That chronology may vary by virtue of changes to arrivals, departures and aircraft used. It is true that they are not instructed task by task and that they carry the responsibility to change their work schedule according to the prevailing circumstances, however that is limited within the context of designated tasks within a schedule. For example, they do not have any autonomy to decide not to load or unload a particular plane or otherwise not conform to the arrivals and departures schedules as varied from time to time.

68 It is clear that there is a degree of control and direction in what the claimants do. When cross examined Mr Hardwick accepted that if two aircraft arrived close together and he could not get to the second aircraft to unload, he would contact the ROA to deal with it. He would then follow that officer's direction. Mr McGlue gave similar evidence. It is obvious that they do not rely entirely on their own devices in what they do. They are, to the extent required, directly supervised and controlled. Given the static nature of what they do the need for specific instruction and overview for each separate task is not required. Although level of supervisory intervention required may be minimal it does not mean that they are not directly supervised. In the event that I am wrong with respect to other issues I conclude that the claimants cannot succeed in any event because it has not been established that they worked without direct supervision.

Conclusion

69 The claimants have not proven that they are entitled to a higher duties allowance. It follows that it will be unnecessary to address the issue of quantum.

G. CICCHINI

INDUSTRIAL MAGISTRATE

2016 WAIRC 00756

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2016 WAIRC 00756
CORAM	**:**	INDUSTRIAL MAGISTRATE G. CICCHINI
HEARD	**:**	THURSDAY 1 SEPTEMBER 2016
DELIVERED	**:**	THURSDAY, 15 SEPTEMBER 2016
FILE NO.	**:**	M 12 OF 2016
BETWEEN	**:**	SIMONE JADE STEWART
		CLAIMANT
		AND
		NEXT RESIDENTIAL PTY LTD
		RESPONDENT

Catchwords	**:**	The Clerks - Private Sector Award 2010 [MA000002] (the Award) -Non-payment of overtime and lunch breaks allegedly worked – Preliminary issue – Whether the written contract of employment which makes provision for the payment of an annualised salary complies with clause 17(1)(b) of the Award – Whether the claim is ousted by the contract of employment which provides for the payment of annualised salary.
Legislation	**:**	*Fair Work Act 2009*
Instruments	**:**	Clerks - Private Sector Award 2010 [MA000002]
Case(s) referred to in reasons	**:**	***Kucks v CSR Limited*** (1996) 66 IR 182 ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 ***Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148
Result	**:**	Preliminary Issue Resolved
Representation:		
Claimant	**:**	Mr P. Mullally of Workclaims Australia as agent.
Respondent	**:**	Ms J Beeson of Beeson HR Consulting as agent.

REASONS FOR DECISION

Background

1 Next Residential Pty Ltd (the respondent) is a residential building company. It operates in Western Australia from premises at 8 Gibberd Road, Balcatta.

2 It employed Ms Simone Jade Stewart (the claimant) in the capacity of administration co-ordinator from 20 January 2014 until 27 January 2016.

3 The terms and conditions of the claimant's employment were set out in a written contract of employment entered into by the parties on 20 January 2014. It is not in issue that pursuant to that contract the claimant was paid an annual salary. At termination of her employment the claimant's salary was $78,000.

4 The parties agree that at all material times the claimant's employment was governed by the Clerks - Private Sector Award 2010 [MA000002] (the Award).

5 On 28 January 2016, the claimant lodged a claim against the respondent seeking to recover $28,984 allegedly owed to her by the respondent. She asserts that the respondent failed to pay her overtime and lunch breaks worked as directed.

6 The respondent denies that it directed the claimant to work overtime or to work through her lunch breaks. It says that any nominal additional hours worked by the claimant was not at its direction but rather was worked by the claimant on or of her own volition. Further the respondent says that any additional hours worked by the claimant were set off against early finishes, late starts and half days worked.

7 The respondent says that the claimant is not entitled to what she claims because, as agreed in her contract of employment, she was paid an annualised salary. Such was in accordance with cl 17 of the Award.

Preliminary Issue

8 The parties seek the determination of a preliminary issue. That is whether the contract of employment excludes those parts of the Award provisions upon which the claimant relies.

Contractual Provisions

9 Clause 8.1 of the contract of employment provides:

> ***Salary***
>
> *Please refer to Annexure A at the back of this document for the particulars of your salary. Your salary will be paid fortnightly into an account nominated by you. Your salary is inclusive of any award provisions/entitlements that may be payable under an award.*

10 It is not in issue that the claimant's salary at commencement was $75,000.

11 Clause 6 of the contract of employment sets out what was agreed with respect to hours of work. It provides:

> *Your ordinary hours of work are from 8.00am to 5.00pm Monday to Friday with a one (1) hour lunch break. You are expected to work, on average at least 40 hours per week, however there will be times when you will be required to work reasonable additional hours as necessary to ensure that the requirements of your position are met. Your remuneration takes these additional hours of work in account and no further payment will be made for extra hours worked.*

Award Provision

12 Clause 17 of the Award which concerns annualised salaries provides:

> ***17.1 Annual salary instead of award provisions***
>
> ***(a)*** *An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:*
>
> ***(i)*** *clause 16 – Minimum weekly wages;*
>
> ***(ii)*** *clause 19 – Allowances;*
>
> ***(iii)*** *clauses 27 and 28 – Overtime and penalty rates; and*
>
> ***(iv)*** *clause 29.3 – Annual leave loading.*
>
> ***(b)*** *Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.*
>
> ***17.2 Annual salary not to disadvantage employees***
>
> ***(a)*** *The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).*
>
> ***(b)*** *The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.*
>
> ***17.3 Base rate of pay for employees on annual salary arrangements***
>
> *For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 16 – Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.*

Claimant's Argument

13 The written contract of employment which was prepared by the respondent:

(i) did not identify the applicable Award; and

(ii) did not advise the claimant of the Award provisions which were to be satisfied by the payment of the annual salary.

14 Clause 17(1)(b) of the Award provides that where an annual salary is paid, the employer must advise the employee in writing of the annual salary and which provisions of the Award is to be satisfied by the payment of the annual salary.

15 Given that the respondent has not complied with clause 17(1)(b) of the Award, the claimant is entitled to overtime hours worked and to receive payment for having worked through lunch breaks. The respondent cannot rely upon cl 17 of the Award to exclude the claim.

Respondent's Answer

16 The claimant was 'furnished' with an employment contract which clearly states in cl 8.1 (Remuneration) that the salary was 'inclusive of any award provisions/entitlement that may be payable under an award'. The respondent says that the employment contract is explicit and its intentions are clear that the salary payable to the claimant was inclusive 'of any or all' of the provisions set out and payable under the Award.

Determination

17 For administrative ease it is common for employers to pay an 'all-inclusive rate' which is intended to compensate the employee for all award entitlements in relation to their work, which may include minimum wages, overtime penalty rates and leave loading.

18 It is imperative that such intention be clearly articulated in the employment contract because an employer will be unable to meet its award obligations by offsetting award obligations against over award payments, unless there is specific agreement with the employee about what the over award payments are compensating the employee for.

19 The need for specificity is recognised by cl 17(1)(b) of the Award which requires the identification of the specific provisions of the award that will be satisfied by the payment of the annual salary. If a payment is made to satisfy a particular award obligation such as ordinary hours of work, then the excess cannot be set off against a different award obligation such as overtime unless the contract of employment clearly indicates that the excess is paid to satisfy any entitlement to overtime. The requirement for specificity is aimed at removing any doubt about what the annualised payment is for.

20 Clause 17.1(a) of the Award provides that an employer may pay an employee an annual salary in satisfaction of any or all of the following provisions (my emphasis added):

(i) Clause 16 – Minimum weekly wages

(ii) Clause 19 – Allowances

(iii) Clauses 27 and 28 – Overtime and penalty rates

(iv) Clause 29.3 – Annual leave loading

21 It is obvious that not all entitlements payable under the Award are capable of inclusion within annualised salary. One such example is the provision of meal breaks (cl 26.1 of the Award).

22 The question which remains is whether cl 8.1 of the contract of employment elucidates the intention that the respondent asserts, being that the claimant's annual salary was inclusive 'of any or all' the provisions set out and payable under the Award. That question can only be resolved in light of industrial realities that existed at the time that the contract was made (see ***Kucks v CSR Limited*** (1996) 66 IR 182 [184] per Madgwick J; ***City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*** [2006] FCA 813 [57] per French J). In that regard context is all important.

23 In ***Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd*** [2014] FCAFC 148 Siopis, Buchanan and Flick JJ said:

> *The test that should be applied is to discern the objective meaning of the words used bearing in mind the context in which they appear and the purpose they are intended to serve. Here, the definition in question expressly extended to work ancillary to the principal business. That was the true question for examination [22].*

24 Their Honours continued:

> *In the present case, Coles stressed that industrial agreements and other instruments may legitimately extend and apply to new fact situations, relying on observations of Gibbs CJ in R v Isaac; Ex parte Transport Workers' Union of Australia (1985) 159 CLR 323 ("Isaac") at 331. In the passage from Isaac upon which Coles relied, (which canvassed the proper construction of a union rule) Gibbs CJ emphasised the primacy of "the ordinary meaning of the words of the rule". However, giving primacy to the text does not deny the importance of understanding the context in which an instrument is made, and which it is intended to address, nor the utility of bearing in mind the facts as they are known at the time the instrument is drafted [46].*

25 The final sentence of cl 8.1 of the contract of employment attempts in the broadest possible way to include within the annualised salary 'any' award provisions/entitlements that may be payable under 'an' award. However, such text creates uncertainty with aspect to various issues, including the award to which it refers and the award provisions it purports to cover. On the face of it, the clause appears to attempt to include award entitlements which are incapable of inclusion.

26 If cl 8.1 of the contract of employment had made specific reference to 'any and all' of the payments set out in cl 17.1(a) of the Award, then there would have been no doubt as to what the parties intended. However, because it does not do that it has led to confusion and disputation. The text of cl 8.1 of the contract of employment reveals a lack of regard to specificity which in itself reveals the context in which the contract of employment was made. It is obvious that the parties were not alert to the applicable award, let alone its provisions which were to be included in the annualised salary.

27 The written contract of employment did not identify the applicable award nor did it provide which award provisions were to be satisfied by the payment of the annual salary. It lacked the type of specificity required by cl 17(1)(b) of the Award. The requirement for specificity is crucial because a worker must be able to compare his or her annual salary to award entitlements so that the no-disadvantage test can be properly considered. That could not be done in this instance.

Conclusion

28 The contract of employment does not exclude the claimant's claim because cl 8.1 of the contract of employment does not clearly indicate that the claimant's annual salary included those entitlements which she now seeks to recover.

G. CICCHINI

INDUSTRIAL MAGISTRATE

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2016 WAIRC 00737

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	CLAIRE ANTHEA BOWMAN
	APPLICANT
	-v-
	COUNTRY HIGH SCHOOL HOSTELS AUTHORITY - BROOME RESIDENTIAL COLLEGE
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 5 SEPTEMBER 2016
FILE NO/S	U 205 OF 2014
CITATION NO.	2016 WAIRC 00737

Result	Discontinued by leave
Representation	
Applicant	In person
Respondent	Mr D Anderson of counsel

Order

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

THAT the application be and is hereby discontinued by leave.

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

2016 WAIRC 00238

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS GEORGE HARTWIG
	APPLICANT
	-v-
	INTERSTATE ENTERPRISES PTY LTD TRADING AS ATS RECRUITMENT SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	THURSDAY, 21 APRIL 2016
FILE NO.	B 181 OF 2015
CITATION NO.	2016 WAIRC 00238

Result	Direction issued
Representation	
Applicant	In person
Respondent	Mr R Lindsay of counsel and with him Ms J Grant of counsel

Direction

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

(1) THAT the applicant file and serve an amended application with full particulars by no later than 5 May 2016.

(2) THAT the respondent file and serve an amended notice of answer and counter proposal with full particulars in answer to the amended application by no later than 19 May 2016.

(3) THAT each party shall give an informal discovery.

(4) THAT the parties file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than three working days prior to the date of the hearing.

(5) THAT the application be listed for hearing for two days on dates to be fixed.

(6) THAT the parties have liberty to apply on short notice.

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

2016 WAIRC 00247

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS GEORGE HARTWIG
	APPLICANT
	-v-
	INTERSTATE ENTERPRISES PTY LTD TRADING AS ATS RECRUITMENT SERVICES
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	WEDNESDAY, 27 APRIL 2016
FILE NO.	B 181 OF 2015
CITATION NO.	2016 WAIRC 00247

Result	Direction issued
Representation	
Applicant	Ms N Young of counsel
Respondent	Mr R Lindsay of counsel and with him Ms J Grant of counsel

Directions

HAVING heard Ms N Young of counsel on behalf of the applicant and Mr R Lindsay of counsel and with him Ms J Grant of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby directs –

(1) THAT the Commission's directions of 21 August 2016 be and are hereby revoked.

(2) THAT the applicant file and serve an amended application with full particulars by no later than 12 May 2016.

(3) THAT the respondent file and serve an amended notice of answer and counter proposal with full particulars in answer to the amended application by no later than 26 May 2016.

(4) THAT each party shall give an informal discovery.

(5) THAT the parties file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than three working days prior to the date of the hearing.

(6) THAT the application be listed for hearing for two days on dates to be fixed.

(7) THAT the parties have liberty to apply on short notice.

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

2016 WAIRC 00741

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00741
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	THURSDAY, 21 APRIL 2016, THURSDAY, 2 JUNE 2016
DELIVERED	**:**	MONDAY, 5 SEPTEMBER 2016
FILE NO.	**:**	B 181 OF 2015
BETWEEN	**:**	THOMAS GEORGE HARTWIG Applicant AND INTERSTATE ENTERPRISES PTY LTD TRADING AS ATS RECRUITMENT SERVICES Respondent

Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Preliminary issue - Whether terms and conditions of Enterprise Agreement were expressly incorporated into employee's contract of employment - Principles applied - Clear words of agreement between contracting parties required - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed
Representation		
Counsel:		
Applicant	**:**	In person
Respondent	**:**	Mr R Lindsay of counsel and with him Ms J Grant of counsel
Solicitors:		
Respondent	**:**	Capital Legal

Case(s) referred to in reasons:

Australian Workers' Union v BHP Iron-Ore Pty Ltd [2001] FCA 3; (2001) 102 IR 410

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

Byrne v Australian Airlines Limited; *Frew v Australian Airlines Limited* [1995] HCA 24; (1995) 185 CLR 410

Gramotnev v Queensland University of Technology [2013] QSC 158

Soliman v University of Technology, Sydney [2008] FCA 1512; (2008) 176 IR 183

Tracey Louise Fergusson v The Salvation Army (Western Australia) Property Trust as the trustee for the Salvation Army (WA) Social Work trading as Salvos Stores [2014] WAIRC 01042; (2014) 95 WAIG 348

Case(s) also cited:

FP Group Pty Ltd v Tooheys Pty Ltd [2013] FWCFB 9605

Cimeco Pty Ltd North Western Australian Construction Projects Agreement 2011 and Cimeco Pty Ltd Midwest and Goldfields Regional Construction Projects Agreement 2011 [2012] FWA 526

Servcorp WA Pty Ltd v Perron Investments Pty Ltd [2016] WASCA 79

Wilton & Cumberland v Cole & Allied Operations Pty Ltd [2007] FCA 725

Reasons for Decision

1 The applicant, Mr Hartwig, was employed by the respondent, Interstate Enterprises Pty Ltd, then trading as ATS Recruitment Services, now Tecside Group Pty Ltd, to perform truck driving services for Tecside's client, BGC Transport. Tecside is a labour hire company which employs casual employees for engagements with Tecside's clients Australia-wide. Mr Hartwig initially registered with Tecside in June 2013 and was informed at that time that he was being considered for an assignment with BGC Transport as a truck driver engaged in the haulage of grain dust. Mr Hartwig commenced the engagement with BGC as a casual HC driver on 7 October 2013.

2 As a part of the engagement, Mr Hartwig was offered and accepted Tecside's standard 'Conditions of Employment' document, setting out the terms and conditions on which Tecside was to engage Mr Hartwig. Subsequently, during the course of the engagement, a dispute arose between the parties as to Mr Hartwig's terms and conditions of employment. He maintained that the terms of the relevant BGC Transport Enterprise Agreement 2013 were expressly incorporated into his contract of employment. Thus, he was entitled to the benefits of that agreement. On the other hand, Tecside maintained that at no time did such an agreement become an express term of Mr Hartwig's contract of employment. Tecside maintained that Mr Hartwig's employment was covered by the *Road Transport and Distribution Award 2010*, a modern award of the Fair Work Commission. The agreed rate of pay was that as specified in Mr Hartwig's initial engagement.

3 As Mr Hartwig now claims he has been denied some $42,412.50 in contractual entitlements, based on the BGC Transport Enterprise Agreement terms, a preliminary issue arises as to whether or not the BGC Transport Enterprise Agreement was an express term of the employment contract between Mr Hartwig and Tecside. Given the complexities of Mr Hartwig's claim on the merits, the parties proposed, and the Commission agreed, to determine whether or not the BGC Transport Enterprise Agreement terms and conditions were expressly incorporated into Mr Hartwig's contract of employment with Tecside as a preliminary issue.

The facts

4 As noted above, Mr Hartwig attended the initial meeting on 26 June 2013. He met with Mr Sutton, then a recruitment consultant. Mr Sutton testified that as a client, BGC regularly requested Tecside to supply truck drivers for its operations. Mr Sutton said that he would regularly advertise for positions available, and registered candidates for when opportunities arose. Additionally, Mr Sutton testified that sometimes BGC would refer individuals directly to Tecside for consideration.

5 At the meeting on 26 June 2013, it was common ground that the Tecside standard terms and conditions of employment, called the 'Conditions of Employment', was provided to Mr Hartwig and explained to him. His evidence was that he read the document carefully before signing it. At that meeting, the rate of pay of $28 to $29 per hour, as being the applicable minimum hourly rate, was discussed. This was reflected in Mr Sutton's notes of the interview and attached as annexure DS-4 to his affidavit.

6 As the document assumes some significance for the purposes of determining the preliminary issue, the ATS Recruitment Services Terms and Conditions of Employment for Casual Workers is set out as follows:

ATS RECRUITMENT SERVICES

Terms and Conditions of Employment for Casual Workers

These Terms and Conditions of Employment are entered into between Interstate Enterprises Pty Ltd (trading as ATS Recruitment Services and hereinafter referred to as 'ATS') and THOMAS GEORGE HARTWIG of (address & postcode) 36 REPTON ST DAYTON (hereinafter referred to as the 'Worker').

The Worker declares that all information provided to ATS is true and correct. The Worker understands that should any offer of casual employment be made by ATS it is subject to the following Terms and Conditions of Employment as detailed below:

Terms and Conditions of Employment

1. Commencement of Employment Terms

These Terms and Conditions apply from 26/6/13.

2. Nature of employment

The Worker is engaged by ATS to provide his/her services to clients of ATS on a casual contract for services basis.

3. Replacement Contract

These Terms and Conditions replace any previous Terms of Employment, whether written or verbal, which may exist between ATS and the Worker and any such contract shall be deemed to have been terminated by mutual consent as from the date of this contract.

4. Duties and Assignments

a) ATS may offer employment and communicate duties to the Worker via telephone, in writing. SMS or electronic means.

b) The Worker agrees and acknowledges that ATS may engage their services at such locations or sites as required by any ATS client (hereinafter referred to as 'Client').

c) ATS will indicate to the Worker the prospective duration and conditions of an employment assignment. However, the Client has the right to vary any duration or assignment without notice, and ATS has the right to vary the duration and/or assignment likewise.

d) Where the Worker accepts an employment engagement, the Worker must endeavor[sic] to complete that period of engagement. The Worker must inform ATS without delay should the Worker not be able to complete the employment engagement period.

e) During the Worker's term of engagement with the Client the Worker shall be supervised by, and must act in accordance with, the directions given by the Client and its authorised officers, agents or supervisors including, but not limited to, working hours, safety regulations and the manner in which the Worker Is[sic] to carry out his or her duties or provide his or her services to the Client.

f) If the Worker is temporarily unable to work in any period of employment the Worker must give ATS at least eight (8) hours of notice before normal start time.

g) The Worker must not agree to any changes in his/her workplace or duties on behalf of the Client without first obtaining the approval of ATS.

h) The Worker warrants that he/she has the skills, capacity and competence required to perform the work for which the Worker is engaged and will carry out his or her duties, functions and obligations in a competent, professional and skillful[sic] manner.

5. Termination

a) ATS win use reasonable endeavours to provide to the Worker assignments with its Clients.

b) The Worker may reject or accept any offer of employment made by ATS.

c) On completion or cessation of an assignment for any reason, ATS is under no obligation whatsoever to offer the Worker any further assignments.

d) Employment may be terminated by either party, giving a minimum of four (4) hours of notice. ATS may at its discretion pay the Worker in lieu of notice.

e) ATS reserves the right to summarily dismiss the Worker for gross misconduct as determined by ATS.

6. Wages

ATS will pay the Worker his/her wages as follows:

a) The Worker is required to present a weekly timesheet to ATS which has been duly signed by a Client representative confirming and authorising the hours so stated by 10am on a Monday morning for work undertaken in the previous week. Failure to present a signed and authorised timesheet by this time may result in a delay in the payment of wages until the following week. Payment is made on a weekly basis by electronic funds transfer into the Workers nominated bank account.

b) Should any bank account details supplied by the Worker to ATS be incorrect, the Worker acknowledges that payment of wages may be delayed or lost and that ATS is not responsible or liable for any loss resulting In such circumstances.

c) ATS accepts no responsibility for incorrect allocation of any payment by a bank, building society or credit union for reasons beyond its control. Delayed wages cannot be processed until ATS has recovered monies misallocated due to the Worker providing incorrect details.

d) The Worker's wages are calculated on an hourly or daily rate as agreed between ATS and the Worker. If the Worker accepts an employment assignment or engagement with a Client the Worker is deemed to have accepted the rate offered for the duration of that employment assignment with the Client. Should the Worker agree to accept an assignment on a flat rate basis for all hours or days worked, that rate includes all normal time and overtime components, and any other additional amount for any site allowance or tool allowances or the like. No further payments will be made in respect of such work when a flat rate is agreed.

7. Superannuation

a) ATS will pay superannuation to the Worker's designated superannuation fund. In the absence of providing sufficient details of a nominated superannuation fund, ATS shall make payment to the Recruitment Super Fund on the Workers behalf.

b) Superannuation is paid in accordance with Superannuation Guarantee Legislation for ordinary hours which means those hours constituting a thirty eight (38) hour week or, where specified within the client/site/industry employment conditions relating to casual workers, an alternative percentage rate and/or hours as so stated.

8. Leave

The Worker, being a casual Worker, is not entitled, subject to any applicable legislation, to any paid leave.

9. Policies and Procedures

a) ATS's policies and procedures, as varied from time to time, form a part of and are included in this contract and the Worker agrees to comply with them.

b) The Worker also agrees to abide by the policies and procedures of the Client/s and sites to which they are assigned.

10. Confidential Information

a) The Worker understands that during the course of employment with ATS and its clients that the Worker may become acquainted with or have access to confidential information relating to affairs, business dealings or transactions of ATS and/or the Client. The Worker agrees to maintain confidentiality of this information and to prevent its unauthorised disclosure or use by any other person, firm or company.

b) The Worker shall not remove any confidential information from the premises of ATS or the Client without prior written consent from ATS or the Client.

c) The Worker shall not, for whatever reason, either for the Worker or third party appropriate, copy, memorise or in any manner reproduce or reverse engineer any of the confidential information of ATS or the Client.

d) The Worker must return all confidential information of ATS or the Client upon termination of the engagement with the Client or ATS.

e) The Worker acknowledges that ATS may obtain, among other things, injunctive relief against the Worker for any breach of this contract at the Worker's cost.

f) The Worker must immediately notify ATS of any suspected or actual unauthorised use, coping or disclosure of confidential Information.

11. Restraint of Trade

The Worker covenants not to work directly for a Client with whom the Worker has been engaged or introduced to by ATS without the written consent of ATS. Consent may be withheld at the absolute discretion of ATS where an agreement between ATS and the client is not in place.

12. Worker Obligations

The Worker agrees:

a) To notify ATS immediately in the event that an offer of casual, part-time or permanent employment is made to the Worker by the Client or an alternative supplier to that client.

b) Not to engage or take part in any conduct or activity which may harm, or adversely affect, ATS's or the Client's operations or business or interests.

c) To comply with all relevant Acts, regulations, statutes, legislations, codes of conduct or practice that may apply during the assignment.

d) To comply with all ATS Occupational Health & Safety policies and procedures (as amended from time to time) as well as those of the Client including, without limitation, requirements as to the wearing of safety equipment whilst in areas requiring such equipment.

e) To obey all lawful written and verbal health and safety instructions issued or displayed by either ATS or the Client.

f) If the Worker accepts an assignment or engagement that requires a license, ticket or certification of any type whatsoever, (including, but without limiting the type of license required, a valid driver's license of any class), then the Worker must ensure that those licenses are current and remain valid during the period of the employment assignment. The Worker must immediately notify ATS if such license, ticket or permit expires or is revoked or declared invalid.

g) To undertake police checks and clearance at his or her own expense either whilst on an employment assignment with a Client or prior to being offered an assignment if requested to do so by either ATS or a Client unless agreed otherwise by ATS.

h) To abide by the relevant road traffic legislation when operating any client equipment or machinery. Any traffic infringements sustained whilst operating such plant or machinery will be the Worker's responsibility.

i) In the event of any damages to the Client's equipment or machinery, which is caused by the Worker's negligence, the Worker will be responsible and personally liable for loss or damage occasioned and if insured for an insurable risk then the Worker is liable for any insurance excess.

13. Workers Compensation

ATS is responsible for statutory workers compensation insurance. In the event of an injury occurring during an assignment, the Worker must immediately notify ATS of the incident or accident. Failure to do so will determine that the Worker does not qualify for workers' compensation insurance. The Worker accepts this fundamental principle as a condition of employment.

14. Governing Law

These Terms and Conditions are governed by, take effect and are constructed in accordance with the laws in force in the relevant state or territory of Australia and the parties submit to the jurisdiction of the state or territory applicable.

15. Variation

These Terms and Conditions may only be varied in writing and executed by both the Worker and ATS.

Worker Signature [signed] Date 26/6/13

ATS Signature [signed] Date 26/6/13

On behalf of INTERSTATE ENTERPRISES PTY LTD (trading as ATS)

(Exhibit R1, annexure DS-1. My emphasis)

7 For present purposes, an important part of this document is cl 6(d), which I comment on further below.

8 Mr Hartwig subsequently commenced the engagement at BGC at the rate paid by Tecside. Set out at annexure DS-2 to Mr Sutton's affidavit are a series of payment advices referring to Mr Hartwig's name, pay date, pay period and the relevant earnings information. The hourly rate set out was $29.15 per hour. That base hourly rate subsequently increased to $31.15 per hour from September 2015.

9 Mr Hartwig testified that after receiving his first pay slip, he began to query his rate of pay. He telephoned Mr Sutton in about late October 2013. Mr Hartwig said that he queried his classification as a 'HC Driver Semi Tipper grade 7', because he was then driving a truck and trailer. Mr Sutton testified that Mr Hartwig also queried his nightshift rate of pay. Mr Sutton's evidence was that he answered Mr Hartwig's queries and although he did not seem particularly happy with the outcome, he thought the information provided meant that Mr Hartwig understood his pay rate. A copy of the Tecside system notes, including conversations between Mr Hartwig, Mr Sutton and others, was annexure DS-3 to Mr Sutton's affidavit.

10 Mr Sutton said that a couple of days after the first telephone call from Mr Hartwig he received a further telephone call. Mr Hartwig asked Mr Sutton for a copy of the 'BGC EBA'. Mr Sutton said that in response to Mr Hartwig's request, he sent an email to him attaching an internet link to the Fair Work Commission website, with the list of registered enterprise agreements, publically accessible. It was Mr Sutton's evidence that at no time during any conversation with Mr Hartwig, did he say that Mr Hartwig's terms and conditions of employment were as set out in the BGC Transport Enterprise Agreement. To the extent that Mr Hartwig claimed to the contrary, Mr Sutton strongly denied it. It was Mr Hartwig's evidence that he could not access the BGC Transport Enterprise Agreement from the FWC link. He rang Mr Sutton again and Mr Sutton read out to him the actual internet address information. Mr Hartwig said he subsequently found what he was looking for. Mr Hartwig testified that he also spoke to 'Siobhan' at Tecside about various other things, including not getting paid the proper meal allowance.

11 It was Mr Hartwig's evidence that no-one at Tecside told him that the *Road Transport and Distribution 2010* modern award applied to his employment.

12 Mr Sutton said he was well aware that employees of Tecside, when working for a client on site, sometimes queried their rates of pay. This is because they are generally working side by side with employees of the client company, and both groups of employees often talk about their terms and conditions of employment.

13 This issue was taken up to an extent in the evidence of Mr Pollack, the Chief Executive Officer of Tecside. His evidence was that as a labour hire business, Tecside, whilst being covered by the *Road Transport and Distribution Award*, also has regard to the applicable rates being paid at the client's site, when setting rates to pay its own employees. This includes rates of pay under relevant industrial instruments, to ensure there is some parity between the client and Tecside, in order to both attract and retain employees. He also said that in about July 2015 he spoke to Mr Hartwig on the telephone. Mr Pollack explained that contrary to Mr Hartwig's apparent understanding, Tecside was not a party to the BGC Transport Enterprise Agreement, the modern award applied as minimum conditions, and Tecside paid in excess of the award.

Consideration

14 For the purposes of determining this preliminary issue, the question to be asked and answered is what were Mr Hartwig's terms and conditions of employment as specified in his contract of employment? It is readily apparent from the terms of the contract of employment document set out above, that the contract between Mr Hartwig and Tecside was both written and oral. The majority of the terms were written. The oral term related to that specified at cl 6(d) in relation to the wage rate, which was to be 'as agreed between ATS and the Worker'. In this case, this related to the earlier discussion between Mr Hartwig and Mr Sutton, in June 2013, when the rate of pay for the BGC assignment was mentioned. Importantly also, is the balance of cl 6(d), which provided that if the employee accepted an employment assignment with a client, they are deemed to accept the wage rate offered for the duration of that assignment.

15 Mr Hartwig in his evidence, and as noted above, said that he read the terms and conditions of employment document very carefully. He said he understood it. Both Mr Hartwig and Mr Sutton agreed that the hourly rate of $28 to $29 per hour was discussed in the initial meeting as being applicable to the BGC assignment. The rate of pay initially paid to Mr Hartwig, on the commencement of his assignment, was $29.15 per hour, as set out at annexure DS-2 to Mr Sutton's affidavit, that being Mr Hartwig's pay advices for the material time. This was consistent with what Mr Hartwig and Mr Sutton discussed in the initial meeting. In accordance with the terms of the employment contract between Mr Hartwig and Tecside, which in my view are clear and unambiguous, in commencing the assignment with BGC, Mr Hartwig was taken to have accepted the hourly rate of pay discussed in June 2013, and paid to him on his commencement.

16 As at the time of the formation of the contract of employment and its operative effect, which must be taken to include both the employment contract document as signed on 26 June 2013 and the later confirmation of the terms by Mr Hartwig, on his acceptance of the BGC assignment and commencing at BGC in October 2013, no reference at all had been made by either party, to the terms of the BGC Transport Enterprise Agreement as being a term and condition of Mr Hartwig's employment. That is, at the time the contract of employment was formed, and at the time of its commencement and performance, there can be, in my view, no basis to contend that the BGC Transport Enterprise Agreement, whatever that ultimately was, expressly formed any part of it.

17 There is only one possible basis for Mr Hartwig to contend to the contrary. That is the subsequent telephone conversation between himself and Mr Sutton, when he queried his rates of pay, the reference by him to the BGC Transport Enterprise Agreement and Mr Sutton sending him the FWC internet link for enterprise agreements, somehow led to the express incorporation of the BGC Transport Enterprise Agreement into his contract of employment. In my view, for the following reasons, which I can briefly outline, that proposition is not tenable.

18 It is trite to observe that awards and industrial agreements are independent from contracts of employment, as was made clear in *Byrne v Australian Airlines Limited*; *Frew v Australian Airlines Limited* [1995] HCA 24; (1995) 185 CLR 410. Incorporation of the terms of industrial instruments into contracts of employment will not be lightly inferred. Notably, in *Byrne*, the issue was whether relevant terms of an award that bound the parties was implied or imported into the contract of employment. Even in the case where an employer is a party to a relevant award or industrial agreement, which is not the case here, as I observed in *Tracey Louise Fergusson v The Salvation Army (Western Australia) Property Trust as the trustee for the Salvation Army (WA) Social Work trading as Salvos Stores* [2014] WAIRC 01042; (2014) 95 WAIG 348 at [16]:

> 16 … The mere mention of an award, or a provision of one, will not provide a basis to conclusively determine that the award is contractually binding. As the learned authors in Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment* (7th ed, 2011) 266 say:
>
> > Nevertheless, mere mention of the existence of an award or enterprise agreement which binds the parties will not conclusively determine that the award or agreement clauses are incorporated into and

> binding in contract. It may be that on proper construction of the contract document, the reference to the award or agreement manifests nothing more than an acknowledgment by the parties of the statutory instruments which will also govern their relationship, according to the terms of the statute. Mention of industrial instruments in a contract document may serve to identify 'relevant information capable of affecting the parties contractual relations rather than documents intended to be binding and enforceable as part of their contractual relations'.

17 Thus, the reference to industrial instruments in contracts of employment in terms such as "are prescribed by"; "are as prescribed"; "subject to and governed by", have been held to be insufficient to constitute words of incorporation: *Gramotnev v Queensland University of Technology* [2013] QSC 158; *Australian Workers' Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3; (2001) 102 IR 410; *Soliman v University of Technology, Sydney* [2008] FCA 1512; (2008) 176 IR 183.

19 The facts of this case, even putting Mr Hartwig's contentions at their very highest, fall far short of establishing that the terms of the BGC Transport Enterprise Agreement were expressly incorporated into his contract of employment, such that they would be enforceable as contractual benefits by him. I accept on the evidence, Mr Hartwig asked Mr Sutton for a copy of the BGC Transport Enterprise Agreement, because he was trying to ascertain what those terms and conditions were. Mr Sutton, to assist him, directed him to the FWC website, where enterprise agreements registered under the *Fair Work Act 2009* (Cth) may be accessed.

20 In my view, such a communication could never be reasonably construed as supporting express incorporation of such an instrument, whatever the terms of that agreement may well be. Even if such an act could constitute in some way, express incorporation, on the evidence, reference to the "BGC Agreement" was vague and ambiguous. There was no specification or proper identification of the relevant BGC Transport Enterprise Agreement itself, at the time. Furthermore, there was no identification or express reference to any particular terms of that agreement, which could support the incorporation proposition. Clear words of agreement between the contracting parties would be required to support express incorporation on this basis.

21 Furthermore, the parties to the relevant contract of employment in this case were Mr Hartwig and Tecside. There was no employment relationship between Mr Hartwig and BGC. There was a commercial contract between Tecside and BGC for the provision of labour hire services, but that contract conferred no benefits directly on Mr Hartwig.

22 Whilst some reference was made to a meeting between Mr Hartwig and Mr Sutton sometime in November 2014, where pay rates were discussed, this was well after the contract was formed and performed. In my view, nothing said in that meeting could constitute any evidence of a variation to the contract of employment between Mr Hartwig and Tecside, even if Mr Sutton had authority to contract on behalf of Tecside, which Tecside contended he did not.

23 Even though it was not a part of Mr Hartwig's claim or argued as such, nor in my view, on the facts, would there be any basis to contend that the BGC Agreement would be incorporated, as an implied term, into Mr Hartwig's contract of employment, on the authority of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. The contract of employment between the parties was clearly effective without such a term.

24 Finally, I must say that much of the dispute that arose between the parties could have been avoided through better communication. I consider that Tecside should have made it clear to Mr Hartwig that the *Road Transport and Distribution Award* applied to his employment at the initial recruitment stage. It further could have indicated that the company paid in excess of the minimum award rates, taking account of rates paid on the client's site. This is so because as Mr Sutton said in his evidence, these are matters that employees will discuss amongst themselves anyway. It is far better in my view, that these matters be clearly communicated at the outset, to avoid unnecessary confusion and potential disputation.

25 For the foregoing reasons, I am not persuaded that the contract of employment between Mr Hartwig and Tecside expressly, or by implication, incorporated the terms of the relevant BGC Transport Enterprise Agreement. Accordingly, the application must be dismissed.

2016 WAIRC 00742

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	THOMAS GEORGE HARTWIG
	APPLICANT
	-v-
	INTERSTATE ENTERPRISES PTY LTD TRADING AS ATS RECRUITMENT SERVICES
	RESPONDENT
CORAM	SENIOR COMMISSIONER S J KENNER
DATE	MONDAY, 5 SEPTEMBER 2016
FILE NO/S	B 181 OF 2015
CITATION NO.	2016 WAIRC 00742

Result	Application dismissed
Representation	
Applicant	In person
Respondent	Mr R Lindsay of counsel and with him Ms J Grant of counsel

Order

HAVING heard the applicant on his own behalf and Mr R Lindsay of counsel and with him Ms J Grant of counsel on behalf of the respondent the Commission, pursuant to the powers conferred on it under the Industrial Relations Act, 1979 hereby orders –

THAT the application be and is hereby dismissed.

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

2016 WAIRC 00728

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00728
CORAM	**:**	COMMISSIONER D J MATTHEWS
HEARD	**:**	MONDAY, 18 JULY 2016, TUESDAY, 19 JULY 2016
DELIVERED	**:**	MONDAY, 29 AUGUST 2016
FILE NO.	**:**	B 28 OF 2016
BETWEEN	**:**	GUY MILLMAN Claimant AND UNITED PETROLEUM PTY LTD Respondent

Catchwords	**:**	Claim for denied contractual benefits - Claim disputed - Employment ended - Claim for payment of imported annual leave at rate of pay as at termination - Respondent contends only leave accrued during period of employment paid at rate of pay as at termination - Held imported annual leave payable at rate of pay as at termination - Respondent contentions in alternative - Section 26 *Industrial Relations Act 1979* (WA) - Unfair to pay imported leave at rate of pay as at termination - Unjust enrichment of claimant - Breach of warranties by claimant - Not in public interest to make orders for payment of imported leave at rate of pay as at termination - Contentions under section 26(1) not industrial matters - No jurisdiction under *Industrial Relations Act 1979* (WA) to decide contentions - Claim succeeds
Legislation	**:**	*Industrial Relations Act 1979* (WA) sections 7, 23 and 26
Result	**:**	Claim allowed, order for payment made
Representation:		
Applicant	**:**	In person
Respondent	**:**	Ms H R Millar (of Counsel)
Solicitors:		
Respondent	**:**	K&L Gates

Case(s) referred to in reasons:

BGC (Australia) Pty Ltd v Phippard [2002] WASCA 191

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337

Hotcopper Australia Ltd v Saab [2002] WASCA 190

Case(s) also cited:

Adelaide Timber Company Pty Ltd v The West Australian Timber Industry Industrial Union of Workers, South-Wet Land Division (1990) 71 WAIG 325

Australian Glass Manufacturing Co Pty Ltd v Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch (1992) 72 WAIG 1499

Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (2008) 247 ALR 208

Re Harrison; Ex Parte Sealanes (1985) Pty Ltd [2005] WASC 158

Robe River Iron Associates v Federated Engine Drivers' and Firemens' Union of Workers Western Australian (1986) 67 WAIG 315

Ruxley Electronics and Construction Company Co Ltd v Forsyth [1996] AC 344

Reasons for Decision

1 Part of the claimant's annual leave entitlement was paid to him upon the termination of his employment with the respondent at the rate of $40.00 per hour. The claimant says he had a contractual entitlement to be paid the entire amount of his annual leave entitlement at the rate of $60.73 per hour. The respondent denies such a contractual entitlement and contends that even if there was such an entitlement it would be unfair for the Western Australian Industrial Relations Commission to enforce it.

Background

2 The evidence led at the hearing clarified various matters relating to the dispute. In my view, and as will be clear from these reasons, no serious credibility issues requiring resolution arose during the course of the evidence.

3 The evidence established the following by way of factual background.

4 By deed executed 7 November 2014 the respondent bought a business named "Fuels West Petroleum" from G and K Millman Pty Ltd. The claimant was one of only two directors and shareholders of G and K Millman Pty Ltd (the other being his wife Karen Jane Millman). The claimant was the controlling mind of G and K Millman Pty Ltd.

5 The respondent offered employment to certain employees of G and K Millman Pty Ltd. The claimant, Deborah Ann Barker and Owen Kinsey were offered and accepted employment with the respondent. (See clause 18.2 of Exhibit 3, the Asset Sale Agreement).

6 Clause 18.4(b) of Exhibit 3 had the effect that, for those employees of G and K Millman Pty Ltd who took up offers of employment, the respondent would become responsible for their "Leave Entitlements", that is their leave entitlements accrued but not used during the course of their employment with G and K Millman Pty Ltd. "Leave Entitlement" was defined in clause 1.1 of Exhibit 3 to include annual leave entitlements.

7 Clause 18.3(a) of Exhibit 3 provided that G and K Millman Pty Ltd had to provide to the respondent, before Exhibit 3 was executed, full written details of the "Leave Entitlements" of relevant employees.

8 In terms of compliance with clause 18.3(a) the claimant pointed to Exhibits 1 and 2.

9 Exhibit 1 is a "Final Payment Certificate" dated 28 October 2014 which attached a document capturing a MYOB accounting programme summary of the leave entitlements of the claimant, Ms Barker and Mr Kinsey.

10 Exhibit 1 was produced in anticipation of settlement of the sale of the business occurring in late October 2014. In the event settlement was delayed until 7 November 2014.

11 Exhibit 2 is a "Final Payment Certificate" dated 6 November 2014 and which attached an updated MYOB accounting programme summary of the leave entitlements of the claimant, Ms Barker and Mr Kinsey.

12 Settlement occurred on 7 November 2014.

13 Pursuant to clause 20.1 of Exhibit 3 the claimant personally warranted that each of G and K Millman Pty Ltd's warranties (with those warranties being set out at schedule 7 to Exhibit 3) were true and accurate.

14 One of the warranties given, at clause 20(a) of Schedule 7, was that Schedule 2 to Exhibit 3 contained a complete list of the employees of G and K Millman Pty Ltd and an accurate statement of, among other things, their accrued entitlements.

15 Schedule 2 to Exhibit 3 recorded the leave entitlements in hours.

16 It is obvious from looking at Schedule 2 to Exhibit 3 that the information included in it was drawn from the MYOB programme summary prepared for the original settlement date (which was the second page of Exhibit 1) and not that prepared for the eventual settlement date (which was the second page of Exhibit 2).

17 For instance, Schedule 2 to Exhibit 3 documents that the claimant's accrued annual leave is 1415.909 hours which is a figure appearing for the claimant in Exhibit 1.

18 Exhibit 2 records a different (but lower) figure in that field and that figure does not appear in Schedule 2 to Exhibit 3.

19 In any event, the sale was not held up because of any alleged failure to comply with clause 18.3(a) or because of any discrepancy between the information in Schedule 2 of Exhibit 3 and the information in Exhibit 2 and the discrepancy was not argued by the respondent to be relevant to the outcome of these proceedings.

20 Both Exhibits 1 and 2 converted the claimant's accrued annual leave entitlement expressed in hours to a money value. The money value is found in the last column of the MYOB programme summary and that figure appears in the Final Payment Certificates.

21 The reason for the conversion to a money value, and the appearance of that figure in the Final Payment Certificate, is that pursuant to clause 18.3(d)(iv) of Exhibit 3 the purchase price of the business was to be reduced by the "Leave Adjustment", with that term being defined by clause 1.1 to include an amount equal to 100% of all amounts accrued but unpaid as at the date of sale in relation to annual leave for any employee of G and K Millman Pty Ltd who had accepted employment with the respondent.

22 Accordingly, the first page of Exhibit 2 reflects that the purchase price was reduced by $56,221.16 and included in that amount was an amount of $55,344.12 for the accrued but unpaid annual leave entitlement of the claimant, the amount of which in hours may be found on the second page of Exhibit 2.

23 I note that it became apparent in the proceedings that the annual leave entitlements of Ms Barker and Mr Kinsey were not applied in reduction of the purchase price, presumably due to oversight, (that is the money value of the entitlements as set out in pages 2 of Exhibits 1 and 2 were not incorporated into pages 1 of those exhibits) but the respondent expressly stated it was making nothing of this in the current proceedings.

24 At clause 3(a) of Schedule 7 to Exhibit 3, G and K Millman Pty Ltd warranted that all information given to the respondent by G and K Millman Pty Ltd and its employees was true, complete and accurate in all material respects and was not misleading or deceptive in any way. At clause 20(i) of Schedule 7 G and K Millman Pty Ltd warranted that if the services of an employee of G and K Millman Pty Ltd had been terminated then the amount provided for in its books for annual leave would have been sufficient to pay out the accrued annual leave entitlement. As I have said, pursuant to clause 20.1 of Exhibit 3 the claimant warranted that G and K Millman Pty Ltd's warranties were true and accurate.

25 The relevant sum effects of Exhibits 2 and 3 on the facts of this case are:

(1) The possibility of the claimant being offered employment with the respondent was in the contemplation of them both;

(2) If an offer of employment was made to and accepted by the claimant, the respondent was to become responsible for the accrued annual leave entitlements of the claimant;

(3) That annual leave entitlement was expressed as a figure in hours in the second page of Exhibit 2 and, more importantly, pursuant to the Asset Sale Agreement, was expressed as a figure in hours (inaccurately but not relevantly so) in Schedule 2 to Exhibit 3;

(4) The figure in hours was converted to a dollar amount in the second page of Exhibit 2 and that dollar amount was included in a figure in the first page of Exhibit 2 representing an amount by which the purchase price was reduced pursuant to the agreement between the respondent and G and K Millman Pty Ltd; and

(5) The claimant warranted that the contents of Schedule 2 to Exhibit 3, which under the Asset Sale Agreement was to and did include the claimant's annual leave entitlement expressed in hours, was correct and that the dollar amount nominated in Exhibit 2 would have been sufficient to pay out his annual leave entitlement if he had not become an employee of the respondent.

26 An offer of employment by the respondent to the claimant was made and accepted by the claimant. The contract of employment between the claimant and respondent was Exhibit 4 in these proceedings.

27 The contract of employment comprises seven pages and is a standard form document with specific details providing that the claimant was to receive an annual base salary of $120,000.00 plus statutory superannuation contributions, that it was to commence on 1 November 2014 and that the first six months of employment was to be a probationary period.

28 The contract of employment entered into followed the rejection by the claimant, on the basis of the remuneration proposed, of an initial offer of employment from the respondent to the claimant.

29 Clause 5.2 of Exhibit 4 is relied upon by the claimant and I reproduce it in full.

5.2 Annual Leave

You will be entitled to 4 weeks' paid annual leave per year of service with the company. Annual leave accrues on a pro rata basis and is cumulative. Annual leave is to be taken at times agreed with the company. The company will not unreasonably refuse to authorize the taking of annual leave by you.

If you accrue more than 40 days annual leave the company may direct you to take up to 25% of the amount of accrued unused annual leave upon giving 2 weeks' notice.

Upon the termination of your employment you will be entitled to payment in lieu of any untaken annual leave.

30 During the course of his employment with the respondent the claimant received fortnightly payslips.

31 Exhibit 5 in these proceedings was a payslip for the period 17 November 2014 to 30 November 2014. It has a row recording information relating to "Annual Leave" with the headings "Entitlement", "Prorata", "Taken" and "Total".

32 In Exhibit 5 the "Entitlement" field was blank, in that no figure was recorded.

33 The claimant raised this verbally with the respondent's payroll section.

34 Exhibit 6 was a payslip covering the period 23 March 2015 to 5 April 2015. It records in the "Entitlement" field a figure "182.05". Annual leave was recorded in the payslips by the respondent as days rather than hours.

35 The respondent calculated entitlements on the basis of a 38 hour week or 7.6 hours per day.

36 The figure of 182.05 days may be converted to 1383.58 hours. If regard is had to the second page of Exhibit 2 the figure of 1383.603 hours is nominated as the total of the claimant's accrued annual leave entitlement with G and K Millman Pty Ltd as at 6 November 2014.

37 The figure of 182.05 days of annual leave in Exhibit 6 was evidently produced by converting the figure on the second page of Exhibit 2 from hours into days (the difference of 0.023 is immaterial in my view).

38 The figure in Schedule 2 to Exhibit 3 was not used. As I have noted the figure in Exhibit 2 was lower than that appearing in Schedule 2 to Exhibit 3. For this reason the inaccuracy in Schedule 2 to Exhibit 3 was not relevant to the outcome of these proceedings.

39 Exhibit 7 in these proceedings was the claimant's final payslip from the respondent.

40 It records in relation to "Annual Leave" that "as at 24 April 2015" the claimant had an "Entitlement" to 182.05 days, that he had "Prorata" annual leave of 9.09 days (this is the entitlement the claimant had built up since becoming an employee of the respondent) that he had "Taken" annual leave of 24 days and that his "Total" was 167.15 days (i.e. 182.05 days plus 9.09 days minus 24 days [which is actually 167.14 days but the difference is immaterial]).

41 The claimant was however employed until 7 May 2015. As the figures for annual leave in Exhibit 7 were expressed as being current as at 24 April 2015, the final figures would have to take account of the period of employment from 24 April 2015 to 7 May 2015.

42 For instance Exhibit 7 records that the claimant took 53.20 hours of annual leave after 24 April 2015.

43 It seems the accurate final figures may be found in Exhibit 8, which I will come to later.

44 As noted above, the claimant's annual salary with the respondent was $120,000.00. On the basis of a 38 hour week he was paid $60.73 an hour. When he had taken annual leave while employed by the respondent he had received an amount by way of pay equivalent to $60.73 per hour (see, for example, Exhibit 6).

45 The claimant expected that the last paragraph of clause 5.2 of Exhibit 4 would have the effect that he would be paid his total number of days of annual leave by the number of days being converted to hours and each hour being paid at $60.73.

46 This, however, is not how the respondent calculated the claimant's outstanding entitlement.

47 Exhibit 8 in these proceedings is an email dated 3 July 2015 from Ajith Abeynaike, the Group Financial Controller of the respondent, to two other employees of the respondent. It shows the way in which the respondent calculated the claimant's entitlement.

48 The email expresses the claimant's annual leave entitlement in hours as at 7 May 2015. That is it purports to reflect the claimant's annual leave entitlement as at 7 May 2015, rather than as at 24 April 2015 as was captured by Exhibit 7.

49 The claimant tendered Exhibit 8 and did not dispute the accuracy of the annual leave entitlement recorded in it insofar as it was expressed in hours. A table at [27] of the respondent's "Outline of Oral Submissions" reproduces and relies upon relevant parts of Exhibit 8. I will accordingly rely on Exhibit 8 as being accurate in relation to the claimant's entitlement to annual leave, expressed in hours, at the time of the termination of his employment.

50 Exhibit 8 shows that the respondent took as a start point that when the claimant commenced employment with the respondent he had an accrued annual leave entitlement of 1383.60 hours (being the figure in the second page of Exhibit 2). The email notes that when this was expressed as a dollar amount the figure given was $55,344.00 (also appearing in the second page of Exhibit 2 although the exact figure given was $55,344.12) and thus, the respondent said, this equates to each hour of annual leave being valued at $40.00. As Exhibit 8 notes, the purchase price was reduced by an amount which included the amount of $55,344.00.

51 The further reasoning evidenced by Exhibit 8 is that all leave taken by the claimant while employed by the respondent should be applied in reduction of the accrued entitlement brought across. That is the respondent proceeded, appropriately, on the basis that the oldest leave entitlement was used first. According to the respondent's calculations in Exhibit 8 the claimant took 237.40 hours of annual leave while employed by the respondent. This reduced the imported entitlement balance from 1383.60 hours to 1146.20 hours according to Exhibit 8. Each of those hours, the reasoning reflected by Exhibit 8 went, should be paid out at $40.00 per hour because each hour of imported leave, on the figures given by G and K Millman Pty Ltd in Exhibit 2, was "worth" $40.00 both to the claimant when he accrued it and in relation to the reduction in the purchase price.

52 At $40.00 per hour the imported entitlement amounted to $45,848.00.

53 As the leave taken was applied as a reduction to the accrued leave balance brought across, no leave accrued during employment was used by the claimant and accordingly the calculations in Exhibit 8 reflect that leave is to be paid out at $60.73 per hour. As there was 79.77 hours of such leave according to Exhibit 8 this amounted to $4844.33.

54 A total of $50,692.33 was paid to the claimant pursuant to the approach of the respondent.

The Contentions of the Parties

55 The claimant says that clause 5.2 of the contract of employment (Exhibit 4) provides that his untaken leave as at the date of the termination of his employment is to be paid out applying the remuneration to which he was entitled under Exhibit 4. Exhibit 8 reflects he had an entitlement to 1225.97 hours of annual leave as at the date of the termination of his employment. The claimant had an annual salary of $120,000.00 under Exhibit 4. Accordingly, the payment to which he is entitled, on the claimant's case, is produced by combining those two figures. On the claimant's case it may be done in the following way:

(1) by converting his annual salary to an hourly amount, based on the respondent calculating entitlements on the basis of a 38 hour week, producing a figure of $60.73 per hour; and

(2) multiplying $60.73 by 1,225.97 to produce a total payout figure of $74,453.16.

56 From this is subtracted the amount actually paid to the claimant, $50,692.33, leaving an outstanding entitlement of $23,760.82. (with the claimant's claim being for $23,760.22 there is a difference of 60 cents which I consider to be immaterial)

57 The respondent contends that clause 5.2 must be read as a whole and if that is done it is clear the last paragraph provides that only leave accrued during the currency of the contract of employment, and not leave accrued in previous employment and imported, is paid out upon termination. The respondent says the entitlement to payment for the imported leave not taken arises as a matter of statute, that is under the *Fair Work Act 2009* (Cth). The relevant result, the respondent contends, is that the present claim is not one for enforcement of a contractual entitlement and is not within the jurisdiction of the Western Australian Industrial Relations Commission.

58 The respondent contended that, if I find against that argument, the accrued entitlement should still not be paid out at $60.73 an hour because there was, in contractual terms, no meeting of the minds of the parties to the employment contract on the figure at which the imported leave would be paid. The respondent says that the figure of $60.73 "wasn't accepted and wasn't understood by the respondent and [the respondent] says couldn't be understood by the respondent based on the documentation that was provided to it." (Transcript page 90).

59 The respondent's alternative argument was that, if I was to find that there was a contractual entitlement to payment of all hours of accrued annual leave at the rate of $60.73 an hour, I ought not enforce that contractual entitlement by order because to do so would not be fair to the respondent and would not be in the public interest.

60 In relation to why it would be unfair to enforce the contractual entitlement claimed by the claimant, if I find it to exist, the respondent contends that the purchase price for the business of G and K Millman Pty Ltd was reduced by an amount, nominated by G and K Millman Pty Ltd and warranted by the claimant to be correct, which assumed that each hour of the claimant's annual leave was valued at $40.00.

61 If the respondent has to pay out those hours to the claimant on the basis that each hour is worth $60.73 the respondent will have, as things have turned out, paid too much for the business. At $60.73 per hour the reduction in the purchase price should have been $91,027.04 (see [17] of respondent's "Outline of Closing Submissions").

62 As the difference between the two amounts can be traced back to the claimant, the respondent argues, it would be unfair to make an order, in the claimant's favour, which has the result that the respondent did not get the proper reduction in the purchase price or, looked at another way, has the result that the respondent pays too much (effectively to the claimant) for the business of G and K Millman Pty Ltd.

63 The respondent says that on the facts of this case the unfairness can be described in terms of the claimant being unjustly enriched (that is the claimant gets the benefit of the inflated purchase price and an inflated annual leave payout) or in terms of the claimant not being held to warranties and indemnities he gave in Exhibit 3. The respondent says that if orders are not made in the claimant's favour he will suffer no loss because he has already had the benefit of the inflated purchase price.

64 The respondent notes that section 26(1) *Industrial Relations Act 1979* requires me to act according to equity, good conscience and the substantial merits of the case and also requires me to have regard to the interests of the respondent. The respondent contends that there will be unfairness to the respondent if the contractual entitlement is enforced by an order in favour of the claimant and that such an order would not be equitable or, on the whole, meritorious.

65 Finally, the respondent says that the unjust enrichment and breach of warranty and indemnity claims may be litigated elsewhere if not dealt with in these proceedings and, invoking section 26(1) *Industrial Relations Act 1979*, says that it would not be in the interests of the community for there to be multiplicity of litigation.

Consideration

66 I am far from convinced that the last paragraph of clause 5.2 of the contract of employment (Exhibit 4) should be read down in the way the respondent contends. That is, I am not convinced that the reference to "any untaken annual leave" is a reference only to any annual leave which accrued during the period of employment under the contract of employment, but which has not been taken, and excludes any imported annual leave.

67 Clause 5 is entitled "Leave". Clause 5.1 is headed "Entitlement" and says:

> **5.1 Entitlement**
>
> You will be entitled to paid and unpaid leave in accordance with the Australian Fair Pay and Conditions Standard in the Workplace Relations Act 1996 (Cth). A summary of those entitlements is set out below.

68 Although the last sentence says that a "summary" of the entitlements in the *Workplace Relations Act 1996* (Cth) is set out below there was no argument put, understandably, that the clauses set out below did not have contractual force and effect on their own terms.

69 Clause 5.2 is headed "Annual Leave".

70 It is clear that the first two sentences of the clause provide for how annual leave accrues while employed under the contract of employment.

71 The next two sentences are not expressed to apply only in relation to leave accrued during the period of employment under the contract of employment.

72 If the claimant wanted to take annual leave imported from his previous employment, as he did, that would have to be at times agreed with the respondent.

73 The application of the second paragraph to imported leave might be debatable but it is not clear that the provision would not apply to allow the respondent to manage the leave balances of all of its employees and all of their leave balances whether accrued or imported. The most sensible reading of the second paragraph is that it would apply to all unused annual leave regardless of its source.

74 Against the background of that analysis of the first two paragraphs of clause 5.2 there is nothing which compels the reading down of the third paragraph to provide that, as a matter of contract, it is only annual leave accrued under the contract of employment which is paid out upon termination.

75 The highest at which the respondent could put it is that some ambiguity about the word "any" in the last paragraph arises. I do not accept that there is ambiguity but if there were such ambiguity, that ambiguity could be resolved by evidence of negotiations or conduct that establishes the relevant facts known to both parties. (See *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352).

76 In this case the respondent made the offer of employment in terms of Exhibit 4 knowing that the claimant had an accrued annual leave entitlement that he was bringing across if he accepted the offer of employment. The amount of that leave, expressed in hours, was known to the respondent. The amount of leave had been expressed by way of a money value in Exhibits 1 and 2 for contractual reasons related to the sale of the business but had also, in those documents and in Exhibit 3 itself, been expressed in hours (inaccurately but not relevantly so). The expressions of the annual leave entitlement in hours are far more relevant insofar as resolving any ambiguity in clause 5.2, if indeed there is ambiguity.

77 The word "any" is one of the widest import. There is no reason to read down the word "any" in the last paragraph of clause 5.2 to not include the imported leave or to be in some other way confined against the background set out above.

78 I find that as a matter of contract the claimant was entitled, upon termination of his employment, to payment in lieu of any untaken annual leave and that this included any leave accrued during his employment with G and K Millman Pty Ltd which was imported and which was not taken during his employment with the respondent.

79 The next question is whether the imported leave ought to have been paid at the rate of $60.73 an hour or $40.00 an hour under the contract. In this regard the respondent was not able to point to anything in the contract itself, whether expressed or implied, which would disturb a conclusion that a person's leave is to be paid at their rate of pay.

80 The respondent contended that there had been no meeting of the minds in relation to whether the imported leave ought to be paid at $60.73 or $40.00 per hour. I find that the meeting of the minds is evidenced by:

(1) clause 5.2 of Exhibit 4 providing that any untaken leave will be paid out; and

(2) Exhibit 4 providing that the claimant's salary was $120,000.00 per annum.

81 Nothing more is required.

82 What the respondent needed to do was establish that there was a term of the contract of employment, expressed or implied, that the claimant would not be paid his imported leave at his rate of pay under the contract of employment. The respondent was unable to do this. The respondent's arguments in this regard ultimately relied upon matters related to the sale of G and K Millman Pty Ltd's business to the respondent and not the employment contract between the claimant and respondent. Those matters are related to but legally separate from the contract of employment upon which the claimant brings his claim.

83 Given this finding I do not need to turn my mind to whether a term that an annual leave entitlement is to be paid at a rate less than an employee's current rate of pay would be lawful.

84 The respondent made something of the claimant being a salaried employee rather than a wages employee in its Outline of Closing Submissions. This distinction is not to the point in this case. An annual salary of $120,000.00 based on a 38 hour week may be expressed as an hourly rate of pay uncontroversially. The respondent itself took this approach as shown in the claimant's payslips, Exhibits 5, 6 and 7.

85 The respondent went on, at [5] of those submissions, to deal with a matter I raised during the course of the hearing, namely whether the fact that the claimant, when he took imported annual leave while employed by the respondent, was paid at the rate of $60.73 per hour had any contractual significance. In the end I find I do not need to deal with the argument. The key matters in relation to the matter of contractual entitlement are the interpretation of clause 5.2 of Exhibit 4 which I have set out above and that Exhibit 4 provided for an annual salary of $120,000.00.

86 For the above reasons I reject the respondent's contention that the present claim is not within the jurisdiction of the Western Australian Industrial Relations Commission because it seeks enforcement of a statutory rather than contractual entitlement.

87 In terms of the claimant's contractual entitlement he had untaken annual leave of 1225.97 hours when terminated. The claimant was paid a salary that may be expressed uncontroversially as $60.73 per hour.

88 As a matter of contractual entitlement the claimant was entitled to have the entire amount of his annual leave entitlement paid out at the rate of $60.73. As a matter of contract he is entitled to a payment of $23,760.82 pursuant to the last paragraph of clause 5.2 as calculated at [56] herein.

89 The respondent argued that I should, nonetheless, not make an order in the claimant's favour for the reasons I have set out at [59] to [65] herein under the heading "The Contentions of the Parties". Those contentions are, essentially, that various matters would make such an order unfair.

90 I reject the respondent's contentions.

91 The respondent's complaint is that, as events have transpired, an order in favour of the claimant will have the result that it will have paid G and K Millman Pty Ltd too much for Fuels West Petroleum.

92 The respondent's complaint is that this overpayment will be a direct result of the information provided to it which the claimant, a director of G and K Millman Pty Ltd, warranted was correct when it was not correct and that it is the claimant who will benefit from the breach of warranty.

93 The nexus between these complaints and this matter is said to be that the person who will, in reality, be the beneficiary of the inflated purchase price paid and the person who warranted the correctness of the information which turned out, on the respondent's case, to not be correct became an employee of the respondent, essentially as part of the sale of the business, and brings the present claim relying on having been an employee of the respondent.

94 The problem I see with the respondent's contentions is that they do not relate to an "industrial matter" as that term is defined by section 7 *Industrial Relations Act 1979.*

95 Pursuant to section 23(1) *Industrial Relations Act 1979* the Western Australian Industrial Relations Commission only has jurisdiction to deal with industrial matters.

96 It is true that the definition of "industrial matter" in section 7 *Industrial Relations Act 1979* is a broad one but even so there are limits to it (see *Hotcopper Australia Ltd v Saab* [2002] WASCA 190 and *BGC (Australia) Pty Ltd v Phippard* [2002] WASCA 191).

97 In my view, the contentions of the respondent lack any ingredient of industrial relations and cannot be characterised as industrial matters.

98 Although the sale of the business and the employment of the claimant by the respondent are factually linked that is not enough in itself to make all and any matters related to the sale of the business industrial matters. The two, while factually linked, are plainly legally separate matters.

99 According to the Asset Sale Agreement, Exhibit 3, the respondent was under no obligation as part of the purchase of the business to offer employment to the claimant, even though that event was within the contemplation of the parties. The employment of the claimant by the respondent was a separate event and was the subject of a separate contract. Even if the respondent had been contractually obliged to offer employment to the claimant the employment contract would remain a legally separate and discrete agreement.

100 That the claimant was involved in the sale of the business and dealt with the respondent as a prospective employee and became an employee of the respondent, essentially as part of the deal, does not mean that all his dealings with the respondent were employment related. The matters of whether the respondent, as events transpired, paid more than it should have done to G and K Millman Pty Ltd for that company's business and whether, if it did so, this was because the claimant as a director of G and K Millman Pty Ltd breached warranty provisions in the sale agreement were not employment related matters and do not have any ingredient of industrial relations. These matters, properly characterised, are commercial disputes.

101 This is so in my view even if the claims relate to warranties in relation to the money value of the claimant's annual leave entitlements with G and K Millman Pty Ltd.

102 That the alleged breach of warranty relates to such a matter might make the dispute seem, at first glance, to be about an industrial matter. However, upon reflection, the matter clearly falls on the wrong side of the line the Industrial Appeal Court has said exists.

103 Properly characterised, the alleged acts or omissions relating to this matter about which the respondent complains were the alleged acts or omissions of the director of a company and not those of a prospective employee or employee.

104 The claimant may very well have been a prospective employee but that is not enough in the circumstances to give the matter an ingredient of industrial relations. The matter might be looked at this way: a breach of warranty complaint could still be made against the claimant in relation to the failure to apply the annual leave entitlement of Ms Barker or Mr Kinsey in reduction of the purchase price or, if it was the case, Ms Barker's or Mr Kinsey's imported annual leave entitlement being paid out at a higher rate by the respondent than the respondent had expected. Those claims could be made whether or not the claimant was a prospective employee or employee of the respondent. This, in my view, points up that the respondent's complaints against the claimant relate to his alleged acts or omissions as the director of a company and not as the respondent's employee or prospective employee.

105 There was no evidence, for instance, that the amount of annual leave brought across by the claimant, expressed in money value, was crucial to the decision of the respondent to offer employment to the claimant in the sense that the respondent would not have offered the claimant employment if the amount was a higher one. There was no evidence that the respondent was induced to offer employment because of any of the information it says was not correct and which the claimant had warranted to be correct. For the sake of clarity I add that even if there had been such evidence it would not have led to me differently characterising the relevant events.

106 The only action the claimant took as a prospective employee was to negotiate and execute Exhibit 4 which contained the unremarkable clause that his annual leave would be paid out upon his employment ending.

107 The only action the claimant took as an employee of the respondent was to query why his payslip did not have an entry in the "Entitlement" field of his annual leave. There was nothing unfair or improper about him doing this. There was nothing unfair or improper about him accepting as accurate the number nominated by the respondent. It was, after all, the number that had been given to the respondent, converted from hours to days. It was not part of the respondent's case that the figure was wrong. The dispute was about the rate at which it would be paid and the claimant, even if I agree with everything the respondent argues, did nothing as an employee of the respondent to affect the rate.

108 Although I have gone to some trouble to explain that, as I see it, the claimant did nothing relevant as a prospective employee or employee even if I am wrong about this and the acts or omissions complained about may be properly characterised as those of a prospective employee or an employee I am still of the view that the alleged acts or omissions lack the ingredient of industrial relations in the same way as the Industrial Appeal Court found in *Hotcopper Australia Ltd v Saab* [2002] WASCA 190.

109 The respondent's contentions are, properly characterised, commercial matters and the Western Australian Industrial Relations Commission is not empowered nor, given Part II of the *Industrial Relations Act 1979*, intended to be equipped to hear and determine commercial disputes.

110 A finding that the respondent's contentions do not relate to industrial matters, which I make, means that I do not, and should not, attempt a qualitative judgement upon the actions of the claimant in relation to the sale of the business.

111 I do not comment on whether, as the respondent contends at [7] to [19] of its Outline of Closing Submissions, the evidence in relation to the claimant's income while employed at G and K Millman Pty Ltd is unreliable. It is irrelevant to the matter of contractual entitlement, the matters relevant there being the claimant's entitlement to annual leave and his remuneration as at the time of termination, and I have no jurisdiction to comment on the evidence in any other context.

112 While section 26 *Industrial Relations Act* 1979 is relevant to all exercises of jurisdiction by the Western Australian Industrial Relations Commission, including the exercise of its jurisdiction in relation to claims that contractual benefits have been denied, section 26 cannot give the Western Australian Industrial Relations Commission jurisdiction it does not have.

113 In other words, having found that the respondent's contentions are not industrial matters, I cannot, through section 26, consider the respondent's contentions on the basis that it is necessary to do so to act with equity and good conscience and to decide the substantial merits of the case or because it would be in the interests of a party or in the public interest to do so.

114 I say nothing about the claimant's conduct in his capacity as a director of G and K Millman Pty Ltd. Any claims the respondent has about that conduct will, as a matter of jurisdiction, have to be litigated elsewhere.

115 The claimant's claim succeeds for the reasons given above. The claim is for an amount of $23,760.22 (less tax) and I will make an order that the respondent pay that amount to the claimant forthwith.

2016 WAIRC 00735

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	GUY MILLMAN
	CLAIMANT
	-v-
	UNITED PETROLEUM PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	WEDNESDAY, 31 AUGUST 2016
FILE NO/S	B 28 OF 2016
CITATION NO.	2016 WAIRC 00735

Result	Claim allowed, order for payment made
Representation	
Applicant	In person
Respondent	Ms H R Millar (of Counsel)

Order

HAVING heard Mr G Millman on his own behalf and Ms H R Millar, of Counsel, on behalf of the respondent; and

HAVING given Reasons for Decision in which I determined to allow the claimant's claim;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred under the *Industrial Relations Act 1979* hereby order:

THAT the respondent forthwith pays to the claimant the sum of $23,760.22 (less tax).

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

SECTION 29(1)(b)—Notation of—

Parties		Number	Commissioner	Result
Blair Stewart Bonser	Nexus (Aust) Pty Ltd	B 46/2016	Commissioner D J Matthews	Withdrawn
Douglas Jones	Sandstone Shire Council	U 89/2016	Commissioner D J Matthews	Discontinued
Mr Jonpaul Scurfield	Mr Phillip Brayne T/A Dempseys Flooring and Sanding Service	U 84/2016	Commissioner D J Matthews	Discontinued
Taylar Woodcock	Geraldton Stockfeeds and Pet Supplies	U 54/2016	Commissioner D J Matthews	Discontinued

CONFERENCES—Matters referred—

2016 WAIRC 00753

DISPUTE RE CLAUSE 31 OF WA HEALTH - HSUWA - PACTS - INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00753
CORAM	**:**	PUBLIC SERVICE ARBITRATOR COMMISSIONER T EMMANUEL
HEARD	**:**	MONDAY, 15 AUGUST 2016
DELIVERED	**:**	MONDAY, 12 SEPTEMBER 2016
FILE NO.	**:**	PSACR 15 OF 2015
BETWEEN	**:**	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS) Applicant AND 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 WA COUNTRY HEALTH SERVICE Respondent

CatchWords	**:**	Industrial Law (WA) - Public Service Arbitrator - Industrial agreement providing that employer may supply uniforms and require them to be worn at all times when considered necessary by the employer - Arbitrator can vary an industrial agreement in limited circumstances - No power to vary an industrial agreement at arbitration
Legislation	**:**	*Industrial Relations Act 1979* (WA) s 26, s 41, s 42G, s 43, s 44, s 80G
Result	**:**	Application dismissed
Representation:		
Applicant	**:**	Mr S Millman (of counsel)
Respondent	**:**	Mr M Aulfrey (as agent)

Case(s) referred to in reasons:

Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch [2003] WAIRC 09550; (2003) 83 WAIG 3314

The Chief Executive of the Western Australian Tourism Commission v The Civil Service Association of Western Australia Incorporated (2000) 80 WAIG 1370

Director General of the Ministry for Culture and the Arts v The Civil Service Association of Western Australia Incorporated [2000] WASCA 13

Reasons for Decision

Background

1 On 31 July 2015 the applicant filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA) (**Act**), relating to a dispute about the application of the 'WA Health – HSUWA – PACTS – Industrial Agreement 2014' (**Agreement**).

2 The parties did not settle the matter at conferences held before Public Service Arbitrators Commissioner Harrison and Acting Senior Commissioner Scott. Accordingly, the matter was referred for hearing and determination on 23 June 2016. It was reallocated to my chambers on the same day.

3 The memorandum of matters referred for hearing and determination states:

> The parties are in dispute over the application of Clause 31, Protective Clothing and Uniforms, of the *WA Health - HSUWA - PACTS Industrial Agreement 2014* (the Agreement), by Fiona Stanley Hospital (FSH), with respect to Clinical Psychologists, Clinical Neuropsychologists and Social Workers.
>
> 1. The applicant says that the respondent's direction to its members who are Clinical Psychologists, Clinical Neuropsychologists and Social Workers to wear a uniform is unjust, unreasonable and unlawful. Given the nature and circumstances of their work, the wearing of a uniform:
>
> (a) constitutes a risk to their health and safety;
>
> (b) breaches client confidentiality;
>
> (c) compromises client welfare;
>
> (d) breaches the standards of the respective professions;

(e) impacts clinical practice; and

(f) conflicts with the requirements of the Job Description Form.

2. Accordingly, the applicant seeks Orders that:

(a) Employees engaged in the following classifications and callings, who are engaged at Fiona Stanley Hospital, are entitled to exercise their professional discretion as to whether and when to wear a uniform, and are exempt from the requirement to wear a uniform:

(i) Clinical Psychologist

(ii) Clinical Neuropsychologist

(iii) Social Worker

(b) Any other Orders the Commission deems appropriate.

The respondent says:

1. It is necessary that its employees employed in the above three classifications, outside of FSH's dedicated mental health facility, wear uniforms.

2. It has always provided that employees required to wear uniforms may be excused from wearing uniforms, depending on the patient to be seen, subject to consultation between the individual staff member and their line management, on a case-by-case basis.

3. It has undertaken a review of the organisational model regarding Clinical Psychologists and Clinical Neuropsychologists and this has not changed that view.

4. It denies it has acted in an unjust, unreasonable, or unlawful manner in requiring the applicant's members to wear uniforms in all the circumstances. The wearing of a uniform does not constitute a meaningful risk to employees' health and safety, does not meaningfully impact client confidentiality or welfare, does not breach the standards of the respective professionals involved, does not meaningfully impact clinical practice, and does not conflict with the requirements of the Job Description Form for any of the three classifications.

5. The orders sought are beyond the power of the Arbitrator to grant, being in effect a variation to the Agreement.

6. The matter should be dismissed.

Respondent's objection

4 The respondent says I should dismiss the matter because the orders sought by the applicant vary the Agreement and therefore are beyond power.

Issue to be decided

5 I must decide whether I have the power to grant the orders sought by the applicant. This involves considering the following questions:

1. Do the orders amount to a variation of the Agreement?; and

2. Does the Arbitrator have the power to make an order varying an industrial agreement?

The clause the respondent says orders would vary

6 The respondent says if the Arbitrator were to make the orders sought, it would in effect vary the terms of clause 31.1(b) of the Agreement.

7 Clause 31.1(b) of the Agreement provides:

31. PROTECTIVE CLOTHING AND UNIFORMS

31.1 Supply of Protective Clothing and Uniforms

(b) The employer may supply uniforms and require them to be worn at all times when considered necessary by the employer.

Respondent's submissions

8 The respondent argues that the scheme of agreement making under the Act is based on consensus. Once a matter is dealt with in an industrial agreement, a party to that agreement ought not be permitted to agitate that matter in further proceedings, whether or not those proceedings were contemplated before entering into the industrial agreement: ***The Chief Executive of the Western Australian Tourism Commission v The Civil Service Association of Western Australia Incorporated*** (2000) 80 WAIG 1370, 1373 (Sharkey P).

9 The respondent submits that under the Act, a Commissioner or Arbitrator can only vary an industrial agreement in the following limited circumstances:

a) an application to vary the agreement by consent under s 43(1) of the Act;

b) an application to vary the agreement for the purpose of including, varying or omitting a stand-down provision: s 43(2) and s 43(3) of the Act;

c) at or in relation to a compulsory conference under s 44 of the Act for temporary period: s 44(6)(ba), (bb), s 44(6a)(b) of the Act: ***Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers' Union, Western Australian Branch*** [2003] WAIRC 09550; (2003) 83 WAIG 3314 [38]-[40].

10 The respondent submits the Commission's powers under s 44 of the Act to vary an agreement may only be exercised at or in relation to a conference. It says arbitration is not a conference, it goes well beyond that: ***Director General of the Ministry for Culture and the Arts v The Civil Service Association of Western Australia Incorporated*** [2000] WASCA 13 [20] (Anderson J).

11 The respondent submits orders made under s 44(6)(bb) of the Act are temporary and for a limited purpose. Such orders can only be interim and made at or in relation to a conference: ***Burswood*** [40], [45] (Full Bench).

12 The respondent contends it is beyond power to vary an industrial agreement at arbitration under s 44(9) of the Act, relying on Anderson J at [20] and [27] in ***Culture and the Arts***. Further, the respondent relies on Kennedy J at [10] in the same case.

13 The orders sought by the applicant are inconsistent with the subject matter of the Agreement and seek an exemption to the employer's right under the Agreement to require uniforms to be worn. By seeking an exemption, the orders vary, rather than 'colour' as contended by the applicant, the Agreement.

14 The respondent says the fact the orders would only apply to employees in the classifications of Clinical Psychologist, Clinical Neuropsychologist and Social Worker at Fiona Stanley Hospital (**3 Classifications**) makes no difference to whether or not the orders would vary the Agreement.

Applicant's submissions

15 The applicant says this is a dispute about the employer's exercise of discretion under clause 31.1(b) of the Agreement. Under the clause, the employer exercises two sources of discretion:

1. a general discretion, in that the employer may supply uniforms and require them to be worn; and
2. a specific discretion, in that the employer should only supply uniforms and require them to be worn when considered necessary by the employer.

16 The applicant says the orders sought merely 'colour' the way the specific and general discretion is to be exercised by the employer. In exercising its discretion, the employer should have regard to the professional obligations of its employees. The orders sit comfortably with clause 31.1(b) of the Agreement, because they are confined to the way in which the employer exercises its discretion by requiring the employer to take into account the professional obligations of the particular category of employees.

17 The applicant submits that it seeks to place before the Commission the industrial matter of whether or not the employer has properly exercised its discretion. It merely wants the employer, in exercising its discretion, to have regard to the professional obligations of these particular categories of employees.

18 The applicant says an Arbitrator may be able to make orders where those orders do not vary the industrial agreement: ***Culture and the Arts*** [22], [28]. Further, the orders would need to be a discrete source of rights and obligations, separate and distinct from and not arising out of the industrial agreement: ***Tourism*** (1374) (Fielding SC).

19 The applicant says the practical effect of the orders sought is that they do not vary the agreement because:

a) Clinical Psychologists, Clinical Neuropsychologists and Social Workers would not be in breach of their professional obligations as their uniforms may not have labels identifying their professions.

b) Patients may be more obliged to consult with these employees if these employees are not wearing uniforms with labels identifying their profession and therefore client welfare may not be compromised.

c) The employees may not be subjected to health risks associated with the wearing of the respondent's uniforms.

d) The employees may still wear uniforms, but uniforms that are to their professional judgement, appropriate.

20 The applicant says that the orders are a discrete source of rights and obligations, separate and distinct from and not arising out of the Agreement. The orders seek to bring accord to professional standards and obligations to patients, something which is outside of what the Agreement deals with.

21 The applicant submits that the Arbitrator has jurisdiction to vary an agreement if required under s 44 of the Act.

22 The applicant submits a variation would have the effect of applying to everyone, whereas the orders sought are confined to employees in the 3 Classifications.

The law

23 Section 41 of the Act sets out how industrial agreements are made and registered.

24 Section 42G of the Act provides that the Commission may order that an industrial agreement include particular provisions where negotiating parties apply to the Commission for such an order.

25 Under s 43 of the Act, an industrial agreement may be varied, renewed or cancelled by agreement made by and between all of the parties to that industrial agreement. Further, a party to the industrial agreement can apply to the Commission to vary an industrial agreement in order to include, omit or vary a provision that authorises an employer to stand-down an employee.

26 Under s 44 of the Act, the Commission may make an order at or in relation to a conference that may vary an industrial agreement.

27 Section 80G(1) of the Act provides that the provisions of Part II Divisions 2 to 2G (which include s 41, s 42G, s 43 and s 44) that apply to or in relation to the exercise of the jurisdiction of the Commission constituted by a Commissioner shall apply with such necessary modifications to the exercise by an Arbitrator of the Arbitrator's jurisdiction under the Act.

28 Kennedy J in ***Culture and the Arts*** states:

> The terms of the first order are inconsistent with the provisions of the agreement as finally registered, and the intention was clearly to vary the terms of cl 10(1) of the agreement. The power of the Commission to vary the terms of an industrial agreement, however, is clearly circumscribed. Section 41(3) of the *Industrial Relations Act 1979* to which Anderson J has referred is designed to ensure that the common intention of the parties is reflected in their executed agreement prior to its registration. There has been no suggestion that the Commissioner could have acted under s 41(3) of the Act. As Anderson J has indicated, there is no other power in the Commission to vary, or to require the parties to the agreement to vary, an industrial agreement. It has no power to impose an "agreement" on the parties [10].

29 In the same decision, Anderson J states:

> It must be accepted that the power of the Industrial Relations Commission to vary industrial agreements is limited and does not include a power to change the operative date of an agreement. The primary power of the Commission to vary an industrial agreement is contained in s 43 and that power is limited to varying an industrial agreement for the purpose of varying a stand-down provision. The Commission also has a power under s 44(6a) to vary the operation of an "existing award or industrial agreement" at or in relation to a compulsory conference under s 44, which is not this case. There was no "existing industrial agreement" at the time of the making of the order. The proceedings that were before Commissioner Cawley were not a compulsory conference. They had progressed beyond compulsory conference to arbitration [20].
>
> …
>
> Neither is it an answer to say that the Commissioner was arbitrating a dispute in accordance with the provisions of s 44(9) and, for that purpose, was exercising discretionary powers to resolve the dispute. That is how the matter got before the Commissioner, but the Commissioner did not have unlimited powers and if there is no power to order that an industrial agreement have retrospective effect, the making of an order having such an effect cannot be supported on the basis that it was made for the purposes of resolving an industrial dispute [27].
>
> …
>
> The whole scheme of the Act in relation to industrial agreements is based upon the notion of consensus. The idea that terms of an industrial agreement can be arbitrated is at odds with the fundamental principle of consensus. Put simply, an arbitrated "agreement" is not an agreement [39].

30 In ***Tourism***, Sharkey P says:

> [T]he Arbitrator conferred rights and imposed obligations not contained in the Agreement and, indeed, inconsistent with those prescribed in the Agreement. There was, thus, a purporting to vary and render in part retrospective the Agreement, as registered… The Arbitrator's powers did not enable him to do what he sought to do in the circumstances of this case (1374).

31 In the same decision, Fielding SC says:

> [T]he terms of the order made by the Arbitrator are plainly inconsistent with the terms of the Agreement registered some months earlier… It is apparent from the decision of the Industrial Appeal Court in ***Director General of the Ministry for Culture and the Arts v. the Civil Service Association of Western Australia Incorporated & Ors*** [2000] WASCA 13, which was handed down after the decision which led to the order now in question, that the fact that an order is made independently of and by a process separate from the proceedings by which the Agreement was registered may, nonetheless, constitute a variation of the Agreement. In short, the governing factor is not so much the form of the order as it is the import of the order. For the order in question not to be taken as one varying the Agreement it would as Anderson J. observed in the ***Ministry for Culture and the Arts v. The Civil Service Association of Western Australia Incorporated & Ors*** *(supra)* need to be seen as establishing "a discrete source of rights and obligations, separate and distinct from and not arising out of the industrial agreement"… I do not consider that can be said of the order now in question… It follows that the order was not authorised by the *Industrial Relations Act 1979.* It is impermissible to amend an industrial agreement other than in accordance with section 43 of the Act (1374).

Consideration

32 The matter the subject of the application is clearly an industrial matter. The Arbitrator has jurisdiction to hear and determine the matter. The respondent's objection is on the basis that the orders sought are beyond power because they amount to a variation of the agreement.

33 There is a difference between conferral of jurisdiction and the manner in which that jurisdiction is exercised. I note that the Arbitrator is not restricted to the specific claim made or the subject matter of the claim: s 26(2) of the Act.

34 In my view, the Arbitrator can only vary an industrial agreement in limited circumstances.

35 The powers under s 41, s 42G and s 43 of the Act are not relevant to the circumstances of this matter.

36 The Arbitrator does not have the power to vary an industrial agreement in the exercise of her jurisdiction in the arbitration of an industrial matter referred under s 44(9) of the Act.

37 From the applicant's submissions at the hearing, it seems to me that the applicant seeks, in effect, to vary the agreement by:

1. exempting the employees in the 3 Classifications from the requirement to wear uniforms;
2. allowing the employees in the 3 Classifications to exercise their professional discretion in deciding whether and when to wear uniforms; and
3. requiring the employer to consider the professional obligations of the employees in the 3 Classifications when the employer exercises its discretion under clause 31.1(b) of the Agreement.

38 The respondent says the effect of the orders sought is to vary the Agreement. The applicant says the effect of the orders sought, even order 2(a), only goes so far as to 'colour' the exercise of the employer's discretion in requiring the employees to wear uniforms.

39 I am not persuaded by the applicant's submission that the orders sought merely seek to bring accord to professional standards and obligations to patients, which is outside of what the Agreement deals with. The import of the orders relates to the wearing of a uniform and who decides whether and when a uniform is worn, which is not outside of what the Agreement deals with.

40 As was the case in ***Tourism***, outlined by Sharkey P at 1374, order 2(a) confers rights and imposes obligations not contained in the Agreement and, indeed, inconsistent with those prescribed in the Agreement.

41 Order 2(a) seeks to vary the Agreement. It does not merely 'colour the employer's exercise of jurisdiction'. In effect, the order goes well beyond that. It goes further than requiring the employer to consider professional obligations. Rather, the effect of order 2(a) is to exempt the employees from the requirement to wear a uniform and gives the employees the right to exercise their professional discretion in deciding whether and when to wear a uniform. In my view, order 2(a) amounts to a variation of the Agreement.

42 While it maintained that order 2(a) does not vary the Agreement, the applicant argued the Commission has the power to make such a variation 'if required under s 44 of the Act'. In my view, it is clear that such a variation is not required under s 44 of the Act. The Arbitrator could only vary the agreement under s 44 of the Act at or in relation to a conference. This matter has progressed well beyond that stage, now being at the hearing and determination stage.

43 The applicant also contended at the hearing that the Commission can vary an agreement at arbitration. The applicant could not provide any authority for the proposition.

44 The applicant argues that ***Culture and the Arts*** is distinguishable 'because it deals with there being no existing industrial agreement…at the time of making the order' and Anderson J does not say 'the Commission does not have the power to vary an agreement at arbitration.' In my view, ***Culture and the Arts*** is not distinguishable on the basis that there was no existing industrial agreement at the time the order in question was made. Further, that decision is authority for the proposition that the Commission's power under s 44(6a) of the Act to vary an industrial agreement is a power exercised at or in relation to a compulsory conference, not at arbitration.

45 To the extent that the applicant submits that ***Burswood*** is not authority for the respondent's contention that orders under s 44(6)(ba), s 44(6)(bb) and s 44(6a)(b) of the Act can only be temporary because ***Burswood*** did not relate to the variation of an industrial agreement, I disagree. I consider that ***Burswood*** supports the respondent's argument that the Commission cannot make orders under s 44(6) of the Act, including orders to vary the operation of an industrial agreement under s 44(6a) of the Act, in the exercise of its arbitral power when it determines the matter in dispute.

46 I am not persuaded that because the orders sought would only apply to employees in the 3 Classifications, the orders would not amount to a variation of the Agreement.

47 Finally, the applicant does not propose any other order that would not involve varying the industrial agreement.

Conclusion

48 The orders sought by the applicant amount to a variation of the Agreement and are therefore beyond power in the Arbitrator's exercise of jurisdiction in arbitrating an industrial matter referred under s 44(9) of the Act.

49 I will make an order dismissing the application.

2016 WAIRC 00754

DISPUTE RE CLAUSE 31 OF WA HEALTH - HSUWA - PACTS - INDUSTRIAL AGREEMENT 2014

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	HEALTH SERVICES UNION OF WESTERN AUSTRALIA (UNION OF WORKERS)
	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 WA COUNTRY HEALTH SERVICE
	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR
	COMMISSIONER T EMMANUEL
DATE	MONDAY, 12 SEPTEMBER 2016
FILE NO	PSACR 15 OF 2015
CITATION NO.	2016 WAIRC 00754

Result	Application dismissed
Representation	
Applicant	Mr S Millman (of counsel)
Respondent	Mr M Aulfrey (as agent)

Order

WHEREAS on 31 July 2015 the applicant filed an application for a conference under s 44 of the *Industrial Relations Act 1979* (WA);

AND WHEREAS the matter was referred for hearing and determination on 23 June 2016;

NOW THEREFORE I, the undersigned, having given reasons for my decision and pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA) hereby order –

THAT this matter be, and is hereby dismissed.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Appeal Board.

PROCEDURAL DIRECTIONS AND ORDERS—

2016 WAIRC 00739

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STATE SCHOOL TEACHERS' UNION OF W.A. (INC.)
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 5 SEPTEMBER 2016
FILE NO/S	APPL 29 OF 2016
CITATION NO.	2016 WAIRC 00739

Result	Order issued
Representation	(by written correspondence)
Applicant	Mr D Scaife, of counsel
Respondent	Mr R Bathurst, of counsel

Order

WHEREAS this is an application to the Commission pursuant to s 46 of the *Industrial Relations Act 1979* (the Act); and

WHEREAS on 21 July 2016 the Commission issued an Order ([2016] WAIRC 00669) in preparation for the hearing of this matter; and

WHEREAS on 1 August 2016 this matter was listed for hearing on 4 and 5 October 2016; and

WHEREAS on 29 August 2016 the applicant advised that difficulties had arisen in relation to the availability of some witnesses for these hearing dates; and

WHEREAS on 29 August 2016 the applicant provided minutes of a proposed consent order in relation to the programming of the matter, which the respondent agreed to as amended; and

WHEREAS the Commission has formed the opinion that the issuing of this order will assist in the conduct of the hearing of the matter.

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

1. THAT the Order dated 21 July 2016 ([2016] WAIRC 00669) be vacated.
2. THAT the hearing dates for 4 and 5 October 2016 be vacated.
3. THAT the matter be listed for 24 and 25 November 2016.
4. THAT the applicant file and serve any witness statements on which it wishes to rely by 27 September 2016.

5. THAT the respondent file and serve any witness statements on which it wishes to rely by 27 October 2016.

6. THAT the applicant file and serve an outline of submissions by 8 November 2016.

7. THAT the respondent file and serve an outline of submissions by 15 November 2016.

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

2016 WAIRC 00706

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	NIGEL BEVERLY
	APPELLANT
	-v-
	THE COMMISSIONER OF POLICE
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
	SENIOR COMMISSIONER S J KENNER
	COMMISSIONER D J MATTHEWS
DATE	MONDAY, 15 AUGUST 2016
FILE NO/S	APPL 41 OF 2016
CITATION NO.	2016 WAIRC 00706

Result	Appeal adjourned
Representation	
Appellant	Mr D Jones, of counsel
Respondent	Mr N John, of counsel

Order

WHEREAS on Monday, 4 July 2016, Nigel Beverly instituted an appeal pursuant to s 33P of the *Police Act 1892* (the Police Act) against the decision of the Commissioner of Police to take removal action on 27 May 2016; and

WHEREAS on Friday, 12 August 2016, a hearing was held for the purpose of programming of this appeal; and

WHEREAS at the hearing the parties agreed to the Commission assisting the resolution of the matter by conciliation pursuant to s 33S of the Police Act; and

WHEREAS this appeal is now referred to Commissioner Emmanuel for the purpose of conciliation; and

WHEREAS the appellant requested that compliance with reg 92 of the *Industrial Relations Commission Regulations 2005* need not occur until after further order;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under s 33T of the Police Act, hereby orders –

1. THAT the hearing of the appeal be adjourned pending the outcome of conciliation.

2. THAT compliance with reg 92 of the *Industrial Relations Commission Regulations 2005* by the appellant need not occur until further order.

3. THAT either party may apply to vary the terms of this order.

(Sgd.) P E SCOTT,
Chief Commissioner,
[L.S.] On behalf of the Western Australian Industrial Relations Commission.

2016 WAIRC 00143

REFERRAL TO COMMISSION UNDER THE PUBLIC SECTOR MANAGEMENT ACT 1994

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JOHN WATTERS
	APPLICANT
	-v-
	DIRECTOR GENERAL DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER S J KENNER
DATE	MONDAY, 14 MARCH 2016
FILE NO/S	APPL 123 OF 2015
CITATION NO.	2016 WAIRC 00143

Result	Order issued
Representation	
Applicant	Mr R Grayden of counsel
Respondent	Mr D Anderson of counsel

Order

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

THAT the application be and is hereby adjourned sine die.

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

2016 WAIRC 00710

APPEAL AGAINST THE DECISION TO TERMINATE TRAINING CONTRACT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	JARROD BELFORD
	APPELLANT
	-v-
	DEPARTMENT OF TRAINING AND WORKPLACE DEVELOPMENT
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	WEDNESDAY, 17 AUGUST 2016
FILE NO/S	APA 3 OF 2016
CITATION NO.	2016 WAIRC 00710

Result	Name of respondent amended
Representation	
Applicant	Mr D Vilensky (of counsel)
Respondent	Mr A Mason (of counsel)

Order

HAVING HEARD Mr D Vilensky (of counsel) on behalf of the appellant and Mr A Mason (of counsel) on behalf of the respondent;

NOW THEREFORE I, the undersigned, pursuant to the powers conferred on me under the *Industrial Relations Act 1979* (WA), hereby order –

THAT the name of the respondent be amended by replacing 'Workplace' with 'Workforce'.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

2016 WAIRC 00717

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	LYUBA DOKTOROVICH
	CLAIMANT
	-v-
	YESOD PTY LTD
	RESPONDENT
CORAM	COMMISSIONER D J MATTHEWS
DATE	FRIDAY, 19 AUGUST 2016
FILE NO/S	B 92 OF 2016
CITATION NO.	2016 WAIRC 00717

Result	Order for substituted service made
Representation (by written correspondence)	
Applicant	In person
Respondent	No appearance

Order

WHEREAS the claimant by notice filed 27 May 2016 brought a claim of entitlement to a benefit under a contract of employment with the respondent; and

WHEREAS the claimant by application filed 8 August 2016 sought an order pursuant to regulation 27 *Industrial Relations Commission Regulations 2005* for substituted service of the notice upon the respondent;

AND HAVING considered that application and the supporting material supplied with it;

I ORDER pursuant to regulation 27(1) *Industrial Relations Commission Regulations 2005* as follows:

1. That notice be given by advertisement in the "Public Notices" section of The West Australian newspaper in substitution for the service of the notice otherwise required; and
2. That the notice state that Lyuba Doktorovich has brought a claim against Yesod Pty Ltd (WAIRC Matter No B 92 of 2016) alleging that contractual benefits under her contract of employment have been denied and that a Notice of Answer must be filed within 21 days; and
3. That the claimant bring the publication of the advertisement to the notice of my Associate by email once it has appeared.

(Sgd.) D J MATTHEWS,
[L.S.] Commissioner.

2016 WAIRC 00719

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	PATRICIA SKIPWORTH
	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 T EMMANUEL
DATE	FRIDAY, 19 AUGUST 2016
FILE NO.	PSA 3 OF 2016
CITATION NO.	2016 WAIRC 00719

Result	Recommendation issued
Representation	
Applicant	Ms P Marcano and with her Mr C Panizza
Respondent	Ms K Worlock (of counsel) and with her Mr R Gabelish

Recommendation

HAVING heard Ms P Marcano and Mr C Panizza on behalf of the applicant and Ms K Worlock (of counsel) and Mr R Gabelish on behalf of the respondent, the Arbitrator, pursuant to the powers conferred on her under the *Industrial Relations Act 1979* (WA) hereby –

RECOMMENDS that Ms Worlock confer with the Director General of Health by no later than 2 September 2016 to discuss the merits of the applicant's claim and consider relevant documents including the briefing note dated 7 June 2016 and report by Shelby Consulting dated 18 May 2016.

Ms Worlock is to report back to the Commission and the applicant's representative by 5 September 2016 in relation to the outcome of her discussion with the Director General of Health.

(Sgd.) T EMMANUEL,
Commissioner,
[L.S.] Public Service Arbitrator.

2016 WAIRC 00738

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SITTING AS
THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES	STEVE BURKE TRANSPORT PTY LTD
	APPLICANT
	-v-
	TOLL TRANSPORT PTY LTD T/AS TOLL IPEC
	RESPONDENT
CORAM	CHIEF COMMISSIONER P E SCOTT
DATE	MONDAY, 5 SEPTEMBER 2016
FILE NO/S	RFT 29 OF 2015
CITATION NO.	2016 WAIRC 00738

Result	Directions issued
Representation	
Applicant	Mr W Spyker of counsel
Respondent	Ms C McCutcheon of counsel

Directions

WHEREAS this is an application to the Road Freight Transport Industry Tribunal pursuant to s 40 of the *Owner-Drivers (Contracts and Disputes) Act 2007*; and

WHEREAS the application was set down for a directions conference on Thursday, 1 September 2016; and

WHEREAS the Tribunal has formed the opinion that the issuing of Directions will assist in the conduct of the hearing of the application;

NOW THEREFORE the Commission, sitting as the Road Freight Transport Industry Tribunal, pursuant to the powers conferred on it under the *Owner-Drivers (Contracts and Disputes) Act 2007*, hereby directs:

1. THAT the matter be listed for one day on Thursday, 27 October 2016.
2. THAT each party shall give informal discovery by Friday, 16 September 2016.
4. THAT the applicant file and serve any witness statements on which it wishes to rely by Friday, 16 September 2016.
5. THAT the respondent file and serve any witness statements on which it wishes to rely by Friday, 30 September 2016.
6. THAT the applicant file and serve an outline of submissions by Friday, 7 October 2016.
7. THAT the respondent file and serve an outline of submissions by Friday, 14 October 2016.
8. THAT the parties have liberty to apply on short notice.

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

2016 WAIRC 00730

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES	STEPHEN CANNELL
	APPLICANT
	-v-
	DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
	RESPONDENT
CORAM	COMMISSIONER T EMMANUEL
DATE	MONDAY, 29 AUGUST 2016
FILE NO/S	U 59 OF 2016
CITATION NO.	2016 WAIRC 00730

Result Orders issued

Orders

HAVING heard Mr D Stojanoski (of counsel) on behalf of the applicant and Mr D Anderson (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

1. THAT the matter be listed for hearing for 5 days from 20 February 2017 to 24 February 2017;
2. THAT the parties file a statement of agreed facts by 15 September 2016;
3. THAT the applicant file and serve outlines of evidence by 18 November 2016;
4. THAT the respondent file and serve outlines of evidence by 16 December 2016;
5. THAT the applicant file and serve outlines of written submissions by 20 January 2017;
6. THAT the respondent file and serve outlines of written submissions by 10 February 2017; and
7. THAT the parties have liberty to apply at short notice.

(Sgd.) T EMMANUEL,
[L.S.] Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Australian Labor Party (WA Branch) Enterprise Agreement 2016 AG 40/2016	18/08/2016	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Australian Labor Party, WA Branch	Commissioner D J Matthews	Agreement registered
Rangers (National Parks) General Agreement 23 of 2016 AG 23/2016	25/08/2016	United Voice WA AND The Director General of the Department of Parks and Wildlife	(Not applicable)	Commissioner D J Matthews	Agreement registered
T.L.C. Emergency Welfare Foundation of Western Australia (Inc.) Enterprise Bargaining Agreement 2016 AG 39/2016	25/08/2016	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	T.L.C Emergency Welfare Foundation of Western Australia (Inc.)	Commissioner D J Matthews	Agreement registered
WA Health – HSUWA – PACTS – Industrial Agreement 2016 PSAAG 2/2016	8/09/2016	The Health Service Providers established pursuant to section 32(1)(b) of the Health Services Act 2016 including the Child and Adolescent Health Service, East Metropolitan Health Service, Health Support Services, North Metropolitan Health Service, South Metropolitan Health Service and WA Country Health Service	Health Services Union of Western Australia (Union of Workers)	Commissioner T Emmanuel	Agreement registered

EMPLOYMENT DISPUTE RESOLUTION ACT 2008—Notation of—

The following were matters before the Commission under the Employment Dispute Resolution Act 2008.

Application Number	Award, order or industrial agreement varied	Parties		Commissioner	Matter	Dates	Result
APPL 10/2016	N/A	The Civil Service Association of Western Australia Incorporated on behalf of Christopher Griffin	Chief Executive Officer, Insurance Commission of Western Australia	Emmanuel C	Request for mediation	12/04/2016	Concluded
APPL 9/2016	N/A	The Civil Service Association of Western Australia Incorporated on behalf of Mr Simon Leske	Chief Executive Officer, Insurance Commission of Western Australia	Emmanuel C	Request for mediation	14/04/2016	Concluded

NOTICES—Union Matters—

2016 WAIRC 00761

NOTICE

FBM 2 of 2016

NOTICE is given of an application by "The Australian Workers' Union, West Australian Branch, Industrial Union of Workers" and "The Food Preservers' Union of Western Australia Union of Workers" for the amalgamation of those organisations to form a new organisation to be known as "The Australian Workers' Union, West Australian Branch, Industrial Union of Workers".

The application is made pursuant to section 72 of the *Industrial Relations Act 1979*.

The rules of the proposed new organisation relating to the qualification of persons for membership including any rule by which that area of the State within which the organisation operates, or intends to operate is limited, are set out below:

"***4 - MEMBERSHIP***

The Union shall consist of an unlimited number of workers employed or usually employed in any of the following industries or callings:-

(1) Pastoral, Agricultural, Horticultural, Viticultural, Fruitgrowing, the growing of Flax, Guayule, Tobacco, Sugar, Rice, Cotton, and of Safflower and other oil seeds, Afforestation and Silviculture (including the harvesting and/or processing and/or packing of any products of the aforesaid industries), the production of firewood, dairying and rabbit trapping, the handling and/or storage of grain for milling and/or export, including domestic and other work performed at agricultural research stations and farms and agricultural schools and colleges.

(2) Road making and road maintenance, other than in the building industry, and the construction, maintenance, conduct and operations of railways (but excluding the conduct and operations of railways by the Western Australian Government Railways Commission), bridges, water and sewerage works.

(3) Metalliferous mining and the production of minerals (including the harvesting of salt, dredging and sluicing work), the transport, storage, loading and unloading, other than the loading and unloading of ships South of the 26th parallel of latitude, of minerals, metals and ores, the production and supplying of electric current, mechanical engineering, the smelting, reducing and refining of ores and metals (including the charcoal iron and steel industry) and the supplying of firewood for mines.

(4) Stone quarrying, crushing and screening.

(5) Surveying of land.

(6) Fish trawling, cleaning and canning, net making, and all general labour in connection therewith.

(7) Boring for water.

(8) Destruction of noxious weeds and vegetation, or the treatment of the products thereof and the eradication of pests and vermin.

(9) Manufacturing of cement and cement and fibrolite and fibre (other than glass fibre) cement articles.

(10) Formation and maintenance of golf links, bowling greens, tennis courts, and of all gardens, lawns and greens in connection therewith.

(11) Rubber working, the manufacturing of tyres and tubes, including the tyre retreading industry.

(12) Service Station attendants, other than tradesmen and clerical workers, lubritorium attendants and vehicle service attendants, other than tradesmen, in motor vehicle sales establishments. Workers other than tradesmen and clerical workers in rust prevention, cleaning and paint protection of motor vehicles.

(13) Manufacture of sealing devices for bottles or jars, and the manufacture of badges and emblems (other than those made out of textile materials).

(14) The clearing of land for cultivation, sub-division for settlement and formation of aerodromes and parking areas.

(15) The laying of oil, gas, or steam pipe lines and the installation of electric power lines.

(16) Work at immigration reception centres.

PROVIDED THAT all persons who have been appointed as officers or employees of the Union shall be entitled also to become and remain members of the Union during their continuance in office or employment; PROVIDED further that no person who is or is eligible to be a member of –

Eastern Goldfields Municipal and Road Board Labourers' Union of Workers;

Western Australian Municipal, Road Boards, Parks and Racecourse Employees' Union of Workers, Perth;

The Western Australian Government Tramways, Motor Omnibus and River Ferries Employees' Union of Workers, Perth;

The Builders Labourers' Union of Workers of Perth, Western Australia;

Except to the extent provided by subrule 28, Westralian Brickyard, Pottery, Porcelain and Roof Tile Fixers Employees' Union of Workers, Perth;

as constituted on the 19th day of August, 1947; or any other Union registered under the provisions of "Industrial Arbitration Act, 1912-1941" (as reprinted) at the date of registration of this Union shall be eligible for or admitted to Membership of the Union, but as from 7th day of March, 1979, the limitation herein imposed by virtue of the registration of the Sugar Refining Employees' Industrial Union of Workers, Fremantle, W.A., as 18 July 1941 shall no longer apply.

(17) The catching and the treatment of whales and the by-products therefrom, (excepting Masters, Mates and Marine Engineers).

(18) Foremen employed in the sleeper cutting and/or saw milling industry (but excluding foremen not exclusively employed as such, and tradesmen foremen), and further excluding that portion of the State of Western Australia comprised within a radius of twenty two and a half (22.5) kilometres of the General Post Office, Perth.

(19) The construction, maintenance and/or demolition of floating docks, graving docks, slipways, bridges, viaducts, causeways, wharves, jetties, breakwaters, moles, retaining walls, and all sheds, and buildings, on or about floating docks, graving docks, slipways, wharves and jetties, and the dredging of harbours, rivers and passages. Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Pattern makers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electric Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Milling Machinists, Press Tool Makers, Drilling Machinists and the assistants to all the foregoing tradesmen, Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Shipwrights, Masters, Mates, Marine Engineers, Clerks and Watchmen, Electrical Workers (except such as are covered by paragraph "15" hereof). Provided further that no person who is eligible to be a member of the "Coastal and E.G. Government Water, Sewerage and Drainage Employees' Industrial Union of Workers" as constituted on the 4th day of July, 1952, shall be admitted to membership of the Union.

(20) (a) Boring for oil, refining, treating, processing, packing, pumping, and all work whatsoever in or in connection with the boring for oil, refining, treating, processing, packing and pumping of oil, and the manufacture (including the extraction) of the by-products of oil, when such manufacture (including extraction) is incidental to and consequent upon the refining of oil carried on by a company whose principal business is oil refining; Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electric Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Tool Makers, Milling Machinists, Bolt and Nut Machinists, Drilling Machinists in the Engineering Industry, and the assistants to all the foregoing tradesmen; Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Masters, Mates, Marine Engineers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "15" hereof), Builders' Labourers employed to assist building tradesmen on the construction of buildings.

(b) Boring for natural gas and the production, distribution, treatment and storage of natural gas, and all work in connection with the boring for natural gas and the production, distribution, treatment and storage of natural gas: Provided that, no person, who immediately prior to the 23rd of March, 1966, was not eligible for membership of the Union and who is or is eligible to be a member of –

The Federated Engine Drivers and Firemen's Union of Workers of Western Australia.

The Collie Federated Engine Drivers and Firemen's Union of Western Australia.

Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch.

Municipal Councils, Road Boards and Local Government Employees' Association of Workers, Western Australia.

Municipal Road Boards, Parks and Race Course Employees' Union of Workers, Perth - Western Australia.

Federated Moulders (Metals) Union of Workers, Perth.

Australasian Society of Engineers' Industrial Union of Workers, Perth, W.A.

Australasian Society of Engineers' Industrial Union of Workers, Fremantle.

The Australasian Society of Engineers, Collie River District, Industrial Union of Workers.

Australasian Society of Engineers' Industrial Union of Workers, Goldfields No. 1 Branch.

Australasian Society of Engineers' Industrial Union of Workers, Midland Junction Branch.

The Association of Architects, Engineers, Surveyors, and Draughtsmen of Australia, Union of Workers, Western Australian Division.

The Boilermakers Society of Australia, Union of Workers, Coastal Districts, W.A.

Electrical Trades Union of Workers of Australia (Western Australian Branch), Perth.

Federated Ship Painters and Dockers' Union of Australia (West Australian Branch) Union of Workers.

The Seamen's Union of Western Australia Industrial Union of Workers, Fremantle.

Building Trades Association of Unions of Western Australia (Association of Workers).

The West Australian Gas Works Industrial Union of Workers.

Amalgamated Engineering Union of Workers, Perth Branch.

Amalgamated Engineering Union of Workers, Kalgoorlie Branch.

as constituted on the 23rd of March, 1966, shall be eligible for or admitted to membership of the Union.

(21) Iron and Steel Rolling, and all work in or in connection with iron and steel rolling (including all persons engaged in the following locality: "All that area of land and the waters of Cockburn Sound contained within boundaries starting from the intersection of the South-Eastern side of Rockingham Road (Road No. 695) and the North-Eastern side of Ocean Street and extending West to the low-water mark of the said sound and onwards for a distance of 1.6 kilometres; thence North to a point situated in prolongation Westerly of the Northern side of Russell Road (Road No. 678); thence Easterly along that prolongation to the low-water mark of Cockburn Sound and onwards for a distance of 4.8 kilometres; thence South to a point situate East of the starting point) and thence West to the starting point loading and discharging material or matter of any kind used in or in connection with iron and steel rolling".

PROVIDED THAT workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Springmakers, Millwrights, Oxy-acetylene and Electrical Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Toolmakers, Milling Machinists, Bolt and Nut Machinists, Drilling Machinists, and the assistants to all the foregoing tradesmen: Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stone Masons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "15" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person employed in any of the industries or callings mentioned in paragraphs "17" to "21" hereof (both inclusive) and who by reason of such employment is eligible to be a member of any Union affiliated with the Federated Engine Drivers and Firemen's Association (Western Australian Branch) Association of Workers on the 11th August, 1952, shall be eligible to be a member of this Union.

(22) All work in or in connection with Stevedoring operations in that portion of the State of Western Australia North of the 26th parallel of latitude.

(23) All workers (other than journeymen, apprentices, and workers employed or usually employed in or in connection with the construction, repair, demolition or removal of any building) employed in or in connection with the construction of foundations for machinery or plant.

(24) In or in connection with the extraction from wood of a base for tanning compound. Provided that, no person who is eligible to be a member of any other Union (other than persons eligible for membership in the Wood Extract Industrial Union of Workers, South West Land Division, W.A.) registered under the provisions of the Industrial Arbitration Act, 1912-1952 on the 3rd day of May, 1955, shall be eligible for membership of this Union in the industry referred to in this paragraph.

(25) All workers engaged in or in connection with the Manufacture of articles of asbestos, of articles which are a compound of asbestos and one or more other materials the processing of such articles of asbestos or asbestos compounds into finished products.

(26) The manufacture or preparation of bitumen emulsion, asphalt emulsion, bitumen or asphalt preparation, hot mixed asphalt, cold paved asphalt, and mastic asphalt or similar materials.

(27) The production or manufacture of aluminium for use as a raw material in the manufacture of articles.

(28) The Union shall also consist of workers engaged in the manufacture of bricks at the enterprise trading as Narrogin Brick.

Provided that workers who are employed in the following vocations shall not be eligible for membership: Fitters, Coppersmiths, Turners, Patternmakers, Tool and Gauge makers, Scalemakers and adjusters, Blacksmiths, Boilermakers and Steel Constructional Tradesmen, Shipsmiths, Toolsmiths, Angle-Iron Smiths, Spring Makers, Millwrights, Oxy-acetylene and Electrical Welders and Cutters, Locksmiths, Mechanical and Scientific Instrument Makers, Motor Mechanics, Motor Cycle Mechanics, Aircraft Mechanics, Die Sinkers, Press Tool Makers, Machinists, Bolt and Nut Machinists, Drilling Machinists, Riggers, Laggers, and the assistants to all the foregoing tradesmen: Carpenters, Painters, Bricklayers, Rubble Wallers, Plasterers, Stonemasons, Plumbers and Sheet Metal Workers, Moulders, Coremakers, Clerks, Watchmen, Cleaners, Electrical Workers (except such as are covered by paragraph "15" hereof), Builders' Labourers employed to assist building tradesmen on construction of buildings.

No Person, who is eligible under subclauses (26) and (27) to be a member of any Union affiliated with the Federated Engine Drivers and Firemen's Association (Western Australian Branch) Association of Workers on the 11th April, 1963, shall be eligible to be a member of this Union.

Notwithstanding anything contained in the foregoing, drivers and/or loaders and/or operators and/or washers of all mechanically propelled or animal-drawn vehicles or implements or machines and their assistants, stablemen and yardmen, employed in or in connection with the cartage, conveyance, movement or transportation of persons, goods, merchandise, wares, implements, machines, vehicles, live-stock, material or matter of any kind shall not be eligible for membership in this Union, except such persons who are employed –

(a) in farming, mining (other than coal mining), or pastoral industries; or

(b) in or in connection with –

(i) agriculture, forestry, land clearing, water conservation or irrigation;

(ii) construction and/or maintenance of railways, roads or bridges; or

(iii) stevedoring operations,

by any Government department or public statutory body established by or under a law of the State to carry out all or any functions of such a department or by any port authority; or

(c) in supplying of firewood for gold mines; or

(d) as fork lift operators in the asbestos cement or fibre (other than glass fibre) cement industry; or

(e) as fork lift operators in the sugar refinery industry.

(29) Piano and/or Piano Player Makers, Repairers and Tuners, Organ Makers and/or Repairers, Makers and/or Repairers of Gramophones, and all other musical instruments of which wood forms a part.

(30) Clock Case Makers and/or Repairers of which wood forms a part, Makers of Sewing Machine Stands of wood, Makers of Wireless Instrument Cases or Cabinets of wood, Billiard Table Makers and Fitters, Wood Mantelpiece Makers, Overmantel Makers, Cabinet Makers, Chair Makers, Couch Makers, Veneer Makers in Furniture Factories, Wood Turners, Wood Carvers, Upholsterers (including Upholsterers of Tubular Steel Furniture), Bedding Makers, Wire Mattress Makers, Picture Frame Makers, Bamboo, Pith, Cane and Wicker Workers, Baby Carriage Makers, French Polishers, Enamellers of Furniture and Spraying Machine Operators engaged in the manufacture and/or repair of furniture and Assemblers of furniture, Estimators of furniture of any description, Carpet and Linoleum Planners and Cutters and Measurers and Carpet Sewers, Soft Furnishing Makers of all descriptions and including without limitation thereof Makers of Curtains, Drapes, Loose Covers, Bedspreads and Jabos, Iron Bedstead Makers, Metal Furniture Makers of all descriptions and Makers of Tubular Steel Furniture (except such persons employed as Chromium and/or Electro Platers and/or Polishers) and Designers of furniture of all descriptions.

(31) All Woodworking Machinists employed in preparing and/or handling material for the above employees including the programming and operating of computerised and numerically controlled machines and persons machining materials that are wood substitutes for the above employees. Provided that such persons are solely or substantially engaged in the manufacture of furniture.

(32) Glass Bevellers, Cutters, Polishers and Silverers, Lead-Light Glaziers and Cutters, Brilliant Cutters, Sandblasters of Glass, Draughtsmen and Painters.

(33) Such other persons not being qualified tradesmen or apprentices who are employed or usually employed in the foregoing occupations may be admitted as "Furniture Workers".

(34) In addition to the aforementioned workers, the Union shall also consist of an unlimited number of persons employed, or usually employed, as follows: Coffin Makers, Iron Bedstead Makers employed in Furniture or Bedding factories, Makers of Plastic and/or

similar furniture and including without limitation thereof Makers of Fibreglass furniture and Foam Rubber furniture makers and Makers of Tubular Steel Furniture (except such persons employed as Chromium and/or Electro Platers and/or Polishers).

(35) Carpet and Linoleum Planners and all Floor Covering Layers, Outdoor Hands employed in measuring and/or fixing furnishings of any description and including without limitation thereof, the installation of blinds, awnings, curtains and drapes and the tracks to which the aforementioned are to be attached and shall include canvas blind cutting and/or making and/or fixing and Venetian Blind Makers and/or Fixers, Wire Blind Makers and/or Fixers, Packers of Furniture, Pictures, Carpets, Drapings, Plate and Sheet Glass in warehouses, shops, factories or stores.

(36) Timber Stackers, Yardmen and Labourers employed in furniture factories, Cementers of Leadlights, Rag Pickers and Fumigators for furniture and upholstery.

(37) Males or Females wheresoever employed in the manufacture of upholstery, carpets, drapings, furnishings of all descriptions, pianos, mattresses, venetian blinds, wire blinds, mantelpieces, billiard tables, overmantels, bedding, picture frames, bamboo, cane, pith and wicker work, and upholstery machinists, upholstery cutters and semi-skilled operatives of all descriptions involved in the manufacture of upholstery and including the making of cushions, together with such other persons, whether employees engaged in the industry or not, who have been appointed officers of the Union.

(38) The Union shall consist of workers employed or usually employed in the sawmilling, sleeper cutting and wood chipping industry as hereinafter defined throughout the South West Land Division of the State of Western Australia excluding the locality comprised within a radius of forty-five (45) kilometres from the G.P.O. Perth, together with the persons who from time to time are elected General Secretary and/or Organiser and/or Industrial Officer of the Union. Notwithstanding the foregoing persons engaged in felling or cutting of timber in plantations at Gnangara, Mundaring, Yanchep and Pinjar shall be eligible for membership of the Union provided that such persons as at 2 November 1992 are not eligible to be members of any other Union registered in the State of Western Australia.

(39) For the purpose of this Rule, the sawmilling, sleeper cutting and wood chipping industries shall include felling, hewing, splitting or otherwise dealing with timber in the bush, transporting such timber to a mill or railway, constructing and maintaining roads or railway lines used in connection with timber or wood chipping mills, sawing, machining, chipping, milling or dealing with timber in any other way in a sawmill or woodchipping mill and despatching the timber or timber product to a railway or seaport; and shall include:

(a) The work of and incidental to the preserving, stacking, seasoning and treatment treating of timber, whether within or without the curtilage of sawmill premises.

(b) The work of peeling logs for plywood and all other work incidental to the manufacture of plywood and particle boards.

(c) The work of and incidental to timber yards of retail merchants at which the business of saw milling is not carried out.

A person shall not be a member of the Union (except in the capacity of an honorary member or a member who or whose personal representative is entitled to some financial benefit or financial assistance under the rules of the Union while not being a worker) who is not an employee within the meaning of the Industrial Relations Act, 1979.

PROVIDED that no person shall be eligible to be a member of the Union unless they were eligible to be a member of:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers; or

The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA

As at the date of the amalgamation of the two Unions on 19 September 2012.

(40) Subject to sub clause (41) the Union shall consist of an unlimited number of persons comprising those -

(a) who are employed in the manufacture, packing, bottling, blending, refining, pulping, brewing, mixing, the following:- pastry, confectionery, biscuits, cakes, cake ornaments, ice, ice cream, grocers' sundries, chemists' sundries.

(b) who are engaged in processing by canning, quick-freeze, or other methods of preservation of poultry, rabbits, game, fruit, vegetables, fish including crustaceans and molluscs or any part thereof.

(c) who are employed or usually employed in or in connection with the handling, candling, grading, packing, pulping, dehydrating, oiling or by any other method processing eggs, with the exception of transport workers, worked engaged in any clerical capacity, or workers employed in or about warehouses which do not deal solely in eggs or workers employed in or about retail shops.

(d) who are employed assisting in the production or putting up for sale the products or wares of factories or establishments manufacturing and/or dealing with any of the classes of goods referred to in paragraphs (a), (b) and (c) of this sub-rule.

(e) provided that such persons are not eligible to join:-

The Australasian Meat Industry Employees' Union Industrial Union of Workers', Western Australian Branch, Perth.

The Western Australian Bakers', Pastrycooks' and Confectioners' Union of Workers.

The Federated Engine Drivers' and Firemens' Union of Workers of Western Australia, Perth, or any other existing Industrial Union.

(f) who are engaged in packing fruit (other than apples or pears) but only where that work is done in connection with a process designed to preserve the fruit or improve its appearance.

(g) who are engaged in the preparation and packing of edible fungus.

(h) who whether employed in the industry or not are for the time being officers of the union.

(i) The following persons shall not be eligible for membership of the Union:

Persons employed as production employees in the poultry processing industry by Inghams Enterprises Pty Ltd situated, as at 14 September 2000, in Baden Street and Powell Street, Osborne Park or at such other location or locations at which the said enterprise at Osborne Park may subsequently be carried out. In this paragraph, Inghams Enterprises Pty Ltd includes its successors, assignees, transmittees or any purchaser of the whole or any part of its business.

(41) In sub-rule (40) each of the following terms shall have the respective meaning hereby assigned to it -

"Grocers' Sundries", means and includes cereal and farinaceous foods, tea, coffee and/or chicory essence, coffee chicory, cocoa, honey, jams, self-raising flour, salt, starch, bird seed, matches, sauces, vinegar, pickles, chutneys, rice, sago, tapioca, macaroni, vermicelli, spaghetti, mustard, spices, herbs, condiments, peppers, soups, fish, and fish pastes, Italian paste, flavouring and colouring essences, peel, preserved fruits, dried fruits, health salines, nuts and nut foods and products, edible oils, margarine, eggs, baking powder, custard powder, blanc mange powder, jelly or jelly crystals, gelatine, vegetables, methylated spirits, turpentine, linseed oils, oils, benzine and polishing materials.

"Polishing Materials" means and includes oils, boot blacking, boot paste, boot polish, harness dressing, harness compounds, ebonite shine, stove polish, metal polish, knife polish, washing blue, moulders' blacking, moulders' plumbago preparations, grinding charcoal or coal dust.

"Chemists Sundries" means and includes tartaric acid, citric acid, alum, bicarbonate of soda, cream of tartar, fruit essences, cordials as manufactured by manufacturing chemists, patent medicines, ointments, hair oils, cosmetics, toilet preparations other than soap, essential oils and health salines.

PROVIDED that no person shall be eligible to be a member of the Union unless they were eligible to be a member of:

The Australian Workers' Union, West Australian Branch, Industrial Union of Workers;

or

The Food Preservers' Union of Western Australia, Union of Workers

As at the date of the amalgamation of the two Unions on [date of amalgamation]."

The matter has been listed before the Full Bench at 10:30 am on Monday 7 November 2016 in Hearing Room 3 (Floor 18). A copy of the rules of the proposed new organisation may be inspected on the 16th Floor, 111 St Georges Terrace, Perth.

Any organisation registered under the *Industrial Relations Act 1979*, or any person who objects to the registration of the organisation and who satisfies the Full Bench that he/she has sufficient interest in the matter, may appear and be heard in objection to the application.

Notice of the objection (Form 13) should be filed in accordance with the *Industrial Relations Commission Regulations 2005.*

S. BASTIAN
REGISTRAR 20 September 2016